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## PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: SOME REMARKS ON THE OPERATIVE SOLUTIONS AT THE EUROPEAN LEVEL AND THEIR EFFECTS ON THE MEMBER STATES. THE CASE OF ITALY

**ABSTRACT.** This paper analyzes European measures against torture and inhuman or degrading treatment or punishment in order to verify their effectiveness, especially in terms of the values that are actually being protected. First, it examines the distinction between the external and internal action of the European Union, highlighting ways in which the EU appears to be more attentive to combat practices of torture in third countries than to domestic incidents and the proposals to legalize torture made at a political level in some Member States. Then, it examines the *European Court of Human Rights*' ruling in the Cestaro versus Italy case, focusing specifically on the fact that Italy was in breach of its obligations under Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, because the framework does not recognize torture as a crime and does not provide instruments of deterrence to effectively prevent the execution and the recurrence of such acts. Currently, the Italian Parliament is discussing a draft amendment to the Criminal Code and aims at introducing the concept of torture as a crime; however, in light of the comments made by the *European Court of Human Rights*, this project questions whether the proposed solution will be able to prevent a repeat of events similar to those that occurred in 2001 after the G8 Summit in Genoa.

### I INTRODUCTION

The preeminent and unsurpassed value for a limited government is respect for human dignity. For this reason, all international and supranational charters of rights, ratified also by Italy, have established both the prohibition of torture and the legal procedures to follow when torture is apparent: from the *Universal Declaration of*

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*Human Rights* of 1948 and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*) of 1950, to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*), adopted by the United Nations (UN) in 1984, its *Optional Protocol* of New York of 2002 and the *Charter of Fundamental Rights of the European Union* (the so-called *Nice Charter*) of 2000.<sup>1</sup> According to the prevailing legal literature<sup>2</sup> and some judicial pronouncements,<sup>3</sup> the prohibition of torture is also a norm of general international law and, in particular, *ius cogens* valid for all States in the international community, regardless of its express provision through agreements.<sup>4</sup>

The European Union (EU)'s commitment towards human rights is affirmed in Art. 2 of the *Treaty on European Union* (*TEU*),<sup>5</sup> which

<sup>1</sup> The Italian State is a signatory of other international charters which enshrine the prohibition of torture and, in particular, the *Geneva Convention* relative to the *Treatment of Prisoners of War* of 1949, the *International Covenant on Civil and Political Rights* of 1966, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment* of 1987, the *Rome Statute of the International Criminal Court* of 1998.

<sup>2</sup> See Erika De Wet, "The Prohibition of Torture as an International Norms of Jus Cogens and Its Implications for National and Customary Law", *European Journal of International Law*, 15(1) (2004): pp. 97–121; Giuseppe Cataldi, "La tortura è tra noi? La portata dell'Art. 3 CEDU nella giurisprudenza della Corte europea dei diritti dell'uomo", in Lauso Zagato & Simona Pinton (eds.), *La tortura nel nuovo millennio. La reazione del diritto* (Padova: Cedam, 2010), pp. 171–192.

<sup>3</sup> See, e.g., International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-95-17/1, Prosecutor v. Anto Furundžija, Judgment of 10 December 1998, and Al-Adsani v. United Kingdom, App. No. 35763/97 (Nov. 21, 2001), <http://hudoc.echr.coe.int/>. The General Assembly of the United Nations took note of the customary nature of the prohibition of torture in the Resolution 61/53 on *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* of 19 December 2006.

<sup>4</sup> See Jeffrey M. Blum & Ralf G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filártiga v. Peña-Irala*", *Harvard International Law Journal*, 22 (1981): pp. 52–113; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006): p. 54; Antonio Marchesi, "La proibizione della tortura all'inizio del nuovo millennio", in Lauso Zagato & Simona Pinton (eds.), *La tortura nel nuovo millennio. La reazione del diritto* (Padova: Cedam, 2010), pp. 3–34.

<sup>5</sup> See Rudolf Geiger, "Article 2 (Common values) TEU", in Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur (eds.), *European Union Treaties. Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union* (München: C.H. Beck, 2015),

evokes the values of respect for human dignity, freedom, the rule of law and human rights as the foundation of the EU. The prohibition of torture and inhuman or degrading treatment or punishment is expressly contemplated by Art. 4 of the *Nice Charter*,<sup>6</sup> which has assumed the same legal value as the Treaties (Art. 6, para. 1, *TEU*) after the entry into force of the *Treaty of Lisbon*, and by Art. 3 of the *European Convention*, which has the value of general principle pending EU accession (Art. 6, para. 3, *TEU*).<sup>7</sup> In addition, the Court of Justice of the European Union has stated that unlike other rights, the right not to be subjected to torture and inhuman or degrading treatment or punishment does not allow any exception.<sup>8</sup>

This paper begins by examining the distinction between the external and internal action of the EU. As regards external action, the contribution examines the *Guidelines to European Union policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment* and the relative discipline of implementation. With regard to internal action, the contribution focuses on the European Union regulations concerning judicial cooperation in criminal matters and right to asylum with particular attention to refugee status, identifying the many critical issues that the discipline presents.

The EU appears to be more attentive to combat practices of torture in third countries than to domestic incidents and the proposals to legalize torture made at a political level in some Member States. Indeed, the positive actions of the EU in this area have focused outward partly because EU foreign policy provides for the protection

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Footnote 5 continued

pp. 15–17; Luigi Fumagalli, “Commento all’art. 2 TEU”, in Antonio Tizzano (ed.), *Trattati dell’Unione europea* (Milano: Giuffrè, 2014), pp. 11–15.

<sup>6</sup> See Marco Olivetti, “Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment”, in William B.T. Mock & Gianmario Demuro (eds.), *Human Rights in Europe. Commentary on the Charter of Fundamental Rights of the European Union* (Durham: Carolina Academic Press, 2010), pp. 26–32.

<sup>7</sup> See Rudolf Geiger, “Article 6 (Fundamental rights and principles) TEU”, in Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur (eds.), *European Union Treaties. Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union* (München: C.H. Beck, 2015), pp. 41–58.

<sup>8</sup> See Case C-112/00, *Eugen Schmidberger v. Austria*, 2003 E.C.R. I-5659 and Case C-548/09 P, *Bank Melli Iran v. Council of the European Union*, 2011 E.C.R. I-11381.

of human rights among its objectives (Art. 21 *TEU*),<sup>9</sup> while the internal action of the EU is more limited due to the areas of competence established in the Treaties, meaning that the management of prisons and detention centers is a task for the Member States, while the EU has no competence even in the definition of standard measures in this matter. This analysis will allow us to therefore make some remarks on the effectiveness of overall measures taken at the European level in terms of the values that are actually being protected. The contribution will highlight how, even in cases in which the EU is able to intervene, the measures taken seem unassertive and not completely decisive, so much so that at times only the Council of Europe procedures to some degree make up for the inadequacies of the EU procedures.

Nevertheless, despite multiple condemnations of the Italian State by the European Court of Human Rights, the crime of torture has not yet been entered in this framework.

In the second part of this paper, we begin by examining the Italian situation especially after the ruling passed by the European Court of Human Rights, *Cestaro versus Italy*, Judgment of 7 April 2015, Application No. 6884/11 and, lastly, we shall explain the draft law that would introduce the crime of torture.

The conclusion is that – compared to a Community framework that is unable to impose the provision of the crime of torture in the national law of Member States and which grants protection only for damages by the European Court of Human Rights – there are supreme values which, in a Constitutional State of Law, are not yet adequately protected.

## II THE EUROPEAN UNION'S COMMITMENT

### 2.1 *The Current External Action of the European Union*

In 2001 (with updates in 2008 and 2012), the General Affairs Council of EU developed the *Guidelines to European Union policy towards third countries on torture and other cruel, inhuman or degrading*

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<sup>9</sup> See Rudolf Geiger, “Article 21 (Principles of European External Policy) TEU”, in Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur (eds.), *European Union Treaties. Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union* (München: C.H. Beck, 2015), pp. 118–122; Maria Eugenia Bartoloni & Enzo Cannizzaro, “Commento all’art. 21 TEU”, in Antonio Tizzano (ed.), *Trattati dell’Unione europea* (Milano: Giuffrè, 2014), pp. 222–227.

*treatment or punishment*, complementary to the *European Union Guidelines on the death penalty* of 1998: both are based on the relevant international norms and standards.<sup>10</sup>

The *EU Guidelines on Torture* covers three areas of EU activity: (1) monitoring and reporting. In particular, the EU Heads of Mission will draft periodic reports of the occurrence of torture and ill-treatment and the measures taken to combat them, and they will also provide periodic evaluation of the effect and impact of the EU actions; (2) assessment based on these reports and other relevant information. The Council Working Group on Human Rights and the relevant Geographic Working Groups will identify situations where EU actions are called upon, agreeing on further steps or making recommendations to higher levels; (3) concrete actions, finalized at influencing third countries to take effective measures against torture and ill-treatment and ensuring that the prohibition against torture and ill-treatment is enforced.

Following the update of 2012, operational guidelines also consider “country strategies”: wherever torture and ill-treatment are a matter for concern, in-depth analysis of the situation regarding torture and other ill-treatment in a given country shall be conducted, identifying possible preventive actions and mechanisms, as well as necessary steps to counter impunity for torture and other ill-treatment. In addition, with regard to concrete actions, more attention shall be paid to prevention activities and trial observation by embassy representatives sent as observers by the EU Heads of Mission where there is reason to believe that defendants have been subjected to torture or ill-treatment.

In the implementation of the *EU Guidelines on Torture*, the EU contemplated a special system of import and export for goods used to impart capital punishment and torture or other cruel, inhuman or degrading treatment or punishment: this is addressed by Council Regulation (EC) No. 1236/2005 *concerning trade in certain goods which could be used for capital punishment, torture or other cruel,*

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<sup>10</sup> See Jan Wouters & Marta Hermez, *EU Guidelines on Human Rights As a Foreign Policy Instrument: An Assessment* (The Hague: Centre for the Law of EU External Relations, 2016); Emanuela Pistoia, “La tortura nella ‘fortezza Europa’. Possibilità e carenze dell’Unione europea”, in Lauso Zagato & Simona Pinton (eds.), *La tortura nel nuovo millennio. La reazione del diritto* (Padova: Cedam, 2010), pp. 243 and 246–250.

*inhuman or degrading treatment or punishment*, adopted under the common commercial policy.<sup>11</sup>

Exports from and imports to the EU are generally guided by the principle of freedom and the general prohibition of restrictions; however, there are goods that are subject to special rules, and among these fall those goods that can be used to inflict capital punishment, torture or ill-treatment. The special rule set out in Council Regulation (EC) No. 1236/2005 states that any export and any import of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment. There is only one derogation: the competent authority may authorize an export or an import of goods listed in Annex II if it is demonstrated that such goods will be used for the exclusive purpose of public display in a museum in view of their historic significance.

In addition, with regard to exports only, Council Regulation (EC) No. 1236/2005 states that dual-use goods – i.e., goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex III – require authorization to leave the customs territory of the Community. The competent authority shall not grant any authorization when there are reasonable grounds (international court judgments; findings of the competent bodies of the UN, the Council of Europe and the EU, and reports of the Council of Europe’s European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment and of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other relevant information) to believe that goods listed in Annex III might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority or any natural or legal person in a third country.

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<sup>11</sup> See Michel Quentin, *The European Union Trade Control Regime of items which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment* (Liege: ESU, 2015); Laura Magi, “Il commercio di beni utilizzabili per praticare la pena di morte, la tortura e altri trattamenti disumani e recenti misure comunitarie di contrasto”, *Rivista di diritto internazionale*, (2) (2007): pp. 387–413; Elisa Scorza, “Il divieto di commercio di strumenti utilizzabili per la pena di morte, la tortura o altri trattamenti inumani o degradanti (d.lgs. 12.1.2007 n. 11)”, *La legislazione penale*, 27 (4) (2007): pp. 679–691.

Council Regulation No. 1236/2005 has certain weaknesses: the first of these is the fact that it only covers a limited group of goods, especially dual-use items, despite the expansion accomplished with implementing Regulations No. 1352/2011 and No. 775/2014.<sup>12</sup>

This Regulation also has a limited impact, failing to stem the latest forms of torture: torture and ill-treatment remain effective with or without the use of specific instruments, and a trade block is therefore not the right tool to prevent such practices.

Moreover, Amnesty International and the Omega Research Foundation have denounced some serious failures on the part of some Member States in issuing permits for goods used for torture in countries where the practice is known, or at least where carelessness is displayed towards exports by their country's companies.<sup>13</sup>

Finally, goods in transit through the EU customs territory are not subject to authorization, nor to forms of control. The proposal for a regulation of the European Parliament and of the Council amending Council Regulation No. 1236/2005 states that a broker shall be prohibited from providing to any person, entity or body in a third country brokering services in relation to goods listed in Annexes II and III, irrespective of the origin of such goods. However, it does not prohibit the transiting of such goods because, according to the European Commission, information on the end-user is not usually available to economic operators transporting the transiting goods within the customs territory of the EU and, therefore, imposing a prohibition on the transporter is not considered proportionate.<sup>14</sup>

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<sup>12</sup> See Amendments (No. 3 and 20) adopted by the European Parliament on 27 October 2015 *on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (COM(2014)0001 – C7-0014/2014 – 2014/0005(COD))*: particularly, European Parliament considers that “a targeted end-use clause should be introduced in order for Member States to suspend or halt the transfer of security-related items not listed in Annexes II and III that clearly have no practical use other than for the purposes of capital punishment, torture or other cruel, degrading or inhuman treatment or punishment, or where there are reasonable grounds to believe that the transfer of those items would lead to the facilitation or the commission of capital punishment, torture or other cruel, degrading or inhuman treatment or punishment. Powers granted under the targeted end-use clause should not extend to medical products that could be used for the purpose of capital punishment”.

<sup>13</sup> See Pistoia (note 10), pp. 253–254.

<sup>14</sup> See COM(2014) 1 final – 2014/0005 (COD) of 14 January 2014, *Proposal for a Regulation of the European Parliament and of the Council amending Council Regu-*



## 2.2 *The Internal Action of the European Union*

The EU has not adopted specific measures to counter the use of torture and other inhuman or degrading treatment or punishment by its Member States.

### 2.2.1 *Judicial Cooperation in Criminal Matters*

#### (a) Approximation of Criminal Laws and Regulations

At present, torture is not among the offences subject to legislative approximation between Member States (Art. 83 of the *Treaty on the Functioning of the European Union*),<sup>15</sup> that is, issue for which the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions. However, the presence of a European tool of harmonization of national criminal laws would exert appropriate pressure on those States that fail to respect the *European Convention* and the *CAT*, which impose an obligation to introduce the crime of torture into the criminal law of the States Parties.

#### (b) European Arrest Warrant

The Council Framework Decision of 13 June 2002 *on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA) would seem to exclude the possibility of refusing delivery of an individual to the authorities of a Member State where there is a serious risk that the requested person may be subjected to treatment contrary to Art. 3 of the *European Convention* and Art. 4 of the *Nice Charter*. This is because such refusal may only be made in specific cases, which are listed exhaustively in Art. 3 (*Grounds for mandatory non-execution of the European arrest warrant*) and Art. 4 (*Grounds for optional non-execution of the European arrest warrant*) of the

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Footnote 14 continued

lation (EC) No. 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (para. 3.2.2).

<sup>15</sup> See Markus Kotzur, “Article 83 (Criminal offences with a cross-border dimension) TFEU”, in Rudolf Geiger, Daniel-Erasmus Khan & Markus Kotzur (eds.), *European Union Treaties. Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union* (München: C.H. Beck, 2015), pp. 447–451; Chiara Amalfitano, “Commento all’art. 83 TFEU”, in Antonio Tizzano (ed.), *Trattati dell’Unione europea* (Milano: Giuffrè, 2014), pp. 896–910.



Framework Decision. However, things are different in the event of a serious and persistent breach by one of the Member States; in such cases, the “whereas” clause No. 10 in the preamble of the Framework Decision permits suspension of the mechanism of the European arrest warrant. Although the discipline of the European arrest warrant is based on a high degree of trust between Member States, the Framework Decision must be read in accordance with EU primary law: the same Art. 1, para. 3 explicitly states the obligation to respect the fundamental rights and fundamental legal principles enshrined in Art. 6 of the *TEU*, which cannot be changed as a result of the Framework Decision. Moreover, a judge who does not refuse the mandate in the presence of such risks would be in violation of Art. 3 of the *European Convention* and Art. 4 of the *Nice Charter*. The European Commission largely adhered to this reconstruction and considered the explicit grounds of refusal for violation of fundamental rights or discrimination to be legitimate; however, it pointed out that these grounds should be invoked only in exceptional circumstances within the EU, emphasizing the problematic aspect with respect to the principle of mutual recognition of criminal judgments.<sup>16</sup>

The paucity of references to the protection of human rights in the discipline of the European arrest warrant<sup>17</sup> is due to the fact that this institution is based, as noted, on mutual trust between Member States<sup>18</sup> and on the assumption that there is no place for torture and ill-treatment in Europe, despite the fact that, in reality, practice proves otherwise and national rules are often characterized by ambiguity and inadequacy.<sup>19</sup>

(c) Cooperation Between Judicial Authorities

The Framework Decisions governing cooperation between judicial authorities distinguish between those areas of criminal justice in which cooperation does not require that the offence be

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<sup>16</sup> See Reports from the Commission of 23 February 2005 [COM(2005) 63 final] and 24 January 2006 [COM(2006) 8 final] on the *European arrest warrant and the surrender procedures between Member States*.

<sup>17</sup> See Nina Marlene Schallmoser, “The European Warrant and Fundamental Rights”, *European Journal of Crime, Criminal Law and Criminal Justice*, 22(2) (2014): pp. 135–165.

<sup>18</sup> See Massimo Fichera, “The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?”, *European Law Journal*, 15(1) (2009): pp. 70–97.

<sup>19</sup> See Pistoia (note 10), pp. 254–267.

considered a crime in both jurisdictions and those in which the application of the dual criminality principle is to be decided by the second State. This State, if it decides to adhere to this principle, will ensure that the request of the foreign judicial authority is complied with only if the offence in question can also be prosecuted under its own national legislation. The crime of torture, however, is not one of those areas in which the principle of dual criminality is abandoned in favor of a simplified system of cooperation between judicial authorities.

### 2.2.2 *Right to Asylum, Refugee Status and Repatriation*

Art. 18 of the *Nice Charter* recognizes the right of asylum and Art. 19 sets out the limits to be observed in the event of removal, expulsion or extradition, stating that collective expulsions are prohibited and no one may be removed, expelled or extradited to a State where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.<sup>20</sup>

The crucial point lies in the procedures for identifying the State responsible for examining the asylum application, provided for in Council Regulation (EC) No. 343/2003 of 18 February 2003 (*Dublin II*). The Regulation contains a number of criteria to be applied, with a clear hierarchy in order to avert the risk of abuse of asylum claims by so-called apparent refugees. However, it does not consider the possibility that the State responsible for examining an asylum application may still decide to reject the applicant, exposing this person to the risk of torture. The designation of the State responsible for examining an asylum application is not affected even by an evaluation of the treatment that the same State may apply to the applicant.

The case law<sup>21</sup> of the Court of Justice of the European Union is therefore important<sup>22</sup>: recently, the Court of Justice, in line with the

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<sup>20</sup> See Pistoia (note 10), pp. 272–275.

<sup>21</sup> See Silvia Morgades-Gil, “The Discretion of States in the Dublin III System for Determining Responsibility for Examining Application for Asylum. What Remain of the Sovereignty and Humanitarian Clauses After the Interpretation of the ECtHR and the CJEU?”, *International Journal of Refugee Law*, 27(3) (2015): pp. 433–456.

<sup>22</sup> See Helene Lambert, “Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue”, *International and Comparative Law Quarterly*, 48 (1999): pp. 514–544; Nicoletta Parisi & Dino Rinoldi, “Confini d’Europa, Stato di diritto, diritti dell’uomo. Gerarchia e bilanciamento tra diritti fondamentali con particolare riguardo alla condizione del migrante”, in Lauso Zagato & Sara De Vido

case law of the European Court of Human Rights,<sup>23</sup> stated that a Member State enjoys a rebuttable (not absolute) presumption of respect for fundamental human rights, and particularly for the prohibition of torture and inhuman or degrading treatment; that presumption can however be rebutted by any contrary evidence provided, e.g., by authoritative international organizations and non-governmental bodies.<sup>24</sup> The transfer of an asylum seeker by one Member State to another of first entry must be subjected to strict scrutiny: Art. 4 of the *Nice Charter* must be interpreted as meaning that Member States must not transfer an asylum seeker to the Member State designated as responsible when there are serious systemic deficiencies in the asylum procedure and in the reception conditions for them in that country and when there are substantiated reasons for believing that the applicant runs a real risk of being subjected to ill-treatment. The requesting Member State may itself examine the asylum application (Art. 3, para. 2, Council Regulation (EC) No. 343/2003), but it can also verify the existence of an additional criterion in the Regulation that allows another Member State to be identified as competent to examine the application for asylum: however, the procedure for identifying the competent State must not be such as to exacerbate the violation of the applicant's fundamental rights.

The Court of Justice of the European Union also maintained that where a Member State has agreed to take charge of an asylum seeker as a Member State of first entry into the EU, the applicant may only challenge this decision if there are systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers in that Member State, as these constitute serious and proven reasons to believe that the applicant runs a real risk of being subjected to ill-treatment.<sup>25</sup>

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Footnote 22 continued

(eds.), *Il divieto di tortura e altri comportamenti inumani o degradanti nelle migrazioni* (Padova: Cedam, 2012), pp. 1–46.

<sup>23</sup> See *MSS v. Belgium and Greece*, App. No. 30696/09, (Jan. 21, 2011), <http://hudoc.echr.coe.int/>.

<sup>24</sup> See *Joined Cases C-411/10 N.S. and C-493/10 M.E.*, 2011 E.C.R. I-13905.

<sup>25</sup> See *Case C-394/12, Shamso Abdullahi v. Bundesasylamt*, (Dec. 10, 2013).

Council Directive No. 2004/83/EC (the so-called *Qualification Directive*) addresses subsidiary protection.<sup>26</sup> This measure seeks to overcome the stringent requirements for the acquisition of refugee status, extending its system of protection to persons not in possession of such requirements: the criteria for subsidiary protection include the real risk of suffering serious harm, including torture and other forms of inhuman or degrading treatment or punishment. In this regard, the Court of Justice of the European Union stated that the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection does not require proof that he/she is specifically targeted by reason of factors particular to his/her personal circumstances. In exceptional cases, the existence of such a threat is established where the degree of indiscriminate violence characterizing the armed conflict taking place reaches such a high level as to suggest that any civilian, returned to the country or region in question, would face a real risk of suffering serious harm merely by their presence in the territory.<sup>27</sup> The Court of Justice of the European Union also clarified the meaning of Art. 12, para. 2, of the *Qualification Directive*, i.e., whether the membership of an organization included in a list attached to the Common Position of the Council of 27 December 2001 (2001/931/CFSP) on the application of specific measures to combat terrorism is sufficient to exclude the recognition of refugee status. The Court of Justice of the European Union stated that refugee status may be denied only after an individual examination of the specific facts in order to verify the existence of reasonable grounds to believe that the person has individual responsibility for having committed a serious non-political crime or an act contrary to the purposes and principles of the UN.<sup>28</sup> Moreover, the Court of Justice reaffirmed that the competent authorities must assess whether the applicant runs a real risk of being criminally persecuted or subjected to inhuman or degrading treatment or punishment.<sup>29</sup>

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<sup>26</sup> See Gregor Noll, "Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive", *European Public Law*, 12(2) (2006): pp. 295–318.

<sup>27</sup> See Case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 2009 E.C.R. I-921.

<sup>28</sup> See Joined Cases C-57/09 and C-101/09, *Germany v. B and D*, 2010 E.C.R. I-10979.

<sup>29</sup> See Joined Cases C-71/11 and C-99/11, *Federal Republic of Germany v. Y and Z*, (Sept. 5, 2012); Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel*, (Nov. 7, 2013).

The new *Qualification Directive* (No. 2011/95/EU of the European Parliament and of the Council)<sup>30</sup> pays more attention to the clarifications of the Court of Justice of the European Union and introduces important further changes<sup>31</sup>: however, the European Commission considered it unnecessary to include details regarding the interpretation doubts analyzed in the *Elgafaji* judgment, even if it would perhaps be appropriate to reduce the variation in implementation by each Member State.

Finally, Council Directive 2005/85/EC of 1 December 2005 (the so-called *Asylum Procedures Directive*)<sup>32</sup> also creates problems of interpretation through its ambivalent character: the controversial element is the use of the notion of safe countries to determine the inadmissibility of an application for asylum, and, in particular, the eligibility of a list of countries which are deemed as safe. Indeed, although the term appears consistent because it adheres to the principle of non-refoulement under the *Geneva Convention* and to the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman or degrading treatment, there is cause for concern in the preparation of lists based on a theoretical and protracted evaluation by individual States.

The EU, on account of the increase in migration flows of recent years, seems to have adopted a less favorable policy of support to refugees,<sup>33</sup> despite the *Stockholm Programme 2010/2014*'s emphasis on the need for a common area of protection and solidarity, founded

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<sup>30</sup> See Jonah Eaton, "The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive", *International Journal of Refugee Law*, 24(4) (2012): pp. 765–792.

<sup>31</sup> See David Kosar, "Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say", *International Journal of Refugee Law*, 25(1) (2013): pp. 87–119.

<sup>32</sup> See Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?", *European Journal of Migration and Law*, 7(1) (2005): pp. 35–70.

<sup>33</sup> See Directives of the European Parliament and of the Council of 26 June 2013, No. 2013/32/EU, *on common procedures for granting and withdrawing international protection (recast)* and No. 2013/33/EU, *laying down standards for the reception of applicants for international protection (recast)*, and Regulations (EU) of the European Parliament and of the Council of 26 June 2013, No. 603/2013, *on the establishment of Eurodac for the comparison of fingerprints* and No. 604/2013 (the so-called *Dublin III*), *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, amending *Dublin II*.

on a common asylum procedure and a uniform status for those that have obtained international protection, based on high standards of protection and fair and effective procedures.

In general, reception procedures have not improved, while use of “administrative detention” measures or limitations on freedom of movement has increased. In addition, there has been a confirmation of the old principle that formed the basis of the *Dublin Convention* of 1990 and the *Dublin II*: i.e., as a rule, every asylum application must be examined by a single Member State and that the competent country is the State of entry of the applicant.

However, taking into account the case law of the Court of Justice of the European Union, Art. 3, para. 2, of Regulation No. 604/2013 states that where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment pursuant to Art. 4 of the *Nice Charter*, the determining Member State shall continue to examine the criteria in order to establish whether another Member State can be designated as responsible. Moreover, where the transfer cannot be made to any Member State, the determining Member State shall become the responsible Member State.

There are further limits in this new discipline: the State responsible for examining the request of the applicant coincides, as a rule, with the one in which the refugee will remain when he/she is granted protection, without the possibility of a transfer coordinated with other Member States and without an evaluation conducted by a specifically designated third party. However, the recent state of emergency in Italy has highlighted the need for solutions that allow, despite the opposition of some States, an effective “redistribution of refugees” between Member States, irrespective of the country of first entry.

Directive No. 2008/115/EC of the European Parliament and the Council of 16 December 2008 *on common standards and procedures in Member States for returning illegally staying third-country nationals* (the so-called *Returns Directive*)<sup>34</sup> gives rise to other considerations,

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<sup>34</sup> See Anneliese Baldaccini, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration and Law*, 11(1) (2009): pp. 1–17.

as it seems more attentive to human rights and the principle of non-refoulement of irregular migrants.

The measures to combat the phenomenon of illegal immigration include readmission agreements whereby parties agree to readmit their own nationals into their territories when they have been found illegally in the territory of another Contracting Party. The conclusion of these agreements requires the approval of the European Parliament, and the agreements share structural similarities: in particular, to ensure the protection of the fundamental rights of migrants, the preamble usually includes references to human rights and the main international agreements on the subject.

In this regard, the European Commission's proposal,<sup>35</sup> whereby future agreements would include clauses allowing the EU to unilaterally terminate the agreement where there is a risk of serious and persistent violation of human rights of readmitted persons, is inadequate because it is not a dissuasive solution: on the contrary, it could encourage partner countries to engage in human rights violations in order to avoid readmitting irregular immigrants found in the countries of the EU, since the purpose of the agreement is restraining illegal immigration from third countries to European countries and not vice versa. In these cases, Member States should not send these migrants away to third countries, as there are other solutions: general international law provides the most effective tools of reaction, such as the suspension of agreements other than those regarding readmission.<sup>36</sup>

Moreover, the way to reduce the risk of violation of migrants' human rights is to (essentially) conclude readmission agreements only with States that are Parties of the major treaties on the protection of human rights, and to provide for a post-repatriation control mechanism to monitor and obtain information on the situation of persons readmitted.

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<sup>35</sup> See COM(2011) 76 final of 23 February 2011, *Communication from the Commission to the European Parliament and the Council on Evaluation of EU Readmission Agreements*.

<sup>36</sup> See Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Leiden: Martinus Nijhoff Publishers, 2009); Stefano Nicolin, "Contrasto all'immigrazione irregolare negli accordi di riammissione dell'Unione europea", in Lauso Zagato & Sara De Vido (eds.), *Il divieto di tortura e altri comportamenti inumani o degradanti nelle migrazioni* (Padova: Cedam, 2012), pp. 203–234.



### 2.3 *Some Remarks*

At this point, we can make a few comments with regard to internal and external actions of the EU and, in particular, evaluate the effectiveness and adequacy of the measures implemented in order to repress the practices of torture. However, before doing so, it is useful to briefly cite two recent resolutions of the European Parliament.

The European Parliament, in the Resolution of 27 February 2014 *on the situation of fundamental rights in the European Union (2012)*, expresses its alarm at the persistence of instances of violation of human dignity in the Union and in its Member States, whose victims include minorities (Roma in particular), asylum-seekers, migrants, people suspected of having links with terrorism and people who are deprived of their freedom, as well as vulnerable groups and impoverished people, stressing that public authorities must abide by the absolute prohibition on torture and cruel, inhuman or degrading treatment, as well as carry out swift, effective and independent in-depth investigations into any breach and prosecute those responsible.

The numerous instances of ill-treatment by police and law enforcement officers, particularly in relation to the disproportionate use of force against peaceful participants and journalists in connection with demonstrations, and the excessive use of non-lethal weapons, are of great concern since the primary role of the police forces is to guarantee the safety and protection of people.

Moreover, the European Parliament reiterates its call for a full investigation into collaboration by European States in the “extraordinary rendition” program of the United States and the CIA, flights and secret prisons within the territory of the EU, and insists that Member States must perform effective, impartial, in-depth, independent and transparent investigations and that there is no place for impunity, since the ban on torture is absolute and, therefore, State secrecy cannot be invoked to limit the obligation on States to investigate serious human rights violations. Indeed, the European Parliament further stressed that respect for fundamental rights and the rule of law is an essential element in successful counterterrorism policies.<sup>37</sup>

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<sup>37</sup> See European Parliament resolution of 11 February 2015 *on the US Senate report on the use of torture by the CIA*, European Parliament resolution of 21 January 2016 *on the EU's priorities for the United Nations High Commission for Refugees session in 2016* and European Parliament resolution of 8 June 2016 *on follow-up to the resolution of Parliament of 11 February 2015 on the US Senate report on the use of torture by the CIA*.

Later, the European Parliament, in the Resolution of 11 March 2014 *on the eradication of torture in the world*, observes that the implementation of the *EU Guidelines on Torture* remains insufficient and is at odds with EU statements and commitments to addressing torture as a matter of priority, pointing out the need for a revision of the action plan in order to define more ambitious and specific actions for eradicating torture.<sup>38</sup>

The European Parliament believes that the EU should adopt more decisive positions and calls on the EU institutions and Member States to strengthen their commitment and political will in order to achieve a worldwide moratorium on capital punishment. Furthermore, the European Parliament calls on the European Commission to draw up an action plan with a view to creating a mechanism for listing and imposing targeted sanctions (travel bans, freezing of assets, etc.) against officials of third countries involved in grave human rights violations, such as torture and cruel, inhuman or degrading treatment.

The developed analysis and the two European Parliament resolutions give rise to some thoughts: first, contrary to the claims of some commentators, the EU commitment against torture and other ill-treatment is often cloaked in hypocrisy, both in policies towards third countries and in internal policies, since the operative solutions are not entirely effective or adequate. The European Parliament has clearly expressed its alarm, although it sometimes takes an ambiguous position: when the European Parliament refers to the different forms of use of force by police, without using the terms torture or ill-treatment, it seems to be identifying something other than torture and ill-treatment, i.e., forms of violence that have less negative impact.

As for the action directed towards third countries, its limitations arise not only from inadequate operative solutions but also from the fact that the goals presuppose the effective cooperation of these third countries.

Regarding the internal action of the EU, it is necessary to reiterate that the legalization of torture (in extreme cases) in the Member States<sup>39</sup> (although all of them have agreed to the various interna-

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<sup>38</sup> See, in the same direction, European Parliament resolution of 12 March 2015 *on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter*.

<sup>39</sup> See Niklas Luhmann, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?* (Heidelberg: C.F. Müller, 1993); Winfried Brugger, "Darf der Staat ausnahmsweise foltern?", *Der Staat*, 35 (1996): pp. 67–97. Particularly, some proposals

tional agreements aimed at the eradication of torture) is absolutely contrary with the principles endorsed by European primary law (Art. 2 *TEU*) and with the provisions of the *Nice Charter* and the *European Convention*. However, it must be emphasized that the instruments used at the European level to prevent these practices appear inadequate in some respects and relatively underused in others.

They are inadequate because, where there is a clear risk of a serious breach of the values of Art. 2 *TEU* or of serious and persistent breach by a Member State of the same values, the procedures described in Art. 7 *TEU* – which can involve, in the first instance, the adoption of recommendations to the Member State and, in the second, the suspension of certain rights deriving from the Treaties to the Member State – seem difficult to apply due to the fact that “the grave breach” is understood as a constant, or at least recurrent, behavior: therefore, it does not cover individual instances spread out over time.

They are not fully exploited because, even when there is room for intervention – e.g., by including the crime of torture among those subject to common minimum standards, or in the case of simplified judicial cooperation – the will to intervene seems to be lacking, despite the positions taken by the European Parliament. Nevertheless, these solutions would have positive effects: first, the Member States should introduce the crime of torture and secondly, they should pay more attention to cases of abuse in the use of force.

Consequently, doubt arises (even in view of some proposals made at the political level in some Member States) as to whether, at the base of EU policy on the subject, there is already a latent distinction between the forms of torture or ill-treatment that must be rejected and the use of coercive means that may in some circumstances be accepted, or upon which an explicit definitive position is not assumed.

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Footnote 39 continued

to legalize torture in extreme cases have been advanced after the notorious Jakob von Metzler case: the child von Metzler was kidnapped for ransom and the police threatened to torture the alleged offender in the hope, unfortunately in vain, to find the child still alive. See Jan P. Reemtsma, *Folter im Rechtsstaat?* (Hamburg: Hamburger Edition, 2005). In general, the debate on the legalization of torture in extreme cases is again today renewed after the terrorist attacks that started in 2001: Alan Morton Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002); Richard A. Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006); Uwe Steinhoff, *On the Ethics of Torture* (Albany: SUNY Press, 2013); Gerald Lang, “Legitimizing Torture?”, *Criminal Law and Philosophy*, (2015): pp. 1–19.

A full cultural evolution has yet to take place: the belief is still held that, in certain cases, a minimum degree of violence may be necessary and that, in any case, the evaluation of this necessity must remain at the domestic level.

### III THE PROHIBITION OF TORTURE IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. THE CASE OF ITALY<sup>40</sup>

#### 3.1 *The Condemnation of Italy for Violation of the Prohibition of Torture*

Although the Italian Constitution states that “Any acts of physical or moral violence against persons subject to restrictions of personal liberty are to be punished” (Art. 13, para. 4),<sup>41</sup> Italy has not yet introduced the crime of torture in criminal law, contrary to the express provisions of Art. 1 of the *CAT*<sup>42</sup> and Art. 3 (*Prohibition of Torture*) of the *European Convention*.<sup>43</sup> For years, the Committee

<sup>40</sup> See Marta Picchi, “The Condemnation of the Italian State for Violation of the Prohibition of Torture. Remarks on the Ruling passed by the European Court of Human Rights, Section IV, 7 April 2015, Application No. 6884/11, case of Cestaro v. Italy”, *GSTF-Journal of Law and Social Sciences* 4(1) (2015): pp. 27–31.

<sup>41</sup> See Marco Ruotolo, “Brevi riflessioni su una recente proposta per l’introduzione del delitto di tortura nell’ordinamento italiano”, in Anna Maria Nico (ed.), *Studi in onore di Francesco Gabriele* (Bari: Cacucci, 2016), pp. 891–896; Andrea Pugiotto, “Repressione penale della tortura e Costituzione: anatomia di un reato che non c’è”, *Diritto Penale Contemporaneo* (2) (2014): pp. 129–152.

<sup>42</sup> See Jan Herman Burgers & Hans Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988); Elisabeth McArthur & Manfred Nowak, *The United Nations Convention Against Torture: A Commentary* (New York City: Oxford University Press, 2008).

<sup>43</sup> See Donna Gomien, David Harris & Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1998); Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights* (Oxford: Oxford University Press, 2014); David Harris, Michael O’Boyle, Ed Bates & Carla Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2014); Viviana Piccioni, “Art. 3, Divieto di tortura”, in Claudio Defilippi, Debora Bosi & Rachel Harvey (eds.), *La Convenzione europea dei diritti dell’uomo e delle libertà fondamentali* (Napoli: Edizioni Scientifiche Italiane, 2006), pp. 107–135; Antonio Balsamo, “L’Art. 3 della CEDU e il sistema italiano – The Statute of Limitation in the Italian Criminal Legal System requires to be amended”, *Cassazione penale* (11) (2014): pp. 3925–3937.

against Torture<sup>44</sup> of the UN and the Committee for the Prevention of Torture,<sup>45</sup> a body of the Council of Europe, have repeatedly criticized and denounced this omission<sup>46</sup> while the European Court of Human Rights has ascertained on several occasions the Italy's responsibility for the violation of the absolute prohibition of torture and the use of inhuman or degrading treatment.<sup>47</sup>

The European Court of Human Rights ruling in the Cestaro versus Italy case, passed on 7 April 2015, is a further condemnation of the Italian State not only for the substantive violation of Art. 3 of the *European Convention*, but also for the lack of an effective criminal law that prosecutes the acts of torture committed.

### 3.1.1 *Facts and Decisions of the European Court of Human Rights*

In its ruling, the European Court of Human Rights unanimously agreed that there had been a violation of Art. 3 of the *European Convention* on account of ill-treatment sustained by the applicant during events which occurred at the end of the G8 Summit in Genoa in July 2001 in the Diaz-Pertini School, whose building was made

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<sup>44</sup> See *Report of the Committee against Torture* of 1 December 2007 (A/62/44, para. 40 C), where the Committee reiterated its previous recommendation (A/54/44, para. 169 a) “that the State party proceed to incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should also ensure that these offences are punished by appropriate penalties which take into account their grave nature, as set out in article 4, paragraph 2, of the Convention”.

<sup>45</sup> See *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 13 to 25 May 2012*, p. 8 (Strasbourg, 19 November 2013).

<sup>46</sup> See Rod Morgan & Malcolm D. Evans, *Combating Torture in Europe: the Work and Standards of the European Committee for the Prevention of Torture (CPT)* (Strasbourg: Council of Europe Publishing, 2001); Novella Ricciuti, “Il Comitato europeo contro la tortura e la prassi italiana dei respingimenti verso la Libia”, *Diritti umani e diritto internazionale* (3) (2010): pp. 673–678.

<sup>47</sup> The first condemnation by the European Court of Human Rights is *Labita vs. Italy*, App. No. 26772/95, (6 Apr. 2000), <http://hudoc.echr.coe.int/>. After this, the European Court of Human Rights found a violation of Art. 3 of the *European Convention* by the Italian State in a growing number of cases: recently, it can cite the rulings of *M. and Others vs. Italy and Bulgaria*, App. No. 40020/03, (31 Jul. 2012), <http://hudoc.echr.coe.int/>, and *Torreggiani and Others vs. Italy*, App. No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, (8 Jan. 2013), <http://hudoc.echr.coe.int/>. Finally, the Italian State was again sentenced to the violation of Art. 3 of the *European Convention* in the *Nasr and Ghali vs. Italy* case, App. No. 44883/09, (23 Feb. 2016), <http://hudoc.echr.coe.int/>.

available at the time by the municipal authorities for demonstrators to use as a night shelter. On the nights of the 21st and the 22nd of July an anti-riot police unit entered the building to carry out a search, leading to acts of violence.

(a) The Material Violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms

First of all, the European Court of Human Rights refers to the definition of torture contained in the *CAT*<sup>48</sup> and the evolution of this concept in the case law of the Court itself<sup>49</sup>: in light of this reconstruction, the European Court of Human Rights ruled that the violence committed in the Diaz-Pertini School, of which the applicant is a victim, had a punitive function as well as being an act of retaliation aimed to cause humiliation, pain and suffering of the victims. Therefore, these forms of violence have the characteristics of real torture, pursuant to Art. 1 of the *CAT*.<sup>50</sup> The violence inflicted on the applicant was deemed as involving particularly serious acts of cruelty, because it was completely gratuitous as the victim did not pose any resistance: i.e., the police abused their position of power, and committed a deliberate and premeditated act, devoid of any foundation.<sup>51</sup> This is demonstrated not only by punitive irruption into the Diaz-Pertini School, but also by the subsequent efforts of the national authorities to justify the search of premises and arrests on the basis of false evidence, e.g., simulating the discovery in the school's courtyard of two Molotov cocktails.<sup>52</sup>

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<sup>48</sup> The Art. 1, para. 1, states that “For the purposes 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.”

<sup>49</sup> See *Cestaro v. Italy*, App. No. 6884/11, paras. 171–176 (7 Apr. 2015), <http://hudoc.echr.coe.int/>.

<sup>50</sup> *Id.*, para. 177.

<sup>51</sup> *Id.*, paras. 179–183.

<sup>52</sup> *Id.*, para. 184.

As a result, the European Court of Human Rights ruled that all the facts indicate that the treatment contrary to human dignity suffered by the applicant should be qualified as torture.<sup>53</sup>

(b) The Infringement of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the Procedural Side

According to the case law of the European Court of Human Rights, mere compensation is not enough to overcome the victim status; instead, it is necessary to punish those responsible for acts of torture.<sup>54</sup> In this way, the European Court of Human Rights identifies the second aspect of the responsibility of Italy in accordance with the procedural requirements of Art. 3 of the *European Convention*<sup>55</sup>: indeed, each contracting country has to carry out effective investigations into all cases of material breach of this article, in order to identify, prosecute and convict accordingly those responsible for acts of torture and inhuman or degrading treatment.<sup>56</sup>

The European Court of Human Rights states that only the Italian judicial authorities can sanction sentence reductions or legal allowances for perpetrators of torture: however, pursuant to Art. 19 of the *European Convention* and in accordance with the principle that the *Convention* is both a theoretical and practical guarantee, the European Court of Human Rights rules that it must monitor and intervene when there is a clear discrepancy between the gravity of the act and the penalty imposed.<sup>57</sup> Moreover, in cases of torture committed by State officials, criminal proceedings should never become extinct through the statute of limitation, while amnesty and pardon should never be granted for this type of crime nor should the sentence be suspended.<sup>58</sup>

It is therefore necessary that each contracting State to the *European Convention* introduces provisions of criminal law, in accordance with the provisions of Art. 3 of the *European Con-*

<sup>53</sup> *Id.*, para. 190.

<sup>54</sup> *Id.*, paras. 230–231.

<sup>55</sup> See Christoph Grabenwarter, *European Convention on Human Rights – Commentary* (München: C.H. Beck, 2014), pp. 40–42.

<sup>56</sup> *Id.*, paras. 204–206.

<sup>57</sup> *Id.*, para. 207.

<sup>58</sup> *Id.*, para. 208.



vention, while, in terms of disciplinary measures, the European Court of Human Rights considers that, when the perpetrators are State officials, it is important that these are suspended during the period of investigation and trial and are permanently removed if convicted.<sup>59</sup>

In the present case, the European Court of Human Rights has found a number of violations of the positive obligations under Art. 3 of the *European Convention*: the police did not cooperate with the investigating authorities to identify the perpetrators of violence and the Italian Government has yet to respond to requests for information regarding the necessary suspension from duty of police officers subjected to criminal proceedings.<sup>60</sup>

In any case, the most serious aspect is the impunity of the authors: the defendants were sentenced to prison terms by the national courts for minor offences of forgery, which were committed with the intent to conceal the facts of torture, while in regards to offences of intentional injury, beatings, private violence and abuse of office, they have benefited from the limitation of actions and a sentence reduction as determined by the pardon governed by Law No. 241/2006.<sup>61</sup>

Consequently, the European Court of Human Rights found that the authorities were incompetent in their response to such serious acts: however, this result cannot be imputed to the shortcomings or negligence of the public prosecutor's office or the domestic courts.<sup>62</sup> The problem has a structural nature: the present case had proved that Italian criminal legislation does not recognize torture and is devoid of the necessary deterrent effect to prevent other similar violations of Art. 3 in the future.<sup>63</sup>

The European Court of Human Rights pointed out that the State's positive obligations under Art. 3 of the *European Convention* include the duty to introduce a properly adapted legal framework, including effective criminal law provisions.<sup>64</sup>

Therefore, the European Court of Human Rights concluded that the Italian legal system should be endowed with the legal

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<sup>59</sup> *Id.*, para. 209.

<sup>60</sup> *Id.*, paras. 214–217 and 227–228.

<sup>61</sup> *Id.*, paras. 219–222.

<sup>62</sup> *Id.*, paras. 223–224.

<sup>63</sup> *Id.*, para. 225.

<sup>64</sup> *Id.*, para. 243.

means to ensure the appropriate punishment of perpetrators of acts of torture or other ill-treatment under Art. 3 of the *European Convention* and be empowered to prevent perpetrators of torture from benefiting from measures of relief that are contrary to the Court's case law.<sup>65</sup>

### 3.2 *The Bill Before the Italian Parliament*

The Italian Parliament must then recognize torture as a crime, without delay, in order to ensure effective respect for human dignity and prevent the further compromise of the Italian State's international credibility.

The bill before Parliament<sup>66</sup> includes an introduction to the concept of torture as a crime under Art. 613-*bis* of the Penal Code: "Whoever, with violence or threat or violation of his obligations of protection, care and assistance, intentionally causes a person entrusted to him, or at least under his authority, supervision or custody, acute physical or mental suffering in order to obtain information or statements, or as a form of punishment, or as a means to curb resistance, or for any reason based on ethnicity, sexual orientation or political or religious opinions, shall be punished with imprisonment from four to ten years. If the facts mentioned in the first paragraph are committed by a public official or a person responsible for a public service, with abuse of authority, or in violation of the duties inherent to the function or service, the applied punishment will be imprisonment from five to fifteen years".<sup>67</sup>

The bill provides for the introduction of aggravating circumstances if the acts committed lead to the unintended consequence of death, establishing an increase of two-thirds of the sentence; while, if the perpetrator intentionally causes death, the penalty is life imprisonment. Moreover, Art. 613-*ter* introduces the crime of instigation of a public official to commit torture.

While the sentencing for the crime of torture is subject to a statute of limitation, the period of time within which proceedings must be instituted doubles the penalty prescribed by the law: therefore, the crime of torture is extinguished after a period of 20 years, or after

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<sup>65</sup> *Id.*, para. 246.

<sup>66</sup> The bill No. 2168 was approved by the Chamber of Deputies on 9 April 2015 and is currently before the Senate of the Republic.

<sup>67</sup> Trans. mine.

30 years when it is committed by a public official or a person responsible for a public service.

The bill also enshrines the ban on the use of statements obtained through the crime of torture and the prohibition to expel or return migrants when it is assumed that, in the countries of origin, they are subjected to torture. Finally, diplomatic agents under investigation or sentence in their country of origin for this offence would be stripped of their diplomatic immunity.

### 3.3 *Critical Considerations to the Draft Law*

The legislature would introduce a wider configuration of the crime of torture than required by the *CAT* because, next to the most serious offence committed by a public official or a person responsible for a public service (para. 2), the crime of torture committed by private persons is also contemplated (para. 1). This solution is satisfactory because it would fully respect the positive obligations of prevention to which each State Party must comply, in accordance with Art. 3 of the *European Convention*.

However, the legislature still fails to address all aspects of torture. First, the provision of the law before Parliament circumscribes the victims of the crime only to the people entrusted to the police officer, or otherwise subjected to his authority, supervision or custody, thus excluding the possibility of recognizing the existence of the offence, in the case of serious violence, freely aimed at causing suffering to the victims, perpetrated by the police in the operations of public policy before the victims fall under the authority of the police. This provision would therefore fail to recognize instances of torture similar to the acts committed in the Diaz-Pertini School, a case that only became classified as torture once it was recognized as such by the European Court of Human Rights. As a result, this provision would not be able to punish and prevent the commission of new facts similar to those condemned by the European Court of Human Rights. However, it would expose Italy to further future international responsibilities because the proposed solution would be inconsistent with the obligations under the *CAT*.

Another critical point is the description of the conduct because the provision requires the use of “violence or threat”: torture is often performed without the use of these modes, so it would be preferable to structure the offence to a “free form” as required by the *CAT*.

Similarly, the request for a specific intent, i.e., the fact that the performed behavior aimed toward a specific purpose, fails to identify

cases of intentional infliction of physical or moral suffering executed without any apparent purpose, but only for revenge or sadism: bringing to mind, once again, the events of the Diaz-Pertini School.

With regards to offences that are committed by a public official or a person responsible for a public service, the legislature still does not rule out possible allowances for the accused on the basis of extenuating circumstances, even though it does outline an appropriate maximum penalty. Consequently, those responsible for these crimes could benefit from reduced sentences.

Finally, the draft law does not exclude the applicability of exoneration, in contrast with the provisions of the *CAT* (Art. 2, paras. 2 and 3), nor does it preclude the statute of limitation and the applicability of amnesty or pardon, unlike the reconstruction entrenched in case law of the European Court of Human Rights. In fact, according to the international order, the condemnation of torture has an absolute and imperative value because neither a state of war, threat of war nor internal political instability can be invoked as a justification for torture (*CAT*, Art. 2, para. 2)<sup>68</sup>: the prohibition of torture does not allow exceptions, limitations, compensations, nor any derogation (*European Convention*, Art. 15, para. 2).<sup>69</sup>

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<sup>68</sup> See Nigel Rodley & Matt Pollard, “Criminalisation of Torture: State Obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, *European Human Rights Law Review*, (2) (2006): pp. 115–141; Cristiana Fioravanti, “Divieto di Tortura e ordinamento italiano: sempre in contrasto con obblighi internazionali?”, *Quaderni costituzionali*, (3) (2004): pp. 555–568; Barbara Concolino, “Divieto di tortura e sicurezza nazionale: il no della Corte europea dei diritti dell’uomo al bilanciamento nei casi di espulsione di presunti terroristi”, *Diritto Pubblico Comparato ed Europeo*, (3) (2008): pp. 1109–1117.

<sup>69</sup> The European Court of Human Rights, in the case of *Khashiyev and Akayeva v. Russia*, App. No. 57942/00 and 57945/00, para. 170 (24 Feb. 2005), <http://hudoc.echr.coe.int/>, ruled that “article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and its Protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, para. 2 even in the event of a public emergency threatening the life of the nation”. In the same sense, see recently *Nasr and Ghali v. Italy*, App. No. 44883/09, para. 280 (23 Feb. 2016), <http://hudoc.echr.coe.int/>.

## IV EVALUATION SUMMARY

The legal literature has emphasized that the use of torture and inhuman or degrading treatment – along with authoritarian tendencies, the return to forms of racism and the absence of standards of social equity – are an index of the regressive nature of time, characterized in that “rights seem to ‘have a price’: the price of so-called public safety”.<sup>70</sup>

It is a sort of inversion of values: the guarantee of freedoms and fundamental rights, at times, is seen as an obstacle to the protection of other values considered to be more important, such as security. Ensuring security is no longer understood as functional to the protection of fundamental rights, instead, in sharp contrast with these, it is used to explain the recent debate on the legalization of torture. National interest is once more taking prevalence over the founding principles of the rule of law.<sup>71</sup>

In addition to these reasons that characterize the policy choices of many countries, there are other explanations for the delay in the recognition of torture as a crime in Italian law: the express provision of this offence would be capable of eroding the impunity that is still enjoyed by some officials and public officers. There are additional reasons: policies targeted at illegal or undocumented immigrants would need to be abandoned and the current penitentiary system would also need to be reviewed.

Nevertheless, in a Constitutional State of Law, the dignity of each individual is the supreme value, meaning that they cannot be treated as a means to achieve an end that transcends them: therefore, torture and inhuman or degrading treatment can never be justified because they dehumanize both the victims and the perpetrators.

Torture is a brutal and disturbing reality, more or less hidden and close to home,<sup>72</sup> yet while it is often ignored, it is an issue that must be addressed in the social, political and legal spheres, and accompanied by a comprehensive public campaign to inform on its associated risks.

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<sup>70</sup> See Marina Lalatta Costerbosa, “Per una storia critica della tortura”, *Materiali per una storia della cultura giuridica* (1) (2011): p. 33, [trans. mine].

<sup>71</sup> See Parisi & Rinoldi, (note 22).

<sup>72</sup> See Patrizio Gonnella, *La tortura in Italia. Parole, luoghi e pratiche della violenza pubblica* (Roma: DeriveApprodi, 2013); Massimo La Torre & Marina Lalatta Costerbosa, *Legalizzare la tortura? Ascesa e declino dello Stato di diritto* (Bologna: Il Mulino, 2013).

The stance on torture determined by domestic<sup>73</sup> and international courts is essential for preventing human rights from being eroded, but it is also necessary that the principles of inviolability of the person and of human dignity become ingrained in cultural and social consciousness. Only then will torture and inhuman or degrading treatment be perceived as non-justifiable under any circumstances.

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<sup>73</sup> See Patrizia Palermo, “Dal terrorismo alla tortura attraverso le procedure di espulsione. Una sentenza della suprema Corte di Cassazione”, *Rivista penale*, (12) (2010): pp. 1277–1289.