Corso di Laurea in Giurisprudenza

Cattedra di Diritto Penale 1

The Protection of Human Dignity at the Supranational and National Levels

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INTRODUCTION

The intersection of criminal and international law, and how they influence and shape one another, has been a subject of scholarly interest. This thesis aims to explore these two fields of law by critically reflecting on real-world situations, using the concept of human dignity as a bridge. However, as human dignity is a complex and broad concept, embedded in legal, philosophical and medical discourse, it would be presumptuous to believe that one specific definition may be found. Hence, this thesis's approach to understanding human dignity is by interpreting it through the lenses of criminal law.

Another central point of this thesis is the interaction between national and supranational law. Specifically, this thesis concentrates on the Italian, European and international legal frameworks, elaborating how they affect one another in the criminal field. On the one hand, national legal systems respect the jurisprudence and legal frameworks of the supranational system. On the other hand, domestic legal challenges often shape the response of supranational Courts. As this thesis will elaborate throughout its chapters, this has especially occurred with the concept of human dignity.

The thesis is divided into three chapters. To better comprehend the intent of the thesis, these chapters should be read together, to first understand the protection of human dignity as an autonomous concept and then as applied to specific offences.

The first chapter of this thesis analyses the concept of human dignity and its evolution. It starts by breaking down the different philosophical and religious approaches and explores how these have aided the introduction of its legal definition. After these introductory remarks, the chapter will show how this legal definition has been adopted in the supranational and national legal framework. Lastly, the chapter concludes by highlighting how human dignity is not only a component of criminal law but also acts as a guiding principle.

The relationship between human dignity and criminal law will be analysed through three crimes, including human trafficking, irregular migration and torture. The thesis has specifically explored these three crimes as they are the most extreme examples to critically portray the role of dignity in law. Moreover, to give a practical and current approach to this thesis, human dignity will be analysed in light of current jurisprudence and humanitarian debate while comparing international, European and Italian legal frameworks.

The second chapter will compare trafficking in human beings and irregular migration. These two offences are closely intertwined, separated by a fine legal distinction. For this reason, the primary remarks of the chapter introduce the legal definitions of these crimes and then dive into the analysis of these offences with respect to dignity. First, it will analyse the delicate relationship between these offences, human dignity and State sovereignty. The chapter will then focus on the victims and how the existing legal framework protects them. This analysis will be given by interpreting relevant legal instruments, such as Directive 2011/36 in EU law and the United Nations Convention Against Transnational Organised Crimes in international law.

The final chapter of this thesis will elaborate on the prohibition of torture. Due to the breadth of the topic, it would be overly ambitious to analyse all aspects related to torture. Therefore, this chapter will evaluate the existing legal framework, focusing specifically on the role of state authorities, detainees and torture used in prisons. It will, among others, consider the impact of the European Court of Human Rights' case law in introducing the offence into the Italian legal framework. This analysis is placed after the examination of irregular migration and human trafficking in order to establish a *fil rouge* between brutality and torture, and the appalling conditions that victims of trafficking face, which are almost akin to torture[1]. The topics of torture, inhuman and degrading treatment are intertwined, and there have been myriad cases which have touched upon these legal concepts and elaborated on the central role dignity plays.

The conclusion of the thesis seeks to determine the role that human dignity plays within the supranational and national legal framework, with particular emphasis on whether it acts as an interpretative tool or as a foundational legal principle. By analysing some of the key offences, such as trafficking in human beings, irregular migration, and torture, this thesis's objective is to explore how human dignity is introduced into legal reasoning, either through jurisprudence or legislative frameworks, and to what extent individuals can meaningfully rely on it in criminal law contexts. Overall, by understanding the centrality of human dignity, the academic contribution of this thesis is to introduce a new critical approach to criminal law.

CHAPTER I

HUMAN DIGNITY

1. EVOLUTION OF THE PRINCIPLE OF HUMAN DIGNITY

Like many other moral concepts, dignity has no single universally accepted definition. The notion of dignity has been influenced by literature, historical events, philosophy and law. Some believe that the multiplicity of definitions given to this concept reflects its depth and conceptual richness, whereas others believe that such definitional plurality indicates conceptual vagueness or indeterminacy. In either case, the notion of dignity is complex and multifaceted.

This thesis will use the terms «human dignity» and «dignity» interchangeably[1]. Within legal and academic contexts, the latter is usually used to portray a basic worth found in all human beings. The concept of human dignity has undergone a profound transformation, evolving from a tool establishing a hierarchical distinction among individuals to a fundamental principle of human equality and a cornerstone of human rights. Furthermore, in time, human dignity has been associated with a myriad of different principles, such as the idea of social status, honour, religion, supreme worth, integrity and so on. Some of these aspects are still relevant nowadays, while others have lost their importance[2].

To better comprehend the definition of human dignity, it is necessary to deconstruct this expression and analyse the terms separately.

The latter notion consists of the predicate «human» and the noun «dignity». Generally speaking, the term *human* relates to our «kind», or to the species of rational animals. On the other hand, the term dignity derives from the Latin term *decus*, meaning distinction and honour. Nowadays, the concept of dignity is central to the framework of both International, European and domestic law[3].

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[1] LEBECH, *What Is Human Dignity?* in *Maynooth University Research Archive Librar*y, 2004, 59-69, available at *www.mural.maynoothuniversity.ie*

[2] DEBES, *Dignity* in *The Stanford Encyclopaedia of Philosophy,* 2023, available at *www.plato.stanford.edu*

[3] PELE, *Human dignity in the Renaissance? Dignitas hominis and spiritual counter-subjectivity: A Foucauldian approach* in Philosophy & Social Criticism, 2018, 753-776, available at www. journals.sagepub.com

The development of human dignity has been deeply influenced by its historical and philosophical context[4]. Therefore, understanding its evolution requires considering different frameworks that have shaped its definition. This thesis examines the evolution of human dignity through three key frameworks: the cosmo-centric framework, which explores Cicero's contributions to the concept of dignity, the Christo-centric framework, which examines dignity with a religious approach; and the logo-centric framework, which focuses on Kant's ideologies concerning the relationship between dignity and autonomy[5].

1.1. The Cosmo-centric Framework

The concept of human dignity is rooted in ancient philosophy and Christian theology, with numerous works of literature and art further shaping and expanding its definition.

Initially, the concept of dignity was attributed according to one's social status or class[6]. Hence, creating a distinction between those who enjoyed a certain status and dignity, and those who did not.

In the sovereign conception, dignity was primarily used to reflect three aspects of high social standing. The first aspect emphasised dignity as a symbol of elevated personal status. For instance, in the Renaissance, it was common to refer to the dignity of a prince. The second perspective attributed dignity according to the role and responsibilities of individuals in higher social positions. A prince, for example, would be expected to fulfil specific duties and embody certain virtues due to his status. Finally, dignity was also associated with the higher worth of an office or the acts performed in its name. As such, an individual deemed worthy of holding a particular office was referred to as *dignus* (in Latin) or *degno* (in Italian).

Whilst most Romans in Ancient Time used *dignitas* relating to the merits, a few, and, in particular, Marcus Tullius Cicero, had a visionary understanding of the

[4] LE MOLI, *Two Circles of Dignity. Human Dignity in International Law* in *Cambridge University Press*, 2021, 50–85, available at *www.cambridge.org.*
[5] LEBECH, *What Is Human Dignity?* in *Maynooth University Research Archive Librar*y, 2004, 59-69, available at *www.mural.maynoothuniversity.ie.*
[6] BAYERTZ, *Sanctity of Life and Human Dignity*, vol. I, Dordrecht, 2011, 73 – 90.

concept. Cicero, highly influenced by Stoicism[7], had the greatest influence on the definition that we now attribute to dignity, especially thanks to the connection he created between *Dignitas* and humankind in the «*De Officiis*»[8]. This was the first time that the term dignity was not connected to rank or worth.

Within the *De Officiis*, Cicero defines dignity as «[…] *someone's virtuous authority that makes him worthy to be honoured with regard and respec*t»[9]. He believes that individuals are worthy to have dignity because of the greatness of the human soul and the superior mind. Moreover, he reflects on the concept of reason and how this also attributes superiority to humans. However, he recognises the existing inequalities among men and advocates for aristocracy, much like Aristotle. It appears that, according to Cicero's ideas, dignity is innate within the human being and can be considered as a concrete quality of a person but also as a sign of strength and swiftness[10].

Cicero and Aristotle's ideas of *decorum* and the worth of the human spirit highly influenced the Renaissance perspective on dignity, leading to what was then referred to as «Renaissance Humanism»[11]. The term *humanism* was used to indicate the growing interest towards humanity: focusing on discovering the human and the

[7] Stocisim was the most important of the schools of Greek philosophy. Unfortunately, our knowledge is very limited due to the loss of its key texts. Stoicism is known for its universalism of human nature and of all mankind. Except for Cicero, many other philosophers further developed the notions deriving from Stoicism. For example: Seneca, Epictetus and Marcus Aurelius. Human dignity was not spoken a lot about between Stoics.

[8] *De Officiis* was written by Cicero in 44 BCE. Due to his high social rank, he was expected to take on certain duties in public and political life (his *Dignitas*), and his education in Athens prepared him for this role. In paragraph 1.30 of the treatise, Cicero outlines Stoic principles related to morality, human nature and dignity. Cicero first clarifies the importance of reason (*ratio*) which both distinguishes human beings between them and also serves as the foundation for making moral decisions (*honestum*) and appropriate behaviour (*decorum*). Cicero then illustrates the so-called *Four Personae of an Individual.* Most relevant is the *first personae*, which is given by nature and is universal to all humans. This first persona is attributed to all human beings as a sign of excellence. According to Cicero, dignity originates directly from the first persona.

[9] In the original version: «*Dignitas est alicuius honesta er cultu er honore er verecundia digna auctoritas*».

[10] LEBECH, *What Is Human Dignity?* in *Maynooth University Research Archive Librar*y, 2004, 59-69, available at *www.mural.maynoothuniversity.ie*

[11] LE MOLI, *Two Circles of Dignity. Human Dignity in International Law* in *Cambridge*, 2021, 50–85, available at *www.cambridge.org.*

secular rather than the divine and eternal. Therefore, the Renaissance started forging the term *dignity* into the one still used today[12].

Although the Renaissance was shaped by a multitude of influences contributing to the development of the notion of dignity, this thesis will pinpoint only some of the most important authors and thinkers of the time.

Around 1195, Lothar of Segni wrote «*On the Misery of the Human Condition*», distinguishing between the dignity of human nature and the wretchedness of human existence. Though he had intended to write a separate work focusing on human dignity, he was unable to complete it before his death. For this reason, in 1357, Giovanni Birel Limosino asked Francesco Petrarca (also known as Petrarch) to take up Segni's unfinished project on human dignity. However, Petrarch declined, and, in his «De Viris Illustribus» explored the concepts of moral and political dignity, drawing inspiration from Cicero. In the latter piece, Petrarch focused on the derivation of the concept of dignity, especially focusing on the importance of rationality.

In the 15th century, Alfonso of Aragon, King of Naples, sought more comprehensive work on human dignity to fill the gap left by Lothar of Segni. In response, Bartolomeo Facio wrote «*On the Excellence and Preeminence of Man*» in 1448. Facio described men as being made to represent God's image to portray the immortality of his mind and soul. He asserted that true happiness could not be found through actions but only through the contemplation of God. Alfonso of Aragon, likely dissatisfied with this theological approach, commissioned Giannozzo Manetti, an erudite jurist from Florence, to write another treatise on the subject. In 1452, Manetti produced «*On the Dignity and Excellence of Man*», a four-volume work drawing from Aristotle, the Bible, Cicero, and Hermeticism ideas. Manetti's approach was based on the importance of dignity and the superiority of men, specifically in his third book. He believed that men's wisdom derived from God and referred to men as «mortal gods». Although Manetti was influenced by a

[12] STEENBAKKERS, *Human Dignity in Renaissance Humanism (Chapter 6)* in *the Cambridge Handbook of Human Dignity*. 2015, 85 – 94, available at *www.cambridge.org.*

myriad of different sources, his arguments essentially reflect a mixture of Stoic and Christian positions. For these reasons, his ideas were compared to the ones elaborated by Petrarch.

It was not until the late 15th century that there was a crucial development in the perspective of human dignity, and this was essentially thanks to Giovanni Pico della Mirandola. He was a pupil and friend of Ficino, who produced a series of influential commentaries developing a Platonic philosophy of his own[13]. Giovanni Pico della Mirandola revolutionised the concept of human dignity through his book «*Oration on the Dignity of Man*»[14]. He believed that human beings are the most fortunate living things as they are God's creation, which granted men the unique ability to act according to their own free will[15]. He was the first to explain the relationship between dignity and the ability to choose what place to occupy within the universe. He did not see dignity as an innate characteristic of human beings but, rather, redeemed that men needed to refine their intellect and virtues to elevate themselves. Pico's ideas were revolutionary as, for the first time, men were being endowed with absolute autonomy to decide for themselves[16].

1.2.Religious Evolution: Christo-centric framework

The Christo-centric framework refers to the influence that religion has had in shaping the notion of human dignity, specifically by linking it to the divine.

Different religions, such as Judaism, Christianity, and Islam, have influenced human dignity in a variety of ways. Although different from one another, these religions are based on three similar cornerstones. The first one is that dignity is not innate, rather, it is attributed by God. Secondly, men enjoy a special status

[13] LE MOLI, *Two Circles of Dignity. Human Dignity in International Law*. Cambridge University Press. 2021. p 50–85.

[14] There have been many other philosophers and thinkers who shaped the term and definition of human dignity. For example, Hobbes gave a definition of the term dignity that was related to power and dominion. His definition was contrary to the one that had previously been given by Giovanni Pico della Mirandola, stating that dignity reflected how worthy one was. On the other hand, Jean Jacques Rousseau believed that, in his words, human beings have *«the faculty of improvement».*

[15] KUSMARYANTO, BOROMEUS, *Theological and Philosophical Perspective on Human Dignity.* Journal of Theology.

[16] CASO, *La Dignità Dell'uomo: Percorso Storico Giuridico* in *Comunione e Diritto*, 2010, available at *www.comunionediritto.org.*

due to the dignity granted to them by the divine. Lastly, when dignity is recognised by religion, men will have specific rights and duties they must uphold[17].

Theologically speaking, not only do humans belong to their Creator, God, but they also enjoy the rights given by Him. Humankind needs to respect and protect these rights and ensure that the rights of others are respected as well. Therefore, the human person's most basic property is the right to dignity[18].

Human dignity is not a Christian term: the idea of human dignity was first found within the biblical notion of *imago Dei*[19]. However, in time, the secular community accused Christian writers of using this term to introduce religious concepts into the discourse[20]. It is for this reason that Christian writers have started adopting a more neutral term, *dignity*.

The evolution of the relationship between dignity and Christianity can be identified in a timeframe that starts from the Middle Ages and leads to the present day. Specifically, we may refer to four moments in history: the Middle Ages, the 19th century, the 20th century and the more recent decades[21].

During medieval times, scholars defined human dignity by interpreting biblical notions. They would usually refer to biblical verses such as Genesis 1:26, which states that humanity was created in God's image, and Wisdom 2:23, which states that human beings are made in the image of God's eternity. These led to two different schools of thought. The first one reflected upon the importance of reason, where the major contributions have been made by thinkers such as Thomas Aquinas, Bonaventure and Albertus Magnus. For example, Aquinas described the individual as the most dignified being as he could imitate God through the aspects of reason, knowledge and self-love. He believed that dignity and God could not be

[17] LE MOLI, *Two Circles of Dignity. Human Dignity in International Law*, Cambridge, 2021, 50–85, available at *www.cambridge.org.*

[18] VORSTER, *A Theological Perspective on Human Dignity, Equality and Freedom* in *Verbum et Ecclesia*, 2012, available at *www.verbumetecclesia.org.za*

[19] Translates to the «image of God». The term derives from a Judeo-Christian approach based on the idea that all human beings reflect God. Not only will human beings live life to their fullest in front of God, but they will also have to act on his behalf as their dignity is derivative. Humans, therefore, have a special relationship with God and need to be treated accordingly. The doctrine of *imago Dei* is the idea that all human beings possess an inherent dignity, value and worth.

[20] HAACK, *Christian Explorations in the Concept of Human Dignity* in *Dignitas* v. 19, no. 3*,* 2012, 4-7 and 10-13, available at *www.cbhd.org*

separated from one another. Thomas held that, even though everyone had dignity, this did not mean that all animals and people possessed the same type or level of dignity. This is, according to Aquinas, the beauty of God's creation[22].

The second school of thought deemed free will and freedom to be central to human beings and their dignity. The latter point has been developed by thinkers such as Bernard of Clairvaux.

It was not until the 19th century, however, that modern Catholic understandings of human dignity started developing. This occurred due to the increasing threat of socialism. Pope Leo XIII's encyclicals were the first representations of a modern notion of human dignity, in particular, the «Rerum Novarum» was a founding document. In his view, God attributed dignity to all men, therefore, granting equality. For the Pope, dignity represented a reactionary term used to protect people from the advancing liberalistic and socialistic views in economic, social and political life.

In his «Rerum Novarum», Pope Leo also analyses the relationship between labour and capital, introducing the idea of «dignity of labour» within the catholic concept of dignity. According to this latter ideology, labour is based on the principle that individuals are «*necessary to each other, and solicitous of the common good*»[23]. He reflects on the lower social class and how the rich and the government should respect them as there is no shame in earning «*their bread from labour*»[24]. Pope Leo's approach is of extreme importance as it starts elevating dignity to a fundamental cornerstone of other principles within the Church's morality.

The role of the Church, and its relationship with dignity, had a significant shift after Hitler's violations in 1933 and the Second World War. The Church started considering modern natural rights as central to their fight against totalitarianism and liberalism. A relevant role was taken by Pius XII, who elevated the concept of dignity ensuring the recognition of a person's value regardless of their social class or the judgment of others. Thus, in the 1930s the Church started developing the

[22] BRADY, *Evolution of Human Dignity in Catholic Morality* in *Journal of Moral Theology* v. 10, no.1, 2012, 1-25, available at *www.jmt.scholasticahq.com*
[23] POPE LEO XIII, *Quod Apostolici Muneris*, 1878, paragraph 6, available at *www.vatican.va*
[23] *Ibid.*
[24] POPE LEO XIII, *Rerum Novarum*, 1891, available at *www.vatican.va*

modern notion of human dignity and natural rights ensuring the protection of the inviolability of humankind[25].

Overall, human dignity becomes an expression for the Church of the bond that is created between men and God, with whom they share an image and similarity found in no other creature. These concepts are still found today, especially in the Catholic communion[26]. Contemporary Catholics address human dignity as a foundational principle of morality, accepting a definition of the notion that is independent of social status and class.

1.3.Kant and human dignity: Logo-centric framework

Immanuel Kant revolutionised the concept of dignity in 1785 when, in his work titled «*Groundwork for the Metaphysics of Morals*», he argued that all people have an inherent dignity. Kant conceptualised dignity as a moral imperative grounded in the respect for intrinsic limits[27]. His foundational moral principle could be summarised as follows: «*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means»*[28].

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[25] In time, the role of the popes became always more prevalent in developing and using the notion of human dignity. For example, we may first refer to Pope Pius XII whom, in 1937, had written: «*A* vast conspiracy threatens the inviolability of the human person that, in his sovereign wisdom and dignity, the Creator has honored with an incomparable dignity. … [I]f a society believed it could diminish the dignity of the human person in refusing all or some of the rights that come to it from God, it would miss its goal*»*. In 1941, he then went on to talk about the essential task of public authorities to protect the inviolable rights of the human person.
Moreover, there have also been other popes who have had a relevant impact on the principles of dignity. For example, both Pope Paul VI and Pope John Paul II referred more than once to dignity and to the fact that men are an expression of God in the world.
This has further been developed by BRADY, *Evolution of Human Dignity in Catholic Morality* in *Journal of Moral Theology* v. 10, no.1, 2012, 1-25, available at *www.jmt.scholasticahq.com*

[26] On the 8 of April 2024, the declaration « Dignitas Infinita » was published. The Church here reaffirms the centrality of the protection of human dignity also in religion. Indeed, three chapters of this declaration regulate all the grave violations which hinder the dignity of a person. For example, homicide, suicide, abortion and euthanasia. Within the declaration, the Church reflects on the distinction between human and personal dignity, concluding that it's human dignity that must be protected. This is further developed in: ACCORNERO, "*Dignitas Infinita", La Dottrina Cristiana Sui Diritti Dell'uomo* in *La Voce e Il Tempo,* 2024, available at *www.vocetempo.it*

[27] DEBES, *Dignity* in *The Stanford Encyclopaedia of Philosophy,* 2023., available at *www.plato.stanford.edu*

[28] DEBES, *A History of Human Dignity* in *Forum for Philosophy - LSE*, 2018, available at *www.blogs.lse.ac.uk*

In his work, Kant referred to the term *Würde* a total of sixteen times. Although the literal translation of *Würde* is «worth», he explicitly rejected this translation due to the economic connotations that surrounded the term. Accordingly, «dignity» was believed to be a better translation, capturing the intrinsic moral value at the heart of ethics[29].

Kant is often identified as a crucial (if not the crucial) progenitor of the form of human dignity that grounds human rights. For example, Jack Donnelly wrote in a discussion of the genesis of human rights that «*In Kant, we first find a fully-formed account of human dignity, very similar to that of the universal declaration, that is placed at the centre of the moral and political theory*»[30].

Before Kant, human dignity was often viewed as an attribute that individuals had to earn through their social class or status. Kant redefined this by introducing another approach, one which applied to all human beings. He described men as rational beings, with the ability to evaluate, compare and re-examine their beliefs. For Kant, rationality is a fundamental element of human dignity as, without such, a being is unable to have *an end in itself.*

Indeed, Kant believed that humanity should never be treated merely as a means. This idea is strictly connected to Kant's constant overlap between the notions of humanity and rational nature. He therefore suggested that people's inherent value does not depend on extrinsic attributes but arises from mere existence[31]. This also connects to another element of human dignity, which is freedom. He stated that true freedom is defined by being able to choose the *ends*. To further comprehend this ideology, Kant drew a connection between human dignity and autonomy[32]. Hence, the idea of treating people with dignity is to treat them as autonomous individuals who are able to choose their identity. Kant's contribution to the development of dignity consists in attributing to each human

[29] *Ibid.*
[30] BAYEFSKY, *Dignity, Honour, and Human Rights: Kant's Perspective* in *Political Theory*, vol. 41, no. 6, 2013, 809-837, available at *www.jstor.org.*
[31] DENIS, *Kant's Formula of the End in Itself: Some Recent Debates* in *Philosophy Compass,* 2007, 244-257, available at *www.doi.org*
[32] KUSMARYANTO, *Theological and Philosophical Perspective on Human Dignity* in *Journal of Theology,* v. 01, no. 02, 2012, available at *www.repository.usd.ac.id*

being an equal and unconditional worth grounded in moral autonomy[33]. He believed that the principles of human dignity and autonomy correspond to one another: autonomy is founded on dignity like dignity is founded on autonomy[34].

Moreover, Kant also highlighted the importance of dignity concerning honour by stating that the respect of a person is founded in the autonomy of their social standing. He analysed different types of honours, distinguishing between morally corrupting forms of honour from morally desirable ones and located «true honour» in individual morality rather than the pursuit of social approval.

Additionally, Kant believed that humans need to self-assess by comparing themselves with the *laws of the intellectual man,* and not with each other. He developed the notion of «love of honour», which is based on the «*principle of not losing one's worth in the opinion of others* [...] *we are obligated not to demean the worth of our own person in the judgement of others»*[35]. Therefore, he associated the need to live honourably with maintaining the dignity of humanity. Dignity and the love of honour are intertwined: one cannot exist without the other[36]. Humans need to respect and treat each other equally and, when they don't, the love of honour shifts into arrogance[37].

The conception of dignity provided by Kant has been very influential, impacting several different areas. From the nineteenth century onwards, Kantian ideology was used for a variety of social and political movements advocating different types of social reforms. Especially, these have been used by several philosophers, such as Schiller, who began his own philosophical retreat by

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[33] POGGI, *Human Dignity and Autonomy: Semantic Disagreements and Conflicts of Values* in *Rivista di filosofia del diritto, Journal of Legal Philosophy.* 2019, 33-50.

[34] The relationship between dignity and autonomy is one that has been treated by several philosophers and has furthermore led to several conflicts. However, it is difficult to resolve the conflict between these two concepts is a lack of both objective and common criteria which can be used to understand which is the correct/right approach to the problematic. As stated by Vittorio Villa, these conflicts are based on «*comprehensive ethical concepts*» which are incompatible between them. Legally speaking, when it comes to solving issues with ethical concepts, some believe that democracy is the tool. In the same way, democracy is also based on ethical principles: for which, however, it is easier to have a general consensus for.

[35] JOHNSON, CURETON, *Kant's Moral Philosophy* in *The Stanford Encyclopedia of Philosophy,* 2024, available at *www.plato.stanford.edu*

[36] BAYEFSKY*, Dignity, Honour, and Human Rights: Kant's Perspective* in *Political Theory*, vol. 41, no. 6, 2013, 809-837, available at *www.jstor.org.*

[37] JOHNSON, CURETON, *Kant's Moral Philosophy* in *The Stanford Encyclopedia of Philosophy,* 2024, available at *www.plato.stanford.edu*

thoroughly studying Kant's ideas on human dignity and human freedom. In his «On Grace and Dignity*»,* he discusses grace and dignity by approaching several of the unresolved questions that Kant had previously asked[38].

Although Kant's approach to human dignity does not find a translation from a moral point of view to a juridical one, the concept of dignity does abandon the ancient meaning to assume a new definition of *human* dignity or *equal* dignity. This falls within the so-called «non-relational dignity», namely the idea that dignity is enjoyed simply by belonging to humanity. This approach renders human dignity an intangible, invulnerable and inaccessible concept. Thus, Kantian human dignity is described as an absolute concept and universal, capable of being the moral foundation of human rights[39].

2. WHAT IS HUMAN DIGNITY?

The concepts of sovereignty and human dignity may be analysed through their underlying semantic structures, which serve to both unify the two concepts and distinguish between two key dimensions: rank-status and inherent worth. As this thesis will elaborate, this dual conceptualisation of human dignity has persisted across history and shaped international law.

Before exploring the various ways in which human dignity has been applied in law, it is essential to clarify its definition and then analyse how it has shaped the legal framework.

This thesis has already explored[40] the various dimensions that the concept of human dignity encompasses, such as human beings, nature, reason, social integration and religion. In the cosmo-centric framework, morality and human dignity are intertwined. In the Christo-centric framework, the fundamental principle of dignity is found in human beings' similarity with God, enabling human beings

[38] MOLAND, *Friedrich Schiller* in *The Stanford Encyclopedia of Philosophy*, 2025, available at *www.plato.stanford.edu*
[39] LE MOLI, *Two Circles of Dignity. Human Dignity in International Law*, Cambridge, 2021, 50–85, available at *www.cambridge.org.*
[40] See *infra*, chap. I, § 1.1, 1.2, 1.3.

to acquire virtue, live in a community and create laws. In the logo-centric framework, Kant intertwined the notion of reason with that of human dignity.

This deconstruction of the notion of «human dignity» facilitates a deeper understanding of the fact that the fundamental value of human beings changes according to the framework within which it is treated. Therefore, highlighting the term human dignity as a particularly complex and multifaceted notion. However, it appears that human dignity generally attributes a special value to human beings which is intrinsic to their humanity. It is a universal concept that applies to all and finds its justification in the mere existence of human beings.

2.1.The Legal Notion of Human Dignity

In contemporary legal discourse, the concept of human dignity has acquired normative significance and now serves as a foundational principle in many binding legal norms, often related to human rights. This thesis elaborates on the notion of human dignity as it appears in several Declarations[41], international conventions[42], national constitutions and other legal instruments. Moreover, the term dignity has also been used as an interpretation tool by several courts, ranging from domestic Courts to the European Court of Human Rights and arriving to the United States Supreme Court[43]. As a result, therefore, various definitions are being used for the legal term human dignity[44].

In law, dignity represents a metaphysical notion balancing both a moral principle on the one side and a legal recognition of human rights on the other[45].

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[41] *Ex multis,* the Universal Declaration of Human Rights

[42] For example, the International Convention on the elimination of any form of racial discrimination of 1965; the International Convention on economic, social and cultural rights of 1996 and the International Convention protecting migrant worker rights and members of their family of 1970.

[43] An example of important cases has been the Lawrence v. Texas (2003) and the Roper v. Simmons (2005)

[44] The notion of human dignity has become always more controversial, especially in the reasoning of the various courts. For example, the Constitutional of South Africa refers to dignity as a *difficult concept*, which needs a lot of precision and elaboration to thoroughly comprehend it. On the other hand, the Canadian Supreme Court in the *R v Kapp* case believed that the notion was too subjective and abstract.

[45] STEINMANN, *The Core Meaning of Human Dignity* in *Research Gate,* 2016, available at *www.researchgate.net*

Legal scholars and jurists have approached human dignity in different ways. Some jurists believe that human dignity is an overused term invoked by Courts when a clear legal basis is lacking[46]. Nevertheless, this thesis will analyse several Court decisions and jurisprudence demonstrating how this opinion is untrue.

An alternative scholarly position maintains that the semantic field of the term human dignity easily varies according to the context[47]. However, this has not been shared by many who, instead, argue that human dignity is an autonomous concept that is uniformly applicable across various situations[48]. This second approach to human dignity has led to the creation of two different schools of thought[49].

The first school of thought[50] holds that human dignity relates solely to the context of human rights, particularly referring to equality, non-discrimination and inhuman and degrading treatment[51].

The second school of thought believes that human dignity has its own definition regardless of human rights. Those who prefer this definition adopt a very heterogeneous approach to its application. For example, Giuseppe Cricenti believes that human dignity is an individual right which content is defined by the right's owner[52].

This thesis will later provide an analysis of the relationship between human rights and human dignity[53]. For the moment, it is necessary to outline how the

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[46] *Ibid.*

[47] MCCRUDDEN, *Human Dignity and Judicial Interpretation of Human Rights* in *European Journal of International Law* vol. 19, issue 4, 2008, 655–724, available *www.academic.oup.com*

[48] Adeno Addis defends the autonomy of human dignity, believing that any definition of human dignity should be independent of philosophical, religious or cultural differences. According to him, this approach would solve many conflicts, for instance, the one between universalism and relativism. This point has further been elaborated by RODRIGUEZ-BLANCO*, Law Actually: Practical reason, anarchism and the legal rule compliance phenomenon* in *Revista Brasileira de Direto,* vol. XI*,* 2015, 7-19, available at *www.seer.atitus.edu.br*

[49] POGGI*, Human Dignity and Autonomy: Semantic Disagreements and Conflicts of Values* in *Rivista di filosofia del diritto, Journal of Legal Philosophy.* 2019, 33-50.

[50] Some jurists and philosophers attaining to this first school of thought are Ferrajoli, Webster, Macklin and Borsellino.

[51] This point of view has been expressly shared and developed in the jurisprudence of the Hong Kong's Courts. Indeed, they deem that human dignity provides a foundation for judges to interpret human rights while also being a tool for citizens to safeguard their own human rights. SHEN, *Judicial Interpretation of Human Dignity by Hong Kong's Courts* in *SAGE Journal*, 2022, available at *www.journals.sagepub.com.*

[52] POGGI, *Human Dignity and Autonomy: Semantic Disagreements and Conflicts of Values* in *Rivista di filosofia del diritto, Journal of Legal Philosophy.* 2019, 33-50.

[53] See *infra*, chap. I, § 6.

concept of human dignity functions in three different ways in law: human dignity as a negative right; human dignity as a source of public protection; and human dignity as a public source to guarantee social security. Each legal system tends to adhere to one of these approaches[54].

A central distinction in this context is between the State's negative and positive obligation. These differ from one another as the first one entails States not *interfering* with the enjoyment of human rights while the second one is an obligation to *protect* individuals and citizens. Lastly, the obligation to *fulfil* also has a positive connotation, requiring States to adopt an active role in ensuring that citizens enjoy their rights and dignity.

When dignity is framed as a negative obligation, it imposes a duty of non-interference upon States, which will require them to abstain from any type of act which may hinder citizens' personal autonomy. This legal concept is found within both philosophical and legal sources, such as Kant's philosophy[55] and Article 1 of the Basic Law[56] for the Federal Republic of Germany[57]. Moreover, Article 3 of the Universal Declaration on Bioethics and Human Rights declares that «*human dignity, human rights and fundamental freedoms are to be fully respected*»[58]. The notion of respecting human dignity has also been reiterated by the European Court of Human Rights[59] and the Inter-American Court[60].

The duty of non-interference may be violated in three different ways by States.

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[54] For example, the German legal system seems to adhere to all three approaches, believing that human dignity is a fundamental value. In other legal systems, the notion of human dignity is not used in the same manner. Indeed, one may find that in some it is not used at all.

[55] See *infra*, chap. I, § 1.3

[56] According to Article: «Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.»

[57] Even in Germany, where dignity is considered as a supreme value, many jurists shine away from actually defining the notion.

[58] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION, Art. 3, *Universal Declaration on Bioethics and Human Right,* available at *www.unesdoc.unesco.org*

[59] There have been several fundamental cases which have been ruled by the ECtHR. For example, the Rooman v. Belgium no 18052/11 and the Fernandes De Oliveira v. Portugal no. 78103/14.

[60] Art. 8, (g) 1994, Inter-American Convention on Violence against Women: «[...] to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women [...]».

The first one occurs when States compromise personal autonomy, particularly in decisions relating to the human body or sexual identity. Furthermore, in this context, very relevant is the principle of privacy in the sphere of sexuality and intimacy, which has been central to many cases of the United States Supreme Court, such as Eisenstadt v. Baird and Lawrence v. Texas[61]. The latter case has been of jurisprudential significance as the Supreme Court rendered a decision referring to the relationship between dignity and privacy rights in the context of homosexuality and sexual intimacy[62]. In this case, the Supreme Court held sodomy laws unconstitutional as they undermined the dignity of individuals[63]. Another aspect which is connected with the one of personal autonomy is the right to death. Notable case law has been rendered by both the Canadian Court, with Carter v. Canada[64], but also by the Italian Court with the Cappato judgment[65].

The second violation of the duty of non-interference attains to the physical and psychological integrity of a person. An example of this may be found in the regulation of the prohibition of torture and other inhuman and degrading treatment, which this thesis will analyse in the last chapter. An example of the violation of the duty of non-interference in this context has been given by the South African

[61] LEGAL INFORMATION INSTITUTE, *Privacy,* available at *www.law.cornell.edu*

[62] SPINDELMAN*, Surviving Lawrence v. Texas* in *Michigan Law Review, 2004, 1615–1667,* available at *www.jstor.org*

[63] The Roe v. Wade case was a landmark decision of the U.S. Supreme Court regarding to the right of abortion. The role of the Right of Privacy was particularly important in this case. In the first decision, the Court believed that this right also encompassed the right to have an abortion. However, the Court then overturned the decision and redeemed that the two were not related to one another.

[64] Supreme court of Canada decision of the 6th of February of 2015. In this case, the Supreme Court of Canada ruled on the existing criminal laws regulating the helping to commit suicide. They specifically widened the scope of the Right to Life, arguing that these laws were unconstitutional as it hindered the rights of those that were consciously making the decision to want to commit suicide. This decision extended not only to those in critical conditions, but also those situations that lead to an unbearable psychological and physical distress.

[65] In Decision No. 207/2018, the Italian Constitutional Court addressed the case of Marco Cappato, who assisted Fabiano Antoniani (known as DJ Fabo) in accessing assisted suicide. DJ Fabo had suffered severe and irreversible health consequences following a serious car accident. Due to his condition, Cappato accompanied him to Switzerland, where assisted suicide is legally permitted.
The Court held that, in cases of individuals suffering from grievous and incurable conditions, the right to end one's life may constitute the only viable means of preserving personal dignity. However, this may be possible only in conformity to several conditions. The Court emphasized that forcing an individual to endure a state of existence perceived as intolerable and incompatible with fundamental human dignity could amount to a violation of constitutional rights.
The ruling underscored the ongoing legal and ethical debate surrounding assisted suicide, particularly in relation to the principles of human dignity and the right to health. This remains a highly contentious issue in contemporary legal discourse.

Supreme Court with the Makwanyane case, which was pivotal as the Court held that the death penalty was unconstitutional and a violation of human dignity[66]. On the other hand, in German constitutional law, human dignity is seen as an *eternal* right. According to Germany, human dignity is infringed whenever a person is considered a mere means to achieve someone else's goals. This framework also includes the prohibition of torture and inhuman and degrading treatment and is based on a Kantian approach[67].

The third violation of the duty of non-interference attains to the relationship between human dignity and the respect for data privacy, which must be protected from unjustified intrusions of public power. This concerns the role of the State in ensuring that personal information is not divulged without the authorisation of the data holder. The General Data Protection Regulation's (hereinafter referred to as "GDPR") role has been crucial in ensuring the protection of personal data. It was Professor Stefano Rodotà who highlighted the importance of the protection of personal data and how this relates to human dignity[68]. At the time, the concept was still not taken into consideration as much as it is today[69].

As aforementioned, the legal framework of human dignity extends beyond non-interference as it also entails a positive obligation[70]. States must implement

[66] The State v. T Makwanyane and M. Mchunu is a case rendered from the Constitutional Court of South Africa. The case regarded individuals being blamed for attempted murder and robbery rendered in aggravating circumstances sentencing to the death penalty and long-term imprisonment. The South African Constitution regulates the notion of dignity under Chapter 3, Section 9 and Section 10. The case was of pivotal importance because the Court stated the infringement of the human dignity of those being sentenced. By referring to the right to dignity and the ICCPR, the Court stated the death penalty was completely unconstitutional. The Court concluded stating that: «*T*he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others». On the Court's judgment find more in: COUNCIL OF EUROPE*, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,* 1997, available at *www.rm.coe.int*

[67] BARAK*, Human Dignity: The Constitutional Value and the Constitutional Right,* Cambridge, 2015, 67-136, available at *www.cambridge.org.*

[68] LE MOLI, *Human Dignity in Human Rights Law. Human Dignity in International Law,* Cambridge*,* 2021, 253 – 262, available at *www.cambridge.org.*

[69] MORETTI, *La tutela dei dati personali come baluardo per la dignità umana e la democrazia* in *Confronti*, 2019, available at *www.confronti.net*

[70] Some argue, that rather than a positive right human dignity is a *value* that states need to respect. This is also reflected in some national law system articles, such as in Italy. In Italy, Article 2 of the Italian Constitution implicitly recognises dignity. Whereas, as aforementioned, in Germany, the German Basic Law explicitly recognises the existence of human dignity.

measures to protect human dignity, enable its realisation and avoid possible infringements[71]. In this context, human rights documents refer to the following obligations: the obligation to ensure (respect for) human dignity[72]; the obligation to promote human dignity[73] and the obligation to foster (respect for) dignity[74].

2.2.Objective And Subjective Notion of Human Dignity

The legal analysis of human dignity also introduces a conceptual distinction between its objective and subjective interpretations. On the one side, the subjective notion of human dignity refers to the individual. On the other hand, the objective notion of human dignity refers to a group of individuals, therefore collectively. This legal division of the concept of dignity has been introduced by Jeremy Waldron, Stephanie Hennette Vauchez and also by Catherine Le Bris[75].

Different national legal systems adopt varying approaches to this distinction: for example, the German constitution tends to favour an objective approach to human dignity. As it will be portrayed by the following case law, the downside to this approach is that the individual may not want to waive the protection of their own dignity.

The role of case law in the shaping of an objective approach to human dignity has been pivotal. Some of the most notable jurisprudence has been the 1981 judgement rendered by the German Federal Administrative Court on the controversy regarding the Peep-Shows*;* the 1995 judgement given by the French

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[71] RESTA*, Tre funzioni della dignità della persona* in *Variazioni su Temi di Diritto del Lavoro,* 2020*,* available at *www.dirittolavorovariazioni.com*

[72] This is usually found within the legal instruments regulating the field of biomedicine. This is found in both the preamble but also in the first article of the Oviedo Convention on Human Rights and Biomedicine. The aim of this Convention is to ensure that scientific and medical advances do not infringe human rights nor do they violate the concept of human dignity.

[73] This can be found in the General Commentary No. 7 of 2005 entitled: «Implementing Child Rights in Early Childhood».Paragraph 37 states: «In each of these circumstances, and in the case of all other forms of exploitation (art. 36), the Committee urges States parties to incorporate the particular situation of young children into all legislation, policies and interventions to promote physical and psychological recovery and social reintegration within an environment that promotes dignity and self-respect (art. 39)»

[74] This may be found in the General Commentary No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of Child which asks that adolescents have the «right to physical and psychological recovery and social integration in an environment that fosters health, self-respect and dignity».

[75] DE SENA, *'Objective' Human Dignity and International Law* in *Diritti umani e diritto internazionale, Rivista quadrimestrale*, 2017, 573-586.

State Council regarding «*lancer des nains*» (literally translated into *dwarf tossing*)[76] and the Omega judgement rendered by the Court of Justice in 2004[77].

The first case relates to the showing of the so-called Peep Shows, consisting of a one-person pornographic live show behind a one-way glass (therefore, a glass where only the viewer could see the artist, whilst the artist could not see the viewer). The judgement aimed to understand whether this practice conformed with the *gutten sitten* (hence, good morals/customs). According to the Court, the showing of Peep Shows infringed Article 1 of the 1949 German Constitution, regulating the protection of human dignity. The court ruled that, regardless of the consent of the artist, the fact that they did not see the viewer from behind the glass objectified them to such an extent which led to the violation of their human dignity[78]. The decision of the Court was based on the fact that the artist does not see the other person[79].

The second case was the 1995 judgement rendered by the French State Council. Similarly to the previous case, the judgement had banned a show due to both the violation of the principle of human dignity and the public order. The case at hand regarded a show which saw people affected by dwarfism being thrown in the air. The applicant, Manuel Wackenheim, believed that the prohibition of the shows was discriminatory as, by having given his consent, there was no violation of his dignity. The State Council argued that dignity is innate in a person, therefore, it is not possible to renounce one's dignity. In addition, no one may disdain another person's dignity. The applicant, not satisfied with the decision, brought the case both in front of the United Nations Commission on Human Rights and the European Court of Human Rights. Both courts reiterated the aforementioned violation[80].

Lastly, the Omega case judgement was rendered by the European Court of Justice. Similarly to the two previous cases, the case at hand referred to the prohibition of a homicide simulation game using laser beams. Several German

[76] Conseil d'Etat, Assemblée, 27.10.1995, n. 136727, in *Legifrance*
[77] Court of Justice, First Chamber, 14.10.2001, n. C-36/02 in *InfoCuria*
[78] In the words of the court, «attributes to them the character of an object of others' desire».
[79] JOUANJAN, *La Dignité de La Personne Humaine Dans La Jurisprudence de La Cour Constitutionnelle de Karlsruhe* in *Revue Générale Du Droit*, 2014, available at *www.revuegeneraledudroit.eu*
[80] JONES, *Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice* in*. Liverpool Law Review,* 2012*,* available at *www.researchgate.net*

Courts had previously held that the game violated human dignity and the principles regulated by the Bonn Constitution[81]. The national court then referred the case for a preliminary ruling to the European Court of Justice (hereinafter referred to as "ECJ") questioning if the prohibition conformed with the community law for both the freedom of movement of services and goods[82]. The ECJ believed that no violation of freedoms had been incurred by the German Courts as the protection of human dignity and public order was of vital importance[83].

The previous cases all reflect a more objective approach to the concept of human dignity, which has been found also within the European Court of Human Rights (hereinafter referred to as "ECtHR") reasonings. Although the ECtHR has over time expressed a balanced approach when referring to the objectiveness and subjectiveness of human dignity, it seems that the Court has always preferred an objective approach, considering human dignity inherent to all humans. This has been reflected in the Laskey, Jaggard And Brown V. The United Kingdom Case[84]. Here, the concurring opinion of Judge Petiti highlighted the importance of dignity. In his words: «*The protection of private life means the protection of a person's intimacy and dignity, not the protection of his baseness or the promotion of criminal immoralism»* [85].

[81] Basic Law for the Federal Republic of Germany

[82] The analysis rendered by the Courts in the previous cases have been discussed thoroughly by many different authors and jurists. In this context, we can find Le Bris, that posits the idea that human dignity is a collective principle: hence, the infringement of such impacts everyone and not only the right holder. She believes that the need to respect human dignity as a collective value could easily lead a to a contract to those already settled human rights (which she defines as "simple" human rights). Due to the impossibility of introducing a general definition of the principle of human dignity, which is therefore completely objective, her approach has been criticised by many. An ulterior example can be found in the cases *Open Door vs. Ireland* and *Pretty vs. United Kingdom,* where the violation of human dignity was not based on a collective approach. In neither cases did the Court take into consideration the principle of dignity.

[83] DE SENA*, 'Objective' Human Dignity and International Law* in *Diritti umani e diritto internazionale, Rivista quadrimestrale*, 2017, 573-586.

[84] During the proceedings, the prosecution found videos involving sado-masochistic atctivities from Mr. Laskey, Mr. Jaggard and Mr Brown with around forthy other homosexual men. Within the videos there are very harsh activities which are carried out from the parts with the sole intent to lead to gratification (e.g. beating of genitalia). Mr Laskey, Mr Jaggard and Mr Brown were imprisoned on the grounds that the consent of the individuals within the video is not enough to carry out such extreme activities within a torture-equipped room. The applicants referred the case to the EctHR stating that there had been a breach of Article 8 of the Convention as the sado-masochistic acts had occurred with the consent of the other parts. The Court, however, stated that there was no violation of Article 8 of the Convention.

[85] ECtHR Laskey, Jaggard And Brown V. The United Kingdom, 19.92.1997, no. 21627/93; 21628/93; 21974/93, in *Hudoc*

Overall, it appears that Courts have a preference to adopt an objective approach to human dignity, tackling the right collectively and not individually.

3. INTERNATIONAL RECOGNITION OF HUMAN DIGNITY

Having established the definition of dignity, the subsequent step is to analyse the various legal instruments that uphold this principle in practice. The protection of human dignity occurs primarily through the enforcement of norms. As this thesis will elaborate, there are numerous legal instruments which refer, either explicitly or implicitly, to the concept of human dignity.

The introduction of the principle of human dignity within legal instruments started after the Second World War, particularly as a response to the atrocities committed during the Holocaust[86].

The development of the principle of human dignity has followed two distinct legal paths. On one hand, it has developed at the national level through domestic courts. On the other hand, it has been enshrined in international conventions and declarations. Crucial to this evolution has been the intersection of these two paths, particularly the impact that the international legal instruments have had on the domestic legal frameworks. It is therefore essential to examine both dimensions, starting with the international framework[87].

The initial incorporation of the concept of human dignity in legal instruments can be traced to three foundational documents.

First, the preamble of the Charter of the United Nations enacted in 1945, provides that «*We the people of the United Nations determined to reaffirm faith in*

[86] The concept of dignity, however, already existed within legal instruments even before the Second World War, for example: the Dijon Declaration of 1936; the American Jewish Committee's Declaration of Human Rights of 1944; the Cuban Declaration of Human Rights of 1946; the American Federation of Labor's Preamble to its international Bill of Rights proposal in 1946; the United Kingdom's International Bill of Rights of 1947. These are just some examples of the fact that, even before the war, there were some legal instruments and constitutions that had already started using the principle of dignity.

[87] As thoroughly analysed in the previous pages, the notion of human dignity is very controversial. Therefore, it is important to bear in mind that each legal instrument may address human dignity in a different manner: some see it as a value whilst others as a right.

fundamental human rights, in the dignity and worth of the human person»[88]. This marked the formal introduction of human dignity into international law.

The second one was the Universal Declaration of Human Rights of 1948, where the first part of Article 1 states: «*All human beings are born free and equal in dignity and rights*»[89]. The latter declaration mentions more than once the principle of dignity, indeed it is also found again in the preamble, in Article 22 and Article 23. This legal instrument is of vital importance as it transferred the concept of dignity to the human rights discourse.

Lastly, there was the German Basic Law (the Grundgesetz), which entered into force in 1949, where Article 1(1) reads «*Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority*»[90].

From the Universal Declaration of Human Rights and the Charter of the United Nations, the concept of human dignity spread to a myriad of different United Nations conventions and specialised agencies[91].

3.1.United Nations Conventions

By 1968, the concept of human dignity had become so within the United Nations framework that the General Assembly[92] explicitly stipulated in its guidelines for the development of new human rights instruments that «*such instruments should* [...] *derive from the inherent dignity and worth of the human person*»[93]. This directive significantly influenced the drafting of subsequent United Nations conventions, such as the International Covenant on Civil and Political Rights (hereinafter referred to as «ICCPR») and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as «ICESCR»).

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[88] Preamble of the United Nations Charter
[89] Article 1 of the Universal Declaration of Human Rights
[90] Article 1(1) of the Basic Law for the Federal Republic of Germany
[91] BARAK, *Human Dignity: The Constitutional Value and the Constitutional Right,* Cambridge, 2015, 67-136, available at *www.cambridge.org.*
[92] The 79th session of the United Nations General Assembly (UNGA) tackled the topic of sustainability and the protection of human dignity for present and future generations.
[93] MCCRUDDEN, *Human Dignity and Judicial Interpretation of Human Rights* in *European Journal of International Law* vol. 19, issue 4, 2008, 655–724, available *www.academic.oup.com*

Both covenants emphasise the role of human dignity in their preambles, stating that the «*State Parties to the present Covenant* [...] *recognising that these rights derive from the inherent dignity of the human person*»[94].

Beyond their preambular references, each covenant elaborates on dignity in substantive provisions. For instance, the ICESCR develops the principle of human dignity in Article 13(1) in the context of education, while Article 10(1) of the ICCPR provides: «*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*»[95].

Over time, the General Assembly has also started adopting specialised international conventions addressing specific matters. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. As this thesis will later on analyse[96], both conventions portray the importance of protecting the principle of human dignity. Numerous additional conventions founded on protecting the inherent principle of dignity have followed, including the Convention on the Rights of Child; the Convention on the Rights of Persons with Disabilities; the Convention for the Protection of All Persons from Enforced Disappearances, among others.

Furthermore, several conventions have also been adopted by the United Nations Specialised Agencies. As an example, the United Nations Education, Scientific and Cultural Organisation (UNESCO) refers to human dignity in the Convention Against Discrimination in Education and the Universal Declaration on the Human Genome and Human Rights[97].

3.2. Geneva Conventions

The previous analysis would be incomplete without considering the numerous other conventions in international law. Among these are the Geneva Conventions, which constitute the cornerstone of International Humanitarian Law.

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[94] ICCPR and ICESCR Preamble
[95] Article 10 of the ICCPR
[96] See *infra* chap II, § 3.2 and chap III, § 1.1, 2.1.1.
[97] MCCRUDDEN, *Human Dignity and Judicial Interpretation of Human Rights* in *European Journal of International Law* vol. 19, issue 4, 2008, 655–724, available at *www.academic.oup.com*

The Geneva conventions encompass four different Conventions (for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Relative to the Treatment of Prisoners of War; Relative to the Protection of Civilian Persons in Time of War) and three Additional Protocols (Relating to the Protection of Victims of International Armed Conflicts; to the Protection of Victims of Non-International Armed Conflicts; Adoption of an Additional Distinctive Emblem)[98].

The Geneva Conventions can be regarded as a truly universal system of laws as nearly every State has agreed to be bound by them. At the heart of these Conventions, is the protection of human dignity, thereby ensuring that its protection is also embedded within the domestic legal framework of the ratifying States. Indeed, all of the Geneva Conventions are connected by the fact that, in each of them, Article 3 (1) (c) regulates dignity, by providing that: «[...] *the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: [...] outrages upon personal dignity, in particular, humiliating and degrading treatment»*[99]. The article condemns cruel treatment, torture, hostage-taking and execution before judgement[100].

These Conventions aim to ensure the well-being of those individuals that have been affected by warfare, by ensuring the protection of their human dignity. The role of the Geneva Conventions is particularly important especially nowadays, as over 300 million people around the world need humanitarian assistance due to widespread conflicts[101].

3.3.Vienna Declaration and Programme of Action

The first International Conference on Human Rights held in Teheran in 1968, played a pivotal role in ensuring a central role of human rights within the Vienna Declarations. In this conference, it was affirmed that: *«all peoples and*

[98] HUMAN RIGHTS COMMISSION, *Human Treaties,* available at www.*humanrightscommission.ky*
[99] Article 3(1)(c) of Geneva Conventions no. 1, 2, 3 and 4
[100] This principle may also be found within Article 4 of Protocol 2 of the Geneva Conventions.
[101] HUMAN RIGHTS COMMISSION, *Human Treaties,* available at www.*humanrightscommission.ky*

governments to dedicate themselves to the principles enshrined in the Universal Declaration of Human Rights and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare»[102].

This statement was used as an interpretative foundation in the drafting and eventual adoption of the Vienna Declaration and Programme of Action, which emerged from the 1993 World Conference on Human Rights, and was subsequently endorsed by the UN General Assembly.

The Vienna Declaration is structured into three principal parts: the preamble; a declaration of the commitment of all States to fulfil their obligations in tackling human rights and the final part enumerating a series of recommendations and requests to enforce human rights.

The notion of dignity is elaborated throughout the whole declaration: the term is used a total of ten times. The first explicit reference is found within the preamble, where the World Conference on Human Rights recognises and affirms «*that all human rights derive from the dignity and worth inherent in the persons, and that the human person is the central subject of human rights»*[103].

Throughout the declaration, the principle of dignity is furthermore found as both a commitment but also as a recommendation. First of all, dignity is regulated as a commitment in the context of extreme poverty and social exclusion. According to the declaration, these are two fields which, once violated, lead to the infringement of the concept of human dignity. On the other hand, there are also several recommendations which require the respect of human dignity in specific fields. These recommendations are found in the section entitled «*Equality, dignity and tolerance*» which regulates all issues connected to racism, torture,[104] enforced

[102] Vienna Declaration and Programme of Action

[103] Preamble of the Vienna Declaration and Programme of Action of 1993

[104] Paragraph 55 of the Declaration states that: «The World Conference on Human Rights emphasizes that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities». As this thesis will later on emphasise with its analysis, torture *destroys* human dignity.

disappearances, rights of minorities, Indigenous peoples, migrant workers, women, children and disabled persons[105].

The Vienna Declaration and Programme of Action remains a landmark document within the history of the United Nations, especially for the central role it has had in the protection of human rights and supporting human rights defenders. Notably, the Declaration paved the way for several breakthroughs in the field of human rights. First and foremost, the creation of the International Criminal Court, whose role in the protection of human dignity will be analysed later on[106]. Moreover, the Declaration significantly contributed to the recognition of emerging rights, the strengthening of protections for women, children and indigenous people, and the institutionalisation of the United Nations High Commissioner for Human Rights. Finally, the Declaration also had a pivotal role in promoting equal importance between civil, political, economic, social and cultural rights.

3.4.International Court of Justice

The International Court of Justice (hereinafter referred to as «ICJ» or as the «Court») was established in 1945 to adjudicate disputes among the 193 UN Member States[107]. It is one of the six principal organs of the United Nations. Unlike the European Court of Justice, the ICJ may only hear cases when requested to do so by States. Therefore, national courts may not ask for judgments or clarifications

[105] Within the Declaration we may find very explicit references to the principle of Human dignity. For example, paragraph 18 refers to the human rights of women and gender-based violence. The paragraph reads that «Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated». Very interesting are the solutions that the Declaration introduces to tackle the problem and avoid any violence or other forms of sexual harassment. Indeed, it refers to «legal measures [...] national action and international cooperation in [...] economic and social development, education, safe maternity and health care, and social support». The Declaration here portrays the importance of human dignity as a notion within the legal context. However, it goes further and really appreciates the distinction that there is between the national and international legal framework: portraying how both need to intertwine to ensure an adequate protection. This point reconnects to the structure of this chapter, and why analysing human dignity from each point of view is essential.

[106] See *infra* chap I, § 7.2.

[107] Article 34(1) of the ICJ Statute provides that: «Only states may be parties in cases before the Court».

to the ICJ. The ICJ operates through two primary functions: advisory proceedings and contentious cases[108].

The Court has made significant contributions to the development of International Humanitarian Law, by rendering human rights-related decisions rooted in general principles of international law. However, it has rendered relatively few judgments explicitly addressing the concept of human dignity. Nevertheless, this principle has been explored and invoked in both concurring and dissenting opinions by individual judges. Although not formally part of the binding judgment, such opinions play a pivotal role in shaping the legal understanding of dignity.

Concurring and dissenting opinions often highlight areas of significant judicial disagreement by introducing alternative legal reasoning or novel interpretations. Indeed, their aim is not only to critique the majority view but also to propose a new legal framework to face the legal issue at hand. Moreover, these opinions will sometimes engage with concepts that the majority of judgments do not directly consider, like human dignity. This will introduce a broader perspective of the facts of the case.

There have been several important opinions that have developed the concept of human dignity[109]. In 1966, Judge Tanaka referred to dignity in the context of racial discrimination and apartheid[110]. In the latter case, Ethiopia and Liberia had submitted an application to the Court against the (at the time) Union of South Africa[111]. In 1996, Judge Shahabuddeen reflected on the use of nuclear weapons and the lethal consequences on human beings. In more recent times, Judge Ranjeva used dignity to examine how Belgium failed to use universal jurisdiction towards Congo[112].

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[108] UNITED NATIONS, *What Is the International Court of Justice and Why Does It Matter?,* 2024*,* available at *www. news.un.org*

[109] KE SONG, XUECHAN*, Individual Opinions as an Agent of International Legal Development?* In *Journal of International Dispute Settlement*, 2022, 54-78, available at *www.academic.oup.com*

[110] In the words of Judge Tanaka: «As persons they have the dignity to be treated as such [...]» and «But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of the personality.».

[111] ICJ, *Dissenting opinion of Judge Sebutinde, Ethiopia v. South Africa; Liberia v. South Africa,* 2024, available at *www.icj-cij.org.*

[112] ICJ, *Declaration of Judge Ranjeva,* available at *www.icj-cij.org.*

3.5.European Court of Human Rights

The European Court of Human Rights (hereinafter referred to as «ECtHR» or «Court») is one of the most important international courts, ruling on applications brought by individual/s or States[113]. The Court adjudicates alleged violations of political and civil rights as regulated by the European Convention on Human Rights (hereinafter referred to as «ECHR» or «Convention»).

The relationship between the Court and the notion of dignity is complex. Although the term does not appear explicitly in the text of the Convention, several elements demonstrate its centrality to the ECtHR's jurisprudence. First, the concept is frequently used as an interpretative tool by the Court. As this thesis will later on analyse, these judgments especially refer to Article 3 of the ECHR[114]. Moreover, out of the 47 Countries of the Council of Europe,[115] 38 of their Constitutions refer to the notion of dignity. As the Court's judgments often reflect both the national and European legal frameworks, this indicates the role of the Court in engaging in a dialogue between national and international legal orders. Therefore, the Court provides a common language through which diverse jurisdictions interpret and apply fundamental rights consistently.

The first time that the term dignity appears in the ECtHR jurisprudence was in the individual opinion of Mr G. Maridakis for the Lawless v. Ireland judgment in 1961[116]. The term then appeared again in 1978 in the Ireland v. the United Kingdom

[113] ECHR, Homepage of the European Court of Human Rights, available at *www.echr.coe.int*
[114] See *infra* chap III, § 3.1.
[115] The ECtHR has jurisdiction over the Countries of the Council of Europe
[116] According to Mr. Maridakis's individual opinion: «There is nothing in the condition which offends against personal dignity or which could be considered a breach of the obligations of States under the Convention. It would have to be held repugnant to the Convention, for example, if the State were to assume the power to require the Applicant to repudiate the political beliefs for which he was fighting as a member of the IRA. Such a requirement would certainly be contrary to Article 10 (art. 10), whereby everyone has the right to freedom of expression and freedom to hold opinions and to receive and impart information and ideas. But the text of that Article itself shows that the undertaking required of the Applicant by the Irish Government as the condition of his release, namely an undertaking to respect thenceforth the Constitution of Ireland and the laws, was in keeping with the true spirit of the Convention. This is apparent from the enumeration of cases where, under most of the Articles, the State is authorised to restrict or even prevent the exercise of the individual rights. And these cases are in fact those involving the preservation of public safety, national security and territorial integrity and the maintenance of order (Articles 2 (2) (c), 4 (3) (c), 5, 6, 8 (2), 9 (2) and 11 (2)) (art. 2-2-c, art. 4-3-c, art. 5, art. 6, art. 8-2, art. 9-2, art. 11-2).»

case, this time explicitly within the judgment[117]. Ever since, especially from the 2000s onwards, there has been a rapid increase in the Court's use of human dignity as an interpretative tool[118]. According to statistics, the term has been used in 2122 cases, with over half involving Article 3[119]. Out of these cases, 323 fall within the category of Key Cases[120]: constituting 15,2% of the ECtHR Case Law[121]. Although these may seem high numbers, they are relatively low in comparison to the number of judgements that have been rendered since the constitution of the Court.

Judge Jean-Paul Costa[122] gave his perspective on the importance of human dignity within the ECtHR and the Convention. He argues that the aim of using the term dignity within the Court is to encourage pedagogical reasoning[123]. He defines this as a twofold approach by the ECtHR: by first indicating to the respondent State the seriousness of the infringement and the actions to take; and then generally elucidating to other states the boundaries of Convention-compliant behaviour[124]. Others argue that referencing dignity serves to create a bridge between the Convention and other international legal instruments. For example, by referring to the ICCPR or the Universal Declaration of Human Rights. Nonetheless, the Court prefers developing the notion of human dignity by referring mainly to the Convention.

In this sense, dignity does not only function as a normative tool, but is also used to reinforce a dynamic and evolutive interpretation of the Court. By invoking dignity, the Court stresses the universality of fundamental rights, allowing for a flexible approach that adapts to societal changes. It is thanks to this interpretative

[117] The Ireland v. UK 1978 ECtHR judgment concerned the interrogation techniques used by Ireland during the Troubles. The Court here analysed Article 3 of the Convention, believing that such techniques fell within inhuman and degrading treatment as affecting the dignity of the victims.
[118] This is, however, not without criticism: some deem that the Court aims to make the Convention become an enumeration of social rights
[119] FIKFAK, IZVOROVA, *Language and Persuasion: Human Dignity at the European Court of Human Rights* in *Human Rights Law Review* vol. 22, issue 3, 2022, available at *www.academic.oup.com*
[120] The ECtHR distinguishes Case Law in level of importance, where the highest importance is defined as Key Case.
[121] This information has been collected directly by searching the Grand Chamber and Chamber English judgments which have referred to «human dignity» on the HUDOC website.
[122] Former president of the Court from 2007-2001. He was elected Judge to the Court in 1998.
[123] In his words: «The Court is not merely adjudicating cases: it also has a pedagogical role, and by referring to dignity it thereby sends important signals to all respondent states».
[124] FIKFAK, IZVOROVA, *Language and Persuasion: Human Dignity at the European Court of Human Rights* in *Human Rights Law Review* vol. 22, issue 3, 2022, available at *www.academic.oup.com*

tool used by the Court that many of the rights contained in the Convention have broadened their scope.

As already mentioned, the Convention has no explicit reference to the concept of human dignity. Therefore, the ECtHR typically develops the concept through other rights contained within the convention, such as Article 3.

Article 3 regulates the prohibition of torture and inhuman or degrading treatment and nowadays amounts to the most used article by the Court when tackling dignity. This article has been used by the Court relating to different legal issues, such as degrading treatment or punishment; use of force by State agents; strip or intimate body search;[125] use of specific instruments or measures of restraint;[126] military service;[127] conditions of detention;[128] life imprisonment[129] and involuntary sterilisation and forced abortion[130].

In the context of degrading treatment or punishment, the Court has rendered two pivotal judgments regarding human dignity, such as the Bouyid v. Belgium case and the Tyrer v. the United Kingdom case. Generally speaking, treatment is believed to be degrading when there is a lack of respect for or diminishes, someone's human dignity.

In the Bouyid v. Belgium judgment, the Court highlighted the relationship between the concepts of degrading treatment or punishment and respect for dignity[131]. In the case at hand, the Court examined the concept of human dignity by ruling a slap given by a police officer to be a «*serious attack on the* [...] *dignity*»[132] of the applicant. The Court believed that any type of non-justified use of physical

[125] Such as ECtHR Wieser v. Austria, 22.02.2007, no. 2293/03 and ECtHR Roth v. Germany, 22.10.2020, nos. 6780/18 and 30776/18 in *HUDOC*
[126] Such as ECtHR Svinarenko and Slaydnev v. Russia, 17.07.2014, nos. 32541/08 and 43441/08, in *HUDOC*
[127] Such as the ECtHR Chember v. Russia, 03.07.2008, no.7188/03, in *HUDOC*
[128] Such as the ECtHR Neshkov and Others v. Bulgaria, 27.01.2015, nos. 36925/10, 21487/12, 72893/12, in *HUDOC*
[129] Such as the ECtHR, Murray v. the Netherlands, 26.04.2016, no. 10511/10 in *HUDOC*
[130] Such as the cases of ECtHR V.C. v. Slovakia, 08.02.2012, no. 18968/07 and ECtHR Y.P. v. Russia, 20.12.2022, no. 43399/13 in *HUDOC*
[131] Paragraph 90 of the case states that: «There is a particularly strong link between the concepts if 'degrading' treatment or punishment within the meaning of Article 3 of the Convention and respect for 'dignity'».
[132] ECtHR Bouyid v. Belgium, 28.09.2015, no. 23380/09, in *HUDOC*

force constituted a violation of dignity[133]. The Court also goes further to state that the majority of interference with human dignity resulting from the use of force will lead to an infringement of Article 3. Finally, the case here also focuses on the definition of the notion of dignity, reflecting on why this is not contained within the ECHR, stating that: *«Although the Convention does not mention that concept – which nevertheless appears in the Preamble to Protocol No. 13 to the Convention, concerning the abolition of the death penalty in all circumstances – the Court has emphasised that respect for human dignity forms part of the very essence of the Convention».* Once again, underlying that the absence of the term dignity within the Convention is not a reason to believe that the concept is not important. Indeed, it is the same Court that defines it as the essence of its Convention.

Similarly, in the Tyrer v. the United Kingdom[134] judgment, the Court found that a punishment infringed on the applicant's dignity and physical integrity, amounting to a violation of Article 3.

Although Article 3 of the Convention is the most frequently invoked, the Court has also applied the concept of dignity in the context of other rights. For instance, by interpreting Article 8 of the Convention, which regulates the Right to Respect for Private and Family Life, Home and Correspondence. The Court has found that the right is infringed when there are situations that have negative consequences for the health of the individual and their human dignity, disrupting the enjoyment and peace of one's home[135]. The concept of dignity is used by the Court with Article 8 referring to housing; home visits, searches and seizures;[136] private life[137]; mental illness-measure of protection[138]; end-of-life issues[139] and many others.

In the Lacatus v. Switzerland case,[140] the Court tackled the violation of the Right of Private Life concerning the infringement of the human dignity of the applicant.

[133] In the words of the Court: «Furthermore, in view of the facts of the case, the Court considers it particularly important to point out that, in respect of a person who is deprived of his liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3».
[134] ECtHR Tyrer v. the United Kingdom*,* 25.04.1978, no. 5856/72, in *HUDOC*
[135] ECtHR Hudorovič and Others v. Slovenia, 07/09/2020*,* nos. 24816/14, 25140/14, in *HUDOC*
[136] Such as ECtHR Kučera v. Slovakia 17.10.2007, no.48666/99 in *HUDOC*
[137] Such as ECtHR Locatus v. Switzerland, 19.04.2021 no. 14065/15 in *HUDOC*
[138] Such as ECtHR A.A.K. v. Türkiye, 19.02.2024, no.56578/11 in *HUDOC*
[139] Such as ECtHR Haas v. Switzerland, 20.06.2011 no. 31322/07, in *HUDOC*
[140] ECtHR Lacatus v. Switzerland, 19.04.2021 no. 14065/15, in *HUDOC*

The Court here established that whoever did not have any means of subsistence would have their inherent human dignity threatened[141]. Indeed, the applicant was forced to beg in public as she was living in extremely poor conditions. This case is distinguished from the Dian v. Denmark[142] case where the Court referred to the existent public assistance available to the EU citizens in financial emergency. Furthermore, the Court believed that in this case there was no violation of human dignity as, begging, adopted in this particular way of life, wasn't in any way inhumane. These two cases therefore show how the Court has taken different interpretations over time on the possible violation of human dignity and begging.

The ECtHR has also issued judgments referring to Article 10 of the Convention, even if fewer than the previous two articles. Article 10 of the Convention regulates the Right to Freedom of Expression. For instance, the Court has taken into consideration the relationship between freedom of expression and human dignity when distinguishing between the reputation/status of a person in comparison to the one of a business[143].

This analysis takes into consideration only some of the articles of the convention, however, the Court has also referred to the Right to Liberty and Security, the Right to an Effective Remedy and the Right to a Fair Trial.

The concept of human dignity is, as stated by the Court, the essence of the Convention. Its interpretations are in continuous evolution, reflecting the time and the societal changes, ensuring that the concept of human dignity remains dynamic and relevant. Ultimately, this evolution portrays the Convention's commitment to uphold and adapt human dignity in an ever-changing world.

4. HUMAN DIGNITY IN EUROPEAN LAW

4.1.Charter of Fundamental Rights

The EU Charter of Fundamental Rights (hereinafter referred to as «the Charter») was introduced in 2000 and became legally binding in 2009 with the entry

[141] Paragraph 56 and 115 of the Lacatus v. Switzerland judgment
[142] ECtHR Dian v. Denmark, 21.05.2024 no. 44002/22, in *HUDOC*
[143] *See* ECtHR Uj v. Hungary, 19.19.2911, no. 23952/10, ECtHR OOO Regnum v. Russia 8.12.2020 no. 22649/08; ECtHR Almeida Arroja v. Portugal, 19.06.2024, no.47238/10 in *HUDOC*

into force of the Lisbon Treaty. The Charter enshrines the most important personal freedoms and fundamental rights enjoyed by both EU citizens and residents. Member States are obliged to respect the Charter when acting within the scope of EU law.

This legal instrument is often described as being particularly progressive and innovative, especially as there is no division between political, civil, social and economic rights.

The Charter comprises six different chapters, which are: Dignity, Freedom, Equality, Solidarity, Citizen's Rights and Justice[144]. This thesis will especially focus on the first chapter.

Dignity lies at the heart of the Charter: it is the first thematic chapter and is also echoed throughout the entirety of the text. The preamble introduces the concept of dignity by affirming its universality and indivisibility[145]. Indeed, the Charter is a dynamic legal instrument that affirms the centrality of human dignity. The universality is further reflected in the interaction between the Charter and the Court of the Justice of the European Union (hereinafter referred to as «CJEU»), as provisions concerning human dignity are regularly invoked before the Court. This relationship has contributed to the development of a notion of dignity which is encompassed within the substantive concept of equality, another universal concept.

The preamble concludes by referring to the responsibilities and duties of the States. This introduces a Kantian approach towards the concept of dignity: living within a community, where one's dignity is not only respected but also protected, requires adhering to specific duties. As this thesis will later develop, these duties and responsibilities connected to the concept of dignity are also important in the CJEU case law[146].

Article 1 of the first chapter, entitled «*Human Dignity*», states its inviolability and the need to respect and protect it, recalling the already mentioned

[144] EU Charter of Fundamental Rights
[145] Preamble of the EU Charter: «Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice»
[146] See *infra* chap I, § 4.2

principles within the preamble[147]. This is the first human rights legal instrument which regulates human dignity in its operative part, allowing people to claim the infringement of their human dignity.

Article 1 adopts a twofold approach towards the notion of human dignity. On the one side, it establishes the duty to respect dignity, implying a principle of non-interference. On the other side, it imposes a duty to protect dignity, implying a positive obligation on the part of the States. The guarantors of both this negative and positive obligation are found within Article 51 of the Charter, which refers to the institutions and bodies of the Union as well as the Member States[148].

The distinction between these negative and positive obligations has been already analysed[149]. However, it is important to highlight how this twofold approach to human dignity is developed within legal instruments. For example, the existence of various constitutional rights and procedures designed to respond to infringements of these rights highlights the positive obligation of States. On the other hand, as found within the first five articles of the Charter, States need to adhere to negative obligations as well. These are: the right to the integrity of the person, the prohibition of torture and inhumane or degrading treatment or punishment and the prohibition of slavery and forced labour. As previously explored, these are also recurring themes in the ECtHR Case Law[150].

While Article 1 has a fundamental role in introducing the value of human dignity, it fails to regulate the full scope of the concept. Therefore, it is necessary to take into consideration other articles of the Charter. Article 25 and Article 31 address human dignity emphasising the practical implications in daily life. The former regulates the Rights Of The Elderly[151] whilst the latter regulates the Right to Fair and Just Working Conditions[152]. These two articles are extremely important

[147] Article 1 of the EU Charter: «Human dignity is inviolable. It must be respected and protected.»
[148] Article 51(1) of the EU Charter: «The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers».
[149] See *infra* chap I, § 2.1.
[150] DUPRÉ, *Human Dignity in Europe: A Foundational Constitutional Principle* in *European Public Law* vol. 19, no. 2, 2013, 319-339, available at *www.kluwerlawonline.com*
[151] Article 25 of the EU Charter: «The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life».
[152] Article 31(1) of the EU Charter: «Every worker has the right to working conditions which respect his or her health, safety and dignity.».

as they portray the simplicity behind the concept of human dignity by extending it beyond scenarios such as torture and referring to ordinary aspects of life.

4.2.Court of Justice of the European Union

The Court of Justice of the European Union (hereinafter referred to as «CJEU» or «ECJ») interprets and enforces EU law to ensure conformity in all European countries.

Like other Courts, the ECJ renders judgments on a set of fundamental principles which shape its jurisprudence. Among these, human dignity not only plays a central role but also serves as a balancing factor against other core principles, such as asylum protection and economic freedom.

In many cases, the ECJ protects human dignity indirectly through Article 4[153] or Article 7[154] of the EU Charter of Fundamental Rights. However, in some cases, the ECJ treats human dignity as an autonomous principle, independent of other existing rights[155]. There is different case law which refers to this second situation.

As already previously examined, the most relevant human dignity-related judgment which has been rendered by this Court has been the Omega Case. However, other very relevant cases have been the Pupino case and the joint cases N.S. v. Secretary State and M. E. v. Refugee Applications Commissioner, Minister for Justice Equality and Law Reform of 2011[156]. All these cases have been redeemed to be of particular importance for the impact that they have had on aligning the interpretation of the ECJ with the ECHR and the EU Charter.

In the Pupino Case[157], the Court reinforced the protection of vulnerable individuals, particularly children, in criminal proceedings to ensure a proper level of protection. Throughout the case, the Court refers also to the need to respect the

[153] Prohibition of torture and inhuman or degrading treatment or punishment
[154] Respect for private and family life
[155] DI STASI, *Human Dignity as a Normative Concept. "Dialogue" Between European Courts (ECtHR and CJEU)?* In *Judicial Power in a Globalized World.* 2019, 115-130, available at *www.link.springer.com*
[156] ECJ, Grand Chamber, 21.12.2011, Joined Cases C-411/10 and C-493/10, in *InfoCuria*
[157] ECJ, Grand Chamber, 16.06.2005, C-105/03, in *InfoCuria*

personal dignity of the victims during proceedings. To support its ruling, the Court referred to both the EU Charter and Article 3 of the ECHR.

On the other hand, in the previously mentioned joint cases, the ECJ prohibited asylum transfers to countries where reception conditions failed to meet the minimum standard required to uphold human dignity[158]. The CJEU rendered this judgment by referring to the previous ECtHR case law, such as the M.S.S. v. Belgium and Greece (paragraph 88), and the EU Charter.

The ECJ treats human dignity as a fundamental principle that may sometimes take precedence over other rights, ensuring uniform protection across all Member States.

5. HUMAN DIGNITY IN ITALY

5.1.The Italian Constitution

Within the Italian Constitution, there is no specific provision regulating human dignity in a similar way to the EU Charter of Fundamental Rights. Nevertheless, the notion of human dignity has played an important role in the jurisprudence of the Italian Constitutional Court, where it has been invoked both implicitly and explicitly as an interpretative tool. Furthermore, the Italian Constitution has at least three articles regulating some aspects of human dignity. The first is Article 3 of the Constitution, which refers to the «*pari dignità sociale*» (translated to «equal social dignity»). This provision is the most frequently referred to by the Italian Constitutional Court in matters relating to human dignity.

The other two relevant articles focus more narrowly on labour law: Article 36(1) guarantees workers a minimum wage sufficient to live with dignity[159] , while

[158] In the words of the ECJ: «[...] Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.»

[159] Article 36(1) of the Italian Constitution in the original language: «Il lavoratore ha diritto ad una retribuzione proporzionata alla quantità e qualità del suo lavoro e in ogni caso sufficiente ad assicurare a sé e alla famiglia un'esistenza libera e dignitosa.»

Article 41[160] refers to human dignity as a limit to the private economic initiative. The latter provisions, while important, have a more specific scope than Article 3 as they pertain to a group of people[161].

In contrast, Article 3 of the Italian Constitution provides a broader scope than the other articles. The article is divided into two paragraphs, where, in the first one, it regulates formal equality (translated from «*uguaglianza formale*») and in the second one the substantial equality (translated from «*uguaglianza sostanziale*»). The first paragraph recognised equal social dignity for everyone, without discrimination for sex, race, language, religion, political opinions and social or personal conditions. Although this first paragraph formally refers to Italian citizens, the Constitutional Court, with judgment no. 120/1967[162], has broadened the scope of this article by including even non-Italian citizens.

The second paragraph refers to substantial equality, which recognises a positive obligation of the State to remove economic and social obstacles which may hinder freedom and equality. It is a way to communicate to the legislator that there is a need to develop a legal framework which can ensure the respect of everyone's equal social dignity.

The notion of «equal social dignity» used in Article 3 is not without interpretative challenges. One school of legal thought believes that it creates a bridge between the concept of equal social dignity and Article 1 of the ECHR, which regulates the duty of the parties to respect human rights. Others, search for

[160] Article 41 of the Italian Constituion in the original language: «L'iniziativa economica privata è libera. Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente, alla sicurezza, alla libertà, alla dignità umana».

[161] The Italian Constitution does also comprise of other articles which, implicitly, do relate to the concept of human dignity. First of all, Article 13 of the Italian Constitution states that personal freedom is an inviolable right. The violation of this right would lead to the infringement of the human dignity of the victim. Furthermore, Article 32(2) of the Italian Constitution regulates how medical treatment may not be made mandatory. Human dignity is a notion which has been used more than once by the Constitutional Court when it comes to regulating the aspects of health, however this will be then analysed thoroughly.

[162] The decision had to do with a Swiss citizen who had been incarcerated in Italy. The question referred to the Constitutional Court was whether art 139 of law 1424/1940 (customs law) was in conformity with Article 3 of the Italian Constitution. The State Advocate believed that there was a contrast between the two norms as the individual was not Italian but Swiss. Furthermore, he believed that the lack of equality consisted on the fact that the Swiss citizen could simply go back to Switzerland, whilst Italian citizens may not. Regardless of these previous points, the Constitutional Court, in Decision n, 120/1967, widens the scope of Article 3 of the Italian Constitution recognising inviolable rights also to non-Italian citizens on the basis of the notion of equality

an autonomous definition for Article 3 of the Italian Constitution, believing that the provision protect the human person whilst aiming to guarantee equal social dignity. This school of thought defines equality as living within the same economic, political, ethical and social conditions[163].

With decision no. 494/2002, the Italian Constitutional Court rendered a judgment interpreting the notion of equal social dignity in the context of family law. The case specifically recognised the right of parents to acknowledge their biological children if the parents come from the same family line, rendering inadmissible the previous legal framework which did not recognise this right. The judgement rendered by the Court referred to both Article 2 of the Italian Constitution, regulating the right to personal identity, and the equal social dignity as enshrined in Article 3 of the Italian Constitution[164].

As the next section of this thesis will explore, the jurisprudence of the Italian Constitutional Court has played a central role in shaping the understanding of human dignity in Italy by linking it to personal identity.

5.2.The Italian Constitutional Court Jurisprudence

The approach of the Italian Constitutional Court has varied on a case-by-case approach in interpreting and adopting the concept of human dignity. Initially, the Court rendered judgements connecting the concept of human dignity to other rights. In time, however, human dignity has adopted a central role and started being developed autonomously.

Initially, the Constitutional Court invoked dignity to strengthen rights not explicitly articulated in the Italian Constitution[165]. An example is judgment no. 217/1988[166], which has recognised the «*Diritto all'Abitazione*» (translated to Right to Housing[167]) to ensure that dependent workers could buy houses in highly

[163] MONACO, *La tutela della dignità umana: sviluppi giurisprudenziali e difficoltà applicative* in *Politica del diritto,* 2011, 45-78, available at *www.rivisteweb.it*
[164] Corte Cost. 28.10.2002, no. 494, in *Giur. Cost.*
[165] DOLSO, *Per una definizione del concetto di "dignità". Itinerari Giurisprudenziali* in *Dignità, eguaglianza e Costituzione,* Trieste, 2019, 47-77, available at *www.openstarts.unit.it*
[166] Corte Cost. 25.02.1988, no. 217 in *Giur. Cost.*
[167] The Right to Housing enters within the social fundamental rights and is currently regulated by Article 47(2) of the Italian Constitution. The article refers to a positive obligation of the State to

populated areas. The Court here has not created a new right, instead, it has shined light on an already existing subjective juridical position by interpreting it in light of the concept of dignity[168].

In subsequent rulings, the Court began reconstructing the notion of human dignity implicitly, using it as a foundation for various personality-related rights. For instance, in decision no. 13/1994, the Constitutional Court refers to the «*Diritto al nome»* (translated to Right to the Name).

When referring to human dignity, the Constitutional Court has taken into consideration also Article 2 of the Italian Constitution[169], referring to the inviolable rights of human beings[170]. In the judgment at hand, the Court reflected on the importance of being able to identify ourselves through the use of a name. Names function as a characterising and essential part of the personality, regardless of the social and personal conditions[171]. Therefore, the Constitutional Court recognised human dignity as an intrinsic and innate value, regardless of whether it is recognised by the Constitution. It is from this thought process that the Constitutional Court has elaborated several rights related to one's personality, reaching fields such as honour, decorum and intimacy[172]. Particularly interesting has been the combined reading of Articles 2, 3 and Article 32 of the Constitution, relating to health.

Over time, the Constitutional Court moved towards recognising human dignity as a standalone legal principle capable of influencing the interpretation of other constitutional rights. A significant example is decision no. 252/2001, where

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ensure that the right is being respected and protected. On this point, read BELLOCCI, PASSAGLIA*, La dignità dell'uomo quale principio costituzionale*, 2007, available at *www.cortecostituzionale.it*

[168] As stated from the Court. «In breve, creare le condizioni minime di uno Stato sociale, concorrere a garantire al maggior numero di cittadini possibile un fondamentale diritto sociale, quale quello all'abitazione, contribuire a che la vita di ogni persona rifletta ogni giorno e sotto ogni aspetto l'immagine universale della dignità umana, sono compiti cui lo Stato non può abdicare in nessun caso».

[169] Article 2 of the Italian Constitution: «La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale».

[170] Also, decision n. 388/199 of the Italian Constitutional Court has been very relevant in connecting these two concepts. In the mentioned decision, the Court stated that the inviolable rights found within Article 2 of the Constitution have been found as always more essential in the protection of human dignity. On this point, read MONACO. *La tutela della dignità umana: sviluppi giurisprudenziali e difficoltà applicative*. Politica del diritto. pp. 45-78. 2011.

[171] Corte cost. 24.01.1994, n. 13 in *Giur. Cost.*: «L'identità personale costituisce quindi un bene per sé medesima, indipendentemente dalla condizione personale e sociale, dai pregi e dai difetti del soggetto, di guisa che a ciascuno è riconosciuto il diritto a che la sua individualità sia preservata».

[172] Corte Cost. 5.04.1973, n. 38 in *Giur. Const.*

the Constitutional Court examined Article 32 of the Italian constitution guaranteeing the right to health. While the second paragraph of this article does not explicitly mention dignity, the Court ruled that the right to health is inherently tied to the inviolability of human dignity[173]. This reasoning led to an extensive interpretation of Article 32, introducing the principle of confidentiality on the state of health of a person[174]. Once again, this judgment has portrayed the approach of the Constitutional Court of adopting human dignity to broaden the scope of already existing rights.

Moreover, the Court has also elaborated the concept of human dignity in criminal law, in particular Article 528 of the Italian Criminal Code. The latter sanctions whoever recreates, by utilising, for example, images, text or objects obscene scenes[175]. This article was central to decision no. 293/2000[176] of the Court which tackled the importance of human dignity while recognising the existence of positive obligations for the State. In addition, the Court tried to find a balance between the freedom of expression and the safeguarding of human dignity. The pivotal point of this decision is the Court's reflection on the so-called «elastic concepts»[177], which, however, find their limit in human dignity. In this context, the notion of human dignity serves as a safeguard against erroneous interpretations of Article 528 of the Italian Criminal Code while simultaneously protecting the rights of Italian citizens. This decision represents a cornerstone for the Italian

[173] Corte Cost. 5.07.2001, n. 252 in *Giur. Const.*: «Occorre preliminarmente rilevare che, secondo un principio costantemente affermato dalla giurisprudenza di questa Corte, il diritto ai trattamenti sanitari necessari per la tutela della salute è "costituzionalmente condizionato" dalle esigenze di bilanciamento con altri interessi costituzionalmente protetti, salva, comunque, la garanzia di "un nucleo irriducibile del diritto alla salute protetto dalla Costituzione come ambito inviolabile della dignità umana, il quale impone di impedire la costituzione di situazioni prive di tutela, che possano appunto pregiudicare l'attuazione di quel diritto» (cfr., ex plurimis, le sentenze n. 509 del 2000, n. 309 del 1999 e n. 267 del 1998).

[174] Corte Cost. 2.06.1994, n. 218 in *Giur. Const*

[175] Article 528 (1) of the Italian Criminal Code in the original version: «Chiunque, allo scopo di farne commercio o distribuzione ovvero di esporli pubblicamente, fabbrica, introduce nel territorio dello Stato, acquista, detiene, esporta, ovvero mette in circolazione scritti, disegni, immagini od altri oggetti oscenidi qualsiasi specie(1), è soggetto alla sanzione amministrativa pecuniaria da euro 10.000 a euro 50.00*0*.»

[176] Corte Cost.11.07.2000 n.293, in *Giuri. Cost.*

[177] As stated by the judgment n. 293/2000 of the Italian Constitutional Court: «La descrizione dell'elemento materiale del fatto-reato, indubbiamente caratterizzato dal riferimento a concetti elastici, trova nella tutela della dignità umana il suo limite, sì che appare escluso il pericolo di arbitrarie dilatazioni della fattispecie, risultando quindi infondate le censure di genericità e indeterminatezza.»

Constitutional Court, as it truly underscores the fundamental role of human dignity,[178] even though it is not explicitly regulated within the Italian legal framework.

Although the primary function of the Constitutional Court is to ensure that the rights and fundamental freedoms are upheld, an equally significant role lies in addressing legislative gaps[179]. This function was exercised by the Italian Constitutional Court in the Cappato judgment. While this thesis has already referred to the Cappato ruling in the context of developing the legal notion of human dignity[180], it has not addressed the Court's role in remedying the legislative gap at issue.

In the Cappato judgment, the Italian Constitutional Court held that Article 580 of the Italian Criminal Code was partially unconstitutional, as it failed to respect the dignity of seriously ill individuals who freely and consciously chose to end their lives with the assistance of others[181]. The Court adopted a twofold approach to Article 580 of the Italian Criminal Code, grounded in the principle of human dignity.

First, it held that the provision may not preclude respect for the patient's decision to end their own life, nor can it amount to an absolute barrier to the possibility of receiving assistance in avoiding a particularly painful and prolonged course of suffering. At the same time, while acknowledging the vulnerability of sick

[178] It is important to note that this predominant role of human dignity within the Italian Case Law might not necessarily be seen only as a positive thing. Indeed, characterising human dignity as a constitutional concept may lead to removing a discourse and interpretation of the Court which balances two rights, rather than preferring a concept over the other. This may lead to a tendency to abuse the notion from the Court whilst also using it in an improper manner. Moreover, this difficult relationship between human dignity and already existing rights leads to more issues when the notion is being adapted in a subjective manner, and not objectively. This would lead to an interpretation of facts which is distorted from reality, whilst also being able to use the concept in an erroneous manner. This point has been thoroughly elaborated by MONACO, *La tutela della dignità umana: sviluppi giurisprudenziali e difficoltà applicative* in *Politica del diritto,* 2011, 45-78, available at *www.rivisteweb.it*

[179] SILVESTRI*, Considerazioni Sul Valore Costituzionale Della Dignità Della Persona* in *Associazione Italiana Dei Costituzionalisti,* 2008, available at *www.associazionedeicostituzionalisti.it*

[180] See *infra* chap I, § 2.1 and footnote 65

[181] Judgment no. 242/2019 of the Italian Constitutional Court has stated that (translated in english): «The freedom to refuse such medical interventions, without compromising the dignity of the patient by subjecting them to a slow and painful end, would require the recognition of the possibility to access, even with the assistance of third parties, a lethal medication.»

persons, the Court believed that the legal framework should not treat them as in need of protective intervention, provided their decision has been taken freely[182]

The interpretation given by the Court was also supported by the analysis of Article 32(2) of the Italian Constitution, which provides for the right to health, and Articles 3 and 13 which enshrine substantive equality and personal freedom. The Court's combined interpretation of the latter articles together with the concept of human dignity aimed to fill in a normative gap that a rigid application of Article 580 was creating[183]. Such application was producing an inequality between those capable of ending their lives unaided and those who, due to physical incapacity, needed assistance[184].

The Court played a pivotal role in demonstrating that a constitutionally orientated interpretation, centred on the principle of dignity, can help to address normative gaps. It has also done this by introducing specific conditions where aiding someone to commit suicide does not amount to criminal liability.

Nevertheless, the ruling underscored the ongoing legal and ethical debate surrounding assisted suicide, particularly in relation to the principles of human dignity and the right to health.

5.3.Decision n. 141/2019 and its Impact on Dignity Protection

In 2019, the Italian Constitutional Court issued decision no. 141 addressing the complex relationship between human dignity and prostitution. This decision was highly criticised for several reasons, especially for the moral aspects elaborated by the judgment. However, it was of vital importance as the Court advanced a distinctive interpretative approach.

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[182] CUPELLI, *Il caso Cappato, l'incostituzionalità differita e la dignità nell'autodeterminazione alla morte* in *Diritto penale contemporaneo,* 2018, available at *www.archiviodpc.dirittopenaleuomo.org*

[183] Judgment no. 242/2019 of the Italian Constitutional Court has stated that (translated in english): «In this respect, the contested provision would appear to conflict with the 'personalist principle' enshrined in Article 2 of the Constitution, as well as with the principle of the inviolability of personal liberty affirmed in Article 13 of the Constitution. The latter constitutional provision, together with Article 32 of the Constitution (not mentioned in the operative part of the referral order, but repeatedly referenced in its reasoning), guarantees the individual's full freedom to determine which external interferences to allow upon their own body, thereby safeguarding their dignity».

[184] CUPELLI, *Il caso Cappato, l'incostituzionalità differita e la dignità nell'autodeterminazione alla morte* in *Diritto penale contemporaneo,* cit.

The Bari Court of Appeal referred the matter to the Italian Constitutional Court seeking an interpretation of Article 3(1) no. 4[185] and no. 8[186] of law no. 75/1958, which classifies the recruitment, aiding and abetting of voluntary and consensual prostitution as a criminal offence. Furthermore, it requested an assessment of this provision in light of Articles 2, 3, 13, 25 (2), 27 and 41 of the Italian Constitution. The factual background concerned allegations that «*the defendants* [had] *organised, for the then-Prime Minister* S[...] B[...], *encounters with escorts who were occasionally or professionally engaged in prostitution*»[187].

The Court adopted an objective approach to human dignity, meaning that dignity was viewed as not dependent on individual perceptions but rather on broader societal values. This approach sparked criticism, with opponents arguing that it risks turning dignity into an oppressive legal tool, generalising perceptions of prostitution and treating those who engage in it as inherently vulnerable and in need of protection[188]. Such an approach, critics contend, reintroduces moral considerations into legal reasoning[189].

While the Court acknowledged a connection between prostitution and sexual freedom, it did not recognise the act as protected and enforced under Article 2 of the Constitution. According to the Court, Article 2 safeguards inviolable rights, which ensure the protection and development of the human person. Article 2 of the Constitution has to be read together with the second paragraph of Article 3 of the

[185] Law 20.02.1958, no. 75 provides that, in italian: «[...] chiunque recluti una persona al fine di farle esercitare la prostituzione, o ne agevoli a tal fine la prostituzione [...]».

[186] Law 20.02.1958, n.75 provides that, in italian: «[…] chiunque in qualsiasi modo favorisca o sfrutti la prostituzione altrui. In tutti i casi previsti nel numero 3) del presente articolo, alle pene in essi comminate sarà aggiunta la perdita della licenza d'esercizio e potrà anche essere ordinata la chiusura definitiva dell'esercizio».

[187] Decision n. 141/2019 provides that, in Italian: «La Corte barese riferisce, per altro verso, che i fatti oggetto di giudizio sono costituiti, nella sostanza, «dall'aver gli imputati organizzato, in favore dell'allora premier S[…] B[…], incontri con escort occasionalmente o professionalmente dedite alla prostituzione».

[188] BIN, *La Libertà Sessuale e Prostituzione (in Margine Alla Sent. 141/2019),* 2020, available at *www.robertobin.it*

[189] Judgment no.141/2019 provides that, in Italian: «La concezione della dignità maggiormente rispondente alle esigenze costituzionali sarebbe, tuttavia, quella soggettiva. Il diritto penale, se usato per tutelare una dignità oggettiva imposta al singolo dall'alto, contro la sua libertà di autodeterminazione, si trasformerebbe, infatti, in uno strumento oppressivo e autoritario. In realtà, dietro a pretese concezioni oggettive e invalicabili della dignità umana si nasconderebbero intenti moralistici, che sfociano in un paternalismo morale inaccettabile come giustificazione di una norma incriminatrice». This point has furtherly been developed by VIOLINI, *La dignità umana al centro: oggettività e soggettività di un principio in una sentenza della Corte Costituzionale (sent. 141 del 2019),* 2021.

Constitution. In this sense, inviolable rights are related to the value of the person and the principle of solidarity. Prostitution, however, is classified as an economic activity and does not lead to the development or protection of the human person.[190]

The Court also rejected the argument that prostitution should be protected under Article 41 of the Constitution, as stated by the defendants, which guarantees economic freedom. The Court emphasised that Article 41 (2)[191] prohibits activities which in conflict with human dignity. This interpretation led to the Court's first major legal distinction between objective and subjective human dignity[192]. Additionally, the Court introduced a flexible interpretation of self-determination, arguing that it is influenced by a variety of social and economic factors. However, this interpretation reinforced the Court's stance that prostitution, even voluntary, does not fall under the scope of Article 2's protection.

In this decision, the Court introduced a new interpretation of law no. 75/1958. The Court believed that initially, this law protected public morality and the freedom of sexual self-determination of the person undergoing prostitution activity. However, recent decisions of the Italian Court of Cassation have believed that this law is related to human dignity. This point was highly criticised by the parties, stating that human dignity needs to be interpreted in an objective manner, which however would lead to criminalising acts only because redeemed ethically incorrect.

Despite these concerns, the Court upheld the law's legitimacy reaffirming that it is within the legislator's discretion to determine how prostitution should be regulated. The Court emphasised that its decision should not be construed as

[190] Judgment no.141/2019 provides that, in Italian: «L'offerta di prestazioni sessuali verso corrispettivo non rappresenta affatto uno strumento di tutela e di sviluppo della persona umana, ma costituisce – molto più semplicemente – una particolare forma di attività economica. La sessualità dell'individuo non è altro, in questo caso, che un mezzo per conseguire un profitto: una "prestazione di servizio" inserita nel quadro di uno scambio sinallagmatico.».

[191] Article 41(2) Italian Constitution: «Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente, alla sicurezza, alla libertà, alla dignità umana».

[192] Judgment no. 141/2019 provides that, in Italian: «Insussistente sarebbe anche la denunciata violazione dell'art. 41 Cost., poiché la libertà del singolo di perseguire il profitto è tutelata solo a condizione che non comprometta altri valori che la Costituzione considera preminenti, tra i quali anzitutto – per l'appunto – quello della dignità umana».

endorsing a prohibitionist model, but rather, as leaving room for legislative intervention to address prostitution on a case-by-case basis[193].

6. HUMAN DIGNITY AND HUMAN RIGHTS

6.1.The Relationship between Human Dignity and Human Rights

There exists a twofold approach regarding the relationship between human dignity and human rights.

On the one hand, human dignity is regarded as the foundational principle of human rights. Under this view, human rights exist due to the recognition of human dignity. This approach is reflected in articulated in various legal instruments, such as the Universal Declaration of Human Rights, the ICCPR and the ICESCR. As already mentioned, both the preambles of the ICCPR and the ICESCR recognise the derivation of rights from dignity[194].

On the other hand, human dignity is violated when human rights are infringed. This approach has found particular resonance in the context of torture and inhuman or degrading treatment. The act itself is degrading to the extent that not only their human right is infringed, rather the dignity of the person is also stripped away[195].

From a legal standpoint, the first approach tends to be the more commonly adopted framework, creating a conceptual a bridge between human dignity and rights. However, this relation has not gone unchallenged.

The first critique relates to the fact that generalising human dignity to be the basis of all human rights is redundant and superficial. It cannot be stated that human rights simply derive from an interpretation of the notion of human dignity. Rather, human rights derive from moral dilemmas and global emergences which make it essential to recognise a specific right to an individual. This right will then be inherently connected to the person's dignity.

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[193] PIERGENTILI, *Prostituzione: dignità umana e autodeterminazione nella sentenza n. 141/2019 della corte costituzionale,* 2019, available at *www.centrostudilivatino.it*

[194] See *infra* chap I, § 3.1.

[195] SCARFFE, *The Language of Dignity in International Law* in *Res Publica,* 2024, available at *www.philpapers.org*

The second critique questions whether an infringement of human rights directly leads to the person's human dignity being violated[196]. Once again, although the two notions are intertwined, they do not have the same definition nor are they used in the same way. If it had been so, the same terminology would have been used to indicate the one and the other. What could be instead said is that human rights act as a tool to safeguard and protect human dignity. Therefore, the violation of human rights will not singularly and automatically always lead to the infringement of human dignity[197].

7. CRIMINAL LAW RECOGNITION OF HUMAN DIGNITY

7.1.The Role of Human Dignity in Criminal Law

Human dignity constitutes a criterion of intervention under criminal law. While it is not possible to classify crimes solely based on violations of dignity as a whole, criminal law protects core values inherently linked to dignity, such as life, physical and moral integrity, freedom and honour. Every crime committed strips away a degree of the victim's dignity, subjecting them to humiliation. Therefore, the intrinsic connection between criminal law and human dignity is undeniable. For these reasons, the approach of the following chapters will examine when dignity and humiliation of the victim are the features of the crime and not only what is being removed from the person.

However, the role of human dignity in criminal law is not limited to regulating crimes. Rather, it is also a guiding principle in criminal proceedings, particularly in safeguarding the Right to a Fair Trial. The right is enshrined in various International, European and domestic legal instruments, notably Article 6

[196] KILLMISTER, *Dignity, Torture, and Human Rights* in Ethical *Theory and Moral Practice,* 2016, 1087–101, available at www.*philpapers.org*

[197] An example of this case can be provided to better comprehend the distinction between human dignity and human rights. Everyone, for example, has the Right To Vote. The latter right is found within a variety of legal instruments, such as Article 2 Protocol 1 of the European Convention of Human Rights. If the individual is still being respected, the violation of their Right to Vote will not automatically nor individually violate their human dignity.

of the ECHR[198] and Article 47 of the EU Charter[199]. The manner in which individuals accused of crimes are tried reflects the State's commitment to upholding human rights and respecting dignity[200].

A cornerstone of the Right to a Fair Trial is the presumption of innocence, which dictates that a defendant is to be considered innocent until proven guilty. This principle is of paramount importance as it ensures fairness in the justice system, prevents wrongful convictions and overall safeguards human dignity by protecting individuals from unjust treatment.

Ultimately, human dignity acts as a fundamental value in protecting victims from crimes but also within criminal proceedings.

7.2.The International Criminal Court

Human dignity has been a foundational principle in the development of international criminal justice. This principle became particularly salient with the establishment of *ad hoc* tribunals created in the mid-1990s, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Its most institutionalised expression, however, was achieved through the creation of the International Criminal Court and the adoption of the Rome Statute.

The International Criminal Court (hereinafter referred to as "ICC") was established in 1998 with the adoption of the Rome Statute and came into force four years later. The Court has jurisdiction only over those States that have expressly consented through ratification, even though there are exceptions for the Court's jurisdiction to extend beyond. As a Court of Last Results, the ICC is mandated to

[198] Article 6(1) of the ECHR states that: In the determination of his civil rights and obligations or 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[199] Article 47 (2) of the EU Charter of Fundamental Rights: «Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.»
[200] AMNESTY INTERNATIONAL. *The Right to a Fair Trial,* 2002, available at *www.amnesty.org*

investigate and prosecute the most serious crimes of concern to the international community[201].

One of the core functions of the ICC has been consolidating a system of protecting human dignity. This has especially been achieved by the creation of the Rome Statute, which aims to both protect and enforce human rights between the Member States. Furthermore, the Rome Statute regulates four different types of crimes, which are genocide, crimes against humanity, war crimes and prosecution. All of these crimes relate to the concept of human dignity.

Genocide entails the intentional destruction of a national, ethnic, racial or religious group. This crime is regulated by Article 6 of the Rome Statute and also by the 1948 Genocide Convention[202]. The latter legal instrument is of extreme importance in protecting the victim's dignity, which is infringed on both belonging to a specific group and also for their objectification and depersonalisation.

Crimes against humanity refer to widespread or systematic attacks against a civilian population. Currently, it is regulated by Article 7 of the Rome Statute and Article 2 of the International Law Commission's Draft Articles On Prevention And Punishment Of Crimes Against Humanity. Crimes Against Humanity, first of all, protects the dignity of the person, the right to life and the right to health[203]. There are several crimes which fall within Crimes Against Humanity, Article 7 of the Rome Statute for example refers to murder; imprisonment or other severe deprivation of physical liberty; sexual violence; persecution and other inhumane acts. The scope of this thesis is not to examine all of them separately, but to demonstrate how human dignity relates to these. For example, in the Media Trial case decided by the ICTR, the latter stated that hate speech targeting a specific group amounted to persecution. Specifically, it destroys the dignity of those to whom the speech is targeted[204].

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[201] INTERNATIONAL CRIMINAL COURT, *About the Court,* available at *www.icc-cpi.int.*

[202] By General Assembly Resolution A/RES/69/323, the 9th of December is the International Day of Commemoration and Dignity of the Victims of the Crimes of Genocide and Prevention of this Crime.

[203] Antonio Cassese is a jurist and the ex-President of the special Lebanese Court. He has stated in the past that crimes against humanity are «[...] particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons*».*

[204] LE MOLI*, Human Dignity in International Criminal Law. Human Dignity in International Law.* Cambridge,.2021, 269-305, available at *www.cambridge.org.*

War Crimes, governed by Article 8(1) of the Rome Statute, include acts such as torture, cruel or inhuman treatment; outrages upon personal dignity; causing great suffering; sexual violence and slavery. Specifically in the context of war crimes, the ICC has developed jurisprudence relating to outrages upon one's personal dignity.[205] Where, by a person, it is not intended necessarily a living person. According to the ICC's caselaw, outrages upon personal dignity occur when there is a violation or humiliation of someone's personal dignity. For example, the Pre-Trial Chamber I of the ICC has referred back to the ICTY Trial Chamber in the *Furundžija* Case, which has stated the importance of human dignity as a building block of both international humanitarian law and human rights law[206].

The ICC does not only tackle the concept of dignity within its Rome Statute, instead, it tries to apply it in every field. This is especially done throughout proceedings and hearings, where the ICC also protects dignity concerning the participation of victims and witnesses[207]. This is another very relevant aspect as victims have the chance to present their views in front of the Court, and respecting their dignity is the only way to ensure that they are being protected. To achieve justice, it is necessary to hear everyone safely. However, the Court goes a step further and states that the victim's dignity has to be ensured also in case of rehabilitation, to ensure that the victim may continue their lives in a normal and safe manner.

7.3. A brief note: does American criminal law infringe human dignity?

This thesis will not provide an in-depth investigation of the U.S. legal framework regarding the protection and enforcement of human dignity. However, it will briefly analyse the current system of punishment in the United States and the potential human dignity violation that this leads to.

The United States legal framework does not regulate the concept of human dignity to the same extent as it is regulated in International, European and domestic

[205] Regulated by Article 8 of the Rome Statute
[206] LE MOLI, *Human Dignity in International Criminal Law. Human Dignity in International Law.* Cambridge, cit.
[207] Article 68 of the Rome statute.

law. This is made evident from the various legal instruments adopted in the United States.

First, there is no explicit notion of human dignity being elaborated within any of the United States legal instruments. Second, the human rights-related legal instruments to which the U.S. is a party, are usually non-self-executing and, therefore, non-judicially enforceable in state or federal courts. Lastly, many legal instruments, such as the International Covenant on Civil and Political Rights, have been signed and ratified but with very critical reservations[208].

One of the main critiques of the U.S. justice system's lower regard for human dignity stems from its particularly harsh form of mandatory sentencing, especially the «Three-Strikes» law. This law significantly increases the prison sentences of individuals convicted of felonies if they have prior convictions for specific offences, such as sexual offences, violent offences and serious offences[209].

In addition to harsher sentencing, the United States has adopted an overall tougher approach towards punishment, treating convicts as though they have forfeited all their freedoms.

The punitive system has led many to question whether the country respects human dignity. As a result, recent reforms have sought to evolve the criminal justice system, particularly due to the role of researchers in highlighting the negative consequences of harsh sentencing and imprisonment. Studies have emphasised that incarceration has a limited impact on crime rates[210].

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[208] TONRY, *The Absence of Equality and Human Dignity Values Makes American Sentencing Systems Fundamentally Different from Those in Other Western Countries* in *Minnesota Legal Studies Research Paper No. 16-8,* 2016, available at *www.papers.ssrn.com*

[209] LEGISLATIVE ANALYST'S OFFICE*, The Three Strikes and You're Out Law.* 1995, available at *www.lao.ca.gov.*

[210] For more on this point, read SHAMES, ALISON, SUBRAMANIAN, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections,* 2014, 9–18, available at *www.jstor.org.*

CHAPTER II

MIGRATION AND HUMAN TRAFFICKING

1. DEFINING MIGRATION AND HUMAN TRAFFICKING

1.1. **Defining «Migration»: Irregular Migration and Migrant Smuggling**

International law does not define the term «migrant». For this reason, it is important to denote the definition of the latter notion that will be adopted throughout this thesis.

Generally speaking, the term «migrant» is used to refer to an individual who migrates from their place of residence to another country or across an international border, temporarily or permanently. Migrants may be forced to leave their country of origin for a multitude of reasons, such as bad governance, violence, corruption, civil wars and ethnic and cultural differences. Therefore, migrants seek countries where their rights are protected and they can live with dignity. In this context, UN agencies and international organisations play an increasingly significant role in advocating for the rights of migrants and providing humanitarian assistance[211]. On the other hand, migrants do not only migrate for tragic reasons, rather, they may also want to pursue their education or work. [212]

Migration is considered an «umbrella term» as it encompasses various migration-related phenomena[213]. This thesis will specifically analyse two of the latter: irregular migration and migrant smuggling.

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[211] An example has been the adoption of the Special Rapporteur on the Human Rights of Migrants and the Committee on Migrant Workers of the United Nations. The latter Committee has a predominant role in ensuring the protection of migrant's rights. To further read on the role of the Committee, *See* OHCHR, *The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,* available at *www.ohchr.org*
This thesis will later on expand on the role of both UN agencies and international organisations in the protection of migrants.

[212] IOM UN MIGRATION, *Glossary on migration* in *International Migration law,* available at *www.pubblications.iom.int.*

[213] The United Nations Glossary on Migration specifically defines migration as an umbrella term.

An irregular migrant[214] is an individual who has entered a country without authorisation or who initially entered legally but lacks a valid residence permit.[215] The regularity or irregularity of the migrant depends on the law of the country, therefore complicating the phenomenon. According to research carried out by the United Nations, at some point, irregular migrants were initially regular migrants, or tried to be, but did not succeed. Generally speaking, irregular migration does not fall within the field of organised crime.[216]

Irregular migration leads to several implications for the protection of both the human rights and human dignity of the migrant. Nowadays, irregular migrants have a high risk of becoming targets of unfair criminalisation, repressive policies and marginalisation, further deepening their exclusion from society. This is unfair as irregular migrants are still protected by international humanitarian law. Moreover, irregular migration poses significant challenges regarding economic, social and cultural rights.[217] This concerns, especially, children whose rights may not be denied based on the legal status of their parents.[218] An example of a typically infringed right is the right to health of irregular migrants. Accessing healthcare is particularly difficult for irregular migrants due to several reasons, such as the lack of protection from the country of destination; the fear of being reported and being sent away and also the economic struggles to pay for their healthcare. In some countries, irregular migrants lack prenatal care or infant care. Additionally, migrants may suffer from severe psychological trauma caused by the conditions of their journey or the sexual exploitation that they encounter once arrived to the country of destination.[219]

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[214] In the last few years, EU Institutions have started adopting the term of «irregular» rather than «illegal» migration. The aim of the institutions was to ensure that migrants were being approached as human beings, and to, furthermore, avoid connotations of criminality. This change in terminology has been also embraced by the UN General Assembly, as stated by the Deputy of High Commissioners of the United Nations in 2011.

[215] IOM UN MIGRATION, *Glossary on migration* in *International Migration law,* cit.

[216] UNITED NATIONS OFFICE ON DRUGS AND CRIME*, Migrant smuggling v. irregular migration,* available at *www.sherloc.unodc.org*

[217] UNITED NATIONS OHCHR, *Dignity and rights of irregular migrants: Statement by the Deputy High Commissioner,* 2011, available at *www.iom.int*

[218] This is regulated by the Convention on the rights of the Child

[219] The Special Rapporteur on the right to health has noted that irregular migrants «may face extreme health risks during transit owing to hazardous conditions such as being cramped or hidden in boats or trucks. They may also face physical and sexual violence during transit. » OHCHR*, The Economic, Social And Cultural Rights Of Migrants In An Irregular Situation,* 2014, available at *www.ohchr.org*

Migrant smuggling is a subset of irregular migration. It consists of the act of aiding someone, who lacks a regular residence permit, to enter a country in exchange for money.

The main reason why migrant smuggling is an ever-increasing phenomenon is the profitability of the crime. According to EUROPOL's statistics, the estimated revenue for the Western Mediterranean route is 50 million euros; the Central Mediterranean route is 20 million euros and lastly from the Eastern Mediterranean route is 80 million euros. Therefore, smugglers pray on vulnerable migrants to ensure a profit from the arrivals.[220]

Distinguishing between irregular migration and migrant smuggling is very complex as it is difficult to comprehend when the entering of irregular migrants is being aided by third parties.

In contrast to irregular migration, migrant smuggling does fall within the category of organised crime. This is especially due to the violent consequences that these migrants may face both in their journey and when they have reached the country of destination. These conditions are truly horrifying, infringing upon their basic human rights and also their inherent human dignity. Migrants may suffer from abuse, rape, or may die during the journey also due to being squeezed into exceptionally small spaces in trucks or boats. Furthermore, once they have reached their destination, they may also find themselves being victims of blackmail or debt bondage. On the other hand, relatives back home will be left with the dreading feeling of the uncertainty of the conditions of their loved ones.[221]

1.2. **Defining «Human Trafficking»**

Human trafficking is considered to be one of the most significant organised crimes due to the commodification of the victim and the abuse of their dignity and fundamental rights. Understanding human trafficking and its impacts on victims requires deconstructing the concept.

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[220] EUROPOL, *The profits of smugglers: Infographic,* 2019, available at *www.europol.europa.eu*
[221] UNODC, *Smuggling of migrants: the harsh search for a better life* in *Transnational organized crime,* available at *www.unodc.org.*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 (also referred to as the «Palermo Protocol»), was the first legal instrument that introduced a definition for «trafficking in persons». This legal instrument was a protocol to the United Nations Convention Against Transnational Organised Crimes, therefore, the two have to be read together.

Article 3 of the Protocol defines human trafficking as the «*recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation»*.[222]

This definition is based on three different elements. The first element refers to the «act» itself, where human trafficking can occur in the same country or it may take place in another country. The movement of victims is highlighted by the use of words such as «transportation» and «transfer». On the other hand, the act may also occur when the individual remains in the same country as portrayed by the use of terms such as «harbouring» and «receipt».

The second element looks at the «means» by which human trafficking is carried out. The definition requires that the individual is in some way threatened or forced to be trafficked.

Lastly, the article refers to the «aim» or the «purpose» of human trafficking, which is the exploitation of the victim. Relevant to human trafficking is also the intent of the perpetrators to want to exploit the victims.

These three elements are, therefore, key to interpreting what is meant by human trafficking.

It is very difficult to find actual data representing the statistics related to human trafficking. This is because many cases are underreported as victims are unaware of the local language or culture or because they fear the repercussions of

[222] OHCHR, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime,* 2000, available at *www.ohchr.org*

exercising their rights. Nevertheless, the available statistics portray an ever-increasing trend of human trafficking.[223]

Human trafficking is an increasing phenomenon due to the continuous appearance of conflict zones, which are areas where victims are usually found by the traffickers. Victims often come from areas affected by wars or impoverished regions, making them particularly vulnerable to traffickers.

Victim exploitation usually occurs in the form of sex trafficking, forced labour, forced marriage, fraud, pornography, organ removal and so on.

Sexual trafficking remains one of the gravest crimes related to human trafficking and is generally associated with gender-related crimes.[224] Whilst women and girls amount to 71 per cent of all trafficked victims, young girls represent three-quarters of the identified child trafficking victims[225]. Furthermore, also victims of forced labour are still victims of trafficker's sexual violence exerted over them.[226] Nonetheless, human trafficking also has male victims: they represent 82 per cent of trafficking victims for organ removal. [227]

Forced labour is another very prevalent form of human trafficking, where victims are exploited in industries such as agriculture, mining and fishing. In comparison to sexual exploitation, forced labour is usually endured by male victims: amounting to nearly 70 per cent[228]. Male victims are usually forced to work

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[223] DIPARTIMENTO FEDERALE DEGLI AFFARI ESTERI *DFAE, La Tratta di Esseri Umani: Una questione di Sicurezza Umana* in *Eidgenössisches Departement für auswärtige Angelegenheiten EDA.* 2024, available at *www.eda.admin*

[224] LIV*, Human Trafficking, in An Examination of a Potential Connection between the Trafficking of Women on the Darknet and the Financing of Terrorism in International Institute for Counterterrorism (ICT), 2019, 6–11,* available at *www.jstor.org*

[225] *Ibid.*

[226] According to the Secretary General Report on human trafficking related to women and girls*:* «The harms of trafficking are known to be more severe for women and girls than for men and boys given the exposure of the former to specific forms of exploitation such as sexual exploitation and violence, domestic servitude and forced marriage». THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *The Gender Dimension of Human Trafficking,* 2017, 1-3, available at *www.icat.un.org*

[227] According to the preamble of Directive 2011/36/EU of the European Parliament and the Council: «[...] also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings». This Directive will be later on examined.

[228] LIV*, Human Trafficking, in An Examination of a Potential Connection between the Trafficking of Women on the Darknet and the Financing of Terrorism in International Institute for Counter-Terrorism (ICT), cit.*

within construction sectors, in comparison to female victims who are usually forced to do domestic work.

Moreover, human trafficking exploitation also occurs in the form of forced begging. Usually, children are the victims of this crime. They are asked to beg for money in public spaces and then hand over the earnings to their traffickers. Specifically, these human traffickers kidnap children, beat them and mistreat them not only to scare their victims but to also ensure that their aesthetic features will attract more compassion from people. Unfortunately, in comparison to other human trafficking-related crimes, this crime is one of the least documented.[229]

By analysing the various types of crimes related to human trafficking, it is evident that there is a gross violation of victims' human rights and dignity. Indeed, many of the trafficker's conducts violate international humanitarian law. Therefore, the phenomenon needs to be analysed using a human rights-based approach. This means that there is a need to distinguish between the right holders (victims of human trafficking), the duty bearers (States, International Organisations etc.) and their obligations. For this reason, this thesis will analyse the role of the victims, the obligations of States and the protection of victims derived from international legal instruments.

1.3. **Distinguishing Human Trafficking from Migrant Smuggling**

Migrant smuggling and human trafficking are two overlapping phenomena which are often confused. However, both of these organised crimes have their distinct characteristics. In addition, they also violate human rights in their own way and require specific legal responses.

Although migrant smuggling and human trafficking are closely linked - since smuggling may sometimes lead to trafficking[230] - both organised crimes are characterised by their own features which set them apart.

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[229] UNITED NATIONS, *Understanding human trafficking,* available at *www.un.org*

[230] Smuggled migrants may become more vulnerable, increasing their risk of exploitation by human traffickers. For instance, the lack of valid documentation upon arrival in the destination country makes migrants more susceptible to abuse. Human traffickers may recognise this vulnerability and exploit it for their own gain.

Both crimes can generate an economic benefit for either the migrant smuggler or the human trafficker. The economic benefits of human trafficking stem from the exploitation of its victims. On the other hand, the economic benefit of migrant smuggling derives from the money received from the migrant to be smuggled.

Another important distinction is that migrant smuggling always involves crossing borders, whereas human trafficking does not necessarily require cross-border movement. As this thesis will later expand on, this also has an impact on the applicable law in the two different situations[231]. Human trafficking victims are, as a matter of fact, protected by international law.

Moreover, another difference between the two crimes is who they impact. Indeed, whilst human trafficking is a crime against the person being trafficked, as this thesis will later expand, migrant smuggling impacts the State[232].

The fundamental difference is that the economic benefit derives from the absence or presence of the victim's consent. When referring to migrant smuggling, migrants will give their consent to be smuggled to a new country on the false pretence of a better life. On the other hand, victims of human trafficking will not have given their consent, but will have been forced into trafficking or kidnapped.

1.4. **Why human dignity?**

Before diving into a thorough analysis of the legal frameworks regulating illegal migration and human trafficking, it is essential to analyse how these crimes violate human dignity.

Historically, irregular migration was referred to as «illegal migration». Although the terminology has varied and changed over time, the term «illegal» still carries a connotation of wrongdoing, which can influence legal systems and governments in the way they address and treat migrants. The power of language should not be underestimated, where terms like «illegal» can easily create stereotypes which are difficult to overcome.

[231] See *infra* chap II, § 3.1.
[232] See *infra* chap II, § 3.2.2.

A contentious issue is the tension between irregular migration and State sovereignty. As this thesis will later explore, this delicate balance has led to the violation of the dignity of irregular migrants[233].

Human trafficking is inherently tied to the violation of human dignity. As demonstrated through real-life cases and relevant case law discussed in this thesis, exploitation endured by trafficking victims strips victims' dignity away. This is closely linked to the vulnerability of these individuals, as also found in victims of irregular migration.

This thesis aims to portray how the international, European and Italian criminal legal framework tackles the concept of dignity within human trafficking and irregular migration.

2. VICTIMS

2.1. Victims' Rights in the EU

The safeguarding and protection of victims' rights are central to several European Directives.

The Victims' Right Directive (Directive 2012/29) is the primary horizontal instrument for the safeguarding of victim's rights. The Directive entered into force in 2015 and has been adopted by all EU Member States except for Denmark. Ever since, it has not been revised. As confirmed by the Commission on 28 June 2022[234], the Directive has had an influential impact in two areas: the victims' participation in criminal proceedings and the treatment of victims by the competent authorities.[235] However, according to the Commission, areas for improvement remain.

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[233] COUNCIL OF EUROPE, *Conference on «Irregular migration and dignity of migrants: co-operation in the mediterranean region»,* 2002, available at *www.coe.int*

[234] EUR-LEX, *COMMISSION STAFF WORKING DOCUMENT EVALUATION of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, available at *www.eur-lex.europa.eu*

[235] As stated by Article 1(1) of the Directive, the main objective of the Directive is to: «[...] ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings». Furthermore, Article 2(2) asks for Member States to ensure that victims are recognised and treated in a respectful way also by the competent authorities which are operating within the criminal proceedings.

One major issue is the victims' lack of awareness of their legal rights and measures of protection. This lack of information deprives victims of exercising their rights and knowing how to participate in criminal proceedings. This is also because no legal guidance is recognised for these victims. In the context of human trafficking and migrant smuggling, this is even more complex due to the language barriers that victims may face. Furthermore, vulnerable victims are not always helped promptly and may need a specialist approach. This is specifically a problem for minors who may easily fall back into exploitation. However, the safeguarding of minors in organised crimes will be tackled later on in this thesis[236].

To address these challenges, the European Union adopted its first-ever EU strategy on victims' rights in June 2020. The strategy aimed to find a balance between victim empowerment while also ensuring effective communication channels with victims. To attain this, the strategy focused on five priorities, which addressed some of the already mentioned issues of Directive 2012/29/EU. The first priority focuses on ensuring effective communication with the victim and fostering a sense of security when reporting crimes. For instance, according to the European Commission, only a third of women who have been physically or sexually abused feel safe enough to report it. The second priority emphasises protecting vulnerable victims by providing specialised support services[237]. Other priorities include improving access to compensation; strengthening cooperation and coordination among all relevant actors and enhancing the international dimension of victim's rights[238].

The European Union strategy on the protection of victims recognises the vulnerability of victims of organised crimes, specifically, trafficking. Not only does it emphasise the need to protect and support the victims, but it also reflects on the psychological impact due to the crime's nature, circumstances, duration and consequences. In a similar manner, Directive 2012/29 also refers to victims of

[236] See *infra* chap II, § 2.2

[237] A wide range of specialised support services are available to victims to ensure their reintegration into society. Medical and psychological assistance are among the first essential services provided to victims to ensure their well-being after having witnessed or endured inhumane crimes. Additionally, victims may also receive legal guidance, information and counselling to help them defend their positions and exercise their rights.

[238] EUR-LEX, *EU Strategy On Victims' Rights (2020-2025),* available at *www.eur-lex.europa.eu*

human trafficking by requiring that particular care is taken *«when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures»*[239].

While both directives play an important role in safeguarding the rights of victims of organised crimes, they do so by referring to other already existing legal instruments. This is the case of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. According to the directive, victims of human trafficking need to be protected from prosecution or punishment for criminal activities, such as the use of false documents. This is also done to ensure that victims will willingly participate as witnesses of criminal proceedings. Furthermore, by referring to Council Framework Decision 2001/220/JHA of March 2001[240], the Directive also establishes the victim's rights in criminal proceedings. The directive specifically asks that victims of trafficking may be given access to legal counselling and representation.[241] To safeguard the psychological sphere of victims, the directive deems it necessary for the assessment of individuals during criminal investigations and proceedings to be appropriate to their needs. The preamble of the directive emphasises its commitment to fundamental rights and human dignity.

[239] EUR LEX, Directive 2012/29/EU available at *www.eur-lex.europa.eu*

[240] The Framework Decision of 2001 was the first legal instrument addressing the protection of victims' rights. It was later modified in 2011 and substituted by Directive 2012/29/EU.
This Framework Decision was of extreme importance as it signalled a turning point in both EU law and international law. The preamble emphasised the necessity of protecting and safeguarding victims' fundamental rights and dignity. Unfortunately, the effects of this Framework Decision were not as satisfactory as expected. This was also due to the nature of the act itself. Indeed, the decision to adopt a Directive in 2012 was reinforced by the fact that it would allow the European Commission to introduce infringement procedures towards non-adhering Member States. Furthermore, Directive 2012/29/EU was also more complete in comparison to the Framework Decision as it introduced new rights and analysed in depth the existing ones. To compare and contrast between the terminology used in the two legal instruments read: PERUZZO, *Diachrony in legal terminology: a case study on the rights of victims of crime in the EU,* 2018, 113–134.

[241] Article 12 of the Directive regulates the protection of victims of trafficking in human beings in criminal investigation and proceedings.

2.2. **Minors as victims**

Vulnerable victims include children, persons with disabilities, the elderly, pregnant women and individuals who have experienced traumatic events. This section of the thesis will specifically address child victims of human trafficking and migrant smuggling.

Child trafficking and smuggling fall within the broader context of child migration. In some cases, families may encourage or even traffic their children to migrate in the hope of economic gains, leading to exploitation. On the other hand, children may also become victims of trafficking through deception or coercion. Some children also migrate to seek asylum. These categories often overlap: a child may be smuggled into a country and later trafficked into forced labour or sexual exploitation, highlighting the interconnected nature of these crimes[242].

There are a myriad of existing legal instruments which protect child victims of human trafficking and migrant smuggling. As previously mentioned, Directive 2011/36/EU regulates the prevention and combatting of trafficking of human beings.[243] The latter specifically states that «*Children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings*»[244]. Due to their young age, children are more susceptible to deception and may experience more fear. For this reason, several legal instruments, such as Directive 2011/36/EU, focus on the child's best interest.[245]

To protect the said interest, public authorities must assess the age of the victim. This is of extreme importance in granting specific rights to children, such

[242] SEEBERG, GOZDZIAK, *Contested Childhoods: Growing up in Migrancy* in *Migration, Governance, Identities,* 2016, 1-19, available at *www.link.springer.com*

[243] The directive encompasses of several articles introducing protection measures and assistance for child victims, both legally but also medically and psychologically. Articles 13-16 are of extreme importance as they thoroughly list all the rights that are recognised to child victims of human trafficking.

[244] EUR LEX, Directive 2011/36/EU, available at *www.eur-lex.europa.eu*

[245] This principle started developing in the 19th century with the recognition of child victims. In 1989, the principle was adopted within the Convention on the Rights of the Child. There are, however, several problems related to the concept: especially attaining to the changing interpretation of the child's best interest according to cultural and social elements. Furthermore, the term's broadness makes it difficult to interpret it. Although the concept is not without criticisms, the principle is constantly being used in law as a yardstick for child victims, including migrant and trafficked children.

as access to education and legal documentation. As all methods of age assessment[246] have a significant margin of error, public authorities have generally accepted applying the benefit of the doubt or the presumption of age. This specifically occurs as children may feel the need to lie about their age due to the trafficker's threats. The presumption of age is also linked to the presumption of status, meaning that authorities assume that the child is a victim[247]. The age of a minor is of vital importance as, the protection and perception of the crime, differ according to whether the victim is a child or a teenager.

It is widely accepted that child victims of trafficking and migrant smuggling should not be criminalised, ensuring the protection of their best interest. This principle is especially enshrined within the Convention on the Rights of the Child.

Article 37 of the Convention states that the detention of children may be only used as a measure of last resort.[248] It is a generally accepted principle that child victims should not be detained at all. This point of view has been shared by human rights organisations and international law, such as the OCSE's Special Representative and Co-ordinator for Combating Trafficking in Human Beings and also UNICEF[249]. Detaining children after having been smuggled or trafficked could have severe psychological and physical effects. For this reason, rather than being detained, children should be cared for. The United Nations High Commissioner for Refugees (hereinafter referred to as «UNHCR») has played a pivotal role in

[246] To determine the age of the victim, public authorities may use both medical and non-medical procedures. In the case of medical procedures, it is essential for States to respect the individual's dignity. This requirement has become of vital importance as there are several reports from child victims who have been placed in uncomfortable positions during the assessment. An example is given by the Council of Europe in their «Guide for Policymakers: Building a Europe for and with Children». Here, the Council referred to the words of an anonymous child from Portugal which stated that «[...] imagine being told you are having this examination and in hospital they ask you to undress and stay naked, touching your privates, demeaning and humiliating you or treating you as non-human».

[247] According to the UNICEF Guidelines, guideline 3.2 provides that: «Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child. Pending verification of the victim's age, the victim will be treated as a child and accorded all stipulated special protection measures ».

[248] As stated within Article 37 (b) of the Convention: « [...] no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time [...]».

[249] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE: *CHILD TRAFFICKING AND CHILD PROTECTION: Ensuring that Child Protection Mechanisms Protect the Rights and Meet the Needs of Child Victims of Human Trafficking,* 2018, available at *www.ocse.org.*

recommending adoptable measures from States, such as prioritising asylum processes, family reunification and introducing alternatives to detention such as foster care[250].

3. CRIMINALISATION UNDER INTERNATIONAL LAW

3.1. Human trafficking

As previously mentioned[251], the first international legal instrument regulating human trafficking was the Palermo Protocol. Due to the complexity of human trafficking, the international legal framework is very vast.

While the Palermo Protocol provides the first internationally recognised definition of human trafficking, its scope often overlaps with the notions of slavery and forced labour. This is particularly evident in the existing international legal framework, where distinctions between these concepts often remain unclear. However, these concepts are connected to one another, particularly in the context of human rights violations and the State's obligations. This connection is also found as, both slavery and forced labour, are explicitly recognised as potential forms of exploitation under the Palermo Protocol's definition of trafficking. Nevertheless, it is important to maintain a clear conceptual separation between these two concepts as, human trafficking, can also occur without subsequent exploitation. Understanding the overlaps and distinctions between these concepts is essential for ensuring coherent legal interpretation and adequate protection for victims.

The relationship between the notions of human trafficking and slavery is rooted in history. Indeed, human trafficking dates back to the abolition of slavery, regulated by both the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. In contemporary discourse, modern slavery has been used as an umbrella term to comprise also human trafficking. The latter concept is regulated by the Modern Slavery Act of 2015, which criminalises offences of modern slavery and trafficking. Specifically, the first part of the act is split into

[250] For instance, in 2006 the UNCHR adopted the «Guidelines for the Protection of Child Victims of Trafficking».
[251] See *infra* chap. II, § 1.2

more sections, such as the «Offences» section. Here, the act concentrates on developing the concepts of slavery and human trafficking.[252]

There are no existing international or European legal instruments that explicitly link the notions of forced labour and human trafficking. However, the ILO and other international organisations (such as the International Confederation of Trade Unions[253]) have started approaching forced labour from the perspective of human trafficking, introducing the concept of «labour trafficking».

In the 1930s, the International Labour Organisation (hereinafter referred to as «ILO») introduced the Forced Labour Convention (no. 29)[254]. Article 2 of the Convention defines forced labour as any work or service which is imposed upon an individual «*under the menace of any penalty*».

Further on, in 1957, the ILO adopted the «Abolition of Forced Labour Convention (no. 105)[255]» which widened the spectrum of forced labour by supplementing the previous convention. With the adoption of this convention, the definition of «labour trafficking» developed, not entailing anymore simply underpaid work, rather, it is not perceived as a gross violation of human rights and dignity constituting similar practices to the ones of slavery. These violations are not a result of the type of work asked to carry out by the forced workers, rather, they are a representation of the relationship between the workers and the so-called «employer».[256]

Beyond the aforementioned legal instruments, international organisations have had a pivotal role in shaping the existing international legal framework.

First, the UNHCR has played a very pivotal role in introducing guidelines regulating human trafficking. Although not binding, the 1951 Refugee Convention and its 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking

[252] Modern Slavery Act (c.30) has been adopted by the UK Parliament in 2015
[253] According to their website, the International Trade Union Confederation is the «main international trade union organisation representing the interests of working people worldwide».
[254] INTERNATIONAL LABOUR ORGANISATION, CO29 – Forced Labour Convention, no. 29/1930, in *Normlex,* available at *www.normlex.ilo.org*
[255] INTERNATIONAL LABOUR ORGANISATION, C105 – Abolition of Forced Labour Convention, no.105/1957, in *Normlex* available at *www.normlex.ilo.org*
[256] BAKIRCI, *Human trafficking and forced labour: A criticism of the International Labour Organisation*, in *Journal of Financial Crime*, 2009, available at *www.researchgate.net*

and Persons at Risk of Being Trafficked tackle the fundamental aspects of human trafficking whilst also reflecting on the role of the UNCHR in helping the victims.

Furthermore, in 2007 the United Nations Global Initiative to Fight Human Trafficking came into force, intending to promote cooperation in the fight against human trafficking.

Lastly, the OHCHR has adopted the Recommended Principles and Guidelines on Human Rights and Human Trafficking. Article 1 is particularly important as it enshrines the relationship between human rights and human trafficking. Specifically, the third paragraph of Article 1 states that «*Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers*»[257]. The importance of dignity and human rights is at the centre of the first guideline of this legal instrument[258].

3.1.1. State Obligations

State responsibilities and obligations concerning human trafficking are extremely complex. This complexity arises mainly from the international legal principle which provides that States are generally not liable for acts committed by private individuals[259]. Nevertheless, there are certain exceptions and clarifications developed by both international legal instruments and established case law.

State Responsibility is central to several international legal instruments, the first being the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (hereinafter referred to as «ILC»). The general principles are encompassed in the first three articles of the act: article 1 provides that States are responsible for international wrongful acts, article 2 defines the «positive conditions» of an internationally wrongful act and, lastly, article 3 deems that an international wrongful act is

[257] Recommended Principles and Guidelines on Human Rights and Human Trafficking, OHCHR
[258] This legal instrument comprises of 11 different guidelines.
[259] Article 8 of the Draft articles on Responsibility of States for Internationally Wrongful «The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct».

governed by international law and not internal law. Particularly relevant to this thesis is Chapter 2 of the act, which attributes third-party conduct to the State[260].

According to an analysis carried out by the King's College of London, there are different scenarios which may lead to the responsibility of the State concerning human trafficking and forced labour. The first scenario relates to the possible contributions of State policies concerning human trafficking and forced labour, for instance, using forced labour by State-managed industries to generate funds. The second scenario concerns the possible diplomatic involvement in domestic servitude, for example, the exploitation of migrant domestic workers within diplomatic households. A last scenario is when States facilitate human trafficking in labour brokerage practices[261].

Building upon the general principles of State responsibility, there are also legal instruments that explicitly address the issue of human trafficking.

The Office of the High Commissioner for Human Rights (hereinafter referred to as «OHCHR») in 2002 adopted the Recommended Principles and Guidelines on Human Rights and Human Trafficking. This instrument is particularly important given that States are usually reluctant to acknowledge their role in human trafficking, especially when such acts are perpetrated by private individuals. For this reason, Principle 2 of the OHCHR's Principles states that «*State*(s) *have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons*».

The obligations to prevent, investigate, prosecute, assist and protect are developed and governed by the general principles of international law. Furthermore, these obligations need to be carried out with an appropriate standard

[260] According to Chapter 2 of the ILC's «Responsibility of States for Internationally Wrongful Acts of 2001», there are seven different ways in which the conduct of a third party may be attributed to the responsibility of the State. These being: when the conduct is of the organs of the State (article 4); when the conduct is of persons or entities exercising elements of governmental authority (article 5); when the conduct is of organs placed at the disposal of a State by another State (article 6); when the conduct is directed or controlled by the State (article 8); when the conduct is carried out in the absence or default of the official authorisation (article 9); when the conduct is of an insurrectional or other movement (article 10) and when the conduct is acknowledged and adopted by a State as its own (article 11)».

[261] BAKIRCI, *Human trafficking and forced labour: A criticism of the International Labour Organisation*, in *Journal of Financial Crime*, 2009, available at *www.researchgate.net*

of care from the States, also known as «due diligence». The concept of due diligence implies that States may not be held responsible for acts carried out by third parties. Rather, they are to be deemed responsible for their failure to respect the aforementioned obligations[262]. Legally speaking, the respect of due diligence has become the only criterion applicable for States to ensure that they have acted responsibly.

The international legal framework also consists of well-established case law, from both the ECtHR and the Inter-American Court of Human Rights (hereinafter referred to as «Inter-American Court»), ensuring the respect of due diligence by States.

The S.M. v Croatia[263] was the first judgment issued by the ECtHR Grand Chamber explaining how internal trafficking infringes Article 4 of the Convention, hence, the prohibition of slavery and forced labour[264]. This decision was preceded by Rantsev v. Cyprus and Russia's judgment [265], which in 2010, widened the scope of Article 4 of the Convention to also introduce human trafficking. However, the latter judgment failed to explain and describe the relationship between trafficking and sexual exploitation. For this reason, in the S.M. v. Croatia judgment, the Court tried to resolve some of the confusion resulting from the previous ECtHR case law, however, the scope and the extent of the protection of human trafficking still raises questions.

In S.M. v. Croatia, the case concerned a criminal complaint lodged by S.M. towards T.M. for having physically and psychologically forced her into prostitution. The investigations led to the finding that T.M. had organised several prostitution rings, however, no evidence had been found of him having forced S.M. into

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[262] OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. *Commentary*, 2002, available at *www.ohchr.org*

[263] ECtHR, S.M. v. Croatia Judgement, 03.12.2025, no. 60561/14, in *HUDOC*

[264] Article 4 of the ECHR states that: «No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purpose of this article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.»

[265] ECtHR, Rantsev v. Cyprus and Russia Judgement, 10.05.2010, no. 25965/04, in *HUDOC*

prostitution. For the previously mentioned reasons, the domestic courts concluded that T.M. was not guilty.

The case was therefore referred to the Grand Chamber, which in turn invoked Article 4 of the Convention, even though S.M. had not taken into consideration such an article. Regarding Article 4, the Court analysed the phenomenon of human trafficking stating that the latter exists when, in conformity to the Anti-trafficking Convention and the Palermo Protocol, the elements of act, means and exploitation exist.

The Court's analysis went on to concentrate on both the meanings of trafficking in human beings and sexual exploitation within the wider scope of Article 4 of the Convention.[266]

When tackling the first issue, the Court referred to the Rantsev v. Cyprus and Russia judgment, which, as mentioned, had already introduced the relationship between human trafficking and Article 4 of the Convention. The Court here had reminded itself of the particular nature of the Convention as a living instrument, which therefore meant that the concept of trafficking had to be taken into consideration. In paragraph 282 of the Rantsev judgment, the Court concluded that it is obvious that «*trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society [...] Instead, the Court concludes that trafficking itself, within the meaning of Article 3 (a) of the Palermo Protocol and Article 4 (a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention»*[267]. This thought process was then found again in other judgements rendered by the court, such as the J. and Others v. Austria[268] and the Chowdury and Others v. Greece[269].

When tackling the meaning of sexual exploitation, the Court reflected on the phrase «forced or compulsory labour» found within Article 4 of the Convention. The Court believed that forced prostitution was associated with the crimes of

[266] STOYANOVA, *The grand chamber judgment in S.M. v Croatia: Human trafficking, prostitution and the definitional scope of Article 4 ECHR, in Strasbourg Observers,* 2020*,* available at *www.strasbourgobservers.com.*
[267] ECtHR Rantsev v. Cyprus and Russia Judgement, 10.05.2010, no. 25965/04, Paragraph 282, in *HUDOC*
[268] ECtHR, J. and Others v. Austria judgment, 17.04.2017, no. 58216/12, in *HUDOC*
[269] ECtHR: Chowdury and Others v. Greece, 20.03.2017, no. 21884/15, in *HUDOC*

slavery or servitude. Therefore, sexual exploitation does fall within the wider scope of Article 4.

Besides reflecting on the scope of Article 4 of the Convention, the ECtHR also analysed the State's positive obligations previously introduced in the Rantsev judgment. As found within paragraph 306 in the S.M. v. Croatia judgment, States have three different positive obligations: «*the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; the duty, in certain circumstances, to take operational measures to protect victims or potential victims, of trafficking; and a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the State's (positive) procedural obligation»*[270].

Similarly to the ECtHR, the Inter-American Court of Human Rights has also had a pivotal role in recognising State responsibility for acts carried out by private entities. This is the case of the Velásquez-Rodríguez v. Honduras judgment. From paragraphs 174-185, the judgment imposes that States take reasonable steps to avoid a possible violation of human rights by carrying out «*serious investigations of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and ensure the victim adequate compensation»*[271]. Furthermore, the Inter-American Court recognised the responsibility to the States even when the agent is a private party.

The judgments of both the ECtHR and the Inter-American Court of Human Rights introduce several obligations for States.

It is generally accepted that States are not only responsible for the conduct that has been taken by State officials, rather, also for the lack of preventing a possible violation of international human rights law. States are obliged to protect the victims and guarantee an effective criminal justice response. Ensuring that States will give criminal justice to the victims is interconnected with the fact that States have a positive obligation to investigate and prosecute the crimes. Not

[270] ECtHR, S.M. v. Croatia Judgement, 03.12.2025, no. 60561/14, paragraph 306, in *HUDOC*
[271] Inter-American Court of Human Rights, 29.07.1998, Case of Velásquez-Rodríguez v. Honduras, paragraph 174 in *Corte Interamericana de Derechos Humanos*.

properly investigating the act would lead to an international State responsibility, even though the trafficking has not involved them directly.

The ILC Draft Articles[272] also regulate legal consequences for a State's breach of its obligations. First, States are asked to cease the wrongful act. This may occur either through verbal reassurance from States but also by implementing policies and laws to protect victims. Furthermore, Chapter 2 of the ILC Draft Articles regulates the reparation for injuries carried out by States. According to Article 34 of the act, these include restitution (article 35)[273], compensation (article 36)[274] and satisfaction (article 37)[275]. These forms of reparation can be given by States singularly or by combining them.

3.1.2. Case Study: Nigeria

To thoroughly the global impact of human trafficking, this thesis section will now refer to the case of Nigeria. According to UNESCO, Nigeria has the highest level of human trafficking activity in Africa[276]. This data was also confirmed in 2012 by the US Government, stating the predominant role in the trafficking of Nigeria, Vietnam, Albania, Romania and China[277]. EUROPOL has also recognised human trafficking in Nigeria as one of the biggest concerns for the European Government[278].

The phenomenon of human trafficking in Nigeria started becoming a documented problem during the 1980s, reaching its peak in the 1990s. Ever since

[272] ILC Draft Articles on Responsibility of States for Internationally Wrongful Act. 2001, available at *www.legal.un.org*

[273] According to article 35, restitution means re-establishing the situation to how it was previously than the committing of the wrongful act. In the context of human trafficking, this entails an obligation from States to send back the victim to their country of origin. However, the term does have a very large scope and does include several other forms of restitution in case of international wrongful acts, such as restitution of ships, properties or detained individuals in their territory. The article also states a limit to restitution, hence, when it is «materially impossible»: for instance, the giving back of damaged property.

[274] Compensation is regulated within article 36, which recognises the obligation to states to compensate victims for the damaging occurred for international wrongful acts. Compensation usually occurs economically.

[275] According to paragraph 2 of Article 37 «Satisfaction may consist in the acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality».

[276] UNITED NATIONS*, Prevention of human trafficking in Nigeria,* available at *www.unodc.org*

[277] BABATUNDE*, Human Trafficking and Transnational Organized Crime: Implications for Security in Nigeria,* in *Peace Research, vol. 46, no. 1,* 2014, 61–84*,* available at *www.jstor.org*

[278] EUAA, *Nigeria trafficking in human beings,* 2021, available at *www.euaa.europa.eu.*

there has been a steady increase in victims of human trafficking. In recent years, the US Government's annual Trafficking in Persons reports placed Nigeria as a «Tier 2» country: meaning that it does not fully comply with the minimum standards of the Trafficking Victim Protection Act (TVPA)[279].

Trafficking in Nigeria occurs both internally but also by cross-border movements. Internal trafficking leads victims to be transported from rural parts of the country to more urban centres, a pivotal example being sexual exploitation.

On the other hand, human trafficking also occurs across borders. For this reason, Nigeria is identified as a source, transit and destination country.

Nigeria is a «source» country as there are a high number of victims who are trafficked from there to countries outside Africa, such as Italy, Belgium, Spain, Netherlands and the United Kingdom[280]. The journey taken by the trafficked victims is sponsored by other women, who are referred to as «madam». The victims will then travel under the control of men.

The majority of victims are children and women. Children are typically exploited through forced begging but also child labour. On the other hand, women and girls are usually trafficked for sexual exploitation. Indeed, Nigeria is the country which sexually exploits most of its victims. However, exploitation does not only occur when in the country of destination, but also occurs in the transit countries, such as Nigeria and Libya. In Libya, for example, due to the inactivity of the government, there is a predominant role of criminal organisations in controlling their victims[281].

The Nigerian Government has had a limited role in protecting the victims of human trafficking. The Nigerian government, like many other governments, usually treat cases of trafficking as cases of illegal migration. Therefore, criminalising the victims of human trafficking rather than protecting their rights. Furthermore, Nigeria lacks an appropriate criminal justice system that enforces the rights of the victims and protects them. Therefore, there is a general sentiment of

[279] UNITED STATES DEPARTMENT OF STATE. *Trafficking in Persons Report: Nigeria.* 2024, available at *www.state.gov.*
[280] EVON, *Nigeria: Human trafficking factsheet* in *Pathfinders Justice Initiative*, 2023, available at *www.pathfindersji.org*
[281] BORLIZZI, *Nigeria: The risk of re-trafficking and (in)voluntary return of victims of trafficking*, 2021, available at *www.asgi.it*

distrust and resentment from the victims. On the other hand, several improvements have been made in legal instruments protecting victims of human trafficking. Within the national legal framework, both the 1904 Nigerian Criminal Code and the 1960 Nigerian Penal Code criminalise human trafficking and women's sexual exploitation. Unfortunately, these legal instruments fail to discuss the notions of human trafficking, introducing normative gaps.

It is important to appreciate Nigeria's role in signing several international legal instruments protecting victims of human trafficking. In 2000, Nigeria signed the Transnational Organised Crime Convention and its Trafficking Protocol, while, in 2003, Nigeria ratified the Convention on the Rights of the Child.

The role of the previously mentioned legal instruments and human rights organisations has led Nigeria to adopt, in 2003, a national law on trafficking, hence the «Trafficking in Persons (Prohibition) Law Enforcement and Administration Act» (TIPLEAA). This act has faced criticism for its restrictive focus on sexual exploitation and not also other forms of exploitation, such as forced labour. However, this Prohibition has established the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), which has gained extreme importance in protecting victims of human trafficking[282].

As mentioned, to address these challenges, Nigeria established NAPTIP. The latter has a wide range of functions, including aiding the return of victims from other countries. Indeed, in 2019 NAPTIP rescued victims from 18 different countries, specifically Libya and Russia[283].

This help is also provided by other organisations. For instance, in Europe, help is given by the European Return and Reintegration Network (ERRIN), supporting both voluntary[284] and forced returnees. Moreover, support for voluntary returnees is also aided by the International Organisation for Migration (IOM). According to IOM, their role is pivotal for victims both before their departure from

[282] BABATUNDE, *Human Trafficking and Transnational Organized Crime: Implications for Security in Nigeria*, in *Peace Research*, vol. 46, no. 1, 2014, 61–84, available at *www.jstor.org*
[283] EUAA, *Nigeria trafficking in human beings,* 2021, available at *www.euaa.europa.eu.*
[284] A debated topic is to what extent may these returns be considered voluntary: would victims still return to Nigeria if they were aware of the appalling conditions awaiting them? In May 2018, it was the UN Special Rapporteur which highlighted how the lack of information given to victims cannot make these returns voluntary.

their country of destination and also after their return to Nigeria. Indeed, they collaborate with the government to identify the more vulnerable victims, such as survivors of trafficking and slavery, and support them through medical and psychological assistance[285].

Beyond State efforts, non-governmental organisations have also played an important role in the protection of trafficked victims. For example, the sexual exploitation of women in Nigeria has led to the designation of the Committee for the Support of the Dignity of Women, also referred to as COSUDOW. This organisation has been extremely important in helping women who return to Nigeria to go back to their daily lives by providing them with vocational skills to avoid re-entering human trafficking[286]. Moreover, they shelter victims for 3-6 months to avoid that women are forced to go back home and feel ashamed. As stated by the programme officer, Sr. Anosike, the aim is to help victims regain their self-dignity and/or self-worth[287].

Even though these organisations have an essential role in helping victims, the reality is that returning to Nigeria may become very problematic due to stigmatisation or the possibility of being re-trafficked. Women who have been sexually exploited fear being stigmatised by their families due to the forms of exploitation they endured. However, families are less keen to be violent towards women who have managed to make money. On the other hand, women who did not manage to earn may face threats and violence from the traffickers, asking them to repay their debts. This causes victims to be re-trafficked, a phenomenon that remains largely undocumented.

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[285] EUAA, *Nigeria trafficking in human beings,* 2021, available at *www.euaa.europa.eu.*

[286] COSUDOW shares several experiences that women have had before managing to ask for help. One of the stories shared is the one of Camille Ebele (not real name) who was interviewed after being saved from the organisation. Camille shared that she had been approached by a woman, the «madam», that had offered to pay for her trip to Italy. Camille was more than happy to join and had also convinced some of her friends. One day, the woman asked them to enter a car, and, after hours of travelling, they arrived at Ghana. Initially she had told the women to relax and enjoy their stay before going to Italy. However, as time passed, she became more aggressive, stating that she «owned their life». This started their sexual exploitation.

[287] ADULOJU, *Nigerian Catholic women religious prevent trafficking, protect victims* in *Vatican News,* 2023, available at *www.vaticannews.va*

Ultimately, without systematic reforms in education, human trafficking in Nigeria risks leading to a vicious cycle of exploitation, re-trafficking and re-victimisation[288].

3.2.**Irregular Migration**

Irregular migration is governed by a complex international legal framework. While international humanitarian law is central to the protection of victim's rights, other international legal instruments also touch upon irregular migration. This section of the thesis will explore how irregular migration intersects with different legal areas, including freedom of movement and navigation, refugee protection, migrant smuggling and international labour standards. Additionally, it will examine the responsibilities and powers attributed to States.

3.2.1. Freedom of movement and Human Rights Law

Existing international legal instruments recognise the necessity of international cooperation among States when safeguarding irregular migrants and the freedom of goods and services. However, an under-addressed and problematic issue of international humanitarian law is their failure to protect the freedom of movement of undocumented and irregular migrants. It is necessary to explore the inconsistencies in the legal protection of irregular migrants to portray how human dignity is infringed.

The freedom of goods and services is extensively regulated by both the international and European legal frameworks. For instance, Articles 26 and 28 to 37 of the Treaty of the Functioning of the European Union strive to eliminate customs duties and quantitative restrictions. According to the European Parliament, the freedom of goods and services is a fundamental key point of the Treaty[289]. The legal framework is also integrated with a myriad of Directives and relevant case law.

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[288] BORLIZZI, *Nigeria: The risk of re-trafficking and (in)voluntary return of victims of trafficking*, 2021, available at *www.asgi.it*

[289] MARTINELLO, *Free Movement of Goods* in *Fact Sheets on European Union* in *European Parliament,* 2024, available at *www.europarl.europa.eu*

The international legal framework does not regulate in the same way the freedom of movement of people. The freedom of movement encompasses three different elements: the departure from the country of origin, the entrance into the host country and the sojourn within the host country. The key issues of the freedom of movement are specifically found, in the context of irregular migration, in the last two elements. The first issue relates to entering the host country, where migrants must find a safe route and obtain permission to enter. The second issue arises after entry, where migrants must be able to sojourn by freely moving and also need to have the right to stay within the country. These key aspects of the freedom of movement are essential in the protection of undocumented migrants.

Unfortunately, these rights are not always recognised. International human rights law claims to apply to everyone indistinctively: in the context of irregular migration, however, there is an infringement of dignity as these rights are neither protected nor recognised[290].

In this context, it is important to analyse articles found within two different legal instruments: The Universal Declaration of Human Rights (hereinafter referred to as «UDHR») and the ICCPR.

The UDHR is a cornerstone legal instrument, which the UN General Assembly in 1948 has deemed vital in the protection of fundamental human rights. However, the UDHR is not binding, limiting its normative influence.

The UDHR comes closest to recognising an individual's right to enter a country. Within the context of irregular migration, two relevant articles found in the Declaration are Article 13 and Article 14. The first paragraph of Article 13 recognises the freedom of movement and residence. On the other hand, the first paragraph of Article 14 recognises the right to asylum in cases of prosecution. However, as pointed out by the Article, this recognition is only for those individuals who seek asylum (asylum seekers) and not undocumented migrants.

The international legal framework regulates the right to asylum in contrasting ways. Article 18 of the Refugee Protocol provides for the right to asylum to be guaranteed in line with the Geneva Convention and the Treaty of the

[290] RAMJI-NOGALES, *Freedom of Movements and Undocumented Migrants,* 2016, available at *www.scholarshare.temple.edu*

Functioning of the European Union. The UNHCR has given an interpretation of this article and developed its opinion through the adoption of several guidelines. Furthermore, the Executive Committee of the UNHCR has stated that State parties must «*admit refugees into [their] territories... which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs*». According to this interpretation, undocumented migrants have the right to enter a country, however, they are not guaranteed the right to remain[291]. The Refugee Convention, therefore, regulates asylum seekers' rights and not those of irregular migrants. States use this normative discrepancy to not recognise the rights of irregular migrants, and to deny them the protection of their human dignity.

Article 12 of the ICCPR also tackles the right to freedom of movement.[292] The first paragraph of Article 12 of the ICCPR recognises the right to liberty of movement for individuals who are already within the State. Therefore, the article does not apply to those migrants who are undocumented. This results in a normative gap in the protection of the freedom of movement for irregular migrants. This normative gap leads to irregular migrants being tolerated but not being protected by the State, undermining their inherent human dignity as protected by international humanitarian law.

3.2.2. State Sovereignty

The relationship between freedom of movement, migration law and State sovereignty is intricate. On the one hand, States seek to exercise their power by controlling both the territory and the individuals who enter it. Indeed, illegal migration is often perceived by States as a challenge to their sovereignty, as it undermines their capacity to control the entry and presence of non-authorised individuals within their territory, therefore, posing a threat to sovereign authority.

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[291] *Ibid.*

[292] Article 12 of the ICCPR provides that: « [1] Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. [2] Everyone shall be free to leave any country, including his own. [3] The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. [4] No one shall be arbitrarily deprived of the right to enter his own country.».

On the other hand, international law requires States to respect human rights and dignity while not discriminating against both nationals and non-nationals.

A State's sovereignty is threefold, comprising an external, internal and territorial dimension. The external dimension involves both international relations among States and the principle of State independence. The internal dimension concerns the State's responsibility for ensuring respect and adherence to the domestic legal framework. Lastly, the territorial aspect refers to the State's role in controlling the persons and things within its territory. In particular, this includes control over the entry and expulsion of individuals[293]. Article 2(7) of the Charter of the United Nations enshrines this right by recognising that nothing may authorise the United Nations to interfere with the jurisdiction of any state[294].

The relationship between the State's internal sovereignty and the freedom of movement is found within the right to entry and the right to leave the country.

States control the right to entry through specific domestic laws. This power must be balanced with international legal principles and agreements prohibiting discriminate towards non-nationals. This is intrinsically connected to the concept of human dignity, as States need to ensure the protection of individuals regardless of their nationality.

Respect for human dignity is also central to the principle of non-refoulment, which primarily applies to refugees. The latter originates from Refugee law and is now governed by Article 33 of the Refugee Convention[295] together with international humanitarian law and international human rights law.

Under this principle, States must not return individuals to countries where their lives may be threatened, except when there is a possible violation of national

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[293] ANGELERI, *Sovereignty and the Human Rights of Irregular Migrants,* in *Irregular Migrants and the Right to Health.* Cambridge University Press*, 2022, www.cambridge.org*

[294] Article 2(7): «Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII».

[295] Article 33 of the Refugee Convention: «No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member- ship of a particular social group or political opinion. [2] The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country».

security or public order. This principle has become a cornerstone of international law, protecting both individuals who enter the State lawfully and those who do not. Furthermore, this principle is one of the few limits to State sovereignty.[296] Therefore, the right of States to return migrants from their territory is not always absolute. On this point, the ECtHR has developed relevant jurisprudence, specifically regarding the prohibition of torture and inhuman or degrading treatment as enshrined in Article 3 of the ECHR.

The ECtHR judgment Hirsi Jamaa and Others v Italy[297] referred to a case involving migrants intercepted in international waters while trying to reach Italy from Libya. Upon arrival, they were returned to Libya by Italian authorities. Italy violated Article 3 of the ECHR as, in conformity with the principle of non-refoulement[298], it did not ensure that the conditions in Libya were safe for the migrants. Indeed, two of the applicants died in unknown circumstances after the events in question. Therefore, Italy did not safeguard migrants' rights by not taking all the necessary steps in line with the principle of non-refoulement.

On the other hand, States also recognise non-nationals the right to leave. The right, as enshrined in Article 12(2) of the ICCPR, states that everyone has the right to leave the country. The third paragraph of the article also governs the exceptions of the right to leave, including: «[...] *provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others* [...]». The right to leave should be distinguished by the State's right to expel non-nationals. States need to respect the expulsion procedure which protects non-nationals from being discriminated against and unjustly expelled. Indeed, it is necessary to safeguard different rights of non-nationals, including the right to life, dignity, non-discrimination, right to family

[296] ICRC, *Note on migration and the principle of non-refoulement* in *International Review of Red Cross*, 2018, available at *www.international-review.icrc.org*
[297] ECtHR, Hirsi Jamaa and Others v. Italy, 23.02.2012, no. 27765/09, in *HUDOC*
[298] Paragraph 36 of the judgment states that: «In its report [of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment], made public on 28 April 2010, the CPT expressed the opinion that Italy's policy of intercepting migrants at sea and obliging them to return to Libya or other non-European countries violated the principle of non-refoulement. The Committee emphasised that Italy was bound by the principle of non-refoulement wherever it exercised its jurisdiction, which included via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory. Moreover, all persons coming within Italy's jurisdiction should be afforded an appropriate opportunity and facilities to seek international protection. [...] ».

life[299] and the right to not be subjected to torture or inhuman or degrading treatment or punishment[300]. Therefore, States will have to inform non-nationals in advance, reminding them that the failure to comply with the order will lead to their deportation.

Although migration laws may appear to limit State sovereignty, another point of view to consider is that these laws encourage States to protect their national security and public order. For instance, through these laws, States may better address issues concerning corruption and transnational organised crimes. Furthermore, States may also guarantee adequate health care for both regular and irregular migrants. Even though some argue that this may impose an excessive economic burden on States, the World Health Organisation has found that an inclusive approach can «*improve their health status, avoid stigma and long-term health and social costs, protect global public health, facilitate integration and contribute to social and economic development*»[301]. Ensuring health care for irregular migrants can help them integrate into society and ensure that they are active members.

These examples, together with the role of migrant workers that this thesis will later expand[302], portray how State sovereignty is not necessarily undermined by migration law. Rather, it is a way to find a balance between the protection of migrant's dignity and State sovereignty.

3.2.3. Smuggling Protocol

The United Nations Convention Against Transnational Organised Crimes and its three supplementary protocols were adopted with significant help from various countries, with Italy playing an especially important role.

In 1975 the international community felt the need to introduce an international legal instrument governing transnational organised crime. Among the

[299] This also extends to the child's best interest as enshrined within the Convention on the Right of the Child.
[300] PERRUCHOUD, *State sovereignty and freedom of movement,* in *Foundations of International Migration Law*. Cambridge University Press, 2012, 123-151, available at *www.cambridge.org*
[301] ANGELERI, *Sovereignty and the Human Rights of Irregular Migrants,* in *Irregular Migrants and the Right to Health.* Cambridge University Press*, 2022,* 15-60, *www.cambridge.org*
[302] See *infra* chap II, § 3.2.7

various countries, Italy and the US played a pivotal role through their initiatives. Indeed, both countries had longstanding issues with organised crime. However, it was ultimately Poland who presented the draft framework of the Convention to the UN General Assembly. On the 15th of November 2000, the UN General Assembly finally adopted the Convention Against Transnational Organised Crimes (UNTOC), which was supplemented by three protocols. These three protocols include: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Protocols Against the Smuggling of Migrants by Land, Sea and Air and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms.

The adoption of the Protocol Against the Smuggling of Migrants by Land, Sea and Air (also referred to as the «Smuggling Protocol») was also strongly influenced by Italy. Indeed, in the 1990s, Italy faced significant challenges with the increasing number of migrants entering the country. Italy, therefore, sought to strengthen its legal framework to respond to this issue. However, the reluctance of the International Maritime Organisation (IMO) in Italy's legislative role, prompted Italy to seek Australia's support. As a result of their collaboration, the Protocol was adopted[303].

With the adoption of the Smuggling Protocol, the international community started better comprehending the distinction between the phenomena of migrant smuggling and trafficking. Up until the 1990s, the terms were being used interchangeably, including phrases such as «trafficking of aliens» and «alien smuggling» to refer to illegal migration. As aforementioned, nowadays Article 3 of the Protocol governs the use of terms, clarifying the notion of smuggling of migrants.

Article 2 of the Protocol states its purpose, hence, the prevention and combatting of the smuggling of migrants as well as the promoting of cooperation among State parties, while also protecting the rights of smuggled migrants.[304] As found within this definition, the Protocol highlights the importance of international cooperation in the protection of smuggled migrants: without this, States may never

[303] KFIR, *International Law and Human Smuggling: Trying to Make Sense of a Convoluted Framework, in COYNE* in *People Smugglers Globally, 2017*, 57–60, available at *www.jstor.org*
[304] Article 2 of the Smuggling Protocol, «S*tatement of Purpose».*

truly tackle the root cause. States needs to adopt an organised approach to face organised crimes. States may cooperate by spreading information on routes, means and methods used by the migrant smugglers.

The question of criminal liability of smuggled migrants has been discussed between States for a long time. The majority of countries were in favour of avoiding the criminalisation of smuggled migrants. Rather, they intended to punish only the migrant *smugglers.* However, this led to different controversies regarding the best way to phrase the concept.

At present, Article 5 states that «*migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol*». According to this article, the smuggled migrant is protected by the Protocol, provided that they are only the *object* of the conduct. Therefore, the wording of the article reflects the initial intentions of the drafters. On the other hand, Article 6 paragraph 4 weakens the position of the smuggled migrant by providing that «*nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law*»[305]. Therefore, although the Protocol does not criminalise victims, it does leave space for States to exert their power on them.

Moreover, Article 6 also mentions other instances in which States may criminalise the conduct, such as «[...] *producing a fraudulent travel or identity document* (ii) *procuring, providing or possessing such a document* (c) *enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph b of this paragraph* [hence, points (i) and (ii)] *or any other illegal means*»[306].

Paragraph 3 of Article 6 also refers to aggravating circumstances that should be applied by States through legislation and other measures, such as those that «[...] *endanger, or are likely to endanger, the lives or safety of the migrants concerned; or* (b) *that entail inhuman or degrading treatment, including for exploitation, of*

[305] Article 6 (4) of the Smuggling Protocol, «*Criminalisation»*
[306] Article 6 (1) of the Smuggling Protocol, «*Criminalisation»*

such migrants. [...]». According to this article, the Protocol requires States to impose harsher penalties both for acts that endanger lives or safety and for acts that may be considered inhuman or degrading. The terms «inhuman or degrading treatment» are not defined by the Protocol, suggesting that the concept is applied on a case-by-case basis. Generally, such treatment refers to severe physical or psychological suffering, leading to humiliating conditions. The article also mentions that such treatment may also include exploitation, overlapping with fundamental aspects characterising human trafficking. According to a subsequent interpretation, it appears that the term «exploitation» as encompassed in Article 6, should be read in a broader sense than the one found within the definition of human trafficking. However, the two crimes are distinguished as, in the case of migrant smuggling, it is necessary to prove that the crime has occurred in *circumstances* which are inhuman or degrading[307].

Article 6 has to be read together with Article 19, also referred to as the «Saving clause». The reason behind this name is that the Protocol strives to find a balance between the criminalisation of migrant smuggling and the protection of international human rights law and refugee law. Article 19 also requires States to respect the principle of non-refoulement.[308] According to this article, it appears that the Smuggling Protocol should not interfere with other existing international legal instruments nor should it create new obligations. The second paragraph of Article 19 also concentrates on the concept of non-discrimination, stating that all articles should be interpreted and applied consistently to everyone.

3.2.4. Irregular Maritime Migration

Irregular maritime migration is one of the biggest challenges faced by the international legal framework in the broader context of irregular migration. This is

[307] GALLAGHER, DAVID, *Specific Rules and Obligations,* in *The International Law of Migrant Smuggling*, Cambridge University Press; 2014, 353-734, available at *www.cambridge.org.*

[308] As defined by the OHCHR, the principle of non-refoulement is a core concept of international law. According to this principle, States may not send back an individual to a place where they could be harmed. The OHCHR points out that the notion of harm should be interpreted as cases of torture, persecution, ill-treatment or other serious human rights violations. This principle applies to everyone, regardless of their nationality or citizenship.

especially due to the significant loss of life at sea. The International Maritime Organisation (hereinafter referred to as «IMO») estimates that, only between the first two months of 2025, there have already been 248 deaths at sea. Furthermore, in 2024, the overall deaths amounted to 2750[309]. Despite these risks, maritime routes remain one of the preferred ways for irregular migrants to enter a country without the need for documentation.

The most active route for irregular migration is the Western African corridor. Between January and February 2025, there have been 7200 arrivals. Moreover, the number of irregular migrants using the Central Mediterranean route has increased by 48% in comparison to the previous year. Libya remains the primary departure point on this route. Lastly, the Eastern Mediterranean route resulted in 6500 arrivals in the first two months of 2025. However, this number has decreased by 35% in comparison to 2024[310].

These statistics portray the need for the international legal framework to develop safe and dignified alternatives for migrants to migrate. This aim has specifically been carried out by the United Nations Convention on the Law of the Sea (UNCLOS) and the IMO Convention. The IMO Conventions are the International Convention for the Safety of Life at Sea (SOLAS Convention)[311] of 1974 and the International Convention on Maritime Search and Rescue (SAR Convention) of 1979. An important role has also been played by regional legal instruments, specifically EU Law and the African Union and Asean law.

The UNCLOS Convention was adopted on the 10th of December 1982 and entered into force in 1994. Today, the Convention is recognised as the primary legal instrument in matters of the law of the sea. The Convention comprises 320 articles, with the aim of «*establishing rules governing all the use of the oceans and their resources*»[312]. Articles 2 and 3 of the Convention are fundamental in regulating

[309] FRONTEX, *Monthly irregular migration statistics - February 2025*, 2025, available at *www.frontex.europa.eu*
[310] *Ibid*
[311] The SOLAS Convention has been adopted in 1974 and entered into force in 1980. This Convention does not extensively regulate the phenomena of irregular maritime migration. Rather, it's aim is to regulate the safety on merchant ships (such as the equipment and operations carried out on the ship). A more detailed analysis of this Convention may be found at: IMO *International Convention for the Safety of Life at Sea (SOLAS)*, 1974, available at *www.imo.org*
[312] UNITED NATIONS, *United Nations Convention on the Law of the Sea of 10 December 1982,* available at *www.un.org.*

State sovereignty. Indeed, they recognise the sovereignty of coastal states in the territorial sea. These States can intercept and arrest vessels and individuals violating coastal state laws and enforcing domestic laws[313]. On the other hand, the Convention does not recognise State sovereignty over the high seas.

There is a strong tension between State sovereignty, irregular maritime migration and human dignity. This is because, as seen in the ECtHR Hirsi Judgment[314], States return migrants without assessing the conditions of their countries of origin. Therefore, infringing both ECtHR case law and generally accepted international law principles. Indeed, States must always ensure that the conditions migrants face upon return to their country are adequate. Once again, this is the principle of non-refoulement. However, this has led to criminal cartels developing the so-called «organised refugee» strategy, where smugglers work with migrants to concoct stories for the authorities. This practice is also referred to as «border game»: making it harder for authorities to distinguish between those truly in need and those who are not. The consequence is that authorities start jeopardising migrants, attributing them the burden of proof and interviewing them with increased scrutiny, often at the expense of procedural fairness[315]. Another reaction from countries may be delaying or refusing disembarkation due to concerns over triggering asylum obligations[316]. The violation of human dignity is evident here: fighting organised crimes has led to not protecting those who are truly in need.

[313] Article 2 of the UNCLOS Convention: «The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. [2] This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.[3] The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.».
Article 3 of the UNCLOS Convention: «Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.».
[314] *See* chap II, § 3.2.2.
[315] VAN LIEMPT, SERSLI, *State responses and migrant experiences with human smuggling: A reality check*, in *Antipode*, 2013, *45*(4), 1029-1046
[316] EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK, *Prioritising Border Control over Human Lives. Violations of the Rights of Migrants and Refugees at Sea.* 2014.

On the other hand, States also play a crucial role in safeguarding human dignity. For example, Article 98 of the UNCLOS Convention enshrines States' duty to render assistance[317].

The duty to render assistance is a long-standing rule of international law. Not only is it encompassed in the UNCLOS Convention, but is also further regulated by the SOLAS and SAR Conventions[318]. A common element between these legal instruments is the principle of non-discrimination, where everyone should be treated equally. For instance, the SOLAS Convention deems that the obligation of shipmasters to assist should occur «*regardless of the nationality or status of such persons or the circumstances in which they are found*»[319].

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[317] Article 98 UNCLOS: «Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. [2] Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose».

[318] HEIDAR, *The Duty to Render Assistance at Sea under International Law,* 2018, available at *www.iflos.org*

[319] Regulation 33: Distress situations, obligations and procedures: «The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly. [1-1] Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable. [2] The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress. [3] Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other

States also protect human dignity by granting search and rescue services, hence, helping those in the sea. This principle is encompassed both within the second paragraph of Article 98 and the SAR Convention.

The SAR Convention was adopted in 1979 and entered into force in 1985. Before the entering into force of this legal instrument, search and rescue services were not regulated by any international system. At present, the SAR Convention outlines several obligations for States to ensure the protection of individuals in distress at sea, such as bringing them to safety. Where, by the latter, it is meant bringing them to a safe place: any territory in which the person can be protected and safeguarded. Furthermore, under the SAR Convention, each State is responsible for one of the thirteen search and rescue regions (SRR) that the ocean has been divided into. Whilst these obligations do entail States helping those in distress, it doesn't impose on them rescuing the persons[320].

The SAR Convention was then revised in 1998, with the entering into force of the Annex. The Annex encompasses five different chapters, regulating the organisation and coordination, cooperation between states, operating procedures and ship reporting systems. Specifically, the third chapter[321] is vital in ensuring that Governments cooperate to better protect maritime migrants[322].

As stated by the UNHCR High Commissioner's dialogue on protection challenges, entitled «*Interception and Rescue at Sea of Asylum Seekers, refugees*

ships have been requisitioned and are complying with the requisition. This decision shall, if possible, be communicated to the other requisitioned ships and to the search and rescue service. [4] The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary. [5] The provisions of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention. [6] Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship».

[320] KLEIN, *A case for harmonizing laws on maritime interceptions of irregular migrants*, in *The International and Comparative Law Quarterly*, vol. 63, no. 4, 2014, 787–814, available at *www.jstor.org*

[321] Chapter 3, Annex SAR Convention: «Requires Parties to co-ordinate search and rescue organizations, and, where necessary, search and rescue operations with those of neighbouring States. The Chapter states that unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory for rescue units of other Parties solely for the purpose of search and rescue».

[322] IMO, *International Convention for the Safety of Life at Sea (SOLAS)*, 1974, available at *www.imo.org*

and Irregular Migrants», there is a strong difference between interception at sea and search and rescue operations.[323] On the one hand, search and rescue operations are a humanitarian legal obligation aiming to help those in immediate distress at sea. On the other hand, interception aims to protect irregular migrants before they end in distress. However, interception does not find a specific definition within the international legal framework. Nevertheless, it is important to acknowledge the twofold role of interceptions. Indeed, they may quickly turn into a violation of dignity when States block and deny their protection. The various control mechanisms adopted by States severely jeopardise the safety of a person in need, creating no distinction between refugees and other migrants[324].

3.2.5. Global Compact

The international legal framework is extremely varied, consisting of a myriad of sources with different natures. Although this makes regulating the phenomena of irregular migration difficult, it also allows for a broader framework tackling various loopholes. This role has been carried out, for instance, by the Global Compact for Safe, Orderly and Regular Migration as adopted by the United Nations.

The Global Compact was adopted in 2018 during an intergovernmental conference on migration in Morocco. This is the first intergovernmental agreement ever adopted governing all the aspects relating to international migration[325]. Furthermore, this legal instrument is of extreme importance in creating a connection

[323] UNHCR, High Commissioner's Dialogue on Protection Challenges: Protection at Sea – Background Paper (2014): «Rescue' and 'interception' are two different things. 'Interception' measures undertaken for humanitarian reasons, which seek to retrieve people in potentially dangerous circumstances at sea and deliver them to safety before a distress situation arises, represent invaluable contributions to protection at sea so long as they are safely conducted and allow intercepted asylum-seekers and refugees to access international protection. Interception measures which are directed at avoiding or shifting refugee-protection responsibilities, which frustrate access to international protection or seek to 'deter' asylum-seekers, which lead to a risk of *refoulement* or which endanger safety, are not consistent with international standards and cannot be characterised as 'rescues'».

[324] UNHCR, *Interception of asylum seekers and refugees: the international framework and recommendations for a comprehensive approach,* 2000, available at *www.unhcr.org*

[325] INTERNATIONAL ORGANIZATION FOR MIGRATION: *Global Compact for Safe, Orderly and Regular Migration,* available at *www.iom.int*

between irregular migration and the protection of dignity and human rights. Indeed, the Unity of the purpose of the Global Compact states that «*We must work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries»*[326].

The Global Compact consists of 23 objectives[327] and is founded on 10 guiding principles[328]. All of the latter should not be read separately but rather should

[326] The Unity of Purpose states: «This Global Compact recognizes that safe, orderly and regular migration works for all when it takes place in a well-informed, planned and consensual manner. Migration should never be an act of desperation. When it is, we must cooperate to respond to the needs of migrants in situations of vulnerability, and address the respective challenges. We must work together to create conditions that allow communities and individuals to live in safety and dignity in their own countries. We must save lives and keep migrants out of harm's way. We must empower migrants to become full members of our societies, highlight their positive contributions, and promote inclusion and social cohesion. We must generate greater predictability and certainty for States, communities and migrants alike. To achieve this, we commit to facilitate and ensure safe, orderly and regular migration for the benefit of all.».

[327] The 23 objectives of the Global Compact include:
[1] Collect and utilize accurate and disaggregated data as a basis for evidence-based policies;
[2] Minimise the adverse drivers and structural factors that compel people to leave their country of origin;
[3] Provide accurate and timely information at all stages of migration;
[4] Ensure that all migrants have proof of legal identity and adequate documentation;
[5] Enhance availability and flexibility of pathways for regular migration;
[6] Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work;
[7] Address and reduce vulnerabilities in migration;
[8] Save lives and establish coordinate international efforts on missing migrants;
[9] Strengthen the transnational response to smuggling on migrants;
[10] Prevent, combat and eradicate trafficking in persons in the context of international migration;
[11] Manage borders in an integrated, secure and coordinate manner;
[12] Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral;
[13] Use migration detention only as a measure of last resort and work towards alternatives;
[14] Enhance consular protection, assistance and cooperation throughout the migration cycle;
[15] Provide access to basic services for migrants;
[16] Empower migrants and societies to realise full inclusion and social cohesion;
[17] Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration;
[18] Invest in skills development and facilitate mutual recognition of skills, qualifications and competences;
[19] create conditions for migrants and diasporas to fully contribute to sustainable development in all countries;
[20] Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants;
[21] Cooperate in facilitating safe and dignified return and readmission, as well as sustainable integration;
[22] Establish mechanisms for the portability of social security entitlements and earned benefits
[23] Strengthen international cooperation and global partnerships for safe, orderly and regular migration.

[328] Point 15 of the Preamble of the Global Compact defines the «cross-cutting and interdependent» guiding principles, these including: (a) *People-centred*. The Global Compact carries a strong human dimension, inherent to the migration experience itself. It promotes the well-being of migrants and

be implemented together and interpreted by taking into consideration the Universal Declaration on Human Rights.

The Global Compact aims to prevent irregular migration, migrant smuggling and also human trafficking[329]. To do so, the legal instrument highlights the necessity of international cooperation and good governance among countries. Furthermore, it emphasises the distinction between regular and irregular migration, specifying the role of countries in both cases[330]. For instance, in the case of irregular

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the members of communities in countries of origin, transit and destination. As a result, the Global Compact places individuals at its core; (b) *International cooperation*. The Global Compact is a non-legally binding cooperative framework that recognizes that no State can address migration on its own because of the inherently transnational nature of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review; (c) *National sovereignty*. The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law; (d) *Rule of law and due process*. The Global Compact recognizes that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. This means that the State, public and private institutions and entities, as well as persons themselves, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law; (e) *Sustainable development*. The Global Compact is rooted in the 2030 Agenda for Sustainable Development, and builds upon its recognition that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migration contributes to positive development outcomes and to realizing the goals of the 2030 Agenda for Sustainable Development, especially when it is properly managed. The Global Compact aims to leverage the potential of migration for the achievement of all Sustainable Development Goals, as well as the impact this achievement will have on migration in the future; (f) *Human rights*. The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance, against migrants and their families; (g) *Gender-responsive*. The Global Compact ensures that the human rights of women, men, girls and boys are respected at all stages of migration, that their specific needs are properly understood and addressed and that they are empowered as agents of change. It mainstreams a gender perspective and promotes gender equality and the

[329] According to the Comments on the zero draft plus by the Special Representative of the Secretary General on Migration and Refugees, Council of Europe, March 2018, «The commitment to tackle smuggling is key to disrupting irregular migration flows. However, the GCM should explicitly recognise the role that corruption plays in facilitating smuggling networks. A commitment from states to ensure that corruption in all its form is not an impediment to the effective management of migration flows, together with specific actions to tackle corruption, would strengthen this objective».

[330] MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES, *Global Compact for Safe, orderly and regular migration*. France Diplomacy, available at *www.diplomatie.gouv*

migration, objective 21 of the Global Compact tackles appropriate ways to protect the migrant by ensuring that they will be able to return and reintegrate into their country. Moreover, it requires the return to be dignified, by fostering institutional contacts between countries and establishing or strengthening national monitoring mechanisms in return. Both objectives pursue the aim of having irregular migrants return guaranteeing their dignity, safety and human rights. Once again this legal instrument highlights how irregular migration is rooted within the concept of dignity.

The Global Compact, however, does not aim to regularise irregular migration but instead serves as a normative framework for policy development.

The consequences and impacts of the adoption of the Global Compact have been controversial. However, as this legal instrument is non-binding, the impact on countries is limited to how they decide to enforce it. In 2024, the United Nations Secretary-General (UNSG) Antonio Guterres presented his 3rd biennial report to the UN General Assembly. The report specifically deemed that, although the Global Compact is grounded on international human rights law, the legal instrument fails to thoroughly protect the rights of migrants. Some of the negative consequences that the report refers to are the *«[...] exclusion of migrants from basic services and civic engagement, increase in efforts to externalise migration governance and to intensify border control* [...] *often expos[*ing] *migrants to risks of human rights violations, available migration pathways not responding to the needs and instead pushing migrants to dangerous routes* [...], *lack of a right-based and gender-sensitive approach when designing and implementing labour migration pathway*»[331]. The picture painted by the report is worrying as it portrays how problematic the protection of irregular migration still is nowadays. Moreover, it demonstrates that the problem of irregular migration is embedded in the protection of dignity and the safeguarding of human rights.

[331] COUNCIL OF EUROPE, *Comments on the zero draft plus by the Special Representative of the Secretary General on Migration and Refugees*, in *Global Compact for Safe, Orderly and Regular Migration, March 2018,* 2018, available at *www.rm.coe.int*

3.2.6. UN Refugee Protocol

Although this thesis does not explore the infringement of dignity for refugees, it is important to take into consideration the whole of the international legal framework by also briefly referring to Refugee law. It is only by analysing the role of refugees that the distinction between them and irregular migrants becomes clear.

The distinction between migrants and refugees became evident in the 1950's, with the establishment of the United Nations High Commissioner for Refugees (UNHCR)[332]. This has then further developed with the adoption of different legal instruments, such as the Refugee Convention of 1951 and the Refugee Protocol of 1967[333].

The most important principle found within the Convention is the principle of non-refoulement. However, there are other basic minimum standards which are recognised for refugees, such as the right to housing, work, education, and to live life in a dignified and independent manner. The Convention also had the fundamental role of introducing the definition of the term «refugee» as regulated by Article 1[334].

The main distinction between refugees and migrants is the reason behind their movement. Refugees usually don't voluntarily decide to move: rather, they are

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[332] UNHCR, *The 1951 refugee convention*, available at *www.unhcr.org*

[333] Very controversial has been the impact of the adoption of the Refugee Protocol. Indeed, it is believed that the Protocol has not added much more to the Convention, nor has it truly updated nor universalised the scope of international refugee law. This thought is further on developed by HATHWAY, *The Architecture of the UN Refugee Convention and Protocol,* in *The Oxford Handbook of International,* 2021, 171-185, available at *www.academic.oup.com*

[334] Article 1 of the Refugee Convention: «For the purposes of the present Convention, the term 'refugee' shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section; (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national».

forced to move for war or fear of death. On the other hand, migrants usually move for different reasons, such as economic. The discrepancy has important consequences on the type of legal framework adopted. Indeed, refugees are entitled to the protection of the rights found in the Refugee Convention while migrants do not[335].

A phenomenon which has started developing has been the one of mixed migratory flows. This is when migrants and refugees travel together, either by land or sea. Even though refugees and migrants are not the same, they will face the same unbearable conditions during their travels, possibly leading to the loss of their lives. Furthermore, they may also be trafficked by traffickers found on the route.

Both refugees and irregular migration should lead to an adequate international legal response safeguarding their dignity. To ensure this, there is a need to understand and comprehend what incentivises this situation. Furthermore, there is a need to avoid those misconceptions countries have towards migrants and refugees[336].

3.2.7. International Labour Law for Irregular Migrants

An extremely relevant topic in the broader context of irregular migration is the consequences migrants face once settled in their country of destination. Irregular migrants are often treated differently compared to regular migrants despite the several obligations imposed on States by the international legal framework. One of the most problematic aspects is the possibility of labour exploitation.

The need to protect labour standards for irregular migrants was first felt with the adoption of the International Labour Organisation (ILO) Convention no. 143 concerning migrations in abusive conditions and the promotion of equality of opportunity. Convention no. 143 comprises several articles regulating illegally employed migrants and ensuring that States provide protection. For instance,

[335] ELDRIGE, *What's the difference between a migrant and a refugee?* in *EncyclopædiaBritannica,* available at *www.britannica.com*
[336] KNOLLE, POSKETT, *Refugees and Migration* in *Darwin College Lectures*, Cambridge, 2020, 79-95, available at *www.cambridge.org*

Article 2 obliges States to determine whether a worker is illegally employed[337]. Similarly, in 1975 the United Nations sub-commission on Prevention of Discrimination and Protection of minorities published the Report Exploitation of Labour through Illicit and Clandestine Trafficking[338]. The Report referred to several human rights issues faced by irregular migrants[339].

Overall, there was a heartfelt need for an international legal instrument that regulated human rights in the labour migration context. This aim was pursued by the General Assembly of the United Nations which, in 1990, adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (hereinafter referred to as the «Convention»).

This was the first legal instrument which offered explicit legal protection for irregular migrants in the country of destination. The Convention does this by first recognising their inherent human dignity. Indeed, as mentioned in Article 17 paragraph 1 of the Convention: «*Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity».* The

[337] Article 2 states that: «Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations. [2] The representative organisations of employers and workers shall be fully consulted and enabled to furnish any information in their possession on this subject.».

[338] BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, in *The International Migration Review*, vol. 25, no. 4, 1991, 737–70, available at *www.jstor.org*

[339] The Report is extremely important in identifying the critical situation that the world was starting to face in respect to irregular migration. Indeed, it is the same report that says, «This situation leads us to note that illicit immigration is tending increasingly to 'take the form of organized criminal trafficking and that the fortune of some is therefore based on the misfortune of others». Furthermore, the Report reflected on the fact that the migrant lived in the same precarious situation in the host country in comparison to their country of origin: «Apart, however, from all the measures which have been or should be taken, we must not overlook the fact that the migrant worker is just as unhappy in the receiving country where he lives illegally and is exploited and despised, as in his own country where chronic underemployment, underdevelopment and poverty leave him with no hope and no means of subsistence. Has not the ILO said that out of four able-bodied men and women in the developing countries, at least one is unemployed or underemployed and that there are in the world 300 million people in this situation which is tending to worsen? ». The Report believes that, to resolve the issue of irregular migration, there is a need for a collaboration between the developed and the developing countries.

protection of their dignity is also found within Article 70, which asks for States to promote standards of fitness, safety, health and principles of human dignity[340].

The Convention further protects irregular migrants by recognising and ensuring the protection of their human rights. This legal instrument does this by recognising the disparity and less favourable conditions irregular migrants face compared to regular workers[341]. There are several provisions regulating the rights of irregular migrants within the country of destination and also for the family. For instance, Article 30 also recognises the right to education for the children of the migrant worker[342]. All these articles are grounded on the international obligation of States to protect the workers from being exploited or abused.

Although the Convention tries to protect irregular migrants, there are several articles within the document which portray a discrepancy among regular and irregular workers[343]. Article 35 highlights how the document does not seek to regularise the situation of irregular migration. Furthermore, the second paragraph of Article 68 asks for States to take «*all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers* [...]».

[340] Artice 70 of the Convention states that: «States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity»

[341] The preamble of the Convention states that: «Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights, Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition, Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned».

[342] Article 30 of the Convention states that: «Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment».

[343] BOSNIAK, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, in *The International Migration Review*, vol. 25, no. 4, 1991, 737–770, available at *www.jstor.org*

Similarly, the first paragraph of Article 69 states that *«States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not».* The mentioned articles portray the twofold dimension in the protection of irregular migrants: although legal instruments strive to protect their dignity and safeguard their human rights, the balance being searched may instead hinder them.

The Convention also refers to the primacy of State sovereignty. Specifically, Article 79 states that the Convention may not affect the State's right to establish the criteria «*governing admissions of migrant workers and members of their families»*. However, as previously explored, the irregular migration legal framework does not necessarily hinder State sovereignty. Rather, safeguarding workers' rights grants stability within the country, also improving the general economy. This, however, may only be achieved if States adequately integrate the workers within the society[344].

4. CRIMINALISATION UNDER EUROPEAN LAW

4.1. EU Efforts Against Organised Crimes

One of the most problematic concerns faced by the European Union has been, and still is, organised crime. Specifically, the most frequent criminal activities have been cybercrime, human trafficking, migrant smuggling, drug trafficking and fraud[345]. To address this situation, the European Union has harmonised existing European criminal law.

Several legal instruments, such as the Framework Decision on the Fight Against Organised Crime, also known as Framework 2008/841/JHA (hereinafter referred to as "Framework Decision"), have defined organised crime within EU law. The first three Articles of the Framework Decision are central to the study of how EU Law tackles organised crime.

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[344] ANGELERI, *Sovereignty and the Human Rights of Irregular Migrants,* in *Irregular Migrants and the Right to Health.* Cambridge University Press*, 2022,* 15-60, available at *www.cambridge.org*

[345] EUROPEAN COUNCIL, *The EU's fight against organised crime*, 2025, available at *www.consilium.europa.eu*

Article 1 paragraph 1 of the Framework defines a criminal organisation as a structured association of people to commit offences «*which are punishable by deprivation of liberty or detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit».* Article 2 of the Framework Decision regulates the positive obligations recognised by States to ensure that the crimes are regarded as offences[346]. Lastly, Article 3 sets out the penalties applicable to the crimes[347]. The Framework Decision consists of nine other articles, which refer to: special circumstances, liability of legal persons, penalties for legal persons, jurisdiction and cording of prosecution, absence of requirement of a report or accusation by victims, repeal of existing provisions, implementation and reports, territorial application and the entry into force. All of these articles need to be read together with the Palermo Protocol, which this thesis has already referred to[348].

The Framework Decision has been implemented by most of the EU Member States. However, according to RAND Europe, the instrument did not have the positive impact that was hoped for[349]. The most problematic aspect of the

[346] Article 2 of the Framework Decision: «Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences: a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.»

[347] Article 3 of the Framework Decision: Each Member State shall take the necessary measures to ensure that: «a) the offence referred to in Article 2(a) is punishable by a maximum term of imprisonment of at least between two and five years; or b) the offence referred to in Article 2(b) is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, or by a maximum term of imprisonment of at least between two and five years. 2. Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance»

[348] See *infra* chap II, § 1.2

[349] RAND Europe conducted a study examining whether EU Member States were truly in conformity with the Framework Decision, specifically complying with the first three articles. The study examined different things, including how States regulated the following aspects: self-standing offence, structure of the criminal organisation, continuity of the criminal organisation, number of members of the criminal organisation, scope of predicate offences, benefit and penalties.
When referring to the structure of the criminal organisation, the study found that 14 Member states (AT, BE, DE, EL, ES, FR, HU, IT, LU, MT, NL, PL, PT, SI) do not refer to a structured association

Framework Decision is the heterogeneity of the national legal frameworks, not helping the cross-border cooperation among States. Furthermore, the legal instrument is in practice underused. According to the study, one of the reasons is connected to the fact that States seem to prefer using offences related to the specific type of crime rather than the generality of criminal organisation. This may be connected to the complexities around the burden of proof for crimes related to criminal organisations. Furthermore, there is also limited awareness among the practitioners[350].

The EU legal framework, however, also provides other legal instruments targeting organised crimes, specifically attaining to human trafficking and irregular migration. The following paragraphs will expand on these various legal instruments.

4.1.1. EMPACT: EU's Strategic Framework for Combatting Crime

In 2012, the Council of Europe adopted the European Multidisciplinary Platform Against Criminal Threats (hereinafter referred to as «EMPACT») to fight

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in contrast to 7 Member States that do (BG, CY, FI, HR, IE, RO, SK). Four Member States further elaborate on the structure of criminal organisations (CZ, EE, LT, LV).
When referring to the continuity of criminal organisations, 17 Member States do not specify the duration of the criminal organisation (BE, CY, CZ, EL, ES, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, SI) whilst 5 specify the duration of the criminal organisation stating that it either needs to be permanent or long term (AT, BG, DE, EE, HU). FI, RO, SK require the criminal organisation to have to be set over a period of time.
When concerning to the number of members of the criminal organisation, 16 Member States believe criminal organisations need to be composed of at least 3 members (AT, BE, CY, CZ, DE, EE, ES, FI, HR, HU, IE, IT, LT, LV, RO, SK), whilst 7 Member States redeem that it is up to national courts to determine the number of members composing the criminal organisation (BG, FR, LU, NL, PL, PT, SI). EL and MT ask for at least two members of a criminal organisation.
When referring to the scope of the criminal organisation, 9 Member states do not provide any restriction to the scope of the criminal organisation (CZ, EL, ES, IT, LV, NL, PL, PT, RO), two member states specify that criminal associations must attack people or property (BE, LU), 14 Member States restrict the scope through a quantitative threshold (AT, BG, CY, DE, EE, FI, FR, HR, HU, IE, LT, MT, SI, SK).
Regarding the benefit aimed by a criminal organisation, all Member States comply with the requirements set out by the Framework Decision. The only exception is SK which requires the criminal organisation to aim at direct or indirect financial gain or other benefits.
Lastly, Member States adopt different approaches to the penalties, but overall, they are all in conformity with the Framework Decision. The only exception is the Spanish Criminal Law.
The study is further on developed in European Commission: BLODES, DISLEY, CORBETT, NEDERVEEN, TAYLOR, GAGLIO, SORRENTI, CALDERONI, *Study Strengthening the Fight Against Organised Crime* in *Publications Office of the European Union website,* 2023, available at *www.rand.org*

[350] *Ibid.*

organised crime. The project EMPACT focuses on ten crime-related priorities: high-risk criminal networks, cyber-attacks, trafficking in human beings, child sexual exploitation, migrant smuggling, drugs trafficking, economic and financial fraud, organised property crime, environmental crime and firearms trafficking.

Regarding trafficking in human beings, EMPACT aims to «*disrupt criminal networks engaged in trafficking in human beings, with special focus on those who exploit minors, those who use or threaten with violence against victims and their families and those who recruit and advertise victims online*». On the other hand, the aim for migrant smuggling is to «*fight against criminal networks involved in migrant smuggling, in particular those providing facilitation services along the main migratory routes*»[351].

EMPACT operates in a policy cycle, where each cycle lasts four years. The current cycle is the 2022-2025 one. The previous cycles have been carried out in 2014-2017 and in 2018-2021. At the end of each cycle, an independent evaluation is conducted analysing the results. During each cycle, there are a number of actors who are asked to cooperate to allocate resources and mutually reinforce efforts[352].

The cycle starts with the Serious and Organised Crime Threat Assessment (SOCTA) which is carried out by Europol by taking into consideration data provided by Frontex, Eurojust, private partners and also open source data. This phase is known as «policy development». The next phase is called «policy setting», where the Committee on Operational Cooperation on Internal Security (COSI) examines the SOCTA to determine the Multi-Annual Strategic Plans (MASP). Subsequently, the Commission meets with the representatives of each Member State, EU Institutions and JHA Agencies to draft the MASP. These Plans are therefore adopted by the Operational Action Plans (OAPs). Each year there is an interim assessment which is carried out by EUROPOL to decide whether it is necessary to modify the MASP[353].

The positive influence that EMPACT has had in the EU transpires from the statistics. From the interim assessment regarding migrant smuggling carried out in

[351] EMPACT, EMPACT fighting crimes together, available at *www.home-affairs.ec.europa.eu*
[352] EUROPEAN COUNCIL, *Fight against organised crime: Council sets out 10 priorities for the next 4 years,* 2025, available at *www.consiulium.europa.eu*
[353] COUNCIL OF THE EUROPEAN UNION, *The EU policy cycle to tackle organised and serious international crime,* 2018, available at *www.consiulium.europa.eu*

2023, authorities seized over 1549246 Euros in cash and arrested 6801 facilitators. Furthermore, 243 key facilitators were identified and/or arrested. Cooperation with non-EU partners and private parties has also been crucial, highlighting the importance of international cooperation. Some of these actors have been the Western Balkans and Eastern countries, Moldova, Serbia, Bosnia, Libya, Cyprus and so on. The role of EMPACT is also pivotal when it comes to education and training, where 59 training courses were issued targeting law enforcement officers combatting migrant smuggling.

From the same interim assessment, it is also possible to see the positive impact that EMPACT has had in the trafficking of human beings. Throughout 2023 there have been 457 arrests, 7536 victims reported and identified and 4108670 Euros seized in cash. Moreover, every year, there is an EMPACT hackathon regarding the issue of human trafficking and how to solve it. Specifically, in 2023 the hackathon concentrated on sexual and labour forms of exploitation in the trafficking of human beings. There was a specific focus on Ukraine, where several suspicious platforms were monitored and identified, leading to new investigations[354].

4.2.**Human Trafficking in EU Law**

Human trafficking has become one of the biggest concerns for the European Union (EU) and its Member States. EU statistics present an alarming situation: the number of victims of human trafficking amounts to around 10,000 per year, with an exponential increase in comparison to previous years[355]. Furthermore, it is particularly concerning that the number of suspected traffickers is higher than the number of those convicted. Moreover, many traffickers are EU citizens, further complicating enforcement efforts. Statistics also show a prevalence of sexual and labour exploitation[356]. These numbers have led the EU to define human trafficking as a crime hidden in plain sight. It has recognised how trafficking is not only a crime but also a direct violation of human rights and the dignity of persons.

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[354] EMPACT, *Migrant smuggling (MIGR). 2023 Results,* available at *www.consiulium.europa.eu*
[355] EUROPA.EU: *Trafficking in Human Beings Statistics - Statistics Explained*, 2025, available at *www.ec.europa.eu*
[356] *Ibid.*

While the statistics portray the severe reality of human trafficking, real-life stories like the one of Merel van Groningen portray how heinous the crime is and how easily her innate dignity was stripped away. Indeed, Merel was sexually exploited at the young age of 15 due to the problems at home, the length of the investigations and the lack of help from the authorities. Authorities played a crucial role in helping Merel by removing her from the red-light district and bringing her to safety. Today, authorities occasionally contact her for assistance as many victims of trafficking distrust authorities. She has also funded the Merel van Groningen Foundation to help trafficking victims[357].

This real-life case scenario represents how easily women, and people in general, are exploited and how essential the EU's safeguarding of human rights and dignity is, specifically in the modern age, where traffickers have started luring people, especially the younger ones, through the internet[358].

Given the alarming rise in trafficking, the EU has continuously worked on strengthening its legal framework[359]. This is specifically portrayed by the role of Directive 36/2011, which, as this thesis will now explore, is embedded within Article 5 of the Charter of Fundamental Rights prohibiting trafficking in human beings.

4.2.1. Directive 2011/36/EU

Human trafficking was first addressed by Joint Action 97/154/JHA and Framework Decision 2002/629/JHA. However, due to the constant increase in the number of victims, the legal instruments required strengthening for better protection. For this reason, in 2011, Directive No. 36 of the European Parliament and Council was adopted with the aim of Preventing and Combating Trafficking in Human Beings and Protecting its Victims (hereinafter referred to as «the

[357] COUNCIL OF THE EUROPEAN UNION, *The EU's Work to Combat Human Trafficking,* available at *www.consiulium.europa.eu*

[358] *Ibid.*

[359] The EU Anti-trafficking coordination, Diane Schmitt, has recently stated the importance of EU and its Member States to tackle human trafficking. She has stated that: «Together, the EU and its member states follow a comprehensive approach, from prevention of the crime to the prosecution and conviction of criminals, while protecting the victims at all stages».

Directive»). The Directive, which replaced the previous Framework Decision, is now a cornerstone in the safeguarding of victims of trafficking. Indeed, it has solved many of the loopholes which previously existed by harmonising European criminal law. Furthermore, it has had a significant role in safeguarding rights and protecting victims. Nevertheless, its implementation has also raised several concerns[360].

According to recital no.1 of the Directive «*Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States*». This recital sets out the intentions of the Directive, which is to ensure the comprehensive protection of victims of human trafficking. This protection is regulated by the 25 Articles of the Directive and its recitals, which are all pivotal and need to be interpreted with a human rights-based approach.

Recital no. 7 provides that the Directive adopts an «*integrative, holistic and human rights approach».* The *holistic* approach to human trafficking refers to both the criminalisation and prosecution of the crime but also the protection of victims and crime prevention. This is a step further in comparison to the Framework Decision 2002/629 which only tackled victim protection within one article[361].

The protection of victims is regulated by eight articles of the Directive, specifically, Articles 8 to 17[362]. These articles are embedded in the safeguarding of human rights and the protection of dignity. For instance, recital no. 33 further specifies that the Directive safeguards fundamental rights and «*observes the principles recognised in particular by the Charter of Fundamental Rights of the*

[360] SYMEONIDOU- KASTANIDOU, *Directive 2011/36/EU on Combating Trafficking in Human Beings: Fundamental Choices and Problems of Implementation*, in *New Journal of European Criminal Law*, 2016, 465-482, available at *www.journals.sagepub.com*

[361] *Ibid.*

[362] Articles 8 to 17 of the Directive include: non-prosecution or non-application of penalties to victims; investigation and prosecution; jurisdiction; assistance and support for victims of trafficking in human beings; protection of victims of trafficking in human beings in criminal investigation proceedings; general provisions on assistance, support and protection measures for child victims of trafficking in human beings; assistance and support to child victims; protection of child victims of trafficking in human beings in criminal investigations and proceedings; assistance, support and protection, for unaccompanied child victims of trafficking in human beings and compensation to victims.

European Union and notably human dignity [...]»[363]. This human rights-based approach adopted by the Directive reflects the principles found in international human rights law.

Article 8 is of extreme importance as it provides that Member States may not prosecute nor apply penalties to those victims «*for their involvement in criminal activities which they have been compelled to commit as a direct consequence»* of being trafficked. As already examined, this Article avoids victims being unjustly prosecuted for crimes that they have been forced to commit.

Differently from the Framework Decision, the Directive aims also to prevent the trafficking of human beings. This allows protection of the victims by acting before the crime has occurred and thoroughly safeguarding their rights and dignity. The Article asks for Member States to take all actions necessary to prevent the crime, such as through education, training, information and awareness-raising campaigns[364].

The Directive has also further developed from the previous Framework Decision by increasing the penalties and criminal sanctions. The latter are regulated by both Article 6 and recital no. 26. Specifically Article 6 asks for sanctions to be «*effective, proportionate and dissuasive»* to deter traffickers from reoffending. Article 4 paragraph 1 states that the offences are punishable «*by a maximum penalty*

[363] Recital 33 of the Directive states that: «This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly».

[364] Article 18 of the Directive states that: «Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.[2] Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns, research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders, aimed at raising awareness and reducing the risk of people, especially children, becoming victims of trafficking in human beings. [3] Member States shall promote regular training for officials likely to come into contact with victims or potential victims of trafficking in human beings, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings. [4] In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2».

of at least five years of imprisonment» or of ten years in case the crime is carried out in aggravating circumstances.

An innovative step introduced by the Directive was the development of the regulation of jurisdiction. Indeed, According to Article 10, jurisdiction extends to whether the «*offence is committed in whole or in part within their territory or the offender is one of their nationals»*. The second paragraph of the Article provides that Member States may extend jurisdiction over the offences committed outside their territory. Although this is very similar to the previous provision, in the Framework decision Member States could decide not to apply this provision when the offence was committed outside their territory[365]. Therefore, the Directive ensures the protection of victims by giving States the possibility of prosecuting also nationals outside of their territories.

Despite its advancements, the Directive has faced criticisms, particularly about the effectiveness of addressing the needs of the victims of trafficking.

One of the biggest criticisms of the Directive is the vagueness of the concepts, hindering the efficient harmonisation of criminal law. For instance, Article 2 refers to «abuse of power», without however highlighting what power means or what it entails. The ambiguity of terms makes it difficult to protect the victims in an efficient manner[366].

Another problem of the Directive is that it introduces provisions that allow Member States to not prosecute or punish the crime. For instance, Article 8 which recognised the principle of non-prosecution, is limited by Recital no. 14 which states that this protection must be granted «*in accordance with the basic principles of the legal system of the relevant Member States».* Therefore, although the Directive aims to harmonise European criminal law, in practice, it is difficult to achieve this as States have their domestic law and principles. This can lead to a general discouragement from the victims who may not feel protected from the legal framework.

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[365] SYMEONIDOU-KASTANIDOU, *Directive 2011/36/EU on Combating Trafficking in Human Beings: Fundamental Choices and Problems of Implementation*, in *New Journal of European Criminal Law*, 2016, 465-482, available at *www.journals.sagepub.com*

[366] DINU, *Implementation of Directive 2011/36/EU: Migration and Gender Issues*,in *European Parliamentary Research Service*, Sept. 2020, available at *www.europarl.europa.eu*

However, the consistent commitment of the EU to develop an efficient legal framework cannot go unnoticed. Indeed, Directive 2024/1217 of the European Parliament and the Council amends Directive 2011/36, to «*further reinforce the fight against human trafficking across the EU by broadening its scope*»[367]. The 2024 Directive broadened the scope of the term «trafficking» by encompassing forced marriage, illegal adoption and surrogacy, and by making them fall under the penalty threshold defined by Article 4 of the previous Directive. There have been also other improvements introduced by the 2024 Directive, such as making it a criminal offence to knowingly use a service provided by someone who is being trafficked. To further increase the protection of victims, the 2024 Directive has also introduced new aggravating circumstances, in case of the offence being committed by public authorities under their duties or if the perpetrator has committed the crime with the use of technology. To further aid the identification of victims, and help their protection, the Directive requires there to be national anti-trafficking coordinators and formal referral mechanisms[368]. Member States are asked to introduce these new improvements in their national legislation by 2026.

Overall, the amendments to Directive 2011/36 represent a significant step towards a more extensive protection of the victims of trafficking by ensuring the protection of their dignity.

4.2.2. Strategy on Combatting Trafficking in Human Beings

On the 14th of April 2021, the EU Commission adopted a new EU Strategy on Combatting Trafficking in Human Beings. According to the Strategy, the Commission recognises the deprivation of dignity, freedom and fundamental rights trafficking victims endure. Furthermore, the Commission recognises how concerning the crime is in the European Union as it threatens vulnerable victims.

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[367] PINGEN, WAHL, *New Directive to Strengthen Anti-Human Trafficking,* 2024, available at *www.eucrim.eu*

[368] «Other novel issues of the Directive include improvements on the protection of victims of trafficking who may be in need of international protection and strengthened rules on the assistance and support of child victims of trafficking in human beings. Regarding compensation, victims of trafficking in human beings will have access to existing schemes of compensation to victims of violent crimes of intent. Member States may establish a national victims fund for paying compensation to victims. As regards prevention, Member States must take appropriate measures, such as education, training and campaigns, with specific attention to the online dimension. ». *Ibid.*

Indeed, the Strategy specifically takes into consideration the role of COVID-19: «*making it easier for perpetrators to find victims. The pandemic also hindered victims' access to justice, assistance and support, and hampered the criminal justice response to the crime*»[369].

The Strategy asks for a "comprehensive" effort whilst requiring a legal response, aiming to prevent and prosecute the crime whilst also protecting the victim's rights[370]. To ensure this, the Strategy aims include: the promotion of international cooperation; the protecting, supporting and empowering of victims with a specific focus on women and children; breaking the business model of traffickers and reducing the demand that fosters trafficking[371]. The Strategy therefore aims to deconstruct the crime by preventing it and also protecting the victims once the crime has occurred. Furthermore, international cooperation is fundamental as many of the people involved are non-EU citizens.

This Strategy takes a step further in the EU's ongoing effort to strengthen its legal framework and protect victims of human trafficking.

4.2.3. Convention on Action against Trafficking in Human Beings

In 2005, the Council of Europe deemed it necessary to introduce a legal instrument which went beyond recommendations or specific actions and was binding. Therefore, in 2005 it adopted the Convention on Action against Trafficking in Human Beings, which entered into force in 2008. This Convention was the first European Treaty in the context of human trafficking referring to it as a violation of human rights, differently from previous legal instruments which concentrated on the criminal justice response. The Convention is of extreme relevance as it applies

[369] EUR-LEX, *Communication from the Commission To The European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025*, available at *www.eur-lex.europa.eu*

[370] Vice President for Promoting our European Way of Life, Margaritis Schinas, has stated that «Fighting trafficking in human beings is part of our work towards building a Europe that protects. Traffickers prey on people's vulnerabilities. With today's Strategy, we are taking a three-pronged approach, using legislation, policy and operational support and funding in tandem to reduce demand, break criminal business, and empower victims of this abominable crime».

[371] EUROPEAN COMMISSION, Fighting Trafficking in Human Beings: New Strategy to Prevent Trafficking, Break Criminal Business Models, Protect and Empower Victims, 2021, available at *www.ec.europa.eu*

to trafficking regardless of how it is carried out, the victim or the type of exploitation. Therefore, the Convention is characterised by a very broad scope. Furthermore, it is distinguished by a particular monitoring system carried out by the Group of Experts on Action against Trafficking in Human Beings (hereinafter referred to as «GRETA»)[372].

According to the first article of the Convention, its purpose is to prevent and combat trafficking in human beings, protect the human rights of the victims and promote international cooperation. The aims followed by the EU legal framework in the context of human trafficking are very similar. As seen with Directive 2011/36 and its amendment, the EU legal framework is in evolution constantly elaborating on the previous legal instruments.

Similarly to Directive 2011/36, the Convention of the Council of Europe approaches human trafficking with a human rights-based approach. Indeed, it recognises trafficking as a violation of «*human rights and an offence to the dignity and the integrity of human beings».* The concept of dignity is thoroughly elaborated throughout the whole of the legal instrument, recognising State obligations to protect it. For instance, Article 16 regulates the repartition and return of victims, asking for both to be carried out in respect of the safety and dignity of the person. Moreover, the Council of Europe states that its primary concern is the safeguarding of human rights and human dignity, «*and that trafficking in human beings directly undermines the values on which the Council of Europe is based* [...]». This dignity-oriented approach highlights the importance that the Council of Europe gives to the concept and how relevant its protection is.

To ensure the protection of victims' dignity, the Convention adopts a monitoring mechanism which is divided between GRETA and the Committee of the Parties (referring to those State parties to the Convention).

GRETA has the pivotal role of supervising the State's implementation of the obligations contained within the Convention. To do so, the Group meets three times a year. The particularity of the mechanism is that it operates on three different

[372] COUNCIL OF EUROPE, *Action against Trafficking in Human Beings*, 2009, available at *www.coe.int*

levels, where each level of urgency corresponds to a verb. Therefore, the verb «urge» is used when the country's legislation or policy infringes the provisions of the Convention. On the other hand, the verb «consider» asks for further actions from the State to comply with the provisions of the Convention. The verb «invite» is used by GRETA when the authorities are on the right track but still need to put in some effort in specific areas. When the report has been issued, Member States will have a period to comment on it before GRETA issues its final report. The final report is then made public[373].

GRETA's most recent public reports, issued in 2024, focused on Italy. This Report is particularly relevant as it evaluates how Italy protects dignity.

In its report, GRETA urged Italian authorities to combat human trafficking, specifically in the context of labour exploitation. Indeed, the Report identified a high number of victims in Italy fluctuating between 2,100 and 3,800 victims every year. Even more preoccupying is that GRETA considers these figures to be underestimates in comparison to the real ones due to the problems of victim identification. Furthermore, GRETA criticises Italy's role in compensating the victims and protecting them within criminal proceedings. Specifically, it is believed that Italy criminalises the victims, creating a situation of discouragement leading to victims not wanting to report the crimes[374]. Italy will have to respond to this report by 2026. This thesis will elaborate on the Italian legal framework in the context of human trafficking later on[375].

4.3.**Irregular Migration in EU Law**

Crimmigration is the study of criminal and migration law. This phenomenon is very vast as it refers to several legal instruments which tackle a myriad of issues, including racial profiling, discrimination, the criminalisation of irregular migration and the erosion of fundamental rights and human dignity. EU law addresses crimmigration by regulating migration law with different approaches[376].

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[373] ECOI.NET, *Council of Europe - Group of Experts on Action against Trafficking in Human Beings (Coe-Greta),* 2020, available at *www.ecoi.net*

[374] VALENTI, *Council of Europe: Greta Publishes 2024 Report on Human Trafficking in Italy* in *Centro Di Ateneo per i Diritti Umani,* 2024, available at *www.unidp-centrodirittiumani.it*

[375] See *Infra* chap. II, § 5

[376] PAHLADSINGH, *Crimmigration and the Return Directive*, 2023, available at *www.eulawlive.com*

The EU legal framework is composed of a complementary set of legal instruments regulating different stages of migration. For instance, the Schengen Border Code regulates the external borders of the Schengen area. On the other hand, the Return Directive provides legal protection for those individuals who don't have a legal basis to remain within the country anymore. This thesis section will now analyse how these legal instruments work together and how they protect irregular migrants' dignity.

The Schengen area was first introduced in 1985 by five EU countries: France, Germany, Belgium, Netherlands and Luxembourg. In time, it has gradually expanded and, at present, it includes 29 countries[377]. The Schengen area is seen as one of the greatest achievements of the European Project as it has created an area without internal border controls aiming to enhance cooperation among countries. Specifically, some of the aims of the Schengen area have been to protect citizens by fighting against terrorism, organised crime, trafficking in human beings and irregular migration[378].

The Schengen area is regulated by Regulation 2016/399 of the European Parliament and of the Council. The Regulation encompasses 45 different articles, divided into general provisions, two chapters and the final provisions.

Article 2 of the Regulation defines internal borders by referring to them as «*the common land borders* [...] *the airports of the Member States for internal flights* [...] *sea, river and lake ports of the Member States* [...]*».* On the other hand, external borders are defined as «*Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders».* The scope of the Regulation is to ensure that individuals enjoy their right to free movement whilst also protecting refugees and those requesting international protection. Article 4 also refers to the importance of fundamental rights by ensuring that individuals are always protected

[377] These 29 countries are: Germany, Austria, Belgium, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

[378] COUNCIL OF EUROPE, *The Schengen Area Explained*, 2025, available at *www.consiulim.europa.eu*

by a human rights-based approach[379]. The Regulation also constantly refers to the principle of non-refoulement, highlighting the positive obligations recognised to States.

In June 2024 the Council of the European Union adopted the reform to the Schengen Borders Code. This reform was deemed necessary to tackle the migration crisis, the public health emergency crisis of COVID-19 and also to increase the protection of internal borders from serious threats. Furthermore, the amendments of the Code introduced a new transfer procedure, granting Member States the authority to return third-country nationals who are illegally in their territory[380]. Although this latter transfer procedure was introduced to face irregular migration, it has raised concerns about pushbacks and human rights violations.

Indeed, these amendments have not been without criticism. Many have lamented the violation of fundamental rights, the infringement of dignity, and the overall violation of general principles of EU and international law. This reforms risks heightening racial profiling by increasing internal border controls and by recognising an increased unregulated power to police officers. Police officers may engage in racial profiling, targeting individuals based on their appearance rather than legal factors. Similarly, using unregulated surveillance also risks infringing on fundamental rights and the protection of privacy rights[381].

While the Schengen Border code regulates the internal and external borders, the Return directive complements this legal framework by governing the return of third-country nationals[382] through transparent procedures which respect human dignity and fundamental rights.

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[379] Article 4 of the Regulation: «When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis».

[380] EUROPEAN COUNCIL, *Council Formally Adopts Update of Schengen Border Code*, 2024, available at *www.consiulim.europa.eu*

[381] ASGI, *Schengen Border Code Reform Threatens Individual Rights and Freedom of Movement, Says New Report by Human Rights Ngos,* 2025, available at *www.asgi.it*

[382] Article 2 of the Return Directive regulates its scope, stating that: «This Directive applies to third-country nationals staying illegally on the territory of a Member State. [2] Member States may decide not to apply this Directive to third-country nationals who: a) are subject to a refusal of entry in

Directive 2008/115, also known as the «Return Directive», was adopted on the 16th of December 2008 by the European Parliament and the Council of the EU. The Return Directive is structured into five chapters encompassing 23 articles founded on the respect of human dignity and the protection of fundamental rights. Within these articles, the Return Directive regulates the distinction between mandatory and voluntary return, preferring the latter. Voluntary departure is regulated by Article 7 of the Return Directive, where the first paragraph grants a period between seven and thirty days for the voluntary return of migrants. However, the second paragraph ensures the protection of fundamental rights by recognising the possibility of extending this period by analysing «*specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links».* The respect for the rights of migrants is further encompassed within the fourth paragraph of Article 6, stating that «*Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued* [...]».

The CJEU has played a pivotal role in the interpretation of the Return Directive. Indeed, after its initial ruling in the Kadzoev case in November 2009[383], it has issued more than 30 rulings[384] interpreting the Return Directive[385]. For instance, a relevant judgment highlighting the CJEU interpretation to ensure its effective implementation whilst safeguarding rights is the Abdida judgment[386]. The Abdida judgment addresses the return of irregular migrants suffering from serious illness. The CJEU held that Articles 5 and 13 of the Return Directive, read together

accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State; b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. 3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.».

[383] CJEU, Grand Chamber, 30.11.2009, C-357/09 in *InfoCuria*

[384] Some of these being CJEU Judgments: C-61/11, El Dridi; C-146/14 PPU, Mahdi; C-473/12 and C-514/13 Bero and Bouzalmate; C-82/16, Ka and Others.

[385] MOLNAR, *The Impact of ECtHR Case-Law on the CJEU's Interpreting of the EU's Return Acquis: More than It First Seems?* 2022, available at *www.akjournals.com*

[386] CJEU, Grand Chamber 18.12.2014, C-562/13, in *InfoCuria*

with the Charter of Fundamental Rights, require the suspension of a return decision if the «*enforcement of that decision may expose that third country national to a serious risk of grave and irreversible deterioration in his state of health*»[387].

In 2013, as requested by Article 19 of the Return Directive, the European Commission issued its first evaluation. Overall, the Commission deemed the Directive to have had some positive consequences, even if it realised that States were not systematically collecting data[388]. Following the assessment, in 2018 the European Commission published a recast proposal for the Return Directive, also referred to as the Return Regulation. In case of adoption, the Return Regulation would substitute the Return Directive, elaborating on the already existing provisions. For instance, it would remove the minimum period of time for the voluntary return and only impose a maximum return period of 30 days. However, the proposal would also introduce new provisions, including the European Return Order, which establishes the mutual recognition of return decisions issued by Member States. This means that if an individual receives a return decision in one Member State and subsequently seeks protection in another, the second Member State would be required to recognize the original decision and could proceed with their removal from the EU[389]. Nevertheless, no negotiations have occurred for the adoption of the Return Regulation.

[387] The Grand Chamber in C-562/13 ruled that: «Articles 5 and 13 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, taken in conjunction with Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union and Article 14(1)(b) of that directive, are to be interpreted as precluding national legislation which: a) does not endow with suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a Member State, where the enforcement of that decision may expose that third country national to a serious risk of grave and irreversible deterioration in his state of health, and b) does not make provision, in so far as possible, for the basic needs of such a third country national to be met, in order to ensure that that person may in fact avail himself of emergency health care and essential treatment of illness during the period in which that Member State is required to postpone removal of the third country national following the lodging of the appeal».

[388] EISELE, *The Return Directive 2008/115/EC European Implementation Assessment* in *European Parliamentary Research Service*, 2020, available at *www.europarl.europa.eu*

[389] ECRE, *Proposal for an EU Return Regulation* in *European Council on Refugees and Exiles,* 2025, available at *www.ecre.org*

4.3.1. Facilitators Package

The Council Directive 2002/90/EC (also known as "Facilitation Directive") and the Council Framework Decision 2002/946/ JHA are jointly known as the «Facilitators Package». These two legal instruments represent one of the cornerstones of crimmigration, as it regulates European Criminal Law in relation to the facilitation of unauthorised entry, transit and residence.

The EU law presents a much broader interpretation of facilitation than the one present in the Palermo Protocol of international law. Indeed, Article 1 of the Facilitation Directive has an extensive scope of application, covering multiple factual and legal hypotheses[390]. The first paragraph of Article 1 provides that «*Each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens»,* However, the so-called humanitarian clause in Article 1(2) of the Directive is not mandatory, leaving it to the discretion of Member States to decide whether to impose sanctions for the behaviour identified in paragraph 1 (a).

The broad interpretation introduced by the legal instrument has led some to criticise the existing legal framework for its overcriminalisation and hindering of fundamental rights. A general response has been asking to reform the legal framework; however, the Commission has decided to not follow the request. Nevertheless, a possible new interpretation may be introduced with the CJEU ruling of the Kinshasa judgment, recently renamed to Kinsa[391].

The case at hand concerns a request for a preliminary ruling submitted from the Tribunal of Bologna (Italy) regarding the compatibility between the Facilitators Package, the Italian legislation and the principle of proportionality as laid down by

[390] MITSILEGAS, *Reforming the 'Facilitators' Package' through the Kinsa Litigation: Legality, Effectiveness and Taking International Law into Account* in *Rivista Eurojus,* 2024, available at *www.rivista.eurojus.it*
[391] CJEU, Grand Chamber, 21.07.2023, C-460/23, in *EUR-LEX*

Article 52 (1) of the Charter of Fundamental Rights[392]. In the case, Kinsa was arrested at the Bologna airport for facilitating irregular entry after attempting to cross border controls using false documents for herself, her daughter and niece. The act was not carried out for profit but rather for humanitarian reasons. Therefore, the Italian referring judge questioned whether the criminalisation of such humanitarian conduct was in contrast with the principle of proportionality, arguing that the restriction is not necessary and disproportionate in the strict sense[393].

Although the CJEU has not yet given its final judgment on the case, if it were to align with this proportionality argument, it could shift to a more dignity-orientated and humanitarian approach interpretation of the Facilitator's package. Moreover, it may avoid the overcriminalisation of the phenomenon, as requested by several international humanitarian organisations. For instance, Amnesty International has introduced several possible amendments to introduce within the Facilitators package to increase the protection of irregular migrants. Specifically, Amnesty International has asked to amend the Facilitators Package by interpreting it together with the UN Smuggling Protocol[394]. Other international human rights organisations have also asked for a more specific notion of migrant smuggling and to introduce exemptions for the protection of family members[395].

As this thesis strives to explore, it is evident that there is a constant balance that needs to be found between the safeguarding of human rights, the protection of human dignity and the enforcement of criminal law.

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[392] Article 52 (1) of the Charter of Fundamental Rights provides 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. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others».

[393] ZIRULIA, *Waiting for Kinsa: The Criminalisation of Facilitating Irregular Immigration before the CJEU*, in *Verfassungsblog on Matters Constitutional,* 2024, available at *www.verfassungsblog.de*

[394] For the list of amendments proposed, see AMNESTY INTERNATIONAL, Amnesty International's Considerations on the Facilitators Package, 2025, available at *www.amnesty.eu*

[395] GAHR, *EU: Stop Criminalising Migration in the Facilitator's Package Law*, in *SOS HUMANITY*, 2025, available at *www.sos-humanity.org.*

4.3.2. EUROPOL

EUROPOL (European Union Agency for Law Enforcement Cooperation) is the EU's law enforcement agency that became operational in 1999 after the adoption of the 1995 Europol Convention by the (then) EC Member States. EUROPOL aims to prevent and combat organised crimes, including trafficking in human beings, illicit migration, cybercrime and money laundering[396].

In 2016, following a period of high irregular migration, EUROPOL established the European Migrant Smuggling Centre (EMSC). EMSC aims to help Member States combat migrant smuggling by supporting police and border authorities in introducing anti-smuggling operations. To achieve this aim, the EMSC works together with other EU agencies, such as EUROJUST and Frontex[397].

According to the statistics gathered by EUROPOL, irregular migration and migrant smuggling are still one of the most complex problems. In 2023 alone, it supported 223 operations against migrant smuggling and issued 1,231 operational reports. Furthermore, EUROPOL started referring to the exponential growth of migrant smuggling occurring through the use of digital platforms. For this reason, in April 2024 it hosted a conference which discussed the difficulties in investigating the digital dimension of migrant smuggling[398].

To further strengthen the role of EUROPOL in preventing and combating migrant smuggling COREPER reached an agreement in 2024. The agreement aimed to ensure the protection of the security of EU citizens, ensuring that EUROPOL used all instruments to find criminals. For instance, by using biometric data to find those criminals that hide behind false identities[399].

This analysis of EUROPOL's role as an EU agency is fundamental to portraying how law enforcement mechanisms complement the EU's criminal legal framework.

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[396] EUROPEAN UNION, *Europol - Cooperazione Nell'attività Di Contrasto: Unione Europea,* available at *www.european-union.europa.eu.*

[397] EUROPOL, *European Migrant Smuggling Centre – EMSC,* available at *www.europol.europa.eu*

[398] EUROPEAN COMMISSION, *Europol Identifies and Tackles Emerging Threats in Migrant Smuggling and Human Trafficking* in *Migration and Home Affairs*, 2024, available at *www.home-affairs.ec.europa.eu*

[399] EUROPEAN COUNCIL, *Migrant Smuggling: Enhanced Role of Europol in Fighting Migrant Smuggling,* 2024, available at *www.consilium.europa.eu*

5. ITALIAN CRIMINAL LAW: HUMAN TRAFFICKING AND IRREGULAR MIGRATION

5.1. Human Trafficking in Italian criminal law

For several years Italy has had a central role in human trafficking and irregular migration. This is specifically due to its geographical position, which has made it both a destination but also a transition country. For this reason, a legal framework prevents the crime whilst also protecting victims of trafficking.

The Italian criminal legal framework on human trafficking is subject to law no. 228/2003 (also referred to as «*Measures against trafficking of human beings*») and the following legislative decree no. 24/2014, which adopted Directive 2011/36/EU. Furthermore, the legislative decree has also broadened the scope of law no. 228/2003: introducing the regulation of victim compensation. Nowadays, the Italian criminal legal framework on the trafficking of human beings balances Italian law, international conventions and EU law.

Law no. 228/2003 has had a pivotal role in amending articles 600, 601 and 602 of the Italian criminal code. The amendments were centred around slavery and human trafficking[400].

Article 601 specifically governs human trafficking. The provision aims to protect the *status liberatis* and human dignity of the victims[401]. Under this provision, anyone who recruits brings into the territory of the State, transfers abroad, transports, transfers control over an individual, or harbours one or more persons that are under the conditions referred to in Article 600 of the Italian Criminal Code, or engages in the same conduct on one or more persons, by deception, violence, threats, abuse of authority, or by taking advantage of a situation of vulnerability, physical or mental inferiority, or necessity, or by promising or giving money or other benefits to the person who exercises authority over them, to induce or compel them to perform labour or sexual services, to engage in begging, or otherwise to carry out unlawful activities involving their exploitation, or to

[400] CAMERA DEI DEPUTATI, *La Tratta di Essere Umani: Quadro Normativo*, 2018, available at *www.camera.it*
[401] Article 601 of the Italian Criminal Code «*Tratta Di Persone*» in *www.brocardi.it*

undergo the removal of organs, shall be punished with imprisonment from eight to twenty years[402].

Article 601 of the Italian criminal code is a very complex provision, encompassing two alternative offences. The first one involves general intent whilst the second one requires specific intent[403] (translated from Italian «*dolo generico*» and «*dolo specifico*»)[404]. Therefore, the articles encompass two different situations which may lead to the offence: the first one refers to when the individual is enslaved or under servitude, while the second one is when trafficking aims for sexual, labour exploitation, or the removal of organs. According to judgment n. 39797/2015, for there to be an offence it is not necessary that the crime has been committed but that the specific intent of the offender to commit the crime was present[405].

As provided by Article 601 of the criminal code, human trafficking may also occur when victims are subjected to servitude or slavery as provided by Article 600. However, these two articles are distinct. Whilst Article 600 requires the victim to be enslaved, Article 601 does not, meaning that trafficking may occur without the individual necessarily being in a state of enslavement. Nevertheless, decision no. 14843/2024 of the Italian Supreme Criminal Court has provided that these two

[402] Literal translation of Article 601 of the Italian criminal code. The original version provides: «*È punito con la reclusione da otto a venti anni chiunque recluta, introduce nel territorio dello Stato, trasferisce anche al di fuori di esso, trasporta, cede l'autorità sulla persona, ospita una o più persone che si trovano nelle condizioni di cui all'articolo 600, ovvero, realizza le stesse condotte su una o più persone, mediante inganno, violenza, minaccia, abuso di autorità o approfittamento di una situazione di vulnerabilità, di inferiorità fisica, psichica o di necessità, o mediante promessa o dazione di denaro o di altri vantaggi alla persona che su di essa ha autorità, al fine di indurle o costringerle a prestazioni lavorative, sessuali ovvero all'accattonaggio o comunque al compimento di attività illecite che ne comportano lo sfruttamento o a sottoporsi al prelievo di organi*».

[403] The intent distinguishes between the general and the specific one. The generic intent entails that the offender wants to generally commit a crime whilst, the specific one, entails that the offender wants to commit a specific crime.

[404] Italian criminal Supreme Court judgment no. 20726/2024 has stated the distinction between the first and the second offence provided by Article 601 of the Italian criminal code. The original judgment provides that: «*La prima ipotesi prevista è a dolo generico, mentre per la seconda è richiesto il dolo specifico, individuato nel fine di indurre le vittime o costringerle alle prestazioni, già prima elencate, che ne comportano lo sfruttamento, o a sottoporsi al prelievo di organi (...) in sintesi, nel fuoco del dolo specifico entrano quelle situazioni che integrano il secondo degli eventi costitutivi della fattispecie di riduzione in servitù (...)*». (Sez. 1, n. 35992 del 05/03/2019, Omorodion, Rv. 276718).

[405] SINDACATO ITALIANO APPARTENENTI POLIZIA, *Delitti contro la dignità della persona,* 2018, available at *www.siap-polizia.org.*

offences may be prosecuted cumulatively when there is no objective unity of the criminal conduct[406].

Law 228/2003 has furthermore widened the scope of the article to encompass any vulnerable individuals. Paragraph 2 of Article 601 deems that the offence also occurs when the victims are minors. The vulnerability of the victim and the protection of their dignity is also accentuated by the fact that victim's consent cannot be used as a defence.

To hinder the trafficking of human beings by sea, the last two paragraphs of Article 601 regulate specific aggravating circumstances, increasing the punishment by a third in cases where the captain or officer of a national or foreign vessel commits or is complicit in the offence. Moreover, a crew member of a national or foreign vessel who is part of trafficking shall be punished with imprisonment from three to ten years.

The legal framework is completed with Article 602 of the Italian Criminal Code[407], which regulates all situations outside of Article 601. Therefore, Article 602 completes the general framework of human trafficking.

Law 228/2003 has also introduced several other novelties in the general context of Articles 600, 601 and 602 of the Italian Criminal Code.

First, the law has played a pivotal role in reforming Article 416 of the Italian Criminal Code, which regulates criminal association (translated from Italian «*associazione a delinquere*»). The article increases the punishment in the hypothesis in which criminal association occurs to commit the crimes provided by articles 600, 601 and 602 of the Italian criminal code.

Second, the law has also introduced a fund for the anti-trafficking measures. The fund aims to finance assistance and social integration programs for the

[406] Summary Decision no. 14843/2024 of the Italian criminal Supreme Court, original version: «*Il reato di riduzione in stato di servitù (art. 600, comma primo, seconda ipotesi, cod. pen.) concorre con il reato di tratta di persona libera (art. 601, comma primo, seconda ipotesi, cod. pen.), poiché, difettando l'unicità naturalistica del fatto, non sussiste un rapporto di specialità ai sensi dell'art. 15cod. pen. tra le due fattispecie, né le stesse contengono clausole di riserva che consentano l'applicazione delle figure dell'assorbimento, della consunzione o del "post-factum" non punibile. (Fattispecie relativa a vittime che, convinte a lasciare il loro Paese con la prospettiva di trovare un lavoro lecito all'estero, giunte in Italia erano state poste in stato di servitù e indotte a prostituirsi)*». (Rigetta, CORTE ASSISE APPELLO BOLOGNA, 28/06/2023)

[407] Article 602 of the Italian criminal code translated in English: «Anyone who, outside the cases referred to in Article 601, purchases, sells, or transfers a person who is in one of the conditions described in Article 600 shall be punished with imprisonment from eight to twenty years.».

victims[408]. Law no. 197/2002 has then increased the fund to a total of 2 million euros per year and, from 2024 onwards, increased the fund to 7 million euros per year[409]. This increase has been fundamental in enhancing support for victims, ensuring greater access to resources and improving their protection.

Overall, law 228/2003 has provided a broader legal framework which aims to thoroughly protect trafficked victims.

5.1.1. Labour exploitation

In 2022, there were 2.422 victims of trafficking in comparison to the 3.799 victims of 2019. The predominant exploitation form was sexual exploitation (amounting to 59% of the victims in 2022 in contrast to 84% in 2018). Although these statistics portray a decreasing tendency in numbers, labour exploitation increased by 28% between 2018 and 2022 (from 10% to 39). Indeed, labour exploitation has been one of the biggest concerns for Italy in the last few years as it is constantly increasing. The areas of work most at risk are agricultural work and industry workers. Other illegal activities include forced begging, domestic servitude, forced marriage and drug dealing[410].

Central to the topic of labour exploitation is Article 603*bis* of the Italian criminal code. The original version of the article saw as central to the offence the act of intermediation of he who exploited the workers. However, this provision had a very residual nature due to the difficulties of the burden of proof and due to the preference of the broader scope of Article 600. For these reasons, law no. 199/2016 amended the article to widen the scope of the Article[411].

Article 603*bis* encompasses four paragraphs. The first paragraph encompasses two distinct situations, where the first one hinders the activities of the

[408] CAMERA DEI DEPUTATI, *La Tratta di Essere Umani: Quadro Normativo*, 2018, available at *www.camera.it*
[409] GOVERNO ITALIANO, *Tratta degli esseri umani e grave sfruttamento,* available at *www.pariopportunita.gov.it*
[410] PLEUTERI, *Tratta di essere umani: la situazione in Italia,* 2024, available at *www.osservatoriodiritti.it*
[411] TORRE, *Lo sfruttamento del lavoro. La tipicità dell'art. 603-bis cp tra diritto sostanziale e prassi giurisprudenziale,* in *Questione Giustizia,* available at *www.questionegiustizia.it*

so-called *caporalato*: hence, the exploitation of workers from an intermediate individual. The second one simply punishes labour exploitation as a general concept regardless of the presence of the intermediate individual or not. For the individuals to be exploited, the state of need of the workers needs to be taken advantage of. This article has been interpreted by judgment no. 43662/2024 of the Italian Criminal Supreme Court.

The Supreme Court's interpretation first referred to the use of terminology, specifically the distinction between intellectual work and manual labour. Indeed, the first paragraph of the article only refers to manual labour. The interpretation of the Supreme Court deemed that intellectual work could not enter within the scope of Article 603*bis*[412] due to the greater degree of intellectual autonomy.

Furthermore, the Supreme Court analysed the terminology «state of need» used within the Article. The Court reflects on the lack of explanation of the notion, stating that it is necessary to interpret the concept on a case-by-case basis. There is, however, a predominant idea of the doctrine that believes that the state of need is interlinked with the idea of vulnerability of the individual as found within Article 600. The state of need refers, therefore, to a grave economic pressure put on the individual[413].

Although the article refers to labour exploitation, the term exploitation and what it encompasses is not defined by the provision. Rather, the third paragraph refers to specific indicators that identify exploitation, including an inconsistent payment of wages in comparison to the national or territorial collective agreements concluded by the representative trade unions at the national level, or otherwise disproportionate concerning the quantity and quality of work performed; the repeated infringement of regulations related to working hours, rest periods, weekly

[412] First paragraph of Article 603bis of the Italian criminal code (italian): «*Salvo che il fatto costituisca più grave reato, è punito con la reclusione da uno a sei anni e con la multa da 500 a 1.000 euro per ciascun lavoratore reclutato, chiunque: 1) recluta manodopera allo scopo di destinarla al lavoro presso terzi in condizioni di sfruttamento, approfittando dello stato di bisogno dei lavoratori; 2) utilizza, assume o impiega manodopera, anche mediante l'attività di intermediazione di cui al numero 1), sottoponendo i lavoratori a condizioni di sfruttamento ed approfittando del loro stato di bisogno. Se i fatti sono commessi mediante violenza o minaccia, si applica la pena della reclusione da cinque a otto anni e la multa da 1.000 a 2.000 euro per ciascun lavoratore reclutato*.»

[413] PARZIALE, *Sfruttamento del lavoro intelletuale e caporalato: la Cassazzione traccia i confini della fattispecie* in *Rivista Penale Diritto e Procedura,* 2025, available at *www.penaledp.it*

rest, mandatory leave and holidays; violation of safety and hygiene regulations and subjecting the workers to degrading worker conditions, methods of surveillance or housing situations[414]. All these elements act as guidelines to interpret the offence leading to labour interpretation. The infringement of even only one of these indicators will integrate labour exploitation[415].

The role of the provision to protect human dignity has been stated several times. Furthermore, this is also portrayed from the positioning of the Article within the Italian criminal code. Indeed, it is found within the thirteenth title of the code, which refers to the offences against the person, and specifically within chapter 3, regulating the offences against the individual personality[416]. Therefore, the aim of law no. 199/2016 was to further protect the human dignity of the victims of trafficking whilst introducing complementary provisions concerning Articles 600 and 601 of the Italian criminal code.

5.1.2. Judgment no. 2319/2024

Judgment no. 2319/2024 of the Italian Criminal Supreme Court is a pivotal representation of how the Italian jurisprudence is constant in trying to safeguard human dignity in the trafficking of human beings. Indeed, in the case at hand, the Court reflected upon the possible exemptions a victim of trafficking can refer to when committing a crime whilst being trafficked.

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[414] Translation from the original Italian version of paragraph 3 of the Article, which provides (Italian version): «*Ai fini del presente articolo, costituisce indice di sfruttamento la sussistenza di una o più delle seguenti condizioni: 1) la reiterata corresponsione di retribuzioni in modo palesemente difforme dai contratti collettivi nazionali o territoriali stipulati dalle organizzazioni sindacali più rappresentative a livello nazionale, o comunque sproporzionato rispetto alla quantità e qualità del lavoro prestato; 2) la reiterata violazione della normativa relativa all'orario di lavoro, ai periodi di riposo, al riposo settimanale, all'aspettativa obbligatoria, alle ferie; 3) la sussistenza di violazioni delle norme in materia di sicurezza e igiene nei luoghi di lavoro; 4) la sottoposizione del lavoratore a condizioni di lavoro, a metodi di sorveglianza o a situazioni alloggiative degradanti*».

[415] TORRE, *Lo sfruttamento del lavoro. La tipicità dell'art. 603-bis cp tra diritto sostanziale e prassi giurisprudenziale,* in *Questione Giustizia,* available at *www.questionegiustizia.it*

[416] VITARELLI, *La Cassazione sull'ambito di operatività del delitto di intermediazione illecita e sfruttamento del lavoro (art. 603 bis c.p.)* in *Sistema Penale*, 2022, available at *www.sistemapenale.it*

The case at hand refers to a Nigerian woman who was trafficked through sexual exploitation. Due to the amount of debt that she had, she started selling drugs to the traffickers. She was then arrested for illegal transportation of drugs.

The woman decided to appeal to the Appeal Court, which believed she did not find herself in the impossibility of asking for police authority or removing herself from the criminal situation.

Contrary to the decision of the Appeal Court, the Supreme Court believed that the decision was vague and did not reflect the reality of the facts. Indeed, the Supreme Court started reconstructing the crime by referring to the international and European criminal legal framework. Specifically, the Supreme Court referred to the Varsavia Convention, Directive 2011/36 and the legislative decree no. 24/2014. Regarding the Varsavia Convention, the Court specifically reflected on Articles 10, which identifies victims of trafficking, and Article 26, which governs State obligations to not criminalise acts carried out by victims of trafficking whilst trafficked. Moreover, the Supreme Court also reflected on the ECtHR case law and the violation of Article 4 of the ECHR in the general context of human trafficking[417]. These legal instruments have already been discussed in detail earlier in this thesis.

Due to the already existing international legal framework, and to the complexity of the situation, Italy referred to the 2019 Report published by GRETA. Such a report asked for Italy to better recognise victims of trafficking and deemed that there was no exemption article within the Italian legal framework[418].

For the aforementioned reasons, the Supreme Court decided to analyse paragraph 1 of Article 54 of the Italian Criminal Code, also referred to as the "State of Necessity". Article 54 allows for non-punishment when the crime is committed to ensure the safety of others from an actual danger of seriously harming someone, may not be punished[419]. Therefore, the Court deemed that this article was

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[417] MASSARO, *Stato di neccessità per reati commessi da vittime di tratta: l'art 54 c.p. tra principi generali e interpretaizone conforme* in *Giustizia Insieme,* 2024, available at *www.giustiziainsieme.it*

[418] FAZZERI, *Stato di necessità ed interpretazione convenzionalmente conforme: la Corte di Cassazione si pronuncia sulla "vittima di tratta"*, 26 Marzo 2024.

[419] The original version of paragraph 1 Article 54 of the Italian criminal code states that: «*Non è punibile chi ha commesso il fatto per esservi stato costretto dalla necessità di salvare sé od altri (1) dal pericolo attuale di un danno grave alla persona(2), pericolo da lui non volontariamente causato(3), né altrimenti evitabile, sempre che il fatto sia proporzionato al pericolo*».

appropriate to find a balance between the safeguarding of human rights and contrasting interests.

For the Article to apply, the Court introduced a two-step approach. The first step consists of asserting whether the individual fell within the notion of a trafficking victim. If such a definition is integrated, then it is necessary to analyse whether paragraphs 1 and 3[420] of Article 54 may be adopted. However, the Court has also deemed it necessary to interpret the article with a human-rights-based approach. Furthermore, the State should not infringe upon its international responsibility as regulated by articles 10, 11 and 117 of the Italian Constitutional code[421].

The Court has regulated three moments in which the exemption may be adopted. The first one is for those crimes which are committed when the individual is irregularly on the territory. The second one occurs when the trafficker gains from the act, such as through the selling of drugs or sexual exploitation. Lastly, the exemption can also be adapted for those crimes committed when trying to free themselves from being exploited[422].

Overall, this judgment marks a progressive shift in Italian jurisprudence by protecting victims of trafficking through a new perspective and taking into consideration the reason behind the committing of the crime. This new approach further protects the dignity of victims by avoiding that they endure further mistreatment also from public authorities.

5.2.**Irregular Migration in Italian Criminal Law**

Italian criminal law is embedded in the principle of subsidiarity, which provides that the legislator resorts to criminal punishment only as a last resort. This concept is embedded within Article 13 of the Constitution which protects the

[420] Paragraph 3 of Article 54 of the Italian criminal code states that (original version): «*La disposizione della prima parte di questo articolo si applica anche se lo stato di necessità è determinato dall'altrui minaccia; ma, in tal caso, del fatto commesso dalla persona minacciata risponde chi l'ha costretta a commetterlo*».
[421] FAZZERI, *Stato di necessità ed interpretazione convenzionalmente conforme: la Corte di Cassazione si pronuncia sulla "vittima di tratta"* in *Sistema Penale,* cit.
[422] *Ibid.*

inviolability of personal freedom. However, in matters of crimmigation, some argue that the Italian legislator tends to over-criminalise the phenomenon.[423]

The regulation of Italian crimmigration has been a recent phenomenon, specifically developing around the 1990s. However, the legal framework, highly influenced by both International and European law, was immediately deemed complex. The first Italian law was the Martelli law (Law no. 39/1990), which regulated both asylum seekers' and migrants' rights. Regarding irregular migration, the Martelli law provided for several concepts such as the regularisation of those individuals within the Italian territories but also the criminalisation and punishment provisions. This law was then followed by the Turco-Napolitano law, adopted in 1998. The Turco-Napolitano law aimed to introduce a general legal framework regulating migration and contrast specifically irregular migration. In the same year, also the Consolidated Act on Immigration was adopted with legislative decree no. 286/1998[424].

The Consolidated Act on Immigration is divided into 6 different chapters, including the general principles; the provisions regarding entering and exiting the Italian territory; labour-related provisions; minors protection and health-related provisions.

The offence of illegal migration was introduced by law no. 94/2009, and is now regulated by Article 10*bis* of the Consolidated Act on immigration, punishing the illegal migrant that enters or remains on the territory with the payment of a sum that varies from 5000 to 10000 euros. This offence applies only if the individual has not committed a more serious offence. However, Article 10*ter* states a need to protect irregular migrants who arrive by sea in case of health or sanitary assistance.

Article 16 of the Consolidated Act states that the fine for irregular migrants may be substituted with its expulsion from the State. This provision has also been interpreted by the ECtHR in the Sagor judgment[425]. In the case at hand, the Italian Court had referred a preliminary ruling asking for an interpretation of the national

[423] MENTASTI, *The criminalisation of migration in Italy: Current tendencies in the light of EU law. New Journal of European Criminal Law* in *Institutional Research Information System*, 2022, 502-525, available at *www.air.unimi.it*
[424] MORGESE, *Lineamenti della Normativa Italiana in Materia di Immigrazione,* 2018, available at *www.unisalento.it*
[425] *Ibid.*

law and European law for the punishment of Mr Sagor's illegal stay. According to the European Court of Justice interpretation «*Directive* [2008/115] *does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down criminal sanctions to deter and penalise such an infringement*»[426]. Furthermore, the Court provided that the Court can return the migrant even if criminal proceedings are pending[427].

Another important article within the Consolidated Act on immigration is Article 12, punishing the aiding and abetting of immigration. Indeed, the Act punishes whoever helps, organises or aids the transportation of irregular migrants within the State. The offence is punished with imprisonment from one to five years and with a 15.000 euro fine. The fifth paragraph of the same provision increases the punishment in the case in which the offender gains from the exploitation of the migrant. However, it is also important to consider the second paragraph of Article 12, clarifies that humanitarian assistance does not constitute an offence.

5.2.1. «Pacchetto Sicurezza»: Security Package

The first-ever «Pacchetto Sicurezza» was proposed and adopted in 2008. This legal instrument aimed to ensure broader protection against clandestine immigration, organised crime and a stronger fight against the mafia[428]. Since then, the Pacchetto Sicurezza has been amended and integrated.

On the 18th of September 2024, a new amendment to the Pacchetto Sicurezza has been proposed. The proposed amendment has sparked debate regarding its potential impact on the regulation of crimmigration in the Italian legal framework.

In the general context of irregular migration, the Pacchetto Sicurezza proposed to modify Article 14 of the Consolidated Act of immigration introducing a provision punishing uprisings within reception and detention facilities for

[426] CJEU, GRAND CHAMBER, 6.12.12, C-430/11 Sagor judgment in *Info Curia*
[427] *Ibid.*
[428] MINISTERO DELL'INTERNO, *Pacchetto Sicurezza: Misure per rendere più sicura la vita dei cittadini. Patti per la sicurezza, available at www.interno.gov.it*

migrants[429]. Specifically, the provision includes punishment for the so-called «passive resistance» (translated from Italian *resistenza passiva)* behaviour of the migrant. The proposal in this case refers to all of the areas and facilities in which irregular migrants are placed after entering Italy. The provision would punish the irregular migrants with detention for one to four years.

The criticism of the provisions attains both to the ambiguity and vagueness of the terminology used and to the areas in which the provision could be adopted. Indeed, the prevalent criticism refers to the fact that punishing the passive behaviour of irregular migrants within the context of said facilities may result in the over-criminalisation of this behaviour. Therefore, rather than punishing the act itself, some question whether the provision aims to criminalise the migrant[430].

Criticism of such legal instruments has come specifically from international human rights organisations, which have deemed the provisions within the Pacchetto Sicurezza to violate human rights. For instance, the Italian section of Amnesty International has specifically asked the Parliament to look over the proposal before implementing it[431].

5.2.2. Impact of ECJ Case Law

One of the most problematic aspects of Italian criminal law has been the regulation of imprisonment for irregular migrants, specifically in relation to Directive 2008/115/EC regulating the return of irregular migrants[432]. There have been two pivotal cases issued by the ECJ explaining how to interpret the Consolidated Act of Immigration in light of Directive 2008/115/EC. The two cases were the El Dridi[433] and the Celaj[434] judgments.

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[429] Specifically referring to the «CFR», hence the Permanent centers for migrants who are returning; the «hotspots», hence the areas of identification of migrants; the «CAS», hence the "«extraordinary» reception facilities and also the «SAI» hence the structures within the system of reception and integration.
[430] PASINI, *L'impatto del c.d. pacchetto sicurezza sulle persone straniere in Italia e sul fenomeno dell'immigrazione* in *Sistema Penale*, 2024, available at *www.sistemapenale.it*
[431] AMNESTY INTERNATIONAL, *Pacchetto sicurezza: le nostre preoccupazioni sul progetto di legge,* 2024, available at *www.amnesty.it*
[432] Directive 2008/115/EC is the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals
[433] CJEU, Grand Chamber, 28.04.11, Case C-61/11, *EL DRIDI* judgment, in *InfoCuria*
[434] CJEU, Grand Chamber, 01.10.2015, Case C-290/14, CELAJ judgment, in *InfoCuria*

The first case concerned Hassen El Dridi who had been sentenced to one year of detention after not abiding by the order of exit for having illegally entered Italy. After having appealed the judgment of the first Court, the Court of Appeal of Trento referred a question to the ECJ regarding the interpretation of Article 14.5*ter* of the Consolidated Act on immigration. This article had been previously amended by the Bossi-Fini Law and provided the detention of the individual who had entered illegally within the country. Therefore the Court of Appeal question regarded the interpretation of this article in light of Articles 15 and 16 of the Return Directive, which regulated the procedures and limits regarding the detention of foreign nationals in immigration detention centres[435].

In the case at hand, the Court of Justice reflected on the Return directive, analysing its fundamental role in balancing the safeguarding of human rights and the return procedures. According to paragraphs 57 and 58 of the judgment of the Court of Justice[436], the Member State may not adopt a custodial sentence on the sole ground that the individual has entered the country illegally. This decision was embedded in the idea that the Return directive aims to establish a common standard for return procedures whilst safeguarding fundamental rights. Therefore, this would contrast with national measures which may slow down or create obstacles impeding this procedure.

For the aforementioned reasons, the Italian legislator amended Article 14(5*ter*) of the Consolidated Act on immigration by removing the punishment through detention and replacing it with a fine. All offences related to irregular migration are, therefore, not punished anymore by detention except Article 13 of the Act which regulates the hypothesis of an irregular migrant re-entering within the same country, hence Italy.

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[435] GRIMALDI, *Contrasto all'immigrazione clandestina: il caso El Dridi e i suoi sviluppi* in *IUS In Itinere,* 2018, available at *www.iusinitinere.it*

[436] Article 57 and 58 of the *El Dridi* judgment provide that: «Regarding, more specifically, Directive 2008/115, it must be remembered that, according to recital 13 in the preamble thereto, it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. [58] Consequently, the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, such as that provided for by Article 14(5b) of Legislative Decree No 286/1998, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.»

As a matter of fact, the case Celaj concerned the interpretation of Article 13 paragraph 13 and Article 13*bis* of the Consolidated Act on immigration. Similarly to the previous case, the Florence Court of Appeal referred a question to the Court of Justice asking for an interpretation of the Italian domestic law in light of the Return directive.

The Celaj case regarded an irregular migrant who had been deported in 2012 and prohibited from returning to Italy for three years. In September 2012, Celaj returned to Italy infringing the prohibition.

According to the prevalent decisions of Italian Courts, the El Dridi judgment and the Celaj judgment are completely distinguished from one another. Indeed, in the first case El Dridi had entered for the first time in Italy whilst, in the Celaj case, he had violated the prohibition to return to the country. For this reason, this would explain why Celaj could be punished with a prison sentence and not simply by a fine[437]. Indeed, the same interpretation has also been shared by the Court of Justice, which has stated in its ruling the possibility of punishing the irregular migrant with a prison sentence[438]. The Celaj case has been therefore pivotal for Italian, and European, jurisprudence as it finds a balance between the safeguarding of the rights of irregular migrants and State sovereignty.

The interpretation of the Return Directive is, however, still very controversial in Italian law. The judgments rendered by the Court of Justice point out the prevalence of the EU law in comparison to national law. Indeed, criminal sanctions for irregular migration introduced by the State are limited by the State obligations regulated by EU law.

[437] GATTA, *Le conclusioni dell'Avvocato Generale nel caso Celaj: il colpo di grazia alla detenzione dello straniero a causa della sua condizione irregolare?* In *Eurojus, 2006, available at www.rivista.eurojus.it*

[438] Ruling of the Celaj case: «Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as not, in principle, precluding legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban».

5.2.3. Italian Constitution

To provide a broad overview of the Italian legal framework, it is also important to briefly analyse the role of the Italian Constitution.

The Italian Constitution encompasses 139 articles, of which the first 12 are the fundamental principles. Within these, pivotal for the protection of irregular migrants and safeguarding of their rights are Article 3 and Article 10 of the Constitution.

Article 3 of the Italian Constitution provides the principle of equality. The first paragraph refers to formal equality, by stating that everyone has the same social dignity and is equal in front of the law. This distinguishes from the second paragraph which mentions the substantial equality, calling on the Republic to remove all economic and social obstacles that may discriminate against individuals[439].

Article 3 has been referred to together with irregular migration after the introduction of the 2009 Legge Maroni. Indeed, the law had provided that simply being an irregular migrant constituted an offence[440]. This led many to question whether this provision conformed to Article 3 of the Constitution, as this could have possibly discriminated against irregular migrants.

The opinion generally presented from the Italian Constitutional Court is that the principle of equality as regulated by Article 3 of the Constitution applies to everyone, regardless of whether they are staying in Italy regularly or not[441]. Article 3 should be interpreted in light of Article 2 of the Italian Constitution which recognises fundamental rights to individuals. Therefore, irregular migrants' rights are the ones encompassed within the Italian Constitution unless otherwise restricted or regulated by international or European Union law.

To provide a comprehensive view of the Italian Constitution, it is also important to briefly examine Article 10, which is applicable to asylum-seekers.

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[439] *See*, art. 3 of Italian Constitution, available at www.normattiva.it.

[440] This was initially encompassed within Article 10*bis* of the Consolidated Act of Immigration. As previously mentioned, the Article has now been amended and simply punishes the irregular migrant with a fine.

[441] SALERNI, *L'evoluzione in Italia della legislazione sulla condizione dello straniero, le connesse politiche penali e le ricadute carcerarie* in *Diritto Penitenziario e Costituzione,* available at *www.dirittopenitenziarioecostituzione.it*

Furthermore, the second paragraph of the same article states that the position of foreign nationals will be regulated in conformity with the provisions and treaties of international law. This article, therefore, applies to those individuals who are seeking asylum for fear of danger or death.

CHAPTER III

THE PROHIBITION OF TORTURE

1. THE PROHIBITION OF TORTURE

1.1. Definition of Torture in UNCAT

Torture stands as one of the most severe violations of human dignity, undermining personal freedom and violating fundamental human rights. Due to its broad and harmful nature, it is necessary to have a strong legal framework regulating the crime, requiring a precise definition.

Definitions of torture are found within international law, customary international law, regional and national law. The core definition of international humanitarian law is encompassed in the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as «UNCAT»).

UNCAT aims to achieve a more effective fight against torture. For this reason, Article 1(1) of the Convention defines torture as «*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*»[442].

Although this definition provides a broad scope, it is generally accepted that, where regional or national laws adopt broader definitions of torture, the

[442]OHCHR, Article 1(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly by resolution 39/46 of 10 December 1984, entered into force on the 26th of June 1987, available at *www.ohchr.org.*

UNCAT's definition cannot be used to narrow those interpretations[443]. The broadness of the UNCAT definition is given by the several elements that it comprises. These must be analysed separately to better comprehend it.

Torture may occur from *any act*. This term is used in its broader sense by pursuing the object and purpose of the UNCAT. This includes individual acts; a series of smaller acts viewed as one; an omission or a threat of inflicting a significant level of violence. When referring to omissions, an example of a torture act may be deliberately not providing prisoners with food or water for an extended period[444].

For the offence to amount to torture, the perpetrator must have intentionally inflicted severe pain or suffering on the victim, either physical or mental. However, the interpretation of these elements has been particularly complex. Specifically, many have questioned whether the elements of pain or suffering should be interpreted objectively or subjectively. These issues have arisen from the lack of specific characteristics determining the degree of pain or suffering required for the definition of torture to apply[445]. Nevertheless, there is a lot of case law interpreting these two terms. For instance, the International Criminal Court (hereinafter referred to as «ICC») has stated that «*the severity implies an important degree of pain and suffering and may be met by a single act or by a combination of acts when viewed as a whole. This can be assessed only on a case-by-case basis in the light of all the circumstances of the case. It is not necessary to prove that the pain or suffering involved specific physical injury (such as organ failure), impairment of a bodily function or death*» and that the consequences of the torture do not necessarily have to be visible[446]. Therefore, severe pain or suffering does not necessarily refer to permanent, life-threatening or life-changing physical injuries or mental scars.

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[443] ASSOCIATION FOR THE PREVENTION OF TORTURE, *What is torture?* available at *www.apt.ch/what-is-torture.*

[444] CASEY-MASLEN, *The Definition of Torture under International Law*, in *The Prohibition of Torture and Ill-Treatment under International Law,* Cambridge, 2025, 14-45, available at *www.cambridge.org*.

[445] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Appeals Chamber Judgment, 12 June 2002, Case No. IT-96-23, available at *www.icty.org*.

[446] INTERNATIONAL CRIMINAL COURT, Pre-Trial Chamber IX, 4 February 2021, ICC-02/04-01/15-1762-Red para. 2701, available at *www.icc-cpi.int.*

As stated, severe pain or suffering can result from both a physical and mental harm. While there is no established hierarchy between the two, prevailing case law tends to give greater importance to physical harm rather than mental harm[447]. This imbalance has been pointed out by the UN Special Rapporteur on Torture in his thematic report of 2010, stating that «*equally destructive as physical torture methods* [psychological methods are] *very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations*»[448]. It is, therefore, generally more complicated to define what threshold needs to be reached for there to be mental suffering.

Another constituent element of the definition of torture refers to the intentionality in the infliction of pain or suffering. According to a 2009 ICC decision, «[...] *believes that it is not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe. This interpretation is consistent with paragraph 4 of the General Introduction to the Elements of Crimes. To prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering*»[449].

Unlike other legal instruments, UNCAT believes that severe pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. As this thesis will later explore, the ICCPR[450] and the Rome Statute[451], for instance, do not distinguish between torture carried out by private persons or public officials. The UNCAT, on the other hand, prefers adopting a definition where the State's

[447] There is no formal hierarchy between physical and mental suffering, however, in practice, courts tend to elaborate more extensively on the physical suffering of victims than on their mental suffering. This emphasis reflects evidentiary and procedural realities rather than legal doctrine. The Ilhan v. Turkey judgment, rendered by the ECtHR, is an example of how Courts elaborate more on physical suffering rather than mental suffering. In this case, the Court focused in detail on physical ill-treatment endured by the victim, while references to mental suffering were limited, such as in paragraph 84.

[448] SOGHOMONYAN, *The Element of Severe Pain in the Definition of Torture,* Raoul Wallenberg Institute, 2021, available at *www.rwi.lu.se.*

[449] INTERNATIONAL CRIMINAL COURT, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,* 2009*,* available at *www.icc-cpi.it*

[450] See *Infra*, chap. III, § 2.1.2.

[451] See *Infra*, chap. III, § 2.2.

responsibility prevails. Indeed, States are held responsible for those violations of human rights when committed by formal or informal State actors.

The definition provided by UNCAT is broadened by how State actors may be involved in torture, hence, through instigation, infliction, consent or acquiescence. This list of terms broadens the conduct which may amount to torture as defined by Article 1 of the UNCAT. Particularly, this occurs with the terms «consent» and «acquiescence», which cover torture also when committed by private parties[452]. This means that the State is never exonerated from its duty of due diligence to prevent any infringement of human rights by non-state actors[453]. As this thesis will later expand on, the ECtHR case law has also used a very flexible and broader interpretation of the concept of public officials[454].

Moreover, the UNCAT definition also provides that a «*person acting in an official capacity*» may act as a torturer. However, this part of the Article has led to confusion in its interpretation. For this reason, the Committee Against Torture (hereinafter referred to as «CAT»), has preferred adopting a case-by-case approach according to the case's circumstances[455]. In addition, a pivotal interpretation has also been rendered by the UK Supreme Court in 2019 in the R v. Reeves Taylor judgment. In this judgment, a person acting in an official capacity «*covers any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict*» [456].

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[452] BIRK, MONINA, NOWAK, *Definition of Torture* in The *United Nations Convention Against Torture and Its Optional Protocol* 2019, 23-71, available at *www.global.oup.com*

[453] UNITED NATIONS. OFFICE ON DRUGS AND CRIME, *Module 9: Prohibition against Torture and other Cruel, Degrading Treatment*, available at *www.unodc.org.*

[454] See *Infra* chap. III, § 3.1.

[455] OHCHR. *Interpretation of Torture in the light of the practice and jurisprudence of international bodies.* 2011, available at *www.ohchr.org*

[456] UK SUPREME COURT, R v. Reeves Taylor, para. 69, 2019. In this case, the appellant, Reeves Taylor, arrested for conspiracy to commit torture and for seven counts of torture. The role of the UK Supreme Court was to interpret the terms «person acting in an official capacity» to determine whether Reeves Taylor could be held criminally liable.

The definition provided by the UN Convention is, overall, both broad and complex. However, it has assumed a pivotal role within international humanitarian law, shaping both the European and domestic legal framework.

1.2. New Torture

In time, torture has evolved, introducing new methods and techniques. Torture is now used in a wide range of contexts: for instance, torture is nowadays used as a tool by regimes or a method of control. This has, therefore, developed what is referred to as «new» torture: political control used by authoritarian regimes to instil fear.

When referring to such «new» torture the techniques used might vary from physical abuse[457], to psychological manipulation[458] to pharmacological methods[459]. These techniques aim to alter the brain chemistry of prisoners by inducing anxiety, terror and fear[460].

Although many regimes deny using torture, and many have also ratified the UNCAT, the reality is that torture is still a widespread phenomenon. Some of the areas which are still nowadays very impacted are Syria, Sri Lanka, Iran and Afghanistan[461]. The atrocities occurring in these areas are only some of the examples portraying the infringement of human dignity that individuals are facing in light of this «new» torture.

To better understand the impact of this new form of torture, Syria serves as a stark example.

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[457] Physical torture techniques comprise of electric shock chairs; body extension; submarine; water pipe; sexual abuse and more.
[458] Psychological torture techniques encompass sensory deprivation; threats; forcing prisoners to remain naked in cold areas.
[459] Examples of pharmacological torture refer to forcing individuals to inject themselves with drugs which may, for instance, lead to depression, paralysis or schizophrenia.
[460] LIPPMAN, *The Protection of Universal Human Rights: The Problem of Torture*, in *Universal Human Rights*, 1979, 25-55, available at *www.jstor.org*
[461] FREEDOM FROM TORTURE, *Where does torture happen in the world?,* 2023, available at *www.freedomfromtorture.org.*

The torture inflicted on Syrian prisoners under Bashar Al-Assad's regime is one of the biggest infringements of human rights[462]. Many had been imprisoned after the 2011 uprisings for possible links with the rebel Free Syrian Army, for their opposition to Assad or for not living in the right area.

On the 8th of December 2024, the Assad regime collapsed for a major offensive by opposition forces. According to the statistics collected by the Syrian Network for Human Rights, over 50 prisons and detention centres tortured their detainees. According to such report, around 72 different torture methods were used, varying from electric shocks and extinguishing cigarettes on flesh to more extreme techniques such as the removal of fingernails or toenails[463]. Overall, over 100,000 victims died in government-run prisons over the 13 years of the Syrian civil war[464].

The atrocities that have occurred in Syria are a clear example of why it is necessary to investigate the role of torture within the legal framework.

[462] A myriad of accounts of victims have been collected by international human rights organisations and by newspapers. All the stories collected tell the horrific events that the victims had to endure within the detention centres and the prisons. Mohamar Ouda, for example, had spent seven years in prison. He states that he was only fed because he suffered from diabetes, but this would anger the officers which would torture him even more. He recollects some of the methods used against him, such as the tearing of toenails and hitting his head with a bar. This account is part of FRANCE 24 *Seven Years of torture by Assad's executioners: «I will never forgive them».* 08/01/2025. On the other hand, BBC has recollected the stories of Qasem Sobhi Al-Qablani and Adnam Ahmed Ghanem the day that he was released from prison with the collapse of the Assad regime. According to Quasem, all the prisoners started running away from the prison once they were freed, fearing the possibility of being captured again and being brought back to the prison. Furthermore, Ghanem stated that after the doors of the prison «You are a dead person [...] this is where the torture began.» These accounts are part of the article written by CUDDY,*"I felt like a breathing corpse": Stories from people freed from Syria torture prison* in *BBC*, 2024, available at *www.bbc.com*

[463] MIDDLE EAST MONITOR, *Syria regime used over 70 methods of torture across 50 detention centres – Report,* 2024, available at *www.middleeastmonitor.com.*

[464] ABDELAZIZ, *The dead, the missing and the reunited: Three tales of Syria's tortured prisoners,* CNN, 2024, available at *www.cnn.com.*

As reported by CNN, one of the most viral stories was the one of activist Mazen al-Hamada. He had managed to run away from the prison and escape from the country in 2014. Ever since his role has been to help his peers get away from the prison and narrate the horrible facts that were occurring within them. In several interviews, he recalled the atrocities within the detention centres: such as officers jumping onto his body to crack his bones. He has stated that the torture techniques were so extreme that he finally lied, stating that he had committed crimes. Although Mazen tried to bring to light to atrocities occurring in Syria for there to be a true change, he was lured back to Syria by the government. A few days later, he mysteriously disappeared, portraying how real and actual the fear felt in Syria.

1.3. Torture and Terrorism

Terrorism is widely perceived as one of the most significant threats to national security, civilisations, and legal frameworks. In response to this perceived threat, some have argued that extraordinary measures, such as torture, might be justified in extreme cases. As this thesis will explore later, this is also known as the ticking bomb scenario[465].

Aside from the humanitarian and legal aspects, there are many problematic aspects related to this approach.

Governments using torture will lead to general distrust from civilians towards public institutions. Furthermore, there is the possibility that civilians may empathise with the terrorists when tortured by the government, especially when they believe that terrorists are being unjustly targeted[466]. In addition, many may fear the standardisation of torture, where, what started as an exception becomes a normal response, particularly in cases of political pressure.

1.3.1. Ticking Bomb Scenario

To provide an overview of the relationship between torture and human dignity, it is also important to consider different perspectives and approaches to torture before diving into an analysis of its legal framework.

The prohibition of torture is one of the cornerstone principles found in any legal framework. In addition, according to international law, torture may never be justified. Despite the absolute legal prohibition of torture, moral philosophers have posed hypothetical exceptions, such as the «ticking bomb scenario»[467].

The ticking bomb scenario refers to the hypothesis in which an individual is, for instance, detained and in possession of information which may avoid a catastrophic situation (such as the explosion of a bomb). This scenario questions

[465] See *Infra,* chap. III, § 1.3.1.
[466] ANWUKAH, *The Effectiveness of International Law: Torture and Counterterrorism*, in *Annual Survey of International & Comparative Law,* 2016*,* available at *www.digitalcommons.law.ggu.edu.*
[467] MAYERFELD, *In Defense of the Absolute Prohibition of Torture*, in *Public Affair Quarterly* 22(2), 2008, 109-128, available at *www.jstor.com.*

how to find a balance between the death of several people and the torturing of one person.

This scenario has been criticised by many, deeming that there is no exception to torture. Rather, this scenario is nothing more than an artificial construct used to justify inhumane conduct. Specifically, philosophers Henry Shue and David Luban have stated that the ticking bomb scenario is an idealisation of an abstraction of a situation which may not occur in real life. It aims to idealise torture by believing these heinous techniques will only be used to extort information once.

Although it is extreme to consider a reality where the ticking bomb scenario could be applied, there have been several past cases where torture has tried to be justified under such pretence. This thesis will now explore some of them while keeping in mind that a genuine ticking bomb scenario has yet to be documented[468].

The ticking bomb scenario dates to the French-Algerian war in the 1950s, with the conflict between the Algerian Nationalists (associated with the FLN movement) and the French Military. Particularly during the Battle of Algiers in 1957, there was widespread use by the French military of torture towards the members of the FLN. It is estimated that of the 24,000 individuals that have been arrested, the majority were tortured. The French military justified its actions by deeming that torture was necessary to avoid attacks on the FLN[469].

Since then, other cases have addressed similar ticking bomb justifications.

The first was the creation of the Israeli General Security Service (GSS) which aimed to investigate individuals suspected of committing crimes against Israeli security. The interrogation techniques used in such cases were criticised as amounting to torture, or cruel, inhuman or degrading treatment. These methods were deemed to violate Israel's Basic Law, «Human Dignity and Liberty», which aims to protect dignity, life, property and privacy.

Due to public concern, the Landau Commission of Inquiry was created in 1987 to investigate the role of the GSS. The guidelines provided by the Landau Commission stated that the GSS was entitled to use a «moderate degree of physical pressure» where required by necessity. It introduced the controversial idea of

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[468] *IBID.*

[469] FARRELL, *The ticking bomb scenario: origins, usages and the contemporary discourse,* in *The Prohibition of Torture in Exceptional Circumstances*, Cambridge, 2013, available at *www.cambridge.com.*

balancing two evils: in a ticking bomb scenario «*the lesser of two evils* [is] *to torture a suspect to extract the location of the bomb*»[470].

However, this justification was ultimately rejected by the Israeli Supreme Court's judgment[471] in 1999. This was a landmark decision as the Supreme Court acknowledged the use of physical pressure techniques by the GSS. In the judgment, the Supreme Court deemed that necessity was a personal criminal defence, and not a tool invoked to pre-authorise actions. In addition, the Court clarified that the necessity defence could be invoked in a ticking bomb scenario, but only when there is no alternative and a concrete danger. Overall, it reaffirmed the prohibition of torture[472].

1.4. Torture and Dignity

To develop a comprehensive analysis of the legal framework surrounding human dignity and torture, it is essential to explore the deep interconnection between these two concepts.

The effects of torture on the human brain and body are lethal. To name some of the many psychological consequences, torture can cause anxiety, depression or PTSD. Furthermore, victims may suffer from chronic pain and live in an altered state of their body forever. In addition, transgenerational trauma will lead to traumatic responses being passed down by generations, resulting in a cycle of violence. The visible and invisible scars that torture leaves are a representation of how dignity is stripped away from victims[473].

The victims, however, do not only suffer from the torture itself but also from having their own bodies used against them[474]. Therefore, the victim becomes an

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[470] AMAND, *Public Committee against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained* in *North Carolina Journal of International Law*, 2000, available at *www.law.unc.edu.*

[471] *Ibid*

[472] REDRESS, *Terrorism, Counter-terrorism and Torture: International Law in the Fight Against Terrorism,* 2004, available at *www.redress.org.*

[473] DIGNITY, *Facts about torture,* available at *www.dignity.dk*

[474] This point has thoroughly been developed by Sussman in his analysis of torture. In all his pieces, he states how he deems torture to be biggest violation of dignity. He reflects on the dual approach that torture has in interrogations and torture in the form of a punishment. Sussman theories contrast with the views expressed by David Luban, where he deems that torture is a form of communication.

active participant, suffering humiliation through the heinous acts they are forced to endure.

The importance of the relationship between these two dignity and torture has become central in the International Day in Support of Victims of Torture[475]. For instance, UN Secretary-General António Guterres stated that: «[...] *human rights defenders and survivors of torture around the world take the opportunity to speak out against this abhorrent denial of human dignity and they act to remember and support its victims*»[476].

The following part of the thesis will portray how human dignity underscores the nature of torture in the legal framework. Furthermore, existing case law has had a pivotal role in shaping the connection between torture and human dignity.

1.5. Modern Torture

With the UNCAT having been adopted 40 years ago, different human rights organisations and States have analysed the impact that the prohibition of torture has had on legal frameworks both nationally and globally.

In 2023, the UN Special Rapporteur Alice Jill Edwards issued a report on torture and other cruel, inhuman or degrading treatment or punishment. This Report has played a pivotal role in providing updated statistics[477]. First, the Report held that over 108 States today explicitly regulate the prohibition of torture within their legal framework. The concern relates to the comparison between the latter States and the 173 States that have ratified the UN Convention Against Torture (UNCAT).

Luban believes that there is a message that the torturers want to give to the victims, and the only way to do so is by torturing them. Therefore, the cornerstone of this view is the inequality between the two individuals, which Luban deems central to the infringement of dignity. These points of view are further developed in: VAN DER RIJT. *Torture, Dignity and Humiliation,* in *Southern Jorunal of Philosophy,* 2016, 480-501.

[475] Similarly to the views expressed by UN Secretary General Guterres, also EU High Representative Josep Borrell, during the coronavirus pandemic, stressed the importance of ensuring that the respect of human rights and dignity remained central to the fight against torture.
EUROPEAN UNION EXTERNAL ACTION, *Torture denies the dignity of human beings – nothing justifies inhuman treatment*, 2020, available at *www.eeas.europa.eu.*

[476] UNITED NATIONS NEWS: *Speak out against torture, an 'abhorrent denial of human dignity', urges UN chief,* 2020, available at *www.news.un.org*.

[477] EDWARDS, *A/HRC/52/30: Good practices in national criminalization, investigation, prosecution and sentencing for offences of torture*, in OHCHR, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, *52nd session of the Human Rights Council*, 2023, available at *www.ohchr.org*.

The Report also analysed the definitions being used by the States and compared them to the one introduced by Article 1 of the UNCAT. According to the Report, another concern is that many States refer to torture within the broader contexts of war crimes or crimes against humanity, and not tackling the prohibition of torture as a standalone right. Furthermore, some States, such as Africa and Latin America, prefer using broader definitions to the one enshrined within the UNCAT.

The 2023 Report also analysed the role of the prohibition of torture in Europe, specifically regarding the members of the Council of Europe. There are still ten State members who, although they have ratified the UNCAT, have still not introduced the prohibition of torture as a standalone offence in their legal framework. These are: Bulgaria, Denmark, Germany, Iceland, Monaco, Poland, San Marino, Switzerland, Sweden, and Hungary[478].

However, there are also various other statistics which have been developed by other international organisations.

In 2024, the World Organisation Against Torture (OMCT)[479] held that the number of armed conflicts is higher now than it was when the UNCAT had been adopted. Even more concerning is that these armed conflicts are characterised by the use of torture techniques, as seen in the ongoing conflicts in Sudan and Ukraine[480].

Furthermore, the International Rehabilitation Council for Torture Victims (IRCT)[481] member centres deem that they help around 81,000 survivors of torture every year. However, this figure does not represent the reality as the number of victims of torture is most likely higher but undocumented. According to the IRCT, torture is intertwined with poverty, with the poor being more than twice as likely to be tortured[482].

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[478] ANTONELLI, *La tortura in Europa e nel mondo,* in *Diciannovesimo rapporto sulle condizioni di detenzione,* RAPPORTO ANTIGONE, available at *www.rapportoantigone.it*.

[479] The World Organisation Against Torture aims to protect the victims of ill-treatment through the use of laws and policies.

[480] THE CENTER FOR VICTIMS OF TORTURE, *Facts about torture,* 2024, available at *www.cvt.org*.

[481] The IRCT has overall 172 medical centres in 78 countries, being one of the largest global networks of medical and legal experts which aim to safeguard the rights of the victims of torture through rehabilitation.

[482] INTERNATIONAL REHABILITATION COUNCIL FOR TORTURE VICTIMS, *Global Impact Data,* 2025, available at *www.irct.org*.

The report issued in 2023 by the Special Rapporteur has, however, also analysed the positive consequences. For example, many States have recognised rape and sexual abuse as methods of torture. Moreover, some States, such as Armenia, also believe that not reporting torture amounts to a crime[483]. In addition, States have started holding accountable perpetrators while also safeguarding victims' rights.

Overall, today the global situation in relation to torture remains varied and complex. Although there has been progress in the protection and safeguarding of the rights of victims of torture, there is much room for improvement. It is for this reason that it is essential to analyse the criminalisation of the prohibition of torture at both the supranational and Italian levels.

2. CRIMINALISATION OF TORTURE UNDER INTERNATIONAL LAW

In international law, the prohibition of torture has a nature of a peremptory norm («jus cogens» norm). Hence, it is a fundamental principle which may not be derogated. This principle is found in many international legal instruments and defined in international law jurisprudence and conventions. Moreover, the non-derogation of the prohibition of torture is also recognised as a norm of international customary law[484].

A landmark judgment tackling the nature of the prohibition of torture has been given by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Prosecutor v. Anto Furundzija case. The judgment elaborates on the importance and general recognition of the prohibition of torture as a peremptory norm in different paragraphs[485]. Specifically, paragraph 153 of the judgment

[483] ANTONELLI, *La tortura in Europa e nel mondo,* in *Diciannovesimo rapporto sulle condizioni di detenzione,* cit.

[484] This principle is found in several legal instruments, but especially within treaty law. According to Article 53 of the Vienna Convention of 1969, any provision in conflict of a peremptory norm makes the treaty null and void.

[485] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Judgment, Prosecutor v. Anto Furundzija. Paragraph 144: «It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory

recognises the dual nature of peremptory norms, both at the interstate level and at the individual level[486].

At the interstate level, States may never legitimise torture as this would infringe the *jus cogens*. If the prohibition is not respected, victims may challenge this before the competent court. On the other hand, at the individual level, every State may investigate, prosecute and punish individuals accused of torture who are present in a territory under its jurisdiction[487].

The *jus cogens* status conferred to the prohibition of torture has also introduced secondary jus cogens legal obligations. For example, the principle that

norm or jus cogens. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture».
Paragraph 153: «While the *erga omnes* nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force».

[486] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Judgment, Prosecutor v. Anto Furundzija. Paragraph 155 «The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: «individuals have international duties which transcend the national obligations of obedience imposed by the individual State».

[487] DE WET, *The Prohibition of Torture as an International norm of jus cogens and Its implications for National and Customary Law,* in *European Journal of International Law,* 2004, p. 97-121, available at *www.papers.ssrn.com*.

States may not absolve perpetrators of torture through amnesty law[488]. Furthermore, no State may cooperate to aid or assist a State which allows torture[489].

2.1. United Nations and the Prohibition of Torture

The United Nations has had a predominant role in regulating the prohibition of torture. This is portrayed, first, by the pivotal international legal framework developed by the UN, such as the Convention Against Torture and the ICCPR. Moreover, the UN also introduced enforcement mechanisms to ensure that States and individuals adhered to such prohibitions.

The UN has also had an important role in protecting the victims of torture. Indeed, in 1981 the General Assembly adopted the UN Voluntary Fund for the Victims of Torture. The fund aims to safeguard victims' human rights and dignity with the voluntary collaboration of Member States. The fund also plays an important role in the rehabilitation of victims of torture[490]. Moreover, in 1997, the General Assembly also proclaimed the International Day in Support of Victims of Torture to ensure a continuous fight against torture[491].

The United Nations strives to ensure respect for the prohibition of torture whilst safeguarding dignity. Indeed, the UN acknowledges that «*torture aims to destroy the victim's personality and negates the intrinsic dignity of the human being. Although international law absolutely prohibits torture, it continues to occur around the world*»[492].

2.1.1. United Nations Convention Against Torture

While this thesis has previously analysed the definition of torture under Article 1 of the United Nations Convention Against Torture (UNCAT)[493], it has yet to consider the extent and importance of the legal instrument in international law.

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[488] LINDERFALK, *Chapter 1: Introduction*, in *Understandings Jus Cogens in International Law and International Legal Discourse*, 2020, pp.1-39, available at *www.elgaronline.com*.
[489] CASEY-MASLEN, *The Definition of Torture under International Law,* 14-45 cit.
[490] OHCHR, *The United Nations Voluntary Fund for Victims of Torture*, available at *www.ohchr.org*.
[491]OHCHR, *International Day in Support of Victims of Torture, 26 June*, available at *www.ohchr.org*.
[492] *Ibid.*
[493] See *Infra,* chap. III, § 1.1.

The Convention Against Torture was adopted by the UN in 1984 and entered into force in 1987. This legal instrument has been pivotal in introducing a new approach to the protection of human rights and human dignity. Not only do its provisions regulate the prohibition and punishment of torture, but, in a broader sense, they also prevent it[494].

The Committee Against Torture (also referred to as «CAT») was established complementarily to the UNCAT. This Committee is composed of 10 independent experts who monitor the enforcement and implementation of the Convention. To ensure this, the Committee requires State Parties to submit periodic reports. Furthermore, the Committee may analyse both individual and inter-state complaints while also undertaking investigations.

Similarly to the CAT, in 2006 the Optional Protocol to the Convention introduced the Subcommittee on Prevention of Torture (also known as SPT). The SPT distinguishes itself from the CAT as its role is to visit places where individuals have been deprived of their liberty or have in any way been victims of torture[495].

These two bodies illustrate the United Nations' active role in enforcing the prohibition of torture and safeguarding human dignity.

Torture is still a widespread offence today, and as regulated by Article 2[496] paragraph 2 of this Convention, there is no justification for ever torturing. The prohibition of torture is further developed in Articles 3[497], which refers to the principle of non-refoulement, and 15. Article 15 regulates the admissibility of evidence obtained through torture[498]. According to this provision, such evidence

[494] ASSOCIATION FOR THE PREVENTION OF TORTURE, *The UN Convention against Torture – a vision needed more than ever,* 2014, available at *www.apt.ch*.
[495] OHCHR, *Introduction: Committee against torture*, available at *www.ohchr.com*.
[496] Article 2 of the UNCAT provides that: «Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. 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. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture. »
[497] Article 3 of the UNCAT provides that: «No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. »
[498] See *Infra,* chap. III, § 5

may never be invoked unless against the person accused of torture «*as evidence that the statement was made*»[499]. The combined reading of these articles and Article 1 are the founding principles of the UNCAT. They ensure that human rights are safeguarded by protecting the rights of victims with a broad approach.

Moreover, Articles 2 and 16 regulate the prevention of torture. The UN Convention does not impose specific methods for preventing torture, rather, it uses a flexible approach which allows Member States to adopt the most suitable technique according to their national contexts. For instance, the first paragraph of Article 2 broadly refers to «*effective legislative, administrative, judicial or other measures*» while Article 16[500] simply asks State parties to prevent torture. This flexibility allows States to efficiently prevent torture without any financial or legal constraint.

In addition, Article 10 of the Convention asks for States to educate, inform and train «*other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment*». Similarly, the following Article[501] requires States to keep under review any type of method and practice which is adopted towards detainees to avoid any form of torture[502].

Furthermore, the UN Convention also regulates several State Parties' obligations to ensure the respect, prevention and prohibition of torture. As this thesis will later explore, these obligations are similar to the ones also enshrined

[499] Article 15 of the UNCAT provides that: «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. »
[500] Article 16 of the UNCAT provides that: «Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.
[501] Article 11 of the UNCAT provides that: «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».
[502] CONVENTION AGAINST TORTURE INITIATIVE, *Un Convention Against Torture – Explainer*, available at *www.cti2024.org*.

within the ICCPR[503]. These obligations include the duty to protect from ill-treatment by private actors; the duty to investigate; the duty to enact and enforce legislation criminalising torture; duty to grant redress and compensate victims[504].

The duty to investigate is enshrined in Article 12 of the UNCAT[505] and complemented by Article 13. The latter article provides that everyone has a right to complain, and it is up to the State to protect the witnesses and examine the statement provided. This duty has been examined by the CAT in Communication no. 59/1996[506]. In such a case, the applicant lamented violations of Articles 12, 13 and 15 of the Convention due to failure to promptly investigate allegations of torture. In the case at hand, the Committee analysed Article 12 as providing that it requires the investigation from the State to occur promptly and impartially. According to the Committee, allowing the investigation to occur promptly is vital to avoid the physical consequences of torture, making the investigation harder to carry out[507]. Furthermore, the Committee explains that, in light of Article 13, States are obligated to examine statements provided by victims when brought to their attention. Moreover, such statements should be considered as a tacit but unequivocal wish of the victims to want the facts examined by the State[508].

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[503] See *Infra,* chap. III, § 2.1.1.

[504] ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INTERNATIONAL LAW, CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A Guide to Jurisprudence*, 2008, 5-53, available at *www.apt.ch*.

[505] Article 12 of the UNCAT: «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».

[506] CAT. Communication no. 59/1996. Encarnación Blanco Abad v. Spain, in *juris.ohchr.org*

[507] Paragraph 8.2. of Communication no. 59/1996: «The Committee observes that, under article 12 of the Convention, the authorities have the obligation to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion. Article 12 also requires that the investigation should be prompt and impartial. The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel inhuman or degrading treatment, soon disappear»

[508] Paragraph 8.6. of Communication no. 59/1996: «The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention. »

Article 4 of the UNCAT also regulates the duty to enact and enforce legislation criminalising torture. According to such provision, States are obliged to ensure that all acts of torture are offences within their domestic criminal law. Furthermore, paragraph 2 of the same article asks for such offences to be punished by appropriate penalties[509]. Article 4 has a pivotal role in ensuring that State parties may hold criminally responsible torturers. For this reason, the Committee has vastly interpreted this provision. It has emphasised that States need to «*incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention*»[510]. According to the Committee, the incorporation of the prohibition of torture into domestic law should occur with a separate domestic provision even for those monist legal systems. On the other hand, the Committee has not given an interpretation of the term «penalties» used in the second paragraph[511].

The protection of human dignity has been also central in many judgments of the CAT, such as Communication no. 188/2001[512]. The case referred to a torture complaint on police brutality. In the case at hand, the Committee analysed prison conditions in light of the respect for prisoners' human dignity[513]. Moreover, interpreting the conditions of prisons considering the respect for human dignity was also central to the submissions given by the State[514].

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[509] Article 4 of the UNCAT provides 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. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature».

[510] ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INTERNATIONAL LAW, CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A Guide to Jurisprudence,* 5-53 cit.

[511] BIRK, MONINA, NOWAK, *Definition of Torture* in The *United Nations Convention Against Torture and Its Optional Protocol* 2019, 23-71, cit.

[512] CAT. 14.11.2003, Communication no.189/2021. Mr. Bouabdallah LTAIEF v. Tunisia, in *www.juris.ohchr.org*

[513] Communication no.189/2021 Paragraph 8.6.: «It points out that prisoners' rights are scrupulously protected in Tunisia, without any discrimination, whatever the status of the prisoner, in a context of respect for human dignity, in accordance with international standards and Tunisian legislation. Medical, psychological and social supervision is provided, and family visits are allowed».

[514] Communication no.189/2021. Paragraph 8.2.: «In relation to the allegations concerning the State party's "complicity" and inertia vis-à-vis "practices of torture", the State party indicates that it has set up preventive and dissuasive machinery to combat torture so as to prevent any act which might violate the dignity and physical integrity of any individual».

2.1.2. International Covenant on Civil and Political Rights

The United Nations adopted the International Covenant on Civil and Political Rights (ICCPR) in 1966. It was one of the first universal legal instruments to recognise the prohibition of torture.

In the ICCPR, the principle of the prohibition of torture is enshrined within Articles 7 and 10.

The first part of Article 7 reads: «N*o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*» This article has been analysed and interpreted by the Human Rights Committee in General Comment No. 20.

Unlike the UNCAT, the ICCPR provides a general prohibition without specifying prohibited acts. According to the CCPR General Comment No. 20, a definition doesn't need to be so detailed. Indeed, whilst the ICCPR is a broad legal instrument, the UNCAT is specialised in regulating the prohibition of torture. However, similarly to the UNCAT, there is no circumstance which derogates the prohibition.

The second part of the provision states that «*in particular, no one shall be subjected without his free consent to medical or scientific experimentation*». According to the CCPR General Comment No. 20, there is very little case law interpreting this second part of the article. Regardless, it still stresses the importance of enforcing this provision for more vulnerable individuals, such as those who may not provide valid consent or are imprisoned.

CCPR General Comment No. 20 also interprets Article 7 in light of the safeguarding of dignity by providing that «*the aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual*»[515]. Additionally, the General Comment asks for a combined reading of this Article and the positive obligations enshrined in Article 10. The first paragraph of Article 10 provides a general principle stating that «*all persons deprived of their liberty*

[515] UNHCR, *CCPR General Comment No. 20: Article 7* (*Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), in *UN Human Rights Committee (HRC),* 1992*,* available at *www.refworld.org*.

shall be treated with humanity and with respect for the inherent dignity of the human person.» Once again, international legal instruments demonstrate how the protection of dignity is of extreme importance. Specifically, Article 10 aims to protect the inherent dignity of detainees as the second paragraph provides the separation of accused persons from other individuals[516]. The third paragraph focuses on ensuring that detainees undergo social rehabilitation and reformation[517].

Existing jurisprudence portrays a constant overlap between these two provisions. However, Article 10 usually applies to general conditions of detention while Article 7 usually applies to infringements of integrity[518]. For instance, in the Kennedy v Trinidad and Tobago judgment[519], the Committee deemed that the abuse of power by police was regulated by Article 7 of the ICCPR, whereas the inhuman conditions in which he was held violated Article 10(1)[520]. It is very difficult to efficiently separate the two articles. This is partly due to the lack of explanation of the terms «cruel», «inhumane» or «degrading» used in Article 7, which may complicate finding unanimous interpretations[521].

2.2. Rome Statute

The definition of torture in international criminal law has been shaped by the International Criminal Court's jurisprudence and the Rome Statute. This definition is characterised by different elements in comparison to the one provided by the UN Convention.

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[516] Paragraph 2 of Article 10 ICCPR: «Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.».

[517] Paragraph 3 of Article 10 ICCPR: «The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.».

[518] ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INTERNATIONAL LAW, CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A Guide to Jurisprudence*, cit. 5-53

[519] UN HUMAN RIGHTS COMMITTEE, 67th SESSION, Communication no. 845/1999: Kennedy v. Trinidad and Tobago, 1999, Geneva, available at *www.digitallibrary.un.org*.

[520] ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INTERNATIONAL LAW, CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A Guide to Jurisprudence*, cit.

[521] TAYLOR, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge, 2020.

The Rome Statute views torture as both a crime against humanity (Article 7) and as a war crime (Article 8).

Article 7 of the Rome Statute defines torture 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; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanction*». In comparison to the UNCAT, this article broadens the scope of the definition of torture in respect to the nature of perpetrators. Indeed, whilst the UNCAT refers to torture as carried out by public officials, the Rome Statute horizontally expands the range of possible perpetrators also to non-state actors. According to the Elements of the Crime, the crime against humanity of torture requires «*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population*»[522].

However, the chapeau of Article 7 of the Rome Statute introduces limitations to the scope of torture requiring certain conditions for the offence to amount to torture. Article 7 defines crimes against humanity as any act «*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*». This definition has also been criticised. For example, the Human Rights Watch has deemed that the lack of reference to public authority and the failure to require a specific purpose should be modified and integrated[523].

Another critical distinction between the Rome Statute and the UNCAT is the purpose pursued by torture. While the UNCAT definition states that torture must be inflicted for specific reasons, the ICC's definition does not impose such a requirement[524].

On the other hand, Article 8 of the Rome Statute defines torture a war crime. Therefore, torture needs to occur within the context of a formal conflict[525], requiring

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[522] HUMAN RIGHTS WATCH, *Human Rights Watch Commentary to the 5th Preparatory,* available at *www.hrw.org*.
[523] *Ibid.*
[524] WAGNER, *The ICC and its jurisdiction – Myths, Misperceptions and Realties,* 2003, available at *www.mpil.de.*
[525] LEIMBACH, *The International Criminal Court's Stance on Torture,* 2012, available at *www.passblue.com*.

different conditions than the ones regulated by Article 7. According to the Elements of the Crime, for there to be torture the individuals need to be protected under one or more Geneva Conventions[526].

The ICC has not rendered many judgments solely related to the crime of torture. This is also due to the complexities of proving torture without referring to broader crimes.

The concept of responsibility acts also differently between the Rome Statute and the UNCAT. Indeed, the Rome Statute applies individual responsibility[527], whereas the UNCAT focuses on State responsibility. This ensures a broader scope of victims of torture protection by having both States and individuals respond of their actions. As this thesis will explore in the Al Hassan judgment[528], this distinction leads to interpreting articles in different manners.

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[526] The Elements of the Crime of Article 8 of the Rome Statute (torture) are the following: «The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. Such person or persons were protected under one or more of the Geneva Conventions of 1949. The perpetrator was aware of the factual circumstances that established that protected status. The conduct took place in the context of and was associated with an international armed conflict. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[527] Individual Responsibility is found within Article 25 of the Rome Statute, which regulates: «The Court shall have jurisdiction over natural persons pursuant to this Statute. 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. 3.In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. 4.No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.»

[528] See *Infra,* chap. III, § 2.2.1.

2.2.1. Al Hassan judgment

On 26 June 2024, the International Criminal Court (ICC) issued judgment on the case of The Prosecutor v. Al Hassan, convicting the accused of multiple crimes, specifically: «*crimes against humanity of torture; war crimes and outrages upon personal dignity and of contributing to the crimes perpetrated by other members of Ansar Dine/AQIM, in relation to: the war crimes of mutilation, cruel treatment and passing sentences without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable; and the crimes against humanity of persecution and other inhumane acts*»[529].

Whilst the conviction addressed serious violations from the accused, the judgment has drawn criticism for the use of evidence obtained through torture.

Al Hassan was prosecuted for allegedly being a member of the Ansar Endine, chief of Islamic police and for having been involved in the Islamic court in Timbuktu. In 2019, Pre-Trial Chamber I confirmed the charges of crimes against humanity and war crimes that had been brought by the Prosecutor. Al Hassan was held in Malian custody in the Directorate of State Security (DGSE) in Bamako for over 8 months. In this time frame, he was interrogated 19 times[530].

The most controversial aspect of the Al Hassan trial refers to the methods used during the interrogations. Indeed, Al Hassan allegedly was tortured during these interrogations and endured waterboarding, electrocution, sensory torture, mock executions, among other methods. Several psychologists and forensic physicians assessed Al Hassan's conditions and his testimonies and deemed his version to be truthful.

The Rome Statute safeguards fair trial rights under Article 55[531] and Article 69(7). According to paragraph 1 letter b of Article 55, the person being interrogated

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[529] INTERNATIONAL CRIMINAL COURT, ICC-01/12-01/18, Situation in the Republic of Mali. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 2024, available at *www.icc-cpi.int*.

[530] GAYNOR, *Is the ICC Al Hassan Judgment a mess or the future?,* 2024, available at *www.justiceinfo.net.*

[531] Article 55 of the Rome Statute regulates the rights of persons during an investigation.
These being: «[1] In respect of an investigation under this Statute, a person: (a) Shall not be compelled to incriminate himself or herself or to confess guilt; (b) Shall not be subjected to any form

«*shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment*». On the other hand, paragraph 7 of Article 69 states that evidence obtained in violation of human rights may not be deemed admissible when «*the violation casts substantial doubt on the reliability of the evidence, or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings*».

The statements provided by Al Hassan during the investigations were of vital importance for the ICC judgment. The Court referenced approximately 500 times these statements in the judgment, highlighting their evidentiary centrality. This raises significant questions regarding compliance with Article 69(7) of the Rome Statute. The Court's decision in 2021 to admit such statements as evidence has had tremendous implications for both the international humanitarian role and international criminal law. Indeed, Trial Chamber X had the opportunity to truly affirm the absolute prohibition of torture and ensure an increased protection of the right to a fair trial.

The Court's interpretation of Article 69(7) is what makes this judgment a landmark decision of the ICC. Indeed, the Court first distinguished the actions taken by the Office of the Prosecutor (OTP) from the ones taken by the national security forces. Specifically, it deemed the fact that the OTP had carried out the investigations in another location as insufficient to establish a link to torture. The Court interpreted «means of a violation» narrowly, focusing only on whether specific statements were directly obtained through torture, disregarding the broader

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of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

[2] Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel».

coercive context[532]. The Court therefore deemed that there was no violation of Article 69(7) as the Defence had not shown a real risk[533] that the statements given by Al Hassan were obtained by means of torture[534]. The Court instead referred to the fact that Al Hassan had an interpreter, had been given water and his rights had been respected and safeguarded[535].

Over time, there has been a process of cross-pollination between international humanitarian law and the Rome Statute. Indeed, the ICC jurisprudence has started adopting many of the general principles found in human rights law, as

[532] Paragraph 42 of the ICC decision no. ICC-01/12-01/18 rendered on the 17th of May 2021 states: «It is not disputed that the Statements sought to be admitted were gathered in this case directly by the ICC Prosecution, and not by those authorities who are alleged to have breached the Statute or the international human rights standards. In such a case, the exclusionary rule under the Statute warrants an assessment focused on the investigative activities of the ICC Prosecution which generated this particular evidence. Such an analysis may include consideration of the general context in which the evidence was gathered and interaction with, or influence of other authorities, but only insofar as those factors are relevant to the gathering of the specific evidence in this case by the ICC Prosecution. This construction of Article 69(7) is consistent with its plain language and with the practical realities which surround evidence gathering with respect to alleged atrocity crime in the different situations within the jurisdiction of the Court. ICC investigators are dependent on the cooperation of States to conduct investigative activities and their control with respect to the overall conditions and circumstances in which those activities are carried out will be limited. Article 69(7) in its plain wording recognises that distinction by focusing not on the general conditions applicable in the situation where the investigations and evidence gathering are occurring but rather those specific to the way in which evidence is obtained»

[533] The real risk test is a pivotal concept in the jurisprudence of the European Court of Human Rights.

[534] Paragraph 71 of the ICC decision no. ICC-01/12-01/18 rendered on the 17th of May 2021 states Based on all of the above, the Chamber considers that the Defence has not shown a real risk that the Statements were obtained by means of torture or CIDT and therefore it has failed to substantiate its arguments that the Statements were obtained by means of a violation of the Statute or internationally recognised human rights; in PALMER, *The ICC's Use of Evidence Obtained by Torture Sets a Dangerous Precedent*, 2024, available at *www.justsecurity.org*.

[535] ICC Trial Chamber X Judgment no. ICC-01/12-01/18. Date: 26 June 2024. Paragraph 325: «The Chamber recalls its finding that the interviews were conducted in an open, constructive and respectful manner with Mr Al Hassan being accorded a full opportunity to express himself. In this respect at one-point Mr Al Hassan commented that he was giving these statements voluntarily so the truth would be clear about what had happened. Mr Al Hassan was well treated during the course of his interviews, being given water and tea as well as regular breaks for meals and prayers. The Chamber also notes that Mr Al Hassan was provided with interpretation assistance throughout and that there was meticulous attention to detail in terms of recording the particulars of all the interviews, including the participants, persons entering or leaving the room, as well as the dates, times and locations of the recordings. The Chamber has also taken into consideration the overall content of the exchanges which is discussed in more detail below. The Chamber is fully satisfied that these conditions of the interview process were conducive to a full and accurate record and that the audio recordings and transcripts bear sufficient indicia of reliability. In sum, there were no circumstances in the manner of the taking of the statements which negatively impact on the voluntariness of the statements or the probative value and weight to be accorded the evidence as a whole».

mandated by Article 21 of the Rome Statute[536]. This evolution reflects the need for international criminal law to also protect and safeguard human dignity[537]. The Al Hassan judgment could have been an opportunity for the ICC to commit to these principles by excluding evidence allegedly tainted by torture.

2.3. International Criminal Tribunal for the Former Yugoslavia (ICTY)

Following the armed conflicts in Rwanda and the former Yugoslavia, two *ad hoc* international criminal tribunals were set up by the United Nations Security Council: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both International Criminal Tribunals[538] were essential in dealing with the heinous crimes which had occurred in Rwanda and the former Yugoslavia, impacting international humanitarian law. The ICTY operated from 1993 to 2017 while the ICTR operated from 1994 to 2015. As there was no international code of criminal procedure, both tribunals adopted the Rules of Procedure and Evidence[539]. These rules contained provisions to protect victims and witnesses[540].

The Statute of the ICTY regulates its powers to prosecute, on the one hand, the Grave Breaches of the Geneva Conventions[541]. It also allows the prosecution of individuals responsible for crimes against humanity when committed in armed

[536] Article 21 (3) of the Rome Statute reads: «The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. »

[537] PALMER, *The ICC's Use of Evidence Obtained by Torture Sets a Dangerous Precedent*. Cit.

[538] Both tribunals were composed by 14 judges who all have to have different nationalities, having to take into account the equitable geographical distribution.

[539] MEDECINS SANS FRONTIERES, *The Practical Guide to Humanitarian Law*, available at *www.doctorswithoutborders.org.*

[540] The protection of victims, however, would only operate during the testimonies and not when they went back to the place of origin. However, under Rule 70B, it was possible for an individual to provide the Prosecutor with information on a confidential basis without having the Prosecutor disclose such information or the source.

[541] Article 2 of the ICTY Statute: «The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments [...]».

conflict[542]. Therefore, the Statute explicitly recognises the power of the ICTY to prosecute crimes of torture.

Throughout its mandate, the ICTY has always adhered to the definition of the prohibition of torture as enshrined within the UNCAT. However, it has also sought to broaden the notion by adapting it to reflect international criminal law in relation to armed conflicts. Moreover, it has expanded the definition to not only include public officials but also non-state parties. Finally, the ICTY emphasised that the severity of pain or suffering is what distinguishes inhuman treatment from torture[543]. Furthermore, according to the tribunal, such level of pain or suffering should be interpreted on a case-by-case basis[544].

The ICTY has had a predominant role in analysing and interpreting the prohibition of torture, specifically, in recognising and attributing to such crime the nature of *jus cogens* and deeming rape a crime of torture. These two interpretations have been made respectively in the Furundzija judgment, previously analysed[545], and the Čelebići judgment[546].

While this thesis has previously analysed, the Furundzija judgment and its interpretation of the prohibition of torture as a peremptory norm have not reflected on other important aspects. For instance, in the case at hand, the ICTY recognised that a person may be deemed a torturer even if he does not physically participate in the infliction. This applies, for example, when the interrogator poses questions while another individual inflicts pain[547]. Therefore, the ICTY interprets criminal

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[542] Article 5 of the ICTY Statute: «The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture [...]».

[543] DROEGE, *'In truth the leitmotiv': the prohibition of torture and other forms of ill-treatment in international humanitarian law*, 2007, IRRC No.867, available at *www.international-review.icrc.org*

[544] INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA, Trial Chamber II, Case No. IT-03-66-T, Prosecutor v. Limaj and Others, 30.11.2005, para. 232, available at *www.icty.org*: The Chamber is of the view that whether conduct amounts to cruel treatment is a question of fact to be determined on a case-by-case basis.

[545] See *Infra* Chap III § 2 and Chap III footnote 42

[546] SHENK, RHOADS, HOWE, *International Criminal Tribunal for the Former Yugoslavia and for Rwanda*, in *The International Lawyer,* 1999, 683-690, available at *www.jstor.org*.

[547] Paragraph 256 of the Furundzija judgment: «It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies».

responsibility by highlighting the role of accomplice liability and giving a narrow interpretation of the terms «aiding and abetting»[548]. The International Criminal Tribunal summarises this principle as it follows: «(i) *to be guilty of torture as a perpetrator (or co- perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.* (ii) *to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.* »

On the other hand, the Čelebići judgment was a landmark decision as it was the first time that rape was recognised as a form of torture. Rape was considered by the ICTY as a Grave breach of the Geneva Convention and a violation of the laws and customs of war. In the words of the Trial Chamber «*the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity*»[549]. This once again stresses the connection between the infringement of dignity and torture.

[548] Paragraph 257 of the Furundzija judgment: «Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described supra, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes».

[549] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Trial Chamber, CC/PIU/364-E, Press Release, *Celebici Case: the Judgement of the Trial Chamber. Zejnil Delalic acquitted, Zdravko Mucic sentenced to 7 years in prison, Hazim Delic sentenced to 20 years in prison, Esad Landzo sentenced to 15 years in prison*, 1998, The Hauge, available at *www.icty.org.*

3. CRIMINALISATION OF TORTURE UNDER EUROPEAN LAW

3.1. Article 3 of the ECHR

Article 3 of the ECHR is one of the cornerstones of the legal framework regulating the prohibition of torture. It provides that «*no one shall be subjected to torture or to inhuman or degrading treatment or punishment.*». Although the provision is brief, the numerous interpretations by the ECtHR have rendered it complex by broadening its scope. Moreover, the Bouyid v. Belgium judgment firmly links Article 3 with the principle of human dignity.

Given the complexity and breadth of this article, this part of the thesis will examine the absolute nature of the provisions, the distinction between the crimes mentioned in the article and the responsibilities it imposes on States.

Article 3 of the ECHR is referred to as an absolute right. Although there is very little jurisprudence referring to this statement, this principle is nowadays generally accepted. Indeed, Article 3 needs to be read together with Article 15(2), which provides that it is never possible to derogate the prohibition of torture, even in case of a public emergency threatening the life of the nation or in other difficult circumstances[550]. Although it may generally be stated that Article 3 is absolute, there is a need to analyse various subjective factors with a case-by-case approach. Moreover, complexities pertain to the vague definitions given to the terms «absolute right» and «absolute prohibition» by the Court. This suggests that the concept of absoluteness under Article 3 remains open to further development[551].

Another important aspect of Article 3 of the Convention is the distinction between the concepts of torture and inhuman or degrading treatment. There is vast

[550] This principle has been stated in the A. and Others v. the United Kingdom judgment in paragraph 126: «The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment (see Ramirez Sanchez, cited above, §§ 115-16)».

[551] GRIEF, ADDO, *Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?,* in *European Journal of International Law*, 1998, 510-524, available at *www.ejil.org*.

jurisprudence on this point which has moved the criteria from a quantitative approach to a more qualitative approach.

The first case which focused on this distinction was the Greek Case, defining torture as an «*aggravated*» inhuman treatment»[552]. Therefore, this was the first judgment creating a subtle connection between torture and inhuman treatment, blurring the lines which distinguished one concept from another. For this reason, the ECtHR started interpreting the concept of torture according to its «intensity». In the Ireland v. the United Kingdom judgment, the ECtHR acknowledges this distinction and its difference «*in the intensity of the suffering*». In the case at hand, the Court was analysing whether the techniques used by the police during the interrogation amounted to torture. In paragraph 167 of the judgment, the Court held that these techniques did not produce suffering «*of the particular intensity and cruelty implied by the word of torture as so understood*». Therefore, in this judgment, the Court replaced the element of distinction by introducing a subjective assessment of the severity of the pain[553].

Similarly, the Court, in the Denizci and Others v. Cyprus judgment, reflects on the importance of distinguishing inhuman or degrading treatment from torture according to the degree of severity of the conduct used. It specifically deemed it necessary to analyse the deliberateness of the conduct[554] and for how long the victim would be impacted by the consequences[555]. This Court's approach has not

[552] DEMIR, NATASA, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, 2021, in *Human Rights Law Review*, 2021, 21(4), pp. 1046-1050, available at *www.academic.oup.com*.

[553] ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INTERNATIONAL LAW, CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A Guide to Jurisprudence*, cit.

[554] Indeed, the Court has recognised the purposive element as described within Article 1 of the UNCAT. For instance, in the Nashiri v. Poland judgment, paragraph 508 provides that: «In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating». This aspect has also been reiterated in the Al Nashiri v. Poland case and the Petrosyan v. Aerbaijan judgment.

[555] Paragraph 384-388 of the Denici and Others v. Cyprus case: «The Court has found above that, at the time of the applicants' detention, the police officers had intentionally subjected them to ill-treatment of varying degrees of severity (see paragraphs 329, 334, 336, 338, 340 and 342). However, it has not been established that the police officers' aim was to extract a confession. The Court also points out that it could not determine the precise manner in which the beatings were inflicted. Moreover, it cannot disregard the uncertainty concerning the severity of the injuries sustained by some of the applicants.385. Finally, the Court observes that, despite the serious injuries sustained

been without criticisms, as it has preferred a more quantitative approach rather than analysing the gravity of the acts themselves[556]. For this reason, the Court still prefers looking at the severity or intensity of the conduct rather than the impact it has. Thus, favouring a qualitative approach based on the severity of the conduct[557].

Although the Court had defined and analysed the principle of intensity, its judgments portray a constantly evolving approach. With the Selmouni v. France judgment, the Court reiterated the core principle of its case law: the Convention is a living instrument. It applied this principle in the judgment by appreciating that core elements which could confine certain acts within the term of «torture», could in the future amount to «inhuman and degrading treatment»[558]. Therefore, elaborating a very open approach that considers torture as constantly evolving[559].

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by some of the applicants, no evidence was adduced to show that the ill-treatment in question had any long-term consequences for them. 386. In the light of the above, the Court considers that the ill-treatment to which the applicants were subjected cannot be qualified as torture. Even so, that treatment was serious enough to be considered inhuman in respect of each applicant. 387. The Court therefore concludes that there has been a breach of Article 3 of the Convention. 388. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged lack of an effective investigation».

[556] NATASA, *Torture, Inhumanity and Degradation under Article 3 of the ECHR,* cit.

[557] For instance, in the Polonskiy v. Russia judgment, the Court continously referred on the minimum level of severity that the conduct needs to uphold for there to be torture. This is especially reflected in paragraph 125 of the judgment that states that: «The Court will next examine whether the treatment complained of attained a minimum level of severity such as to fall within the scope of Article 3. It is not convinced by the Government's argument that the minimum level of severity was not reached as the treatment had not resulted in any deterioration of the applicant's health. The absence of long-term health consequences cannot exclude a finding that the treatment is serious enough to be considered inhuman or degrading (see Egmez, cited above,§§ 78 and 79). The applicant was hit at least several times in his face, shoulders, back and legs and was subjected to electric shocks, which is a particularly painful form of ill-treatment. Such treatment must have caused him severe mental and physical suffering, even though it did not apparently result in any long-term damage to his health. Moreover, it appears that the use of force was aimed at debasing the applicant, driving him into submission and making him confess to criminal offences. Therefore, the Court finds that the treatment to which the applicant was subjected was serious enough to be considered as torture».

[558] Paragraph 101 of the Selmouni.v. France judgment: «The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture (see the Aksoy judgment cited above, p. 2279, § 64, and the Aydın judgment cited above, pp. 1891-92, §§ 83-84 and 86). However, having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' (see, among other authorities, the following judgments: Tyrer v. the United Kingdom, 25 April 1978, Series A no. 26, pp. 15-16, § 31; Soering cited above, p. 40, § 102; and Loizidou v. Turkey, 23 March 1995, Series A no. 310, pp. 26-27, § 71), the Court 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». Available at *HUDOC*

[559] NATASA, *Torture, Inhumanity and Degradation under Article 3 of the ECHR,* cit.

Moreover, the Selmouni v. France judgment was pivotal as this was the first time that the ECtHR referred to Article 1 of the UNCAT. Nowadays, the ECHR Guide to Interpreting Article 3 of the Convention states that Article 1 of the UNCAT plays a fundamental role in distinguishing between the crimes of torture and inhuman or degrading treatment[560].

The ECtHR case law has been pivotal in specifying the different conducts that infringe the prohibition of torture[561]. Indeed, the Court has never listed acts which necessarily lead to the violation of the prohibition of torture, rather, it has preferred adopting a more flexible approach to analyse the characteristics of conduct on a case-by-case basis. For instance, in the Gäfgen v. Germany judgment, the Court referred to the fact that a threat of torture can amount to torture «[...] *as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture* [...]». However, the Court also reflected on the need to take into consideration the requirements and elements of the given case for there to be an actual violation of the prohibition of torture[562].

The protection of human dignity is at the heart of Article 3 of the ECHR. To ensure this, the Convention introduces both positive and negative obligations for States. When referring to the positive obligations, States are required to introduce

[560] ECHR, *Guide on Article 3 of the European Convention on Human Rights. Prohibition of torture*, 2025, available at *www.ks.echr.coe.int.*

[561] *Ibid.*

[562] Paragraph 108 of the Gäfgen v. Germany judgment states that: «Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3. It reiterates that according to its own case-law (see paragraph 91 above), which also refers to the definition of torture in Article 1 of the United Nations Convention against Torture (see paragraphs 64 and 90 above), and according to the views taken by other international human rights monitoring bodies (see paragraphs 66-68 above), to which the Redress Trust likewise referred, a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture. However, there appears to be broad agreement, and the Court likewise considers, that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused. Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture». Available at *www.hudoc.echr.coe.int*.

laws and mechanisms that ensure that the prohibition of torture is respected and that civilians are protected. For instance, in the X and Others v. Bulgaria judgment, the Court recognised the importance of States adopting a legislative and regulatory framework. In paragraph 179 of the judgment, the Court specifically held the need for «[...] *the enactment of criminal-law provisions and their effective application in practice* [...]» in the more serious cases[563]. Furthermore, the Court has held that States should, in specific circumstances, take operational measures to protect victims or potential victims. In the Kurt v. Austria judgment, the Court held that the State must adequately assess whether there is a real risk requiring operational measures. Therefore, the Court will not only have to assess whether the State's preventive assessment was adequate, but also the operational measures adopted[564].

On the other hand, the Court also recognises a positive procedural obligation to investigate individuals suspected of committing acts of torture[565]. The positive obligation aims to ensure that the domestic laws are being efficiently implemented by the State. Moreover, the Court refers to the standards that States must adhere to

[563] Paragraph 179 of the X and Others v. Bulgaria judgment: «The positive obligation under Article 3 of the Convention necessitates in particular establishing a legislative and regulatory framework to shield individuals adequately from breaches of their physical and psychological integrity, particularly, in the most serious cases, through the enactment of criminal-law provisions and their effective application in practice (see S.Z. v. Bulgaria, cited above, § 43, and A and B v. Croatia, cited above, § 110). Regarding, more specifically, serious acts such as rape and the sexual abuse of children, it falls upon the member States to ensure that efficient criminal-law provisions are in place (see Söderman v. Sweden [GC], no. 5786/08, § 82, ECHR 2013, and M.C. v. Bulgaria, cited above, § 150). This obligation also stems from the provisions of other international instruments, such as, in particular, Articles 18 to 24 of the Lanzarote Convention (see paragraph 127 above). In that connection the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights (see Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96 and 2 others, § 90, ECHR 2001-II, and Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI). »

[564] Some of the most relevant paragraphs in the Kurt v. Austria judgment are: paragraph 157 which states that "[...] It also extends in certain circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual". Furthermore, paragraph 159 provides that: "The Court notes that the duty to take preventive operational measures under Article 2 is an obligation of means, not of result. Thus, in circumstances where the competent authorities have become aware of a real and immediate risk to life triggering their duty to act, and have responded to the identified risk by taking appropriate measures within their powers in order to prevent that risk from materialising, the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. On the other hand, the Court observes that in this context, the assessment of the nature and level of risk constitutes an integral part of the duty to take preventive operational measures where the presence of a risk so requires».

[565] ECHR, *Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture*, 2025, cit.

carry out the investigations. For example, the investigation needs to be carried out independently, adequately, promptly, and with a sufficient element of public scrutiny[566].

3.1.1. ECtHR Jurisprudence on Torture

This thesis has already analysed the numerous judgments rendered by the ECtHR relating to the prohibition of torture[567]. This section tackles cases in which victims are subjected to torture while in detention, particularly in police custody. The judgments of the Court have therefore introduced a set of standards to improve the prison conditions of States.

In the Aksoy v. Turkey judgment, was subjected to the so-called «Palestinian hanging». Hence, his arms were tied behind his back, and he was suspended by them while being interrogated by State agents. Here, the Court referred to the severe pain that the victim had endured, and how this could only amount to torture and no other form of ill-treatment[568].

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[566] MAVRONICOLA, *Facilitating (Further) Inhumanity: On the Prospect of Losing Article 3 ECHR, a Vital Guarantee for the Under-Protected* in *European Convention on Human Rights Law Review* 2024, 97-115, available at *www.brill.com*

[567] *See* chap. III, § 3.1

[568] Paragraphs 83-87 of the Aydin v Turkey judgment provided that: «While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

84. The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.

85. The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region (see paragraph 14 above) and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.

In the Bati and others v. Turkey judgment, the applicant was also subjected to the «Palestinian hanging» while also «[...] [beaten], *suspended by the arms, undressed and sprayed with water*»[569]. Moreover, the Court also analysed the medical certificates which presented the serious injuries that the victims had sustained from the conduct of the police officers. Therefore, the seriousness of the acts that the applicants had to endure amounted to torture as defined within Article 3 of the Convention[570].

In the Nevmerzhitsky v. Ukraine judgment, the applicant was forcibly fed in a degrading and violent manner. Indeed, police officers had cuffed him, used a mouth-widener and inserted a rubber tube to insert food directly into his throat. The Court held that this method amounted to torture as the use of force was in no way justified by a medical necessity[571].

In the Lapunov v. Russia judgment, the applicant was discriminated for being homosexual and subjected to threats of rape, sexual and psychological abuse whilst he was being held incommunicado in the basement of the Chechen police

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86. Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed, the Court would have reached this conclusion on either of these grounds taken separately.
87. In conclusion, there has been a violation of Article 3 of the Convention».

[569] Paragraph 41 of the Bati and Others v. Turkey judgment is only one of the examples of ill treatment that the applicants had to endure. The same conducts had also been put into place towards the other applicants. For instance, in paragraph 34, applicant Kaya stated that «while in custody she was subjected to falaka, sprayed with water, threatened with rape and undressed ».

[570] Paragraphs 122-124 of the Bati and Others v. Turkey judgment provided that: «In the instant case, the applicants were indisputably kept in a permanent state of physical pain and anxiety owing to their uncertainty about their fate and to the level of violence to which they were subjected throughout their period in police custody. This applied especially to the younger and more vulnerable applicants (Ulaş Batı and Zühal Sürücü were 17 years old at the material time, Sinan Kaya and Ebru Karahancı 18, and Okan Kablan and Sevgi Kaya 16, while Devrim Öktem was pregnant). The Court considers that such treatment was intentionally inflicted on the applicants by agents of the State acting in the course of their duties, with the aim of extracting from them a confession or information about the offences of which they were suspected.123. In these circumstances, the Court finds that, taken as a whole and having regard to their purpose and duration, the acts of violence to which the applicants were subjected were particularly serious and cruel and capable of causing "severe" pain and suffering. They therefore amounted to torture within the meaning of Article 3 of the Convention. 124. There has consequently been a violation of Article 3 on that account».

[571] Paragraphs 98 and 99 of the Nevmerzhitsky v Ukraine judgment provide that: «In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture. [99] In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention».

headquarters. For instance, he was forced to give details of his sexual encounters whilst being filmed[572]. Once again, the Court deemed that these acts amounted to torture as defined in Article 3 due to the heinous conduct of the authorities[573].

All the aforementioned cases elaborate a recurring pattern portraying how torture can also occur while in police custody. This therefore is deeply rooted in the problem of detention conditions and abuse of police power hindering detainees' human dignity[574].

The abuse of police power in the context of torture may be explained by several factors, the most important one being the failure of the State to prevent ill-treatment. Therefore, considering the positive obligations recognised to States under Article 3 of the Convention, the latter should ensure an adequate system which recognises criminal responsibility to State agents and police officers. This also means that States are responsible for carrying out effective and prompt investigations. For instance, in the Ochigava v. Georgia judgment, the domestic authorities did not adequately or thoroughly investigate the involvement of prison officers in the ill-treatment of the detained. Moreover, the Court held in paragraph

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[572] ECHR, *Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture*, 2025, cit.

[573] Paragraphs 107 to 110 of the Lapunov v. Russia judgment provide that: «As to the legal classification of the treatment, the Court observes that the applicant provided a clear and detailed account of his ill-treatment between 16 and 28 March 2017 when he was held incommunicado in the basement of the Chechen police headquarters solely on account of his homosexuality. He was entirely vulnerable *vis-à-vis* the police officers who beat him up on several occasions by kicking and hitting him, sometimes with PVC pipes. Almost six months after the ill-treatment, the applicant displayed injuries that were recorded in the forensic medical examination (see paragraphs 37 and 44 above), which confirmed that they could have been inflicted on the applicant during the period in question and in circumstances consistent with his explanations. 108. The applicant's physical injuries were aggravated by psychological violence. He was forced to disclose the names of homosexual men to the police officers and witnessed the beating of one of them (see paragraphs 21, 22 and 25 above). He was subjected to discriminatory remarks and insults by the perpetrators, who threatened him with rape and sexual abuse. He was also repeatedly forced to give details of his sexual encounters to various individuals, sometimes while being filmed (see paragraphs 25 and 28 above). Prior to his release he was threatened with reprisals, to deter him from pursuing criminal proceedings. 109. The combination of the above factors aroused in the applicant feelings of fear, anguish and inferiority that persisted even after his release, manifesting themselves in "defined tremors" across his body in response to his memories of the events (see paragraph 37 above), persistent anxiety and PTSD (see paragraph 61 above). 110. The Court notes that the treatment to which the applicant was subjected, while entirely under the authorities' control, was not made strictly necessary by his conduct. Thus, having regard to the material before it, the Court finds that the ill-treatment to which the applicant was subjected by State agents between 16 and 28 March 2017 amounted to torture (compare *Abdulkadyrov and Dakhtayev v. Russia*, no. 35061/04, § 70, 10 July 2018). There has accordingly been a violation of the substantive limb of Article 3 the Convention».

[574] SCAROINA, *Il delitto di tortura. L'attualità di un crimine antico*, Bari, Cacucci, 2018, pp. 72-90.

59 of the judgment that «*such an inexplicably selective approach on behalf of the investigative authorities sits ill with the respondent State's procedural obligations under Article 3 of the Convention because, in order for an investigation to be effective, its conclusions must always be based on thorough, objective and impartial analysis of all relevant elements, and this obviously includes conducting an adequate probe into credible allegations of criminal complicity*»[575].

A particularly controversial issue in the context of detention practices is the use of *incommunicado* detention, especially regarding its possible incompatibility with the prohibition of torture. Indeed, in certain extreme cases, where exceptionally prolonged or harsh isolation occurs, this may accentuate the feeling of distress of the detainee and amount to torture. Furthermore, police officers may feel freer to treat detainees in a harsher manner possibly infringing their human dignity. For instance, there are numerous cases from the ECtHR regarding the inefficient investigation of the infringement of the prohibition of torture when the detainees are held incommunicado in Spain. The Court has found multiple violations by Spain for the failure to thoroughly investigate the claims of torture made by the victims[576]. For these reasons, the Court has repeatedly urged States to comply with the measures highlighted by the Convention for the Prevention of Torture[577].

3.1.2. Other forms of Ill-treatment

This section briefly examines the concepts of degrading and inhuman treatment or punishment in Article 3 of the ECHR. The European Court of Human Rights distinguishes between the forms of ill-treatment according to the degree of severity. Moreover, these concepts are characterised by different definitions.

[575] ECHR, Section V, 16.02.2023, no. 14142/15, Ochigava v. Georgia., in *HUDOC*
[576] For instance, in the case of Martinez Sala in 2004, of San Armigiro Isasa in 2010, of Beristain Ukar in 2011 and of Otamendi Egiguren in 2012.
[577] RIGHTS INTERNATIONAL SPAIN, *Spain's Incommunicado Detention Violates Human Rights*, 2014, available at *www.liberties.eu*.

Degrading treatment occurs when a person is humiliated or fears the offender. According to paragraph 89 of the Gäfgen v. Germany judgment[578], treatment is degrading «*when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience*».

Due to its humiliating nature, degrading treatments heavily intertwine with the concept of human dignity, as thoroughly examined in the Bouyid v. Belgium judgment. As the definitions of degrading treatment and torture may overlap, the degree of humiliation is to be considered on a case-by-case approach[579].

On the other hand, inhuman treatment gives more attention to the level of suffering inflicted. As provided by paragraph 120 of the Labita v. Italy judgment, an act is inhuman when «[...] *it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering* [...]». Therefore, the definition of inhuman treatment is much more centred on the level of suffering of the victim rather than on the humiliation[580].

3.2. European Committee for the Prevention of Torture (CPT)

The Council of Europe in 1950 created the European Convention on Human Rights and introduced Article 3 prohibiting torture. Several years later, Member States deemed that it was necessary to introduce an efficient monitoring mechanism. Therefore, in 1987, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was signed and entered into force two years later. The latter established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "CPT"). This Committee is embedded in the protection of human rights and of victims of ill-treatment.

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[578] The definition of degrading treatment has also been found in the Ilascu and Others v. Moldova and Russia judgment of 2004; and the M.S.S. v. Belgium and Greece judgment of 2011.
[579] ECHR, *Guide on Article 3 of the European Convention on Human Rights: Prohibition of Torture*, cit.
[580] HARRIS, O'BOYLE, BATES, BUCKLEY, KAMBER, BRYANSTON-CROSS, CUMPER, & GREEN, *Article 3: Freedom from Torture or Inhuman or Degrading Treatment or Punishment*, in *Law of the European Convention on Human Rights*, 2023, Part three, available at *www.global.oup.com*

Article 1 of the latter Convention states the role of the Committee providing that it «[...] *shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment*». According to this Article, the Committee is a proactive non-judicial mechanism which aims to prevent torture and inhuman or degrading treatment by visiting specific countries.

There are various elements of the CPT which make it particularly important. One notable element is that the CPT's relationship with State Parties is founded on the principles of cooperation and confidentiality. Hence, CPT aims to assess and help State parties in an efficient manner whilst cooperating with them. This will allow the CPT to effectively address the issues of State parties.

Moreover, the Committee's composition consists of individual experts in various fields, including medicine, human rights and psychiatry[581]. This variety of individuals allows for the Committee to thoroughly investigate the situation upon their visits while also ensuring adequate protection of possible victims of torture.

The CPT conducts two types of visits. The first type is the period visits, which are carried out by the Committee regularly in all State Parties. On the other hand, *ad hoc* visits are conducted by the Committee when specific conditions, which possibly amount to torture, inhuman or degrading treatment arise. While the reports of the period visits are published in advance, *ad hoc* visit reports are disclosed only after the visit[582].

Once arrived, the Committee has vast powers with limited restrictions. For instance, it can ask for any information from the State and move freely in different areas. Additionally, it may also interview individuals deprived of their liberty[583].

In its lifespan, the CPT has achieved significant success but has also faced some issues.

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[581] CASSESE, *The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age*, in *The Human Dimension of International Law: Selected Papers of Antonio Cassese,* 2002, available at *www.corteidh.orcr*.
[582] EUROPE'S HUMAN RIGHTS WATCHDOG, *Prevention of Torture - and CPT*, 2014, available at *www.europewatchdog.info*.
[583] COUNCIL OF EUROPE, *CPT Standards,* Rev. 2015, available at *www.coe.int*.

On the one hand, the CPT has successfully managed to carry out its visits to the State parties. Regardless of certain disagreements or resistance from national authorities, this system has always brought effective visits. However, the CPT has recognised instances where State parties tried to improve the situation given their visit: for instance, by moving individuals away from detention centres.

The CPT has also been very effective in its preventive aim. Not only has the Committee managed to thoroughly investigate specific cases and prevent potential threats, but it has also made many of its findings public through its Annual Report. These reports aim to ensure that all State parties can adopt the standards that have been developed by the CPT and build on them.

A weakness that the CPT has faced has been the lack of experts. Although the Committee is known for its diverse expertise, each situation needs a specific expert who may not be available or present. Therefore, the Committee may ask for outside help, and the latter may draft the visiting report, however, their view will not be part of the draft report nor the discussion in the plenary Committee. This proves to be inefficient as the heart of the problem will not be thoroughly tackled[584].

With the 14th General Report of 2004, the CPT reflected on the importance of combating impunity. It specifically reflected on the undermining of the protection of the prohibition of torture when officers are the ones responsible for such offences. The CPT believed that it is essential to bring to justice such individuals to convey the message that such offences will not be tolerated by the Committee.

Furthermore, the CPT holds that, to prevent ill-treatment, investigations should always be undertaken even in the absence of a formal complaint. It has stated that, for an investigation to be efficient, it should be independent, thorough and conducted in a comprehensive manner[585], prompt, and expeditious and there should

[584] CASSESE, *The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age*, in *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, cit.

[585] Paragraph 32 and 33 of the 14th General Report of 2004 of the CPT provide that «For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are independent from those implicated in the events. In certain jurisdictions, all complaints of ill-treatment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a preliminary investigation should be opened into a complaint; the CPT welcomes such an approach. However, it is not unusual

be a sufficient element of public scrutiny[586]. These elements are very similar, if not the same, to the ones that have been introduced by the ECtHR jurisprudence.

3.3. Jurisprudence of the Court of Justice of the European Union

The Court of Justice of the European Union has had a limited but significant impact on the prohibition of torture. Its jurisprudence has been heavily influenced by the existing jurisprudence of the ECtHR. Indeed, Article 4 of the EU Charter of Fundamental Rights[587] contains an equivalent provision to Article 3 of the ECHR.

In the C-353/16 judgment, the CJEU examined whether subsidiary protection applied to non-EU Nationals who had been previously tortured in their country of origin and were not at risk of such ill-treatment upon their return. The CJEU held that the lack of a risk of being tortured meant that the subsidiary protection could not be applied to the applicant. However, the CJEU here also considered the complex psychological state of the victim, considering that he could commit suicide upon arrival in his country of origin. Therefore, considering the

for the day-to-day responsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowledging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations. 33. An investigation into possible ill-treatment by public officials must comply with the criterion of thoroughness. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, inter alia, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. The investigation must also be conducted in a comprehensive manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded». Available at *www.rm.coe.int*.

[586] COUNCIL OF EUROPE, *CPT Standards,* cit.

[587] Article 4 of the EU Charter regulates the Prohibition of torture and inhuman or degrading treatment or punishment. This provision provides that: «No one shall be subjected to torture or to inhuman or degrading treatment or punishment».

ECtHR jurisprudence[588] and the EU Charter, the CJEU held[589] that removing a non-EU national suffering from particularly serious mental or physical illness constituted a form of ill-treatment[590].

The judgement of the CJEU was therefore particularly important also for its acknowledgement of the ECtHR jurisprudence and for its interpretation of Article 4 of the EU Charter in light of the principle of human dignity.

4. CRIMINALISATION OF TORTURE UNDER ITALIAN LAW

The prohibition of torture entered the Italian legal framework with the enactment of Law no. 110 of 2017. However, as this thesis section will develop, this has not been simple.

Since its enactment, torture is now part of the Italian Criminal Code and has been interpreted and adopted in several key Italian judgments. Moreover, both jurisprudence and legal doctrine recognise the inherent link between human dignity and the prohibition of torture. This principle has also been shared by anti-torture associations in Italy, such as Antigone.

While the adoption of the law has been a step forward in the Italian legal framework, it has been subject to criticism. Many have questioned whether the law

[588] Specifically, this interpretation was given in accordance with the Paposhvili v. Belgium judgment. Paragraph 184 of the judgement provides that: «As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see M.S.S. v. Belgium and Greece, cited above, §§ 286-87, and F.G. v. Sweden, cited above, §§ 117-18) ».

[589] Paragraph 58 of the C-353/16 provides that: «It follows from the foregoing that Articles 2(e) and 15(b) of Directive 2004/83, read in the light of Article 4 of the Charter, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine».

[590] ECRE, *Court of Justice of the EU rules on scope of subsidiary protection for torture victims*, 2018, available at *www.ecre.org*.

and the related provisions adopted in the Italian Criminal Code are adequate in protecting from police brutality and abuse of power.

4.1. Pivotal Jurisprudence in Italian Criminal Law

Law no. 110/2017 has been a revolutionary step in Italian criminal law as it has explicitly introduced the prohibition of torture within the Italian criminal code. As this section will now develop, its enactment, however, was long delayed due to legal and political issues.

Over the years, various developments have pressured the Italian legislator to criminalise the prohibition of torture, with the most important influence deriving from two judgments of the European Court of Human Rights, specifically Cestaro v. Italy and Bartesaghi, Gallo and Others v. Italy.

In the Cestaro judgment, the ECtHR recognised for the first time Italy's failure to have a specific provision for torture. However, it was the Bartesaghi, Gallo and Others judgment which accelerated the adoption of Law No. 110/2017[591].

4.1.1. Cestaro v. Italy judgment

The Cestaro v. Italy case is a landmark judgment in Italy's legal history.

On the one hand, the facts of the case and the police brutality shocked many Italians.

On the other hand, this was a landmark judgment as the ECtHR recognised Italy's violation of Article 3 of the ECHR and ordered Italy to introduce adequate legal instruments to combat torture.

The case concerns the violence suffered by the applicant, Mr Cestaro, during the night of the 21st and the 22nd of July of 2001.

Mr Cestaro was one of the many protesters in Genoa for the G8. The protesters were divided into those who were peaceful and the so-called "Black Blocs", known for being a more violent radical group.

[591] COLELLA, *Il delitto di tortura (art. 613 bis c.p.) a sei anni dall'introduzione,* in *Diritto penale contemporaneo, 2018,* available at *www.archiviodpc.dirittopenaleuomo.org*

On the night between the 21st and 22nd of July, many protesters, including Mr Cestaro, took shelter in the Diaz-Pertini School. On the same night, the police brutally stormed the school to, allegedly, find proof against the Black Blocs. The raid degenerated into extreme, indiscriminate violence. Mr Cestaro, the applicant, was one of the victims of torture, as, according to paragraph 34 of the judgment, he «[...] *was mainly struck on the head, arms and legs, whereby the blows caused multiples fractures: fractures of the right ulna, the right styloid, the right fibula and several ribs* [...]». These violent actions resulted in Mr Cestaro becoming permanently and partially disabled.

Mr Cestaro, as provided by law, first brought the case in front of the domestic courts. The Italian Courts held that Mr Cestaro was not entitled to being a victim as he had been already awarded compensation. Moreover, the Court deemed that Mr Cestaro had not exhausted all domestic remedies to bring the case in front of the Strasbourg Court. The applicant, however, reiterated the decisions of the Court of Appeal which held that the entire case should be dismissed as the charges were time-barred and that an amnesty had been applied to the remaining offences[592]. In addition, Italy lacked a specific offence of torture. For all these reasons, Mr Cestaro decided to turn to the ECtHR.

The Court held that Mr Cestaro was perceived as a victim considering the interpretation of Article 34 of the ECHR. In addition, it believed that his being

[592] CASSIBBA. *Violato il divieto di tortura: condannata l'Italia per i fatti della scuola "Diaz-Pertini*", in *Riv. Diritto Penale Contemporaneo,* 2015, 1-8, available at *www.penalecontemporaneo.it*.

awarded compensation was not enough for him to not be recognised as a victim[593]. Moreover, the ECtHR found that the exhaustion requirement had been met[594].

Having therefore recognised the admissibility of the claims made by Mr Cestaro, the Court moved to the analysis of both the material and procedural breaches of Article 3 of the ECHR[595].

The analysis of the material breaches of Article 3 of the ECHR are found in paragraphs 182 - 190 of the judgment. In its analysis, the Court deems the ill-treatment inflicted on the applicant to have been gratuitous and in no way were the means used by the authorities proportionate to the aim. The Court therefore deemed that the intentional and premeditated nature of the ill-treatment may not be overlooked. In addition, the Court also considered the fact that the authorities had sufficient time to organise the search operations, which therefore did not explain the violent behaviour[596]. Overall, the Court held that the authorities were guilty of the material breach of Article 3 of the ECHR.

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[593] Paragraph 231 of the Cestaro v. Italy ECtHR judgment provides that: «The Court has repeatedly held that the breach of Article 3 cannot be remedied solely by awarding compensation to the victim. This is so because, if the authorities could confine their response to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, Camdereli, cited above, § 29; Vladimir Romanov, cited above, § 78; and Gäfgen, cited above, § 119; see also, mutatis mutandis, Krastanov, cited above, § 60; under Article 2, see Nikolova and Velichkova, cited above, § 55, with the references therein; finally, see Petrović v. Serbia, no. 40485/08, § 80, 15 July 2014). That is why the applicant's ability to request and obtain compensation for the damage which he sustained as a result of the ill-treatment or, as in the present case, payment by the authorities of a given amount as an advance on the compensation are only part of the overall action required (see Camdereli, cited above, § 30; Vladimir Romanov, cited above, § 79; and Nikolova and Velichkova, cited above, § 56)». Available at *www.hudoc.echr.coe.int*.

[594] VIGANÒ, *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 *Riv. Diritto Penale Contemporaneo,* 2015, available at *www.penalecontemporaneo.it*.

[595] Paragraph 169 of the Cestaro v. Italy ECtHR judgment provides that: «Under those circumstances, it considers that the complaint of a violation of Article 3 is sufficiently serious and that there is no need to examine the substantiation of the applicant's other allegations (humiliating positions, inability to contact a lawyer and/or a support person, lack of appropriate and prompt treatment, and presence of police officers during the medical examination). »

[596] Paragraphs of the Cestaro v. Italy ECtHR judgment regarding the Court's analysis of the material breaches of Article 3 of the ECHR. Paragraph 182 - 190 of the judgment provide that: «The ill-treatment complained of in the instant case was thus inflicted on the applicant entirely gratuitously and, as in the cases of Vladimir Romanov (cited above, § 68) and Dedovski and Others (cited above, §§ 83-85), cannot be regarded as a means used proportionately by the authorities to achieve the aim pursued. [...] Above and beyond any circumstantial evidence of the presence of Black Bloc members

From paragraphs 204 to 236, the ECtHR gave its assessment of the procedural aspects of Article 3 of the Convention. A combined reading of Articles 3 and 1 of the Convention provide a duty for Governments to investigate the actions of State authorities[597]. Investigations should be effective and capable of identifying the individuals responsible for the torture. Applying such principles to the case at hand, the Court deemed that there were three issues in the investigations that had been carried out by Italy, these being the failure to identify those responsible for the impugned ill-treatment; statute-barring of the offences and partial remission of sentence and doubts concerning the disciplinary measures taken against those responsible for the impugned ill-treatment[598].

The Court held that, although the investigations took over ten years, the Genoa Public Prosecutor's Office was not guilty of delays or negligence as it had to deal with «*a number of major obstacles during the investigation and that the trial*

in the Diaz-Pertini School on the evening of 21 July (see paragraphs 51 and 63 above), the actual modus operandi was inconsistent with the authorities' declared aim: the police forced their way into the building by breaking down the gate and the entrance doors of the school, beat up virtually all those inside the building and seized their personal effects without even attempting to identify the owners. [...] It does not transpire from the domestic decisions that the officers had received any instructions regarding the use of force (see paragraphs 65, 68 and 79 above). The police immediately assaulted clearly harmless people who were standing outside the school (see paragraphs 31 and 66 above). At no stage did they attempt to negotiate with the individuals who had lawfully sought shelter in the school building or to persuade them to open the doors which those persons had lawfully locked, preferring to break them down without further ado (see paragraphs 32 and 67 above). Lastly, they systematically beat up all those present throughout the building (see paragraphs 33 and 67 above). It is therefore impossible to overlook the intentional and premeditated nature of the ill-treatment suffered, in particular, by the applicant. [...] With specific regard to Article 3 of the Convention, the Court has on many occasions held that that provision enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see Selmouni, cited above, § 95; Labita, cited above, § 119; Gäfgen, cited above, § 87; and El-Masri, cited above, § 195). In conclusion, having regard to all the facts set out above, the Court 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.».

[597] Paragraph 204 of the Cestaro v. Italy ECtHR judgment provides that: «The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see paragraph 93 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity [...]»

[598] Paragraphs 213 to 228 of the Cestaro v. Italy ECtHR judgment.

courts had to conduct highly complex criminal proceedings against dozens of accused persons, also involving some one hundred Italian and foreign parties claiming civil damages, in order to establish, with respect for the safeguard of the trial, individual responsibilities [...]»[599]. However, as provided by paragraphs 227 and 228 of the judgment, the Court believed that Italy did not introduce adequate disciplinary measures against the responsible for the ill-treatment. In addition, it appeared that the authorities responsible for the torture were in no way suspended from their position. Therefore, Italy had failed to adequately punish the torturers in light of the violations as provided by Article 3 of the Convention[600]. Overall, the Court believed that Italy had breached the procedural obligations of Article 3 of the Convention[601].

The conclusions of the Court have been given by applying Articles 41 and 46 of the Convention. On the grounds of Article 41, the Court deemed that Italy owed 45,000 euros to the applicant. In addition, the Court also reflected on the failure of Italy to comply with its obligations to have a provision regulating torture. Indeed, paragraph 243 of the judgment states that «[...] *the State's positive obligations under Article 3 may include a requirement to establish an appropriate legal framework, in particular by introducing efficient criminal-law provisions* [...]». This holding of the Court is truly what makes Cestaro v. Italy a landmark decision for the initial process of the adoption of an appropriate provision against torture.

[599] Paragraph 223 of the Cestaro v. Italy ECtHR judgment.
[600] VIGANÒ, *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 *Riv. Diritto Penale Contemporaneo*, cit.
[601] Pargraph 236 of the Cestaro v. Italy ECtHR judgment provides that: «The Court finds a violation of Article 3 of the Convention – on the ground of ill-treatment sustained by the applicant, which must be classified as 'torture' within the meaning of that provision – under both its substantive and procedural heads. That being the case, it holds that it is necessary to reject both the Government's preliminary objection regarding the loss of victim status (see paragraphs 131 et seq. above) and its preliminary objection concerning the non-exhaustion of domestic remedies (see paragraphs 139-140 above).».

4.1.2. Bartesaghi, Gallo and Others v. Italy

The Bartesaghi, Gallo and Others v. Italy judgment[602] delivered by the Strasbourg Court reiterates many of the points previously set out in the Cestaro v. Italy judgment. The underlying facts of the case are the same as the Cestaro v. Italy case, with the difference that, in the Bartesaghi, Gallo and Others judgment, there were forty-two applicants.

As in the earlier judgment, the Court analysed both the material and procedural breaches of Article 3 of the Convention, concluding that the acts committed during the night of the 21st and 22nd of July 2001 likewise amounted to torture.

4.2. Article 613*bis* of the Italian Criminal Code

With law no. 110 of 2017, Italy introduced Article 613-*bis* in the Italian Criminal Code, thereby criminalising torture as an autonomous offence. This provision aims to adhere to the obligations deriving from supranational law, specifically the UNCAT and the ECHR. Moreover, it complies with the constitutional principles enshrined in Articles 2, 10, 13(4) and 117(1) of the Italian Constitution.

To respect such obligations, the Italian legislator introduced a provision like the one provided by Article 3 of the ECHR, slightly deviating from Article 1 of the UNCAT[603]. Indeed, the Italian legislator has preferred to develop the crime of torture with a dual nature, applying both to acts committed by public authorities and to those committed by private individuals. However, this provision still upholds the

[602] ECtHR, Section I, 22.06.2017, nos. 12131/13, 43390/13, Bartesaghi, Gallo and Others v. Italy judgment, in *HUDOC*

[603] This has been provided by judgment no. 47079/2019 of the Italian Supreme Court, which has stated that the Italian legislator does not believe that torture should exclusively be committed by a public authority. Instead, the provision should also include those individuals who have no official qualification. In the Italian original version: «[...] *di non identificare in via esclusiva la tortura con il reato proprio del funzionario pubblico, ma di includere nella nozione anche le condotte poste in essere da soggetti privi di qualifica*».

fundamental principle enshrined in the UNCAT stating that, generally, a broader interpretation of the provision should be preferred[604].

However, Article 613-*bis* is strongly criticised as overly complex and multifaceted, complicating its interpretation and application. An analysis of this provision will aid its comprehension while also analysing its flaws.

Article 613-*bis* of the Italian Criminal Code is divided into five paragraphs[605]. The first paragraph regulates torture as a general crime, the second paragraph regulates torture when committed by public officials and the last paragraphs list aggravating factors of the crimes in case of death or injuries. The scope of the Article is to protect human dignity[606], personal moral autonomy and mental and physical integrity.

The first paragraph of this provision provides that «*whoever, by violence or grave* ["gravi"] *threats, or cruel behaviour, inflicts physical suffering or verifiable psychological trauma on a person deprived of their personal liberty, or entrusted to custody, power, vigilance, control, care or assistance, or who finds themselves in a condition of impaired defence, shall be imprisoned for four to ten years if the act has been committed repeatedly or results in inhuman or degrading treatment harming the victim's dignity*»[607]. As it immediately appears, the provision is very complex, and it encompasses several elements. Therefore, it must be broken down.

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[604] FIANDACA, MUSCO, *Diritto Penale: Parte Speciale. I Delitti Contro la persona,* Bologna, 2020, 2(1), 276-285

[605] Article 613-*bis* of the Italian Criminal Code, in the Italian original version, provides that: «Chiunque, con violenze o minacce gravi, ovvero agendo con crudeltà, cagiona acute sofferenze fisiche o un verificabile trauma psichico a una persona privata della libertà personale o affidata alla sua custodia, potestà, vigilanza, controllo, cura o assistenza, ovvero che si trovi in condizioni di minorata difesa, è punito con la pena della reclusione da quattro a dieci anni se il fatto è commesso mediante più condotte ovvero se comporta un trattamento inumano e degradante per la dignità della persona. [2] Se i fatti di cui al primo comma sono commessi da un pubblico ufficiale o da un incaricato di un pubblico servizio, con abuso dei poteri o in violazione dei doveri inerenti alla funzione o al servizio, la pena è della reclusione da cinque a dodici anni. [3] Il comma precedente non si applica nel caso di sofferenze risultanti unicamente dall'esecuzione di legittime misure privative o limitative di diritti. [4] Se dai fatti di cui al primo comma deriva una lesione personale le pene di cui ai commi precedenti sono aumentate; se ne deriva una lesione personale grave sono aumentate di un terzo e se ne deriva una lesione personale gravissima sono aumentate della metà. [5] Se dai fatti di cui al primo comma deriva la morte quale conseguenza non voluta, la pena è della reclusione di anni trenta. Se il colpevole cagiona volontariamente la morte, la pena è dell'ergastolo.»

[606] According to the Judgment of the Italian Supreme Criminal Court no. 37171/2024, the crime of torture as provided for by article 613-*bis* is inherently linked to the protection of human dignity.

[607] The original version of the paragraph may be found in footnote 141.

According to the first paragraph of this provision, torture may be committed by «whoever [...]». The Italian legislator has therefore preferred introducing a broader definition of torture in comparison to the one provided by the UNCAT, which only takes into consideration torture committed by public officials. This has been one of the first criticism raised as, although Italy is obligated to conform with international instruments, it has decided to adopt another definition.

Moreover, the torturer may commit the crime by violence or serious threats, or cruel behaviour. When analysing the conduct of the torturer, one of the most controversial questions is whether the threat must be severe (*gravi*) to qualify as torture. It has been debated whether using the term *gravi* for threats and not violence implies that violence is always serious. Furthermore, the conduct[608] can also constitute torture when it is committed with cruel behaviour. According to the judgment of the Italian Supreme Court no. 324/2016, cruelty means that the act of the torturer has been carried out with no empathy or emotion but rather pleasure or satisfaction[609]. In addition, recent Italian jurisprudence has held that kidnapping is encompassed within the definition of torture due to the presence of the elements of violence and cruelty[610].

The provision also refers to the impact that the conduct must have on the victim for the crime to amount to torture, including physical suffering or verifiable psychological trauma[611]. The legislator has here preferred approaching torture in a more innovative way, which encompasses how torture can be carried out nowadays

[608] Judgment of the Italian Supreme Criminal Court no. 42647/2024 interpreted the part of the provision that provides that the conduct may be «*committed repeatedly*». According to such judgment, this refers both a plurality of repeated acts over time and to a plurality of violent behaviours occurring within the same chronological context.

[609] FIANDACA, MUSCO, *Diritto Penale: Parte Speciale. I Delitti Contro la persona*, cit.

[610] Italian Criminal Supreme Court judgment 1729/2021, Italian original version provides that: «*Il delitto di sequestro di persona è assorbito in quello di tortura, nonostante la diversa oggettività giuridica, nella misura in cui la condotta di privazione della libertà personale della vittima connoti parte della condotta torturante, agevolando la realizzazione del fine ultimo, perseguito dall'agente, di inflizione alla medesima di un supplizio, mentre si configura il concorso tra i due reati nel caso in cui la privazione della libertà personale si protragga oltre il tempo necessario al compimento degli atti di tortura*».

[611] According to judgment no. 34207/2024 of the Italian Supreme Criminal Court, the definition of the prohibition of torture is intrinsically broader than the one provided for in Article 3 of the ECHR, especially, due to the reference of the psychological trauma on the victim of torture. Moreover, the broadness of the Italian provision is also demonstrated by the fact that it encompasses «inhuman or degrading treatment» within the same context of torture, making it only one crime, and not distinguishing the two.

without there necessarily being a visible physical trauma on the victim. Moreover, the fact that the psychological trauma needs to be verifiable should not be interpreted as an attempt to restrict the definition. Rather, it simply underscores the need for the trauma to be identified with objective criteria[612]. The fact that the provision does not refer to physical injuries on the victim is also integrated by the fourth paragraph of Article 613-*bis*, which reacts by increasing the punishment.

The Article also embeds a victim-vulnerability requirement: the victim must be «[...] *deprived of their personal liberty, or entrusted to custody, power, vigilance, control, care or assistance, or who finds themselves in a condition of impaired defence* [...]». The Italian legislator has preferred including the victims of the crime also those who are more vulnerable and therefore should be more protected.

The most controversial element of this first paragraph of the Article is the conclusion: «*results in inhuman or degrading treatment harming the victim's dignity*». The legislator aimed to ensure that the Italian Criminal Code conformed to international and European law, especially after the Cestaro and Bartesaghi, Gallo and Others judgments. Indeed, the criticism has specifically focused on this part of the provision being extremely redundant and not truly introducing broader protection for the dignity of the victims of torture. The redundancy is given by the fact that acting with cruelty necessarily results in inhuman or degrading treatment[613].

The second paragraph of Article 613-*bis* provides that «*if the acts referred to in the first paragraph are committed by a public official or a person entrusted with a public service, through abuse of power or in violation of the duties inherent to their office or service, the penalty shall be imprisonment for a term of five to twelve years*». This provision has also been very debated and has led to very controversial opinions, especially when tackling its nature.

Upon initial examination, the second paragraph of the provision bears a strong resemblance to Article 1 of the UNCAT. For the conduct to constitute torture, it must be committed by a public official, or a person entrusted with a public service and must satisfy the elements outlined in the first paragraph. The provision,

[612] COLELLA, *Il delitto di tortura (art. 613 bis c.p.) a sei anni dall'introduzione*, cit.
[613] FIANDACA, MUSCO, *Diritto Penale: Parte Speciale. I Delitti Contro la persona,* 2020

therefore, refers to torture when individuals hold specific duties and responsibilities, while also introducing a potential exclusion of liability where «*the* [...] *suffering incurred derives exclusively from the enforcement of lawful measures that deprive or restrict rights*»[614].

A more thorough examination of the provision, however, makes the reader question whether the nature of the crime should be associated more with an autonomous crime or an aggravating circumstance.

The Italian legislator aimed to make this second paragraph an aggravating circumstance, together with the other two stated in the fourth and fifth paragraphs. This nature has also been confirmed by judgment no. 50208/2019 of the Italian Supreme Court on the matter[615]. However, this approach has been heavily criticised by existing legal doctrine, deeming this perspective as too simplistic.

According to the prevailing legal doctrine, this second paragraph needs to be interpreted systematically, literally, and considering the principles set forth by the Constitution and supranational law. This second paragraph enriches the provision by introducing a new possible conduct for the crime to amount to torture As stated, the third paragraph of the provision excludes the liability of public officials, which would mean that the second paragraph may not amount to an aggravating circumstance but rather to an autonomous crime. This remains a controversial legal issue as, according to the the supranational legal framework, the paragraph should be interpreted as an autonomous crime, and not as an aggravating circumstance[616]. Nevertheless, Italy still prefers interpreting it as an aggravating circumstance rather than a standalone offence.

The last two paragraphs of Article 613-*bis* provide two different aggravating circumstances, substantially increasing the penalty in the case of torture resulting

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[614] This is the third paragraph of Article 613-*bis* of the Italian Criminal Code. Some have found this provision to be very controversial and redundant within the Italian criminal law due to the already existing Article 51 of the Italian Criminal code, which provides that «the exercise of a right, or the performance of a duty imposed by a legal provision or by a lawful order of the public authority, precludes criminal liability». MARTURANO, *La configurazione del reato di* tortura, 2020, available in Diritto.it.

[615] Italian Supreme Court Judgment no. 50208/2019 provides in its preamble that: «La norma di nuovo conio prevede un reato comune - contemplando l'eventualità che esso sia commesso da un pubblico ufficiale o da un incaricato di pubblico servizio come circostanza aggravante - e di evento […]». (Italian original version)

[616] COLELLA, *Il delitto di tortura (art. 613 bis c.p.) a sei anni dall'introduzione*, 2023, cit.

in an injury, a serious injury, a very serious injury or an accidental or intended death. In these last two paragraphs, the Italian legislator has especially referred to the intentionality of the acts of the torturer[617], increasing the penalty when the death was not accidental. On the other hand, when torture leads to injuries, these do not constitute torture if the torturer intentionally injured the victim.

The fifth paragraph has also led to several controversies, deeming this provision to be overly redundant. Indeed, part of the legal doctrine holds that, if torture leads to death, this will constitute voluntary murder under Article 575 of the Italian Criminal Code, with the possible aggravating circumstance as provided by Article 61 no. 4 of the code[618].

4.2.1. Article 613-*ter* of the Italian Criminal Code

The Italian criminal legal framework has also introduced Article 613-*ter* to punish the incitement to commit torture from one public official to another. The provision specifically provides that «*any public official, or anyone entrusted with a public service, who—while performing official duties— concretely incites another public official or service provider to commit the crime of torture, is punishable by six months to three years' imprisonment if that incitement is either rejected or accepted but the torture is not carried out*».

This provision portrays the central position that public officials are deemed to play in the crime of torture, mirroring the definition provided by Article 1 of the UNCAT.

According to this provision, the offence is consummated when the incitement is either refused by the public officer or accepted without carrying out the illicit conduct. If torture is ultimately committed, this would amount to a crime with joint participation as provided for in Article 110 of the Italian Criminal Code.

The fundamental element of Article 613-*ter* is the reference to the incitement having to be concrete and adequate to determine the perpetrator of the

[617] For the conduct of the perpetrator to amount to torture as defined by Article 613-*bis* of the Italian criminal law, the provision asks for there to be *dolo generico*. Hence, the torturer does not necessarily have to act with a specific intent.
[618] MARTURANO, *La configurazione del reato di tortura*, 2020, available at *www.diritto.it.*

crime (in Italian «*concretamente idoneo*»). This element needs to be interpreted case by case.

The nature of the provision has been deemed to be more symbolic as, in practice, it is not as applied as Article 613-*bis*. Indeed, it is very complex to prove incitement from one public official to another in Court[619].

4.2.2. Bill proposals amending Article 613-*bis* and 613-*ter*

In recent years, the effectiveness of Article 613-*bis* of the Italian Criminal Code has been the subject of considerable debate in Italy. Various political parties have shared contrasting opinions on whether the provision is adequate or requires amendment. Additionally, law enforcement authorities have consistently voiced opposition to the provision, arguing that it imposes excessive limitations on their powers. The controversy reached a new peak when two bills, both presented by two Italian political parties, were referred to the Senate: Bill (translated from Italian «Disegno di Legge») no. 341, proposed by the political party «Fratelli d'Italia», and Bill no. 661, proposed by the «Movimento 5 Stelle». While Bill No. 661 aims to amend Article 613-*bis* by treating the prohibition of torture as an aggravating circumstance, Bill No. 341 takes a more radical approach, aiming to repeal the provision[620].

On the one hand, Bill No. 341 aims to repeal the provisions regulating the prohibition of torture in Italy. First, the Bill deems Article 613-*bis* and Article 613-*ter* to inefficiently protect citizens from torture, as it can't simply be classified as an «ordinary offence». Moreover, according to the Movimento 5 Stelle international law does not require the introduction of autonomous crimes within the domestic legal framework but, rather, it only asks to ensure that the conduct is punishable. Overall, the Bill deems that the previous legal framework was more compatible with the requirements of international law than the present one is[621].

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[619] FIANDACA, MUSCO, *Diritto Penale: Parte Speciale. I Delitti Contro la persona,* 2020

[620] SCAROINA, *Il delitto di tortura. L'attualità di un crimine antico*, Bari, Cacucci, 2018, pp. 348-359.

[621] MARCHESI, *Sulla proposta di abrogare il reato di tortura*, 2023, available at *www.SIDIblog.it.*

Bill No. 661[622] aims to adhere to the prevailing and more recent jurisprudence, which reflects a preference for referring to the prohibition of torture as an aggravating circumstance and not as an autonomous crime. The Fratelli d'Italia political party aims to do so by re-writing the provision whilst maintaining the spirit of the provision. Indeed, the Bill also responds to the prevailing legal doctrine idea that the prohibition of torture should be considered an autonomous crime by removing the third paragraph of the provision[623]. In addition, the Bill aims to rewrite the fourth paragraph of the Article by stating the prevalence of aggravating circumstances concerning the mitigating circumstances[624].

Since the introduction of Article 613-*bis* and Article 613-*ter* within the Italian legal framework, law enforcement agencies have continuously voiced their concerns about these provisions. They are, therefore, part of the supporters of the proposal of amending the Bills, believing this necessary to avoid state authorities being charged with torture. On this point, the Secretary General of the UILPA police force, Gennarino De Fazio, has expressed his concern by stating that there are hundreds of police officers who are being investigated for alleged torture offences. Although he recognises that some may be responsible, he believes that there is a big problem of false reporting from detainees to avoid harsher sentencing[625].

The opposing view has instead been presented by different human rights organisations, such as the Italian division of Amnesty International[626] and Antigone

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[622] Testo DDL n. 661/2023

[623] As specifically stated by the Bill: «This bill, still with reference to Article 1, entirely repeals the aforementioned third paragraph, which establishes that the offence does not apply in cases where the suffering caused by torture results solely from the execution of lawful measures depriving or restricting rights»

[624] Original version of paragraph 3 of Article 613-*bis* of the Italian Criminal Code: «*Le circostanze attenuanti, diverse da quelle previste dagli articoli 98 e 114, concorrenti con le aggravanti di cui al terzo comma, non possono essere ritenute equivalenti o prevalenti rispetto a queste e le diminuzioni di pena si operano sulla quantità di pena risultante dall'aumento conseguente alle predette aggravanti*.».

[625] POLIZIA PENITENZIARIA UIL, *Su reato di tortura si apra discussione seria - Comunicato Stampa*, 2024, available at *www.polpenuil.it*.

[626] The Italian division of Amnesty International has initiated a petition to avoid the adoption of the proposed bills. According to their website, the appeal has now been signed by 34598 people. In addition, Amnesty international has also addressed a letter to the President of the Italian Senate Ignazio La Russa. The letter states as follows: «Dear President, After almost thirty years since the ratification of the United Nations Convention against Torture by Italy, which took place in 1989, finally, in 2017, Parliament fulfilled the obligation to introduce the crime of torture into the Italian

association. They believe that the abrogation or amendment of the mentioned provisions would be a violation of human rights and a step backwards in time. Furthermore, they think that the proposed bills only aim to safeguard law enforcement agencies from abusing their powers and torturing victims[627].

The debate on the possibility of adopting the proposed bills is still very heated and has led many to question which perspective would lead to a more efficient fight against the prohibition of torture.

4.3. Police Brutality in Italy

Despite Italy's efforts to remove torture, significant progress remains to be made.

One of the biggest problems Italy still needs to face is the improper use of force by law-enforcement officers, which frequently amounts to the crime of torture. Numerous incidents have arisen involving police misconduct. In many of these, organizations, such as Antigone, have intervened to safeguard the victims' rights.

Victims of the authorities' abuse of power are usually detainees or individuals when being put under arrest. In addition, torture has also been faced by those victims who are subjected to medical treatment even if against their will (the so-called «TSO»). Indeed, these cases also see an active role of state authorities[628].

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criminal law. The United Nations Convention expresses the consensus of the international community on the need to define as torture and adequately punish very serious violations of human dignity and the psychic and physical integrity of people when committed by public officials. It is therefore a matter of great concern that just six years after the introduction of the crime, Parliament is about to discuss its possible repeal and its declassification as a common aggravating factor. In these six years, in prisons and other places of detention, there has unfortunately been no lack of episodes of violence perpetrated by public officials of gravity and characteristics such as to be prosecuted as acts of torture. The acceptance of a proposal to repeal the crime of torture would constitute a serious setback for the protection of human rights in our country and would put at risk the punishability of those who use torture as an instrument of overwhelm and the possibility of ensuring justice for victims. We therefore ask that Parliament reject any hypothesis of repeal of the crime of torture and instead work for its strengthening in compliance with international standards as required by international human rights bodies, and that Italy continues to engage in preventing human rights violations by public officials and in prosecuting those guilty of the crime of torture. We thank you for your attention». In AMNESTY INTERNATIONAL, *Il reato di tortura non si tocca!,* available at *www.amnesty.it*.

[627] CARDINALE, *Chi vuole uccidere il reato di tortura?*, 2024, available at *www.lacittafutura.it*.

[628] CURCI, *Polizia italiana: una riforma mancata?*, 2023, available at *www.fondazionefeltrinelli.it*.

In addition, the conditions of the detention centres are inhuman, especially due to the overcrowding of prisoners and the lack of adequate protection for detainees[629]. Indeed, this is one of the problems that, in 2024, has pushed the Committee on the Prevention of Torture (CPT) to visit Italy.

In its visit, the CPT visited four different repatriation detention centres spread throughout Italy: Rome, Potenza, Milan and Gradisca. The Committee specifically criticised the measures being adopted in these centres as too restrictive and the lack of transparency in their management. Indeed, the Committee described the conditions as the ones found in jail. According to the Report of the CPT, individuals were held in bad conditions, victims of torture and abuse of force. Particularly preoccupying was the transport of foreign nations whilst handcuffed in police cars without food or water.

Overall, the Committee deemed Italy as not adequately protecting the individuals stated in the repatriation detention centres. Moreover, Italy failed to collaborate with the CPT by not giving them adequate responses to many of their questions[630]. For these reasons, the CPT recommends a better access to lawyers and legal support to foreign nationals, also entailing the spreading of information[631].

4.3.1. Stefano Cucchi's judgment

The Stefano Cucchi judgment has been a landmark decision in Italy regarding police brutality. The judgment has specifically gained importance due to the media attention.

The decision of the Court of Cassation, rendered in 2022, held the accused, Alessio di Bernardo and Raffaele D'Alessandro, guilty of the murder of Mr Cucchi. Although the Court did not apply the torture provision, which did not yet exist

[629] OSSERVATORIO VITTIMI DEL LAVORO ED EQUIPARATI ALLE VITTIME DEL DOVERE. ASSOCIAZIONE APS, *Violenza nelle carceri: aumento dei casi*, available at *www.vittime-del-dovere.it*.
[630] CENTRO DI ATENEO PER I DIRITTI UMANI, *Rapporto del Comitato per la prevenzione della tortura (CPT) del Consiglio d'Europa sulla visita "ad hoc" in Italia del 2024,* available at *www.unipd-centrodirittiumani.it*.
[631] COUNCIL OF EUROPE, *Anti-torture Committee publishes report on ad hoc visit in Italy*, 2024, available at *www.coe.int*.

within the Italian legal framework, the judgment has led to different discussions tackling the relationship between torture, dignity and police brutality[632].

Mr Cucchi was arrested on the night of the 15th of October 2009 on the grounds of drug dealing. He was then brought to his parents for a house search, which resulted in a negative outcome, and afterwards to the detention centre of Tor Sapienza (Rome). A few hours later, the authorities called the ambulance due to the victim's severe headache and possible seizures. Stefano repeatedly refused treatment up until the 17th of October, when he was admitted to the hospital of Sandro Pertini. According to the medical reports, Mr Cucchi presented several traumatic injuries, causing his death on the 22nd of October.

The Italian Courts have analysed all the evidence to fully comprehend what had happened to Mr Cucchi and the cause of his death. Indeed, the several medical reports, together with the picture of the deteriorated face of the victim, make it difficult to accept that Mr Cucchi's death could be attributed solely to a possible drug dependency. On the contrary, there is reason to believe that he was subjected to inhuman acts amounting to torture (a criminal offence that had not yet entered into force at the time of the events). This may also be represented by the psychological response he had as, in the hospital, he consistently refused to speak.

The Italian Courts not only found that Mr Cucchi had been the victim of such inhuman treatment but that it had occurred on two separate occasions: from the moment that he was brought from his home until the authorities called the ambulance and, secondly, in undergrounds cells of the courthouse before he appeared before the Court for being arrested. Therefore, the acts were perpetrated by state authorities, given that at the time of his arrest, and during the subsequent search of his home, he displayed no injuries, as confirmed by his family. In addition, it was the same Mr Cucchi who had more than once told other inmates about having been injured by the «guards» and by the «servants of the State». The Court also heard several testimonies, including inmate Samura Yaya who reported hearing screams and kicks coming from Mr Cucchi's room whilst in jail[633].

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[632] SIMONETTI, *Il caso giudiziario Cucchi e gli altri: la riflessione in merito alla legge sulla tortura in Italia - prima parte*, 2019, Vatican News, available at *www.vaticannews.va*.
[633] MEDICI PER I DIRITTI UMANI, *Il Caso Cucchi. Un'indagine medica indipendente.* 2015, available at *www.mediciperidirittiumani.org*.

The heinous facts of this case portray one of the biggest problems that Italy, and other countries, have had to face: police brutality. Beyond the torture itself, the victim's dignity is further infringed when the perpetrators are the authorities who are supposed to protect us.

The acts that Mr Cucchi had to endure were not classified as torture as the offence was still not codified in Italian criminal law. However, it is generally accepted that the dignity of Mr Cucchi has been violated due to torture that he had to endure more than once[634].

This judgment has had a pivotal role in initiating a debate aimed at assessing the relationship between human dignity and torture. Indeed, Article 613-bis of the Italian Criminal Code is designed to safeguard the dignity of the person, which is the fundamental value protected by the provision.

4.3.2. Role of Antigone

The Antigone Association, founded in 1991 in Italy, ensures the protection and safeguarding of human rights within criminal law. Moreover, it aims to promote respect for human dignity. The association aspires to improve the conditions of jails and detention centres, ensuring that they are seen as places of rehabilitation, and not only for punishment[635].

With the adoption of Article 613-*bis* and 613-*ter* of the Italian Criminal Code, many individuals have reached out to the association to report possible tortures they suffered. According to the statistics of the association, most of the cases that have been brought have regarded police brutality committed by various state authorities. Moreover, the association has taken an active role in several cases concerning police brutality, such as judgment no. 211/2023 concerning the prison of San Gimignano (Siena, Italy)[636].

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[634] GONNELLA, *Cucchi, la verità nascosta per dieci lunghi anni*, RAPPORTO ANTIGONE, available at *www.rapportoantigone.it*.

[635] ANTIGONE, *Missione e Visione,* RAPPORTO ANTIGONE, available at *www.rapportoantigone.it*.

[636] In its website, the association also refers to other cases in which its role has been very prevalent. These have included the judgments of the district prison Lorusso Cotugno in Turin and a judgment in front of the Court of Bari. More on the role of the Association in these judgments may be found at: FILIPPI, *Dai procedimenti penali seguiti da Antigone: riflessione sullo sviluppo del reato di tortura,* RAPPORTO ANTIGONE, available at *www.rapportoantigone.it*.

The Court of Siena, with judgment no. 211/2023, found five police officers guilty of torture as defined in Article 613-*bis* paragraph 2. The case at hand saw the victim, a foreign detainee, tortured on the 11th of October 2018. The inmate, whilst leaving his cell to take a shower, was taken by the police officers who dragged him through the whole corridor twice, hit him on his head, twisted his arm and strangled him. Moreover, a police officer, who roughly weighed 120 kg, straddled the victim's waist and pinned him down with his knees whilst another officer continued strangling him.

According to the Court, these acts amount to torture as they were not necessary, and the police officers abused their authority. In addition, the Court had found out through several testimonies that the police officers aimed to punish and scare the inmates as, the same morning, there had been tensions and forms of protests by the detainees. This confirmed the Court's interpretation of these acts as amounting to torture as defined by Article 613-*bis* of the Italian Criminal Code[637].

As a result of judgment no. 211/2023, and other judgments, the role of Antigone association is to help other victims of torture in the case by filing a civil claim for damages within the criminal proceedings[638]. This position is taken by the association to ensure that the offence of torture is respected by the Court and to allow for compensation[639].

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[637] COLELLA, *La sentenza di condanna del Tribunale di Siena sui fatti di tortura nel carcere di San Gimignano,* 2023, available at *www.sistemapenale.it*.

[638] This mechanism, «*costituirsi parte civile*» in Italian, is regulated by Article 76 of the Italian Procedural Criminal Code. According to this article, the individual or entity which files a civil claim for damages within a criminal proceeding, may take part of every stage of the proceeding. This allows the victim to be formally recognised as such by the judge who may recognise them an adequate compensation.

[639] Patrizio Gonnella, president of the Antigone association, has stated on the 10th of March 2023: «We fought hard for years to secure a law that would punish torture, and now that it is in place we realize just how essential it was: it finally allows us to define as 'torture' those acts that, before, were only known to violate the dignity of victims in Court" and "[....]We believe that truly stand and protect those officers who carry out their duties lawfully, we need to prosecute anyone who abuses of their powers inside prisons, convinced that offences behind walls will not be found out. Fortunately, over the years more and more people (both inmates and the Prison Administration itself) have begun reporting such abuses, making it possible to start investigations and convict perpetrators [...]». This interview has been provided by the following website: ANTIGONE, *Condanne per tortura a San Gimignano. Antigone: «una sentenza che restituisce giustizia in un caso riconosciuto di tortura».* 2023, RAPPORTO ANTIGONE, available at *www.rapportoantigone.it*.

5. IS EVIDENCE OBTAINED BY TORTURE ADMISSABLE?

To thoroughly analyse the crime of torture, it is also necessary to comprehend its procedural aspects in both the Italian and international criminal law.

5.1. International legal framework

Under international law, evidence obtained by torture is generally inadmissible. However, Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the only international legal instrument that explicitly provides this legal principle.

The Article provides that «*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*». This provision is also known as the exclusionary rule. Such a rule will apply regardless of whether it is a criminal, civil or administrative proceeding, hence, highlighting its broad scope.

The exclusionary rule has been adopted by the UN and, subsequently, in several domestic legal frameworks to safeguard human dignity by ensuring that evidence obtained illicitly is not used against the victim of the torture. However, this provision has also been adopted to uphold the fairness of criminal proceedings and to avoid that false testimony may be introduced within the Court. Moreover, testimony obtained under torture is typically not reliable[640].

Aside from these reasons, the provision fundamentally aims to discourage the use of torture to obtain evidence, introducing a negative obligation for States[641].

Article 15 of the Convention is the final version of several debated drafts. For instance, the provision provides that "any statement" will amount to illicit evidence if obtained by torture. However, the previous version of the Article

[640] FAIR TRIALS, *Tainted by torture: Examining the use of evidence obtained by torture*, 2018, available at *www.fairtrials.org*.

[641] The UN General Assembly Resolution A/Res/72/163 paragraph 6 provides that «[...] States must ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, [and] urges States to extend that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment [...]». In CONVENTION AGAINST TORTURE INITIATIVE, *Non-admission of evidence obtained by torture and ill-treatment: procedures and practices,* 2021, available at *www.cti2024.org.*

referred to « [...] *oral or written statement or confession obtained by means of torture or any other evidence derived therefrom*»[642]. Nowadays, the prevalent interpretation is to adopt a broader approach to the Article, holding that it applies not only to statements but also to any legal document obtained by torture. In addition, although the Committee has not explicitly given its view on the point, it is also generally accepted that the Article extends to any indirect evidence. Hence, the ulterior evidence found is based on the previous evidence obtained by torture[643].

On the latter point, an interesting approach has been adopted by the European Court of Human Rights, specifically in the Jalloh v. Germany judgment. As there is no specific reference to the exclusionary rule within its Convention, the Court applies a fairness test. In paragraphs 96 and 97 of the Jalloh v. Germany judgment, the Court stated that it was not up to them to define whether the evidence obtained was unlawful or admissible under domestic law. Rather, the role of the Court was to question «*whether the proceedings as a whole, including the way in which the evidence was obtained, were fair*». The Court held that the unlawfulness of the evidence may only be understood by thoroughly examining possible violations of the Convention and whether the proceedings were overall fair[644].

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[642] MONINA, *Non-Admissibility of Evidence Obtained by Torture* in *The United Nations Convention Against Torture and its Optional Protocol: A Commentary*, 2nd Edition. 2019

[643] *Ibid*.

[644] Jalloh v Germany App no 54810/00 ECtHR, Paragraph 95 to 97 provide that: « 95. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found (see, inter alia, Khan v. the United Kingdom, no. 35394/97, § 34, ECHR 2000-V; P.G. and J.H. v. the United Kingdom, no. 44787/98, § 76, ECHR 2001-IX; and Allan v. the United Kingdom, no. 48539/99, § 42, ECHR 2002-IX).
96. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, inter alia, Khan, cited above, §§ 35 and 37, and Allan, cited above, § 43).
97. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual

This principle had first been stated by the ECtHR in the Harutyunyan v. Armenia judgment[645], which specifically interpreted Article 3 and Article 6 of the Convention. Although these articles do not specifically regulate the exclusionary rule, according to the Court, they are grounds for interpreting the fairness of the evidence[646].

A point which has raised many questions on the interpretation of Article 15 of the Convention has been understanding on who the burden of proof falls. According to the P.E. v. France judgment, the Committee Against Torture held that an initial burden must fall on the author of the allegations, believing that proof may also be simply given by circumstantial evidence. Following this, the State will have to analyse such evidence[647].

It is not feasible to deem that a victim, who has endured such traumatic events, should also have the responsibility to prove the torture. Therefore, there is a shared responsibility between the State and the applicant where, the State has, a

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interest that the evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, mutatis mutandis, Heaney and McGuinness v. Ireland, no. 34720/97, §§ 57-58, ECHR 2000-XII).». Available at *HUDOC.*

[645] AMBOS, *The transnational use of torture evidence*, 2009, ICC Legal Tools, available at *www.legal-tools-org*.

[646] Harutyunyan v. Armenia App no 36549/03 ECtHR. Paragraph 63 of the judgment provides that: «The Court observes, however, that different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction. The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see, as the most recent authority, Jalloh v. Germany [GC], no. 54810/00, §§ 99 and 105, ECHR 2006-IX).». Available at *HUDOC.*

[647] P.E. v. France judgment, Committee Against Torture 2002. Paragraph 4.14 and 4.15 of the judgment provide that «[...] Moreover, the State party maintains that article 15 of the Convention in no way binds it to make enquiries of a third State in order to assess the validity of allegations of torture. With regard to extradition, it has never been accepted that a State should interfere in the course of adjudicatory proceedings taking place in a third country. The burden of proof can therefore fall only on the author of the allegations.

[4.15] Since the obligation contained in article 15 applies only to situations where it is established that a statement has been obtained as a result of torture, the proof can result from a sufficiently consistent body of circumstantial evidence [...]». Available at *HUDOC.*

positive obligation to analyse and demonstrate whether the evidence is obtained by torture or not[648].

Unlike the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not all international legal instruments explicitly incorporate the exclusionary rule. However, there are existing provisions which do refer to this principle.

In the Rules of Procedure of the ICTY and the ICTR[649], the general provisions regulated by Rule 89 (d) provide that «*a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial*.» Although the provision does not explicitly refer to evidence obtained by torture, it does provide the principle by which probative evidence may be excluded. Hence, any evidence that is against the law and a fair trial[650].

In a very similar manner, Article 69 paragraph 7 of the ICC Statute provides that «*evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings*.». This provision outlines two distinct conditions under which evidence may be considered inadmissible, specifically when it hinders the right to a fair trial. Moreover, this provision specifically refers to the safeguarding of human rights, the fundamental cornerstone of this legal principle[651].

In conclusion, evidence obtained through torture is inadmissible in international criminal law.

5.2. Italian legal framework

The inadmissibility of the evidence obtained by torture in the Italian legal framework is enshrined in Article 191 paragraph 2*bis* of the Italian procedural

[648] ASSOCIATION FOR THE PREVENTION OF TORTURE, *THE EXCLUSIONARY RULE: International law prohibits the use of evidence obtained through torture,* 2012, available at *www.atlas-of-torture.org*.
[649] The Rules of Procedure are identical for both the ICTY and the ICTR.
[650] AMBOS, *The transnational use of torture evidence*, ICC Legal Tools, available at *www.legal-tools-org*.
[651] *Ibid.*

criminal code. According to this provision, «*any statements or information obtained through the crime of torture (Articles 613-bis and 613-ter of the Italian Criminal Code) are inadmissible as evidence, except when introduced against the individuals charged with that very crime and solely for the purpose of establishing their criminal liability*». With the adoption of this Article, the Italian legislator, aimed to introduce a provision which respects the obligations and rights enshrined in Articles 3 and 6 (1)[652] of the European Convention on Human Rights. Specifically, the combined reading of these provisions ensures that the right to a fair trial is safeguarded by preventing the use of evidence obtained through torture[653]. In addition, the Italian legislator aimed to introduce a provision which respected the inherent dignity of victims of torture within the criminal proceedings.

Article 191 paragraph 2*bis* explicitly refers to the offence of torture, such as Articles 613-*bis* and *ter* of the Italian Criminal Code. The provision highlights that, for the evidence to be inadmissible, it must be gathered considering the elements provided by the Articles regulating the crime of torture. Therefore, Article 191 introduces a narrower hypothesis than the one encompassed in Article 188 of the criminal procedural code[654] and Article 64 (2)[655], which provide for the general

[652] Article 6 of the ECHR provides that: «In the determination of his civil rights and obligations or 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. [2] Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. [3] Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) 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 him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.».

[653] CASSIBBA, *Brevi riflessioni sull'inutilizzabilità delle dichiarazioni estorte con tortura ai sensi del nuovo art. 191 comma 2-bis c.p.p.*, in Riv. *Diritto penale contemporaneo*, 2018, 4, p 109-117, available at *www.archiviiodpc.dirittopenaleuomo.org.*

[654] Article 188 of the Italian criminal procedural code provides that: «Methods or techniques that could impair a person's freedom of self-determination or alter their ability to remember and assess facts may not be used, even with the person's consent.».

[655] Article 64 of the Italian criminal procedural code «Methods or techniques capable of affecting a person's freedom of self-determination or of altering their ability to remember and assess facts may not be used, even with the consent of the person being interrogated.».

inadmissibility of using methods which may limit a person's freedom of self-determination[656].

However, the inadmissibility of evidence introduced by this provision finds only one possible exception: when the evidence is used against the torturer to prove his criminal responsibility. This exception has been introduced to ensure that the perpetrator may be deemed guilty for his actions.

One of the biggest issues concerning Article 191 of the Italian criminal procedural code is the hypothesis in which the judgment is not final, hence, not having proven the torture. In this case, it is up to the judge to carry out thorough investigations ensuring that all the evidence which has been introduced respects this principle. This judicial duty needs to be also interpreted considering the right to a fair trial as encompassed in Article 6 of the ECHR.

On the other hand, when the judgment is final, the parties will have the possibility to lodge an *impugnazione straordinaria* under Article 630 letter d) of the Italian criminal procedural code. Under this provision, a final judgment may be reviewed when «*it is shown that the judgment was rendered as a result of falsification in documents or in court, or of another act defined by law as an offence […] ».* Hence, the main aim of this provision is safeguarding an individual's rights also after the judgment has become final[657].

Article 191 does not only provide for an inadmissibility of evidence when directly derived by torture, rather, it also takes into consideration the possibility that such evidence is indirectly derived by torture. This is especially comprehended using terminology within the provision, specifically the term *comunque* (however) used in the original Italian version of the Article[658]. According to such, evidence which derives from torture, on the grounds of a link between one another, is still inadmissible as they would be violating the law. This is moreover recognised by a broad interpretation of the terms «evidence obtained» used in the first paragraph of

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[656] CASSIBBA, *Brevi riflessioni sull'inutilizzabilità delle dichiarazioni estorte con tortura ai sensi del nuovo art. 191 comma 2-bis c.p.p,* cit.

[657] COLAIACOVO, BRONZO, *Inutilizzabilità delle prove e delitto di tortura nel sistema processuale Italiano*, in *Revista Brasileira de Direito Processual Penal*, 2021, pp. 311-342, available at *www.iris.uniroma1.it*.

[658] The original version of Article 191 (2*bis*) provides that: «*Le dichiarazioni o le informazioni ottenute mediante il delitto di tortura [613 bis, 613 ter c.p.] non sono comunque utilizzabili, salvo che contro le persone accusate di tale delitto e al solo fine di provarne la responsabilità penale*».

Article 191[659], which encompasses the evidence which has been «obtained and gathered»[660].

[659] Article 191 (1) of the Italian criminal procedural code provides that: «Evidence obtained in breach of statutory prohibitions may not be used (Articles 26, 62, 63, 103, 197, 203, 234 § 3, 240, 254 § 3, 267)».
[660] COLAIACOVO, BRONZO, *Inutilizzabilità delle prove e delitto di tortura nel sistema processuale Italiano,* cit.

INTERVIEW TO JUDGE DE MARZO

To gain deeper insight into the relationship between the national and supranational legal system in the protection of human dignity, Judge Giuseppe De Marzo was interviewed by Giada Maria Rizzi.

Judge De Marzo is *Counsellor of the Fifth Criminal Division of the Supreme Court of Cassation and has jointly been assigned to the First and Second Civil Divisions*. He serves as a judicial instructor in various courses organized by the Italian High Council for the Judiciary (*Scuola Superiore della Magistratura*). He has written numerous monographs and has coordinated the commentary of an Italian Civil Code. He is a regular contributor to *Il Foro Italiano*. On the 13th of January 2016 he was appointed as the representative of his division within the framework of the implementation of the Memorandum of Understanding between the Supreme Court of Cassation and the European Court of Human Rights[661].

Questions

1. *Do you think the Italian legal framework sufficiently refers to the concept of human dignity?*

The Italian legal framework encompasses several legal provisions that prioritise the individual, reflecting the system of protections established by both the Constitution and the Italian legislature. Among these are the principles of equal social dignity and the broader principle of equality outlined in Article 3 of the Italian Constitution. These principles need to be read in conjunction with Article 2, which extends their scope by recognising the inviolable rights of the person, to both Italian and non-Italian citizens (judgment of the Constitutional Court no. 120/1967). The latter article is pivotal in portraying the centrality of the individual in the legal framework.

[661] Giustizia Insieme, available at *www.giustiziainsieme.it/en/contatti/262-giuseppe-de-marzo.*

2. Do you believe that Italian jurisprudence primarily uses human dignity as an interpretative tool, or does it tend to prioritise references to established human rights?

Both constitutional and ordinary Italian jurisprudence frequently explicitly refer to the concept of human dignity, which represents the synthesis of the various dimensions through which the human essence is expressed, particularly, in its projections of freedom and equality. It is no coincidence that Article 32, paragraph 2, of the Italian Constitution, refers to dignity, providing that the law may under no circumstances violate the limits imposed regarding respect for humans.

For instance, in its recent judgment no. 203/2024, the Italian Constitutional Court, in addressing the potential expansion of the protection provided under Article 13 of the Constitution, clarified that for a measure, even if not coercive, to fall within the scope of protection of Article 13, must amount to «legal degradation». Hence, there must be «a diminishment or mortification of the dignity or prestige of the person», provided that the obligations in question are of such intensity as to be comparable to a form of «subjugation of the individual to the power of another», constituting a violation of the *habeas corpus.*

To further elaborate on how the concept of human dignity is used within the legal framework, it is also important to analyse criminal law, particularly, the prohibition of torture as enshrined within Article 613-*bis* of the Italian criminal code. This provision aims to safeguard human dignity, as, the suffering caused by inhuman or degrading treatment, is accompanied by the subjugation of the victim to the will of the perpetrator and infringement of its fundamental rights, reducing the individual to a mere object of another's cruelty, violence or abuse. (Sez. 1, n. 37171 del 29/04/2024, F., Rv. 287067 - 01).

3. The Italian Constitution does not comprise an article which explicitly regulates and protects human dignity as the EU Charter of fundamental rights. Do you think this is a limit? Or do you believe that the Articles that do refer to a certain extent to dignity (such as Articles 3, 36(1) and 41 of the Constitution) are efficient?

The historical and cultural reasons which have led the German legislator to open the *Grundnorm* of 1949 with the affirmation that «human dignity is intangible. It falls within the State duty to respect and protect it», are the same reasons which have led the Italian legislator to place the individual at the centre of the Constitution. It should be highlighted that the protection of the fundamental rights of the person, both as an individual and as a social formation (Art. 2), is accompanied by a dynamic projection of the principle of equality (article 3 second paragraph). This principle imposes on the legal system a positive obligation to remove economic and social obstacles which, by effectively limiting the freedom and equality of citizens, hinder the full development of the human person.

4. In what ways have Italian Courts used human dignity as an interpretive tool to expand constitutional rights not explicitly listed in the Constitution?

Fundamentally, the situations expressly provided for, do not require abstract legal recognition, as they are grounded directly in the essence of personal values. This grounding ultimately plays a central role in balancing other constitutionally relevant interests (such as issues involving the protection of minors and, more broadly, of vulnerable individuals). In other words, beyond serving as a criterion for giving substantive content to general clauses set out by ordinary legislation, dignity—when considered in relation to specific constitutional rights—also plays a role in delineating their boundaries, often extending them.

5. What is your view on the interaction between national courts and the European Court of Human Rights when it comes to the interpretation of human dignity?

The dialogue with the Strasbourg Court has been and continues to be, fundamental. Precisely, because it increasingly guides legal reflection, in light of established principles and their balancing, moving beyond a merely formal analysis of the relationship between norms.

6. Is human dignity better protected when treated as a self-standing legal principle or when tethered to other specific rights (e.g. privacy, health, or fair trial)?

Interpreting legal principles, particularly because it allows to explicitly portray the correlation between the various interests at stake, lets dignity play a determining role in justifying the conclusions reached, particularly when it comes to identifying the interpretative limits of other expressly recognised legal positions.

Rome 29/05/2025

CONCLUSION

This thesis has critically examined supranational and national criminal law through the lens of human dignity, defined as an intrinsic, innate value. It has shown how human dignity is an autonomous concept that also applies to specific offences, ultimately demonstrating its multifaceted role in law.

By interpreting the term «foundational value» as the legal ground for creating new rights grounded in explicit legal provisions, human dignity cannot be limited to this notion. On the other hand, defining human dignity as an interpretative tool would mean evaluating whether it is used by Courts to examine existing statutes, customs, and other legal instruments to approach real-life scenarios. This thesis has portrayed the role of human dignity in this tension by elaborating on how legal frameworks adopt human dignity differently. Indeed, it shields and protects victims while also expanding on already existing rights.

Focusing on international law, the concept of human dignity is explicitly enshrined much more in comparison to European and Italian law. For instance, Article 1 of the Universal Declaration of Human Rights of 1948 provides that «*all human beings are born free and equal in dignity and rights*». This concept has been further elaborated by the Charter of the United Nations, the Geneva Conventions and the International Covenant on Civil and Political Rights.

Nevertheless, EU law also occasionally recognises human dignity as a guiding value. This has been confirmed by Recital no. 33 of European Directive no. 36/2011, which provides that it «*observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity* [...]»[662].

[662] Recital 33 of the Directive states that: «This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of slavery, forced labour and trafficking in human beings, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, the protection of personal data, the right to an effective remedy and to a fair trial and the principles of the legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly».

A different approach has been taken by the European Court of Human Rights, specifically through its jurisprudence, as the Convention does not explicitly mention the concept of human dignity. Nevertheless, this principle has played a pivotal role in a myriad of cases. The most important one was Bouyid v. Belgium, where the Court believed that any type of non-justified use of physical force constituted a violation of dignity and an infringement of Article 3 of the Convention. Finally, the case also focused on the definition of the notion of dignity, reflecting on the absence of the latter within the Convention and underlying that its absence does not mean that the concept is irrelevant. Indeed, this judgment illustrates how human dignity is at the heart of the Convention, as evidenced by its presence in the Preamble to Protocol No. 13. This decision of the Court highlights the centrality of the concept of human dignity, and how, for the ECtHR, the concept of human dignity does play a dual role as both an interpretative tool and foundational value.

Similarly, the Italian legal framework does not contain explicit provisions for the principle of human dignity. For instance, Articles 3, 36 and 41 of the Italian Constitution do not provide an explicit provision for dignity in the same way as the Universal Declaration for Human Rights does. However, the Italian legal framework implicitly recognizes human dignity as a fundamental value and aims to protect it. For instance, Article 613-bis of the Italian Criminal Code provides for the prohibition of torture but it does not refer explicitly to dignity. Nevertheless, it is widely accepted that this provision should be interpreted as protecting human dignity.

In the interview, Judge De Marzo gave a unique interpretation of the role of human dignity within the Italian legal framework, aligning with what has been said until now. Judge De Marzo further reflected on the importance of human dignity, treated both implicitly and explicitly by Italian Courts. Human dignity is used to broaden the scope of provisions and introduce other principles, such as equality. Moreover, Judge De Marzo reflects on the importance of human dignity as a principle which imposes obligations on States.

Human dignity also plays a central role in expanding existing criminal law concepts, for instance, in migration law. Indeed, human dignity has helped

introduce the so-called *crimmigration*, which studies how migration and criminal law intertwine often leading to practices such as racial profiling, discrimination and the erosion of fundamental rights, including human dignity itself. This is particularly evident in case law. For instance, judgment no. 2319/2024 of the Italian Supreme Court represents a significant development in Italian jurisprudence, as it exempts victims of human trafficking from criminal liability when their unlawful actions are a direct consequence of their exploitation. The ruling introduces a new approach that considers the underlying causes of the offence. By doing so, the Court reinforces the protection of victim's dignity and seeks to prevent their further victimisation.

Nevertheless, Italy has been criticised for over-criminalising migration due to racial profiling, exclusion and punishment. Therefore, enforcing the concept of the protection of the dignity of migrants – specifically, smuggled migrants – has been of vital importance in introducing an efficient legal framework. This also links to the role of human dignity in human trafficking, which specifically focuses on helping and supporting victims. Human dignity thus assumes another important role, demonstrating the flexibility and breadth of the concept. Indeed, it can also act as a protective legal standard, actively preventing violations of fundamental rights while also safeguarding victims.

As stated in the introduction, the concept of human dignity has also been used as a bridge in this thesis to explore the relationship between domestic and supranational law, specifically referring to Italian law. All the supranational legal instruments have highly influenced the Italian legal framework. Initially, it could appear that the Italian legal framework does not account for human dignity as much as international and European law does. However, the Italian legislator's role has amended the legal framework to conform to the jurisprudence of the ECtHR. This demonstrates how Italy interprets the main concept of the *living instrument* under the ECHR, in the sense that it evolves alongside the jurisprudence and legal framework of international and European law, even if this process takes time. This point has also been confirmed in the interview with Judge De Marzo, reflecting the principle of legal harmonisation between domestic and supranational legal systems.

Human dignity is therefore a key element of criminal law, which does impact international, European and Italian law. However, there is still room for improvement in finding a balance between criminalisation and the safeguarding of human dignity. Although Italy has taken steps forward in introducing specific provisions, these provisions tend to be overly complex and difficult to apply. This has happened for example with article 601 of the Italian criminal code for human trafficking but also with article 613-*bis*. The overly complex articles make it harder for the court to interpret such provisions. In addition, this makes it harder for victims of these offences to be able to enforce their rights, and the principles enshrined.

The problematic aspects of using human dignity as an interpretative tool relate to the possible inconsistencies arising from the introduction of overlapping definitions by supranational and national criminal courts. For instance, some courts may adopt broader definitions, while others narrower ones. In addition, the absence of the principle of human dignity from the legal framework may also hinder its enforceability. The fact that the concept of human dignity has been used as an interpretative tool, therefore, may lead to inconsistencies.

Addressing these challenges is essential if human dignity is to be more than a guiding ideal and become an enforceable cornerstone of criminal law.

In conclusion, this thesis has explored different concepts and approaches to human dignity within the field of criminal law. It has analysed the phenomenon from different standpoints, either autonomously or through specific offences, and illustrated how the supranational and national legal systems intertwine and affect each other. As stated in the introduction, human dignity acts as a guiding principle in legal decisions. Overall, it appears that, while human dignity is thoroughly present in the legal framework and is referred to as a fundamental value, criminal law tends to treat it more as an interpretative tool in practice. Nevertheless, the fact that human dignity acts as a guiding principle remains unmistakable.

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