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UNIVERSALLY PROSECUTED, UNIVERSALLY PERPETRATED: THE PROHIBITION OF TORTURE IN AN INTERNATIONAL AND EUROPEAN PERSPECTIVE

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«La tortura è il mezzo di assolvere i robusti scellerati e di condannare i deboli innocenti»

Cesare Beccaria

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Introduction to the work

Considering torture as a sterile and anachronistic threat, placing it on the fringes of our daily lives and which will never concern us, we do nothing but indirectly justify it. It has indeed been rightly observed that torture is a phenomenon that «*emerges powerfully from the past and threatens to have a future*»[1]. Moving from this assumption, if the states did not consider torture as a current crime, they would not even have needed to condemn and typify it in so many EU and international treaties.

I decided to elaborate a thesis on torture because I certainly consider it exciting and intriguing, given the domestic and supranational normative production in addition to the incessant, concrete and necessary exercise of all jurisdictions, which have tried to apply the various international provisions.

Nevertheless, I believe torture is also strictly inherent to facts of political and institutional nature, as demonstrated by the Italian experience and by many situations that can be attributed to political bodies, which have always condemned the practice with solemn proclamations but then disregarded their own words with dubious and unclear attitudes.

The stimulus to work on these pages comes also from the encounter during my studies of the concept of human dignity, returned very topical today, invoked and declined in different forms and ways. The appeal in the criminal field with reference to torture seemed to offer interesting insights and moreover, represented to my eyes a reason for personal growth, not only regarding the criminal issues that this crime presents but also with respect to the moral and social considerations that it reveals.

During the studies of European Criminal law, the attention immediately focused on Art. 3 of the ECHR (CEDU), entitled "Prohibition of torture", a concise and brief article but full of issues and historical experience. This particular article,

[1] D.DI CESARE, *Tortura*, Bollati Boringhieri, Torino,2017, pg.17.

which will be successively analyzed in the *ad hoc* chapter , states that «No one shall be subject to torture or to inhuman or degrading treatment of punishment», giving an extensive interpretation of what may be the criminal case , including inhuman and degrading treatments, acts that may be prodromal or completing torture itself.

As Beccaria said, the outcome of torture appears to be: «a matter of temperament and calculation, which varies in each human being according to his strength and sensibility»[2] , thus not giving the possibility of considering it a legitimate instrument, due to the disproportion between torturer and tortured. It is an illegitimate mean[3], for a legal order aiming to respect the rule of law, so consequently there is no justice.

Therefore, starting from the Latin definition of torture, in will be analyzed the use of the methods in the cradles of the most important western civilizations: Ancient Rome and Athens. In this period, we can find the first codification and the first instruments of torture that were applied to subjects in the various procedures. The medieval era will be then be exposed, where, at the same time of the evolution of the laws, torturing practices became more complex and numerous, also due to the interference of the Church, which used torture to make desist heretics from professing a faith not aligned with the Rome's dictates.

It was only thanks to the period of the Englightment, with the studies of Verri and Beccaria, added to the *Declaration des droits de l'Homme et du Citoyen* following the French Revolution – wich did not provide for an explicit prohibition for facts of torture but certainly a step towards the condemnation of it – that torture became central in the philosophical-political debates, generating in the consciences the objective of defeating and eradicating it through the use of law. The analysis will then focus on the reckless use of the same in modern times with the Nazi and Fascist regimes that made torture a daily practice. Finally, the work will focus on the twentieth and twenty-first centuries, through an examination of the

[2] C.BECCARIA, *Dei Delitti e Delle Pene, Capitolo XVI: La Tortura*, ET Classici,1764, pg. 93.
[3] P. VERRI, *Osservazioni Sulla Tortura*, Bur Rizzoli, 1804, see pg 136: "*I tormenti non sono un mezzo per iscoprire la verità, ma bensi un mezzo che spinge l'uomo ad accusarsi reo di un delitto, lo abbia ovvero non lo abbia commesso".*

serious situations involving torture and the subsequent violation of human rights in the world.

The second chapter, will focus on the historical evolution of the various conventions, treaties, pacts and agreements that nations have concluded, committing themselves to jointly fight this scourge. In fact, to the prohibition of torture, the international community gives the characteristic of jus cogens, i.e. a mandatory rule of law in the sistematic international sources. It will be also taken into account the nomo-phylactic rule of the European Court of Human Rights that with its various judgements and pilot sentences, tried during its existence to trace the framework of what in practice can be defined as torture, condemning also Italy several times for the occurrence of these atrocities within its territory.

Subsequently, the third chapter will deal specifically with the historical and legislative developments in Italy which led, although with considerable delay, to the introduction of the crime of torture into our criminal code, deriving obligation arising from the treaties to which Italy has adhered. It will then be put in evidence the situations that alarmed the Italian legislator, starting with the events of the immediate post-war period and ending today, where torture seems far from disappearing. The facts related to the G8 in Genoa – black page in Italy's recent past- and the recent ruling by the Strasbourg Court received from Italy concerning the case of Marcello Viola and the so called "carcere ostativo" regime deserve both to be examined in depth in two specific paragraphs, given for the first the tragic nature of the events and the importance of what could be a leading case for the second.

In conclusion, the last chapter will be dedicated to the difficult discipline of torture in relation to secret services and secret of state, which, at first sight, could be expression of exception to the ban of torture in order to safeguard the national interest, which is considered greater. The last paragraph will take into account the various critics made to the new Articles 613-bis and 613-ter, along with the various de jure condendo reflections. The first two cases of application of the new article sanctioned by the criminal code will also be mentioned.

CHAPTER 1

HISTORY OF TORTURE

1. General outline

Although it is condemned in almost every national legal system, there is still uncertainty of what it is from a legal point of view, and what are the boundaries of this crime. Amnesty International has openly denounced this problem in its 1973 Report on torture, by stating that «Everyone has an idea of what torture is; yet no one has produced a definition which covers every possible case» [4].

Along with ill- treatments and other degrading behaviours, torture is defined as the infliction of pain and suffering, physical or psychological, to punish a person or to obtain confessions and information[5]. Starting from these assumptions, we can divide the notion of torture in two distinct situations: one in which the subject is physically tormented, and one where the subject is psychologically tormented, both considered on the same level of intensity and gravity. When there is torture, the certainty is that there is both «physical and mental agony, there is pain and wounds[6]», but, in almost every case, will bring to a distorted creation of what the truth is. Finding a specific and universally accepted definition of torture is necessary for two main reasons[7].

First of all, the international community has to be able coordinate and cooperate with each Government for the commission of acts of torture. If each State follows its own definition found in national laws, or simply adheres to one of the treaties concerning torture, there is an obvious difficulty in ensuring the prevention

[4] AMNESTY INTERNATIONAL, *Report on torture*, 1973, cit,pg 29.
[5] INTERNATIONAL REHABILITATION COUNCIL FOR TORTURE VICTIMS, online web page "Defining Torture".
[6] F. DOSTOYEVSKY, The Idiot, 1869, Edizioni di Stato di Mosca, trad. G.De Dominicis Joriotrad.
[7] G. MILLER, *Defining torture*, Floersheimer Center for Constitutional Democracy, New York, 2005, pg 1-4.

of torture. Governments could easily use those big deficits of certainty to move around the notion without consequences. As Amnesty International stated in its 1973 report, «there is a strong tendency by torturers to call it by another name, such as "interrogation in depth" or civic therapy».[8] There could be obstacles to the prevention and punishment of torture simply because governments are unable to reach an agreement on what should be the best and most complete definition; many states tend to restrict the notion and application, in order to move freely.

Secondly, torture is such a serious act that it falls under the category of those crimes against humanity which are ruled by the principle of universal jurisdiction. This means that any state of international organisation can claim their jurisdiction when there is a suspect of actual attempts of torture, regardless the territory where torture is inflicted or the nationality of the torturers. This may lead to confusion, because if a state wants to proceed for torture crimes that exceed their usual jurisdiction, a lack of a common definition and application may be a serious problem, causing disagreement between countries as to what should be the correct way of proceeding.

In this second issue, Miller also englobes the problem of the general need for individuals, such as public officials[9] , to have some sort of framework in order to don't fall in the error of committing torturous acts and similar crimes. Methods of police officials are often border line and a lack of certainty leads to inappropriate use of the public force. In the aftermaths of the 2001 attacks in New York, the general CIA director George Tenet was very close to admit that the practices of the agency in order to obtain information stating that «there had been uncertainty in the past as to what interrogations techniques were specifically permitted or not»[10]. Important examples of this big topic can be found in the Hamdan vs. Rumsfield case of 2006[11], related to violations of the Geneva

[8] AMNESTY INTERNATIONAL, *Report on torture*, 1973, pg 29.
[9] G. MILLER, *Defining Torture,* Floersheimer Center for a Constitutional Democracy, New York, 2005, pg 4-5.
[10] D. JEHL, *Questions are left by CIA Chief on the use of torture*, New York Times, 2005.
[11]U.S. SUPREME COURT, *Hamdan vs. Rumfield*, 2006, (www.supremecourt.gov/opinions/05/pdf/05-184.pdf, p.4, point 4.

Convention with regards to the ways prisoners were treated in the Guantanamo[12] base, area opened in 2002 after the Twin Towers attack in 2001, the Abu Ghraib[13] case, the Genova G8 (that includes Bolzaneto and Diaz case), putting in evidence the actuality and urgency related to these particular problems.

Another element that can be found in the notion of torture is the will of the torturer to inflict pain[14] towards the tortured. This will differentiate this crime with other forms of crimes that still inflict physical and mental damage but without the "*dolo*" required for torture. In fact, only the intentional behaviour is condemned, the accidental infliction of pain is not to be considered as torture[15]. The "evil intention" has to be part of the scene, not just a mere event.

These synthetic considerations expressed so far seem to show the complexity of the issues related to torture that cannot be simplified into an absolute renunciation of any means of obtaining informations and compression of the fundamental rights of the individual[16]. In fact, we shall consider that torture is strictly related to respect and protection of democracy. Can all possible means be used in order to protect the democratic values shared by the international community? It is precisely in this context, that states, aware of the lack of ethics and guarantees, splash around. Significant in this sense is the Military Commission Act[17] , launched by U.S.A. in 2006 (partially modified in 2009) , asserts that « a statement obtained by the use of torture shall not be admissible , but a statement in which the degree of coercion is disputed may be admitted if the military judge finds that the totality of the circumstances renders the statement reliable and possessing

[12] In 2002, President G.W. Bush opened the naval base in the Guantamo Bay, Cuba, a detentive area where Afghan prisoners were detained because suspected of terroristic activities. According to sources, from 2002 until 2011, more than 800 people were detained in Guantanamo, and only 10 were subject to a regular criminal proceeding. Although Obama signed in 2009 the closing of the base, is still open right now.

[13] In 2004, on the CNS were published a series of photos of iraqi prisoners in the Abu Ghraib prison. During the war in 2003 between Iraq and U.S.A, the american military army and CIA members perpetrated towards those tortures, rapes and numerous abuses.

[14] From the definition given by the online website of the International Rehabilitation Council for Tortured Victims, pg. *Defining Torture*.

[15] G. K. MCDONALD, *Substantive and Procedural Aspects of International Criminal Law*, Volume II, part I, The Netherlands,2000.

[16] E. SCAROINA, *Il Delitto Di Tortura, l'attualità di un crimine antico*, Cacucci Editore, Bari, 2018.

[17] The Military Commission Act, also known as HR-6166, was an act of the Congress signed by President Bush. Drafted after the Hamdan vs. Rumsfeld (2006), the purpose was to "authorise trial by the Military Commission for violations of the law of war, and for other purposes".

sufficent probative value ; and the interests of justice would best be served by admission of the statement into evidence » [18].

Refferring to what will be observed in the following chapters, the boundaries between the various notions of torture, inhuman and degrading treatments, is constantly evolving, in the same way as the gradual increase in the level of protection of the fundamental rights of the individual. Emblematic in this sense is the ruling of the Strasbourg judges, with regards to the Selmouni vs. France case (1991)[19] , stating that there is still no valid and shared notion that can cover all the possible situations. The APT, Association for the Prevention of Torture, founded in 1997 in Geneva, committed to working worldwide to prevent torture and other forms of ill-treatments, tries to classify and give a framework to torture, stating that a definition of torture is relevant for inter alia: individual responsability for the crime; States violations for the prohibition of torture; the prevention of torture; and the reparation and rehabilitation for torture victims [20]. Individual responsability gives the first limits, binding the judges' decision according to the penalties regulated by the state where the proceeding is carried on and is strictly connected to the State violation for the prohibition of torture, as the "protector of rights and democracy" must ensure protection to possible victims. Scientific studies have shown that many, perhaps the majority would directly apply torture to other individuals, so long as they believe that they are authorised to do so or will suffer no consequence at all[21].

For what concerns the prevention and the rehabilitation programs, Italy, for example, makes use of associations and NGOs that, operating in both

[18] Is the admission made after 2005, it would be admitted only if respect the further condition "the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005".
[19] The case concerned a dutch citizen of Maroccan origin, stopped and detained in Bobigny (France), by the French police for a drug smuggling investigation. He claimed to have suffered various rapes and violences.
[20] APT, *The Definition of Torture, Proceedings of an Expert Seminar*, pg. 28-29 Geneva, 2011.

[21] E.g. the Milgram (Yale) experiments in the 1960s and the Stanford Prison Experiment in the 1970s: See S. MILGRAM, *Obedience to Authority: An Experimental View*, New York, HarperCollins, 2004; S. MILGRAM, *Behavioral study of obedience Journal of Abnormal and Social Psychology*, Vol. 67, pp. 371-378,1963.; HANEY, C., BANKS, W. C., AND ZIMBARDO, P. G., *"Study of prisoners and guards in a simulated prison"* Naval Research Reviews,1973.

national and supranational territory, offer assistance to individuals who have suffered tortures or are in serious danger.

The Roxanne Service[22], a Rome Municipality institution, offers prevention and assistance to every subject victim of torture and enslavement. In particular, injury reduction and consulting service, reintegration and, in the most difficult cases, repatriation, when expressely requested. Granting both judicial and extra-judicial remedies, is also enshrined in Art.13 of the ECHR, which states that everyone whose rights and freedoms are violated shall have an effective remedy before a national authority notwithstanding that the violation is committed by person acting in an official capacity.

1.1. History of torture: Roman and Greek period

Despite the expressed condemnation of torture proclaimed in every international treaties and conventions starting from the French Enlightement period, de facto it has never been eliminated, including those states who declare themselves respectful of human rights. It is a legal instrument whose origin dates back to the latin word *tortura*, which derives from *torquere*: the term means *torture of the limbs*, practiced for confession and information purposes[23]. The first apparitions of practices classifiable as torture therefore dates back to the Greek and roman period[24], where torture was reserved only to non-citizens (the roman *barbari*) and to slaves (then excluded after II b.c.).

According to the expert G. Remus, torture as a practice was invented by the last Roman king, Tarquinio "The Superb" and by Emperor Marco Aurelio Massenzio[25]. Famous was also the Agrigento tyrant Falaride which had built a copper ox that was heated up in order to lock inside of it condemned prisoners[26]. Foreigners were put on the same levels as slaves, and those whose territories had

[22] Roxanne Service, online website, homepage.
[23] F. CORDERO, *Riti e Sapienze del Diritto,* Roma-Bari, 1981, pg 762.
[24] P. VERRI, *Osservazioni sulla tortura,1804, ibidem.*
[25] G. REMUS, *Constitutiones criminales,* in P.Verri*, Osservazioni sulla tortura*, 1804.
[26] D. ALIGHIERI, *Divina Commedia, Inferno, XXVII Chant, 1321.*

not entered into treaties with Rome were considered part of the category. We have so the first legal contradiction in the roman empire, substituting only for slaves and strangers the trial with torture, denying the privilege given to freemen, where torture was a residual method used after the fair trial and if there were important evidences against the suspect[27]. However, this procedure seems to be denied by Cicero's works and script, where we can find that torture was used also on freemen[28].

Also in roman times, two types of tortures were distinguished: the one known as *tormentas* or *cruciatus* [29], were there was a material violence towards the subject, and the other form of torture, also known as *ad erundam veritate,questio , tormentum*[30], used in court in order to obtain a confession or a declaration useful for ascertaining the facts. During the Marco Aurelio's reign, were exempted from torture only important figures, such as the *eminentissimi, perfectissimi,* decurions, senators, *milites,* veterans and their sons, unless they were suspected for the most important crimes against the security of the empire, such as the *crimen lesae maiestatis*[31]*, crimen magie, nefanda dictu sunt conscios aut molientes* [32]. During the third century AD, roman citizens were divided into two different categories, the *honestiores* and the *humiliores*[33].The first group, were the representation of the higher classes, with all the privileges deriving, while the second group were comprised of the poor and lower classes. To the *humiliores* was given the possibility to testify only under torture and, if convicted, subject to every corporal punishment. Cicero, denounced numerous times the illegitimacy of these situations, claiming that torture wasn't an applicable method to apply arbitrarily depending on social class[34]. Torture was disciplined with a set of minimum rules that avoided an excessive use: women and teenagers younger than fourteen years old couldn't be tortured[35].

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[27] T. MOMMSEN, *Le Droit Pènal Romain, 1907.*
[28] A. TRIGGIANO, *Teoria e Storia del Diritto Privato,* Rivista Internazionale online.
[29] C. BECCARIA, *Dei delitti e delle pene*, ET Classici,1764, *pg. 93.*
[30] Ulpiano, *Digesto, cit. (29,5, I,25): «quaestionem sic accipimus non tormenta tantum, sed omnem inquisitionem».*
[31] G. LATERRA, *Storia della tortura, 2007, pg 26.*
[32] A. BANFI, *Considerazioni sul procedimento criminale romano nel IV sec. d.C,* Torino, 2013.
[33] Brocardi.it, definition of *humiliores* and *honestiores.*
[34] P. VERRI, *Osservazioni sulla Tortura,1804.*
[35] E. COHEN, *The modulated scream, pain in late medieval culture,* New York, 2010, pg 53-54.

Moreover, if a woman was pregnant, she would have avoided torture, unless she was investigated for high crimes such as the above mentioned. Torture was so used that during those years a proper judicial doctrine was created, with regard of the various methods of application. The most standard technique of torture was the rack[36], a wooden or metal frame on rails, which was moved manually to distend and stretch muscles and joints of the victims, causing atrocious pains.

During the next centuries, firstly Constantine[37] with some laws prohibiting and limiting tortures, aiming to protect the lowest classes of society from abuses, such as the relation between slave and dominus, children and women, and then the roman emperor Justinian, with the Justinian Code, put the basis for a better interpretation and use of torture in trials. In the *Digest,* there is a particular section regarding torture, exempting for example different types of subjects (lawyers, doctors) and under what conditions torture was a legit mean. He also expressly stated that torture must be the last resort in case there is almost the impossibility to reach the judicial truth[38]. In 64. D.C., with Nerone's empire, there was an extensive use of torture in christians' prosecution, thus inducing them to deny their faith, as the christian religion was considered a serious crime at the same level as *crimen lesae maestatis.*

Talking briefly about the Greek experience, the word used and applicable for the modern term of torture, was *basanos*[39] (used to testify the veridicity of gold), indicating any mean or tool useful to test a person, to which the greeks made extentive use, both with a punitive and a judicial function. The punitive torture was inflicted in the *oikos*[40] or in the *polis*[41]. Inside the *oikos*, torture was used by the family householder, circumstance that gives particular problems regarding which kind of conducts were leading to the use of torture, as it was up to the householder itself decide which type of torture apply in a particular case. Any violation of rules concerning domestic discipline and, more in general, any attitude

[36] G. RILEY SCOTT, *The History of Torture,* New york, 2003, pg 48.
[37] B.W. HARRISON, *Torture and Corporal Punishement as a problem in Catholic Theology,* article in Living tradition, 2005.
[38] E. COHEN, *The Modulated Scream, pain in late medieval culture,* U.S.A., 2010, pg.53-54.
[39] For a proper definition of *basanos,* M. GAGARIN, *The Torture of Slaves in Athenian Law,* 1996.
[40] E. CANTARELLA, *La chiamavano Basanos: La Tortura nell'Antica Grecia,* Criminalia, 2012.
[41] For *oikos*, ancient greeks intended the family, while with *polis*, they intended in public, in front of everyone.

not sufficiently respectful, could cost penalties such as domestic imprisonment, flogging, mutilation, condemnation to exhaustive works, carried out under conditions that could bring to death.

Moving on to the public torture, especially in Athens, during criminal trials was commonly used to testify, but at one and only condition: torture could not be suffered by an Athenian citizen[42]. Thus, public slaves, freemen that hadn't had Athenin citizenship, *meteci* [43], were the only subjects who could have had suffered torture. Coming to the applicable forms, surely the cruellest was the *apotympanismos,* or Greek crucifixion. It consisted in binding the condemned to a pole (*sanis or tympanon*), abandon him to the city gates, where dead arrived after hunger, pain, thirst, bites of ferocious animals[44]. The condemned subject to *sanis* was chained, bounded in adjustable stocks, with wrists and ankles closed by rings and tightened thanks to the *helos*[45]. Aristophanes in his famous masterpiece "*The Frogs"*[46] *,* lists some alternative but still common methods of torture used in ancient Greece, reserved to war prisoners and other determined categories: whipping, skinning, putting vinegar inside the nose cavities.

1.1.2 Middle age evolutions

Torture was a frequent interrogation method used in the Middle Age. This period was characterized by an abuse of torturous tools in order to verify the facts, and new ones were created, thanks also to the Church, very keen on counteracting the problem of the heretics[47]. After the barbaric period, with the return of the state authority and the inquisitorial type of criminal trial, torture returned to be widely practiced[48] , becoming official part of the Holy Inquisition

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[42] E. CANTARELLA, *La chiamavano Basanos: La Tortura nell'Antica Grecia, Criminalia,2012.*
[43] *Meteci* were strangers living in Athens, registered in a special register, but still didn't enjoy the same right sas the Athenians.
[44] E. CANTARELLA, *La chiamavano Basanos, La Tortura nell'Antica Grecia, Criminalia, pg 21.*
[45] *Helos* was a particular kind of vine used for *apotympanismos.*
[46] ARISTOPHANES, *The Frogs,* online at Corrierespettacolo.it
[47]L.TRACY, *Torture and brutality in Medieval literature: negotiations of national identity,* Cambridge, pg.48.
[48] E. SCAROINA, *Il delitto di tortura: L'attualità di un crimine antico, Cacucci editore, Bari, 2018, pg. 33.*

criminal procedure, thanks to the 1229 Toulouse Council and the "*Ad Extirpanda*[49]", measure adopted by Pope Innocenzo IV.

Although in this period many scholars, such as Gratian[50] , reaffirmed the rejection of torture as a legal method of obtaining the truth, Pope Innocenzo III, with his decretum "*Vergentis in senium",* stated that heretics were traitors of God and so, could be subject to new forms and variety of legal sanctions. It was in this time that the Medieval Inquisition was born, and torture reached its peak of use. Inquisition[51] was a court established by the Roman Catholic Church in the XIII century to decide on heresy cases and other offenses against the Church. Those convicted then, could be handed over the civil authorities for punishments, including capital execution.

In that period, it was established that torture and punishments should take place without bloodshed [52], clarification that explains the constant use of the fire stake or the strangulation before the fire stake. The confessions obtained with torture had to be confirmed by the defendant after two days. The Inquisition judged heresy with an articulated procedure, using two prodromal edicts before going to trial.

The first one was the edict of faith, an obligation to all citizen to denounce and give information of heretics they know about; while the second one is the edit of grace, intending that if the suspect negates and confesses everything within one month, he will be forgiven. Once the trial starts, this benefit is no longer conceded, and, if the suspect didn't confess at first instance, he would have been submitted to torture. Generally, the most used sanctions imposed to heretics were capital execution torture and life imprisonment [53]. It was up to the judge deciding which type of torture apply in the concrete case, depending on the gravity of the heresy, the collaboration of the suspect and the territorial region where the trial took place[54].

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[49] *"Ad extirpanda de medio Populi Christiani hareticae pravitatis zizania"*. For more G. LATERRA, *Storia della tortura, pg 31.*
[50] With his *Decretum,* Gratian refused use of torture for church's aims.
[51] Definition from dictionary.com/inquisition.
[52] POPE INNOCENZO IV, *Ad extirpanda,* online at documentacatholicaomnia.eu, 1252.
[53] A. PROSPERI, *L'inquisizione romana: letture e ricerche,* Edizioni di Storia e Letteratura,2003.
[54] E. PETERS, *Torture,* University of Pennsylvania Press, 1985.

Among with the above-mentioned rack, other kind of tortures used in this period were the leg-screw, the arm-screw and the strappado[55], mainly used by the Spanish Inquisition, the cruellest[56] tribunal of all the Church's institutions. Tooking place in the unified Spanish reign, it was the result of the policy of converting Muslims and Jews to Christianity, in order to reinforce la "*lempieza de sangre",* to strike political opponents, confiscating assets of the condemned in favor of the royal treasury. The Spanish Inquisition, strongly wanted by king Ferdinando[57] in contrast with the Roman Pope, was the most organized and complex inquisitorial structure, as well as the bloodiest,[58] estimating 31.912 executions in the period 1408-1808, 9.000[59] under Torquemada[60], including 125.000 in prison.

The *Consejo de la General y Suprema Inquisicion* gave instructions to the courts, examined the trials reports, reviewed the cases and acted as acted as an intern court for members accused of crimes. The president was the General Inquisitor and the other members were the provincial inquisitors, appointed by the king and sustained by lawyers and prelates. The *Tribunales* were formed by three inquisitors[61] and other officials(*familiares[62])* such as secretaries and notaries. Despite being hated by other citizens, their number grew in time due to the exemptions of tax contribution and the prestige of the position, symptom of blood purity. The accused was not granted with any legal assistance and, if he refused to testify, that would have been consider a clear proof of his guilt. The Spanish Inquisition was abolished only in 1834, thanks to Queen Maria Cristina Ferdinanda di Borbone.Also during the late Middle Age, torture was considered the *«Queen of proofs[63]»*and was integral part of the criminal procedure. The judicial authorities

[55] The strappado consisted in tying the accused hands behind their back and connect with a cord that was connected to the ceiling. The heretic was then raised up and down really quicky in order to cause severe joints and muscles pains.
[56] Interview to A. Prosperi, *Torquemada? l'uomo che inventò l'Inquisizione*, online at Repubblica.it, 1998.
[57] G. BERTI, *Storia della stregoneria,* Mondadori, Milano, 2010.
[58] W. DURANT, *The Reformation,* 1957, mentioning Juan Antonio Llorente, General Secretary of the Holy Spanish Inquisition.
[59] P. SCHAAF, *History of the Christian Church,* online at ccel.org.
[60] Tomas de Torquemada, Castillan dominican friar and first Grand Inquisitor, active for 18 years.
[61] They were members of the secular clergy, experts in law issues.
[62] Name given to members of lower grade, without a fixed salary. They encouraged reports, collected wittnesses and captured the suspect.
[63] E. PETERS, *Torture,* University of Pennsylvania, 1985, Cit. pg 40.

firstly showed the suspect all the various types of tortures in order to convince them to confess. Only if the exhibition was unsuccessful, torture was applied.

In Italy, during the Middle Ages and especially in the seventeenth century, judges used to condemn to tortures the so-called *"untori"*, those who were considered the propagators of plagues. Moreover, in addition to physical sufferings, the houses were the *untori* lived in were demolished and it was then erected a column with an inscription that handed down to posterity the news and the punishments inflicted to the subject[64].

1.1.3 The Enlightenment

Until the 18th century, the use of torture was widespread all over Europe, seen as a rapid method to solve disputes according to the Roman and Spanish Inquisition. Probably the most important victim was Galileo Galilei, who, taking inspiration the Copernicus' heliocentric theory asserting that the sun was immobile while the Earth and the other planets move around, was condemned as heretical by the Roman Inquisition. There are no documents that can proof the actual torture, but most scholars converge on the fact that he was subjected to "rigorous examination[65]. Galileo considered the Church as the defensor of ignorants[66] and he was forced to deny the results of his studies by the inquisition. The Church defended the right of the "non-truth" [67], displaced by a world that was changing and that they did not understand. Church should have overcome the habits of thought and invent a pedagogy illuminating the people of God.

Just with the sunrise of the new century, thanks also to the Enlightenment movement, started in France by Voltaire and Rousseau, the scientific methods prevailed on the moral attempts of legitimating torture, pivotal point of criminal trials until that period. The first step towards the condemn of the

[64] A. MANZONI, *Storia della colonna infame, Introduzione*,available online, 1843.
[65] J. SPELLER, *Galileo's Inquisition Trial's revelaed,* Germany, 2008, pg. 36-38.
[66] E. GARIN, *Scienza e vita civile nel Rinascimento italiano,* ed. Laterza, 2003.
[67] From the speech of St. and Pope John Paul II to the members of the Pontificial Academy of Sciences meeting in plenary assembly in 1992.

use torture happened during the French Revolution, when the Declaration des Droits de l'Homme et du Citoyen was adopted in 1789. This document was influenced by the doctrine of natural rights; universal rights that apply to all men without exceptions from the moment of their birth. There isn't a specific disposition regarding torture, it provides that citizens are considered to be innocent until proven guilty, and that if it proves to be necessary to arrest them, "any rigor which would not be necessary for the securing of his person must be severely reprimanded by law[68] ». It was clearly a conquer towards the crystallization of a universal principle, but history tells us that torture was daily practiced in the royal courts , denying the suspects to defend themselves and to have a fair trial, term referred to the ideal concept of justice, which pre-exist and is directly linked to the inviolable rights of everyone involved in the trial[69]. Considered as a precursor for human rights instruments, the declaration inspired the most important modern treaties, starting an evolution when during the twentieth century, torture held a prominent place in the list of international crimes which had to be prohibited.

Also, our compatriot, Cesare Beccaria, with his "*On crimes and punishements",* masterpiece and cornerstone for the respect of human rights, marked the framework of the modern criminal law. Beccaria described torture as the «*emanation of the most barbarous ages*[70]», underlining the importance of human rights. «Either the crime is certain or it is not; if it is certain, then no other punishment is suitable for the criminal except the one established by law; torture is useless because the confession of the accused is unnecessary; if the crime is totally verified, one should not torment an innocent person because according to the law, he is a man whose giultiness have not been proven[71]. Beccaria also stated that no one may be considered guilty before the judge has reached a verdict, nor can society

[68] Declaration des Droits de l'Homme et du Citoyen, Art. IX, 1789.
[69] C. CONTI, *L'imputato nel procedimento connesso. Diritto al silenzio e obbligo di verità,* Padova, 2003, 87 ss.
[70] C BECCARIA, *On Crimes and Punishements, 1764, cit. pg 1.*
[71] Portable Library of Liberty, *An Essay on crimes and punishments*,Cesare Beccaria, 2009.

deprive him of public protection until it has been established that he has violated the pacts that grants him protection[72].

After some time, also Pietro Verri, another important Italian scholar, alongside Beccaria's arguments, stated the injustice of torture, which it's by nature «excessive, impossible to moderate and discipline»[73]. His ideas were pertaining to law and justice, granting axioms such as presumption of innocence and prohibition of self-incrimination. The truth, according to the scholars of the period, was not inherent in the suspect's muscles and fibres, but had to be sought in the circumstances in which he is located, not applying physical and mental violence but the criterions of research and reason[74]. Thanks to Beccaria's work, a process of abolition of torture started in Europe, with Prussia pioneer, Austria and France, becoming a symbol of modern criminal law.

Taking inspiration from the Magna Charta Libertatum, drafted by the Archbishop of Canterbury in 1215 and the 1776 Declaration of American Independence, in 1789 the *Dèclaration des droits de l'homme et du citoyen*[75] ,was approved by France's national constitutional assembly. Influenced by the doctrine of the natural rights[76], they held to be universal: valid at all times and pertaining to human nature itself. The concepts came from the political and social duties of the Enlightment, such as the individualism, the social contract[77] and the separation of powers[78]. Setting individual and collective rules for the individual, the declaration aims to "born men to be free and equal in rights, distinctions may be found only

[72] Beccaria's observations were criticized by Muyart de Vouglans in 1767, with his "Réfutation de quelques principes hasardés dans le Traité des Délits et des Peines" defending torture as a judicial method.
[73] P. VERRI, *Osservazioni sulla Tortura, cit.*pg 59: «such is the man who overcame the disgust of the evils of others, suffocated the germ of compassion, jubilates of his superiority».
[74] P. VERRI, *Osservazioni sulla Tortura, pg.30.*
[75] Inspired by the Enlightment, the original version of the declaration was discussed by the representatives on the basis of 24 articles, led by Champion de Cicè, with the consultation of Thomas Jefferson, is a core statement and clear step towards a constitution in France.
[76] Inalienable and universal rights, not depending on the laws and cultures of any particular governement, they cannot be restricted(almost) or repealed by human laws.
[77] Theorized by the Jean-Jaques Rousseau in his "*Du Contract Social",* concerns the legitimacy of the authority over the individual.
[78] Typical division of the three powers: legislative, executive and judiciary, known as the *trias politica* model, was espoused by Montesquieu, evaluating also the oeuvre *"Leviathan"* by Thomas Hobbes.

upon the general goods[79]". Containing incredibly futuristic concepts for that period, the declaration did not reflect in facts what was happening during the French revolution where torture was used to repress and condemn. The most commons forms of torture were the wheel, where the criminal was tied onto, then stretched out and beated, causing chest collapse and broken limbs. Called the "Règne de Terreur", this period was characterised by the vagueness of laws and for the cruelty of the executors. In this age, also the guillotine, invented by De Guillotine, a medical doctor, was daily used for criminal repression.

Despite the progress made during the 18th century, torture continued to be widely used, justified by the sake of what was defined as a higher cause. This "mechanism of power" was strongly criticized by Michael Foucault in his *"Discipline and punish: the birth of the prison",* social oeuvre divided into four parts: torture, punishment, discipline and prison.

The core part useful to the paper is the first one, where the author describes torture as a «*manifestation of power, an opportunity of affirming the dissymmetry of forces*[80]». Foucault argues these barbaric methods were ineffective and deleted everything that had been done in the past decades. The states denied and will always deny the practice of torture, causing to perpetrators no legal consequences for their conducts[81]. The technological evolution created new forms of torture, more sophisticated to inflict more physical and psychological pain.

1.1.4 The twentieth century

Moving on to the 19th and 20th century, torture as a mean to obtain political and social power was frequent during the Russian Revolution period. Carried out by Lenin after the October 1917 Revolution, the new government established the NKVD[82] and the Cheka, secret political police, on which Lenin and

[79] *Declaration des droits de l'homme et du citoyen*, Art. 1.
[80] M. FOUCAULT, *Discipline and Punishement: the birth of the prison, 1975, Cit. pg. 55.*
[81] M. LIPPMAN, *The Development and Drafting of the UN Convention against Torture, and other Cruel, Inhuman, Degrading Treatment of Punishement,* Boston, College International and Comparative Law Review, V. 17, I.2, 1994, pg. 284.
[82] Known as the NKVD, it was the People's Commissariat for Internal Affairs, dicastery active in the Soviet Union from 1917 until 1930.

the Bolsheviks rely to bring terror and violence all over the territory. When the Cheka was recognised, it turned into the GPU, internal to the NKVD, gaining independent powers in order to torture and kill all the Lenin's oppositors. Only in the first half of the 20th century, the NKVD was replaced by the KGB[83], acting as intelligence agency and internal security police at the same time.

KGB was responsible of many arrests, deportations, tortures and executions, particularly during the Cold War between U.S.A. and Russia. The torturous methods used were varied. KGB privileged the mental torture, as they never used chains or other physical tools to make the tortured confess. Generally, the victim was isolated into little cells, where there was a continuous change in temperature, lack of food and drinks, causing great mental disturbance[84]. During interrogations, there was the practice of requiring the victim to stand up during the whole interrogation, or to maintain a very uncomfortable position for a prolonged period of time[85]. There were also professional areas, such as doctors and scientists that helped the KGB in creating new cruel forms of torture to apply to prisoners and oppositors.

Surely the most critical moment was reached during WWII, where the Third Reich caused the tragedy of the Holocaust, probably the last wake up call for international community. The Nazi concentration camps were the most dreadful, brutal and widespread use of torture in the history of the human being. The "systematic use of violence, brutality and terror[86]", stated into the Blue Series[87], consisted in the cruel and abusive methods used by the Nazi police, the Gestapo, to interrogate and incriminate the oppositors of the regime. With regards of the concentration camps, the prisoners were «*packed in trains without any food, drinks and sanitary facilities*[88]».

The biggest concentration camps, such as Auschwitz and Birkenau, were equipped with gas chambers to kill groups of Jews, burning their bodies without

[83] State Security Committee, popularly known as the KGB, was the name of the main security, secret service and police during the Soviet Union period, active from 1954 until 1991.
[84] S. SHANE, *Soviet-Style, "Torture becomes Interrogation",* New York Times, 2007.
[85] S. SHANE, *Soviet-Style, "Torture becomes Interrogation",* New York Times, 2007.
[86] International Military Tribunal, 1946, pg. 475, available online.
[87] Was the official record of the trial of the major leaders of Nazi Germans accused of war crimes.
[88] From the trial before the International Military Tribunal, 1946, available online.

bullets waste. Prisoners were killed randomly, spite killing of Jews were common, poison injections, and neck shooting were everyday occurrences. Hunger and starvation, sadism, rations, inadequate clothing, disease, beatings, forced suicides were applied during this period. Medical experimentation was also daily practised during the Nazi period. These experimentations were not only conducted towards Jews, but also to homosexuals, gypsies and Sintis.

The repression of these, especially homosexuals, reached its peak during the Nazi and Fascist Period. At that time «homosexuality was considered a handicap, a contagious disease that could have compromised the perfection of the Aryan race[89]». The German doctors used to send people to laboratories where they conducted every sort of experiments on them. Most died, and the survivors suffered permanent injuries, due to the lack of hygiene, and caused by mutilation, infections, mental and physical anguish.

In Italy, torture was often used against political opponents. Because of its laxative powers, castor oil – usually used in the cosmetic and automobile industries- was used by the Voluntary Militia against dissidents and political opponents, forcing them to swallow a bottle while their pants were tied up with a rope in order to prevent the victims from taking them off during the evacuation, thus forcing them to return home in humiliating condition[90].

The atrocities of this period awakened the international community and the future International treaties, conventions and institutions will have a key role in pursuing the objective of the protection of the human rights at all levels. Although it is condemned in almost every state, torture still remains an imminent and actual issue. UN, the interoperative organisation, has denounced many times the persistency of this crime in many reports. The UN expert on torture Nowak[91] , observed that «*torture is today practised in more than 90 percent of countries».*

[89] M. REGLIA, *Rom, Sinti, disabili, omosessuali. Ecco l'altra Memoria*, online at redattoresociale.it, 2014.
[90] *Olio di ricino*, online at memorieincammino.it, in M. FRANZINELLI, *Squadristi. Protagonisti e tecniche della violenza fascista 1919-1922*, Mondadori, Milano 2004.
[91] M. NOWAK, *Interim Report of the Special Rapporteur on Torture*, 2008.

1.2 Constant perpetration of torturous acts

Unpleasantly, torture in our century occurs in the same way as the medieval forms. Amnesty International, an NGO founded in 1961 by Englishman Peter Benenson, is committed in defending human rights. The purpose of AM is to promote, in an independent and impartial manner, the respect for human rights enshrined in the Universal Declaration of Human Rights and to prevent specific violations. Its many reports on torture have denounced and showed evidences of the use of tortures in many countries and emphasized how torture is a »widely spread phenomenon that increases year after year»[92]. The organisation condemned the practice in many states by publishing reports[93], helping the UN bodies to enhance prevention.

Amnesty founded that torture has re-born, considering that the 75 percent of the states still uses it, despite most of them had signed the Convention against Torture in 1987.With regards to our country, Amnesty International criticized the fact that Italy didn't incorporate torture as a specific offence in the national legal system[94], and in 2012 Amnesty condemned Italy on two specific matters.

Firstly, it was noted how the country still lacked effective mechanisms to prevent ill treatment by public officials, considering that "authorities failed to ratify the Optional Protocol to the Convention against Torture and to establish an independent National Preventive Mechanism for the prevention of torture and other ill treatment at the domestic level[95]"

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

[92] AMNESTY INTERNATIONAL, *Report on Torture,* 1973, Cit. pg1.
[93] A. TAYLOR, *Justice as a Human basic Need, New York, 2006.*
[94] AMNESTY INTERNATIONAL, *The State of the World's Human Rights,* 2012, pg 192.
[95] AMNESTY INTERNATIONAL, *The State of the World's Human Rights,2012,pg 192.*

note of the sentence was that it declared police officers and public officials as being actually guilty of violating fundamental human rights, which they should have been protecting[96]. Italy has always justified itself by contesting that the existing international conventions do not explicitly impose an obligation on contracting parties to create a specific crime of torture, but that they simply require the punishment of the single acts which constitute torture.

Having made this introduction about Italy (specific chapter 3.1.), the attention shifts to the various reports that Amnesty carried out in the course of his existence. A fundamental role is given to the fight against any form of ill- treatment, to the criminalisation of torture facts, constantly denouncing the non-compliance of states to the obligations placed in the treaties. It is remarked how, «a lack of a specific criminal offence of torture and adequate sanctions that reflects the gravity of the crimes creates and environment which fosters impunity, where perpetrators are not held to account and victims are denied recourse to an effective remedy[97]».

According to Amnesty International, an analysis of the effect of torture inevitably involves a study of human tolerance to pain or stress. Pain or stress produces biological responses in man which have to be viewed in terms of a combination of mental and physical processes. Secondly, we must take into account the context in which torture is applied in order to verify the effects on the subject[98]. The first difficulty, particularly the ones related to the experiences of pain – that can vary in accordance to the single level of tolerance - arises from the traditional and convenient habit of considering body and the mind as discrete entities[99].

But, however this concept of a mind-body dichotomy may appear to be in the development of moral and behavioural norms, it poses severe obstacles to a proper understanding of certain human phenomena such as pain. It is generally accepted, that there is a very real distinction between "third degree methods"

[96] M. PICCHI, *The Condemnation of The Italian State for violation of the prohibition of torture* , Journal of Law and Social Science, 2015, pg. 28.
[97] AMNESTY INTERNATIONAL Report 2016/2017: *The State of the World's Human Rights*, cit., pg 49.
[98] AMNESTY INTERNATIONAL, *Report on Torture,* 1973, pg.19.
[99] This theoretical separation has been, by and large, axiomatic in cultures with religious and philosophical roots as diverse as the Judaeo-Christian and the Hindu.

(physical assault such as the *falanga*[100]) and "fourth-degree methods" (psychological disorientation such as sensory deprivation). In the context of political repression, of course, these essential features are inherent in the torture situation.

Therefore, the first object of the torturer/interrogator is to weaken the compensatory moral[101] and habitual defences of the victim, achieved through a proper debilitation. Methods are relatively universal: semi-starvation, exposure, exploitation of wounds, induced illness, sleep deprivation, lack of proper hygiene, prolonged interrogation under extreme tension, prolonged constraint, forced writing, and fatiguing physical exercises, debilitating the principle "a healthy mind in a healthy body[102]". Damaging the anatomical and physiological components of body functions progressively impairs the working of the brain and hastens the collapse of will. Starvation deprives the brain of energy to work, malnutrition with Vitamin B deficiency deprives the brain of necessary metabolism[103]. According to Amnesty International, over the last century, attempts have been made in to limit or cancel what we consider as physical torture, preferring a type of conduct aimed at targeting nervous and mental debilitations[104].

In an experiment in England[105], 20 men and women volunteer members of a hospital staff, aged between 20 and 55, were each placed in a silent room and deprivation consisted of wearing goggles which limitated patterned vision, and padded fur gauntlets. On the other hand, they had four normal meals, and dunlopillo mattresses on which they could sleep or rest. They would have been payed an amount of money equal to the period spent in the room. The maximum time spent was 90 hours. The usual causes of abandonment of the experiment were unbearable anxiety, tension or panic attacks. Dreams were invariable in those who slept for any

[100] Most common term for repeated application of blunt trauma to the feet, or rarely, to hand palms or hips. Recognised as torture by ECHR when "used to obtain informations or to punish".
[101] AMNESTY INTERNATIONAL, *Reports on Torture, 1973, pg.41.*
[102] From the latin "*Mens Sana in Corpore Sano*", essential for well-being, written in the "*Satire"* of latin poet Giovenale.
[103] Theory of the "breakdown process", proposed by Sargant. He offers a comparison with combat exhaustion, as recorded by Swank and Marchland and argues that the breakdown is simply due to the effect of stress.
[104] AMNESTY INTERNATIONAL, *Report on Torture*, pg. 96,1973. Most commonly called "sensory deprivation", was first applied during the the Korean War, where the Group for the Advancement of Psychiatry points out that mental torture makes the individual to fight against himself.
[105] The Lancet Journal, Elsevier, 12 September 1959. It is a weekly peer reviewed general medical journal.

length of time and in a quarter of the 20 included nightmares about drowning, suffocation, killing people, etc. These were the results, although they were volunteers in their own hospital who knew that there was no reason for any panic and who were not submitted to any wall-standing or deprived to any food or sleep. In that period, the scientific debate focused on the possibility that the human brain would stop working in the absence of sensory stimuli[106], provoking hallucinations, perfect application for a "good" torture.

Not all forms of modern torture were born properly to induce the victim to confess or to give information referred to a particular topic. This is the case of the pharmacological subministrations[107] of substances in torture or interrogation situations. If a drug existed that could make people tell the truth[108] and reveal all their secrets and memories, that could make them change their beliefs and allegiances, no one would have been studying and lose time on the process of psycho-analysis in order to unearth information that they wish revealed, and every drug company, doctor, psychiatrist, and newspapers in the world would be using it on the patients in order to benefit from its virtues. There are currently no drugs that scientifically proves to cause consistent or enhancement of truth telling[109].

The primary suffering caused by the use of these drugs or anaesthetics is the victim's belief that the effects will soon start. A classic example is the short-acting anaesthetic that, even if by carefully injected induces a drowsy state between waking and sleeping, and the victim experiences is a tremendous sense of relaxation. If he has been very tense, he may talk freely about the things which have been worrying him, and, consequently, reveal the "stream of consciousness[110]" that the interrogator wants. It was extensively used during World War II in the concentration camps. Moreover, if the abreaction[111] does occur and the victim then

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[106] J. LILLY, *The Scientist,* Ronin, 1978. The "Water Tub" experiment: in the absence of external stimuli, the brain tends to induce a deep-dream state, in which sometimes hallucinations are manifested.
[107] AMNESTY INTERNATIONAL, *Reports on torture*, 1973, pg. 51.
[108] There are included a series of psychoactive drugs used in an effort to obtain informations from subjects that otherwise are unabled or won't render them.
[109] D.BROWN, *some believe "Truth Serums" will come back,* The Washington Post, November 2006.
[110] From the literary technique used by J. Joyce in his Ulysses, which consists in the reproduction of the free flow of thoughts, feelings and sensations.
[111] Technique used in psychiatry for relief of terrible mental stresses, online at sciencedirect.com

falls asleep and ceases to be aware, the torturer can claim that all was revealed, and thus trick his victim into revealing the information[112].

The use of this interrogation method significantly important today. Emblematic in this sense, is the 2012 Aurora Cinema Case occurred in Colorado, where James Holmes, fired with multiple firearms inside the cinema, killing 12 people and injuring 58 of them with tear-gas grenades.

Judge[113] William Sylvester ruled that in the event of Holmes pleading insanity his prosecutors would be permitted to interrogate him while he is under the influence of a medical drug designed to weaken his brain and get him to confess the facts. The idea would be that such a narcotic interview would be used to confirm whether or not he had been legally insane when he embarked on his shooting. The precise identity of the drug would be "medically appropriate", most likely to be a short-active barbiturate such as sodium amytal[114]. Contrary to the 5th amendment[115] of the United States Constitution, this decision is still controversial.

The secondary use of drugs for torture purposes is the induction of debility. Hallucinogenic drugs, such as LSD, cause great disruption to normal perceptual and conceptual processes and they may be used to confuse and weaken the victim.

Apomorphine, one of those disruptive substances, produces vomiting and paralysis[116]. If the subject is unable to breathe, this lack of oxygen eventually causes deprivation of consciousness, and artificial respiration may be used until the drug's effect finishes or expire. Recovery from an injection, may be accompanied by muscle pains. Routinely used in major surgery, people who have received thist treatments without anaesthetic in experiments have all agreed[117] that it is such an unpleasant experience to be able to see, think, feel, hear and unable to move.

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[112] AMNESTY INTERNATIONAL, *Reports on Torture,* 1973, pg. 52.
[113] E. PILKINGTON, *Judge approves truth serum on accused Aurora shooter James Holmes,* The Guardian.2013
[114] First synthesized in Germany in 1923, it induces delirium tremens and may be life-threatening. Known as the "blue heaven", it was produced and commercialized until the early 80s' by Eli Lilly and Co.
[115] Specifically, with regard of the Due Process clause, present in both the 4th and 5th Amendement.
[116] American Society of Health-System Pharmacists, *Succinylcholine Chloride,*2016, available online.
[117] AMNESTY INTERNATIONAL, *Reports on Torture, 1973, pg. 54.*

Heroin and other drugs can be used to induce addiction, for anyone given regular doses will become physiologically dependent on them and their withdrawal will produce physical and mental distress. Two aspirins may cause a fatal gastric haemorrhage, twenty paracetamol irreversible liver damage, and one common antibiotic may irreversibly destroy the bone marrow[118]. According to international law, these preparations are classified as a form of torture[119].

On admission of Amnesty itself, in many countries where torture is daily practiced, the availability of information is really limited[120], due to the poor cooperation of those governments who use torture as a *leitmotif* of their work and control in a determined territory. Taking this into account, Amnesty tried to give information on every continent about the situations regarding torture and respect of human rights and dignity.

1.2.1 African Situation

During their struggle for freedom, the nationalist movements of various African states were exposed to the use of torture on their militants, and on persons suspected of being their sympathisers. Torture was inflicted by the military and political personnel of the colonial powers, as it was used by the French in Algeria until their independency in 1962. The practice of torture[121] has been detected by international enquiries and condemned as a flagrant violation of rights of the African majority.

Notwithstanding the aspirations towards justice and protection of the human person from torture or humiliating treatment which are incorporated into the constitutions of most African states, the use or torture seems used by many of the countries[122].

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[118] AMNESTY INTERNATIONAL, *Reports on Torture*,1973, pg.54.
[119] W. BRUGGER, *May Governements even use Torture?* Am J Comparative Law, 2000, pg. 661-678.
[120] AMNESTY INTERNATIONAL, *Reports on Torture,* 1973, pg. 109.
[121] The Sharpeville massacre in 1960 and the events occured in Mozambique during 1971-1972.
[122] Amnesty International expressly reports Ghana, South Africa, Morocco, Malawi, Rhodesia, Tanzania, Namibia, Togo, Tunisia, Uganda and Zambia.

Ghana was one of the earliest African states to achieve independence following the period of colonial rule, celebrating its freedom from British administration in 1957. At the very beginning of Nkrumah's presidency – first Ghana president - a number or political parties were banned, and in 1964 Ghana became a one-party state. A Preventive Detention Act promulgated only a year after independence allowed detention without trial and due process for five years and was used against opponents of the Nkrumah regime. Early in Amnesty International's existence, evidence of torture of a number of detention centres where large numbers of political detainees were held without charge or trial.

Exiled political groups claimed that Mr Obetsebi-Lamptey died as a result of tortures in 1962[123]. A letter from a group of prisoners to Wilson, at that time Prime Minister of Great Britain, was transmitted to exiled United Party members in 1965; it alleged that several of theirs had been tortured over a period of five to six months in the "special block",prison area where Nkuramah detained his oppositors, and that one of them, Dr. Danquah, had died after having been detained there. During the summer of 1972, Amnesty international again began to receive allegations that torture was being used in Ghana, where army personnel were enforcing military drill (exercises, carrying of heavy stones, etc.) on civil servants who arrived late at their offices and on other civilians[124].

Police brutality has long been a feature of South Africa, where discriminatory policies and laws gave rise to continuative arrests within the underprivileged communities[125]. However, after the introduction of security laws by the Nationalist Governemnt, allegations of torture became more and more common. These laws were passed mainly to deal with African political oppositions. They introduced preventive detention, increased the police's powers over political suspects to a point where "the security police can hold anyone for as long as they

[123] AMNESTY INTERNATIONAL, *Amnesty International concern's on in the Republic of Ghana,* 1983.
[124] AMNESTY INTERNATIONAL, *Amnesty International concern's on in the Republic of Ghana*,1983. One detainee who died in hospital at is alleged to have been bold shaved with a broken bottle and forced to carry heavy stones.
[125] AMNESTY INTERNATIONAL, *Report on Torture, World survey on Torture,* 1973, pg. 123.

felt necessary, until he had satisfactorily replied to all questions ... or (until) no useful purpose will be served by his further detention[126]"

In 1968 the General Assembly passed a resolution condemning "any and every practice of torture, inhuman and degrading treatment of detainees in South African prisons and in South African custody during interrogation and detention" Ironically, allegations of torture began to increase around this period[127]. In those years, all the power and lack of respect for human rights by the Nationalist Party can be found in the events regarding Sharpeville. A group of protestants against the "Pass Law[128]" were shot to death, without hesitation by the South African police, killing 69 people and beating, detaining and torturing other 180[129].

Another important issue related to South Africa and torture was apartheid[130], formally abolished in 1991, after years of political fights and many sacrifices. Issue brought for the first time to the U.N. in 1946, has been subject of various studies and analyzed by Amnesty International, thanks also to the complaints of important people, such as Nelson Mandela, and to the bloody events that took place in South Africa in those 50 years, increasing awareness on the topic. The techniques mentioned[131] by a UN report of 1973 on torture of prisoners in South Africa, as well as in information that has come directly to Amnesty international, included both physical and psychological techniques. Physical brutality is still the most important feature of South African torture procedures.

Allegations have been made that there is appliance for electric shock torture in almost every police station in South Africa, leading the UN investigators to suggest that the police must receive some training in the use of torture. The Central Government of South Africa substantially encouraged torture and cruelty

[126] Terrorism Act, Section 6, 1967.
[127] AMNESTY INTERNATIONAL, *Report on Torture*, 1973.
[128] Pass Laws were a form on internal passport used by South Africa designed to segregate the population, manage urbanisation, and allocate migrant labour.Firstly introduced in 1797 by Earl McCartney, british statesman and colonial administrator.
[129] South African police stated in the reports after the massacre that the "white police", after seeing the great crowd in front of them, fired because they were panicking. Liutenant Pieenar also stated that "due to their "nonwhite" ethnicity, the protestants' native mentality doesn't allow them to gather in a pacific way".
[130] Racial discrimination policy pursued by white minorities in the South African Republic and implemented by violent means against the freedom and civil rights of indigenous and black people.
[131] AMNESTY INTERNATIONAL, *Reports on Torture,* 1973, pg. 126-127.

against apartheid opponents, condoning also the application of illegitimate practices by the Security Policet[132].

1.2.2 Asia

With a view to the Asian area, very few zones are free from the political and economic situations that generates torture. No Asian human rights convention exists, and a supra-national consensus has not yet been reached on the prohibition of torture, although it is generally prescribed nationally. This should not suggest that brutality is less repugnant to Asian cultural patterns than to European traditions but in societies where the problems of malnutrition, disease and illiteracy are daily reported torture may be present and appear with less clarity than in more economically developed areas.

In most Asian countries, these problems are further compounded by population pressures, and in some cases by deep ideological division[133]. Amnesty International gathered information regarding important states such as India, Philippines, Sri Lanka and Vietnam, drawing torture as a mere deliberate method and torture as collective punishment that occurs during conflicts situations.

Unfortunately, Amnesty couldn't collect information about the People's Republic of China, due to the fact that there was difficulty for what concerns the veridicity of information. Certified allegations were received in 1972 regarding torture and ill-treatments of political prisoners held in prison in the Lhasa District[134] of the Chinese autonomous region of Tibet. Some of the torture methods can be traced back to medieval times, while other reported forms of abuse, such as forced organ harvesting, are unprecedented in history. Chinese torture sends back the imaginary to inhuman techniques which were used to force the victim to provide information or to change behaviour and his way of thinking. In modern times, the

[132] REPORT OF THE SPECIAL COMMITTEE ON APARTHEID, *Maltreatment and Torture of prisoners in South Africa,* New York, 1973, pg. 10-25.
[133] AMNESTY INTERNATIONAL, *Report on Torture, 1973,* pg. 138.
[134] For example, the Drapchi prison, the biggest in Tibet. The name in Tibetan language means "four corners"and is a prison active from 1965.

most famous victims of this atrocious system were the practitioners of Falun Dafa[135], Tibetans[136], Uighurs[137], and House Christians.

Torture techniques in China are both physical and mental, including torturous methods such as the tiger bench[138] , *diaodiaoyi*[139], the water torture (although there is little evidence on the effectiveness of this method)[140], forced alimentation. Only in 2015, after a long investigation due to the closed political government of China, Amnesty finds that the Chinese's criminal justice system relies heavily on forced confessions, extracted through torture, and that lawyers who try to challenge torture cases are routinely ignored, harassed and even detained[141]. Torture in China is particularly used towards suspects in pre-trial detention, hoping to avoid in second instace the try in court, surely more expensive in time[142]. These include human rights defenders, officials detained for corruption, Falun Gong adherents, and Tibetan and Uighur suspected of "secessionism". A Falung Gong practitioner accused of "separatism", described to Amnesty International the conditions suffered during his detention in Chinese prisons: «My hands were tied to the upper part of a bunk bed, and one of my legs was tied to the lower part of the bed. I was made to stand in that position while the guards used hangers to beat my head and plywood to beat my body. The guards put chili in my mouth, and I was not allowed to use the toilet. After this, I was suspended to the ceiling and subjected to this kind of punishment for 27 days»[143].

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[135] Chinese spiritual discipline that includes meditation, qigong exercises and a teaching based on the principle of truthfulness, compassion and tolerance. However, since 1996, the Communist Party started to see Falun Dafa as a concrete threat, beginning to prosecute practicers of the discipline.
[136] Declared illegal in 1959 from China, the Tibetan Region, also known as the Tibetan Governemnt in exile,they were obliged to fled in India with the Dalai Lama after the revolution against the Chinese army in Lhasa.
[137] Minority group populating the Xinjiang Region in northwest China, that after the July 2009 Urumqi riots, were tortured, killed and forced to exile.
[138] The individual's legs are tightly bound to a bench, and bricks are gradually added under the victim's feet, forcing the legs to bend backwards.
[139] A person seated in this restraint chair will be unable to lean back or have his/her feet rest on the ground. The chest will be bound to a board while the hands are cuffed, rendering the entire body immobile.
[140] First described by Hyppolitus De Marsiis, is a process in which water is slowly dripped onto the scalp, allegedly making the victim insane.
[141] AMNESTY INTERNATIONAL, *Torture in China: Who, What, Why and How*, Amnesty Online website.
[142] AMNESTY INTERNATIONAL, *No End in Sight: Torture and Forced Confessions in China, 2015.*
[143] Extract from an interview available at amnestyinternational.com, *Torture in China,* 2015.

After China, India is the second most populated country in the world, with a population of almost one billion and a half people, very fertile ground for the growth of decisive repressive practices that exceeds the limits established by international conventions. In fact, during the late 60's, due to overpopulation and unemployment, there was a suitable situation for the expansion of the Naxalism, a filo-communist movement named after a peasant uprising in the village of Axalbari.

The Indian government started a policy of counter insurgency detaining and sentencing Naxalities suspect without even a trial, due to preventive laws such as the 1971 Maintenance of Internal Security Act, declared unconstitutional by Indian Supreme Court in 1973. Allegations[144] were made in which there were "bad treatments, inflicted on revolutionaries when they are arrested — tortures, burnings with cigarettes or during their detention they were subjected to beatings. Several dozen prisoners have died during their incarceration or in the course of struggles inside the prisons. Amnesty International has also received allegations of torture and ill-treatment of civilian detainees from two other parts of India, Nagaland in the far north-east and Kashmir in the north-west.

From the 1st on November 1955 until the fall of Saigon[145] in 1975, U.S.A. army among with South Vietnam fought against North Vietnam, supported by China and Soviet Union, in what we call the Vietnam War or Second Indochina War[146]. The conflict in Vietnam brought a large number of torture allegations and also a very large number of Vietnamese civilians subjected to torture during those past years[147].

In Southern Vietnam, controlled by the government in Saigon, torture appears to have been common in many interrogation centres. Some of these centres belong to police stations, as in the National Police Headquarters in Saigon, where the interrogation centre apparently holds more than two thousand people, People suspected of having any connection with the National Liberation Front, were

[144] Le Monde, Paris, May 1973.
[145] The capture of Saigon, the capital of South Vietnam, by the PAVN (People's Army of Vietnam) and the Viet Cong. The event marked the end of the Vietnam War and the start of a transition period to the formal reunification of Vietnam.
[146] Lasted 19 years, this proxy-war had the involvement of U.S.A until 1973,and included the Cambodian Civil War and the Laotian Civil War, both communist states after 1975.
[147] AMNESTY INTERNATIONAL, *REPORT ON TORTURE*, 1973, pg. 152.

captured and taken to centres for intensive questioning. Many of them were captured and detained under the Phoenix Program[148]. According to USA's estimate, more than 20,000 suspected members of the National Liberation Front were tortured and threatened during this period[149].

According to Amnesty, thousands of prisoners were held permanently shackled into disciplinary cages, so that they emerged with atrophied legs and in an advanced stage of physical and psychological degeneration[150]. In that period, CIA was so keen on using terror tactics that actually didn't care if someone was guilty or not: the police motto was: "*Khong dan choc cho*"[151](if they are not guilty, beat them until they are). Based on information[152] smuggled out by inmates, details of corruption, ill-treatment, drug-trading, imprisonment of children and inadequate food and medical facilities emerged.Also in the communist territory of North Vietnam, allegations were made by U.S.A. soldiers beated up and tortured in prison and subject to violent interrogations method, forcing communists "to be brutal with them"[153].

1.2.3 Torture in Turkey

Moving on to torture situation in Europe, in the next chapters there will be the exposition the French, German and Italian system, analyzing why the experts call it the ticking-time bomb scenario. With regards to the European area, the focus is surely concentrated on the past and present situation of Turkey, considered Europe but still ethically and legislative inadequate to complete and fulfil the respect of human rights and European duties.

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[148] Program designed by CIA with the cooperation of South Vietnam in order to destroy the Viet Cong via assassination, terrorism and infiltration methods.
[149] AMNESTY INTERNATIONAL, Report on Torture, 1973, pg. 153.
[150] Prisoners generally didn't have a bathroom and were staying in very little cages with no light and air.
[151] Extract from an interview to Sidney H. Schamberg detailing torture allegations, New York Times, 1972.
[152] VIETNAMESE COMMUNITY IN PARIS, *The Situation in The Prison of Chi Hoa*, 1972.
[153] Description of the Navy Captain Jeremiah Denton, survivor of the prisons, available online.

Since the intervention of the military in political affairs in Turkey in March 1971 and the imposition of martial law in eleven of the country's sixty-seven provinces, there have been widespread allegations that political prisoners have been tortured. From 1971 until recently, extremely detailed statements written by men and women who say they have been tortured and have witnessed others being tortured have been smuggled out of prisons in Turkey and sent to Europe. Many U.N. and Amnesty International officials went to Turkey and documented the situations of prisoners, stating that «There appears to be a strong prima facie case for investigating the allegations of torture, brutality and threats in the treatment of prisoners in Turkey»[154].

In their reply to Mr Hunter's document the Turkish government stated categorically that «no ill-treatment whatsoever is inflicted during the questioning, nor is there any implement or device designed to serve this purpose»[155]. They also said that acts of torture and ill or arbitrary treatments, are strictly forbidden[156] by the Constitution[157] and other relevant laws and constitute severe crimes in Turkey where all actions of the executive are subject to judicial control.

Although many Foreign Ministers[158] during time expressly negated the possibility of torturous acts and ill-treatments towards civils, Turkish history, made up of internal repressions and civil war, has been fertile ground for the growth of torturous methods. From 2003, the head of AKP[159] Recep Tayyip Erdogan became Prime Minister of Turkey for the first time and, accentuating the conservative drift of his own regime, ironically, tried to put a stop to the practices of torture, particular issue in the 80's and 90's. As soon as he obtained power, his government engaged a "zero tolerance[160]" campaign against police abuses, due also

[154] Report of Mr. Hunter, A.I. official during his journey to Turkey, available online.
[155] AMNESTY INTERNATIONAL, *Report on Torture,* 1973, pg. 169.
[156] Art 70 of the Turkish Constitution states as natural right personal safety that cannot be limited except for predetermined. Cases.
[157] Art 73 of the Turkish Constitution prohibits any form of torture, ill-treatments, confiscations and corveès.
[158] Mr. Bayulken, for example, appeared before the Political Committee of the Council of Europe addressing to the Council documents negating the possibility of torturing methods.
[159] The Justice and Development Party is a conservative political party developed before the Turkish Islamic tradition and biggest party in the country.
[160] Online at thesubmarine.it/2017/06/08/carceri-turchia-torture.

to the fact that Turkey was trying to comply E.U. policies and his entering application was examined in that period.

Things have unfortunately changed in recent years, especially after summer 2016, when some fringes of the Turkish army tried to overthrow Erdogan's regime with a coup d'état. The attempt from the armed force, reunited in the Peace at Home Council, failed[161] when the army loyal to Erdogan stopped them in Ankara and Istanbul. Since July 2016, the government extended national state of emergency three times, removing all forms of constitutional protection for prisoners and paving the way for the resumption of torture. Furthermore, according to SCF[162], the government has reinstated some police officers known for their violent interrogative methods.

Since then, there have been at least 75[163] suspicious deaths in Turkish prisons, which authorities attributed to natural causes or suicides. In the case of some of these suicides, the forensic doctors who signed the reports did not even had the chance to examine the deceased bodies. In addition of these extreme cases, it must be remembered that in recent months government forcibly repressed peaceful demonstrations nationwide[164] and has led to one hundred thousand detention or arrests of people accused of collusion with Fetullah Gulen, Erdogan's favourite scapegoat, currently a refugee in United States.

1.2.4 The Americas

With regards to the Americas situations, another big geographical territory where, due to the varieties of cultures and juridical systems, torture was and is widespread practiced in different ways.

The Eighth Amendment to the Constitution of the United States or America provides that cruel and unusual punishments shall not be inflicted[165].

[161] Turkish failed coup attempt: All you need to know, in aljazeera.com.
[162] SCF stands for Stockholm Center for Freedom, a non-profit organisation founded in 2017 by Turkish journalists that fled or exiled to Sweden after the 2016 events.
[163] Stockholm Center for Freedom, Retrieved, 2017.
[164] politico.com/magazine/story/2016/07what-caused-the-turkish-coup-d'ètat-214057
[165] Eight Amendment of U.S.A. 1791. It prohibits the federal goverment from imposing excessive bail, excessive fines, cruel and inusual punishements.

Torture in U.S.A. has a well-defined historical legacy that can be traced back to the age of slavery, period between the birth of the national in 1776 until the passage of the 13th Amendment in 1865. According to the Slaves Code, slaves were regulated by legally authorised violence, whose brutality was regulated and proportionate to the gravity of the misconduct.

Black freemen instead, were subject to the Blacks Code, having their movement regulated by patrollers, belonging to the white population, who were allowed to inflict punishments. This caused the development of costmary torture practices to be applied depending on social and racial status, such as lynching[166] and third degree[167]. The "third degree", very criticized by abolitionists and following the work[168] done by the Wickersham Commission, it was formally no longer used at the end of the 30's.

Coming back to modern times, together with the already mentioned torturous methods used during the Vietnamese occupations, tortures towards black people were practiced by the Ku Klux Klan, organisation born in 19th century with political aims[169] and racist contents, advocating the superiority of the white race[170].. Starting from their belief stating that KKK was created to regenerate our unfortunate country and to redeem the white race from the humiliating condition in which it was recently precipitated by the new Republic and that the homeland was founded by white race and for the white race , and any attempt to transfer this control over the nation in favour of inferior races such as the negress, is clearly against the divine will and constitutes a violation of the Constitution, social equality must therefore be banned forever, because it represents a dangerous step towards political equality or, worse , towards mixed marriages and the production of a subspecies of bastards and degenerates…[171], little boy Emmet Till[172] was murdered

[166] It was a public act of murder, torture and mutilation carried on by crowds primarily against Afro-Americans. Generally, it was reserved to rape, uppity towards someone, assasination, assaulting black men.
[167] It is a form of intense interrogation, such as prolonged confinement or physical torture, used and socially accepted by American Police.
[168] We are talking about the *1931 Report on Lawlessness in Law Enforcement*, publicated by the Wickersham Commission.
[169] Ku Klux Klan in *Enciclopedia Italiana,*Treccani Encyclopedia, 1993.
[170] Ku Klux Klan in Britannic Encyclopedia.
[171] The rite of initiation, torturing and killing of the victims took place with the recitation of this formula, available online.
[172] Online at essence.com/horrific/kkk-crimes.

in 1955, after being beaten to the point that his face was disfigured and one of his eyes was dislodged from its socket before being fatally shot, just because was flirting with a white woman while visiting a local store. Coming to more recent times, numerous attacks of formers KKK members were done also against non-black people. In 2014, the former KKK leader Frazier Miller murdered three people after opening fire at a local Jewish community centre[173].

Another important issue related to torture when mentioning U.S.A is the application of this method from the defenders of democracy, police agents. The above-mentioned Abu-Ghraib and Guantanamo cases are the most important cases but are only the tip of the iceberg when we talk about this topic. After the 9/11[174] attacks, in order to apply the "war on terrorism[175]", Bush allocated 40 billion for terrorism emergency while other 20 billion for air transport industry. The Department of Justice launched also a special procedure for some males who didn't possess the U.S. citizenship, carried out by the Immigrational and Naturalization Service[176] offices. Also, a new security agency was created, called U.S. Department of Homeland Security, in order to coordinate counterattack measures against terrorism.

In 2004, a series of photos were published on CNS News regarding Iraqi prisoners detained in the Abu Ghraib prison. In that context, emerged that during the war undertaken in Iraq by U.S.A, army and CIA members committed abuses against prisoners that included torture [177], rape and murder. The episodes received general and worldwide condemnation[178], although soldiers received support from some conservatives[179]. Many international organisations focused the attention and reported the precarious situations in which prisoners were detained, establishing that Abu Ghraib's abuses were not isolated cases but all part of a vast

[173] *White Supremacist Convicted of Killing 3 at Kansas Jewish Centers,* New York Times, 2015.
[174] E. SCHMITT AND T.SHANKER , *U.S. officials Retool Slogan for Terror War,* New York Times, 2005.
[175] Slogan used by the Bush Administration to refer to a series of military operations in U.S.A and international territories.
[176] Active until 2003, when the functions were transferred to three new entities: U.S. Citizenship and Immigration Service, US. Immigration and Custom Enforcement, and U.S. Customs and Boards Protections.
[177] A. W. MCCOY, *A Question of Torture,*American Empire Project, First Edition*, 2006.*
[178] Rush: MPs Just "Blowin Off Streams", CBS News, 2004.
[179] S. SONTAG, *Regarding the Torture of Others*, New York Times, 2004.

plan of torture and brutality, both in U.S. prisons in the territory and abroad, including Afghanistan and Guantanamo.

Amnesty International interviewed former detainees who disclosed that they were among the prisoners subjected to torture and ill-treatment in US custody at Abu Ghraib. Detainees, including also raped women, complained they were everyday beaten, obliged to stay for hours in painful positions and some were also subjected to sleep deprivation, prolonged standing, and exposure to loud music and bright lights[180].

The US authorities have stated on numerous occasions that its regime of detention in Iraq has fundamentally changed since abuses at the Abu Ghraib prison were exposed[181]. The US government's second periodic report to the UN Committee Against Torture of June 2005 states: "The Department of Defence has improved its detention operations in Iraq and elsewhere, improvements have been made based upon the lessons learned, and in part because of the broad investigations and focused inquiries into specific allegations[182]". While dozens of US soldiers have been court-martialled in connection with the abuse of detainees, senior US administration officials have remained free from independent scrutiny. According to the US government, as of 1 October 2005 there had been 65 courts-martial in connection with the abuse of detainees in Iraq[183] . In June 2004, two US marines were sentenced to eight- and twelve-months' imprisonment by a military court in Iraq. Both men had pleaded guilty for using electric shocks torture to an Iraqi prisoner in the South of Baghdad[184] .

On the other side, speaking about situations that occurred inside the U.S. territory related to human rights violations, we have to mention the Guantanamo military base case. Since the terrorist attacks of 9/11 and the United States' subsequent declaration of a global war on terror, a law of military detention has been emerging through *habeas corpus* petitions from detainees held at

[180] AMNESTY INTERNATIONAL, *Beyond Abu Ghraib, detention and torture in Iraq, 2006.*
[181] AMNESTY INTERNATIONAL, *Beyond Abu Ghraib, detention and torture in Iraq, 2006.*
[182] Second Periodic Report of the U.S.A. to the Committee against Torture, UN Doc. CAT/C/48/Add.3,
29 June 2005, Annex 1, Part 2, pg.77.
[183] United States of America, Update to Annex One of the Second Periodic Report of the United States of America to the Committee Against Torture, 21 October 2005.
[184] The Guardian, *US marines plead guilty to prisoner abuse*, June 2004.

Guantanamo Bay Base[185]. With the AUMF[186] signed a week after the hijacked planes crashed into the Twin Towers, the Congress granted the president the power to "use all necessary and appropriate force[187]" against everyone who were considered to be part in those terroristic attacks.

The initial US government position concerning Guantanamo was that detainees were unlawful enemy combatants and so, this category of detainees was an *unicum*, as dangerous for the nation, and were detained under conditions that were considered appropriate for the U.S. Governement. This lack of international law certainty made the Guntanamo case a grey area.

Although the initial authority to detain suspected terrorists was not seriously questioned with the memory of 9/11 still fresh, the rights of those being held at Guantanamo soon became a central issue when the media began coverage of the conditions and treatment of detainees, following also the inherent Hamdi case, in which the Court recognized the power of the U.S. government to detain enemy combatants , including U.S. citizens, but ruled that detainees who are U.S. citizens must have the rights of due process and the ability to challenge their enemy combatant status before an impartial authority, and Rasul(member of the Tipton Three[188]) vs. Bush, landmark decision of the U.S. Supreme Court in which the Court held that foreign nationals held in Guantanamo could adhere federal courts for writs of *habeas corpus* to review the legality of their detention. The Court's judgment on June 28, 2004, reversed a decision which had held that the judiciary has no jurisdiction to hear any petitions from foreign nationals held in Guantanamo Bay.

Following the success of the alleged complaints, Boumediene[189], a naturalized citizen of Bosnia and Herzegovina, was the last Guantanamo detainee to successfully bring his case to the Supreme Court. He complained at first instance the legality of the detention at Guantanamo bay and the applicability and

[185] Onine at lawfareblog.com/guantanamo-litigation-history
[186] Signed by Bush, the Authorisation for Use of Military Force, authorises the use of armies against those responsible of 9/11 and associates. Every representative voted in favor of the adoption, except for Barbara Lee.
[187] *Guatanamo Litigation*, available online at Lawfare Blog.
[188] is the collective name given to three British citizens from Tipton, England, who were held in extrajudicial detention by the U.S. governement for two years in Guantanamo.
[189] U.S. Supreme Court, 06-1195- *Boumediene vs. Bush*, 2008.

constitutionality of the Military Commission Act. Justice Kennedy held that non-citizens detained at Guantanamo had a constitutional right to habeas corpus and found the MCA's restriction of federal jurisdiction for detainee *habeas corpus*[190] cases to be an unconstitutional suspension of that right. Kennedy determined that the limited judicial review under the DTA[191]'s direct appeals system did not adequately substitute for federal *habeas* review, as it did not afford detainees the opportunity to present evidences to prove they did not fell within the scope of the government's MCA's detention authority.

Today interrogations are believed to have all but ended at Guantanamo. With no new detainees being transferred to the detention facility for nearly four years, Guantanamo has continued as a location for indefinite military incarceration and occasional military commission trials. If the prison's original status as a strategic interrogation facility has essentially been mothballed[192], its continued existence has become a political issue, with any prospect of the detentions being addressed by the USA within a human rights framework.

Three years after President Obama signed an executive order to close the Guantanamo detention facility but his administration's failure to meet this commitment has encouraged a number of successors to make campaign promises to keep the prison open or even to expand it. In fact, President Trump, due to his political aim to defend national boarders stated he will: «load Guantanamo up with a lot of bad dudes[193]», justifying de facto the actions perpetrated by U.S. government and army members to continue with detentions methods that could lead to torture or more in general violations of human rights.

In May 2014 Amnesty International launched a global campaign to call for the eradication of torture and other ill-treatment in Mexico. After five years, the main concerns remain: Torture and ill-treatment is a persistent human rights

[190] Is a recourse in law through which a person can report an unlawful detention or imprisonment to a court and request that the court order the custodian of the person, usually a prison official, to bring the prisoner to court, to determine whether the detention is lawful.
[191] for Detainee Commission Act, emanated by the Congress in 2005. It contains provisions related to treatment of persons in custody of the U.S. Department of Defense and the administrations of detainees held in Guntanamo Bay.
[192] AMNESTY INTERNATIONAL, *Guantanamo – A decade of damage to human rights, 2011, pg .43.*
[193] The Guardian, *Donald Trump cements frontrunner status after big win in Nevada*, 2016.

violation and is commonly used by state agents carrying out law enforcement and security tasks to extract confessions, inventing charges and inflict suffering on citizens[194]. Torture persists in Mexico and the number of complaints received by federal authorities has increased.

Amnesty International has also found that official records on torture and ill-treatment across the country are inaccurate, contradictory and incomplete, which undermines the obligation of the state[195] to properly prevent, investigate and punish torture and ill-treatment. Many known cases, such as the Enrique Guerrero case, where a public prosecutor threatened him to get him to confess to involvement in a kidnapping that had occurred in Oaxaca, a state in the south of Mexico, fill the pages of newspapers but seems that Mexican national authorities doesn't care at all about this issue, giving priority to the problems related to the Mexican Drug War.

Also, in other dangerous states, such as Cuba, fulfilling the requests of the international community regarding torture and other primary human rights seems difficult. There aren't any procedural safeguards for Cuban citizens as the *habeas corpus* is not respected[196] on the island: no necessary medical exam, notifying relatives, and having the right to be accompanied by a defence attorney from the very moment they're arrested. Those arrested didn't see them granted the most basic rights, such as the criminal informations, the rights to be heard and the due process.The report[197] confirms overcrowding in Cuban prisons, malnutrition of detainees, lack of hygiene and poor health.

In Brazil, following the 1968 coup which brought the military regime to power, Amnesty International received countless reports of the torture of political prisoners in Brazil[198]. Reports were consistently growing after the introduction of Institutional Act No. 5 in 1968, which mined civil liberties in Brazil and strengthened the penalties for those accused of crimes against national security.

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[194] AMNESTY INTERNATIONAL,*Paper Promises, Daily Impunity, Mexico's torture epidemic continues, October 2015, pg .1.*

[195] The institution responsible in the SEIDO, Subprocuraduría Especializada en Investigación de Delincuencia Organizada.

[196] Online at havanatimes.org/opinion/cuba-violates-convention-against-torture

[197] UN Webpage, Human Rights Council at Cuba, Committee Against Torture Reccomendations, Concluding Observations (2012).

[198] AMNESTY INTERNATIONAL, Report on Torture, 1973, pg. 185.

Thanks also to the "Death Squad[199]", we can say that torture is widespread and that it can be said to constitute administrative practice. It appears to be used in the majority of interrogations, even against people detained for a short period of time, in order to extract from them information and intimidating potential dissidents. In 2003, roughly 2,000 extrajudicial murders occurred in Sao Paulo and Rio de Janeiro, with Amnesty International claiming the numbers are far higher[200]. Brazilian politician Flavio Bolsonaro[201] the son of Brazilian President Jair Bolsonaro, was accused of having relationships with these paramilitary organisations.

1.3: The French and German system: the ticking-time bomb scenario

In order to deal with the choices made by the Italian legislator, it is necessary, in advance, to assess how some countries which, for historical, cultural and judicial asset, most resemble our country. The comparison with Germany and France therefore seems appropriate and significant. Both countries have a very hard and deep-rooted history of applied torture. As already mentioned, for the Germans was glaring the Nazi period, while for the French can be traced back to the practice of the period of Algerian independence, in the historical time of the famous "Je vous ai compris[202]" of De Gaulle.

The preamble of 1958 to the French Constitution proclaims the recognition of all the principles enshrined in the *Dèclaration* of 1789, which recognized natural rights but not yet an express mention of the prohibition of torture. Taking inspiration from the naturalist legal philosophy[203] and natural rights, the 1810 *Code des dèlit et des peines*, sanctioned the practice of torture in art. 303,

[199] The "*Esquadrao da Morte"* was a paramilitary organization that emerged in the late 1960s in the context of the Brazilian Military dictatorship. The purpose of the original "Death Squad" was, with the consent of the military government, to persecute, torture and kill suspected criminals (*marginais*)
[200] A. STICKLER, "*Brazilian police execute thousands*". BBC News, 2005.
[201] Deutsche Welle, "Jair bolsonaro's son a growing risk to brazil's governement",2019.
[202] key sentence of Charles de Gaulle's speech of 4 June 1958 in Algiers, from the balcony of the General Government, in front of the crowd gathered in the Forum Square. He will then give the French citizenship to all Algerians who would have moved to France.
[203] Scholars such as Jeremy Bentham, cosidered founder of modern utilitarianism and theorist of the ticking-time bomb scenario.

punishing "*tous malfaiteurs, quelle que soit leur dènomination, qui, pour l'execution de leurs crimes, emploient des tortures ou commettent des actes de barbarie*[204]".

The 1994 *Code Pènal*, on the other hand, is more articulated and distinguishes two types of torture, according to whether it is intended as a crime against humanity or carried out against a single subject. Torture is punished with life imprisonment if committed "in execution of a concerted plan against a group of civilian population in the context of a generalized and systematic attack[205]". It is instead viewed as a crime against the person, punished with imprisonment of up to 15 years (with a tightening up to 30) "the submission of a person to torture or acts of barbarism[206]".

"*Die Würde des Menschen ist unantastbar*" (The dignity of the person is inviolable): this is the wording of Art. 1, 1st c., 1st part, of the *Grundgesetz*[207] and respect for and protection of the same constitute an obligation for all the powers of the State. The FRG's StGB does not provide for torture as a separate offence. The punishment of this crime is provided for in some paragraphs of Chapter 30 of the Special Section of the StGB. These are Paragraphs 343,entitled *Aussageerpressung (extortion of delcarations)* ,340, *Körperverletzung im Amt (* Personal injuries during the performance of acts of service), and 357,entitled *Verleitung eines Untergebenen zu einer Strafta (*Induction of a subordinate to commit a crime) .Provides for paragraph 343, 1st c., StGB, that anyone, as a public official and in the exercise of his functions in the context of criminal proceedings, on the occasion of an internment, committing acts of physical abuse or violence against a person or threatening to resort to the use of violence or inflicting psychological suffering in order to force him to make statements in the course of a procedure or to refrain from making them, shall be punishable by a term of imprisonment of between one and ten years. The prohibition of torture is considered by the constitutionalists of the FRG to be an "*Unverzichtbare Norm*" (a universal rule) and the ECHR, in its now famous opinion on ruling *Daschner vs.*

[204] Art. 303*, Code des dèlits et des peines*.
[205] Art.212-1, n 6, Code Pènal.
[206] Art. 221-1, Code Pènal.
[207] The 1949 Basic Law for the Federal Republic of Germany, approved in Bonn.

Germany case[208], has noted that the absolute prohibition of torture and inhuman or degrading treatment remains protected against any scenario, including the ticking time bomb one[209], i.e. the debate whose question is whether torture can be used in cases of extreme urgency.

The recent terrorist threats involving these countries has brought the resurfacing an old dilemma concerning the absolute prohibition of torture: should torture be permitted under circumstances of extreme danger, for the greater good?

In fact, following the attacks in France, the French Parliament was induced to declare the state of alert and the application of *Law No. 55-385* of 1995, which regulates under the conditions of Article 1, when "*pèr il imminent rèsultants d'atteintes graves à l'ordre public" or "d'èvenements prèsentant, par leur nature et leur gravitè, le caractère de calamitè publique*", can prolongue the state of emergency up to 12 days. Significant are the exceptions and procedural guarantees that govern the stage of preliminary investigations, as well as the possibility of applying to subjects if "*il existe des raisons sèrieuses de penser que leur comportement constitue une menace pour la securitè et l'ordre publics"*, a series of restrictions such as liberty deprivation.

The numerous critics of this measure have brought the legislator to formulate the *Loi Renforcant la securitè interieure et la lutte contre le terrorisme* and the *Loi 1610/2017* , guaranteeing the Minister of the Internal Affairs to close religious places " *dans lesquels les propos qui sont tenus, les idèes ou thèories qui sont diffusèes ou les activitès qui se deroulent , provoquent à la commission d'actes de terrorisme en France ou à l'etranger , incitent à la violence , ou font l'apologie de tels actes*[210]"and in art.3 to apply "*des measures de surveillance aux fins de prèvenir des actes de terrorisme, à l 'encontre de toute personne è l'ègard de laquelle il existe des raisons sèrieuses de penser que son comportement constitue une menace d'une particulière gravitè pour la securitè et l'ordre publics, qui soit entre en relation de manière habituelle avec des personnes ou des organisations*

[208] 61-year-old Daschner ordered a subordinate, E. Ortwi, to threaten to inflict pain on suspected kidnapper Magnus Gäfgen if he didn't tell the police where o11-year-old Jakob von Metzler was.
[209] ECHR, n. 22978/05, *Gafgen vs. Germany*.
[210] Loi Renforcant la Securitè Interieure et la Lutte contre le Terrorisme.

incitant, facilitant ou participant à des actes de terrorisme soit soutient ou adhère à des thèses incitant à la commission d'actes de terrorisme ou faisant l'apologie de tels actes[211]"

According to the 2017 Amnesty Report, police abused of these dispositions, perpetrating over 4.000 non authorised personal searches and over 400 arrests[212].

It is precisely in this perspective that the ticking-time bomb scenario appears to resurface, finding an application even in modern times. Using torture in the setting of the ticking-bomb scenario seems to be justified under the principle of utility envisioned by philosopher Jeremy Bentham[213]. Thus, in a ticking-bomb scenario, it would be permissible to allow one single individual to suffer pain, if thousands of lives could be saved. The concept of ticking-time bomb mas then conceptualized by Latèrguy in his famous novel *Les Centurions ,* that lists a series of conditions under which the scenario could be reasonable to take place : the evidence in support of the contention that he has the relevant information would satisfy the requirements of evidence for convicting him of an offence; there are reasonable grounds for believing that he is likely to tell the truth if severe torture is threatened, and, if necessary, applied to him;there are reasonable grounds for believing that no other means would have the effect of compelling him to tell the truth;there are grounds for believing that if the information is obtained quickly, there is a good chance of defusing the bomb before it goes off;there are reasonable grounds for believing that the likely damage to be caused by the bomb will include death of many citizens, the suffering of others, including the infliction of pain on others with lasting effect than the infliction of torture on the person who has been captured[214].

The question was posed by Luhmann and by Brugger, where in his work he proposes and theorises a clear example of what the time bomb scenario actually means: a subject is threatened by a terrorist who has hidden a deadly chemical

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[211] *Dossièr Lègislatif, Exposè des motifs*, 2017, online at legifrance.gouv.fr.
[212] Amnesty International, *Report 2016/2017. The state of the world's human rights*, 2017, pg.160.
[213] C. SUNG, *Torturing the Ticking Bomb Terrorist: an analysis of judicially sanctioned torture in the context of terrorism*, Boston College Third World Law Journal, Volume 23, Issue 1, 2003, pg.197.
[214] J. Latèrguy, Les Centurions, in W.L. TWINING, WL; P.E. TWINING, *Bentham on torture*, 1973.

bomb. When the money is handed over, the terrorist is arrested by the police and detained in custody. Despite the questioning, the terrorist does not reveal the hiding place, demanding freedom, a large sum of money and a plane for escaping. Once he gets on the plane, he will reveal the hiding place of the bomb. Police see only one way of eliminating the danger: extracting information regarding the hiding place of the bomb from the terrorist, if necessary, with violence. Can the policemen do that[215]? Brugger's answer is clear: under certain conditions, the state does not have the right, but the duty, to subject a certain subject to torture. According to Brugger, the absolute prohibition of torture is simply unfair[216].

Another ticking-time bomb pioneer, Alan Derschowitz, is favourable to the use of torture but, asks States to regulate the "torture warrant[217]", in order to avoid unregulated abuses of it. His ticking time-bomb scenario have although encountered many critics, especially from the APT, stating that the prohibition of torture is an absolute and peremptory norm that, if derogated, would lead to the creation of a new rule authorizing de facto the practice[218]. William Schulz, executive director of Amnesty International, was firmly against Derschowitz "torture warrants" because the scenario pointed out is hypothetical and unrealistic, though not forming a legal basis to justify torture[219], at all. Therefore, there will never be certainty that by torturing someone you will save a greater good, or many other lives.

The scale of the problem is much broader than what one might think. In fact, the ticking-time bomb scenario does not regulate the problem on the possible failure of the torturer method, since torture "not only makes people talk, but makes them speak the truth[220]", not contemplating the possibility of false information and

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[215] W. BRUGGER, *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?* Juristen Zeitung, 2000, pg.165 ss.
[216] W. BRUGGER, *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?* Juristen Zeitung, 2000, pg.172.
[217] A. DERSCHOWITZ, *Want to Torture? Get a warrant*,2002, available online.

[218] ASSOCIATION FOR THE PREVENTION OF TORTURE, *Defusing the ticking-bomb scenario: Why we must say no to Torture, always*, 2007.
[219] W. F. SCHULZ, *Is the ticking bomb case plausible? The Phenomenon of Torture: readings and commentary,* Chapter VI, Pennsylvania Press, 2007 p.260-261.
[220] J. Ip, *Two narratives of torture*, Journal of Human rights, Volume 7, 2009, p.52-54.

reticence. Another problem refferred to the ticking-bomb scenario is that there is a high risk that by allowing torture is exceptional cases, it may become routine practice and, indirectly justify it in every circumstance. In 1987, torture was legalized as an interrogation method under the ticking-bomb scenario[221]; it could be used only if there were no other possible ways to gain important information.

This decision was legislated by the Landau Commission, a three-man Commission constituted to draw guidelines for the use of moderate measures of pressure. In 1994, the UN Committee against Torture stated that "permitting as it does, moderate physical pressure as a lawful mode of interrogation, is completely unacceptable by this Committee[222]".

Even if the absoluteness of the prohibition cannot be found directly in the provisions of the Treaties, the ticking -time bomb scenario contrasts with the assumption of the ban, understood by now as a *jus cogens* norm, violating the most important principles in defence of human integrity.

[221] W. F. SCHULZ, *The Debate in Israel*, The Phenomenon of Torture: readings and commentary, Chapter VI, Readings 9 and 10, Pennsylvania, 2007, p.266.

[222] C. COOK, A. HANIEH, A. KAY, *Stolen Youth -The politics of Israel's detention of Palestinian children*, 2004. Pg. 155. Concluding observations of the Committee against Torture: Israel, 12 June 1994.

CHAPTER II
PROHIBITION OF TORTURE IN INTERNATIONAL AND EUROPEAN LAW

2. The UN Charter and Convention against torture

The Commission on the Responsibility of the Authors of War, established in 1919 at the Paris Peace Conference to investigate war crimes during the First World War, listed the torture of civilians[223] as one of the first violations of war laws. After the horrors of the Holocaust and the of the Third Reich, the winning States decided that the major war criminals had to be brought to justice[224], with the establishing of the Nuremberg Tribunal[225]. Harshly criticized by the international community for the lack of due process and impartial decisions, the only references to torture can be found in the 1946 judgment of the Tribunal, which explained the inadmissibility of the mitigating circumstance of having followed superior orders[226], done by the German soldiers under the indications of their generals.

On the basis of a work done by the Commission on Human Rights, in 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). It represents one of the most important soft law instruments in the international scenario[227]. Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life

[223] W.A. SCHABAS, *The crime of torture and the International Criminal Tribunals*, in Case Western Reserve University Journal of International Law, 2006, pg.349.
[224] E. BATES, *History*, in International Human Rights Law, edited by D.Moeckli, S. Shah, S.Sivakumaran, Second Edition, Oxford, pg.29.
[225] Were a series of tribunals held after WWII under the law of war and international law. The trials were most notable for the prosecution of pmembers of the political, military, judicial, and economic leadership of the Nazi regime, who planned and participated to the Holocaust and other war crimes.
[226] W.A. SCHABAS, *The crime of torture and the International Criminal Tribunals*, in Case Western Reserve University Journal of International Law, Volume 37,2006, pg. 351.
[227] T. TREVES, *Diritto Internazionale: Problemi Fondamentali*, 2005, pg. 191-195.

in larger freedom[228], was voted by 48 of 58 members, while 8 refrained[229]. Also, Saudi Arabia's abstention was due because of two of the Declaration's articles: Article 18[230] and Article 16[231].

Canadian J. Humphrey, important scholar of that time was appointed as the Director of the Division of Human Rights and was called to work on the project, becoming the Declaration's principal drafter[232]. The structure of the Declaration was influenced by the post-enlightenment studies and elaboration of the Code Napoléon[233] including a preamble and introductory general principles. Nobel Prize Cassin[234] compared the Declaration as the entrance of a Greek temple, with a basis, steps, four columns, and a pediment.

The preparatory works were characterized by various disagreements and the compromise was found in the not-binding nature of the declaration; it simply constitutes an invite to States to act accordingly with its principles[235] .The Declaration served the purpose attributed to UN of "promoting and encouraging respect for human rights and fundamental freedoms for all without distinctions of race, sex, language or religion", as stated by Articles 1 and 3 of the UN Charter. After having enshrined the right to life, personal safety and liberty[236] , art. 5 states that «no individual shall be subjected to torture, cruel, inhuman or degrading treatment or punishment», therefore highlighting that no one can be subjected to detention or arbitrary arrest , the right to a fair trial, presumption of innocence[237]and the principle of legality[238]. Cassin expressed his hesitations in particular on the drafting of Article 5 of the Declaration, stating that the world's boundaries on torture were extremely vague. In fact, do some human beings have the right to

[228] Preamble to the Universal Declaration of Human Rights.
[229] South Africa's position, for example, can be seen as an attempt to protect the apartheid system,which definitely violated many articles of the Declaration.
[230] Art 18 of the Declaration states that everyone has the "right to change his religion or beleif".
[231] Art 16 of the Declaration regards equal marriage rights.
[232] J. MORSINK, *The Universal Declaration of Human Right: origins, drafting and intent.* University of Pennsylvania Press, 1999.
[233]M.A GLENDON, *A World made new: Eleanor Roosevelt and the Universal Declaration of Human Rights* Random House, 2002.
[234] Renè Cassin was a French jurist, co-author of the Universal Declaration of Human Rights.
[235] A. CASSESE, *I Diritti umani oggi*, Edizioni Laterza, 2009, pg. 32.
[236] Art 3. of the Universal Declaration of Human Rights.
[237] Art 10 of the Universal Declaration of Human Rights.
[238] Art. 11 of the Universal Declaration of Human Rights.

inflict suffering upon other human beings without their consent, even for ends that might appear good?[239]. The authors of the Declaration gave a negative answer, by creating Article 5.

We move with UDHR to a de facto typization of natural rights and also towards the establishment of a system of universal values, as in it the consensus on its validity and suitability to withstand the fate of the future community of all men[240]. We always have to bear in mind that rights are evolving in the same way as the socio-political and historical backgrounds of a given time period. Rights, given their iridescent and multiform nature, are established in those period that require the affirmation of those particular rights. Moving from this notion, the rights enshrined in international agreements derive from social achievements, and if in future there will be de need to affirm and claim for new ones, the fight for their conquest will be entrusted to posterity.

In the UN. Context, a very important part is done by the UNCAT (United Nations Convention against Torture), an international human rights Treaty, under control by UN that aims to prevent torture and other acts of cruel, inhuman or degrading treatment or punishments. The text of the Convention was adopted by the UN General Assembly on 10 December 1984 and, following ratification by the 20th state party, it came into force on 26 June 1987. Since the convention's entry into force, following the ratification by the States, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law[241].

The Convention is divided into three parts: it contains a definition of torture, enshrined in Art. 1, committing State parties to taking effective measures to prevent any act of torture in any territory under their jurisdiction. These include ensuring that torture is a criminal offense under a party's domestic law[242] ,

[239] J. MORSINK, *The Universal Declaration of Human Rights: Origins, drafting and intent*, Philadelphia, 1999, p.45.
[240] N. BOBBIO, *L'Età dei diritti,* Torino, 1997, pg. 21.
[241] CAT General Comment n.2: Implementation of Art. 2 by State Parties, Committee against Torture. 23 November 2007. p. 2.
[242] Art. 4, UNCAT.

establishing jurisdiction over acts of torture committed by or against a party's national[243], ensuring in Art. 8 that torture is an extraditable offense[244], establishing universal jurisdiction. Parties must promptly investigate any allegation of torture, and victims of torture, must have an enforceable right to compensation[245]. For the purpose of this Convention, the term "torture" means: " any act by which severe pain or suffering , whether physical or mental, is intentionally inflicted on 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[246]".

The words "inherent in or incidental" to lawful gives relevant difficulties in determining which conducts fall into this category, due to the fact that the State parties have different and singular legal systems and, no criteria for making such determination were written by the drafters. This allows state parties to pass domestic laws that permit acts of torture that they believe are within the lawful sanctions clause. However, the most widely adopted interpretation of the lawful sanctions clause is that it refers to sanctions authorized by international law[247].

Pursuant to this interpretation, only sanctions that are authorized by international law will fall within this exclusion. Art. 2 puts a clear ban on torture, requiring parties to take effective measures to prevent it in territories falling in their jurisdiction, "no exceptional circumstances whatsoever[248]".

Particular reference should be made to art. 3, which enshrines the ban of refoulment, prohibiting parties from returning, extraditing, or refouling any

[243] Art. 5, UNCAT.
[244] Art. 8, UNCAT.
[245] Art. 14. UNCAT.
[246] Art. 1, UNCAT.
[247] R. SIFRIS, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*. Routledge, 2013, p. 145.
[248] Art. 2.2, UNCAT.

person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture". This article gives difficulties also in the control of the effective application by the State, as seen in our domestic Abu Omar case, regarding the kidnapping and transferring to Egypt of the Milan imam by the US secret services. Given those necessary premises, it is common ground accepted that in the UNCAT statement, torture is not an instrument of free violence but is aimed at a specific purpose, adding the necessity of the "*dolo specifico",* in order to integrate the crime.

Firstly, we must distinguish the recipient of the prohibition under examination, dividing torture practiced by state agents[249] from private torture. In the UNCAT, only the type of torture carried out by the public agents is typified, except in the case of the private person acting on behalf of the public official, starting from assumption that "the responsibility of the states must be connected to behaviours put in place by its functionaries[250]".

One of the first explicit references to the prohibition of torture is although contained in the ICCPR[251] , a plurilateral agreement adopted by the UN General Assembly with the Resolution 2200 on December 1966, in force from 1976. The Covenant engages its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial[252]. In September 2019, the Covenant has 173 parties and six more signatories without ratification. The ICCPR is part of the International Bill of Rights along with the ICESCR[253] and the UDHR. The ICCPR is monitored by the UN Human Rights Committee, which analyses reports of States parties on how the rights are being respected first and secondly implemented. States have the duty one year after entering in the Covenant and then everytime the Committee asks. At Art. 7, the

[249] In the General Comment 2, P.15 the definition given to public agent also englobes: "*private contractors, and other acting in official capacity or acting on behalf of the State, in cojuction with the state, under its direction or control, or otherwise under colour of law".*
[250] P. LOBBA*, Punire la tortura in Italia, spunti ricostruttivi a cavallo tra diritti umani e diritto penale internazionale,* 2017.cit.pg 192.
[251] International Covenant on Civil and Political Rights.
[252] International Covenant on Civil and Political Rights, Office of the United Nations High Commissioner of Human Rights, available online.
[253] Abbreviation of International Covenant on Economic, Social and Cultural Rights.

Covenant states that "no one can be subjected to torture or to cruel, inhuman or degrading punishment or treatment, in particular, no one can be subjected, without his consent, to a medical or scientific experiment" and that "respect for the dignity of such persons must be guaranteed at same conditions as for free people[254]", sustaining also the prohibition of arbitrary arrests and, of course, the right to a fair trial.

In the context of the initiatives taken to implement the UDHR, it is crucial the figure of the *Special Rapporteur on Torture*[255], established by the UN Commission with resolution 1985/33 in 1985 with the task of transmitting urgent appeals to all states in relation to individuals that can be subjected to torture, making visits in the territories, preparing an annual report on his activity and trasmitting it to the Commission. The mandate of the Special Rapporteur last for 3 years and, even if the supervisory reports of the *Special Rapporteur* does not contemplate effective powers of taking measures for preventing or reprimanding torturing practices, but it has a very important jurisprudential incidence, orienting the courts' decisions.

The acts that this figure may produce are two: Allegation Letters and Urgent Appeals. Regarding Allegations Letters, the Special Rapporteur sends them when the suspect violation has already occurred and consists in questioning the government to clarify the position regarding the allegation and any other relevant information. Generally, these letters contain allegations with regards to systematic patterns of torture such as detention conditions and use of particular methods of torture or concerning legislation on the matter, including criminal procedures legislations or sentencing provisions[256].

On the other hand, the Urgent Appeals are limited to cases where, due to the evidences particular subjects are at risk of torture and inhuman or degrading treatments by the authority or by public officials. The Rapporteur may be concerned

[254] Art. 10 of the ICCPR, sustaining the prohibition of arbitrary arrests and right to fair trial.
[255] The Special Rapporteur is subordinated to the UN Human Rights Council wich replaced the Commission in 2006. The UN Human Rights Council is a subsidiary organ of the UN General Assembly. in case of violations, the Council can open special procedures where some experts are sent in the reported status to verify the situation.
[256] INTERNATIONAL JUSTICE RESOURCE CENTER, *special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* ijrccenter.org.

about any form of illegitimate acts, such as corporal punishments, deportation to a country where there is risk of torture and solitary confinement[257].

The exhausting work of the UN was followed by a series of international acts concerning the repression of torture, as the whatsocalled Mandela Rules, in order to honour the legacy of the former President of South Africa, who spent 27 years in the prison of Robben Island because of his fights against Apartheid and more in general for the respect of human rights, equality and democracy. These set of standard rules, approved by the UN Crime Commission in 2015 in Vienna with the Resolution 70/175, contains provision for the treatment of prisoners, substituting and reviewing the SMRTP[258]. Eight areas were revised[259] : respect for prisoner's human dignity, medical and health services, clarifying that healthcare of prisoners is a state responsability and should be as possible as equal to the standards available in the community; disciplinary measures and sanctions, investigations of death and torture in custody, protection of vulnerable groups, access to legal representation, complaints and independent inspections and training of staff, Provisions dealing with information for prisoners and access to complaints mechanism had also been updated, as well as protection against retaliation, intimidation or other consequences as a result of complaints[260].

2.1 The Geneva Conventions

The declarations drafted so far awakened the political and civil spirit of the states, enhancing the necessity to combine the various notions of torture into a single one, trying to create a single notion. Unfortunately, however, from a legal point of view, despite their strong moral and political value, Declarations do not impose mandatory duties on the States to which they are addressed. Protection of

[257] INTERNATIONAL JUSTICE RESOURCE CENTER, *special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* ijrccenter.org.
[258] Standard Minimum Rules for the Treatment of Prisoners adopted in 1957.
[259] Online at penalreform.org/issues/prison/conditions/standard-minimum-rules
[260] Informations available at un.org/mandelarules.

human rights would benefit most from the conclusion of a convention, because of the binding nature of the obligations it imposes on State parties.

In this context, torture and the relative prohibition, can be found in one of the most important Conventions on international humanitarian law, the 1946 Geneva Conventions. These Conventions contain provisions on humanitarian law of armed conflicts, providing minimum protection and standards of human treatment towards individuals who are victims, creating rules for the treatment of the wounded, sick or shipwrecked combatants, prisoners of war and civilians in occupied territories[261].

The first Geneva Convention was created by the International Committee for Relief to the Wounded-one, the first name of the International Red Cross, held in Geneva to improve medical services on the battle field in 1864, enshrining a series of rules to protect those who were wounded on the battle field[262]. This Convention, which is summed up of only ten articles, was the *incipit* of the whole international humanitarian law. In 1949 two new Conventions were added to the two original ones, and all four were ratified by State members. The four Conventions, along with the Additional Protocols of 1977, are still in force today. The Geneva Conventions, along with their Additional Protocols, contain various provisions which prohibit any form of torture and other cruel or inhuman treatment[263]; Torture is prohibited by Article 3 (common to the four Geneva Conventions), by Article 12 of the First and Second Conventions, by Articles 17 and 87 of the Third Convention. In the international armed conflict discipline, torture is a grave breach under Articles 50, 51, 130 and 147 of these Conventions.

In fact, Article 3 of the Geneva Conventions prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons involved in a war[264]. Those who do

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[261] J. H. BURGERS, *The United Nations Convention Against Torture: A handbook on the CAT,* The Netherlands, 1988, p.12.

[262] C. FOCARELLI, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.522-523.

[263] From the official website of the International Committee of the Red Cross, *what does the law say about torture?*

[264] K. J. GREENBERG, J. L. DRATEL, *The Torture Papers*, Cambridge, 2005, p.1142.

not participate in armed conflicts cannot be subjected to torture[265] and those who do not participate directly in the battle, either because they are civilians or because they are soldiers who have temporarily ceased fire, cannot be subjected to ill-treatment and have to be treated with humanity and dignity[266]. Article 3 constituted a *sui generis* norm at the time, taking into account that it was the first ever provision to cover acts which were committed outside of the scenario of an armed conflict, establishing a series of peremptory rules without possibility of derogations.

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

Regarding prisoners of war, Article 17 of the Third Convention provides that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever and prisoners of war who refusing to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind". Article 87 of the same Convention deals with all the penalties that can be applied to prisoners of wars, claiming that collective punishment for individual acts, corporal punishment imprisonment in premises without daylight and, in general, any form of torture or cruelty, are prohibited and strictly forbidden. Article 50 of Geneva I and Article 51 Geneva II are also really important , listing all those grave breaches involving the following acts , such as as wilful killing, torture or inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully".

The creation of a system of Conventions that have covered the phenomenon of torture and ill-treatments in a very detailed way, demonstrates awareness of the

[265] C. FOCARELLI, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, p.535.

international community towards these issues, at least in reference to situations of war emergencies and conflicts. Therefore, also in times of war, torture is prohibited in all its forms; this proves that torture is such a grave breach and that, was de facto routinely used during the wars.

In June 1977, the contents of international humanitarian law based on the four Geneva Conventions was renewed through the adoption of two additional Protocols on the protections of victims of international and national armed conflicts[267]. Article 75 of the First Additional Protocol provides a list of acts which are considered to be prohibited at any time and under any circumstances, whether committed by civilians or military agents. This list includes any form of torture, whether physical or mental, that directly is aimed to destroy and limitating human dignity.

Article 4 of the Second Additional Protocol, on the other hand, envisages as a fundamental guarantee the fact that "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person". Art. 4 goes on to state a variety of acts which are prohibited under any circumstances, stating that the acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever, listing a series of acts such as violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; Collective punishments; taking of hostages; Acts of terrorism; Outrages upon personal dignity, in particular humiliating and degrading treatment, raping, enforced prostitution and any form of indecent assault; Slavery and the slave in all their forms; Pillage; Threats to commit any of the foregoing acts."

Not all violations of the treaty are equally sanctioned. The most serious crimes are termed grave breaches, such including killing, inhumane treatment, biological experiments, willfully causing great suffering or serious injury to body

[267] *What does the law say about torture?* in online website of the International Committee of the Red Cross, 2011.

or health compelling to serve in the armed forces of a hostile power; willfully depriving a protected person of the right to a fair trial if accused of a war crime. For what concern the issue, torturing is included in the *grave breaches*[268].

2.2 The European Charter on Human Rights and the European Court of Human Rights

An extended system of protection of the rights of men was born in Europe in 1949, after the devastation and the political situation deriving from the Second World War, with the establishment of the Council of Europe, an international organisation whose main goal is to protect human rights, democracy and the rule of law in Europe safeguarding and protecting human rights. Two decisives Conventions derived from this organ: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[269], and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987[270]. In 1950, the Council of Europe adopted a series of acts for the protection of human rights, the most significant being the Convention for the Protection of Human Rights and Fundamental Freedoms, which was later called the European Convention on Human Rights, an international convention to protect human rights and political freedoms in Europe, drafted in 1950 by the Council of Europe. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention as soon as possible because is a document of extraordinary importance and milestone for the protection of rights, also due to the provision of a permanent jurisdictional body, the European Court of Human Rights, to which each individual can ask for the ascertainment of the rights enshrined in the Convention. Regarding torture, the position of the ECHR is particularly relevant given the close relationship between

[268] INTERNATIONAL COMMITTEE OF THE RED CROSS. How "grave breaches are defined in the Geneva Conventions and Additional Protocols, online website.
[269] D. V. ARTUSY,The evolution of Human Rights Law in Europe: Comparing the European Court of Human Rights and the ECJ, ICJ and ICC, in Inquiries Journal, Vol VI, n.11, 2014.
[270] A. REIDY, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR,* in Human Rights Handbooks No.6, Germany, 2002, p.8.

European law and domestic law, also in light of the jurisprudential interpretations of the European Court of Human Rights.

The prohibition of torture in the Convention is enshrined in Article 3, headed "prohibition of torture", stating that "no one can be subjected to torture or to human or degrading treatment or punishment". It is one of the shortest provisions of the Convention,and constitutes the first treaty provision to incorporate a general prohibition of torture. It should also be noted that this is the only provision of the agreement knowing no exceptions or possible derogations: they are not admitted, pursuant to art. 15, "measures notwithstanding the obligations provided for by the agreement", not even in the case of war or other public danger that threatens the nation, considering the art. 3 an absolute prohibition[271]. As repeatedly stated by the court, the absolute nature of the prohibition is linked to the observation that it is an expression of *ius cogens*, recognized and universally shared[272].

Also in the case of Labita vs. Italy , where the applicant complains of having suffered, during the first months of his detention in the Pianosa prison, treatments contrary to the Art. 3 ECHR, this mandatory prohibition is underlined: «even in the most difficult circumstances, such as the fight against terrorism or organized crime, the convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment[273]». In the 2005 case Khashiyev and Akayeva v Russia[274], regarding two Russian citizens that brought Russia before the ECHR, complaining use of torture on their family members, the ECHR observed that article 3 enshrines one of the most fundamental values of democratic societies, even in the as the fight against terrorism and organized crime.

The Court has pointed out that Article 3 uses the term torture in order to identify a specific act that differs from inhuman and degrading treatment, because a "special stigma[275]" attaches to it: that of deliberately causing very serious and cruel suffering through inhuman treatments. Torture includes a more serious or

[271] M.K. ADDO, N.GRIEF, Does Article 3 of the ECHR enshrine absolute rights? In European Journal of International Law, 1998, pg.510.
[272] ECHR, n.35763/97, *Al-Adsani vs. United Kingdom*, 2001.
[273] See. ECHR, n. 24888/94 *V.vs. UK*, 1999.
[274] See ECHR, n.57942/2000, n. 57945/2000, *Khashiyev and Akayeva v Russia*, 2005.
[275] A. REIDY, The Prohibition of Torture, a guide to the implementation of Art. 3 of the ECHR, in Human Rights Handbook n.6, 2002, pg.11.

grave crime, that causes greater suffering, inflicted for a specific purpose[276]. The Strasbourg court, as a "living instrument[277]" of interpretation and uniformity of the rights has taken on the duty that it is not possible to give a crystallized notion of torture, highlighting that "the rate of development of the sense of juridical civilization expressed today from the European legal order, gives a much higher level of protection of human dignity than in the past, an important sign of the effects that law has produced on the common European civil conscience[278]".

The preparatory works that brought to the creation of this article confirms the challenges facing its interpretation and concrete application. The wording of article 3 was first proposed by the Consultative Assembly in a draft text; In the first session of the Consultative Assembly in 1949, there was a proposal strongly influenced by the atrocities and brutalities committed during the Reich experience, event that marked deeply all the European experience. This proposal consisted in adding the following text to Article 1: «The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organizations, are inconsistent with civilized society, are offences against heaven and humanity and must be prohibited. It declares that this prohibition must be absolute, and that torture cannot be permitted for any purpose whatsoever, either for extracting evidence, to save life or even for the safety of the State[279]».

Another specification was suggested to be added to Article 2: in particular «no person shall be subjected to any form of mutilation or sterilization or to any form of torture or beating, nor shall be forced to take drugs nor shall the be administered to him without his knowledge and consent. Nor shall he be subjected

[276] C.M. DE VOS, *Mind the gap: Purpose, pain and the difference between torture and inhuman treatment, in Human Rights Brief*, Washington, 2007, pg.4.
[277] ECHR, n.25803/94, *Selmouni vs. France*,1999.
[278] F. BILANCIA, *Anche l'Europa condanna la violenza di Stato*, in A. Giannelli, M.P. Paternò, *Tortura di Stato*, cit. pg.171.
[279] A. CASSESE, *The Human Dimension of International Law: Selected Papers*, Oxford, 2008,Cit.pg.536.

to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering[280]».

Due to the strong objections, it was decided to leave the text of Article 3 as a general and broad provision in order to englobe all the possible forms of torture. Eloquent in this direction is the progressive extension of the list of possible active subjects that can integrate the crime of torture. Traditionally undivided in public agents or those working on behalf of the public authority, they are instead identified today in anyone who can mine the dignity and integrity of the victim due to a particular situation that sees the latter in a state of weakness. Therefore, the Court peacefully considers torture as a common crime, integrable by anyone and the State, as well as being a direct author through the state authorities, it can be indirectly responsible because of the inadequacy of the preventive measures, integrating in those case objective responsibility.

Returing back to art. 3 of the ECHR, the distinction between the three prohibited acts emerges. Based on a certain threshold of severity[281], the difference between acts of torture, inhuman and degrading treatment or punishment is necessary to evaluate if an act falls within the scope of the aforementioned. Once this requisite has been satisfied, the Court has to evaluate other elements, such as the duration of the treatment, the physical and mental effects of the treatment and the generalities of the victim. These three prohibited acts have been distinguished in two leading cases of the European Commission and the Court, the Ireland vs. UK and the Greek Case[282].

In the Ireland vs. UK judgement, related to the identification of *ill-treatments,*[283]placed in the context of the so-called Operation Demetrius, consisting

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[280] COUNCIL OF EUROPE, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, Volume II*, The Netherlands, 1975.
[281] A. REIDY, *The Prohibition of Torture; a guide to the implementation of Article 3 of the ECHR*, Human Rights Handbooks No.6, 2002, p.10.

[282] D. LONG, *Guide to Jurisprudence on Torture and ill-treatment: Article 3 of the European Convention for the Protection of Human Rights*, Geneva, 2002, p.13.
[283] A. COLELLA, *C'è un giudice a Strasburgo. In margine alle sentenze sui fatti della Diaz e di Bolzaneto: l'inadeguatezza del quadro normativo italiano in tema di repressione penale della tortura, in Riv. it. dir. e proc. pen., 2009*, pg. 1817.

of a series of measures taken by Northern Ireland against subjects suspected of terrorism between 1971 and 1972, concerning the mistreatment inflicted by the British police on some Irish citizens suspected of supporting the IRA[284]. The object of this leading case was in the relevance, pursuant to article 3, of the so-called "five techniques[285]", forms of *ill-treatment* used by the English police towards the suspects in order to convince them to collaborate. Some practices were standing motionless against a wall, hooding, being subjected to loud and annoying noises, sleep, food and water deprivation. Drawing the criterias of the minimum limits of the relevant *ill-treatments* for the purposes of art. 3 of the ECHR, the court clarified that the mistreatment «must attain to a minimum level of severity if it is to fall the scope of art. 3. The assesment of this minimum level depends on the circumstances of the case, such as the duration of the treatment, it's physical or mental effects and, in some cases, the sex, age and state of health of the victim,etc*[286]*.

Given the circumstances of the case, the court exluded the existence of torture, detecting a mere inhuman treatment, relevant under Article 3[287] and, defining the minimum threshold of gravity, reaffirmed above all that by its nature, this threshold is variable taking into account factors such as the victim's personal condition and duration of treatment[288].

Despite the definition of the court, the evaluation appeared to be conflicting and not pacific: in fact, the decision on the case received numerous *dissenting opinions,* written by one or more judges expressing interpretative distance with the majority of the judges. in this case, it was accompanied by the judges Evrigenis, Matscher, Zekia and O'Donoghue. On the part of some judges who believed, in the light of the Greek case, supporting the most serious hypothesis of torture, because they held considering the conduct of the authors and suffering of the victims, causing "the disintegration of an individual's personality, the

[284] The Irish Republican Army is a name used by various paramilitary organisations in Ireland throughout the 20th and the 21st century. Irishmen formerly in the British Army returned to Ireland and fought in the Irish War of Independence. During the indipendence war was the army of the Irish Republic, declared by Dail Eireann in 1919.
[285] ECHR, n. 5310/71, *Ireland vs. UK*, 1978.
[286] F. CASSIBA, A. COLELLA, *Proibizione della tortura*, in G. UBERTIS, F.VIGANÒ, *Corte di Strasburgo e giustizia penale ,* Torino, 2016,pg.66.
[287] A. DE SANTIS, *Il divieto di tortura e trattamento disumano e degradante nell'ordinamento europeo: il caso della Gran Bretagna*, Diritto & Diritti, 2004.
[288] *Ireland vs. UK*,1978 and ECHR, n. 50901/99*Van der Ven vs. Netherlands*, 2003.

disruption of his mental and psychological balance and the destruction of his will[289]".

The dividing line between the different areas of application of torture and inhuman and degrading treatment has been traced, according to the degree of suffering that the victim suffers[290], from the Strasbourg Court in the leading case on the subject called the Greek case (1967) brought before the European Commission of Human Rights. The definition is attributed to the judgment concerning the interstate appeal presented by the Netherlands and other countries concerning the human rights violations perpetuated in Greece during the " colonels' regime" following the 1967 coup. The case involved fifty-three individuals, acting with their citizens, alleging torture and ill-treatment during detention in Athens[291] and other cities. Firstly, the court gave a definition of "inhuman treatment", describing it as treatment as deliberately causing severe suffering, mental or physical, which, in the particular situation is unjustifiable[292]. The Commission then went on to define torture as an «inhuman treatment, which aims at obtaining information or confessions, or the infliction of punishment, and it is generally aggravated form of inhuman treatment[293]».

Finally, the Commission defined "degrading treatment" as an element of torture, viewing it as an act which «grossly humiliates a person before others or drives to act against his will or conscience[294]». In the above-mentioned Greek case and Ireland v UK case, the Court and the Commission had stated that other than a

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[289] From the *dissenting opinion* of Dimitrios Evrigenis in *Ireland vs. UK*.
[290] F. CASSIBBA, A. COLELLA, *Proibizione della tortura*, cit. pg. 228.

[291] From *the Greek Case*, Year Book of the European Convention on Human Rights, 1969, cited in G. H. MILLER, *Defining Torture*, Floersheimer Center for Constitutional Democracy, 2005, p.6.
[329] The Greek Case, ECHR, n. 3321/67, *Denmark vs. Greece*, n. 3322/67, *Norway vs. Greece*, n. 3323/67, *Sweden vs. Greece*, n. 3344/67, *Netherlands vs. Greece*.
[330]ECHR, Greek Case,1967.
[331] ECHR, Greek Case,1967.
[332]G. VENTURINI E S. BARIATTI, *Diritti individuali e Giustizia Internazionale*, Milano,2009, p.435-436.

certain threshold of severity, an act could be considered as a violation of article 3 only if it was supported by evidences "beyond reasonable doubt[295]". An *ill-treatment* had to endorsed by strong evidence to be punishable as torture. However, the issue with this reasoning was that it failed to take into account the difficulty for victims to obtain this kind of evidence, especially in cases where the evidence of torture on the victim's body may last for a short period of time.

Summing up the interpretation of the court, reference can be made to other cases to configure and catalogue the 3 acts stated by Article 3 of the ECHR. An *inhuman treatment* shapes in the Price vs. UK case of 2001, in which an applicant, a disabled woman sentenced to a prison term for insulting the court, complained that she could not recharge his wheelchair battery and was not assisted in his physiological needs during the detentive period. In this case, an inhuman treatment is detected when intense physical or mental suffering is caused. Precarious prison conditions, such as overcrowding or security regimes, can be included[296].

«A *degrading treatment* is considered in the case in which it is such as to arouse in the victim feelings of fear and anxiety aimed at humiliating it in order to bend its will»[297]. Can be mentioned on the subject of racial discrimination, Orsus and others[298] vs. Croatia, in which the conduct of the Croatian state was evaluated which, on the basis of linguistic reasons, created *ad hoc* classes for Rom ethnic students. *Degrading treatment* can be found also in the case Ashot Harutyunnyan vs. Armenia, concerning an Armenian citizen, charged in a trial involving financial crimes, complained that he was forced to follow the trial in metal cages[299].

Torture can be considered in cases where the violence is particularly serious, deliberately inflicted and characterised by a specific purpose[300].The

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[296] E. SCAROINA, *Il Delitto di Tortura: L'attualità di un crimine antico*, Cacucci Editore, Bari, 2018. Pg. 81.
[297] E. SCAROINA, *Il Delitto di Tortura: L'attualità di un crimine antico*, Cacucci Editore, Bari, 2018. Cit,Pg 80.
[298] ECHR, n. 15766/03 *Orsus and others. Vs. Croatia, 2010.*
[299] ECHR, n.34334/04 *Ashot Harutyunyan vs. Armenia*, 2010, mentioned in A. COLELLA, *La Giurisprudenza di Strasburgo*, pg.225.
[300]ECHR, n. 5856/72 *Tyrer vs. UK*, 1978.

historical fact that gave rise to the sentence was the infliction of a corporal punishment, in this case three shots of a rod to a fifteen-year-old boy, as a sanction for acts of bullism at school. Mr Tyrer then decided to refer the matter to the Commission asking whether there had been an infringement of Article 3 of the CEDU;

The condemnation received from Italy in the Cestaro vs. Italy case, on the facts of the G8 in Genova, also concerns this issue. The definition given by the Strasbourg on torture, for the purposes of its relevance according to art. 3 of the ECHR, presses on four specific elements: the free nature of the treatment; the severity of the violence; punitive, vindictive and directed to humiliation and physical and mental suffering of the victims purpose; the intentionality of the conduct[301].

In the Aksoy vs. Turkey case[302] , the subject was arrested and tortured through the use of the "*palestinian hanging"*, a very painful technique consisting in tying the wrists behind the back and lift the body with a rope attached to the wrists, which if used repeatedly, causes the dislocation or even rupture of the limbs. Subsequently, according to the defense, Aksoy was killed because he was reluctant to withdraw the complaint presented to the court. Remaining in the Turkish context, the court also ruled that "rape, a particularly cruel act in itself, which affects the physical and moral integrity of the victim, is aggravated in those circumstances because it is committed by a person with authority to the detriment of a particularly vulnerable*[303]*". Furthermore, «The rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment, given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. 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[304]».

[301] ECHR, n.6884/2011, *Cestaro vs. Italy*, 2015.
[302] ECHR, n.21987/93, *Aksoy vs. Turkey*, 1997.
[303] ECHR, n. 57/1996/676/866, *Aydin vs. Turkey*,1997. The case concerns the raid of a group of police officers in the house of the applicant, at that time a minor, threatening her and her family to obtain information about the PKK. Not having achieved the result, the agents took the family to the gendarmerie in Derik, where the minor was beaten and to sexually assaulted for several days.
[304]ECHR, *Aydin vs. Turkey*, 1997.

The second Convention was born in the context of the European process for protecting human rights is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[305]. Taking inspiration from the growing interest in abolishing torture, a convention was created specifically and solely for the crime of torture. It was adopted by the member states of the Council of Europe in November 1987.

This Convention differs from other sectorial conventions because it does not pursue the aim of giving a definition of torture, but rather wants to establish a new organ, the European Committee for the Prevention of Torture. The drafters of the ECHR wanted to complete the system established by the Convention with an ulterior mechanism, aimed at strengthening the protection granted to detainees or individuals deprived of their liberty[306].

In fact, the Convention provides the creation of a group of international inspectors, entrusted with the task of conducting surveys in different places where there are suspects of torturous acts. The Committee is granted the power to visit every places of detention in the various member states of the Council of Europe, to identify situations where there is a risk of torture or where torture is indeed practiced[307]. Small teams of Committee members can carry out unannounced visits to prisons, jails, police cell or other institutions in which people are withheld and at the end of these visits, a final report is drafted with recommendations and sent to the Government in question, If the situation is particularly serious, these reports can be published to exercise pressure on States.

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[305] K. GINTHER, *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, in the European Journal of International Law, Austria, 1990, pg.123.

[306] M. FORNARI, *La Convenzione Europea per la prevenzione della tortura e delle pene o trattamenti inumani e degradanti*, in *La Tutela Internazionale dei Diritti Umani*, di L.Pineschi, 2006, pg.571.

[307] A. CASSESE, *I diritti umani oggi*, Roma, 2009, p.189.

2.3 European Panorama

Even if the legislators' aim to build and create the European Union on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, seen as common to Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women, as also stated in Art. 2 TFUE , the first EU Treaties, starting from the ECSC in 1951, were focused on protecting and balancing the economic interests in the immediate post-war period, due to the continuous disagreements in the European Area, especially between Germany and France.

The European Community of Steel and Coal was an organisation of six European countries created after World War II to regulate their industrial production. It was formally established in 1951 in Paris, and signed by Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany. Throughout European history, many treaties and acts have been aimed at repressing directly or indirectly torture. For what concerns direct repression of torture, we can mention the 2000 Charter of Nice, enshrining political, social and economic rights for EU citizens and residents into EU law, which establishes in Art 4 that: "no one can be subjected to torture or to inhuman and degrading treatment or punishment" .Also the 2004 European Constitution, inspired by the values of the Humanism but never adopted formally as his embryonal form was not developed, stated the prohibition of torture in the context of Title 1, Part 2, dedicated to respect for dignity.

For what concerns indirect repression of torture, the principles expressed on the Charter have found concrete implementation in some normative acts aimed at repressing torture, such as the CE Regulation 1236/2005, which prohibits the export or import of goods whose only use is or may be that of inflict the death penalty, torture or other cruel, inhuman or degrading treatment or punishment.

Today, this regulation has been substituted by Regulation n. 125/2019, partially modifying the scope of application, adding more substances and tools that could be used for torturing methods.

The regulation, while absorbing the UNCAT's definition of torture, gives also an independent definition, and in Art. 2 defines it as «any act by which

pain or strong suffering, whether physical or mental, is intentionally inflicted on a person in order to obtain from it or from a third person information or confessions, to punish her for an act that she or a third person has committed or suspected of having committed, to intimidate her or to put pressure on her or to intimidate or put pressure on a third person, or for any other reason based on any form of discrimination, if such pain or suffering is inflicted by a public service agent or any other person acting in an official capacity, or on his instigation, or with his express or tacit consent».

In Art. 3 and 4 of the present Regulation, we can find the statement that requires the absolute prohibition of exportation and importation of materials listed in Annex II, independently from their origin such as forks, guillotines, electric shock devices and thumb clamps[308]. Specifically regarding good that could be used for torture, inhuman and degrading treatments this Regulation requires the exportation authorisation of all the goods listed in the Third Additional protocol, such as rings and chain systems with locking mechanism which have a maximum overall dimension in fastened position between 150 and 280 mm, measured from the outer edge of one cuff to the outer edge of the other[309].

In Art. 12, we can find the criteria for the authorisations, which also provides some derogations at the discretion of the competent authority. For example, if there are reasonable grounds that the good listed in Annex 3 could be used by a law enforcement authority. In addition, the competent authority, in examining the goods, shall take into account judgments provided by international courts, reports from the Special Rapporteur, provision by the Council of Europe and other relevant informations applied by the country of destination.

The discipline is also implemented pursuant to Article 133 of the EC Treaty, on common commercial policies, pursuing the aim of contributing to ensure the effectiveness of the prohibition of torture and any other cruel, inhuman or degrading punishment[310]. Worthy of mention is also the recent Directive 541/2017, substituting the Council Framework Decision 475/2002, amending Council

[308] Annex II, list of goods referred to in Art. 3 and 4 of Reg. 125/2019.
[309] Annex III, list of goods referred to in Art. 11 of Reg. 125/2019.
[310] A. MIGNOLI, *La Politica Commerciale*, in S. MANGIANELLI, *L'Ordinamento Europeo: le politiche dell'Unione*, Milano,2008, pg.176.

Decision 671/2005. on the fight against terrorism, which recognizes that terrorist acts constitute one of the most serious violations of universal values and one of the most serious attacks on democracy and the rule of law , reaffirming again at Point 1 and 2 that the European Union is founded on those universal values, such as equality, solidarity, respect for human rights, on the basis of democratic principle and rule of law.

2.4 Torture in the American, Arab and African Charters

It is clear that the prohibition of torture has become an absolute, non-exceptionable ban of universal nature, *jus cogens*, belonging to all modern democratic systems. With regard to this issue, continents and countries such as America, Africa and also some Arab states have developed and regulated the prohibition in treaties and conventions.

The first human rights instrument relevant for torture in the American continent is the American Convention of Human Rights, adopted by many countries belonging to the Western Hemisphere in San Josè, Costa Rica in 1969, but entered into force after the ratification of Grenada in July 1978. In the Preamble, its purpose is to consolidate in this hemisphere within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. Although the Convention does not provide an explicit reference to torture, is considered mother and pillar of the subsequent *IACPPT,* the Inter-American Convention to Prevent and Punish Torture of 1985 The 23 articles of Chapter II give a list of individual civil and political rights addressed to everyone, including the right to life in general, from the moment of conception, enshrined in Art. 4.1, including the right to humane treatment, to a fair trial, to privacy, freedom of assembly, freedom of movement.

The IACCPT , adopted by the OAS, will provide a specific definition of torture , adopted by the OAS, continental organisation founded in 1948, for the purposes of solidarity and cooperation in the Western Hemisphere, in Art. 2 it condemns all forms of torture defining all the acts intentionally performed where physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation with the aim of intimidating, personally punish, as a preventive

measure, as a penalty, or for any other purpose. It is also considered torture even if the practice do not cause physical or mental anguish but diminishes the personality of the victim.

As well as the various practical cases, in Art. 3 the IACPTT identifies in the "public servant or employee*"* the possible perpetrators of torturous acts. Very important case regarding this article, happened when Mr. Angel Manfredo Velásquez Rodríguez, a student at the University of Honduras was found involved in activities that the State considers dangerous to national security[311]. Between 4:30 and 5:00 pm, several heavily armed men in civilian clothes, driving a white Ford vehicle without license plates, kidnapped Mr. Velásquez Rodríguez from a parking lot in Tegucicalpa. Mr. Velásquez Rodríguez was later taken to an armed forces station located in Tegucigalpa, where he was detained by members of the National Office of Investigations and the Honduran Armed Forces, accusing him of political crimes,torturing and interrogating him. In this perspective, the state has been held responsible for failing to take adequate action to prevent private behaviour that constitutes torture.

Following the establishment of the Inter-American Commission, consultative organ to the OAS , composed by seven independent members and the Inter-American Court, called upon to supervise the application of the IACPPT*,* after the 2006 *Ximenes-Lopes vs. Brazil* cases , and following also the interpretation of the European Court of Human Rights , it was also specified that rape may fall within the notion of torture in the presence of the other relevant requirements, precising that *«*he personal features of an alleged victim of torture or cruel , inhuman , or degrading treatment should be taken into consideration when determinating whether his or personal integrity has been violated , for such features may change the insights of his or her individual reality and , therefore, increase the suffering and the sense of humiliation when the person is subjected to certain types of treatment[312]. It was also later on extended to sufferings and acts intended to

[311] Corte Interamericana de Derechos Humanos, n. 7920, *Velasquez-Rodriguez vs. Honduras*, 1988.
[312] Corte Interamericana de Derechos Humanos*,*n. 10/970 inf.5, *Majla vs. Peru*,1996.

"obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental suffering[313]".

Also art. 6 of the IACPPT should be mentioned, lying down that States Parties shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature, by excluding the value within the criminal proceedings of the evidence obtained against the tortured person, unless it is used against the author of the torturatory treatment.

The Arab countries have also taken firm position against torture with the Arab Charter on Human Rights. adopted by the Council of the League of Arab States on May 2004 and providing for a number of traditional human rights, such as the right to liberty and security of persons, providing in addition the election of a seven-person Committee of Experts on Human Rights with the function of States' reporters. Amnesty International has informed that it has received three separate reports that activists and, activists in prison since May 2018 have been sexually harassed, mistreated and tortured during interrogations in Dhahban prison[314]. The Charter fundamentally reaffirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the Cairo Declaration on Human Rights, which provides an overview on the Islamic perspective on human rights, stating Islamic sharia as its unique source. Art. 8 of the Arab Charter states that "no one shall be subjected to the physical or psychological torture or to cruel, degrading humiliating or inhuman treatment and that each State Party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them". The commission of, or participation in such acts shall be regarded as crimes that are punished by law and not subject to any statute of limitations, adding also that each State Party shall guarantee in its legal systems redress for any victim of torture and the right to rehabilitation and compensation.

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[313] Corte Interamericana de Derechos Humanos, n. 11/015 11/769, *Miguel Castro- Castro Prison vs. Peru*,2006.

[314] From amnesty.org, *Saudi Arabia: End i-ll treatment, arbitrary detention of human rights defender Waleed Abu al Khair.*

In moving the attention to Africa, it must be recalled the African Charter on Human and People Rights, adopted in 1981 in Nairobi, with the aim of protecting and promoting human rights and fundamental freedoms in the African continent. The African Charter on Human and People's Rights includes a preamble, committing to the elimination of Zionism, which it is compared as colonialism and apartheid, causing South Africa to qualify its 1996 accession with the reservation that the Charter fall in line with the UN's resolutions on Zionism[315]. The Charter followed was inspired by the European and Inter-American and therefore created a regional Human Rights in all the African territory. The Charter shares many features with other regional instruments, but also has notable unique characteristics concerning the norms it recognizes and also its supervisory mechanism. The Charter recognizes most of what are regarded universally accepted civil and political rights, dedicating to torture a specific article. In fact, Art. 5 of the ACHPR states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, asserting is addition that it is strictly forbidden every forms of exploitation of human rights, such as slavery, torture, cruel, inhuman or degrading punishment and treatment.

In order to implement this fundamental principle, ACHPR established the African Commission on Human and People's Rights in 1987, a quasi-judicial body tasked with promoting and protecting human rights and throughout Africa as well as interpreting the ACHPR. It has many powers, such as investigating human rights violations, creating programs of action towards the encouraging human rights, setting up effective communications between them and states to get first-hand information on violations of human rights[316]. Although the ACHPR is under a regional government facility, they don't have any power of enforcement of their decision. Therefore, the ACHPR will draft eventually the proposal and then the Assembly of Heads of State and Government will act accordingly[317]. Although Art.

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315 United Nations General Assembly, Resolution 3379 adopted on November 1975 determining that Zionism is a form of racism and racial discrimination.

316 C. WELCH, *Organisation of African Unity and the Promotion of Human Rights*, *The Journal of Modern African Studies*,1991.

317 A. ODINKALU, *Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights,* Human Rights Quarterly, 1993.

5 does not provide for a definition of torture, it guarantees to each individual the respect of his or her own human dignity, placing the prohibition of torture as a corollary of it[318].

In the important case of *Purhoit and Moore vs. Gambia*, the Commission has identified the concept of dignity as «inherent basic right to which all human beings, regardless of their own mental capabilities or disabilities as the case may be, are entitled to without discrimination[319]». The applicants allegedthat the legislative system in the African state of Gambia for mental-illed patients violated the right to enjoy the right of physical and mental health and the right of the disabled to special measures of protection in keeping with their physical and moral needs, both rights guaranteed in the African Charter. Holding that Gambia fell short of satisfying the requirements of Articles 16 and 18.4 of the African Charter, the Commission stated that «the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind[320]»

2.5The International Criminal Tribunal for Rwanda and for theFormer Yugoslavia

Having considered up until now the case law of human rights treaty bodies, a consideration must be given to the international criminal tribunals, established because of the situations that occurred in Yugoslavia and Rwanda. The Statute of the International Criminal Tribunal for the former Yugoslavia was adopted by UN Security Council in 1993 with Resolution 827, while the one of the International Criminal Tribunal for Rwanda, was adopted after Resolution 955 in 1994[321]. Both of them view torture as a grave breach[322] and humanitarian crime.

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[318] E. SCAROINA, *Il Delitto di Tortura: L'attualità di un crimine antico*, Cacucci Editore, Bari, 2018, pg. 61.
[319] African Commission of Human and People's Rights,n. 241/2001. *Purhoit and Moore vs. Gambia*, 2001.
[320] *African Commission on Human Rights*, *Purhoit and Moore vs. Gambia*,2001.
[321] C. FOCARELLI, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità*, Seconda Edizione, 2012, pg.878-879.
[322] G. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War*, New York, 2010, pg.615.

In the early 90's, the Balkan zone was at the centre of various civil and internal armed conflicts, triggered and caused by the dissolution of the Socialist Federal Republic of Yugoslavia. In order to clear the situation on these events, these *ad hoc* tribunals were established specifically to prosecute the crimes and atrocities committed. Even though the International Criminal Tribunals deal with individual responsibility for the crime of torture and other forms of ill-treatment, they have occasionally referred to State responsibility as well. The Trial Chamber of the ICTY has stated that «States are obliged not only to prohibit and punish torture, but also to forestall its occurrence, States are bound to put in place all those measures that may pre-empt the perpetration of torture. It follows that international rules prohibit not only torture, but also the failure to adopt the national necessary measures for implementing the prohibition and the maintenance in force or passage of laws which are contrary to the prohibition[323]». The Tribunal has stressed out that there is a moral obligation and force behind the prohibition of torture, which is aimed at imposing duties that States have towards one another[324].

The competence of the Tribunals embraces three categories of crimes: war crimes, genocide and crimes against humanity[325], perfectly comprehending torture, easily linkable to all three categories. The Statutes of both Tribunals, the crime of torture is considered to be at the same time a war crime and a crime against humanity.

In the former Yugoslavia, the conflicts were both international and internal, while in Rwanda the issue concerned the internal situation only. This has had an important consequence; on one hand, the Statute of the ICTY gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions[326]; on the other hand, the Statute of the ICTR covers violations of Art. 3 of the Statute itself

[323] ICTY, *Prosecutor v Furundzija*, 1998.
[324] ASSOCIATION FOR THE PREVENTION OF TORTURE AND THE CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: a guide to jurisprudence*, Geneva, 2008, pg.146-147.
[325] F. TRIONE, *Divieto e crimine di tortura nella giurisprudenza internazionale*, Editoriale Scientifica, 2006, pg.11.
[326] C. FOCARELLI, Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità, Seconda Edizione, Italia, 2012, pg.880.

(which is common to the Geneva Conventions and the Additional Protocol of 1977), which applies to internal armed conflict[327].

Articles 2 of the Statute of the ICTY expressly enshrines as "grave breaches" both acts of torture or inhuman treatment, and "acts which cause great suffering or serious injury to an individual's body or health". Torture falls under the scope of Articles 2 and 3 when it is committed against the protected subjects listed in the Geneva Conventions. Furthermore, Article 4 of the Statute grants the Tribunal the competence to judge all those who are responsible of genocide. This crime is defined in the second paragraph as "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethical, racial or religious group".

The article goes on to display five different ways in which genocide can be carried out, two of which can certainly be executed through acts of torture, Letters b and c of Article 4, second paragraph, gives the definition of torture: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The case law of that court also deserves mention for having recognised for the first time the nature of *ius cogens* of the prohibition of torture, including it among the most serious forms of threat to fundamental rights of the individual recognised by the international community[328] . Accepting the definition of torture provided by UNCAT, the courts have partially modified its definition, adding some punctualities. The ICTY, in the case of *Prosecutor vs. Furundzija*, has qualified as torture the violence inflicted on a person in order to humiliate him[329].

In 1998, less than two months after the adoption of the Rome Statute that established four core international cimes - such as genocide, crimes against humanity, war crimes, and the crime of aggression - the ICTR issued a very important judgment in the *Prosecutor vs. Akayesu* case, regarding the conviction of a man for committing the crime of torture, which was listed in Article 4 of the

[327] APT AND CENTER FOR JUSTICE AND INTERNATIONAL LAW, *Torture in International Law: A guide to jurisprudence,* Geneva, 2008, pg. 146-147.
[328] ICTY, Prosecutor vs. Furundzija,1998.
[329] ICTY, Prosecutor vs. Furundzija,1998.

Statute. The Trial Chamber found that the interrogation techniques used against the victim, integrated the crime of torture because put him under the threatened his life.

In the *Prosecutor vs. Akayesu* case, the ICTR also specified that ill treatment must be inflicted for any of these purposes: «to obtain information or confession from the victim or a third person; to punish the victim or a third person for an act committed or suspected of having been committed by either of them; for the purpose of intimidating or coercing the victim or the third person; for any reason on discrimination of any kind»[330].

The purpose requirement of torture therefore is considered to be a fundamental element that distinguishes torture from other forms of ill- treatment. The Trial Chamber then went on to add that acts of torture could also be classified as crimes of genocide under certain circumstances. This entailed that an act could be punishable as torture if it caused bodily or mental harms to members of a national, ethnic, racial or religious group.

For explaining this important point, the Trial Chamber referred to the 1961 Eichmann case, where Israeli courts held that serious bodily and mental harms could be caused by enslavement, deportation and detention in ghettos and concentration camps in conditions which were designed to cause this humiliation and deprivation of their rights as human beings, to suppress them and cause them inhumane suffering and torture[331].

The International Criminal Tribunal for the former Yugoslavia gave a similar judgment to, in the 2001 *Prosecutor vs. Delalic* case. The ICTY Trial Chamber stated that it is difficult to envisage circumstances in which rape could be considered as occurring for a purpose that does not involve punishment, coercion, discrimination or intimidation[332].

In its reasoning, the Trial Chamber of the ICTY referred to the ruling of the European Court of Human Rights in the *Ireland v United Kingdom* case, stating that it best illustrated the difficulty in determining a precise threshold of severity

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[330] ICTR, n. 96-4-A, *Prosecutor vs. Akayesu*,1998.
[331] Supreme Court of Israel, n. 36 I.L.R 5, *Attorney General of the Goverment of Israel vs. Eichmann*, 1961.
[332] International Criminal Tribunal for the Former Yugoslavia, n. IT-96-21-T, *Prosecutor vs. Zajnil Delalic, Zdravko Music, Hazim Delic, Esad Landzo, 1998*, regarding various tortorous acts, sexual harassment and abuses perpetrated by the bosnian army in the Celebici village.

beyond which an act becomes torture. The Trial Chamber concluded that the mistreatment that does not rise to the level of severity necessary to be characterized as torture may in determined cases, if there is an *ad hoc* provision, constitute another offence[333]. Also important is the principle of liability of military leaders and those who had political responsibility for decisions in relation to international crimes of particular importance[334].

In the *Prosecutor vs. Tadic case*, regarding the commission of some war crimes at a Serb concentration camp in Bosnia-Herzegovina by Tadic. The Tribunal stated at first instance what it is meant to be as armed conflict, i.e. whenever there armed violence between governmental authorities and organized armed groups or between such groups in the territory of that State[335]. The ICTY has also insisted that Article 3 of the Geneva Conventions grants a minimum protection, and also represents customary international law.

In the case *Prosecutor v Musema*, the Accused, Alfred Musema, was the general director of the Gisovu Tea Factory in Kibuye Prefecture during the 1994 genocide in Rwanda. The Prosecutor alleged that on various occasions Musema transported armed attackers, including employees of the factory, to different locations in Gisovu and Gishyita communes and ordered them to attack Tutsis people seeking refuge there. He also personally took part in such attacks and killings. The indictment against Musema was later amended to include charges that he committed various acts of rape and that he ordered and encouraged others to rape and kill Tutsi women[336].

The ICTR Chamber compared the provisions of Art. 3 of the ICTR Statute and Art. 5 of the ICTY Statute, helding that «although the provisions of both aforementioned Articles pertain to crimes against humanity, there is a material and substantive difference in the respective elements of the offences, that constitutes crimes against humanity. The difference arises from the fact that Article 3 of the ICTR Statute expressly requires national, political, ethnic, racial or religious, discriminatory grounds with respect to the offences of murder, extermination,

[333] N.S. RODLEY, The Definition(s) of Torture in International Law, Current Legal Problems, Oxford University Press, 2002.
[334] ICTY, *Prosecutor vs. Zajnil Delalic, Zdravko Music, Hazim Delic, Esad Landzo, 1998*.
[335] ICTY, n. IT-94-1-T, *Prosecutor vs. Tadic*, 1997.
[336] From internationalcrimesdatabase.org, Case 121, Musema.

deportation, imprisonment, torture, rape and other inhuman acts, whereas Article 5 of the ICTY Statute does not stipulate any discriminatory grounds with respect to these offences»[337].

Concluding the chapter, it should be mentioned, as the first attempt to codify international criminal law is the definition of torture contained in the Statute of the International Criminal Tribunal , an independent body with international and permanent personality, with ordinary jurisdiction over crimes of particular importance to the international community, such as genocide, war crimes, and crimes against the administration of justice. According to Art. 7.2, "Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

Compared to other international conventions, the definition is limited, due to the additional requirement that wants the person to be to "in custody or control", regardless of the agent's purposes[338] .The scope of operation of this provision is therefore wider than that of the UNCAT, as torture is consecrated as a crime against humanity. Considering torture in the light of the specific purposes to suppressing the most serious crimes that alarms the whole community, we shall appreciate the effort of the courts to encompass all the different faces of torture.

2.6 Modern aspects of the crime: Prohibition of torture as ius cogens norm

The list of International treaties and conventions that have globally affirmed the prohibition of torture is «long and nourished»[339], leading to consider

[337] ICTR, n. 96-13-T, *Prosecutor vs. Musema*, 2000.
[338] N. RODLEY, *The Definition of Torture in International Law*, Current Legal Problems, Oxford, 2002, pg.467-493.
[339] E. SCAROINA, *Il Delitto di Tortura: L'Attualità di un Crimine Antico, Cacucci Editore, Bari, 2018, Cit, pg 29.*

it as *ius cogens* disposition, in respect of the Vienna dispositions[340] on what is considered a peremptory norm.

Although the possible interpretation on what *ius cogens* really should mean (emblemetic in this sense are the works of scholars such as Kolb and Hannikainen), is pacific that the capacity of these peremptory norms is to prevail over the state, regardless of the latter's practices and political visions. According to international community, to *jus cogens* belong all the principles and norms that cannot be derogated and setted aside.

In fact, «they must be accepted by the international community as a whole and not be capable of derogations[341]» and «*qui repose sur le caractère imperative garant dans son domaine de l'unicitè*[342]»Some scholars, however, state that not only is it unuseful, but it also paves the way to justifications expressing moral indignation at best and selected national interests at worst[343]. Prohibition of torture is one of a limited group of human rights not permitting any derogation, not even in emergency or war conditions[344], therefore having the power to declare the invalidity of an international treaty if the rules contained in it can clash with the prohibition. The aim of rejecting and repressing torture is universally accepted, meeting the requests of public coscience[345] of determined issues. Moreover, torture has been mentioned by the UN Human Rights Committee[346] as one of the acts which would clash *ius cogens* norm. A violation will be considered "a serious breach under peremptory norms of international law[347]". The *jus cogens* powers has effects also at an inter-state and at an individual level.

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[340] According to Art. 53 of the Vienna Convention on the Law of Treaties, in order to consider a norm *as ius cogens* it must fulfill four criterias: 1) they have to be norms of general international law 2) accepted by the international community of States 3) mandatory4) they can be modified only by new mandatory norms.

[341] L.HANNIKKAINEN, *Peremptory Norms (Ius Cogens) in International Law: Historical Development, Criteria, Present Status,* Finnish Lawyer's, Helsinki, 1988, Cit, pg.779.

[342]G. ABI-SAAB, *Prèface*, Cit, pg.17-18 in R. KOLB, *Thèorie du ius cogens international: essai de relecture du concept,* Presses Universitaires de France, Paris, 2001.

[343] G. SCHWARZENBERGER, *The Problem of International Public Policy: Current Legal Problems*, pg. 191–214, 1965.

[344] A. Clapham, *The ius cogens prohibition of torture and the importance of sovereignity state immunity*, edited by M. Kohen, pg. 180-161, 2007.

[345] ICTY, Trial Chamber II, *Prosecutor v.Furundzija*, n. IT-95-17/1-T,1998.

[346] General Comment 29, Art. 4, UN Doc. HRI/GEN/Rev.6,2003.

[347] C. Focarelli, *Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità, Seconda Edizione*, Italia, 2012. pg.269.

At a national level, *jus cogens* serves to delegitimize any form of act authorizing or admitting torture, providing the nullity of every disposition null or void *ab initio,* and grating the possibility to appeal national and supra-national courts for *ius cogens* violations. States have to vanquish as far as possible the consequences of acts performed in reliance of provisions in conflict[348] with this peremptory norm. Unlike customary law which traditionally required consent and allows the modification of the obligations provided between Parties through treaties, jus cogens norms or peremptory norms can't be violated or modified through international treaties or generally domestic laws not characterized buy the same normative power[349]. The International Criminal Tribunal for former Yugoslavia stated that there is a *jus cogens* for the prohibition against torture[350].

The ratio for this is that the torturer has become an enemy of all mankind. There have been some countries which have used and relied on information obtained through torture, justifying this as a counterattack to democracy threats ; many of them have also cooperated with other States to circumvent the existing rules on torture, reconsidering the rule of non-refoulement towards those countries where an individual may be at risk of been subjected to torture.

At an individual level, regarding criminal liability, the consequences of the *ius cogens* power entitles the States "to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction[351]". Assuming the lack of a precise definition of *ius cogens* when speaking about torture, throughout history governements have always tried to evade the absolute prohibition, compressing or even eliminating it[352].

[348] Art 71 of the Vienna Convention.
[349] *Prosecutor v. Furundžija*,1998.
[350] *Prosecutor vs. Furundzija,*1998.
[351] *Prosecutor vs. Furundzija*, 1998.

[352] M. SCHEININ, *Terrorism*, in International Human Rights Law,2nd edition, 2014, p.558.

For example, the U.S. notion of "enhanced interrogation techniques[353]"(beating, hooding, face slapping[354]) "moderate physical pressure[355]" by Israeli's Mossad might legitimize governments to shift the line between what is prohibited and what is permitted. In July 2014, the European Court of Human Rights ruled that "enhanced interrogation" is torture,and ordered Poland[356] to pay restitution to a Palestinian and a Saudi Arabian national, both locked up for several months and tortured at a CIA black sites between 2002 and 2003 before being transferred to Guantanamo Bay. The Court also stated that it is up on States to not allow men to be sent to places where they can face torture or in any case violations of human rights. In December 2014, the U.S. Senate made public around 10% of the Senate Intelligence Committee report about the CIA's use of torture during the Bush's administration[357]. In fact, the government would have implicitly authorised waterboarding[358] towards detainees at Guantanamo, thus making no effort to stop the practice of torture within the United States.

We can conclude that the prohibition is absolute and cannot be justified even in situations of emergency, such as the ticking bomb scenario already mentioned before. The UN Convention against Torture clearly at Art. 2.2 and 2.3 states that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture". CAT also reads: "Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State party shall make these offences punishable by appropriate penalties which take into account their

[353] An euphemism for the U.S' program of torture of detainees by the CIA, DIA and various components of the U.S. army imn black sites around the world, including Bagram, Guantanamo Bay, Abu Ghraib.
[354] S. SCOTT, *Soviet-Style "Torture" becomes "Interrogation", New York Times, 2006.*
[355] *Moderate physical pressure, the painful lesson Israel learned about*, in Newyorktimes.com
[356] R. LYMAN, *Poland to Pay 262,000 to Inmates Held at Secret C.I.A. Prison*, New York Times, 2015.
[357] *European court condems Poland over secret CIA torture prison*, The Daily Telegraph, 2014.
[358] *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees,* in Human Rights Watch, 2011.

nature"[359].No State would actually legislate to allow for torture- except for Israel in 1987 when the Landau Commission legislated on the possibility to use torture as an interrogation method, when the use of force was unavoidable- however, there have been a few proposals of legit use of forms of torture when governments hypothetically thought about the possibility of having "torture warrants" in emergency cases.

CHAPTER III

PROHIBITION OF TORTURE IN THE ITALIAN LEGAL SYSTEM

[359] Art 4 of the Convention Against Torture.

3. Italy's delay in the introduction of a specific criminalisation

Art. 117 of the Italian Constitution enshrines that the legislative power must be exercised respecting the Constitution and the obligations deriving from the Treaties, penalizing through domestic discipline the duties deriving from. Them and from international community system. It therefore follows that, with regard to prohibition of torture - a key principle of the international community - that our country must incorporate this disposition inside the criminal code with adequate sanctions and ensure that it is applied in practice[360]. Also Art. 13 (1-5), of the Italian Constitution provides an implicit duty to avoid any forms of torture or ill-treatment towards individuals. In fact, after stating the inviolability of personal liberty, the exceptional cases when judicial authorities can adopt interim measures and the limits of preventive detention, at paragraph 2 asserts that inspections, detentions, personal searches and, more in general restriction of personal liberty is only permitted by an act of the judiciary authority and at paragraph 4 that it is sanctioned and punished every physical and moral violence towards persons subject to restrictions of freedom. Worthy of mention is also art. 27 of the Italian Constitution, where at p.3 it is stated that penalties may not consist in treatments contrary to sense of humanity and must tend to a re-education of the condemned person.

However, despite the various requests of the international community and humanitarian organizations, Italy showed itself, before the introduction of Art. 613-bis and 613-ter, slow and resistant to the promises done at international level. Expressed obligations of criminalization were present and introduced by the Geneva Conventions at Art. 1 and later, also by the two Additional Protocols of 1977, by which the contracting parties committed themselves to apply, respect and ensure the disposition present in the Conventions. The acts and conducts expressed are and shall remain prohibited at any time and in anyplace whatsoever, whether committed by civilian or by military agents: violence to the life, health, or physical or mental well-being of persons, in particular: murder; torture of all kinds, whether physical or mental; corporal punishment mutilation; outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and

[360] D.M. SANTANA VEGA, *Diritto penale minimo e obblighi costituzionali taciti di tutela penale*, in Dei delitti e delle pene, 2000, pg.49.

any form of indecent assault; the taking of hostages; collective punishments; and threats to commit any of the foregoing acts[361] ".

After Italy's ratification of UNCAT in 1989, signed in New York in 1984 it also undertook, in accordance the aforementioned Convention to 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, eliminating the mere limit of material behaviour.Art. 4 obliges each State Party to make these offences punishable by appropriate penalties which take into account their grave nature. Similar obligation is then provided in the following art. 16, enshrining that ach 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. 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.

To further strengthening the concept, each State Party shall guarantee that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by competent and impartial authorities., climbing those steps in order to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

In order to comply with this obligation, the United Nations have expressed themselves numerous times, urging states to provide with a law that provides at least the minimum content, the perimeter, as also specified by the Italian Supreme Court, pointing out that «*Italy's failure to comply with the obligations of the Convention creates a paradoxical situation in which an offence*

[361] Art. 75, I Additional Protocol to the Geneva Conventions, 1977.

such as torture, internationally considered to be delictum iuris gentium, is not a specific offence under Italian law[362]». It must also be considered that there is no possibility that the crime could be time barred as expressly stated in the Rome Statute.

Italy manifested numerous times late in implementing international law in domestic codes. Article 1 of the Italian Criminal Code affirms that no one may be punished for an act not expressely provided as a criminal offence by law. The provision transposes the so-called principle of formal legality (*nullum poena nullum crimen sine lege*) into the criminal law system, according to which crime is only what is provided for as such by law. It deals with a general principle, already expressed in art. 25 Cost., paragraph 2, by virtue of which no one may be punished except by a law that entered in force before the fact committed, and also confirmed and reaffirmed in international law[363], by art. 7 ECHR and 49 of the Nice Charter, as well as art. 14 of the preliminary dispositions to the Criminal Code. According in fact to the Italian Supreme Court,«t he principle of legality is violated if a penalty is applied which is not provided for or differs from that provided by law for that particular kind of offence[364]»

The Italian Governments many times justified this absence in the eyes of the international community, deducing that its judicial system already provided laws referable to torture. The Italian Criminal Code enshrines a series of provisions which punish acts that can be connected to torture, because they discipline single elements that form the matter of the offence. In fact, the Code encompasses crimes such as the delicts disciplined by Art. 606 to 609, which concern the protection of individual and personal liberty.

Articles 606 to 609 of the Code are inserted in the section covering the crimes against the individual. They respectively punish illegal arrest[365], undue

[362] Cass.pen., sez.6, 17.07.2014, n.46634, rv.261004, online cortedicassazione.it.
[363] I. CRISAN, *The Principoles of legality "nullum crimen sine lege" and their role*, in Effectius Newsletter, 2010, pg.1-3.
[364] Cassazione penale, Sez. Unite, sentenza n. 5690 ,1981, online at cortedicassazione.it
[365] Art.606 c.p. reads: «*Il pubblico ufficiale che procede ad un arresto, abusando dei poteri inerenti alle sue funzioni, è punito con la reclusione fino a 3 anni*».

limitation of personal freedom[366], abuse of authority towards detainees[367] and arbitrary personal search and inspection[368]. These crimes punish abusive forms of restriction of personal liberty and other ill- treatments towards individuals under arrest, but they fail to give relevance to the safeguard of the physical and mental integrity of the victim. Article 606 concerning illegal arrest constitutes a permanent crime, because it presumes the perpetration of the conduct for a long period of time; if the torture was instantaneous, it could not be punished under this article. These provisions also do not entail sufficient and adequate penalties, considering that the maximum jail sentence is three years.

The crime mentioned in art. 323, abuse of office[369], is inserted in the section of the Code dedicated to the crimes against the Public Administration. The collocation in the code evidences that is not contemplated the violation of human dignity that the subject is receiving, which is proper to torture. Also, the article requires that the perpetrator wants to achieve a patrimonial advantage, meaning that the act could not be punished as torture if it was committed for a different reason.

Moving on to the common crimes we can mention some of them that relates to act of physical torture. The first one that comes to mind is Art. 572, on ill-treatments over coabitants or family members, placed in the section of crimes against the family[370]. Problems regarding this article concern the limitative restriction of the necessary passive subject, a family member or coabitant. Torture is instead a crime against everyone, with no differentiation. Other common crimes

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[366] Art.607 c.p. reads: «*Il pubblico ufficiale, che, essendo preposto o addetto ad un isitituto di custodia preventiva o ad un istituto per l'esecuzione di una pena o di una misura di sicurezza, vi riceve taluno senza un ordine dell'Autorità competente, o non obbedisce all'ordine di liberazione dato, ovvero indebitamente protrae l'esecuzione della pena o della misura di sicurezza, è punito con la reclusione fino a 3 anni*».

[367] Art. 608 c.p. reads: «*Il pubblico ufficiale, che sottopone a misura di rigore non consentite dalla legge una persona arrestata o detenuta di cui egli abbia la custodia, anche temporanea, o che sia da lui affidata in esecuzione di un provvedimento dell'Autorità competente, è punito con la reclusione fino a 30 mesi».*

[368] Art. 609 reads: «*Il pubblico ufficiale, che, abusando dei poteri inerenti alle sue funzioni, esegue una perquisizione o un'ispezione personale, è punito con la reclusione fino ad un anno*».

[369] Art. 323 c.p. reads: «*Salvo che il fatto non costituisca un più grave reato, il pubblico ufficiale o l'incaricato di pubblico servizio che , nello svolgimento delle funzioni o del servizio , in violazione di norme di legge o di regolamento, ovvero omettendo di astenersi in prensenza di un interesse proprio o di un prossimo congiunto o negli altri casi prescritti , intenzionalmente procura a se o ad altri un ingiusto danno patrimoniale , ovvero arreca agli altri un danno ingiusto, è punito con la reclusione da 1 a 4 anni»*

[370] M. RONCO AND B. ROMANO, *Codice Penale Esplicato*,UTET, p.2567.

on physical torture are Art. 581, regarding [371] and 582[372] prosecutable only through a legal complaint brought on by the victim, these crimes envision extremely light penalties in comparison with the gravity of the act.

Even bigger obstacles are encountered with regards to the safeguard of psychological violence; the Code encompassed crimes enshrined in Article 594[373](now abolished), Articles 610[374] and 612[375].These laws seem to be even more inadequate to prevent and repress torture the two delicts in Articles 610 and 612, included as crimes against moral liberty, do not provide proportionate sanctions reffering to the more serious crime of torture. To integrate the crime of private violence, the *"dolo specifico"* requires that the will to force someone actually reaches its purpose[376]. Torture, on the other hand, should be punished independently from the fact that the torturer reaches its objective. For what concern Art. 612, his crime too is only prosecutable on the basis of a formal complaint asked to the authority by the victim[377].

Italy, before the introduction of a specific prohibition of torture provision, argued that it was unnecessary to implement internal law, because, according to Article 10[378] of the Constitution, the national system conforms himself to the general principles of international law, considering them part of the Italian system once they are born at an international level, without any further *ad hoc* provision[379].

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[371] Art. 581 c.p. reads: «Anyone who uses violence towards someone, if the facts results in an illness in the body or mind is punished, on complaint of the injured, with imprisonment up to six months or a fine up to three hundred and ninety euros.».
[372] Art. 582 c.p. reads:«Whoever causes a pesonal injury to anyone, from which derives an illness in the body or mind, is punished with imprisonment up to six months to three years».
[373]Art. 594 c.p. reads: «Anyone who disonor a person present shall be punished with imprisonment up to six months».
[374] Art. 610 reads: «Anyone who with violence or threat, forces others to do, tolerate, or omit something is punished with imprisonment up to four years».
[375] Art. 612 reads: «Anyone who harasses others with unjust damage is punished on compliant of the person offended, with a fine up to 1,032 euros. If the threat is serious, or is made up on the ways indicated in art.339, the penalty is imprisonment for up to one year».
[376] F. ANTOLISEI, *Manuale di diritto penale*, Parte speciale, Torino, 2008, p.148-149.
[377] F. ANTOLISEI, *Manuale di diritto penale*, Parte speciale, Torino, 2008, p.155-157.
[378] Art. 10 of I. Constitution reads: "*L'ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute*".
[379] C. FOCARELLI, Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità, Seconda Edizione, Italia, pg. 286.

In these circumstances, even if all the provisions mentioned can supplement and paint the crime of torture, the result has remained incomplete and unsatisfactory for decades, leaving aside cases which are expressly sanctioned at an international level. Ratifying and giving execution to a treaty is not sufficient to adapt the national judicial system to international norms. These norms require the creation of an *ad hoc* legislative provision to be fully implemented[380], referring especially to criminal laws, because of the already mentioned principle of *nullum crimen, nulla poena sine lege*.

In addition to the problems of a substantial nature regarding the introduction of the tortorous crime , at a procedural level the counterweight to the use of the practice is certainly Article 188 of the Italian Criminal Procedural Code, according to which no methods or techniques may be used, not even with the consent of the person concerned, which may affect the freedom of self-determination or alter the ability to recall and assess the facts, since the acts in question are absolutely null and void, according to art. 191 c.p.p[381], amended by Law 110/2017 in order to reaffirm, in the second paragraph, the prohibition. Torture, in fact must be rejected because it offers no guarantee of the truthness of the answer, not because it forces him to reveal a secret[382].

The first law proposal was made in 1989, one year after the Italian State had ratified the UN Convention Against Torture. This first project for the introduction of the prohibition of torture was presented by the Communist Party Senator Battello[383]. However, the draft law was never submitted to the approval of the Assembly because they felt the discussion was not an impellent matter. During the the XIII Legislature, in charge from 1996 until 2001, where Head of State were Scalfaro and Ciampi while the governments were formed by Prodi I, D'Alema I, D'Alema II, Amato II, attempted at reaching the objective of creating a law on the subject-matter of torture.

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[380] C. FOCARELLI, Diritto Internazionale I: Il sistema degli Stati e i valori comuni dell'umanità, Seconda Edizione, Italia, pg. 283.

[381] Art. 191 p.2-bis reads: «*Le dichiarazioni o informazioni ottenute mediante il delitto di tortura non sono comunque utilizzabili, salvo che contro le persone accusate di tale delitto e al solo fine di provarne la responsabilità penale*».

[382] F. CARNELUTTI, *Lezioni sul processo penale*, Roma, 1947, pg.168.

[383] *Il reato di tortura in Italia – Sviluppi legislativi*, Amnesty International online website.

The Council of Ministers, guided by Giuliano Amato, approved bill no. 7283, on torture and other cruel, inhuman and degrading treatments. This project was not aimed at introducing the specific crime of torture into Italian legislation, but rather at foreseeing the aggravating circumstances for crimes committed against human beings[384] but unfortunately, the bill was never been object of examination[385].

At Art. 1, the bill aimed to punish crimes against the person, whether committed or attempted, increasing the punishments from one third to half when the offender has committed the act by abuse of power or violation of the duties inherent in a public function or public service or by using violence or by acting cruelly or in any case resorting to other kinds of physical or moral violence against the person suitable to intimidate him or to reduce in an appreciable way the freedom of self-determination, in order to obtain from him or from other statements or information.

Some steps forward were taken in 2002, when the crime of torture was introduced in the Italian Military Criminal Code[386]. Article 2 of law no. 6 2002 introduced Article 185-bis, entitled "other offences against person protected by international conventions", punishing up to five years the military that for causes not related to war, committed acts of torture or other inhuman treatments, illegal transfers, experiments or medical treatments not justified by the state of health towards war prisoners, civilians or persons protected by international conventions.

The events that led to the adoption of a law against torture took place in Somalia, when the United Nations Operation in Somalia had accused Italy of being responsible of ill-treatments and violence towards Somalians. An *ad hoc* investigative Commission was established, made up of five members. chaired by the former President of the Constitutional Court Ettore Gallo. A lot of sensation was made at the time by the photos of a Somali who appeared to have been tortured with electrodes by a paratrooper[387]. The report presented states that sometimes

[384] V. MOINE, *La mancanza del reato di tortura nell'ordinamento italiano*, in Nomodos, blog di commento giuridico all'attualità, 2013.
[385] Camera dei Deputati, Documentazione per l'esame di Progetti di legge, Disposizioni urgenti in materia di introduzione del delitto di tortura nell'ordinamento italiano, A:C: 189 e abb., n.149, Maggio 2014, pg. 15.
[386] L. ZAGATO, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, p.174.
[387] *Violenza in Somalia, accuse ai comandi,* from LaRepubblica online website,1998.

command action was inadequate or even deficient. At the highest level there was a lack of ability to predict that certain facts might have happened and the controls that should have ensured the punctual application of directives and provisions were neglected[388]. None of the superior officers were condemned for these practices[389].

The Commission of Justice of the Italian Senate underlined the brutality of acts on Somalian citizens, soliciting the introduction of the crime of torture in the Criminal Code and the reform on the disposition in the Military Criminal Code[390].

In 2006, the Italian Chamber of Deputies approved bill n. 1216, on the introduction of the crime of torture[391], but abandoned and in 2008, at the beginning of the new XVI[392] legislature, two new law propositions were brought before the Senate, draft laws n. 256 and 264[393]. These propositions followed the wording of the crime of torture enshrined in the UN Convention of 1984, presenting at the same time differences. First of all, they proposed two different durations of the prison sentence, varying from 3 to 12 years and to 4 to 10 years; secondly, there had been a debate on whether the crime committed by a public official constituted a particular aggravated form of the crime.

In 2012, with Monti I, the Senate finally created a legislative decree on torture[394] but due to the premature fall of the governement the proposition wasn't approved.

In March 2013 the bill, D.d.l. S 10, presented by the Partito Democatico Senator Manconi, together with four other bills signed by Senators of other groups[395] will lead to the introduction of art. 613-bis in the penal code.

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[388] *Violenze in Somalia, accuse ai comandi,* La Repubblica online website, 1998.
[389] M. E. LANDRICINA, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, pg.7.
[390] M. E. LANDRICINA, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, pg.8.
[391] L. ZAGATO, *La tortura nel nuovo millennio: la reazione del diritto*, Italia, 2010, pg. 175.
[392] From 2008 until 2013. Head of State was Napolitano and the governements were Berlusconi IV and Monti I.
[393] M. E. LANDRICINA, *Il crimine di tortura e le responsabilità internazionali dell'Italia*, Roma, 2008, pg. 16.
[394] P. FANTAUZZI*, Tortura, 30 anni di omissioni e ritardi*, online article from L'Espresso,2015.
[395] D.d.l.n S362 (Felice Casson), S.388(Barani), 395 (De-Petris- De Cristofaro), 849(Buccarella), 874(Torrisi).

The bill was divided into seven articles and had the purpose of introducing the crime of torture into Italian legislation[396]. It specifically aims at introducing new types of offences into the criminal code, through the introduction of Articles 613-bis and 613-ter. In addition, a series of changes were proposed, in particular of Article 191 of the Criminal Procedural Code, and of Article 157 of the Criminal Code[397], and proposed the abolishment of diplomatic immunity in cases of torture.

The d.d.l.S 10 introduced the crime of torture as a crime against moral freedom , stating that the public official or a public service officer who inflicts on a person, by any act, injury or suffering, whether physical or mental, in order to obtain information or confession from him or a third person, to punish him or her for an act he or a third person has committed or is suspected of having committed, to intimidate him or to put pressure on him or a third person, or for any reason based on discrimination, shall be punishable by imprisonment from four to ten years".

First of all, it should be noticed that it was considered as a crime that can be integrated only by a specific category of active subjects, and with the *dolo specifico*, the further aims of extrapolating informations, confessions, punitive, and was for this reason strongly criticized by the Justice Commission of Senate in 2013. In this context, it was opted for the choice of classificating the subject as a common crime and to renounce on the request of the *dolo specifico*.

Choosing the plurality of actions as typical conduct, instead of the single violence was justified by the fact that single actions may imply distinct and autonomous criminal charges[398], such as Art. 581 and 582. The new draft was then examinated in 2014 with the approval of a new text, providing for the qualification as a common crime, with the addition of two aggravating circumstances and with

[396] XVII legislatura, *Disposizioni urgenti in materia di introduzione del delitto di tortura nell'ordinamento italiano*, A.C. 2168-A, Dossier n. 149/1- Elementi per l'esame in Assemblea, 20 Marzo 2015.
[397] GUGLIELMO TAFFINI, *L'infame crociuolo della verità; uno studio sulla tortura,* Italy, 2015, pg.83-84.
[398] *See.* Final Relation of the President of the Senate's Justice Commission, available online*: "la scelta della pluralità di azioni materiali nasce dall'evidente necessità di evitare doppie incriminazioni, giacchè ciascuno degli atti compiuti dal soggetto agente implica o può implicare la consumazione di un autonomo reato, quale, ad esempio, il delitto di lesioni personali".*

the request that the violations inherent to the behaviour were "severe"[399]. Full of scepticism also around this text, the proposal was trasmitted to the Chamber of Deuputees and to the Justice Commission. During the work of the Commission, were also heard the Police Chief, criminal law scholars like Professors Vigano and Padovani[400] and representatives of Amnesty International and Antigone, interested in the protection of rights and guarantees in the penal and penitentiary system.

The Chamber Act 2168[401], was then transmitted from the Justice Commission to the House and approved in 2015. The approved text confirmed the placing of the crime among those against moral integrity, also confirming the common nature of the crime. The conduct is modified, attributing importance also to the individual act, to the obligations of protection, care and assistance, referring to violence and threats as conduct and with the additional subjective element of intentionality and in order to obtain information, punish.

Returning to the Senate was again approved with an amendment by the Justice Committee in a version that provided for the inclusion of the requirement of reiteration and the lack of reference to inhuman and degrading treatment. It was approved on the 17 of May 2017 with 195 votes in favour, 35 against, 104 abstentions. At the end of this long process, a suitable discipline on torture was finally brought to light.

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[399] E. SCAROINA, *Il Delitto di Tortura: L'attualità di un crimine antico*, Cacucci Editore, Bari, 2018. See also M. MONTANARI, *Il Senato adotta il testo unificato per l'introduzione del delitto di tortura nell'ordinamento italiano,* online at penaleconntemporaneo.it, 2014.

[400] T. Padovani, heared before the Commission of the Chamber of Deputies, 22 October 2014, stenographic report available on the official website of the Chamber of Deputies, pp. 6-7 , «*La descrizione della condotta deve riconoscersi pregevole nella parte in cui aggiunge il requisito dell'abuso dei poteri o della violazione dei doveri inerenti la funzione, poiché tiene conto del fatto che i pubblici agenti sono legittimati all'utilizzo della forza, se proporzionata e necessaria per l'espletamento delle proprie funzioni»*..

[401] Chamber Act 2168: «Anyone who, by violence or threat, or by violation of his or her obligations of protection, care or assistance, intentionally causes a person entrusted to him or her, or in any case subject to his or her authority, supervision or custody, acute physical or mental suffering in order to obtain from him or a third party, information, statements, or to inflict a punishment or overcome resistance, or because of ethnicity, sexual orientation, political or religious opinions, shall be punished by imprisonment from four to ten years".

3.1 Excessive use of force by police officials

Given the composite and multiform reality of torture, in our country it continues to be characterised by events that can be traced back to the activities of state authority, which, through its use in judicial proceedings or in order to express and reaffirm their power with the political torture[402], is perpetrated in numerous contexts, from the management of public order to the fight against the enemy. Within this chapter we will look in which precise contexts torture is applied, through the analysis of the most important cases of chronicle, until the possible introductions of restorative justice[403], placebo for the public opinion.

In addition to the G8 affair, analysed in the next chapters 3.4, the case history of so-called police brutalities is substantial and extensive. The episodes of violence perpetrated in the course of the last few years by the police officers, proofs the absolute inadequacy of the instruments, normative and otherwise, to prevent and avoid behaviour ascribable to torture, or in any case, *ill-treatments*. We have the first factual evidence of an effective use of torture, to be precise «*denudato e legato su un tavolo: a questo punto qualcuno gli tappava il naso e qualcun altro gli aveva versato in bocca acqua in cui era stata gettata una polverina dal sapore indecifrabile e constestualmente era stato incitato a parlare*[404]», it refers as early as the 1970s, when the fight against "*brigatista*" terrorism concentrated all the attention of the authorities.

In 1978, Enrico triaca, suspected of being a "Brigate Rosse" supporter in the context of the operation relating to the kidnapping and killing of Aldo Moro, was condemned on the basis of statements made just while he was subject to the above mentioned practice, waterboarding, called at the time "the Algerian" because used by French troops in Algeria. In those years, in fact, «a group of officials dedicated to torture was operating in Italy»[405].

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[402] G. SERGES, *La Tortura Giudiziaria. Evoluzione e fortuna di uno strumento d'imperio*, in L.PACE, S. SANTUCCI,G.SERGES(a cura di), *Momenti di storia della giustizia*, 2011, pg.214.
[403] G. MANNOZZI, *La giustizia senza spada. Uno studio comparato su giustizia riparativa e mediazione penale*, Milano, 2003.
[404] Triaca reffered it to the Piacenza Court, in L. Masera, *Il Prof. De Tormentis e la pratica del waterboarding in Italia,2014, in* Diritto Penale Contemporaneo.
[405] L. MASERA, *Il Prof De Tormentis, cit. p..3.*

Another episode relating to those years is certainly the kidnapping of the American General J. Dozier, NATO General. In January 1982, the NOCS, broke into the apartment in Padua where the general was detained, freeing him and arresting the members of the Red Brigades present. According to the sentencing pronounced by the court of Padua, they were subjected to mistreatment of various kinds: beatings, sexual violence, death threats, in order to induce them to collaborate by revealing the names of the comrades still free and any unexplored hiding places[406]. Emerges in the context of those years, the Gulotta case, tortured by a Carabiniere, in order to confess the killing of two colleagues inside the Alcamo police station, near Trapani. After 22 years in prison, thanks to the review of the trial, he was cleared of all charges.

Another emblematic case was certainly that of the young Federico Aldrovandi, who, following a violent fight was immobilized by two policemen who, continuing to beat him, caused his death following a chest trauma because, on September 25, 2012, in Ferrara, at 5: 30 in the morning a person called 112 complaining that a young man was going crazy in the street. In addition to the two policemen materially involved, four other members of the police force were also investigated in this procedure, who, through the commission of the crimes referred to in 328, 372, 378[407] of Italian Criminal Code, would have diverted the investigation to favour their colleagues. The Supreme Court, in confirming that no general mitigating circumstances were granted to the defendants, points out that « *essi avevano distorto dati rilevanti per il seguente sviluppo delle indagini , sin dalle prime ore successive all'uccisione del ragazzo" and "omesso di fornire un contributo di verità al processo, da reputarsi doveroso per dei pubblici ufficiali , a fronte delle manipolazioni delle risultanze investigative pure realizzate dai funzionari responsabili della Questura di Ferrara*[408]».

Of no less importance is the case of Giuseppe Uva, recently concluded in July 2019 with the ruling of the Court of Cassation[409], dating back to 2008 where Uva had been stopped in a state of alteration caused by drunkenness together with

[406] F. VIGANÒ, *Stato di necessità e conflitti di doveri. Contributo alla teoria delle cause di giustificazione e delle scusanti*, Milano, 2000.
[407] Art. 328: *rifiuto di atti d'ufficio*; 372: *falsa testimonianza*; 378: *favoreggiamento personale*.
[408] Corte di Cassazione, sez. IV, n.36280, 2012, confirming the Ferrara Court of Appeal's decision.
[409] L. MANCONI, V. Calderone*, Quando hanno aperto la cella*, 2011, Il Saggiatore pg.153 ss.

a friend, Alberto Biggioggero, and taken to the Via Saffi police station in Varese. During the stay, Biggiogero called repeatedly the 118 requesting the intervention of an ambulance to help Uva that, according to him, was suffering physical violence by the agents. The Carabinieri, called by the ambulance, denied the need for assistance but, about two hours later, they urged for the hospitalization of Uva with a TSO program, where he died about two hours later. According to the Tribunale di Varese judgment, the expert opinions "allow the absolute exclusion of the existence of any injury that caused or contributed to the death of Giuseppe Uva[410]". The Court of Appeal of Milan, instead, asked for the condemnation of the defendants claiming that the actions carried out by the agents of "violent and unjust duration" would have caused the death of the victim by grafting himself into a pre-existing cardiac pathology, asking for the condemnation for involuntary murder and kidnapping aggravated by the title of public official.

In May 2018, the Court of Appeal of Milan acquitted the defendants from the crime of kidnapping because the fact does not exist and confirmed in the rest the sentence of the first instance, sentencing the appellant civil parties to pay the costs[411]. Sentencing then confirmed by the Corte di Cssazione in 2019.

Coming now to analyze one of the most striking cases of police brutality, namely the Cucchi case, it is highlighted as never before case the massive and guilty presence of all the institutions that took part in the affair. In it is fact stated that Cucchi: *«ha attraversato un numero elevato di luoghi instituzionali e di apparati statuali: due caserme dei Carabinieri, le celle di sicurezza, le aule e l'ambulatorio del Tribunale di Roma, l'infermeria e una cella del carcere di Regina Coeli, il pronto soccorso del Fatebenefratelli, il reparto detentivo del Sandro Pertini.*

[410] F.SIRONI, *Caso Giuseppe Uva*, *Carabinieri e agenti di polizia assolti anche in appello*, in L'Espresso, 2018.

[411] Processo Uva, le ragioni dell'assoluzione in Appello, in VareseNews, 2018. In motivating the acquittal of the defendants from the crime of kidnapping, the judges wrote that Giuseppe Uva, in front of the two Carabinieri, had immediately reacted to their requests in an aggressive manner contrary to Biggiogero, explaining that it was necessary to handcuff him in order to take him to the barracks and adding that, if they wanted to beat him as the prosecution claimed, they would not have called even to the aid of witnesses, moreover, not even belonging to the same Force.

Complessivamente, si è trattato di un itinerario verso la morte, scandito da dodici passaggi[412]*».*

On October 15, 2009 Stefano Cucchi, a drug dealer with a criminal record for non-drug related crimes, was stopped by the Carabinieri Francesco Tedesco, Gabriele Aristodemo, Raffaele D'Alessandro, Alessio Di Bernardo and Gaetano Bazzicalupo after being seen giving transparent packaging in exchange for a banknote. Taken immediately to the police station, he was searched and found in possession of 12 packs of various sizes of hashish, three packs of cocaine and a medicine to treat epilepsy, a disease Cucchi was suffering from. Cucchi before his arrest and arrival at the station has no physical trauma.

The next day the hearing is held for the confirmation of the detention in prison, strongly criticized again from Manconi: «*Cucchi is attributed a foreign nationality and the condition of "homelessness", even though he was regularly resident in the city*[413]*».* Already during the trial, he had difficulty in walking and talking and also shows evident bruises in his eyes, but he doesn't say he was beaten in any way[414].

Despite the precarious conditions, the judge fixes the hearing for the trial to be held a month later, and orders until that date the dentention in custody at Regina Coeli prison[415]. After the hearing Cucchi's condition worsened further, and on 16 October at 11pm he was taken to the Fatebenefratelli hospital emergency room, where injuries and bruises were reported: to his legs, jaw fracture abdomen haematuria, chest decompression and fracture of the third lumbar vertebra and coccyx[416]. He is therefore recommended to be admitted and recovered, but the patient refused. In the following days, due to his deteriorating condition, he was transferred to the prison ward of the Sandro Pertini hospital, where he died at dawn on 22 October 2009: at the time of his death he weighed only 37 kilograms[417].

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412 L.MANCONI, V.CALDERONE, *Quando hanno aperto la cella*,2011, Il Saggiatore,cit. pg.215.

413 G. MERLO, L. MANCONI, *«Quella strana telefonata che mi arrivò pochi giorni dopo la morte di Cucchi*», in Il Dubbio, October 2018.

414 *Interrogatorio Cucchi all'udienza di convalida del fermo*, La Repubblica, November. 2010.

415 Denuncia del garante sul caso Cucchi, Manconi: "*Lesioni e traumi sul corpo*", Roma, la Repubblica, October 2009.

416 C. PICOZZA,M. BISSO, *Morte Cucchi, presto avvisi di garanzia Tra carcere e ospedale referenti differenti* , Repubblica.it, 2009.

417. Il caso di Stefano Cucchi: morto per una "caduta" in carcere Ecco le foto mostrate dalla famiglia, in solleviamoci.wordpress.com, October 2009.

After the first hearing, the relatives repeatedly try to see, or at least know, his physical condition without success: they only hear news when an official goes to their home to notify the magistrate's authorisation to perform an autopsy. The trial against doctors and prison officers for involuntary murder is opened in 2012[418], and others will follow for other charges, also due to the partial annulments by the Cassazione.

At the express request of the family members, in September 2015 the Public Prosecutor's Office of Rome reopened an investigation file on the case[419].

[418] On 13 December 2012, during the trial in the first instance, the experts appointed by the Court established that the young man died as a result of lack of medical care and serious shortages of food and liquids. They also stated that the injuries found post-mortem could be caused by a beating or an accidental fall. On June 5, 2013, the 3rd Assise Court of Rome sentenced in the first degree four doctors of the Sandro Pertini Hospital of Rome to 1 year and 4 months and the head doctor to 2 years imprisonment for involutary murder,one doctor to 8 months for false ideology, while acquitting 6 nurses and officers of the Prison Police, who, according to the judges, did not contribute in any way to Cucchi's death .On 31 October 2014, with a judgment of the Court of Appeal of Rome, all the defendants, including the doctors, were acquitted: following this, the lawyer of the Cucchi family announced an appeal to the Court of Cassation, while his sister Ilaria declared that she would ask for further investigations to the Public Prosecutor Pignatone and that she would continue her campaigns to raise public awareness of the case.. The Cassazione, at the public hearing of 15 December 2015, ordered the partial annulment of the appeal sentence, ordering a new trial for 5 of the 6 doctors of the Pertini Hospital, previously acquitted. According to the judgment, Cucchi's pathological states, pre-existing and concomitant with the polytraumatism for which he was hospitalized, should have imposed greater attention and deepening on the part of the medical staff. On July 18, 2016, the Court of Appeal of Rome acquitted the 5 doctors from the charge of involuntary murder because "*il fatto non sussiste*". The First Criminal Section of the Cassazione, in a public hearing on April 19, 2017, ordered the annulment of the further sentence of appeal, ordering a new trial for the 5 doctors of the Pertini Hospital. According to the Court, the doctors had shown serious negligence due to delays in both diagnosis and treatment, and for this reason the acquittal sentence is contradictory and illogical. On the following day, April 20, 2017, the statute of limitations for the crime in question began; On March 23, 2018, the new appeal proceedings were opened before the Second Chamber of the Court of Appeal of Rome. The Municipality of Rome, among others, is also a plaintiff. As part of the proceedings, a new technical report on the causes of Stefano Cucchi's death is carried out highlighting the negligence in the actions of the defendants. In the hearing of 6 May 2019, the Deputy Attorney General asks not to proceed against them, for intervening statute of limitations of the crime of involuntary murder, a request that preludes to their acquittal in criminal court, but not for the purposes of civil liability. With the judgment of 14 November 2019, the judges acquitted Dr Stefania Corbi because the fact does not exist and declared that no proceedings should be brought against the head doctor Aldo Fierro and the doctors Flaminia Bruno, Luigi De Marchis Preite and Silvia Di Carlo for the crime of involuntary murder by statute of limitations.

[419] The first hearing of the trial-bis against the first 5 soldiers, in various ways for pre-intentional murder,falsehood and slander, is held on November 16, 2017 before the First Assise Court of Rome;. At the hearing on October 11, 2018, the prosecutor announced the complaint filed by Francesco Tedesco, informing the court of what has emerged from the investigation in the meantime, and in particular of the attempts to defraud him. With the sentence issued on November 14, 2019, the First Assise Court of Rome recognized the chosen Carabinieri Alessio Di Bernardo and Raffaele d'Alessandro guilty of pre-intentional, sentencing them to 12 years imprisonment and perpetual interdiction from public offices, in addition to the payment of legal costs and one hundred thousand euros as a provision to each of the victim's parents. Carabiniere Francesco Tedesco is acquitted of

The family lawyer had previously exposed to the Prosecutor that a Carabinieri soldier, Riccardo Casamassima, had received threats in order to give negative testimony in the appeal process, and that the person concerned had reason to believe that such threats came from one or more former colleagues involved in the case[420]. On January 17, 2017, at the conclusion of the preliminary investigation, a request was made for a stay for trial for pre-intentional murder and abuse of authority against the military of the Carabinieri Corps Alessio Di Bernardo, Raffaele D'Alessandro and Francesco Tedesco, accused of hitting Cucchi with slaps, punches and kicks[421], making him fall and causing him fatal injuries due to a subsequent omissive conduct by the doctors treating him, and for having subjected him to restrictive measures not allowed by law. Tedesco, together with Vincenzo Nicolardi and Marshall Roberto Mandolini, must also answer for the accusation of falsehood and slander, for the omission in the arrest report of the names of Di Bernardo and D'Alessandro, and for the accusation of having testified falsehood at the trial of first instance, having made statements that led to the charge of three officers of the prison police for the crimes of personal injury and abuse of authority against Cucchi. On 24 February 2017 the three soldiers accused of pre-intentional murder were precautionarily suspended for an indefinite period of time[422].

On June 20, 2018, Francesco Tedesco, one of the defendants in the so-called "*Cucchi- bis*", filled a complaint against unknown persons, in which he complained about the disappearance of a service record he had written on October 2009 and addressed to his superiors, in which he explained the events that took place on the night between October 15 and 16[423].

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the crime of pre-intentional murder but is sentenced to 2 years and months 6 of imprisonment for falsa testimonianza, the same crime for which Carabinieri Marshal Roberto Mandolini is sentenced to 3 years and months 8 of imprisonment and a 5-year ban from public office.

[420] *Cucchi, il carabiniere che ha denunciato i colleghi: "Costretto a lavorare con loro. Ora devo testimoniare ma ho paura*"Il Fatto Quotidiano, May 2018.

[421] G. BIANCONI, *Cucchi, svolta nell'inchiesta «Omicidio preterintenzionale»: sotto accusa tre carabinieri*, in Corriere della Sera, 2017.

[422] *Stefano Cucchi, "sospesi dal servizio i tre carabinieri accusati di omicidio preterintenzionale", il Fatto Quotidiano*, 24 febbraio 2017.

[423] Following this complaint, the Public Prosecutor's Office launched an investigation entrusted to the Prosecutor Musarò, who gradually enrolled in the suspects registry five soldiers of the Carabinieri Corps, Francesco Cavallo, Luciano Soligo, Massimiliano Colombo Labriola, Nico Blanco and Francesco Di Sano, charged according to art. 479.c.p., for an evidences pollution aiming to divert the trials towards to people who had no responsibility. Initially heard by the Rome Public Prosecutor's Office as a person informed of the facts, in February 2019 the Carabinieri brigadier

The common denominator of the cases reported above was therefore the absence of a real discipline at the time that could determine, precisely, which were the cases that could fall under a notion of torture, remains the fact of the violations that have been committed with impunity of Article 3 ECHR, to conduct investigations and facts of torture in a transparent and effective manner.

The condemnation by the European Court of Human Rights will arrive with regard to the 2017 case *Cirino e Renne vs. Italy*, relating precisely to the patterns of mistreatment and torture that take place by police forces but within prison facilities.

The plaintiffs were detained in the Asti district and, following an altercation between a custody officer and Mr Cirino, in which Mr Renne had also intervened, the two had been stripped of their clothes and taken to a cell in the isolation section of the discrict. Inside these cells there was no furniture other than a net without mattress, sheets and blankets. As for the toilets, in the cell there was a Turkish toilet without running water and there was no washbasin. The window of the cell was without glass and the only source of heating was a small radiator, which malfunctioned and provided little protection. from the cold of December.

For several days, which it is not possible to quantify exactly, the applicants were left naked and deprived of food, subsequently supplied in rationed quantities[424]. They were beaten every day, several times a day and repeatedly punched, kicked, and beaten in the head by numerous prison officers, day and night. During their detention in solitary confinement, they had received no visitors and it was not them allowed to leave. Following these episodes, both applicants had been

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general Alessandro Casarsa, at the time commander of the Carabinieri Group in Rome, was also enrolled in the register of suspects charged of art. 479 c.p. Once the investigation was completed, on 14 April 2019 a total of 8 soldiers of the Carabinieri were indicted: Alessandro Casarsa, Francesco Cavallo, Luciano Soligo, Massimiliano Colombo Labriola and Francesco Di Sano for 479 c.p.; Lorenzo Sabatino and Tiziano Testarmata for Art. 361 and 378 c.p., and finally Luca De Cianni for 479 c.p. 368 c.p. The first preliminary hearing was held on 21 May 2019 and, on 16 July 2019, the GUP of the Court of Rome accepted all the requests of the PM and ordered the indictment of all the defendants. The new trial saw the first hearing on 12 November 2019, with the appearance of the civil parties consisting of the Ministry of Defence and the Carabinieri Corps, as well as the Carabinieri soldier Riccardo Casamassima. At that hearing, however, the monocratic judge Federico Bona Galvagno, at the request of the Cucchi family lawyer, abstained because he was retired Carabiniere. The trial will therefore begin probably in 2020 with Judge Giulia Cavallone.

[424] ECHR, n.2539/2013, n. 4705/2013, *Cirino and Renne vs. Italy,* 2017.

hospitalized in hospital with traumatic injuries. As a result of the criminal investigation against the officers, resulting from some phone tapping, five officers had been sent to trial on charges of mistreatment aggravated by the abuse of power.

The Court of Asti had established that the facts had taken place in the manner described by the victims and that the ill-treatment, far from being isolated episodes, was carried out in a systematic manner according to a general practice used against prisoners considered to be problematic[425]. The court also found that there was ample evidence that the custodial officers operated with impunity, due to the acquiescence of the prison management and the complicity between the custodial officers. As for the five alleged perpetrators, one had been acquitted, two acquitted on the grounds of the statute of limitations and only two had been formally charged with ill-treatment amounting to torture. However, as the crime of torture was not covered by the Penal Code, the courts of first instance had led the crime the abuse of authority, in particular for the which, however, the statute of limitations had intervened, so the proceedings had been dismissed.

The court, recognizing the vulnerable situation of the victims[426], qualifies the conduct as torture with consequent substantial and procedural violations of Article 3 ECHR[427], defining that "justice cannot stop at the prison gate[428]". Pursuant to Article 41[429] of the Convention, the Court awarded the applicants the sum of EUR 80,000 each by way of moral damage in addition to EUR 8,000 euros for trial expenses.

[425] Cass pen., sez 6, n.30780, May 2012, rv.253291.
[426] ECHR, *Cirino e Renne vs. Italy, 2017: "The Court once again notes that the applicants were subjected to physicval abuse at all hours of day and night for many consecutive days. Moreover, the physical abuse was coupled with extremely serious deprivations, which must have inevitably accentuated their suffering. In this latter respect, the applicants were subjected to deprivations and rationing of food and water,and were detained in cells with limited or no access to sanitary facilities, appropriate bedding and heating. The applicants were further subjected to gratuitous acts, which must have entailed elements of humiliation and debasement".*
[427] ECHR, Cirino and Renne vs. Italy, 2017.
[428] ECHR, Cirino e Renne vs. Italy, 2017.
[429] Art. 41, ECHR: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The situation of prisoners in Italian penitentiaries has recently become a political debate[430], following the well-known Sulejmanovic[431]and Torreggiani judgements, leading case in a larger body of similar situations, such as the Scoppola vs. Italy[432] case, since it had kept in detention an individual of more than 70 years of age, afflicted from serious illness and who was obliged to stay in bed all day because of a broken femur, in an adequate institute for his health conditions[433]. The ECHR found a violation of Article 3 of the Convention, which implicitly imposes a positive obligation on the State to guarantee humane conditions and medical access[434].

The European Court of Human Rights, with the Torreggiani judgment adopted on 8 January 2013 by a unanimous decision, condemned Italy for violation of Article 3 of the ECHR. The case, as is known, concerns inhuman or degrading treatment suffered by the applicants, seven people detained for many months in Busto Arsizio and Piacenza prisons, in triple cells and with less than four square meters each available. The ruling of the Strasbourg Court defined by the same judges as a "pilot ruling" which dealt with the structural problem of the malfunctioning of the Italian prison system stated that Imprisonment does not make the prisoner lose the benefit of his rights under the Convention.

On the contrary, in some cases, the imprisoned person may need protection because of the vulnerability of his situation and the fact that he is totally under the responsibility of the State. In this context, Article 3 places a positive obligation on the authorities to ensure that every prisoner is detained in conditions compatible with respect for human dignity, that the manner in which the measure is carried out does not subject the person concerned to a state of discouragement or a test of intensity exceeding the inevitable level of suffering inherent in detention

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[430] G. DELLA MORTE, *La situazione carceraria italiana viola strutturalmente gli standard sui diritti umani*, Diritti Umani e Diritto Internazionale, 2013.
[431] ECHR,n. 22635/03, *Sulejmanovic vs. Italy*, 2009. The case concerned a Bosnian prisoner confined at the roman Rebibbia prison, where he was forced to stay in a 16sqm2 cell shared with 5 other people and with permission to leave only for 4 hours a day.
[432] ECHR, n. 10249/2003, *Scoppola vs. Italy case*, 2008.
[433] A. COLELLA, *La Giurisprudenza della Corte di Strasburgo: il divieto di trattamenti inumani e degradanti*, in Diritto Penale Contemporaneo, Milano,2011, pg.241.
[434] Camera dei Deputati, Documentazione per l'esame di Progetti di legge, *Disposizioni urgenti in materia di introduzione del delitto di tortura nell'ordinamento italiano*, 2014, pg.10.

and that, taking into account the practical requirements of imprisonment, the health and well-being of the prisoner is adequately ensured[435].

Overcrowding of prisons[436] in Italy does not only affect the cases of the complainants, the European Court has decided to apply the pilot ruling in view of the growing number[437] of persons potentially concerned in Italy and the infringement judgments to which the appeals in question could give rise. In fact, in many decisions of the Strasbourg courts, it is considered that prison overcrowding generates an automatic violation of Article 3 ECHR if the individual space reserved to the prisoner is less than 3sqm[438]. On the other hand, if the space is between 3 and 4 sqm, the violation can be detected only in the presence of other situations that negatively affect the quality of the stay in prison[439]. The Cassazione interprets the Strasbourg jurisprudence in a favorable way for prisoners, stating that in order to verify the parameters of the European Court of Human Rights, only the area in which the prisoner has freedom of movement must be taken into account, thus excluding beds and furniture.

3.2The Diaz case: Criminal relevance before Law n. 110/2017

The most tragic and ferocious affair in Italian history regarding the violation of Article 3 of the ECHR is certainly the one relating to the G8, which took place in July 2001, culminating in Strasbourg's condemnations for the facts of torture the police committed at the Diaz School. Italy also settled an agreement with other complainants and admitted responsibility for the torturous acts committed in

[435] ECHR, n.43517/09, *Torreggiani and others vs. Italy*, 2013.

[436] Strasbourg Judges, *Torreggiani vs. Italy,* 2013. *"The serious lack of space experienced by the seven applicants for periods ranging from fourteen to fifty-four months - which in itself constitutes treatment contrary to the Convention - seems to have been further aggravated by other treatments reported by the persons concerned. The lack of hot water in the two institutions for long periods, admitted by the Government, as well as insufficient lighting and ventilation in the cells of the Piacenza prison, on which the Government has not expressed an opinion, have not failed to cause the applicants further suffering, although they do not in themselves constitute inhuman and degrading treatment".*

[437] Same situation in ECHR, n.66655/13 *Contrada vs. Italy*, 2015.

[438]ECHR, n,61467/12, n.39516/13, n.48213/13, n.68191/13, *Rezmives and others vs. Romania*, 2017. In this pilot sentence. the Court considers that the conditions of the applicants' detention, also taking into account the duration of their incarceration, have subjected them to hardship going beyond the unavoidable level of suffering.

[439] P. BERNANDONI*, Dalla Corte di Strasburgo nuovi criteri in materia di condizioni detentive e art.3 CEDU*, Rivista Italiana Dir. Proc. Pen.,2017, pg. 345 ss.

the Nino Bixio police station in Bolzaneto[440]. According to Amnesty International, it was «the most serious suspension of democratic rights in a Western country since the Second World War[441]».

In July 2001, Genoa hosted the g8 summit, a meeting of the eight most industrialised countries in the world. The summit began on July 19, presenting immediately several peaceful demonstrations, ended in violence in the following days. The protesters were guided by Vittorio Agnoletto, spokesman for the Genoa Social Forum, a coalition of movements, political parties and societies opposed to capitalist globalisation created in 2000, and had set up their centre for activities in the Diaz- Pertini school[442],building conceded by the authorities for those protesters to use as operative center and shelter[443]. On the day of July 20th, some representatives of the GSF, together with some protesters belonging to the black bloc group, occupied the so-called "red zone[444]". At that time, an isolated Carabinieri truck was attacked, and unfortunately, a protester was killed. It was Carlo Giuliano, hit by a firearm while he was throwing a fire extinguisher towards the means of transport[445].

During the night of the 21st of July, a group of armed forces (Carabinieri and police men) unit assaulted the Diaz-Pertini school and attacked the activists inside, as well as several journalists, justifying the search of premises and all the arrests on the basis of fake evidences[446].Police justified themselves to have acted according to Art. 41 of TULPS[447] , but the video footages that were later brought

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[440] *G8 di Genova, Italia patteggia a Strasburgo con le vittime di Bolzaneto*, rainews.it, 2017.
[441] M.JANSEN, I. LANSLOT, *Dalla parte del noir: l'oscurità immensa del g8 a Genova nel 2001*, Noir de Noir: un'indagine pluridisciplinare, by D. VERMANDERE AND M. MONICA,2007, pg.73.
[442] Italy condemened for g8 torture- ECHR urges introduction of anti-torture law, Ansa,it, Strasbourg, 2015.
[443] M.PICCHI, *The condemantion of the Italian State for violation of the prohibition of torture*, Journal of Law and Social Science, 2015, pg. 28.
[444] In those days, Genova was divided into three zones: the red zone, concomitantly to the city centre and places of the summit; the yellow zone, considered controlled area; white zone, area not covered by police control.
[445] *G8, tragedia a Genova*,La Repubblica, 20 July 2001.
[446] Y. MACCANICO, Italy, *making sense of the of the. Genova g8 trials and aftermath*, in Stateswatch Journal, Volume 18, n.4. In this context, police said they found some *molotovs* inside the school, but according to the Geneva Court of Appeal those bottles were intentionally reallocated there in order to justify the violence.
[447] Art. 41 of TULPS (Testo Unico Leggi di Pubblica Sicurezza) allows the officers and officers of the Criminal Investigation Police to have the power, even if by clue, of the existence, in any public or private premises, of weapons, ammunition or explosive materials, not reported or not delivered or otherwise,to proceed immediately to search and seizure.

to Court demonstrated that the use of force was «arbitrary, disproportionate and not necessary»[448].

Of the 63 wounded, three had important prognosis[449]: the 28-year-old German student of Melanie Jonasch, victim of a brain trauma, various cranial bruises, multiple contusions to the back, shoulder and right upper limb, fracture of the left mastoid, bruises to the back and buttocks; the German Karl Wolfgang Baro, head trauma with venous hemorrhage; and the English journalist Mark Covell, left hand and 8 fractured ribs, perforation of the lung, hemithorax trauma, shoulder and humerus, in addition to the loss of 16 teeth[450], whose beating, which occurred halfway between the two schools, was recorded in a video.

After these atrocious events, criminal proceedings were initiated by the Public Prosecutor of Genoa. During the preliminary ruling, Mr. Cestaro brought a civil action against the police officers suspected of having committed those acts[451].At that time, the applicant was 62 years old, and he affirmed that he was repeatedly beaten by the police officers, even though he didn't react, throwing himself to the ground[452]. In his testimony, he recalled the atrocious measures applied to those who were inside the school, which included temporary detention in humiliating circumstances and being subjected to brutal physical violence. Additionally, Mr. Cestaro brought one complaint before the European Court of Human Rights in 2011, claiming the violation of Art. 3 ECHR, suffering ill-treatments by the policemen[453].

In 2004, twenty-eight individuals were put on trial.[454] In the same year, Arnaldo Cestaro brought a civil action before the Court, along with others who had been subjected to ill- treatments. The charges brought against the suspects were of

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[448] G. TAFFINI, *L'infame crociuolo della verità, uno studio sulla tortura*, Key Editore, Italy,2015, cit.pg.72.
[449] Y. TROFIMOV, I. JOHNSON, A. PUGLIESE, *G-8 Protesters Say They Were Beaten, Deprived of Rights by Police in Italy*, in The Wall Street Journal, 6 agosto 2001.
[450] M. PREVE, *"Ho finto di essere morto continuavano a picchiarmi"*, in la Repubblica, Genova, 27 luglio 2001.
[451] C. PEZZIMENTI, *Nella Scuola Diaz-Pertini fu tortura: La CEDU condanna l'Italia nel caso Cestaro*, in Giurisprudenza Italiana, 2015, pg. 1709..
[452] C. PEZZIMENTI, *Nella Scuola Diaz-Pertini fu tortura: La CEDU condanna l'Italia nel caso Cestaro*, in Giurisprudenza Italiana, 2015, pg. 1710.
[453] *G8 Genova, Strasburgo condanna l'Italia per tortura,* Rai News, 2015.
[454] ECHR, Cestaro vs. Italy, n. 6884/2011.,2015.

abuse of power, defamation, violence, falsification of documents and illegal licence to carry fire arms[455].

There was the first-degree judgement in 2008, which absolved the majority of the suspects. Only twelve of the suspected individuals were convicted by the Court of Genoa awarding Cestaro 35,000 Euros in damages and asserting that in a state governed by the rule of law it is indeed not acceptable that precisely those who should be the guardians of law and order should bring actions of such magnitude, even in situations of particular stress[456]. They were given penalties that varied from two to four years of imprisonment, and they were banned from holding public office for the entire duration of the penalty[457]. The penalties were decided on the basis of a series of mitigating circumstances taken into consideration by the Court, such as the fact that the authors of the crime did not have any criminal record, and that they acted under a situation of stress.

With the judgment of the second instance, the Court of Appeal of Genoa reformed the previous judgment and condemned all the top police officers who had been acquitted, for a total of 25 convictions out of 28 defendants[458]. The Court of Appeal firstly affirmed that the case could not be proceeded against some of the accused, because of the statute limitation of the crimes[459]. The remaining suspects were acquitted; however, the same individuals were later on convicted by the Court of Appeal of Genoa, counting a total of a 100 years of prison sentence for the twenty-five police officers.

The Court, departing from the grounds of the Court's judgment, stated that it was not possible to describe the facts in question as the sum of individual criminal acts committed by operators independently of each other in the grip of low uncontrolled instincts; on the contrary, it is a matter of concurrent conduct by individual agents kept in the knowledge that they would have done the same and were doing the same by their colleagues, consistent with the motivations received

[455] ECHR, Cestaro vs. Italy, n. 6884/2011,2015.
[456] Tribunale di Genova, n.4252/2008.
[457] ECHR, Cestaro vs. Italy, n. 6884/2011,2015.
[458] Genova Court of Appeal, n.1530/2010.
[459] C. PEZZIMENTI, *Nella Scuola Diaz-Pertini fu tortura: La CEDU condanna l'Italia nel caso Cestaro*, in Giurisprudenza Italiana, 2015, pg. 1710.

from their hierarchical superiors and with the explicit assignment to use force to carry out the break-in and raid aimed at arresting dangerous violent subjects, without any prior or subsequent form of control over the use of such force[460].

Moreover, the Court of Appeal recognized compensation for damages limitedly to those who brought on civil action in the first degree. The Court of Appeal noted that it was highly unlikely that the events had occurred spontaneously, considering that the police force had started beating the victims before even entering the Diaz-Pertini. On the contrary, the evidence pointed to the conclusion that the acts were brought with the permission and consent of their superiors, who had allowed the police unit to use force to enter the building and to arrest the allegedly dangerous individuals[461].

The third degree before the Court of Cassation occurred in 2012. The defendants, the Attorney General of the Court of Appeal of Genoa and some of the victims brought on the appeal in Cassation against the appeal sentence. During the various hearings, the Attorney General rejected the request of Genoa's Public Prosecutor to consider the crimes as torture, which at that time did not exist in the Italian judicial system, considering the mas crimes of harm.

The Italian Court of Cassation reconfirmed the appealed sentence, declaring that the crime of violence, for which almost all defendants had been charged with, was statute-barred[462], remarking with strong and clear words that «the violence, generalized in all environments of the school, was unleashed against people at the evidence helpless, some dormant, others already in an attitude of submission with their hands raised and, often, with their sitting position clearly

[460] Genova Court of Appeal , n.1530/2010: « *The responsibility of such conduct and, therefore, of the injuries inflicted, is, therefore, recognisable in the hands of the managers who organized the operation and who led it on the field with the modalities and purposes described above [...] why unleash such a significant mass of armed men charging them to break through the entrances and raid the school with the motivation that the dangerous Black Blocs who, in the previous days, had set the city of Genoa on fire and had made a mockery of the Police, without providing a clear and specific assignment on the c.d "security" or any limit aimed at distinguishing the subjective positions, means having the certain awareness that such a mass of agents, as one man, would have at least physically and indiscriminately attacked the people inside, as in fact happened without any sign of surprise or regret expressed by any of those present in front of the evidence of the massacre».*

[461] M. CALANDRI, *Torture e impunità nell'inferno di Bolzaneto*, La Repubblica, 2008.

[462] C.di Cassazione, n.38085/2012.

waiting for instructions, so that it could be said that it was unjustified and punitive violence, vindictive and directed to the humiliation and physical and mental suffering of the victims[463]». According to the Court, these violent acts could be defined as torture under the UN Convention Against Torture, or as inhuman and degrading treatments under the European Convention.

With the sentencing of the case *Cestaro v Italy* of April 2015, the European Court of Human Rights was able to reassess the events of the G8 of Genoa, finding Italy guilty of contravening Article 3 of the ECHR[464]. The plaintiff denounced that he had been subjected to violence and ill- treatments by police forces, in the night between the 21st and the 22nd of July 2001[465]. He contested that the cruel and violent acts inflicted on him were unjustified and that he did not oppose to them, constituting an abuse of power without deprived of justified foundation[466].

In the complaint lodged in January 2011, Mr. Cestaro had contested violations of Articles 3, 6 and 13 of the ECHR, claiming that those who were responsible had not been punished adequately[467], particularly because of the consequences of the statute limitation and of the pardon envisioned in law 241/2006.

However, Italy responded to the plaintiff that the Italian judiciary system was adequate to punish acts of torture, based on the introduction of Article 185-bis in the Criminal Military Code in 2002, but, according to the Strasbourg Court, Italy did not have a proper legislation for preventing and stigmatizing the crime of torture, especially when it committed by the police forces, remarking violations of Art.3 of the ECHR, both substantially and procedurally[468]. The Court went on to

[463] C.di Cassazione, n.38085/2012.
[464] ECHR, Cestaro vs. Italy, n. 6884/2011.2015.
[465] C. PEZZIMENTI, *Nella Scuola Diaz-Pertini fu tortura: La CEDU condanna l'Italia nel caso Cestaro*, in Giurisprudenza Italiana, 2015, pg. 1709.
[466] M. PICCHI, *The Condemnation of the Italian State for violation of the prohibition of torture,* Journal of Law and Social Science.
[467] *Scuola Diaz, Blitz della polizia fu tortura- Corte Europea condanna l'italia*, Il Fatto Quotidiano,2007.
[468] G. TAFFINI, *L'infame crociuolo della verità, uno studio sulla tortura*, Key Editore, Italy, 2015, pg.80.

reject all the objections that had been made by the Italian government as a justification for the events and stated that the responsibility was of three types[469].

For what concerns the substantial violation of Article 3, it defined the acts such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance[470]. The ECHR concluded that the acts had been committed with a punitive intent, and that they had caused serious and permanent injuries on the complainant[471]. Many video footages had been destroyed, and, as said before, two Molotov bombs had been planted as false evidence[472]. As a result, the facts indicated that the ill-treatments were contrary to human dignity, therefore falling under the notion of torture.

According to the Court the only issue was to understand if the acts constituted torture, or if they could be qualified as mere inhuman and degrading treatments[473].

The Cestaro sentence underlines that, to establish if an act qualifies as torture, it is important to evaluate the «inhumanity of the act and the capacity to cause sufferings», evaluating sex, duration and health status of the victim. Evidences gathered during the investigations pointed out that there was a deliberate will of police to harm, so the ill-treatments endured by the plaintiff integrated the crime of torture[474]. Secondly, the Court, considered the valid and founded also the procedural violations of Art.3 [475]. The ECtHR pointed out that procedural obligations imposes to States the duty to carry out effective investigations, identify, prosecute and punish with sanctions those who are guilty or suspected of inhuman treatments. The ECHR also underlined that the Italian government had not yet

[469] ECHR, *Cestaro vs. Italy,* n. 6884/2011.,2015.
[470] ECHR, *Cestaro vs. Italy*, n. 6884/2011.,2015. Same reasoning was made also in the *Ireland vs. UK case.*
[471] G. TAFFINI, *L'infame crociuolo della verità, uno studio sulla tortura*, Key Editore, Italy, 2015, pg 78.
[472] G. TAFFINI, *L'infame crociuolo della verità, uno studio sulla tortura*, Key Editore, Italy, 2015, pg 79.
[473] M. PICCHI, *The Condemnation of the Italian State for violation of the prohibition of torture, Journal of Law and Social Science*, pg.28.
[474] ECHR, *Cestaro vs. Italy,* n. 6884/2011.,2015
[475] C. PEZZIMENTI, *Nella Scuola Diaz-Pertini fu tortura: La CEDU condanna l'Italia nel caso Cestaro*, in Giurisprudenza Italiana, 2015, pg. 1712.

suspended from duty and trial, and if convicted, should be permanently removed. Italy did nothing of the sort, without giving any plausible justification.

Finally, the Court pointed out another hole in the procedural and structural aspect of the issue, defining the structural problem[476] as a lack in the system and not related failures of the single case[477] . According to the ECHR, a mere compensation was not enough to set up for the damages caused to the victims: it was also necessary to punish those who were responsible. From this perspective, Italy has been found guilty of lacking an express norm that prohibits torture and of not introducing adequate procedural dispositions.

In fact, Article 19 of the ECHR states that even though it is up to national judicial authorities to condemn the authors of torture, the Court has an obligation to intervene when it finds an important, lawful and unjustified difference between the act and the penalty. Additionally, if the crime is committed by a state official or other public authority, pardon cannot be permitted, and the proceeding cannot become extinct through the statute of limitation.

The Court examined the applicability of Article 46 of the Convention to the case, enshrining that The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties, evidencing that if a State it has the obligation to adopt the general measures to end the violations. the Court also stated the urgent necessity of the Italian judicial system to adopt appropriate provisions to punish the authors of torture and other forms of inhuman and degrading treatment[478]. On April 2015, the Strasbourg judges condemned Italy for violating Article 3 of the ECHR[479].

The G8 affair has brought Italy another 3 convictions for torture with the appeals filed by Gallo Bartesaghi (and others), Blair (and others) and Azzolina (and others). Gallo Bartesaghi concerns the same violations occurred in the Diaz-Pertini

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[476] G. ZAGREBELSKY, *Violazioni strutturali e Convenzione europea dei diritti dell'uomo, interrogativi a proposito di Broniowsky,* Dir.um.dir.int., 2008/2, pg.5.
[477] B. NASCIMBENE, *Violazione "strutturale", violazione "grave" ed esigenze interpretative della Convenzione europea dei diritti dell'uomo*, Riv. Internaz. Priv. Proc. 2006, pg.645.
[478] G. TAFFINI, *L'infame crociuolo della verità, uno studio sulla tortura*, Key Editore, Italy, 2015, pg 82.
[479] *Reato di Tortura, da Strasburgo un'altra condanna all'Italia per la Diaz*, La Repubblica, 2017.

and Pascoli school, while Azzolina and Blair concern the treatment suffered by the complainants in the barracks of Bolzaneto. In the Bartesaghi case, most of the victims were hit with a truncheon and some with kicks and punches. Two cases are particularly serious, having suffered a weakening of chewing and respiratory function of about thirty percent[480].

Mr Blair, was arrested during the police raid on the Diaz-Pertini school) and then taken to the barracks in Bolzaneto on 22 July 2001, around 5 a.m. He indicates that, at his arrival, an officer drew a red cross on his cheek with a marker. During the search on his body, he would have been slapped in the face and would have been forced to undress in the presence of officers and do push-ups. Together with the other occupants of the cell, he would have been deprived of sleep, as some officers shouted and laughed loudly in the hallway or underwent numerous unscheduled identity checks[481].

On July 20, Mr Azzolina was kicked and sprayed with irritating gas during a police charge near Via Tolemaide. Transported to the hospital because of an open head wound, he was treated before being taken with other people to the Bolzaneto barracks in an armoured vehicle. Placed together with other people against a wall, he was threatened, insulted and beaten. A police officer took his hand and violently spread his fingers between his third and fourth finger, causing a deep tear[482].

Threatened to be beaten again if he moved or complained, Mr. Azzolina suffered a suture of the wound without anaesthesia. Afterwards, the victim and other arrested persons were forced to undress before being taken to cells where they were beaten on the wounds at close intervals. The complainant was released the next day, at 2 a.m., after being forced to pass between two rows of law enforcement officers who beat him with every means at his passage. Mr Azzolina suffered injuries to a hand, head and leg, and various contusions[483].

In these cases, too, the infringement of Article 3 was claimed by the Strasbourg court, citing all the provisions and grounds relating to the previous

[480] ECHR, *Bartesaghi and other vs. Italy*,2017,12131/2013 and 43390/2013.It is evidenced that 78 were recovered in hospital due to the injuries reported.
[481] ECHR, *Blair. Vs. Italy*,2017, 1442/2014.
[482] ECHR, *Azzolina and other vs. Italy*, 2017, n. 28923,2009.
[483] ECHR, *Azzolina and other vs. Italy*, 2017, n. 28923,2009.

Cestaro judgment. The treatment suffered by the appellants therefore constitutes, on the basis of a unanimous decision, a form of torture, in consideration of its particularly serious nature, the situation of the victims' psychological and physical suffering and the specific aims pursued by the police in the occasion[484].

Both the substantial and procedural violations of Art. 3 ECHR, have made the Italian affair defined as a place of «non-droit[485]». This affair marks a dark page in the history of our country, but it also represents a «fundamental step towards the introduction of the crime of torture into our criminal system»[486].

3.3 The 41-bis regime and the Viola case: The inhumanity of the "carcere ostativo"

The numerous judgments of European origin effectively ordered Italy to adopt appropriate measures given the vulnerability of the situation of detainees. With imprisonment, the detainee does not lose the rights enshrined in the Convention; on the contrary, "it would not be tolerable to continue legislative inertia in relation to the serious problem identified", and, in case of legislative inertia to "take the necessary decisions aimed at ending the execution of the sentence under conditions contrary to the sense of humanity [487]».

The most important measures are those that tend towards a concrete solution to the problem, through decriminalisation and revision of the penitentiary system, not forfetting the sanctions system. They assume importance with regard to the compensation of damages suffered by the detainee for injury to human rights under Law 92 of 2014, introducing preventive and compensatory remedies to art. 35 bis and ter, also replacing paragraph 6 of art. 69. Before the introduction, in fact, our system did not provide for any right of the abused prisoner to obtain

[484] ECHR, *Bartesaghi and other vs. Italy*,2017, 12131/2013 and 43390/2013.
[485] ECHR*, Blair. Vs. Italy,*2017, 1442/2014.
[486] E. SCAROINA, *Il delitto di tortura, l'attualità di un crimine antico*, Cacucci Editore, Bari,2018, cit,pg 116.
[487] C.Cost, n.23 ,2013.

compensation for the damages suffered[488]. Law no. 103 of 23 June 2017 introduced deflationary measures, conferring other government delegations[489] for the reform of the penalty system. For example, it introduced the extinction of the crime for restorative conduct ex Art. 162-ter and the increase in the possibilities of access to alternative measures of detention.

Within our prisons, particular types of inmates are subject to what is commonly referred to as "*carcere duro*", namely the regime of Article 41-bis, which has grown exponentially since its introduction, rising from 473 subjects in 1993 to 730 in 2015[490], arriving with 729 in 2017[491]. The provision was introduced by the so-called Gozzini Law, which amended Law no. 354 of 26 July 1975 on the Italian penitentiary system. It was originally applicable only to cases of emergency within prisons, but later, after the Capaci massacre in May 1992 in which Giovanni Falcone, lost his life, a second paragraph was added to the article by decree-law no. 306 of 8 June 1992(Martelli-Scotti), converted into law no. 356 of 7 August 1992.

With the new provision, in the presence of "serious reasons of public order and security", the Minister of Justice was allowed to suspend the guarantees and institutions of the penitentiary system, in order to apply "the necessary restrictions" against those detained for mafia, with the objective of preventing the passage of orders and communications between the criminals in prison and their organizations on the territory .The question is whether the measure in question may constitute a violation under Article 3 of the ECHR. It should be recalled that the applicability of Article 41-bis is limited to: "exceptional cases of riots or other emergency situations" or "serious grounds of public policy and public security". In addition, the subject has reductions to meetings with family members, censored evaluation of the correspondence, as well as the procedures for participation in the hearings related to the proceedings in which the detainee is accused.

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[488] F. VIGANÒ, *Alla ricerca di un rimedio risarcitorio per il danno da sovraffollamento carcerario: La Cassazione esclude la competenza del magistrato di sorveglianza*, in Diritto Penale Contemporaneo, 2013.

[489] A.DELLA BELLA, *Riforma Orlando: la delega in materia di ordinamento penitenziario*, penalecontemporaneo.it, 2017.

[490] A. Della Bella, *Il "carcere duro"*in Diritto Penale Contemporaneo, pg. 197,2017.

[491] Numbers stated by the Garante Nazionale dei diritti delle persone detenute o private della libertà personale, submitted to the Chamber of Deputees in 2017.

It is further appropriate to point out that judicial practice has recognised the usefulness of the institute for the destructive force it has of the associative bond dictated by art. 416 bis, a crime which represents an attack to public order[492]. The instrument, in fact, in addition to having a strong sanctioning character, «favours the collaboration with the judicial authority»[493] of the subject subjected to the regime, in order to see the penalty reduced. The EDU court, has always recognized the compatibility of special detention regimes with Article 3 ECHR, having been called several times to rule on Article 41-bis, starting from the *Labita v. Italy* case and therefore the threshold of gravity necessary to be qualified as torture is not reached[494].

Even more decisive was also the pronunciation regarding the *Enea vs. Italy* case, where it was recognized the compatibility of the "*carcere duro*" of a prisoner in very serious health conditions[495]. The condition is, therefore, that of balancing the interests of security with those of the individual, delimiting the exceptionality and danger of the subject with a detention which does not decisively compromise his physical or psychic integrity, trying not to aggravate *"imprisonment within the imprisonment[496]"*. A particular knot is the one concerning the duration of the measures provided for in Article 41-bis, which is de facto indefinite since it may be renewed every two years[497].

Also, the CPT has various times examined the conditions of detainees in 41-bis regime, taking into account also the political reasons at the basis of its introduction. Before the introduction of the 2002 reform of the discipline, according to the CPT «It was evident that, for a considerable number of 41-bis prisoners- if not virtually all of them- application of this detention regime had been renewed automatically; consequently, the prisoners concerned had for years been subject to a prison regime characterised by an accumulation of restrictions, a situation which

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[492] P. ARDITO, *Il "carcere duro", tra efficacia e legittimità. Opinioni a confronto, in Criminalia*,2007, pg. 250.
[493] M.G. COPPETTA, *Carcere duro o trattamento inumano*, in A.Giannelli, M.P. Paternò, *Tortura di Stato*, 2004,cit., pg.224.
[494] ECHR,n. 26772/85,*Labita vs. Italy* , 2000.
[495] ECHR, n.74912/01, *Enea vs. Italy*, 2009.
[496] E. SCAROINA, *Il delitto di tortura: L'attualità di un crimine antico*, Cacucci Editore, 2018, cit. pg.141.
[497] In the case *Enea vs. Italy*, the 41-bis regime was renewed nineteen times, for one and a half consecutive periods.

could even be tantamount to a denial of the concept of penitentiary treatment, which is an essential factor in rehabilitation[498]».

Instead, at the end of the 2006 visit the CPT concentrated more on the concrete implementation of the measure, with regards to the solitary confinement regime and the substantial absence of relations with family or even with penitentiary police[499].

After analysing the various hypotheses of possible violations of the prohibition of torture in prisons, the institute of the so-called life imprisonment of the prisoner deserves express mention, which is valid for drawing who, sentenced to life imprisonment for certain crimes provided for by Article 4-bis[500] of the Penitentiary Code, does not intend to give significant[501] collaboration, intended as an effective aid to verify the crimes, in the ways indicated by Article 58-ter[502] of the same code. The refusal to collaborate, in fact, eliminates certain benefits to the convicted person, such as work outside the prison, "*permessi premio*", semi-freedom and also will not be able to access to "*liberazione condizionale*" under Article 176, paragraph 3 of the Criminal Code, without prejudice to the possibility of "*permessi di necessità*[503]".

The possibility of a constitutional incompatibility contrary to Art. 27.3of the Constitution immediately arises. The Constitutional Court has given more importance to the finalities of general prevention and security of the community, in fact, such discipline does not absolutely preclude the loss of benefits, because the condemned person can always and in any case, change his choice[504], redeem himself and, therefore, act against the criminal association itself, collaborating with the judicial authority.

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[498] CPT/Inf (2010)12(Italia, P. 82).
[499] CPT, Report to the Italian Governement on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishement from 8 to 21 April 2016, Strasbourg, 2017. CPT/Inf 2017, 23, P. 45-54.
[500] Are inserted particularly crimes contemplated by art. 41-bis, such as 416 bis and ter c.p.; 600,600 bis co.1, 600 ter co.1 and 2, 601,602, 609 and 630, regarding laws on immigration and stranger conditions.
[501] C.RUGA RIVA, *Il premio per la collaborazione processuale*, Milano, 2002, pg.12.
[502] Series of rules and procedures in order to collaborate with the judicial authority.
[503] Enshrined in art. 30 of the Penitentiary Code, gives the possibility to get out of jail for exceptional cases, like severe familiar problems or if a familiar's life is in big danger.
[504] C.Costituzionale, n.135, 2003.

With regard to the constitutional legitimacy of Article 4bis, the Constitutional Court dealt specifically with this issue in its judgment No 306 of 11 June 1993. It highlighted the choices of criminal policy of the legislator, observing how the latter, subordinating access to conditional release and any other benefit to the collaboration of the detainee, wanted to give explicit priority to the general prevention and protection of the community, through the requirement of the collaboration of the members of the mafia associations, which, in the context of the fight against organized crime, represents a capital instrument for the activities of the investigative authorities[505].

The doctrine has not hesitated to pronounce itself strongly criticizing the interpretations given by the Court, because «there is silence and silence[506]»: the prisoner could in fact decide not to cooperate because he is afraid for the safety of his family or to expose them to criminal proceedings[507].There is therefore a misunderstanding: the principle *nemo tenetur se detegere*, guaranteed during the preliminary investigation phase and throughout the trial process, turns into a sort of duty to cooperate, with negative and unpleasant consequences for the convicted person[508]. The theme which, however, is relevant for the purposes of the elaboration is on the compatibility of this perpetual punishment with the principle posed by Art. 27.3 and, therefore, on the traceability to treatments contrary to the sense of human beings, including torture.

The CPT, in its 2017 report on Italy, found the situation to be in conflict with Article 27.3 of the Constitution, which could result in torture, inhuman or degrading treatment. In fact, the Committee considers inhuman to keep a person in prison without the concrete possibility that he or she could regain his or her freedom in the event of rehabilitation, arguing that a person sentenced to life imprisonment is considered once for and for all to be dangerous and is deprived of any hope of conditional release (except on compassionate grounds or by pardon)[509].

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[505] C.Costituzionale, n.306,1993.
[506] A. PUGIOTTO, *Come e perché eccepire l'incostituzionalità dell'ergastolo ostativo. Dalle pagine di un libro a Palazzo della Consulta*, in Diritto Penale Contemporaneo, 2016, cit, pg.30.
[507] L. EUSEBI, *Ergastolano «non collaborante»*, 2012, cit. pg.1224.
[508] L.FILIPPI, G. SPANGHER, *Manuale di diritto penitenziario*, Giuffrè, 2016, cit. pg238.
[509] CPT, *Situation of life-senteced prisoners. Extract from the 25th General Report of the CPT, published in 2016*, CPT/Inf,10-part, 2016.

The Grand Chamber of Strasbourg also reiterated the cornerstones of the case law on the subject, considering life imprisonment compatible with the provisions of Article 3 ECHR but domestic law has to provide review mechanisms to verify the need for imprisonment, assessing the importance of the possible re-education of the sentenced person[510]. In this view, the institution ends up being a life imprisonment aggravated by the fact that, if the subject did not cooperate, there would be no possibility of recovery, clear representation of violation of human rights that integrates inhuman and degrading treatment[511].

The first signs in the direction of the possible overcoming of the situation are to be attributed to the work of the Commissione Palazzo, in charge in 2013 of to draw up a draft reform of the penal system. Among other proposals, the Commission inserted that of hypothesizing a further alternative to the useful and inexigable cooperation, with the addition to paragraph 1 bis of Article 4 bis of Penitentiary Code of the phrase and also in cases where it appears that the lack of cooperation does not excludes the existence of conditions, other than the collaboration itself, that allow the abovementioned benefits to be granted[512]. With such a formulation, any element capable of providing positive elements of detachment from the criminal groups of origin would have been capable of overcoming the need for collaborative conduct[513]. On the 13th of June 2019, the sentence received by Italy from Strasbourg concerning the situation regarding Marcello Viola, will probably overturn the future italian case-law and orientation.

At the origin of the case there is an action brought against the Italian Republic by a national, Mr Marcello Viola, who, on 12 December 2016, brought an action before the Court in accordance with Article 34 of the ECHR. The applicant, in the so-called first Taurianuova trial was held responsible for association crimes with the title of promoter (and consequent sentence to twelve years' imprisonment by the Palmi Assise Court. In in a second trial the so-called Taurus trial the applicant was sentenced to life imprisonment, either by mafia-type association and

[510] ECHR, n.57592/08, *Hutchinson vs. UK.,2017*. The Court on the basis of international consensus, gives a time reference for the review in 25 years.
[511] COUNCIL OF EUROPE*, Treatment of long-term prisoners*, Strasburgo, 1977, pg. 22.
[512] In penalecontemporaneo.it/upload/commissione_palazzo.
[513] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola c. Italia in materia di egastolo ostativo*,online at giurisprudenzapenale.com,2019, pg. 3.

by various disputed murderous acts. The term of imprisonment was later commuted to life imprisonment with daytime isolation for two years and two months.

In March 2015, the appellant requested the granting of "*liberazione condizionale*", which was rejected by both the Supervisory Court and the *Corte di Cassazione* because, according to the Court, the specific condition of the termination of the ties with the organisation to which the appellant belonged had to be expressed through an activity of collaboration with the judiciary;

Within six months of the rejection of the conditional sentence, Viola appealed to the European Court, alleging multiple violations: Infringement of Article 3 of the Convention on the grounds that life imprisonment would be penalty which is not compressible, in breach of the principle of proportionality and social reintegration; infringement of Article 3 of the Convention from a procedural point of view, since the mere declaration that the application was inadmissible prevented a real evaluation of its merits and for the lack of access to generics "preliminary findings" to which the internal pronouncements had referred[514]; Infringement of Article 5(4) of the Convention because the domestic legal system does not guarantee an appeal for the verification of procedural conditions. and substantive legitimacy of the restrictive measure; Infringement of Article 6(2)[515] as regards the presumption of innocence and the principle of *nemo tenetur se detegere* also in the executive phase; Infringement of Article 8[516] in the sense of coercion of the cooperation of those who proclaims innocent, with exposure to serious risk of the applicant and his own family.

In the legal and jurisprudential framework referred to, it is appropriate to make a brief mention of the exceptions raised by the Government. Apart from the initial exception concerning the applicant's failure to qualify himself as victim, the Italian State pleaded that the internal legal remedies had not been exhausted on the

[514] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola c. Italia in materia di egastolo ostativo, 2019*, online at giurisprudenzapenale.com pg. 3.
[515] ECHR, Art. 6.2: «Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law».
[516] ECHR, Art.8.1: «Everyone has the right to respect for his private and family life, his home and his correspondence».

ground that, although the applicant claimed to be innocent, he did not use the instrument of the "*revision*" to assert its reasons.

The Court rejected the exception, assessing the special nature of the extraordinary remedy indicated, the characteristics of which are not in any way suited to the situation of the government defenses. The first one, concerns the characteristics of the mafia phenomenon, an argument which, also in past has made a great impact on the case law of the European Court of Justice, if it is considered that the Court has never identified as a violation the existence in itself of the differentiated regime pursuant to Article 41 bis and, even when approached for specific situations of the applicants, who complained about the application of a inhumane and degrading treatment of themselves for reasons related to the own state of health[517]or the continuation of the differentiated regime for a duration so long as to constitute in the applicant's hypothesis, an infringement of Article 3 always rejecting the complaints, holding that the threshold of gravity required for a material breach of that article was not exceeded.

The further complaints specifically relating to contacts with family members, searches or the handling of trials by videoconferencing, were also rejected, as the Court considered that they were proportionate to the security objective pursued by the differentiated regime precisely on the basis of the specificity of the mafia phenomenon. However, when the procedures for the application of the detention regime appeared, from the reconstruction of the fact offered by the plaintiff, to be particularly vexatious, the procedures before the European Court of Justice clashed with problems related to the failure to exhaustion of internal appeals[518].

The difference between 4bis and 41bis plays a key part and focuses on the development of the Government's argument: on one hand, the termination of the differentiated regime showed that the applicant no longer had the capacity to maintain links with the organisation he belonged to from prison, but on the other

[517]See. ECHR, Enea vs. Italy, 2009, n. 74912/2001.
[518] See.*ECHR Riina vs. Italia*,2003, n.43575,2009. in. A. MORI, *Prime osservazioni sulla sentenza Marcello Viola in materia di egastolo ostativo*, online at giurisprudenza penale, 2019, pg.5.

hand 4bis would still require further positive evidence of the break in links with the organisation[519].

Moreover, according to the Government, life imprisonment would not be an incompressible punishment, since the detainee could have access to "*liberazione condizionale*", in particular through the institutions of "*impossibile*" and "*inesigibile*" collaboration, stating that the choice of collaboration would not derive from a legal automatism, but from an autonomous evaluation of the person concerned. The one and only collaboration would be the objective indicator of the rejection of criminal values and would justify the legislative choice to make the needs of general prevention and protection of society prevail[520].

The Government pointed out the two other alternatives: the presidential pardon and the possibility of suspending the execution for health reasons[521]. And, finally, it pointed out that prisoners under perpetual hostile punishment would also be offered the possibility of working inside the prison, through an ad hoc individualisation of prison treatment.

The Court notes that domestic legislation does not absolutely prohibit access to "*liberazione condizionale*" but makes the cooperation essential and *sine qua non* condition. Starting from Constitutional Court ruling 313 of 1990 and the central function of the resocialization of the punishment, the Court recalls that protection of human dignity prevents a person from being deprived of his or her liberty without simultaneously intervening for the reintegration of the same person and without providing the possibility of being released[522].

It is a positive obligation already highlighted in other judgments[523] of the European Court itself. Therefore, while recognising the possibility for states to introduce presumptive mechanisms with respect to the evaluation of the dangerousness of those convicted of serious crimes, the Court assesses whether the

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[519] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola in materia di egastolo ostativo*, online at giurisprudenza penale, 2019, pg.6.
[520] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola in materia di egastolo ostativo*, online at giurisprudenza penale, 2019, pg.6.
[521] Regarding the suspension emblematic is the ruling of ECHR Provenzano vs. Italy,2018, n. 55080/13.
[522] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola in materia di egastolo ostativo*, online at giurisprudenza penale, 2019, pg 7.
[523] ECHR,*Harakchiev and Tolumov vs. Bulgaria*,2014, n. 15018/11 and 61199/12.

need to demonstrate the breaking of links with particularly criminal associations through collaboration is compatible with the principle of the possibility of reviewing the sentence through an evaluation of the treatment.

The negative answer is related to the fact that maintaining the equivalence between non-cooperation and permanence of social dangerousness means anchoring the assessment of dangerousness at the time of the commission of the fact «*without taking into account the path of reintegration and the progress made during the execution*»[524]. In relation to the choice to cooperate with the judiciary, «*the Court doubts of the freedom of the aforementioned choice and also of the opportunity to establish an equivalence between the lack of collaboration and the social dangerousness of the convicted person*[525]»

Provided that the personality of a convicted person evolves and and does not remain blocked when the crime is committed, with the possibility of critically reviewing his criminal path[526], the prisoner has the right to know under what conditions a release is foreseeable and what he has to do to obtain it[527] .

The Strasbourg Court, on the merit of case and regarding the eventual violation of Art. 3 of the Convention, it unanimously rejects the Government's objection concerning the appellant's classification as a victim; Declares the action admissible; and decided, six votes to one, that there has been a violation of Article 3 of the Convention. Furthermore decided, six votes to one, that the finding of the violation constitutes in itself sufficient equitable satisfaction for the harm moral suffered by the plaintiff[528].

Interesting is the dissenting option of judge Wojtyczek. The first sentence of Article 2.1 of the Convention requires States not only to refrain from causing death in a voluntary and illegal manner, but also to take the necessary measures to protect the lives of persons subject to its jurisdiction, and that, in this respect, the obligation of the State implies the primordial duty to ensure the right to

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[524] A. MORI, *Prime osservazioni sulla sentenza Marcello Viola in materia di egastolo ostativo*, online at giurisprudenza penale,2019, pg 7.
[525] *ECHR, Viola vs. Italy*, 2019, n. 77633/16.
[526] ECHR,*Murray vs. The Netherlands*, 2016, n. 10511/10.
[527] ECHR,*Vinter and others vs.UK* ,2013. n. 66069/09.
[528] ECHR,Viola vs. Italy, 2019, n. 77633/16.

life, by putting in place a legal and administrative framework capable of deterring violations against the person, based on a mechanism of prevention, repression and sanction of violations. This obligation concerns in particular protection against crime.

The High Contracting Parties have the obligation to adopt effective measures to dismantle the criminal organisations which constitute a threat to people's lives. To achieve this goal, it is crucial to destroy the solidarity between the members of such organisations,and break the relative law of silence[529]. National authorities they must take appropriate measures, taking into account the circumstances specific to their country.

The essential aspects of this case can be summarised as follows: the applicant, who was sentenced to life-imprisonment, directed a criminal organization. It is an organization that continues to threat life and safety of people in Italy. The complainant holds information that could help the authorities to prosecute other people working within this organisation and thus help to considerably reduce the threat to people's lives and prevent new crimes. However, he refuses to communicate the relevant information to the authorities, protesting his innocence and invoking fear for his life and that of his family members.

In the Hutchinson ruling, cited above, the Court established the principle: «A prisoner sentenced to life imprisonment without charge is therefore entitled to know, from the beginning of the sentence, what he has to do in order for his release to be possible and what the applicable conditions are[530]».

Consequently, the result is a situation in which the case law of the life-sentence cases becomes less and less understandable and more and more unpredictable[531].

3.4 Law n. 110/2017: The Articles 613-bis and ter

[529] Dissenting option Judge Wojtyczek, Viola vs. Italy, 2019, n. 77633/16.
[530] See. ECHR, *Hutchinson vs. UK.,2017.*
[531] Dissenting option Judge Wojtyczek, Viola vs. Italy, 2019, n. 77633/16.

Article 613-bis now occupies its place within Title XII, Section III, of the second book of the Penal Code. It punishes “Anyone who, by means of violence or serious threats, or by acting cruelly, causes acute physical suffering or verifiable psychological trauma to a person deprived of personal liberty or entrusted to his custody, power, vigilance, control, care or assistance, or who is in a condition of impaired defence, shall be punished with imprisonment of from four to ten years if the act is committed by more than one conduct or if it involves inhuman and degrading treatment for the dignity of the person. If the facts referred to in the first paragraph are committed by a public official or a person in charge of a public service, with abuse of powers or in violation of the duties inherent to the function or service, the penalty is imprisonment for a period of between five and twelve years. The previous paragraph does not apply in the case of suffering resulting solely from the execution of legitimate measures of imprisonment or limitation of rights. If the facts referred to in the first paragraph result in personal injury, the sentences referred to in the previous paragraphs are increased; if serious personal injury results, they are increased by one third and if very serious personal injury results, they are increased by half. If the facts referred to in the first paragraph result in death as an unintended consequence, the penalty is imprisonment for thirty years. If the guilty party voluntarily causes death, the penalty is life imprisonment".

Alongside this disposition, there is the provision in Article 613 ter which punishes the “incitement of a public official to commit torture", punishing from six months to three years the public official or person in charge of a public service who, in the performance of his duties or service, concretely incites another public official or other person in charge of a public service to commit the crime of torture, if the instigation is not accepted or if the instigation is accepted but the crime is not committed. The outlined new Article 613 bis of the Italian Criminal Code includes a notion of torture which, as has been pointed out, could be defined “ a *disvalore progressivo*[532]” : the legislator includes in the new crime both the phenomenon of common torture, committed by anyone, and that of the so-called “State torture”, in which the active subject is a public official or a public service

[532] I. MARCHI, *Il delitto di tortura, prime riflessioni a margine del nuovo art. 613-bis c.p*, in Diritto Penale Contemporaneo, 2017, pg.3.

officer, leading to a "voluntary, causal crime linked by the way of conducing it, by the event and by the passive subject[533]".

Idealistically considered a great step forward towards the normalization of the Italian legal system to international *diktats*, the new articles were not peacefully accepted, expressing disappointment about the amplitude of the standard and its concrete applicability. «It is not a good law - It is deficient in terms of the statute of limitations. Moreover, the definition of the case is confusing and restrictive, written with the concern to exclude rather than include all forms of contemporary torture. However, it allows a step forward, even if incomplete, towards the implementation of the obligation to punish torture imposed by the United Nations Convention against Torture to the extent that it puts an end to the removal of torture, the law allows to overcome that situation of serious breach for which Italian judges were forced to disguise one of the most serious violations of human rights as a trivial crime, sometimes as a mere abuse of office, with the consequence of punishing it slightly or not punishing it at all because of the statute of limitations[534]».

It was therefore observed that, the legislator, by introducing this law, had not taken into account the tensions to which the principle of legality is subjected. Indeed, Senator Manconi, the first signatory of the original text, declared the disposition to be completely distorted[535], not taking part into the final approval votation. Part of the doctrine also argued that the figure should be placed immediately after the crimes relating to the intentional injuries[536], sustaining that the crime of torture, due to the multi-offensive[537] nature, not only is an offence to

[533] D. FALCINELLI, *Il delitto di tortura, prove di oggettivismo penale*,2017, online at Archivio Penale, cit. p 19.
[534] Antonio Marchese, President of Amnesty International Italia, after the definitive approval of the law: «The hypothesis of postponing for the umpteenth time, in the vague hope that a new parliament would be able to do what none of the previous five had done, would have served only those who - and there are still many - have never wanted the crime of torture, without if and without but and in any way defined, considering it contrary to the interests of the police forces»
[535] *Il No del primo firmatario Manconi: "Testo stravolto"*, La Repubblica, 2017.
[536] F. VIGANÒ, *Sui progetti di introduzione del delitto di tortura, cit*., pp. 24-25; A. Colella, La *repressione penale della tortura: riflessioni de jure condendo*, in Dir. pen. cont., 2014, pp. 30-31.
[537] A. COLELLA, *La Repressione penale della tortura*., pg.11

moral freedom, but also harms the physical and psychological integrity of the subject[538].

Analysing more specifically the crime referred to in art. 613-bis, the classification of the crime as a common crime, rather than as initially conceived, immediately arises also in the light of the indications coming from international law. But it is clear that «torture is not the exclusive prerogative of the public force[539]», and the ECHR jurisprudence now includes among the violent and cruel acts that can be committed by anyone, acts of torture, inhuman or degrading treatment. The case Bălșan v. Romania concerned an allegation of domestic abuse. Ms Bălșan, the applicant, alleged that the authorities had failed to protect her from her husband's violent behaviour and to hold him accountable, despite her numerous complaints.

In this case the court evidenced the violation of Article 3 of ECHR because of the authorities' failure to adequately protect Ms Bălșan against her husband's violence. The Court considered that the physical violence to which Ms Bălșan had been subjected, sustained by the medical and police documentation had been sufficiently adequate to reach the threshold of severity in order to fall under the scope of Article 3 of the Convention. Ms Balsan also repeatedly complained and asked local authorities to intervene, therefore there was an obligation upon the authorities to take all reasonable measures to act preventing the assaults and misconducts.[540].

The will to make the crime of torture a common crime, according to some scholars, is aimed instead at not tying the hands of the police, who may feel legitimately repressed in their powers. In fact, the United Nations Committee against Torture's response to the outcome of the verifications carried out in Italy in 2017, pointed out that the legislator was not consistent with the definition of torture provided by UNCAT. In fact, there are many critical issues regarding this law: «the basic offence does not include specifications relating to the perpetrator – namely

[538] G. LANZA, *Verso l'introduzione del delitto di tortura nel codice penale italiano*, cit., p. 7.
[539] F. VIGANÒ, *Sui Progett*i, ibidem, cit. pg.6-7.
[540] ECHR, n. 49645/09, *Balsan vs. Romania*, 2017.

reference to the act being committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity[541]».

The first paragraph of Art. 613-bis punishes anyone with four to ten years' imprisonment,with violence and serious threats, or acting cruelly, causes acute physical suffering or verifiable psychic trauma to a person deprived of the personal freedom or is in custody, power, vigilance, control, care, assistance, or that he is in a condition of "*minorata difesa"*, but only if the fact is committed with more than one conduct or if the same can be called inhuman and/or degrading treatment.

The passive subject is identified as whom is being deprived of his personal liberty, or entrusted with the custody, power, supervision, care, control or assistance of an agent, or is in a condition of "*minorata difesa"*. Broadening the subjects who can suffer this crime was also dictated by the fact of not being able to find a juridical collocation to certain events, such as those relative to the Diaz school in the occasion of the G8, which, although not having been deprived of their personal freedom, were exposed to a serious and gratuitous form of violence without any effective possibility of defence[542].

The objective element is therefore concentrated on a behaviour that causes two alternative events: acute physical sufferings, a verifiable psychic trauma in the victim: the two events allow to introduce only particularly violent actions into the punishability acts. The concept of "acute physical suffering" arouses some perplexity with regards the possible introduction in the process of barely emotional contents, at the expense of objectivity[543].

The real *vulnus* is, however, constituted by the concept of "verifiable psychic trauma". With regards to this issue it was outlined a double interpretative horizon: if we mean the "psychic" verifiable trauma" without the response of medical examinations to the trauma suffered, in terms of personality disorder, we can configure a more extensive application of the facts of the case, to the extent that it would be considered a criminal offence to food or sleep deprivation is also relevant; if the psychic trauma outlined by which the case is understood to be

[541] CAT*, Concluding observations*, 2017, cit. pg 2.
[542] F. VIGANÒ, *Sui progetti*, pg.11.
[543] F. BUZZI, *Compete al medico legale contribuire all'apprezzamento ed alla quantificazione della sofferenza morale*? in Riv. it. med. leg., 2010, p. 7.

equivalent only to medically ascertainable disorders, the application of the new offence is much more restrictive[544]. It should be noted that if you adhere to the more restrictive thesis, the most modern techniques of torture could not be of criminal relevance such as the "no touch tortures", like the Chinese water torture, based on self-induction of pain by the victim. In an historical period characterized by continuous and unstoppable technological evolution, are more sophisticated and prolonged modes of torture have been devised in order to leave no marks visible on the bodies of the victims[545].

Criminal conduct focuses on the seriousness of the violence or threats or the cruelty of the action: the first element denotes the intensity of the specific conduct; the second element echoes the concept of aggravating circumstance referred to in Article 61, no. 4, of the Criminal Code correlated to behavioural patterns that objectively express the agent's intention of cause particular pain to the victim, having abused or having acted cruelly towards people.

The Italian Supreme Court recently defined cruelty as characterized by conduct that excesses normal causality, leading to additional suffering and expressing a particularly reprehensible inner attitude, which must be ascertained in the same way as the manner of conduct and all the circumstances of the case, including those relating to the impulsive notes of malice[546].

The codified text further defines the nature and duration of typical conduct: the expressions *più condotte* and alternatively *trattamento disumano e degradante la dignità umana*" lead within the sphere of punishability both active and omissive conducts and structure it through the alternative that embraces both the single act/omission and the plurality of acts/omissions. The use of the notion of "*minorata difesa*" in terms of characterization of the torture victim seems questionable, since it's blurred lines may potentially give to judges excessive discretionary power in evaluating the evidences. The term is known to criminal law, but is only relevant as a crime circumstance[547] capable of affecting the quantification of the penalty: different legal characterisation of the fact would be

[544] A. NISCO, *La tutela penale dell'integrità psichica*, Torino, 2012, pp. 75 ss.
[545] G. LANZA, *Verso l'introduzione del delitto di tortura nel codice penale italiano,* cit., pg. 15.
[546] Cass. pen., Sez. Un., 23 giugno 2016, n. 40615, 30/9/2016.
[547] Art. 61.5 c.p.: "*l'avere profittato di circostanze di tempo, di luogo o di persona, anche in riferimento all'età, tali da ostacolare la pubblica o privata difesa*".

tolerable depending on whether the is committed to the detriment of a young person and in good condition of health or to an elderly person who is in a condition "*minorata difesa"*[548].

Taking a look at the subjective element, the text of the bill approved by the Chamber of Deputies on April 2015 deleted the provision of *"dolo specifico "*and the term "*intenzionalmente*": the latter had been favourably evaluated by a part of the doctrine, which considered it an element of strong typification, suitable to distinguish real torture practices from simple injuries and threats[549]. The option chosen by the Italian legislator thus is different from the wording of Art. 1 UNCAT, which offers a definition of torture characterised by the presence of the adverb "intentionally", as well as a finalistic requirement of conduct. The legislative choice to renounce to the *dolo specifico* does not seem to be shareable, especially in cases of torture perpetrated by qualified persons, where the purpose is coessential to the fact[550]. The prediction of specific malice would therefore have allowed to give prominence to the aims typically pursued by torture, in in accordance with international guidelines, requiring the ulterior aim.

P. 2 of Article 613 bis of the Italian Criminal Code is designed to punish torture perpetrated by public officials or persons in charge of a public service with abuse of power or in violation of the duties inherent in the function or service: it provides that, if the acts referred to in paragraph 1 are committed by a public official or a public service appointee with abuse of power or in violation of the duties inherent in the function or service, the penalty is imprisonment for a period of between five and twelve years. The national legislator, departing partially from the supranational obligation, with reference made for the description of the conduct outlined in the previous paragraph could lead to the introduction of a special

[548] The provision was thus formulated by intervention of Article 1, paragraph 7, of Law No 94 of 15 July 2009 (the previous paragraph reads: "*having benefited from circumstances of time, place or person, such as to hinder public or private defence*"), adding the reference to age.
[549] A. COLELLA, *La repressione penale della tortura: riflessioni de jure condendo*, p. 40, online at dirittopenalecontemporaneo.
F. VIGANÒ, *Sui progetti di introduzione del delitto di tortura*, p. 13, online at dirittopenalecontemporaneo.
[550] T. PADOVANI, *Report of the audition before the Justice Commission of the Chamber of Deputees,* 22 October 2014, p. 6.

aggravated crime of independent nature[551] , related to the presence of the subjective qualification. The aforementioned option, advocated by the police unions to avoid the "*stigmatizzazione delle forze dell'ordine*[552]" , implicitly refers that the conduct perpetrated by the public official or by the person in charge of public service acquires "the dimension of an autonomous criminal offence to the extent that it describes a special conduct, objectively qualified by the abuse of powers or violation of the duties inherent in the function or service[553]", a "*quid pluris*[554]*"* compared with that of a citizen.

P. 3 of Art. 613 bis of the Criminal Code provides that p. 2 does not apply in the case of suffering resulting solely from the enforcement of lawful measures involving deprivation of liberty or limitation of rights. The ratio of the above provision is clear: the legislator wants to limit the scope of punishability of the new crime of torture and uniform to Article 1 UNCAT providing: «It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions».

It is required to ask whether the aforementioned provision was really necessary: in case already codified articles, such as Art. 51 c.p. , entitled "The exercise of a right or the performance of a duty imposed by a legal rule or a lawful order*"* can exclude responsability and punishability, was it necessary to write in down in another article again? Where it is considered that the aforementioned provision can in any case take on a relevant meaning, also in consideration of the provisions of art. 1 UNCAT, it is necessary to underline the difference between the generic concept of "suffering" provided by UNCAT and the notions of *acute sofferenze fisiche* and *verificabile trauma psichico*, as alternative events prefigured by art. 613 bis, p. 1,: the following constitute a "*quid minus*" compared to seconds,

[551] Servizio Studi della Camera dei Deputati, XVII Legislation, *Introduzione del delitto di tortura nell'ordinamento italiano* A.C. 2168-b, in Dossier n. 285 – *Elementi per la valutazione degli aspetti di legittimità costituzionale*, dd. 21 June 2017, in Dossier n. 149/3, *Elementi per l'esame in assemblea*, dd. 23 June 2017.
[552] I. MARCHI, *Il delitto di tortura*, cit., p. 5.in Diritto Penale Contemporaneo,2017.
[553] D. FALCINELLI, *Il delitto di tortura*, cit., p. 25; F. Viganò, *Sui progetti di introduzione del delitto di tortura*, cit., p. 6.
[554] I. MARCHI, *Il Delitto di tortura*, in Diritto Penale Contemporaneo, pg5.,2017.

characterized by a higher level of intensity[555]. If there is a simple suffering, therefore, the crime of torture cannot be said to be integrated in all its constitutive elements.

It is necessary to focus attention on the last two paragraphs of Article 613 bis of the Italian Criminal Code, which foreshadow various aggravating circumstances. Paragraph 4 states that if the facts referred to in paragraph 1 result in personal injury, the following shall be deemed to be aggravating circumstances, and penalties are increased; If a serious bodily injury results, they are increased by a third and if a very serious bodily injury results, they are increased by half.

This paragraph therefore introduces an aggravating circumstance having a common effect and two independent circumstances. Paragraph 5 states that if the facts referred to in the first paragraph result in death as an unintended consequence, the penalty is imprisonment for thirty years; if the guilty party voluntarily causes death, the penalty is life imprisonment. If death would be the consequence, would rather take shape the provision of Article 575 (voluntary murder), possibly aggravated pursuant to 61 no. 4 of the Criminal Code.

Part of the doctrine has proposed a reading of these paragraphs, as already mentioned, starting from the assumption that it would prefigure the provisions of paragraph 2 as an autonomous crime. In fact, the torture committed by the public official wants to rise at higher level, evaluating the different damaging charges compared to the common torture[556].

Other doctrine, always starting from the evaluation and consideration of an autonomous crime, believe paragraphs 3 and 4 as characterized by an autonomous edictal framework, susceptible of autonomous aggravation, taking into account the penalties of common torture and that of the agent: «It would seem extravagant that the legislator intended here to configure as many aggravating circumstances of an aggravating circumstance: so it seems to be necessary to conclude that the second paragraph intends, in fact, to introduce an autonomous type of crime[557]».

[555] I. MARCHI, *Il delitto di tortura*, in Diritto Penale Contemporaneo, pg.5.
[556] P. LOBBA, *Punire la tortura in Italia*, pg.232, online at penalecontemporaneo, 2017.
[557] F. VIGANÒ, *Sui Progetti*, cit. pg.5

The case referred to in Article 613 ter of the Italian Criminal Code, introduced by Law 110/2017, punishes with imprisonment from six months to three years the conduct of a public official or a public service appointee who, in the performance of his duties or service, concretely incites another public official or another public service appointee to commit the crime of torture, if the instigation is not accepted or if the instigation is accepted but the crime is not committed.

The provision contained in Article 613 ter of the Italian Criminal Code frames the instigatory behaviour of the person qualified to commit the crime of torture in the exercise of the functions or service: the instigator is punished with the penalty provided for therein if he addresses another public official or public service appointee, instigating him "*in modo concreto*[558]" by committing the crime of torture. With this diction, Article 613 ter of the Italian Criminal Code declares himself a special crime with respect to the figure of quasi-offence provided for by art. 115 of the Italian Criminal Code. The Criminal code provides for other criminal offences where the conduct of instigation is punished, such as Article 414 and Article 415. The exemption contained in Article 613 ter of the Italian Criminal Code is legitimized in the name of a offensiveness concretely demonstrable compared to the actual commission of the torture by those who are instigated, in an overall *ratio* of criminalization which does not disregard the "*peculiar decrease in social confidence*[559]" that the attitude of the public official generates as to the safeguarding moral freedom.

The crime referred to in Article 613 ter of the Italian Criminal Code constitutes a crime of concrete danger: the crime is not punishable in itself if, due to its manner, it does not incorporate conduct likely to provoke the commission of the crime. The new case, however, does not contemplate the hypothesis of incitement against a private person to commit the crime of torture: art. 613 ter leaves in such a way "naked" an area of impunity incompatible with the intent to provide remedies and effective sanctions, in compliance with international obligations. The

[558] Judgment 65/1870, in Giur.Cost., 1970 pg.955 ss: «*l'apologia punibile ai sensi dell'art.414, ultimo comma del codice penale non è, dunque, la manifestazione del pensiero puro e semplice, ma quella che per le sue modalità integri un comportamento concretamente idoneo a provocare la commissione di delitti»*

[559] D.FALCINELLI, *Il Delitto di Tortura,*cit. pg. 30.

result is that if a public official instigates "*in modo concreto*" a private citizen, the fact will not even be punishable under Article 115[560].

In doctrine, it was noted the need to sanction the instigation regardless the qualification of the recipient[561]: the abovementioned consideration acquires even more consideration today in view of the fact that the crime of torture referred to in Article 613 bis, para. 1, can be committed by anyone.

CHAPTER IV

FINAL CONSIDERATIONS

[560] I.MARCHI, *Luci e Ombre del nuovo disegno di legge per l'introduzione del delitto di tortura nell'ordinamento italiano: un'altra occasione persa*? in Diritto Penale Contemporaneo,2014, pg.16.
[561] I. MARCHI, *Luci e ombre del nuovo disegno di legge per l'introduzione del delitto di tortura nell'ordinamento italiano*, cit., p. 17, in Diritto Penale Contemporaneo.

4.Attempts of moral legitimisation of torture: Secret Services and Secret of State

The question arises as to whether, in the name of the higher requirements of public security, the State can exceptionally renounce to rights and guarantees that would prohibit the use of torture under normal conditions in order to defend itself. Some scholars pronounced themselves in favour of a rights limitation in those situations, arguing that Secret services can operate even «*extra legem*[562]», while according to others in no case can the protection of the community prevail over the right to life, integrity and personal freedom[563].

In this regard, we must remember the case of Abu Omar: an Egyptian political refugee, imam at a mosque in Milan, investigated and subsequently condemned for association with the purposes of terrorism ex apt. 270 -bis c.c., who was forcibly taken in 2003 by a group of CIA[564] and SISMI[565] agents to be taken to Germany and then to Egypt to be interrogated about alleged contacts with terrorist cells. His illegitimate detention lasted for four years, during which time he was subjected to repeated abuse, harassment and torture. The Fourth Chamber of the Strasbourg Court, with the unanimous ruling reported, condemned Italy in relation to Abu Omar affair.

First of all, the Strasbourg Judges claim that there has been a breach of the substantive obligations arising out of the Articles. 3, 5 and 8 ECHR with regard to Abu Omar (Osama Nasr) himself and his wife Nabila Ghali: the Italian authorities were not only aware, according to the Court, of the plan of the American secret services to kidnap the imam - through an operation technically qualified as extraordinary rendition - in order to hand him over to the Egyptian authorities, by

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[562] Interview to On. Scialoia, La Stampa, August 2006 entitled *"Nuove regole per gli 007 nella lotta contro il terrorismo"*.

[563] G.M. FLICK, *Principi di legittimità e legalità nell'attività degli Organismi di intelligence anche con riferimento alle norme di diritto penale e processuale penale*, in Per Aspera ad veritate, 1999, pg. 1014.

[564] Established by Truman in 1947, the Central Intelligence Agency is a U.S. spy agency operating outside the American territory.

[565] Subsititued by AISE (Agenzia Informazioni e Sicurezza Esterna) in 2007, SISMI (Servizio Informazioni e Sicurezza Militare) was an Italian Secret Service military agency with international security tasks.

which he would then be interrogated and tortured, but they also cooperated actively with American officials, at least in the first phase of the operation[566].

The Court considers in the present case a violation of the so-called procedural obligation of the State to punish those responsible for acts contrary to Article 3 ECHR. With particular reference to the infringement of the substantive obligation deriving from Article 3 ECHR, the Court has no doubt as to the seriousness of the facts of which the appellant was the victim, who, once kidnapped, was kept completely unaware of the destination and the reason for the transfer, remained imprisoned for years in inhuman conditions and without any contact with the outside world, and suffered frequent physical and psychological violence during interrogations[567].

The Court refers here to its own case-law in which it was clearly stated that extraordinary rendition operations, involving such treatment, entail a violation of the prohibition of torture[568]. The Court concludes that the risk of a violation of Article 3 was particularly high and should have been considered as a direct consequence of the transfer. The picture is aggravated by the fact that Abu Omar enjoyed refugee status in our country[569].

The most interesting aspect of the judgment is, however, the breach of the positive procedural obligations arising from Article 3. The judges identified two profiles of violation: the annulment of the sentences handed down to SISMI agents following the Constitutional Court's rulings, and the inaction of the Government with regard to the objective of bringing the convicted American officials to justice[570].

Abu Omar's wife, Nabila Ghali, also appealed for violation of art. 3. The Court recalls that the case law has not established a general principle according to which the family members of those who have been subjected to treatment contrary to Article 3 are themselves victims. However, the circumstances of the case, and,

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[566] M. MARIOTTI, *La Condanna della corte di Strasburgo contro l'Italia sul caso Abu Omar*, Diritto Penale Contemporaneo, 2016.
[567] ECHR, *Nasr and Ghali vs. Italy*, n. 44883/2009.
[568] ECHR, *El Masri vs. The Former Yugoslav Republic of* Macedonia, n.39630/2009.
[569] ECHR, *Nasr and Ghali vs. Italy*, n. 44883/2009.
[570] M. MARIOTTI, *La Condanna della corte di Strasburgo contro l'Italia sul caso Abu Omar*, Diritto Penale Contemporaneo, 2016.

in particular, the anguish in which the wife has lived, the absence of information, the attempt to circumvent the investigation[571] which has slowed down the investigations of the judiciary, are such that she herself is considered to be a victim of treatment contrary to Article 3.

What emerges from this case is the co-responsibility violation of three institutions of the Italian State: not only, in fact, the Government remained inactive in requesting extraditions and has even taken action to improperly use State secrets, but this use has been deemed legitimate twice by the Constitutional Court; and finally, the President of the Republic has contributed to removing persons responsible for torture from punishment by pronouncing a pardon order against them[572].

The reaction to terrorism conducted in this way calls for reflection on the issue: «can the legitimacy of the aim pursued justify the commission of illegal acts by the public authorities»[573]? Law n. 124 of 2007 on the "Information System for the Security of the Republic and new regulations of secrecy" provides for the employees of the Aise (External Information and Security Agency) and the Aisi (Internal Security Information Agency) the possibility of availing themselves of the instrument of the "functional guarantees" with the limitations provided for by the Law. These are special causes of justification applicable to the secret services that carry out conducts that can be considered a crime provided that they have been authorized for institutional purposes[574].

According to this regulation, specifically in art. 17 it is stated that «without prejudice to the provisions of art. 51 of the Criminal Code, the personnel of the security information services is not punishable if they carry out conduct provided for by law as a crime, legitimately authorized from time to time as indispensable to the institutional purposes of these services». The law would seem to guarantee a margin of impunity to the members of the services from a «functionalist viewpoint of the criminal law[575]» in virtue of which the conduct -

[571] ECHR, *Nasr and Ghali vs. Italy*, n. 44883/2009.
[572] Online at. Giurisprudenzapenale.com
[573] M. MALERBA, *Prevenzione del Terrorismo,* in Diritto penale Contemporaneo, 2017, cit. pag. 71.
[574] on line at sicurezzanazionale.gov.it
[575] E. SCAROINA, *il Delitto di Tortura, l'attualità di un crimine antico*, Cacucci editore, Bari, 2018, cit,pag. 336.

although referable to an abstract case - is not considered because it is functional for the purpose of «safeguarding a social value superior or at least equal to that sacrificed[576]».

Except with reference to paragraph 2 of Article 17, it is specified that the aforementioned agents are not liable on condition that their conduct is indispensable and proportionate, the result of a comparison between public and private interests involved, causes the «*least possible damage, does not constitute crimes intended to endanger or harm life*», as well as other crimes expressly provided for by law. The special cause of justification therefore can never operate when the conduct put in place endangers fundamental rights of the person such as life, physical integrity, personal freedom, health.

In the same discipline of the information services, art. 39 also refers to State secrecy as a constraint placed by the President of the Council of Ministers on acts, documents, news, activities and anything else whose diffusion is suitable to damage the integrity of the Republic, also in relation to international agreements, the defence of the Institutions placed by the Constitution at its foundation, the independence of the State with respect to other States and relations with them, the preparation and military defence of the State.

With regard to its application, art. 39 always establishes that "in no case may news, documents or things relative to terrorist or subversive acts of the constitutional order or to acts constituting the crimes referred to in art. 285 (devastation, pillage and massacre), 416 bis (conspiracy to commit crimes), 416 ter (mafia political electoral exchange) and 422 (massacre) be the object of State secrecy. In this regard, the opinion has been consolidated that the crime of torture is to be counted among the «*crimes when committed, for which Law 124 of 2007 excludes the operation of the state secret*[577]».

A debated question seems to have been that of the Constitutional Court, called between 2009 and 2014, to resolve multiple conflicts of attribution of powers

[576] C. DE MAGLIE*, Gli infiltrati nelle organizzazioni criminali: due ipotesi di impunità*, Riv. It. Dir. Proc. pen., 1993, cit.pag. 1043.
[577] A. PUGIOTTO, *Repressione penale della tortura e costituzione: anatomia di un reato che non c'è*, in Dir. Pen. Cont. 2014, cit.pag.141.

between the State in relation to developments in the investigation of the well-known Abu Omar affair. In these pronouncements of control, it could be inferred that torture is not considered suitable enough to «*subvert the constitutional order and overwhelm the pluralistic and democratic structure of the State by disarticulating its structures*[578]». In this regard, it seems that there are two opposing and antithetical views on the limits to state power and duty to combat serious forms of crime. According to the majority thesis, state secrecy cannot be considered in itself as a source or justification of reprehensible behaviour from a moral or constitutional legal point of view[579].

It is reiterated that the principle of legality as the rule and limit of power to safeguard the fundamental rights of the person, can under no circumstances be derogated from in the name of a «crude and antiquated end that justifies the means[580]». It should therefore be observed in conclusion that in both cases examined, functional guarantees of the secret services and state secret, to speak of legalized torture «means to operate an oxymoron[581]».

4.1. De iure condendo perspectives of art. 613 bis

Law 110/2017, which introduced the crime of torture into the Criminal Code, marked a fundamental milestone, with which the legislator has tried to comply with international and EU regulations after a 30-year absence. The question has been asked whether the new art. 613-bis of the Criminal Code is really suitable for the function for which it is intended or is a simple rule introduced to avoid other EU sanctions, without any concrete effectiveness in preventing and combating the conduct constituting torture. At a first reading, in fact, the introduction of the criminal offence can be considered as a significant step forward towards a full protection of the fundamental rights of the person, in line with the indications of

[578] C.Cost. n. 106/2009.
[579] G. M. SALERNO, *Segreto di Stato tra conferme e novità*, Percorsi Costituzionali 2008 pag. 57.
[580] M. MALERBA, *La resistibile ascesa del segreto di Stato: tra salus rei publicae, "nero sipario" e strisciante impunità*, in Dir. Pen. Cont., 2017, cit. pag. 79.
[581] A. PUGGIOTTO, *Repressione penale della tortura e Costituzione,* in Dir Pen. Cont, 2017, cit. pag.131.

the international community for which the repudiation of torture is «absolute and mandatory[582]».

Only two years after its introduction into the domestic legal system, there are already those who are hoping for reforms and interventions on the case introduced. Before its entry into force, the only crime provided for in punishment of torture, was the one referred to in Article 185 bis of the Military Criminal Code of War and the last acceleration in the entry of the new crime was due to the well-known facts of Genova already mentioned in this work (G8, Diaz and Bolzaneto).

A first controversial point, according to some, is found in the placement of the article located in the section on crimes against moral freedom, while it would have been more appropriate to place it in the chapter on crimes against life and safety. Moreover, it should be noted that Law 110/2017 does not provide for the inclusion of the crime of torture among those listed in Article 157, paragraph 6 of the Criminal Code, which provides for the doubling of the statute of limitation period[583]. Further critical profiles need to be highlighted. Among the main censorships levelled against the new case there is that of the choice to structure torture as a common crime, including among the active subjects also the private individual and not only those who act in an official capacity, but also those in possession of a public qualification.

In particular, this orientation asserts that three significant elements are missing: the nature of the crime itself, the intentionality of the conduct and the peculiar connotative purposes of the reason why the offender acts[584].The lack of choice to characterize torture as a *reato proprio* has also been harshly criticized by the CAT and the Commissioner of Human Rights. The question is whether the introduction of a common crime has weakened the protection against State torture, if only because of the possible dilution of the stigma associated with "official"

[582] S. TUNESI, *Il delitto di tortura. Un'analisi critica*, online giurisprudenzapenale.com, 2017, cit, pg.2.
[583] S. TUNESI, *Il delitto di tortura. Un'analisi critica*, online giurisprudenzapenale.com, 2017.
[584] E. SCAROINA, Il delitto di Tortura, l'attualità di un crimine antico, Cacucci Editore, Bari, 2018, pg. 351.

conduct[585], whose «gravity is undoubtedly on a completely different order of magnitude».

According to the second part of the doctrine, the answer from a normative point of view is negative, since in a single provision - article 613 bis of the Criminal Code - there are two autonomous figures of crime, marked by distinct conduct and degrees of harm[586]. It is no coincidence that before the introduction of Article 613-bis, it was proposed to insert two distinct types of crime, respectively in Articles 593-bis and 593-ter, aimed at sanctioning "common" torture and the other torture committed by a public official or a public service appointee[587].

It is worth mentioning in this regard the role of the CAT, where in its latest concluding observations report submitted by Italy, showed significant criticisms against the current wording. Starting with the positive aspects, the Committee welcomed, first of all, the ratification or accession by Italy to instruments of international law, such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention for Protection from Enforced Disappearance; the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse; and the Convention on the Rights of Persons with Disabilities.

The Committee has also positively evaluated two legislative measures adopted by our country in the areas relevant to the Convention: the adoption of Law no. 119/2013 on the fight against gender-based violence; the adoption of Law no. 10/2014, which established the National Guarantor for the rights of persons detained or deprived of their liberty, which also acts as a national prevention mechanism for torture under the Optional Protocol to the Convention together with the preventive mechanisms already operating at regional level[588].

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[585] P.LOBBA, *Obblighi internazionali e nuovi confini della nozione di tortura*, in Diritto Penale Contemporaneo, 2019. Cit, pg.25-26.
[586] P.LOBBA, *Obblighi internazionali e nuovi confini della nozione di tortura*, in Diritto Penale Contemporaneo, 2019. pg.25-26.
[587] F. VIGANÒ, *Sui Progetti di introduzione del delitto di tortura in discussione presso la camera dei Deputati,* 2014, pg.25.
[588] CAT, Concluding Observations, (CAT/C/SR.1582 e 1585),2017.

The Committee was also pleased with some initiatives put in place by Italy that modify national policies and procedures in order to offer greater protection of human rights and a more effective application of the Convention against Torture, in particular: the adoption of the National Action Plan against trafficking and exploitation of human beings; the adoption of the National Plan to combat violence against women and the establishment of the Directorate General for Training in the Department of Prison Administration.

Finally, the Committee appreciated the efforts made to respond to the problem of asylum seekers, persons in need of international protection and irregular migrants who have arrived on national territory[589].

Analysing the negative aspects, the Committee disapproved the lack of *dolo specifico*, since it did not take into account the finalistic element provided for by the UN Convention, which is divided into three alternative purposes to which the conduct must aim: obtaining information or confessions; punishing, injuring or exerting pressure; discriminating[590]. The Committee also stated to eliminate all those provisions that are considered redundant and excessive[591].The absence of *dolo specifico* in the Italian legislation would risk the extention of the scope of the offence too far, especially as regards the disproportionate use of force by the police.

Secondly, the basic case does not require the perpetrator of the torture- the instigator, the consent or acquiescence - to be a public official or other person acting in an official capacity.

Thirdly, the Committee considered that the newly introduced criminal offence is significantly different in the scope than that contained in Article 1 CAT, insofar as it contains elements constituting the crime that go beyond those provided in the Convention[592]. However, according to some authors, this choice should not

[589] CAT, Concluding Observations, (CAT/C/SR.1582 e 1585),2017
[590] CAT, Concluding Observations, (CAT/C/SR.1582 e 1585),2017.
[591] CAT: «the state party shall bring the content of Art.613-bis of the Criminal Code into line with art. 1 of the convention by eliminating all superfluos elements».
[592] F. CANCELLARO, *Pubblicate le osservazioni del comitato onu contro la tortura sulla situazione italiana*, in diritto penale contemporaneo, 2018.

be dramatized, especially since it does not seem to alter the already multiform features of the figure provided for in Art. 1 CAT[593].

From the point of view of sanctions, some scholars think that the penalties should be increased in favour of the formulation of a case more faithful to that set forth in Article 1 of the UN Convention as well as in Article 13.3 of our Constitution. A new case under Article 613 could be: «The public official or the person in charge of a public service who, by abusing the functions or the service, intentionally causes someone to suffer serious physical or mental suffering in order to obtain a confession or information, to punish, to intimidate or to discriminate, is punished with imprisonment from five to twelve years. If from the fact derives serious injury, imprisonment from six to twelve years is applied; if very serious injury derives, imprisonment from eight to fourteen years; if death derives, imprisonment from twelve to twenty years[594]».

Again, with regards to the abuse of state authority, in so-called cases of "superior responsibility" it should be sanctioned the failure to control the superior for crimes committed by his subordinates. This could be accompanied by the introduction of a new figure for the incrimination of torture in Article 613-quater: «"Outside the cases of complicity in the crime, the superior who omits through negligence to exercise the necessary control to prevent the commission of the crime of torture, is liable, if the crime is a consequence of the violation of his duties of vigilance, with the penalty established for it reduced by no more than one third". [595]».

Law 110/2017, as already mentioned before, also intervenes on the ritual code by introducing in Article 191 of the Criminal Code the paragraph 2-bis, which prohibits the use of statements obtained through the crime of torture, except against persons accused of such crime and for the sole purpose of proving their criminal liability. According to some, the rule in question is ambiguous and difficult to apply

[593] P. LOBBA, *Obblighi internazionali e nuovi confini della nozione di tortura*, in diritto penale contemporaneo, 2019.
[594] E. SCAROINA, *Il delitto di tortura, l'attualità di un crimine antico*, Cacucci Editore, Bari, 2018, Cit,pg. 352.
[595] E. SCAROINA, *Il delitto di tortura, l'attualità di un crimine antico*, Cacucci Editore, Bari, 2018, Cit,pg. 355.

because it will have to be subject to verification which can only be judicial[596]. This rule is therefore substantially useless because art. 64.2 of the Italian Criminal Code already states that methods and techniques suitable to influence the freedom of self-determination or to alter the ability to remember and evaluate the facts cannot be used, not even with the consent of the interrogated person.

Law 110/2017 also intervenes on art. 19 T.U. of legislative decree no. 286 of 25 July 1998 (Consolidated text on immigration). The law requires the immediate end of returns and expresses the need to strengthen jurisdictional guarantees[597] on the topic, rejections to those states suspected of systemic violations of human rights. Article 4 of Law 110/2017 also provides for a general exclusion from immunity for foreigners subject to criminal proceedings or convicted of the crime of torture in another state or by an international court. In the second paragraph, Article 8.1 of the UN Convention is implemented by providing for the obligation of extradition to the requesting state of the foreigner suspected or convicted of the crime of torture[598].

In conclusion, many people wondered if it would not be better to wait longer than to have, «after such a long wait, a bad law»[599]. In the work, the critical issues that seem to impose a rethink aimed at aligning the new case of torture with the conventional notion and thus ensuring a concrete and effective protection for victims were mentioned.

From another point of view, a major problem seems to be that in Italy there are no data on the number of reports of torture, nor on the related legal actions taken. We know that the only sentence for torture is the one inflicted by the GUP of the Tribunal Minors Court of Milan, in July 2019, against four 15-year-old boys, guilty of segregating and beating a boy of the same age for hours in a garage in Varese November 2018. Three were sentenced to four years in prison and a fined 1,200 euros, one to four years and six months and a fine of 1,500 euros[600].

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[596] S. AMATO, M. PASSIONE, "*Il Reato di Tortura",* Diritto Penale Contemporaneo, 2019, pg. 17.
[597] A. PUGIOTTO, *Una legge sulla tortura, non contro la tortura*, Quaderni Constituzionali, 2018.
[598] S. AMATO, M. PASSIONE, *"Il Reato di Tortura",* Diritto Penale Contemporaneo, 2019, pg. 19.
[599] S. AMATO, M. PASSIONE, *"Il Reato di Tortura",* Diritto Penale Contemporaneo, 2019,Cit, pg 20.
[600] La Repubblica, *Varese, minorenni condannati per il reato di tortura: è la prima volta in Italia*, 2019.

A judgement destined to make history in Italy because it is the first sentence for the crime of torture. The highest infliction was imposed by the judge on the minor considered to be the mastermind of the kidnapping and beating of the 15-year-old boy, bound and beaten with an iron stick. As it turned out, he was ready to leave Italy with his mother before being arrested. The prosecutor requested convictions for a total of 21 years in prison, claiming that all four young defendants showed no signs of regret and empathy with the victim. The defence had asked for the very young people to be put on probation, denied by the Prosecutor and the judge[601].

Another case is still pending before the Taranto Public Prosecutor's Office, section of the Tribunal Court of Minors, which investigated the "*comitiva degli orfanelli*", accused of torturing an elderly disabled man who died as a result of violence in hospital.

The police of Taranto and the Central Operative Service of Rome have executed 9 orders issued by the judges for preliminary investigations at the Ordinary Court and the Minors Court against an adult and 8 minors, considered in various ways serious suspects in connection with the crimes of torture, injury, damage and aggravated home invasion against Antonio Cosimo Stano, the 65-year-old who died on 23 April after being beaten and bullied by a baby gang in Manduria. Stano had been terrorized and already in precarious health and hygiene conditions, had decided to lock himself up (depriving himself of food) because he was repeatedly the victim of "raids" by a group of young people who subjected him to harassment, beatings and aggressions[602]. The episodes were circumscribed thanks to the confessions of some suspects, statements of persons informed about the facts and the technical analysis of the mobile phone of one of the suspects, which allowed to identify the participants and collect geolocation datas[603]. The GIP of the Court of Taranto, in the order of application of the precautionary measure, writes that «

[601] Il Messaggero, *Quindicenne picchiato e sequestrato da quattro coetanei a Varese: prima condanna per tortura*, 2019.
[602] La Repubblica, *Manduria, picchiato a morte da baby gang: 8 fermi per tortura, sei sono minorenni. "Violenti per noia*", 2019.
[603] La Repubblica, *Pensionato vittima della baby gang a Manduria: altri 8 minori arrestati. Un altro disabile pestato 'per passatempo"*, 2019.

Stano has been subjected to inhuman and degrading treatment, hunted down by his torturers, terrorized, mocked, insulted even with spitting, pushed into a state of confusion and disorientation, forced to call for help out of fear and exasperation in the face of the continuous attacks suffered and, what is more, filmed with video footage (then broadcast online in telephone chats) in such humiliating conditions».

Today, in view of the persistency of repressions, the death penalties, conflicts, ethnic "cleaning" and violence in general, which constitute serious violations of human rights, the issue of torture must be considered more topical than ever. Despite the criticisms highlighted in the work, it must be considered that the new law is not a missed opportunity, but it represents a step forward towards the objective of effectively combating and punishing (and preventing) torture in Italy.
In this regard, Natalia Ginzburg, Italian writer and politician, said that «one cannot ask too much from a law, as if it had the power to make society as a whole better and clearer[604]». A law is not enough if it is not accompanied by a cultural and social change: the ability to see and the courage to speak.

[604] Atti Parlamentari – Camera dei Deputati, X Legislation, Discussions, n.29536, 15 March 1989 Sitting.

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