Università
Ca'Foscari
Venezia

Master's Degree

in Comparative International Relations

Final Thesis

Human Rights Behind Bars:

preventing torture and ill-treatment in prison.

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Academic Year
2020/2021

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List of Acronyms

BJS	Bureau of Justice
CAT	Convention against Torture
CDPC	European Committee on Crime and Problems
CESCR	Committee on Economic, Social and Cultural Rights
CIA	Central Intelligence Agency
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DG I	Council of Europe's Directorate-General on Legal Affairs
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
HRC	Human Rights Committee
IACHR	Inter-American Convention on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
IRA	Irish Republican Army
JDI	Just Detention International
NGO	Non-governative organization
NIC	National Institute of Correction
NIJ	National Institute of Justice
NPMs	National Preventive Mechanisms
NPREC	National Prison Rape Elimination Commission
OLC	Office Legal Counsel
OPCAT	Optional Protocol Convention against Torture
PC-CP	Council for Penological Co-operation

PREA	Prison Rape Elimination Act
SMR	United Nations Standards for the Treatment of Prisoners
SPT	Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
SRT	Special Rapporteur on Torture
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America

Abstract

Le pratiche di tortura all'interno delle carceri esistono e non sono esclusivamente circoscritte all'interno dell'immaginario collettivo. Sebbene la tortura sia concepita da molti stati come un tabù, in realtà tale pratica e tutte le sue più sfaccettate forme continuano ad essere una vera e propria sfida non solo per il diritto internazionale stesso, ma anche per tutte quelle innumerevoli organizzazioni internazionali non governative, quali Human Rights Watch, Amnesty International ed a livello nazionale italiano Associazione Antigone, che da anni tentano di ridurre le violazioni dei diritti umani portando alla luce tutti quei casi di inadempienze che celano tortura e trattamenti inumani e degradanti.

Il seguente elaborato si propone di mettere in luce l'uso della tortura e dei trattamenti inumani o degradanti all'interno dell'ambiente carcerario focalizzandosi sull'importanza della valorizzazione dei diritti umani, dei quali anche coloro privati della loro libertà personale sono da sempre detentori. Sebbene la seguente tematica sia da sempre poco dibattuta e caratterizzata da un certo grado di indifferenza non solo da parte della società odierna, ma anche dalle principali classi politiche ed autorità giudiziarie, l'indifferenza non può di certo ritenersi la cura migliore per sradicare tale "cancro" e tantomeno lo sono i vari tentativi di legittimarne l'uso in situazioni eccezionali, in quanto è bene ricordare che il crimine di tortura rimane uno dei pochi reati aventi carattere assoluto.

Il seguente elaborato finale si struttura in quattro capitoli principali. Il primo capitolo ha l'obbiettivo di introdurre il potenziale lettore alle tematiche della tortura e delle carceri, proponendo un'analisi dell'evoluzione storica di tale pratica disumana e dello sviluppo del sistema penitenziario nel corso dei secoli. Entrambi i punti cardine del seguente capitolo verranno esaminati partendo da come venivano utilizzati e concepiti durante l'antica Grecia per poi giungere ai metodi più moderni di tortura attuati specialmente nei sistemi carcerari odierni. Le fondamenta dell'intero studio verranno quindi relazionate per poi studiarne la loro controversa connessione che, come si vedrà, non si limita ad essere radicata esclusivamente in quei grandi paesi dai regimi dispotici autoritari, bensì, nonostante i tentativi di eclissarla, trova terreno fertile anche in tutti quei paesi liberal-democratici promotori dei diritti umani.

Il secondo capitolo verte su quelli che sono gli strumenti legali sia a livello internazionale, che a livello regionale europeo, volti a prevenire, criminalizzare e

sanzionare il crimine di tortura ed i suoi possibili autori. In particolare, verranno analizzati dal punto di vista cronologico spazio-temporale i principali trattati e convenzioni che da anni svolgono un ruolo cardine nello sradicamento di tale crimine. Particolare attenzione verrà poi posta al ruolo fondamentale dei vari meccanismi di controllo nati da questi strumenti legali. Essi non solo hanno dettato parametri per gli stati ratificanti le convenzioni e per il trattamento dei carcerati, ma, insieme alle varie organizzazioni non governative, detengono anche il compito di portare alla luce le violazioni dei diritti umani, in particolare il crimine di tortura e delle pene o i trattamenti inumani o degradanti, all'interno delle carceri. Successivamente importanza verrà data a tutti quei dispositivi di tipo "soft law" *ad hoc* impiegati per la protezione dei diritti umani fondamentali delle persone private della loro libertà e più volte ripresi e citati sia dai giudici internazionali che dai vari meccanismi di controllo istituiti dalle varie convenzioni.

Il terzo capitolo, partendo dalla conferma che ogni carcerato non è privato dei suoi diritti naturali discendenti dalla nascita, esamina tutte quelle circostanze che all'interno del sistema penitenziario possono sfociare in violazioni dei diritti umani e nella conseguente inadempienza di tutte quelle convenzioni istituite a criminalizzare la tortura ed i trattamenti inumani o degradanti. In particolare, verranno studiate tutte quelle circostanze tipiche dell'ambiente detentivo che, se commesse in maniera sproporzionata ed illecita, possono sfociare in situazioni di violenza e tortura. A conclusione del seguente capitolo verrà poi analizzato lo scandalo del carcere iracheno di Abu Ghraib, come esempio cardine di eventi di pura follia e odio nei confronti di individui che, a causa della loro posizione svantaggiata in partenza, risultano innocui.

Nell'ultimo capitolo, l'attenzione del lettore verrà spostata dal quadro normativo internazionale ed europeo a quello nazionale italiano. Il capitolo mantiene la medesima ottica internazionalista che da stampo all'intero elaborato, fornendo tuttavia esempi concreti di casi ricorrenti di fronte alla Corte Europea dei Diritti Umani concernenti casistiche di violazioni dell'articolo 3 della Convenzione Europea dei Diritti Umani legate all'ambiente carcerario italiano. Verranno quindi sottolineate le principali debolezze del sistema penale italiano quali i periodi estremante lunghi di processo, il sovraffollamento carcerario che da anni corrode le carceri italiane e, probabilmente l'inadempienza meno giustificabile, l'assenza di un reato di tortura all'interno del Codice Penale Italiano fino al 2017.

Introduction

This dissertation examines the controversial relationship between the practice of torture, and inhuman or degrading treatment and punishment in the correctional environment, focusing on the importance and respect of human rights of which all detainees are holders , regardless their sex, age, nationality, ethnicity and seriousness of the crime committed. Affirming that life behind bars is easy is a euphemism. Events of mistreatments and human rights offences happen every day during prison life, and a proof of this is provided by the numerous denunciations made by international courts, monitoring mechanisms and non-governmental organizations that highlight how this problem is still deeply-rooted not only in those countries where authoritarian regimes reign, but also in those states that have always proclaimed themselves great promoters of human rights. Since this subject is particularly awkward, it is characterized by a certain degree of indifference not only by the current society, but also by the main political classes and judicial authorities.

This final thesis has been divided into four parts. The first chapter introduces the subject with an analysis from the historical point of view of the two main pillars of the entire dissertation: the offence of torture and the penitentiary system. They will be examined following a chronological order, and therefore starting from the most archaic and cruel methods of punishment, during the Ancient Greece and Rome, to the most sophisticated and modern practice of torture that are often used in most of the current correctional buildings. Throughout the analysis peculiar attention will be given to the fact that the most archaic and bloody methods of punishment are no more used, unless in the most underdeveloped and despotic states, in order to leave enough space to all those practices of torture that have an effect on individual's psyche. This form of torture, better known as psychological torture, represent an important element for the entire work, since several states have always tried not to recognize mental torture as such, and so not as a form of offence severe enough to be criminalized by international conventions. However, contrary to what many states believe, psychological torture is a form of torture condemned by all international legal instruments, and it can be sometimes even more heinous and brutal, since it does not leave permanent bodily scars, rather psychological injuries that most of times that most of times are even more difficult to overcome. Concerning the establishment of the correctional environment, what is more interesting is noticing that at the beginning real prison establishments did not exist, and that

punishment was considered as a public sanction that must be showed in front of a public to further diminish the alleged criminals, exactly like during a bad play. The idea of public punishment seen as an open-air theatre was then outdone from the eighteenth century, when incarceration was seen as the most logical way to satisfy the severity of the crime committed. The first prisons were built in the United States to become then ordinary buildings also throughout Europe. Clearly, living conditions were hard and prisoners lived in degrading circumstances, without any kind of contact with the outside world. As years passed, and after the horrors of the world wars, the concept of imprisonment drastically changed, passing from a place, where corporate punishment was on the agenda, to institutions where fair and human conditions were guaranteed. In general, considering the data of imprisonment of the last decades, it is possible to affirm that during a period of decrease in the number of detainees, particularly thanks to a shift from a retributive idea of incarceration to a rehabilitative one, the imprisonment rate started to increase and incarceration began to be very frequent.

Even though the number of imprisoned population has slowed during the last years, and this is confirmed also by several national institutional reports, imprisonment continues to occupy a central position in the criminal justice response, and its interrelated connection with the use of torture is the focal point for the entire thesis. Indeed, according to the common societal point of view, a detainee, who is in a weak position right from the beginning, is considered as a possible threat and enemy for the entire society, and as such he/she deserves to be inhumanely treated and harshly repressed by a severe prison system.

Whatever form violence assumes in prison, international law plays a leading role in the criminalization and prosecution of torture, and inhuman or degrading treatment. Therefore, the second chapter shifts the attention of the reader to the main multilateral conventions that function as a guiding light in the fight against torture and in the protection of fundamental human rights. The awareness to develop proper universal norms and regulations to protect human rights and fundamental freedoms is a proof that the practice of torture, in its multifaceted forms, is a common enemy embedded in every country. Furthermore, as a proof of its absolute and non-derogable features, the prohibition of torture is also classified as a *jus cogens* rule.

Chapter II will consider the main international and regional instruments and all their monitoring mechanisms that play an important role of denunciation and report within every ratifying country. Starting from the Universal Declaration on Human Rights (UDHR), passing through the International Covenant on Civil and Political Rights

(ICCPR), at last a complete study of the United Nations Convention against Torture (CAT), the *ad hoc* instrument completely based on the prohibition of torture is provided. From the regional point of view, the main European conventions on the subject are considered. A deep analysis of the European Convention on Human Rights (ECHR) and its article 3 is granted, explaining the threshold used by the European Court on Human Rights (ECtHR) to assess when an act amounts to torture, or inhuman or degrading treatment. Concrete examples of the cases concerning breaches of article 3 will be given, also in order to better explain the evolution of the Court's jurisprudence over years. What is probably a particular aspect at European level is the *ad hoc* Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), that can be considered as one of the most successful outputs of the Council of Europe. Indeed, this special legal instrument, which does not establish new norms, rather it is simply based on article 3 of the ECHR, has established an innovative monitoring mechanism called Committee against Torture (CAT), whose task is to conduct visits to any place of detention under state's jurisdiction, in order to control life conditions of all people deprived of their liberty. Despite the first worries of a possible conflict between the Court's jurisprudence and the CPT, this Committee turned out to have an original and fresh approach: being completely it develops a series of standards that country should follow to increase the quality of life in prison, and that the ECtHR often recalls during its judgements.

In the light of these noteworthy legal instruments, the second chapter also provides an analysis of the non-binding soft law legal instruments that, in this field, are of particular importance, since they establish a set of rules and standards thought to be used as dynamic instruments for the evolving interpretation of prisoners' rights. As prison population is not only composed by men, even though they represent the largest part, but also by women, the United Nations have established international standards to face the problems concerning women in prison and all their consequential peculiar difficulties linked to their very nature. The standards, which have been issued also at European level by the Council of Europe highlight how rights of all prisoners count, and how it is vital to respect their dignity and humanity even though they cannot benefit from a normal life.

The third chapter is completely based on all those circumstances that in prison may give rise to breaches under the main international Conventions. Always providing examples of cases in front of the courts in which these kinds of offences have been found, the chapter begins with the basic concept that all prisoners are equal and entitled to the

same rights as other "normal" individuals. The attention will be then shifted the main circumstances that in prison can amount to torture and ill-treatment. Among them, solitary confinement is often used in a disproportionate and unlawful way, probably just to punish the detainees and not to guarantee the safety and security of the prison society, as solitary confinement aims at doing. Several cases have proved how, in reality, it can be dangerous, causing different physical and psychological injuries.

The same can be stated also for methods of restraints, which if used in an incorrect way, may give rise to situations amounting to ill-treatment. Particularly, attention must be given to the use of handcuffs on women, during gynecological visits or when in hospital giving birth. In these cases, the principle of proportionality and lawfulness is not applied, and humiliating situations can arise causing severe psychological consequences.

For what concerns the practice of body searching, it will be analyzed according to the different methods through which it is practiced and following their degree of intrusiveness. Because of its particular nature, body searching is particularly humiliating and painful for the prisoner and in several cases these methods can traumatize the involved individual.

Even sexual violence is one of the most recurrent offences in the correctional environment, even though it usually remains unnoticed. Rape, sexual coercive behaviors, sexual harassment, and sexual verbal violence can cause permanent physical and psychological traumas and injuries on the victim. Therefore, because of the high rate of prison sexual violence, the US have made in recent years a step forward by enacting the Prison Rape Elimination Act, which criminalizes and prosecutes all the acts of sexual mistreatment within the US prisons. In this context of restricted freedom, what is really striking are the causes for which sexual violence is perpetrated. Indeed, these acts are not only committed to impose power and control over the victim, but they can be forced also in exchange for food, drugs, or favorable treatment inside the prison buildings. The Aydin v. Turkey case is in this scenario a leading case that highlights how sexual violence can be considered as an act of torture, and therefore condemned under the main international conventions.

The chapter ends with the recent example of how a detention centers can become a risky area for the protection of individuals' human rights. The Abu Ghraib case shows to what extent human hatred and madness can arrive. The publication of the photos of events of torture and mistreatments in the Iraqi prison of Abu Ghraib show the abuses and practice of torture the US military personnel conducted on Iraqi prisoners, and it can be

probably considered as the culmination of several years of War on Terror that brought with itself violations of human rights and breaches under international law that the US have always tried to justify.

In the fourth and final chapter, the reader's attention will be shifted from an international legal framework to the Italian legal system, always maintaining an international analyzing perspective. In the following chapter, the main deficiencies of the Italian institutional and correctional framework, which has brought to subsequent violations of article 3 of the ECHR, will be highlighted. One of the main aspects that has been eroding the Italian prison system is the overcrowding rate. In Italy, prison overcrowding has been a severe problem repeatedly denounced by the CPT and in front of the ECtHR. In this regard, the two main cases that have involved Italy in front of the European judges, the Sulejmanovic and Torreggiani cases, will be analyzed as a starting point of possible new norms and standards to control and regulate this issue. Importance will be given to the lack of a proper crime of torture within the Italian Penal Code. This inefficiency of the Italian legal and political authorities has then led to the non-prosecution and non-criminalization of severe cases of torture in which the alleged perpetrators were condemned for less serious crimes, as in the case of the prison of Asti always examined this chapter. After the numerous denunciations by international courts, monitoring mechanisms, and international organizations, the Italian lawmaker issued a norm to be included in the Penal Code that although it has apparently filled the gap of this inefficiency, it appears not to completely satisfy and follow the rigid standards imposed by international conventions. Rather, as it will be seen, the new 2017 norm against torture seems to have its own shape providing a definition of the concerned crime that is still weak and occasionally too restrictive.

CHAPTER I

Torture, punishment and prisons: a historical overview

1. Torture: a historical background

The debate regarding the crime of torture is almost as old as the history of political thought,[1] indeed this heinous practice has probably existed since the appearance of humanity. There are several accounts that prove how torture is rooted in society, and many scholars, from the Enlightenment to present days, have discussed about it.

When people think about this crime, they are often influenced by the idea that this atrocious practice is something related to antiquity and to the backwardness of despotic states, rather being related to countries which foster democracy and the great ideals of human rights. However, different reports on the subject published by different non-governmental organizations, including Amnesty International, Human Rights Watch[2], Freedom House, and Associazione Antigone have assessed that governments from different countries around the world have largely used this practice during the last three decades.[3] What is striking about these documents is that the places of human rights abuses are not only those countries where an authoritarian regime reigns, and that are not subjects to legal obligations that fully criminalize torture, but also those democratic systems that support the protection of human rights as a widely recognized and consolidated value. Yet the various complaints filed by the different NGOs have not been enough to eradicate the "radicitus of the torture's cancer". Indeed, several annual reports claim how the proudly democratic states regularly resort to violence and torture in different occasions.[4]

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[1] Maria Pia Paternò, "La critica alla tortura nell'illuminismo giuridico settecentesco" in Alessandra Gianelli, Maria Pia Paternò, *Tortura di Stato. Le ferite della democrazia* (Roma, Italia: Carocci editore, 2004), 17.

[2] See the Human Rights Watch Prison Project, available at https://www.hrw.org/legacy/advocacy/prisons/index.htm [accessed 20 June 2021].

[3] Christopher J. Einolf, "The Fall and Rise of Torture: A Comparative and Historical Analysis", *Sociological Theory*, Vol. 25, No.2 (June 2007): 111 According to the different reports released by these organizations about human rights abuses in 2000, it has been estimated that governments of 132 countries resorted to the practice of during this year.

[4] Giuseppe Goisis, "Alcune considerazioni sulla tortura. Un punto di vista antropologico" in Lauso Zagato, Simona Pinton, *La tortura nel nuovo millennio. La reazione del diritto* (Padova, Italia: CEDAM, 2010), 151.

From an anthropological point of view, the concept of torture remains a taboo in the current society. In fact, this practice, which is broadly used by contemporary democratic governments, is at the same time denied or even worse minimized, describing it as simple abuses without inhuman consequences. Moreover, it is often declassified as a habitual and functioning custom, used by governments as counter offensive against possible enemies[5], and the result of this is the indifference to the many victims of torture, unless they are in front of a court witnessing these ignominious acts. Therefore, the crime of torture is something that directly concerns also Western democratic societies that usually try to justify it in the name of superior interests, such as war on terror.[6] Indeed, the problem of the legitimization of torture has had a revival after the terrorist attacks of 9/11,[7] even if this crime plunged its roots in ancient times changing throughout the course of history.

The etymology of the term is itself interesting, since it derives from the Latin stem *torquere* that means the act of distorting a body with the use of force.[8] It is possible to say that is the same for an act of torture with the aim of punishing an individual: what the perpetrator is intended to do is to destroy and degrade the humanity and individuality of the victim by using force[9].

Since Ancient Greek times, the indisputably practice of torture was used against individuals who were not considered to be part of the society, such as slaves, foreigners, and members of different ethnic and religious communities, while the citizens benefited from personal immunity that protected them from this cruel destiny.[10] The main reason for which the ancient states used this practice was to elicit information and confessions about committed crimes and treason. For this reason, techniques that damaged the body

[5] Ibid., 154. According to Giuseppe Goisis, the usual and defensive habits of many states are the ones of reducing crimes against humanity as something less dangerous and serious than what it really appears. The same is also for genocide declassifying it as "numerous murders".
[6] Antonio Marchesi, *Contro la tortura. Trent'anni di battaglie politiche e giudiziarie* (Modena, Italia: Infinito edizioni. 2019), 7.
[7] Andrea Pugiotto, "Repressione penale della tortura e costituzione: anatomia di un reato che non c'è", *Diritto Penale Contemporaneo*, No. 2 (2014): 130.
[8] Rossella Bonito Oliva, "Tortura e torture" in in Alessandra Gianelli, Maria Pia Paternò, *Tortura di Stato. Le ferite della democrazia* (Roma, Italia: Carocci editore, 2004), 53; Pugiotto, Repressione penale della tortura, 131.
[9] Pugiotto, Repressione penale della tortura, 131. According to Andrea Pugiotto, torture is like rape; it penetrates strongly the victim's body aiming at depriving the individual of all his human values. However, through torture not only the victim's humanity is blemished, but also the perpetrator's individuality. They are both deprived of their dignity, and they are considered passive and active instruments during this plain act of violence.
[10] Einolf, "The Fall and Rise of Torture", 103.

of the accused were not only accepted and moral, but also required to prove the veracity of the testimony.[11] The ancient Greeks were the first society to adopt judicial torture into their legal system.[12] The history of the practice of torture in the Ancient Greece is particularly curious: the Greeks used the term *basanos* to label torture. *Basanos* was a touchstone used to assess gold for purity and, over time, it became a metaphor to physically test the truth on human bodies through torture.[13]

The same was for the Roman Empire, where only non-citizens could be coerced to prove their testimony. Indeed, the Roman society was divided into two social classes: *honestiores*, which was the privileged governing group, and *humiliores* composed of everyone else and considered as a second-class. Obviously, only the latter could be tortured during interrogations, and criminal cases, even though *honestiores* could undergo the same treatment only in cases of repeated crimes or treason. The Roman jurisprudence regarding torture was a combination of "judicial interrogation (quaestio)", and "tormenting punishment (tormentum)", and as a result, who was found guilty received corporal punishment and humiliating executions that previously were reserved only to slaves and foreigners.[14] However, the practice of torture used to obtain true statements was often criticized by Romans, who considered it as "res fragilis et periculosa". In fact, the truth was not always the result of torture, since accused were more likely to release false evidence as true in the hope that they could be saved from that agony. Anyway, the immunity from being tortured was slowly undermined. By the late Roman Empire anyone, regardless of his own citizenship, could be tortured when suspected of serious crimes and treason.[15] It is in this period that certain methods of corporal punishment became known, such as crucifixion.[16]

At the beginning of the twentieth century, the practice of torture became the key element in judicial proceedings, not only for ordinary crimes, but also for special ones like heresy and witchcraft.[17] Considering what Foucault writes in his work *Discipline and*

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[11] Courtenay Ryals Conrad, H. Moore, "What Stops the Torture?", *American Journal of Political Science*, Vol. 54, No. 2, (April 2010): 460.
[12] Lisa Hajjar, "Does torture work? A sociolegal assessment of the practice in historical and global perspective", *Annual Review of Law and Social Science*, Vol.5, (August 2009): 317.
[13]Malcolm D. Evans, Rod Morgan, *Preventing Torture. A study of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment* (New York, USA: Oxford University Press Inc., 1998),1.
[14] Hajjar, "Does torture work?", 318.
[15] Evans, Morgan, *Preventing Torture*, 3.
[16] Hajjar, "Does torture work?", 318.
[17] Einolf, "The Fall and Rise of Torture",107.

Punish, torture in the premodern era followed three main characteristics: firstly, it had to cause a certain degree of pain; secondly the body of the tortured had to show a distinctive characteristic, for example the lack of a hand or a mark, as a public symbol of the power of the king over his subjects, and finally penal torture must be theatralized in front of a public in order to show the sovereign's power to torture. For this reason, it is possible to assert that the gloomy scenario of the practice of torture affliction did not changed for many years, and continued to be justified and legalized, although it sometimes evolved into different forms of executions.[18]

The abolition of the practice of torture was probably the landmark of the Enlightenment period. Many intellectuals, among whom Beccaria, Voltaire and Montesquieu, argued against public torture and cruel execution, supporting the values of humanity and rationality.[19] Torture began to be considered as a cruel, unjust and ineffective act.

The repeal of torture was the result of both a political and legal process. Many states experienced a change in the sovereign's model and saw the emergence of many national democracies; this fostered the abolition of this practice in different legal documents such as the Eighth Amendment to the American Constitution, which outlaws "cruel and unusual punishment", and the English Bill of Rights.[20] Thanks to the spread of the Enlightenments' values, many states gradually began to ban torture in favor of different and less cruel means of punishments, such as imprisonment. These new forms of punishments, mainly workhouses and penitentiaries, were based on the ideas of surveillance and discipline that guarantee the same degree of people's loyalty to the governments, just as the previous forms of corporal punishments and torture.[21]

If, on the one hand, the Enlightenment has contributed to the abolition of many inhuman practices and to the prevalence of rationality and civilization over barbarism[22] at least in the most developed states, on the other hand torture has never been truly eliminated. During the twentieth century, it was widely used, and became an essential characteristic of totalitarian states. Indeed, the period of the great wars was characterized by the unlawful employment of torture. As previously said, during the centuries before

[18] Michel Foucault, *Discipline and Punish. The Birth of Prison* (New York, USA: Vintage Books, 1995), 33-34.
[19] Evans, Morgan, *Preventing Torture*, 7.
[20] Hajjar, "Does torture work?", 320-321.
[21] Einolf, "The Fall and Rise of Torture",109-110.
[22] Evans, Morgan, *Preventing Torture*, 21.

the Enlightenment, the brutal and bloodthirsty practices of punishments were legalized by governments and required by judges. On the contrary, in the twentieth century torture, which was apparently banned by many neo-democratic states, was illegally and secretly conducted by states' security agents against individuals.[23]

There are several causes and historical evidences that led to the reemergence of the practice of torture during the twentieth century. First, there was a huge increase in international conflicts that was characterized by changes in the warfare, severity and nature of wars. With the development of new technology, and methods for fighting, the outcomes were devastating, and it was in this context that torture was adopted again in the laws of war as a response to the new progressive belligerent means.[24]

Then, there was a preponderance of ethnic, racial and religious hostilities. For example, in the Rwandan genocide and in the Holocaust, torture was fully employed by governments against individuals that were not seen as full members of society.[25] Not by chance, during the Nuremberg trials it was revealed that "in 1942 Hitler ordered that the troops had the right and duty to use in this struggle any and unlimited means, even against women and children, if only conducive to success".[26] And again, in 1931 French state's agents used electricity to torture the national resistance in Vietnam.[27]

Finally, while during this period many democracies existed, or began to emerge, there were at the same time many dictatorial regimes. What is not surprising is that even if democracies are less likely to exercise torture, many studies showed that both governments made use of new technological methods of torture to better identify people suspected of crimes and treason.[28] The Eastern states employed the same practice throughout the twentieth century; both China and the Soviet Union used it in the name of Communism and to obtain confessions from political enemies.[29]

At the end of the twentieth century, and in particular during the Cold War, torture was exploited to avoid the spread of Communism. In this scenario, the Central

[23] Einolf, "The Fall and Rise of Torture",112.
[24] Katharine E. Tate, "Torture: does the convention against torture work to actually prevent torture in practice by states party to the convention?", *Willamette Journal of International Law and Dispute Resolution*, Vol. 21, No. 2, (2013): 201-202.
[25] Hajjar, "Does torture work?",201-202.
[26] Evans, Morgan, *Preventing Torture,* 16.
[27] Hajjar, "Does torture work?", 323.
[28] Tate, "Torture", 201-202.
[29] Evans, Morgan, *Preventing Torture,* 20. Both Chinese and Korean armies used the tactic of torture during the Korean War. Also, the Vietnamese did the same against the Americans during the second World War.

Intelligence Agency developed a new tactic of torturing individuals: the "no touch torture". This particular method was no more based on physical pain, rather on psychological suffering, which was more pervasive and more difficult to detect, since it did not leave visible injuries, but only scars in the psyche. In 1953, CIA established mind control programs, such as the top-secret MK-ULTRA program,[30] that consisted of hypnosis, electroshock, deprivation of sleep, and psychedelic drugs.[31]

After the second world war, the spread of the culture about the protection of human rights and human dignity led to the denunciation of torture by the international community.[32] Torture was then considered by the public opinion as a brutal way to demolish the status individuals, depriving them of their own rights and protection. Due to the seriousness of the crime of torture, it has been considered a *delictum iuris gentium*, that entails the universal jurisdiction under international law, since it is considered a harmful crime for all the international community.[33]

However, several countries continue to use this practice that seems to be settled in the customs of the society, rather being employed only in certain circumstances. An example of this is given by a famous way of torturing common in the Mediterranean area and in Turkey, whose name is *fàlaka.* This practice consists of repeatedly beating the victim's sole of the foot or palm with a truncheon, but what is horrible is that it can be easily hidden. In fact, in these countries the state's agents, after clubbing the prisoners, force them to stay with hands or feet in the cold water or give them an anti-inflammatory cream.[34]

With the development of new technologies, also the most democratic states have taken the opportunity to test new methods of inducing pain and suffering against possible terrorists or criminals. Nowadays, one of the most common forms of torturing individuals

[30] See the project, available at https://www.nytimes.com/packages/pdf/national/13inmate_ProjectMKULTRA.pdf [accessed 20 June 2021].
[31] Hajjar, "Does torture work?", 325.
[32] Evans, Morgan, *Preventing Torture*, 20.
[33] Martin Dixon, *Textbook on International Law* (Oxford, UK: Oxford University Press,2013), 154-155. Under international law, there are a series of crimes that are considered so harmful and destructive of the international community and order that any state can exercise its own jurisdiction over them. This jurisdiction depends only on the type and nature of crime that is committed by an individual, that usually consists of crimes of genocide, torture, war crimes, piracy and crimes against humanity.
[34] Antonio Cassese, *Umano-disumano. Commissariati e prigioni nell'Europa di oggi* (Bari, Italy: Gius. Laterza & Figli,1994) 72-73.

is called "clean" or "stealthy" torture.[35] Its distinctive characteristic is that it does not leave any kind of visible scar, rather it penetrates in the psyche of the victim, who is often subject to psychological soreness, to the use of electric shock, to stay in stressful positions, and to rape and sexual abuses.[36] The goal of these new methods is that by targeting the mind, rather than the body of the victim, the result is even worse than beating or burning him as the injuries are more piercing.[37] Moreover, the main advantage of the perpetrator is that these practices are easier to deny or to hide, and for this reason, the victim's position is less credible, seeing as he cannot give proof of what he has suffered. This uncertainty, which is created by the difficulty to reveal the truth, generate a compliance by state's agents who use these methods, considered allegedly more human (compared to other practices of torturing) without the possibility of being labelled as torture.[38] In this regard, different states used these techniques against possible terrorists, or in cases of extreme threat: Israelis used torture against Palestinian prisoners, the French against Algerian civilians, and United Kingdom against Irish Republican Army in Northern Ireland, and Iraqis prisoners during the war on terror.[39]

However, what has probably aroused the public opinion in the first years of 2000s were the dramatic photos taken in both the Guantanamo and Abu Ghraib prisons.[40] The information about the treatment of prisoners in both the corrections has proved that there has been little progress in the field of eradication of torture, and let emerge the problem of inhuman punishment inside detention centers, which has always been underestimated in the current society. The victims were shown in stressful positions, and were often subjected to harsh interrogations through the use of electric shock or mind-altering drugs.[41] What is really surprising is how the Bush administration supported this policy, claiming that torturing US enemies was not wrong, if it was the only method to obtain the truth and to protect public safety. Though many states continue to define torture as a taboo, the American case is in this regard remarkable. By approving practices of torture and degrading treatment, the US government make torture more deleterious, since it is

[35] Hajjar, "Does torture work?", 325.
[36] Einolf, "The Fall and Rise of Torture", 103. With regard to rape and sexual assaults, it seems that sexual violence was less common in the years when torture was formally legalized as a form of punishment. Although, it is plausible that it was simply not documented, and on the contrary widely practiced.
[37] Hajjar, "Does torture work?", 325.
[38] Conrad, Moore, "What Stops the Torture?", 461.
[39] Einolf, "The Fall and Rise of Torture",112.
[40] Ibid., 101.
[41] Hajjar, "Does torture work?",313.

illegally fostered by one of the most powerful states whose capacity to influence legal norms and standards is noteworthy.[42]

The issue regarding the lawfulness of torture has been solved under international law with the recognition of this practice as an international crime prohibited under all circumstances, including war and conflict. The three main characteristics that mark an international crime are the deliberateness of the act, the perpetrator, who is a state's agent, and the fact that it is committed against a defenseless individual. The crime of torture strictly follows these three characteristics, but in addition what distinguishes it is the custodial relationship between the criminal and the victim. In fact, when torture is used against an individual in custody, victimization is ineluctable since the prisoner is unable to protect himself and to fight back. Because of the recognition of the crime of torture as one of the core crimes in international law, together with crimes against humanity and war crimes, it is considered a negative right, which means that each individual has the right not to be tortured exactly as he has the right not be exterminated or deliberately killed during conflicts.[43] In the rule of law, therefore, torture has not the citizenship and will never own it.[44]

It is thanks to the evolution of international law, to human rights organizations and to monitoring mechanisms established by different conventions that the current society is able to control and fight the battle against torture. Perhaps, if there were less war conflicts among states and democracy was more encouraged, there would be also the possibility to drastically reduce the praxis of torture, which, as already said, is more common against war prisoners and foreigners.[45]

However, the idea that torture is only committed by authoritarian states is nowadays dated. There is clear evidence that it has become so prevalent in contemporary times that the exception of democratic countries, as the ideal states which do not resort to torture, is no more credible. Despite a series of efforts done at the international level to clarify the definition of torture in order not to consider it a taboo anymore, it still remains a concept impossible to define, rather it can be only described only when we see it.[46] Torture may be physically or psychologically harmful, but it still remains underhanded, and in such a background the main risk is that many criminals will remain unpunished,

[42] Ibid., 315.
[43] Ibid., 326.
[44] Pugiotto, "Repressione penale della tortura",131.
[45] Einolf, "The Fall and Rise of Torture",118.
[46] Paul D. Kenny, "The meaning of torture", *Polity*, Vol.42, No.2 (April 2010): 132-133.

since only a little part of this huge iceberg emerges, while the rest is surrounded by silence and indifference. These considerations show how torture is a living evil that cannot be traced back only to ancient times, and whose denunciation cannot only be bound to humanistic ideals of Enlightenment. The fight against torture is still open and is more and more complex every time it jeopardizes the great values of democracy and human rights.

2. The evolution of punishment and detention system throughout history

The evolution of society throughout history has brought to the development of criminal justice, and to a series of changes in the punishment techniques against alleged criminals. This change has led to the current idea of imprisonment and correctional ideology.

The creation of prison with the philosophy of penitence has been one of the most important reforms of all times. The conventional moral attitudes of believing that incarceration serves to remove a potential criminal from the society is the typical answer to the question regarding the usefulness of the correctional system. In fact, the most common idea is that the offender, at least for a certain period, is incapacitated to commit other crimes while in custody, and this may help to reduce offences' rate and perfect the society from all those individuals, who are more inclined to dangerous activities. [47] Even if there is not any international agreement which gives a universal definition of correction, its aim still remains the one of centuries ago: correcting the wrong behaviors of criminals who deserved to be punished in order to provide public safety.[48] However, the way the prison system was intended to work is completely different from the way it actually works and treats the confined inmates.[49]

Since ancient times, societies devised ingenious methods to punish criminals and to enforce the law. Whipping, mutilation, torture, executions, drowning were some of the most common ways to inflict penalty. The more the punishment was cruel, the more the state's power and wealth were impressive over its subjects. Of course, when urbanization took place and society began to tolerate less the bloody and public forms of punishment,

[47] Mary K. Stohr, Anthony Walsh, *Corrections the Essentials* (London, UK: Sage Publications Ltd.,2016), 18.
[48] G. Larry Mays, L. Thomas Winfree Jr., *Essentials of the corrections* (UK: John Wiley & Sons, Inc.,2014), 2.
[49] Stohr, Walsh, *Corrections the Essentials,* 17.

new structures to hold criminals in confinement were designed and adopted by many states.[50]

Generally, before prisons were created, theatrical corporal punishments were common. The aim, indeed, was the one of making the body of the criminal suffer for the acts committed, and to satisfy the general desire of vengeance that lingered in the society.[51] Of course, what was intended for imprisonment during ancient times was completely different to the modern ideas of correctional philosophy.

One of the first sets of rules designed to establish what was legal or wrong, and the related forms of punishments was the Code of Hammurabi. The code, which represented the cultural and social norms of Babylonian society, was based on the *lex talionis*, according to which equal retaliation was the pillar of criminal justice. Punishments were inflicted in the name of the state, and consisted of the cruelest methods, such as mutilation and death penalty.[52]

The Greek society living in the *polis* provided another case of public punishment and its ideas of crime and justice strongly influenced other subsequent cultures. Criminal justice was based on retribution and deterrence, and laws were issued and implemented by a judicial body, called The Eleven, that decided the forms of penalty that could be inflected. The Greek politics, indeed, was based on codified Draconian punishments that consisted of brutal and bloody methods, such as lapidation, starvation and precipitation.[53] Prisons did not play the leading role in the Athenian criminal justice, since capital punishments, exile and fines were certainly more common.[54]

The Romans were famous for borrowing most of the Greek punitive customs, but they differentiated from the Greek model, as they established the Twelve Tables, the first written Roman laws that were concerned with violations of criminal law and sanctions. Also in the ancient Rome brutal methods of punishment were the best way to inflict the sentence: crucifixion, being publicly burned or eaten by beasts were some of the *summa supplicia*, in other words, the highest punishments reserved to the highest offenders that demonstrated, once again, the limitless sovereign power of emperor.[55] Exactly like

[50] Ibid., 18-19.
[51] Eric J. Wodahl, Brett Garland, "The Evolution of Community Corrections", *The Prison Journal*, Vol. 89., No.1 (March 2009): 82.
[52] Robert D. Hanser, *Introduction to corrections* (Thousand Oaks, California: Sage Publications, Inc.,2017), 6.
[53] Mays, Winfree, *Essentials of corrections*, 29.
[54] Morris, Rothman, *Oxford history of prison*, 7-8.
[55] Ibid., 16.

ancient Greeks, Romans did not use imprisonment as the main form of penalty, even if, as reported in the Twelve Tables, it was used against debtors and offenders who were awaiting their fate.[56]

During the Middle Age, corporal punishment continued and was largely inflicted to traitors, heretics and witches. They suffered some of the most inhuman penalties ever seen, especially because their deaths were programmed as performance. The legal infliction of penalty and pain was in front of an audience, prisoners often marched through streets in silence to reach the gallows, and finally their dead bodies were exposed in public areas as a symbol of warning until they decomposed.[57]

At the beginning of the recorded history, the first views and reactions to offences and disobedience were based on the fundamentals of corporal punishment or banishment in order to protect the society from alleged criminals. As time changed, the aim of punishment changed too, becoming no longer pain and suffering, rather focusing on deterrence, rehabilitation and as a last resort, solitary confinement.

The movement toward less ghostly forms of punishment and tortures, and the eventual triumph of a new conception of imprisonment took place during the Enlightenment. The great ideals of Cesare Beccaria, Jeremy Bentham, Francois Voltaire, and Charles Montesquieu, who advocated the importance of human treatments for prisoners, materialized and paved the way for new legislation, and theories concerning individual's rights and criminal law in western Europe.[58]

In particular, Cesare Beccaria with his famous work *An Essay on Crime and Punishments*, was one of the first intellectuals who publicly claimed his refusal to death penalty and condemned it on two grounds. Firstly, the state did not have the "spiritual and legal right to take lives". Secondly, he strongly believed that death penalty was not the best way to punish an individual; according to him retributive function and the severity of the penalty were not effective enough to avoid committing crimes, rather the certainty of a penalty was the key to obtain a reducing offences rate. Among other things, to him must be recognized the idea of proportionality between the crime committed by an

[56] Hanser, *Introduction to corrections*, 6.
[57] Morris, Rothman, *Oxford history of prison*, 47 -50. During the Middle Age some of the most barbarous practices of punishments were conducted against prisoners. Penalties were classified according to the seriousness of the crime, but whipping, burning one's skin, mutilation, buried alive and decapitation were the most common at that time.
[58] Hanser, *Introduction to corrections*, 12.

offender and the given sanction, that was ad hoc tailored to match the severity of the offense.[59]

Incarceration was now seen as the most logical way to satisfy all these requirements. The development of prison as a place of punishment started during the 18th century. Compared to the previous forms of corporal punishment, incarceration was not so brutal and the length of the prison stay varied according to the sentence.[60] During this period, different corrections were built both in Europe and in the United States, among them Walnut Street Jail in Pennsylvania and Newgate Prison in Simsbury, Connecticut, were considered the first official ones. They were places where inmates were not only confined and strictly supervised, but also places of work. Indeed, they were designed to keep prisoners under hard labor, usually in mines.[61] Prison was supposed to produce a "new man" through the loss of his liberty. Its aim was not the one of physically punishing the inmates, instead civilizing its occupants, so that they could be integrated in the civilized society once again. Nevertheless, prison's conditions were not the best: inmates lived in inhuman and harsh circumstances, they were denied their privacy and they could not have any kind of contact with the outside world.[62]

During the 19th century, it was widely accepted that imprisonment would reduce crime rates thanks to prisoners' incapacitation, even though they lived in an unpleasant environment. The rehabilitative philosophy of imprisonment was, therefore, the most popular in this period, and gave inspiration for a well-ordered society. Its primary purpose was the one of correcting prisoners' behaviors and characters, so that they would have the opportunity to reduce their crime attitudes, but it was also a way to safeguard the society from unwanted actions. Following these concepts, prisons were reinvented as institutions of socialization, in which structured routine and ordered discipline marked the days, and where inmates spent their time working or self-reflecting.[63]

In this scenario, attention was closely paid to the two American correctional models: the Pennsylvania system and the Auburn system. The main ideals of both systems were linked to the rehabilitative model and to a rigid lifestyle imposed on prisoners; only these would change them into "law-abiding citizens". Reform, and not deterrence, was now the main pillar of incarceration. The principal assumption was that incarceration

[59] Ibid.,14.
[60] Wodahl, Garland, "Evolution of Community Corrections",83.
[61] Hanser, *Introduction to corrections*, 15; Stohr, Walsh, *Corrections the Essentials*, 29.
[62] Morris, Rothman, *Oxford history of prison*, 98.
[63] Wodahl, Garland, "Evolution of Community Corrections",84.

would succeed exactly where other institutions, such as family, school, and church, failed. Indeed, the idea was that the defective social environment made individuals more inclined to commit crimes, and therefore, the only way to discipline and train them to obedience, was the correctional environment.[64] To some extent, these two systems were not only considered the precursors of the current correctional system, but they also had a great impact on the worldwide penal philosophy of that time.

The Pennsylvania system was firstly applied to the two prisons constructed in the federal state: the Western State Penitentiary, opened in 1826 in Pittsburgh, and the Eastern State Penitentiary opened in 1829 outside Philadelphia.[65] Under the Pennsylvania plan, prisoners were kept in solitary confinement,[66] however problems appeared as to whether this system would truly have a rehabilitative aim, and if it would be truly economic. Indeed, the long period of isolation brought many inmates to have emotional breakdowns, other forms of mental illness, or, in certain circumstances, attempted suicides became ordinary. These consequences led even the Pennsylvania system to abandon this wrong scheme, which was soon corrected by the Auburn plan.[67]

Under the Auburn plan, which was the main scheme used in the homonym prison, inmates were kept in isolation during the evening hours, but they could stay together while working or during meals. Of course, rules were precise: they could not talk to each other or even share a glimpse, throughout their activities they were expected to stay in silence, they were lockstep while marching and it is in this circumstance that the classic black and white striped uniform became famous.[68] Social isolation, silent regime, hard work, prayers and, if needed, corporal punishment were the only objectives a prisoner had in order to be released.[69]

Despite the severe rehabilitative system used in many correctional institutions at that time, there was an extreme increase in crime rate that caused the first cases of overcrowding in prisons, a recurring phenomenon that characterized the current detention system worldwide.[70] Life in prison was so difficult that the real challenge was to survive

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[64] Morris, Rothman, *Oxford history of prison*, 106.
[65] Mays, Winfree, *Essentials of corrections*, 36.
[66] Ibid., 7. Isolation is one of the oldest correctional philosophies. On the one hand, it has always been used to simply separate an individual from external and social contacts. On the other hand, it is still used to confine dangerous or just unpleasant prisoners from the correctional community, as they are considered the "rotten apple" that can endanger the rest of the offenders.
[67] Hanser, *Introduction to corrections*, 16-17.
[68] Ibid.,18-19.
[69] Mays, Winfree, *Essentials of corrections*, 39.
[70] Morris, Rothman, *Oxford history of prison*, 90.

inside it. In such a chaotic environment, unusual forms of punishment were used to maintain a degree of superiority over the convicts, and despite corporal penalty was supposed to be banned, it was still used by prison's administration to enforce discipline and rules.[71]

With the twentieth century, industrialization and the evolution of socio-economic institutions also led to a new progressive view of incarceration based on parole and probation. It was not a coincidence that during the darkest years prisons, these new systems came forth, and the success was their ability to coexist and, in certain cases, supplement reinforce the existing prisons' structure.[72]

However, after the First World War, both Europe and the USA were devastated, and due to their poor economies, the rate of crimes and prisoners started to steadily increase. With no funding to create other structures that could hold inmates, there was a shift back to the overcrowding issue, and to the use of severe punishments instead of rehabilitative and reformative methods.[73]

It was then with the Second World War, that the development of the European prison system took two completely divergent paths. On the one hand, there was the desire to put an end to the problems concerning overcrowding and harsh punishment, and so the will to rely less on imprisonment and more on non-custodial punishment. On the other hand, it was exactly in this period that many states used imprisonment as an excuse to abuse and exploit different ethnic populations. This was the case of the Nazi Germany and Soviet Union. Both the Nazi concentration camps and Soviet work camps facilitated the ruthless exploitation of convicts' labor. Ironically, both systems, where millions of people died and suffered the most inhuman treatments, were based on the assumption that the only important value of the penal reforming was forced labor, which was masked with terrible slogans, such as "Arbeit macht frei".[74] It was clear that this kind of system, perverted into disfiguring torture and extermination, was undoubtedly incompatible with principles of rehabilitation used to create productive inhabitants.

The horrors of the second world war and of exterminating imprisonment gave the world a picture of collective punishment that was inhumane, unjust and ignominious. In reaction to these events, it was clear that the old conception of corporal penalties and of

[71] Ibid., 156.
[72] Wodahl, Garland, "Evolution of Community Corrections",84.
[73] Morris, Rothman, *Oxford history of prison*, 174.
[74] Ibid., 194.

isolated imprisonment should have been drastically modified. Now the challenge was to guarantee fair and human prison conditions and, therefore, new kinds of institutions were needed to enforce it. All over the world, prisons were re-invented, always maintaining rigid regimes, but in addition to the traditional closed prison system, several institutions developed a system of "prisons without walls", where inmates could not escape, though a certain degree of freedom and sociality with the outside world was granted.[75] Technological development and economic progress changed the correctional lifestyle. The same one that can be seen also today in the current detention institutions: striped uniforms have been abandoned, lockstep disappeared, sufficient sanitation ventilation and housing have been introduced, and every cell has been provided with toilets with running water.[76] The new penal reforms stressed the necessity to tailor a sentence to the convicted individual according to the severity of the crime committed, his attitude and willingness. Custodial sanction and deprivation of liberty lost their popularity since parole, probation, fines and suspended sentence became more common punishments for first-time offenders. What the state and its bodies tried to do was to seek individual treatment sanctions, rather than relying only on imprisonment as first resort.

In general, however, despite the reforms that promoted short or non-custodial sentences, the prison population continued to grow all over the world.[77] The increasing number of inmates led also to the sunset of rehabilitative philosophy, the same philosophy that characterized the prison system since retributive ideals, based on harsh punishments, faced their decline. The belief that "providing psychological or educational assistance"[78] inmates would, in a certain sense, reduce the possibility of committing future crimes, showed instead, according to politicians, scholars and the public in general, its inefficiency. [79]

Although the period soon after the Second World War began with great optimism and trust in the new frontiers for a more equitable justice, retributive correctional philosophy arose again from the ashes of unsuccessful rehabilitative ideals, and to some extent, it has also shaped the current correctional system since the 1970s. This new rationale of penal harm, also called just deserts idea, has taken inspiration from the old concept of retaliation, according to which every criminal deserves to be punished for

[75] Ibid., 196.
[76] Ibid., 174.
[77] Ibid., 197-199.
[78] Mays, Winfree, *Essentials of corrections*, 6.
[79] Wodahl, Garland, "Evolution of Community Corrections", 94.

having broken the law and as a consequence, incarceration for this alleged criminal must be uncomfortable. During the last years of the twentieth century, the method of sentencing rapidly moved toward a "crime-control model", according to which incarceration was the optimal solution to reduce crime rates in the society.[80]

Generally speaking, there has been an outbreak of the number of individuals under the supervision of correctional programs throughout the world. In particular, the United States has experienced a huge increase from the 1980s to the first years of 2000s.[81] In one of the most influencing countries, promoter of human rights and of new alternatives to incarceration, the use of imprisonment as a sanction was not declined, rather it even increased in the American jurisdiction. One of the strangest factors of this rise in numbers is that during the 1990s, crime rate, especially homicide rate, diminished both in the United States and Europe, and, as a consequence, what was expected was the resulting decline in imprisonment rate, which in reality never materialized. Imprisonment continues to occupy a central position in the criminal justice response, and all other intermediate sanctions seem to have failed to replace prison solutions.[82]

The reasons why alternative sanctions are not used with the same frequency as incarceration are dual. On the one hand, these softer practices have been a less credible option in the eyes of judicial and political authorities. On the other hand, also the public opinion has been skeptical about, and a Council of Europe's study on the subject confirmed this thesis, revealing that: "a major constraint on the use of non-custodial alternatives was the level of public tolerance".[83] Moreover, it would be an error to assume that the late-twentieth- century prisons changes made a more comfortable and lenient treatment. The most common prisons were overcrowded, cells, which normally hold two prisoners, confined three or four inmates, and the harsh routine of prisons was

[80] Doris L. Mackenzie, p 1 e 7 "Sentencing and Corrections in the 21st Century: Setting the Stage for the Future", 1-7, available at https://www.ncjrs.gov/pdffiles1/nij/grants/189089.pdf [accessed 20 June 2021].
[81] According to David Garland, the phenomena that the United States faced in this period was called "mass imprisonment", and it did not have a parallel in the western world. The main feature of this phenomena was that incarceration was no more seen as the confinement of a single individual, rather it became the systematic detention of whole groups of population. For further references see David Garland, "Introduction: the meaning of mass imprisonment", *Punishment & Society*, Vol.3, No. 1 (January 2001): 5-6.
[82] Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (Cambridge, UK: Cambridge University Press, 2004), 24.
[83] Roberts, *Virtual Prison*, 31.

characterized by fear and violence, not only between inmates and officials, but also among inmates.[84]

During the last years, the number of the population in prison has slowed, even though imprisonment continues to occupy a central position in the criminal justice response. A proof of that, is given by the different statistical researches conducted both in Europe and in the United States. In the latter, during 2019 both state and federal imprisonment rate has been the lowest since 1995. In its research, the Bureau of Justice announced that for the eleventh consecutive year, there has been a decrease in prison population, which amounts to "419 sentenced prisoners per 100,000 US residents". The imprisonment rate is equal to 17 percent, 3 percent less than 2018.[85] Concerning European Union, in 2018 there has been the lowest percentage of the number of prisoners since the beginning of the century. In fact, there have been 111 prisoners every 896 people, that is equal to 495,000 inmates in all European countries.[86] In the context of European Union, it is noteworthy to cite the pilot project of six Belgian prisons, which in 1998 implemented the restorative justice program. This new method, which is becoming more recurrent in most European prisons, has the aim of creating a bridge between offenders and the outside world. Prisoners are encouraged to deal with their problems, and they are helped by aid services to find their place in the society once released.[87] Indeed, the main advantage of this program is to fight against the most common collateral effects of imprisonment, that usually are the incapability to find an occupation, to receive public services and benefits, and, in certain states, also the denial of the right to vote.[88]

The history of prisons is "riddled with the best of intentions and the worst of abuses".[89] If nowadays was asked the society or policy directions on crime which is the best solution for criminals, the answer would certainly be punishment. Correctional institutions have been built in part to clean the society from offenders, but at the same time, to resort to violent and coercive punishments against such individuals, keeping the

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[84] Morris, Rothman, *Oxford history of prison*, 202-212.
[85] See the statistical report issued by the American Department of Justice, available at https://www.bjs.gov/content/pub/press/p19_pr.pdf [accessed 20 June 2021].
[86] See the statistical report issued by Statistics Explained, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics#Overcrowding_and_empty_cells [accessed 20 June 2021].
[87] Stohr, Walsh, *Corrections the Essentials*, 8.
[88] Michael Tonry, Joan Petersilia "Prisons Research at the Beginning of the 21st Century", *Crime and Justice: A Review of Research*, Vol. 26 (1999): 4.
[89] Mays, Winfree, *Essentials of corrections*, 16.

public opinion in the dark about these abuses. Prisoners are the best and the worst of the society. They include whether the virtuous Mahatma Gandhi and Martin Luther King, or some of the cruelest terrorists. Despite their status, they are entitled to rights, they should not be subjected to hash physical and psychological punishments and they should have the right to have safe and clean-living conditions. The prison represents the strongest power the state can exercise over its citizens during a period of peace, and if the balance between state's authorities and individuals' rights is struck here, it is not likely to go far better elsewhere.[90]

3. Torture and prisons: a controversial relationship

The prison context is an opaque place, where everything can secretly happen. The international cases of Abu Ghraib or Guantanamo Bay are just the tip of an iceberg that is still surrounded by indifference and silence.

The case of the Iraqi prison is particularly notable. What emerged from a declaration of one of the responsible, subsequently convicted, was that American officials resorted to violence and abuses because of the fear of detainees, who were perceived as threatening. The worry about being attacked by a prisoner was so huge, that torture would certainly be the only solution in order to repress this feeling. It is clear that this logic does not have any sense, since Abu Ghraib's prisoners were defenseless compared to the prison's officials, who took every single opportunity to completely degrade convicts' humanity. Photos of tortured naked inmates were shared as trophies among officials, and these acts were the countless proof of the social supremacy of every single guard over prisoners. It was like that the superior status of officials gave them the possibility to completely degrade the lower position of prisoners, treating them as animals for slaughter.[91] In both American cases, practices of torture were made public through the use of leaked photos on journals, and only in this way society has seemed to become more interested in this hidden and unsolved problem. However, publishing cruel images of a handcuffed man standing on a box with the hands tied to electric wires, should not be the only manner to make the public opinion aware of this extremely important issue.

[90] Morris, Rothman, *Oxford history of prison*, XIII.
[91] Pietro Buffa, "Tortura e detenzione: alcune considerazioni in tema di abusi, maltrattamenti e violenze in ambito detentivo", *Rassegna penitenziaria e criminologica*, Vol.17, No. 3 (2013): 140

The use of torture in the fight against political terrorism did not exempt some European states. In 1978, the British government was condemned by the European Court of Human Rights for having resorted to violence and torture against prisoners during the fight against Northern Ireland Republican Army.[92] What happened inside detention centers under the British control was clear: Irish inmates endured the cruelest practices of interrogation, they were naked and handcuffed, obliged to stay in upright positions without food or water for many days. Equally important is the case of the German Federal Republic concerning the brutal ways of imprisonment of the militants belonging to the Red Army Faction. They were kept in solitary confinement and their psyche was strongly damaged by the deprivation of sleep and food and by the uncontrolled shift from dark to light at any time of the day.[93] These are only few cases of the use of torture against political opponents at the end of the twentieth century, though the problem is not certainly solved. Indeed, Italian prisons have actually been under investigation by the European Committee for the Prevention of Torture because of different cases of harsh methods of punishment against inmates during the last years.[94]

From the societal point of view, an individual who is deprived of his own liberty, is considered to have little power as long as he stays behind bars. This is a common cause that leads to the phenomena of prison torture, in fact the individual, who apparently has not any right, is perceived as an inappropriate and unpleasant person, who is often considered as an enemy. This enemy, who represents a threat for the society, must be neutralized and deserved to be harshly repressed by the official, who, in this case, personifies the collective opinion about the use of cruel treatments to improve the society.[95]

Unfortunately, the public opinion, especially when more inclined to conservative or despotic thoughts, still believes that using violent methods against people deprived of their liberty may be justifiable. In reality, except for a legitimate use of force in cases of security procedure, any kind of excessive violence, which goes beyond a few exceptions, is absolutely prohibited. In this environment the inmate is, of course, in a position of disadvantage: most of the time it is impossible for him to denounce these forms of

[92] ECtHR, 18 January 1978, Ireland v. United Kingdom, Application No.14038/88.
[93] Gianelli, Paternò, *Tortura di Stato*, 109.
[94] See the Council of Europe's anti-torture Committee report available at https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=090000168099865b [accessed 20 June 2021].
[95] Buffa, "Tortura e detenzione", 133-34-35.

mistreatment, as this can create a consequent reaction by the official who continues, secretly, to retaliate in a tougher way.

Violence in prison can differ in methods and intensity, but at the end the goal is always the same: dehumanizing the prisoner's individuality making him an object without rights. Each year around 25 percent of prisoners are victimized by torture, 4-5 percent experienced sexual violence and 1-2 percent have been raped.[96]

Sexual violence is a recurrent form of mistreatment inside prisons. Because of its stigma of being raped or sexually assaulted is very complex to study or assess. In a recent study on the subject, sexual violence in prison was considered in a more narrowly way "as non-consensual sexual acts with oral, vaginal or anal penetration as well as abusive sexual contacts (touching or grabbing in a sexually threatening manner or touching genitals)".[97]

As already said, torture is strictly prohibited in international law, however its use is systematically widespread. In the prison context, the causes that can facilitate the employment of torture are different. Torture is often used against minorities (sexual, religious and political minor groups) to assess the superiority of the perpetrator, or it is also used to obtain confidential information by pre-trial detainees.[98]

Whatever form torture assumes, there are undoubtedly deplorable insights into life behind bars throughout the world, and sadistic treatments, which happen in most of prisons. The different conventions examined in the next chapter, are the results of long-lasting attempts made by the international community, to eradicate this stigma, which regardless of its investigative or punitive aim, still continues to have citizenship in many countries of the world and, in particular, where it is more difficult to denounce.

[96] Stefan Enggist, Lars Møller, Gauden Galea, Caroline Udesen, *Prisons and Health* (Copenhagen, Denmark: WHO Regional Office for Europe): 19.
[97] Ibid., 21.
[98] Ibid.,22.

CHAPTER II

The sources and the long-lasting attempts at international level to prevent the crime of torture

1. The crime of torture in international law

As it has been seen in the previous chapter, the practice of torture has always threatened the societal civil values throughout the course of history. Since the nineteenth century it has been considered an enemy of humanitarian jurisprudence and of the fundamental human rights, which characterize every single individual[99]. However, its still usual and hidden existence is proved by the need of international community to set off a series of international legal instruments in order to both criminalize and prevent it. Nowadays, the protection of fundamental human rights plays a leading role in several legal instruments, both international and regional, and it is exactly in these documents that the crime of torture and cruel, inhuman or degrading treatment is strongly stressed, as probably one of the most criminalized offences.

During the Second World War, states witnessed some of the most deplorable atrocities ever committed by humankind. Millions of deaths of civilians and soldiers, the drama of the Holocaust, and the newborn nuclear weapons as means of mass destruction are just few of them. After these horrors, states decided to put an end to those barbarities, so that they could not have threatened human rights and the international community anymore. One of the major achievements, in this regard, is probably the Universal Declaration of Human Rights (UDHR) of 1948. In this legal document, the prohibition of torture and cruel, inhuman and degrading treatment, included in article 5, was so remarked that even though the declaration is quite weak from the point of view of its binding objectives, since it does not created legal obligations upon states, it has served as

[99] Ogechi Joy Anwukah, "The Effectiveness of International Law: Torture and Counterterrorism", *Annual Survey of International & Comparative Law,* Vol. 21, No. 1 (2016): 9. See also Filiberto Trione, *Divieto e Crimine di Tortura nella Giurisprudenza Internazionale* (Napoli, Italy: Editoriale Scientifica srl, 2006), 29.

an example for future binding sources, that it is possible to say that its real legal value exceeds the one of a simple recommendation[100].

Another important instrument, in which the negative right not to be subjected to torture, cruel and inhuman treatment has been adopted, is the International Covenant on Civil and Political Rights of 1966 (ICCPR). In its article 7, it uses the same provisions contained in art. 5 of the UDHR, specifying that "in particular, no one shall be subjected without his free consent to medical or scientific experimentation"[101]. Together with International Covenant on Economic, Social and Cultural Rights, this convention can be interpreted as an evolution of the previous Declaration with the main difference that, conversely to the UN document, it legally binds its member states.

A remarkable international legal covenant is definitely the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. From the legal point of view this source can be probably considered a touchstone in the field, indeed it was created in order to be a more specific instrument used not only to fight, but also to prevent acts of torture, cruel and inhuman treatment. In addition, what makes this source a distinguishing one in the field is that it provides the principle of non-refoulement, universal criminal jurisdiction of acts torture, according to the principle of *aut dedere aut judicare,* and it also establishes a Committee of experts whose assignments are preventive, monitoring and controlling[102].

The above-mentioned legal instruments are those that will be extensively analyzed throughout the following subchapters, nevertheless the criminalization of torture is not just limited in those international sources, rather there are a series of other noteworthy legal sources that aim at denouncing this crime.

the 1998 Rome Statute of the International Criminal Court makes explicit reference to the crime of torture in article 7, paragraph one. This article lists a number of acts, such as murder, extermination, enslavement and other acts with similar nature, committed to intentionally leave severe physical or mental suffering and damage, which

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[100] Nigel Rodley, Matt Pollard, *The Treatment of Prisoners under International Law* (New York, USA: Oxford University Press Inc., 2009), 80.

[101] Anthony Cullen, "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights", *California Western International Law Journal,* Vol. 34, No. 1 (2003): 30; See article 7 of the ICCPR.

[102] Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl, Germany: Norbert Paul Engel Verlag, e. K., 2005), 158; Ugo Villani, *Dalla Dichiarazione Universale alla Convenzione Europea dei Diritti dell'Uomo* (Bari, Italy: Cacucci Editore, 2015),18.

constitute crimes against humanity when perpetrated as part of an extensive intentional attack against civilians.[103] More specifically, torture is described as: "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions"[104].

The sphere of regional legal systems is so vast that beside the European Convention on Human Rights, other instruments have adopted similar provisions regarding the crime of torture, cruel, inhuman and degrading treatment. For example, article 5 of the 1969 Inter-American Convention on Human Rights (IACHR) replicates the same formula of article 5 of the UDHR, adding also that all the individuals that are deprived of their personal liberty, must be treated with respect of their own personal human dignity.[105] Within American jurisprudence there is another convention that deserves to be mentioned, that is the 1985 Inter-American Convention to Prevent and Punish Torture (IACPPT) whose article 2 provides a broad and specific definition of torture[106].

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have jurisdiction over torture. Although these two tribunals interpret their own statues, rather than other conventions, they both provide further and more specific evidences in order to prosecute alleged individuals, who may be responsible for acts of torture and ill-treatment. In particular, the ICTY's statue considers torture not only as a breach of 1949 Geneva Conventions but also as a crime against humanity.[107] In this context, the Furundzija case represents a

[103] Antonio Cassese, "International Criminal Law" in Malcolm D. Evans, *International Law* (New York, USA: Oxford University Press Inc., 2003), 740-1.
[104] See article 7, paragraph 2, letter e) of the Rome Statute of the International Criminal Court, available at https://www.refworld.org/docid/3ae6b3a84.html [accessed 20 June 2021].
[105] See article 5, paragraph 2 of the Inter American Convention on Human Rights, available at https://www.refworld.org/docid/3ae6b36510.html [accessed 20 June 2021].
[106] Article 2 of the Inter-American Convention to Prevent and Punish Torture reads: "[...] For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish". See the Convention available at https://www.refworld.org/docid/3ae6b36510.html [accessed 20 June 2021].
[107] See articles 2 and 5 of the International Criminal Tribunal for the former Yugoslavia Statute, available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [accessed 20 June 2021].

remarkable example in which the court's judges focused the attention on the crime of torture as a peremptory norm. Following the Rwandan genocide of 1994, the Security Council established International Criminal Tribunal for Rwanda on the premise of the former Yugoslavian international tribunal. Also, in its statue torture is recognized as a crime against humanity when committed in the context of widespread and systematic attacks against civilians[108].

During war times it can be possible that the protection of human rights may be suspended and derogated in order to protect civilian populations from a possible exceptional grave attack. It is precisely in the *jus ad bellum* context that the four Geneva Conventions with article 3, common to all, strictly prohibits acts of torture, humiliating and degrading treatment against people not involved in the armed conflict, considering it a grave breach of the Conventions[109]. Furthermore, in 1978 the first additional protocol, added to the Geneva Conventions, expanded the prohibition of the crime of torture and ill-treatment to all the individuals regardless their status in international conflicts, in accordance with article 75. Indeed, this article bans torture "at any time and in any place whatsoever", during international armed conflicts prohibiting "torture of all kinds, whether physical or mental" [110] and "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault"[111].

The prohibition of torture, inhuman and degrading treatment is also recognized and criminalized in more specific treaties issued in order to protect the rights of more vulnerable categories[112]. In this respect, there are some conventions that must be cited, for example article 37 of the 1989 United Nations Convention on the Rights of the

[108] See article 3 of the statute of International Criminal Tribunal for Rwanda, available at https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf [accessed 20 June 2021].
[109] Article 3 of the four Geneva Conventions states "[...] the following acts are and shall remain prohibited at any time and in any place whatsoever [...] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture", see the four Conventions available at https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm [accessed 20 June 2021].
[110] See article 75, paragraph 2, letter a) , point ii, available at https://ihl-databases.icrc.org/ihl/INTRO/470 [accessed 20 June 2021].
[111] See article 75, paragraph 2, letter b), available at https://ihl-databases.icrc.org/ihl/INTRO/470 [accessed 20 June 2021].
[112] Antonio Marchesi, "Tortura. La parola che gli stati non dicono" in Massimo Basilavecchia e Lucio Parenti, Scritti in ricordo di Giovanna Mancini (Tomo II) (Lecce, Italy: Edizioni Grifo 2019), 256.

Child[113], article 10 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[114], and article 15 of the 2006 United Nations Convention on the Rights of Persons with Disabilities[115].

Besides the above mentioned legal instruments, the prohibition of torture and cruel, inhuman and degrading treatment, that is the right to physical and mental integrity[116], is one of the absolute and non-derogable rights which is widely contemplated not only in international human rights sources, but also by customary international law, and it ranks also as a *jus cogens* norm.[117] This unanimous rejection and the recognition of the crime as a general international law prohibition have provided a broader legal framework in which this offence can be condemned.

However, despite all the struggles that the international community has made and continues to make, the common recognition of the crime of torture and cruel, inhuman and degrading treatment and its consequent breach has not been fully consolidated on the international level yet. Proof of this is that many states, although ratifiers of the main above cited conventions, continue to resort to torture in several occasions such as detention centers, against terrorist suspects, during interrogations and even against women and minor detainees. Suffice it to mention the use of waterboarding in the US during the War on Terror. Originally used by the French Army during Liberation Wars, it was then adopted by CIA's authorities during Bush administration against alleged

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[113] See United Nations Convention on the Rights of the Child adopted by General Assembly Resolution 44/25 of 20 November 1989, available at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx [accessed 20 June 2021]. Art. 37, letter a) states "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

[114] See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 of 18 December 1990, available at https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx [accessed 20 June 2021]. Art. 10 states "No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[115] See United Nations Convention on the Rights of Persons with Disabilities adopted by General Assembly Resolution 61/106 of 13 December 2006, available at https://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf [accessed 20 June 2021]. Art. 15, paragraph 1 states "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation."

[116] Manfred Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Kehl, Germany: Norbert Paul Engel Verlag, e. K, 2005), 157.

[117] Manfred Nowak, "Obligations of the States to Prevent and Prohibit Torture in an Extraterritorial Perspective" in Mark Gibney & Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, USA: University of Pennsylvania Press, 2010), 11; Simona Pinton, "La riparazione dovuta alle vittime di tortura" in Lauso Zagato, Simona Pinton, *La tortura nel nuovo millennio. La reazione del diritto* (Padova, Italia: CEDAM, 2010), 95-6.

terrorists[118]. Although recognized as illegal by the legal standards imposed by the UN Convention against Torture (CAT), the US has tried for years to justify it, minimizing its damages when used against alleged terrorists who may have information that can save national security and people's lives[119]. In this respect, international organizations, like Amnesty International or Human Rights Watch, have been playing a leading role in the denunciation of the "social cancer" of torture, and of its frequent use by several military forces in order to intimidate and extract confessions or information[120]. Moreover, in the face of a complex and incisive international system of legal obligations, it seems there is general disregard of the duty to implement, at national level, all those mechanisms of prevention and criminalization of the crime of torture, that international law, in theory, obliges to have. In this regard, as it will be stated in the fourth chapter, the Italian case is a perfect example; despite having ratified all the major international legal and political instruments, the crime of torture has been adopted in the Italian Penal Code only in 2017.[121]

International law does not have a centralized enforcement mechanism, rather it is enforced by states themselves. In this regard, international reputation is a cause for compliance with international law[122]. International reputation can be defined as the belief "about the state's future actions on its past action"[123], in other words, states generally comply with international law because the benefits deriving from cooperating outweigh

[118] Marchesi, *Contro la tortura*, 13, 30.
[119] Ibid. See also the article "Torture and the Constitution" available at https://www.washingtonpost.com/archive/opinions/2005/12/11/torture-and-the-constitution/b3729372-5c9b-4a73-bab1-cc249f946cc8/ [accessed 20 June 2021]. The practice of waterboarding has been abolished only through the amendment of the 2005 the Detainee Treatment Act, which bans any form of torture and ill-treatment used by US military forces. See the text available at https://www.congress.gov/bill/110th-congress/house-bill/5460/text?r=2&s=1 [accessed 20 June 2021].
[120] In 1973, the non-governmental organization Amnesty International published a report issued to launch the Campaign for the Abolition of Torture in which it has been found that during the last decades many states have relied on the method of torture as a tool of governance and for matters of national security and what is really surprising of this is that there is not any country which is immune, even the most democratic ones. For further references see Matthew Lippman, "The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.", *Boston College International and Comparative Law Review*, Vol. 17, No. 2 (January 1994): 333.
[121] Antonio Marchesi, Alessandra Giannelli "Il paradosso della tortura: assolutamente vietata ma universalmente diffusa" Marchesi tortura di stato p 156-57 in Alessandra Gianelli, Maria Pia Paternò, *Tortura di Stato. Le ferite della democrazia* (Roma, Italia: Carocci editore, 2004),156-7.
[122] Rachel Brewster, "Unpacking the State's Reputation", *Harvard International Law Journal*, Vol. 50, No. 2 (Summer 2009): 236.
[123] Ibid., 235.

"the short-term cost of compliance"[124]. For example, when a state cheats of violates international norms, it develops a bad reputation which may lead other states to exclude and boycott possible future relations. In this case, the state's authorities should comply with international law because the boycott costs outweigh the immediate compliance costs"[125].

The same logic can be used in the field of combating torture and mistreatment. International law alone cannot completely eliminate the crime of torture and cruel, inhuman and degrading treatment, but it can at least aim to influence the states' behaviors which have accepted being bound by international obligations. What is probably even more sharp than the obligations deriving from a possible breach of the crime of torture, is the following grade of accusation by other ratifiers, international bodies and public opinion that ends up being more effective at international level. Taking the example of Abu Ghraib prison, the indignant reactions of both public opinion and the international community led, apparently, the United States to change the way it respected international duties. So, once the denunciation of international violations succeeds, making the state's customs change is probably the most effective and significant result of international law.[126]

1.1 The Universal Declaration of Human Rights of 1948

The Universal Declaration of Human Rights, adopted by General Assembly resolution 217 A on 10 December 1948, can be considered not only as a milestone in the international scenario for the protection of human rights, but mainly as a springboard for the development of further legal instruments created to provide protecting and more specific human rights standards at international and universal level.

Soon after the horrors of the Second World War, it was evident that something had to be done in order to avoid the recurrence of probably one of the most disgraceful events of humanity. In this context, the UDHR sought to create a new international order based on the respect of human rights and on the improvement in the relations between state and individuals, in which the latter were no more considered as subjects of the state,

[124] Ibid., 232.
[125] Ibid.
[126] Marchesi, Giannelli "Il paradosso della tortura", 156-7.

rather as acting characters within international community[127]. This authoritative document has been in fact conceived to elucidate the human rights and freedom to which all individuals, regardless sex, religion, nationality would be entitled. Although this declaration does not have the binding characteristic typical of treaties, it constitutes a system of soft laws, whose legal and cultural influence, has served as goals and aspirations that governments have tried to emulate.[128]

For the drafting process the United Nations appointed a special commission, led by Eleanor Roosevelt, to work on the document.[129] Albeit all the delegates in charge of drafting came from different cultural and national background, the main aim of the task was the one of creating a declaration of human rights principles that could be easily understood by all people and not a simple "document for lawyers", that is why the adjective universal was deliberately used in the title.[130] In the drafting process different ideals of liberal origins and of natural law have flown into the design of the declaration making it as universal as possible.[131] An example of this can be seen right from article 1, in which " All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[132]. Further, to better articulate the concept of universalism, which entirely characterizes the declaration, also the language used plays an important role: most of the articles start with the word "everyone" that expands the concept of non-discrimination, assessing that all declaration's rights are intrinsic basic birthrights[133] and show the figure of the individual, who is not isolated in the society, rather who has the possibility to freely develop his or her personality within the community.[134] However, the Declaration draft was not a simple path. The Communist governments criticized the Declaration for being too vague and based mainly on Western ideas.

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[127] Villani, *Dalla Dichiarazione Universale*, 18.
[128] Robert F. Gorman, Edward S. Mihalkanin, *Historical Dictionary of Human Rights and Humanitarian Organizations* (Lanham, USA: Scarecrow Press, Inc., 2007), 289.
[129] Susan C. Mapp, *Human Rights and Social Justice in a Global Perspective - An Introduction to International Social Work* (New York, USA: Oxford University Press Inc.,2008), 17.
[130] Paul Gordon Lauren, *The Evolution of International Human Rights-Visions Seen.* (Philadelphia, USA: University of Pennsylvania Press, 2011), 220-1.
[131] Villani, *Dalla Dichiarazione Universale*, 20.
[132] See article 1 of the UDHR available at https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed 20 June 2021].
[133] Lauren, *The Evolution of International Human Rights*, 221.
[134] See article 29 of UDHR; Villani, *Dalla Dichiarazione Universale*, 20.

Consisting of thirty articles, the UDHR has three main fields of application: political and civil rights, economic, social and cultural rights, and collective rights.
The declaration starts out by listing the first group of rights, also called negative rights, as they require the government to refrain from abusing its authoritative power over individuals. Among these rights must be mentioned right to life, right to liberty, right to be free from slavery and servitude and the right to a fair trial.[135]

Recalling the main scope of this chapter, that is to present the main international legal sources available to combat torture, also the UDHR sets forth this crime in its article 5 stating: " No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[136]. The configuration of the legal boundaries of the crime of torture within this article was favored by the fact that, at that time, many national legal instruments already recalled the criminalization of torture, that is why, in drafting article 5, less difficulties were found. Despite the lack of binding legal obligations, article 5 has constituted a reference point for many following legal conventions. For example, it was the main constituent for the preparatory works of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which used to be considered a binding evolution of this article. Moreover, the codification of that clause has also helped the development of other important documents such as the International Covenant on Civil and Political Rights, which uses it as a matrix; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the African Charter on Human and Peoples' Rights[137].

The second group of rights, the social and cultural rights are also called positive rights, as it is expected that the government acts in order to implement them. They include the right to an adequate standard of living such as food, clothing, housing and medical care. The last group of rights, collective rights, are those for groups of individuals and they cover the right to religion, peace and development[138].

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[135] Mapp, *Human Rights and Social Justice*,17; Anthony E. Cassimatis, *Human Rights related Trade Measures under International Law-The Legality of Trade Measures imposed in Response to Violations of Human Rights Obligations under General International Law (*Leiden, the Netherlands: Martinus Nijhoff Publishers, 2007), 27-30.
[136] See article 5 of the UDHR.
[137] The African Charter on Human and Peoples' Rights in article 5 states: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." Trione, *Divieto e Crimine di Tortura*, 28-9.
[138] Mapp, *Human Rights and Social Justice*, 18.

The official monitoring mechanism established by the Declaration is the United Nations Human Rights Council, successor of the Human Rights Commission, recognized in 2006, and headquartered in Geneva. Its main task is the one to assess whether there may be possible violations of human rights, though without enforcing power. It consists of forty-seven states that regularly hold at least three sessions per year. Even though it does not have judicial power what is expected is that it will improve its ability of monitoring human rights in order to be able to immediately assess those states that are mainly human rights abusers, and that, despite their wrong positions, are still part of the Council. Always remaining in the field of monitoring mechanisms, non-governmental organizations play a vital role. Two of the most famous are Amnesty International and Human Rights Watch that investigate in order to denounce mistreatments[139].

As already stated, the UDHR is devoid of binding legal obligations. Nevertheless, through state practice, the standards laid down in the Declaration have been consolidated into customary international law, and during the following years more and more states have codified them into national constitutions or domestic statutes, making them enforceable. However, it could be risky asserting that some provisions have become binding customary laws. In this respect, article 5, regarding the prohibition of torture, is challenged. It is out of question that this provision has gained more and more value over years, becoming an example of *erga omnes* obligation, but it is right to remind that there are many governments that have declared their respect and compliance to the prohibition, actually secretly breaching it[140]. It is therefore true to assess that through state practice and *opinio juris*, these rights could be considered as customary international law, however this statement should not be generalized, since as it has been affirmed many states continue to resort to torture despite its international violation.

The UDHR is a pioneering document, whose strength is certainly having given substance to the term "human rights". Even though there are still contradictory visions whether human rights can be considered universal and indivisible[141] , what the declaration

[139] Ibid.,22.
[140] Rodley, Pollard, *The Treatment of Prisoners*, 63, 69-70.
[141] Several countries have argued that human rights cannot be considered universal as each state considers them also in accordance with their cultures. It is quite clear that Western societies have a completely different approach to rights with a greater emphasis on the individual rather than on the collectivity. And again, in some cultures women are still treated as subordinated to men and, for this reason, they are often not entitled to rights. Mapp, *Human Rights and Social Justice*, 19-20.

aims at doing is to be a source of inspiration for social justice and regulations to be followed and emulated.[142]

1.2 The International Covenant on Civil and Political Rights of 1966

Considered part of the International Bill of Rights together with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights[143] has given shape to most of the rights already included in the UDHR.

Accepted and ratified by more than three quarters states worldwide, the Covenant clearly expresses the will of many nations to create a binding instrument which could be an official document for the protection of human rights. Both the Covenants were adopted on 16 December 1966 by the General Assembly, after more than two decades of preparatory works, during which it was hard to find a possible solution that could conciliate the different ideals of the various state members, that is why there was a slowdown in the draft process. In fact, finding an agreement between the two most powerful nations, the United States and the Soviet Union, was not easy. The former supported civil and political rights, which were in line with the American Constitution, instead rejecting social, economic and cultural rights, considered against their conception of individual responsibility. Whereas the Soviet Union, which was led by a communist authoritarian regime that gave little space to civil and political rights, found a pretext to support the other rights.[144]

Nevertheless, finding a political and social agreement is not always an easy task and, in this case, the only solution was to create two different covenants that would have satisfied the different ambitions the two poles had. The ICESCR definitely opened a new

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[142] The importance of the UDHR can be seen also in practical terms. It is the most translated single document in history, it has had an impact on new national constitution, for example Canada created its own Senate Committee on Human Rights and Fundamental Freedoms in order to draft Canadian bill of rights, its vision of human life has encouraged several states to ratify the Convention on the Prevention and Punishment of the Crime of Genocide, and has been an helpful element for the drafting of the four humanitarian law Geneva Conventions. For further reference see Lauren, *The Evolution of International Human Rights*, 227-9.

[143] See the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [accessed 20 June 2021].

[144] Mapp, *Human Rights and Social Justice*, 19.

passage in human rights standard setting, even though the United States have not ratified it yet. Its articles, pushed by Soviet Union, were considered sympathetic to social welfare, and gradually gained even more popularity, obtaining the support from the International Labor Organization for the right to work, from UNESCO for the right to equal education and cultural life, from World Health Organization for the right to health and from Food and Agricultural Organization for the right to be free from hunger. On the other hand, the ICCPR, ratified by both United States and Soviet Union, is a 53 articles legal document whose rights range from right to life to the right to vote and seek to protect all individuals, under state's jurisdiction, in order not to deny them basic freedoms and to protect their human rights dignity from all forms of discrimination.[145] To this Covenant two additional and optional protocols were added. The first one was adopted on the same date of the treaty and makes provisions for victims of violations to file complaints against the state that has accepted to be bound by the protocol. While the second one was adopted by the General Assembly, after many years of discussion, and aims at completely abolishing the death penalty[146].

Apart from the main differences relating to the content of the covenants, they both entail the same juridical provisions. They are legally binding instruments, and as such, they create legal obligations upon states that have ratified them, but what is more, the rights listed are not simply matter of domestic jurisdiction, rather matter of international concern, as member states share the same will and interest of compliance of other states party to their human rights obligations[147].

Regarding the monitoring mechanism, the ICCPR has established the Human Rights Committee (HRC)[148], an organ in charge of overseeing the states' implementation of the obligations they have assumed. Moreover, an obligatory state reporting procedure has been introduced; the reports issued by member states show the implementations made in order to give effect to the rights contained in the Covenant. These reports are then rigorously analyzed by the HRC in order to assess whether a critical situation may arise. At the end, the HRC makes concluding observations that do not have legal effects, as they

[145] Lauren, *The Evolution of International Human Rights*, 240; Cassimatis, *Human Rights related Trade Measures*, 26.
[146] Nowak, *U.N. Covenant*, xxiii-xxiv.
[147] Gorman, Mihalkanin, *Historical Dictionary*, 153; Lauren, *The Evolution of International Human Rights*, 239.
[148] On the contrary, the monitoring mechanism established by the ICESCR is the Committee on Economic, Social and Cultural Rights (CESCR), a body in charge of monitoring the implementations of the member states to the Covenant.

are simply recommendations. In addition to the reporting and supervising procedure, the HRC has also been equipped with the capacity to consider inter-states and individual communications. This system, however, is subordinated to the acceptance by the state to receive complaints by another state that has made the same declaration pursuant to article 41 of the treaty[149]. Whereas the right to submit individual complaints, which seems to have more success than the previous one, is dependent upon the ratification of the first optional protocol, and communications can be made only after the exhaustion of domestic remedies[150].

With respect to the crime of torture, the ICCPR codifies the ideal prohibition that is included in article 5 of the UDHR. Article 7 of the covenant reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"[151].

At this point different considerations must be done. First of all, this article is one of the few articles that does not permit any kind of derogation and restriction. Although article 4 permits states to adopt possible derogations under the Covenant in cases that can be regarded as a threat to states' national security, this clause cannot be applied to article 7, which claims its identity as a non-derogable right[152].

Another remarkable point is that article 7 does not make any kind of differentiation between the three levels of condemned crimes, a distinction that is explicitly done in article 3 of the European Convention on Human Rights. Therefore, it is not required that a sharp threshold is used, as an act of torture or other form of ill-treatment depends solely on the kind, purpose and severity of such an act. Thus, cases

[149] Article 41 of the ICCPR states: "State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration."

[150] Nowak, *U.N. Covenant*, xxiii,xxv; Evans, Morgan, *Preventing Torture*, 65; Roland Bank, "International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?", *European Journal of International Law*, Vol. 8, No. 4 (1997): 614.

[151] See article 7 of the ICCPR.

[152] Sarah Joseph, Melissa Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary* (New York, USA: Oxford University Press, 2013), 216, 236-7; Rodley, Pollard, *The Treatment of Prisoners*, 55; Marchesi, "La Proibizione della Tortura all'inizio del Nuovo Millenio", in Lauso Zagato, Simona Pinton, *La tortura nel nuovo millennio. La reazione del diritto* (Padova, Italia: CEDAM, 2010), 7.

where torture has been employed, or cases in which no specific term has been attached may both regard electric shock, burning or intense beatings. Also, the HRC has not found the need to draw such a categorization, but of course only when the gravity of the fact is in doubt as in inhuman or degrading treatment cases, where the purposive element, typical of torture, is lacking.[153] Based on that, it is evident that what characterizes torture is its purpose, indeed such an act is usually committed by a perpetrator, who intentionally inflicts severe physical or mental suffering in order fulfill a specific aim. What is important to stress here is that the HRC has rejected the approach of considering an act of torture only when committed by a state-official, rather it has recognized the horizontal effect of this norm, as any individual can commit torture, and this is probably what marks the difference with article 1 of the United Nations Convention against Torture, in which it is one of the mandatory preconditions. Most cases in which the HRC found acts of torture were during the former dictatorship in Uruguay. Victims were usually subjected to periods of incommunicado detention and to a variety of deplorable practices, such as electric shock to fingers and genitals, burnings with cigarettes or standing naked and handcuffed for hours.[154]

More complicated is the delineation of an act of torture from cruel and inhuman treatment. These two terms include a certain level of severity and suffering, but they lack the specific intent in order to be considered torture. The HRC has repeatedly found that conditions of detention may sometimes fall within this category of crime. Indeed, article 7 should be read in compliance with article 10 paragraph one, which requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"[155]. It is quite clear that life behind bars is not easy, and the fact that members states have the duty to train adequate personnel informed of the ban of torture is a proof that too often corporal punishment, solitary confinement and prison conditions can harm detainees' human dignity[156].

[153] David Weissbrodt, Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment", *Law and Inequalities: A Journal of Theory and Practice*, Vol. 29, No. 2 (2011): 352; Nigel Rodley, "The Definition of Torture in International Law", *Current Legal Problems*, Vol. 55, No. 1 (2002): 473-4,479; Joseph, Castan, *The International Covenant*, 228.
[154]Nowak, *U.N. Covenant*, 161-2; Joseph, Castan, *The International Covenant*, 232.
[155] See article 10 of the ICCPR; Nowak, *U.N. Covenant*, 163,166; Rodley, Pollard, *The Treatment of Prisoners*, 56; Tate, "Torture", 204.
[156] Joseph, Castan, *The International Covenant*, 290; Nowak, *U.N. Covenant*,167-8, 172-3,175.

Within the three acts that are described in article 7, degrading treatment can be considered "the weakest level of violation"[157]. In this case the humiliation of the victim in his/her eyes or of others is what is relevant, rather than the severity of suffering. Nevertheless, all punishments included in this article can amount to a certain level of severity causing serious harms and therefore leading to a possible breach of it[158].

However, in contrast to article 5 of UDHR, article 7 adds a further provision that proved to be necessary after the atrocities within the Nazi concentration camps: the prohibition of medical and scientific experimentations. Clearly, conventional medical treatment done in the interest of patient's health and with his/her consent are outside the scope of the provision[159].

Even though it is not officially stated, the Covenant mandates special protection not only for children but also for women[160]. The practice of genital mutilation is considered a violation of article 7, and in addition the Committee should be informed on national laws and practices regarding domestic violence or abortion in the case of pregnancy caused by rape[161].

Finally, a more comprehensive analysis of article 7 should be made in conjunction with article 2 of the same Covenant. Reading these two articles together would provide a complete overview of the main duties of the state in case of breach. Indeed, according to the second article a state must guarantee and protect all the rights of the Covenant to all the individuals under its own jurisdiction. Whenever a violation is committed, the state must ensure remedies providing also effective investigations to prosecute the alleged criminal. The Committee has therefore stressed that the duty to criminal prosecution is an obligation upon states, highlighting the case of torture and its inderogability[162].

The UDHR and the ICCPR are two important examples which led to what can be considered the most relevant achievements of international law in the field of the

[157] Nowak, *U.N. Covenant*, 165.
[158] Ibid., 165-166.
[159] Ibid., 188-191. A noteworthy example is El-Masri v. The Former Yugoslav Republic of Macedonia case, in which the applicant complaint he was subjected to degrading treatment, and to medical experimentations without his own consent.
[160] Article 24 makes direct reference to the children, although it is quite clear that as the Convention is addressed to every single individual, also women are included even if there is not a specific article.
[161] Joseph, Castan, *The International Covenant*, 244.
[162] Mirko Sossai, "The Accountability Gap: note sull'esercizio della giurisdizione civile e penale nei confronti dei contractors impiegati negli interrogatori" in Lauso Zagato, Simona Pinton, *La tortura nel nuovo millennio. La reazione del diritto* (Padova, Italia: CEDAM, 2010), 61.

criminalization of torture. With regard to the Covenant it is possible to say that its norms and provisions seem to have become part of the practice of member states, both in the actions of law enforcement, but also in the everyday relations between states and individuals.

1.3 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984

The *ad hoc* instrument that entirely focuses on the crime of torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a universal binding normative document adopted by the United Nations General Assembly in December 1984 and entered into force in June 1987 in compliance with article 27[163]. The Convention is the result of several worldwide struggles aimed at criminalizing torture and other cruel, inhuman or degrading treatment or punishment.

The long works started with the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly without vote in December 1975. The Commission on Human Rights started working on its draft after the proposal of the Swedish delegation and the International Association of Penal Law, during the thirtieth Commission's session. The main goal was to create an instrument that could refine and expand the content of article 5 of the UDHR. It is possible to concretely see how this article serves as basis for the entire Declaration, indeed article 2 is a formal statement of the main principles as it reads

> "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights"[164].

[163] See the Convention available at https://www.ohchr.org/en/professionalinterest/pages/cat.aspx [accessed 20 June 2021].

[164] See article 2 of the Declaration available at https://www.ohchr.org/en/professionalinterest/pages/declarationtorture.aspx#:~:text=Any%20act%20of%20torture%20or,Universal%20Declaration%20of%20Human%20Rights [accessed 20 June 2021].

The question of its legal status is still open, as being just a declaration, it does not strictly impose legal binding obligations upon states, rather it has been adopted as a guideline for all states and other international entities which exercise effective power[165].

However, after the events of the Second World War, the recognition of genocide as a crime against humanity, and the continuing abuses on prisoners, which the Declaration did not halt, Amnesty International strongly insisted on the need to adopt a legally binding instrument that could determine / lead to a more incisive condemnation and punishment to torture. Through its Resolution 39/46 the General Assembly tried to give a solution to this huge unsolved problem by approving CAT[166]. This historic step has been made in order to create a more humane international society, in which states can have proper legal methods to prevent and enforce the prohibition of torture and cruel, inhuman, or degrading treatment.

The convention has different distinctive contributions however, to better understand the relevance of this document and all the obligations that derive from it, it is necessary to analyze in detail article 1, the key pillar of the entire discourse. Article 1 mirrors the definition of torture previously given in the UN declaration, and reads

> "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"[167].

By reading this article, it is evident that the convention provides a very detailed definition of what constitutes torture even if it is, at the same time, quite rigid as it highlights several core elements, whose simultaneous presence can lead to a possible breach of this article.

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[165] Rodley, Pollard, *The Treatment of Prisoners*, 67-8.
[166] Lippman, "The Development and Drafting", 307,331.
[167] See article 1 of Convention, and article 1 of the Declaration.

Analyzing individually every single aspect, article 1 defines torture as any act that causes severe physical or mental pain. At first glance, it seems that acts of omission causing torture are not included in the definition of article 1, as there is not any explicit reference to this question. On the contrary, the legal doctrine agrees with considering these kinds of acts as amounting to torture and cruel, inhuman or degrading treatment[168]. Therefore, any kind of act, be it active or passive, can present the main characteristics to be considered as such. For example, all individuals deprived of their liberty have the right to food, water and freedom from hunger, and since they are under the state's jurisdiction, this has the duty to achieve the realization of these rights, not only because of virtue of international law prescriptions, but also because of the value of detainees' humanity. An act of omission in this sense, can be seen as a violation of the fundamental norms of international human rights law[169].

Another essential aspect of an act of torture is its intensity. The word "severe" is a key element to affirm that an act constitutes torture, and at the same time it also suggests that not any offence can be considered as such. The scope of a severe act comprises a durable violent or abusive conduct, that is not *per se* severe, but becomes so over a period of time. At this point, estimating the level of severity or humane suffering of an act of torture leads to several opened questions, as it is impossible to establish *a priori* threshold that is able to distinguish when an act of torture causes enough painful suffering without taking into consideration individual's physical and mental condition in that precise situation and context. Moreover, it is unavoidable to remember that the current forms of torture cannot be compared to the Medieval and archaic ones. Contemporary torture aims at damaging mental and physical integrity, and in these cases, it cannot be said that these acts do not amount to torture just because new technological weapons do not leave visible scars. Mental suffering was included within the scope of the prohibition of torture. However, it is important to note that this element is subject to some reservations made by states during ratification. The United State senate, for example, has decided to list specific circumstances of mental violence that can amount to torture[170].

[168] Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement* (The Hague, the Netherlands: Martinus Nijhoff Publishers, 1999), 14-15
[169] Ibid.,14-15.
[170] Boulesbaa, *The U.N. Convention*, 16-19; Marchesi, "La Proibizione della Tortura", 13-14; Marchesi, Giannelli "Il paradosso della tortura", 146; Marchesi, "Tortura.", 544; Cullen, "Defining Torture", 32-33.

Another constituting element is the intentionality of the act that plays a very important role as it excludes negligent conduct from the application of article 1. Therefore, an act of torture must be intentionally inflicted with a specific purpose in mind, for example obtaining information or simply punishing, discriminating or intimidating the victim. Undoubtedly, also cruel, inhuman or degrading treatment, which are also criminalized under the convention, can cause a severe level of physical or mental suffering, though what distinguishes them from an act of torture is precisely the intention. Indeed, they cannot be considered as torture because they lack the intentionality behind the act[171].

One of the most discussed aspects of the definition of torture is the description of the person whose conduct can be sanctioned under this convention. According to article 1, an act of torture is limited to acts committed by a state's official or by a person acting in official capacity. Therefore, also individuals, who turn a blind eye to acts committed by state's agents or on behalf of the state, can be prosecuted by tribunals. However, during the preparatory works different representatives wanted to expand the possibility of the commission of an act of torture also for private individuals, but at the end the convention was thought only to cover state's involvement in acts of torture[172].

One of the most controversial aspects regards the exclusion under article 1 of lawful sanctions. According to this clause, pain and suffering that derive from the imposition of lawful legal sanction cannot fall within the scope of this article. This principle finds its substantive reason in the fact that many sanctions provided by national law are characterized by a certain degree of suffering, with the following possibility for a state to be condemned for the normal functioning of its internal judicial system. It is difficult to determine which sanctions can be lawful or not also because article 1 does not make any reference to determined acts that can be considered as such. Furthermore, interpreting the term "lawful" is particularly complex in this instance, because in several national systems some acts can be considered lawful, whereas considered barbarity and torture by other states or by international law itself[173]. Exactly like the previous

[171] Boulesbaa, *The U.N. Convention*, 20; Weissbrodt, Heilman, "Defining Torture", 386; Oona A. Hathaway, Aileen Nowlan & Julia Spiegel, "Tortured Reasoning: The Intent to Torture Under International and Domestic Law.", *Virginia Journal of International Law*, Vol. 52, No. 4 (Summer 2012): 799.

[172] Boulesbaa, *The U.N. Convention*, 23-4; Marchesi, "La Proibizione della Tortura",14; Rodley, "The Definition of Torture", 486-9.

[173] Marchesi, "La Proibizione della Tortura", 15; Marchesi, "Tortura.", 544; Marchesi, Giannelli "Il paradosso della tortura", 148.

Declaration, the Convention does not make any kind of reference to the Standard Minimum Rules for the Treatment of Prisoners in article 1. This omission may suggest that pain and suffering are behaviors at the basis of everyday life within prisons, and for this reason lawful sanctions are not criminalized as torture should be. Lawfulness should be considered in accordance with international law instead of domestic law, otherwise a state can divert the main scope of the covenant by adopting violent punishments[174].

The convention is not only limited to the prosecution and criminalization of the acts of torture, but it shall be applied also to other forms of cruel, inhuman or degrading treatment, as article 16 states. Indeed, it also provides that this kind of acts shall be prevented in any place under the state's jurisdiction, when committed by an official state's organ or by any individual acting in its capacity. However, this article is quite weak compared to the prevention and punishment methods for torture in the CAT. First of all, there is no requirement for these acts to be criminally sanctioned or that victims are entitled to compensation. Moreover, there is no reference to the problem of expulsion, return or extradition of an individual towards states where there is the real risk for the subject to be victim of cruel, inhuman or degrading treatment. The consequences extracted by these acts should not be minimalized or weakened, though a failure to strengthen this article is due to the fact that these actions were considered as too vague to provide legal culpability and judgement[175]. A possible solution to this gap may be provided by the Committee against Torture, whose general comments serve as an up-do-date interpretative instruments for the norms included in CAT. Nevertheless, in one of it comments it recognizes that "the definitional threshold between ill-treatment and torture is often not clear"[176].

The essential core of the convention is driven by the obligations that it creates upon states. Article 2 entails that it is incumbent on member states to take all necessary measures, such as judicial, administrative and legislative, to prevent acts of torture within their jurisdiction. Additionally, there is not any kind of circumstance, either state of war

[174] In this case, article 27 of the Vienna Convention on the Law of the treaties is relevant to the question of lawfulness presenting a possible solution. Indeed, the Vienna Convention prohibits the member states to a treaty to invoke their domestic law to justify a possible violation of the object and purpose of such a treaty. See art. 27 of the Vienna Convention available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed 20 June 2021]. Boulesbaa, *The U.N. Convention*, 29-31; Lippman, "The Development and Drafting", 314-5.

[175] See article 16 of the Convention; Lippman, "The Development and Drafting", 316.

[176] Marchesi, "La Proibizione della Tortura", 16.

or national security, that permits a justification of an act of torture, confirming once again the inderogability of this right[177].

Then, the CAT imposes a series of negative obligations, such as the one that can be found in article 3. This article states for the first time the principle of *non-refoulement*, according to which it is severely prohibited to expel, extradite or return an individual towards a state where "there are substantial grounds for believing that he would be in danger of being subjected to torture"[178].

Among the self-executing obligations imposed by the convention, article 4 imposes that each member state makes the offences punishable under the Convention, directly condemned also within national criminal law through *ad hoc* legislation. This provision can be seen as a method to ensure effectiveness, as the criminalization of torture at national level creates the perception of torture as abomination[179]. Here, it is necessary to make reference to the Italian case, further analyzed in the fourth chapter, since it is a clear example that ratifying a convention without introducing a specific internal legislative provision is not enough especially within criminal law, according to which *nullum crimen, nulla poena sine lege*[180].

As already said in the previous chapter, the crime of torture is a *delictum iuris gentium* that harshly damages the fundamental values of the entire humanity, and in this regard article 5 provides universal jurisdiction over this offence. This means that each state party to the convention has the duty to ensure its national judges to be competent to prosecute any act of torture committed within territories under its jurisdiction, including on board of a ship, or aircraft, or when the alleged criminal is a national of the state. Moreover, national judges may be competent every time an alleged criminal is under the jurisdiction of the state, and unless a process of extradition is implemented. Basically, universal jurisdiction is usually combined with the *aut dedere aut judicare* principle[181].

In order to fully criminalize torture, it is not sufficient to fulfill the obligations that derive from the Convention itself, but rather it is also required that the implementation of

[177] See article 2 of the Convention.
[178] See article 3 of the Convention.
[179] See article 4 of the Convention; Anwukah, "The Effectiveness of International Law", 24.
[180] Pugiotto, "Repressione penale della tortura", 132.
[181] The crucial element known as *aut dedere aut judicare* stipulates that, whenever an alleged criminal is found in a territory of a state, the state must either extradite him towards another state, which claims him/her for reason of prosecution, and where he/she will be brought in front of a national court, or it the state do not pursue an extradition process, it must submit the case to its competent domestic authorities. See article 5 of the Convention; Marchesi, Giannelli "Il paradosso della tortura", 144; Evans, *International Law*, 344.

the regulations would be effective. For example, article 10 entails the duty to provide an adequate training and education regarding the prohibition of torture "to civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment"[182]. And again, the duty to proceed with prompt and objective interrogations whenever there could be "the reasonable ground to believe" that an act of torture has been committed[183]; the duty to obtain a fair and right compensation, which include also the full costs of a possible rehabilitation, for any victim who has been subjected to torture[184], and the provision according to which statement established be the result of acts of torture should not be invoked as evidence in any kind of proceedings[185].

The second part of the CAT deals with the Committee against Torture, the monitoring mechanism directly established by the convention. Of course, as other monitoring mechanisms do, this procedure is intended to operate as an inspector for the state parties, in order to ensure and evaluate the implementation of their obligations under the convention. The Committee was established according to article 17 and consists of ten individual experts elected by states, who are qualified in the field of human rights[186]. Its main task is monitoring compliance with the Convention, however as other UN monitoring mechanisms, it is a "quasi-judicial" organ; although it is at the center of the prevention of impunity, it lacks of the ability to issue legally binding decisions, furthermore, even if it is expected to constantly monitor states' compliance, it does not have enough resources to launch effective investigations[187]. This is due to the fact that it operates in a "grey area between fact and law" without having certainty of the empirical ground upon which it stands, and because it is not able to make proper determinations on legal issues [188].

The Committee's jurisprudence ranges from a reporting system to an investigating one. To comply with its legal obligations, each state member must submit a report in which the main achievements to fulfill the obligations under CAT are described. After

[182] See article 10 of the Convention.
[183] See article 12 of the Convention.
[184] See Article 13 of the Convention.
[185] See article 15 of the Convention.
[186] See article 17 of the Convention; Boulesbaa, *The U.N. Convention*, 237-40; Lippman, "The Development and Drafting", 319.
[187] Tobias Kelly, "The UN Committee against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty", *Human Rights Quartely*, Vol. 31. No. 3 (August 2009): 781.
[188] Ibid.

the examination of the report, the Committee issues a general comment, which does not have legal binding effects. Therefore, because of the lack of coercive sanctions, the main goal of this system is the one of opening a dialogue with the state, anytime the Committee notices any insufficient information or whenever further clarifications regarding certain issues are requested. Further, the Committee is not authorized to conduct independent investigations about states' reports, as doing so would mean acting *ultra vires.* Also, the language used in its responses indicates how its role is limited to general comments and fact finding, as it uses terms like "wish to know"[189]. Taking the example of Italy, in the concluding observations of 18 December 2017 the Committee has negatively commented the adoption of new article 613 *bis,* considering it "incomplete inasmuch as it fails to mention the purpose of the act in question, contrary to what is prescribed in the Convention"[190].

In order to provide the Committee an innovative enforcement procedure, CAT establishes in its article 20 an inquiry procedure, which in reality proved to be largely ineffective. According to this provision, the Committee can start an investigatory procedure when it receives solid information that acts of torture are systematically conducted within the territory of a state. At this point, the Committee encourages the alleged state to cooperate, designating members for confidential investigation in the assigned territory, after state's acceptance. It is clear to understand that this system has been quite complicated because, even if confidentiality is at the basis of a possible investigation, it is highly unlikely that a state party, which frequently resorts to torture, permits the Committee to inspect places where human rights violations can be found[191].

Article 21 provides a further inter-state system of complaint, which was intended as an instrument of enforcement in order to monitor each other's performance of the fulfilment of the obligations under the convention. However, also this system presents several limitations. First of all, it works only if both states have accepted the Committee's competence to deal with accusation of the covenant's obligations. Of course, the acceptance is not compulsory, rather optional, and what the Committee intended to do

[189] Boulesbaa, *The U.N. Convention,* 252-3; Lippman, "The Development and Drafting", 320; Bank, "International Efforts", 619.

[190] Concluding observations on the combined fifth and sixth periodic reports of Italy of 18 December 2017 are available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fITA%2fCO%2f5-6&Lang=en [accessed 20 June 2021].

[191] See article 20 of the Convention; Boulesbaa, *The U.N. Convention,* 264-5; Lippman, "The Development and Drafting", 321.

was to create an *ad hoc* mechanism that provides a friendly solution to states' complaints[192]. Even though this system could have several strengths, it has never been able to become successful. Nowadays the strong will of states to protect their sovereignty is proved by the fact that the inter-state complaint system has some requirements to strictly follow in order to be enforced, that are exhaustion of domestic remedies, a declaration of competence for the Committee and the subsequent non-binding nature of any future decision[193].

The last system of complaints, provided by article 22, designs an individual petition procedure. Once again, it is limited only to those states that have accepted to be subject to the CAT during the ratification process. The Committee can receive claims from, or on behalf of, those individual victims of violations of the Convention. Nevertheless, there are many limitations imposed on the admissibility of these complaints that only few were effective. Firstly, the Committee considers inadmissible anonymous complaints, and what is even more serious is that most states, which engage in gross human rights violations, do not have accepted this procedure. To date, the majority of individual cases brought in front of the Committee dealt with the principle of non-refoulement, even if the Committee found violation of article 1 in three proceedings involving Serbia and Montenegro[194].

The CAT scope of enforcement procedures has been limited for many years by the will of states to protect and maintain their sovereignty. A stark gap continues to exist between the recognition that freedom from torture is a fundamental aspect of human rights, and the states' right to defend their sovereignty. In 1986, the UN Commission on Human Rights tried to fill this gap by appointing a Special Rapporteur on Torture (SRT), whose main tasks are to monitor situations among states, making a greater impact on those states where torture is more pervasive, and to issue recommendations directly to national authorities or to the Commission itself. SRT has always focused on the incidence of torture within prisons, noting that particularly critical situations occur under authoritative regimes or during state of emergency. Further, it has long criticized

[192] See article 21 of the Convention; Boulesbaa, *The U.N. Convention*, 277; Lippman, "The Development and Drafting", 322-3.
[193] Boulesbaa, *The U.N. Convention*, 280.
[194] The three cases concerned are Dragan Dimitrijevic v. Serbia and Montenegro Complaint No. 207/2002, Dimitrov v. Serbia and Montenegro, Complaint No. 171/2000 and Dimitrijevic v. Serbia and Montenegro, Complaint No.172/2000. Boulesbaa, *The U.N. Convention*, 286; Lippman, "The Development and Drafting", 323-4; Hathaway, Nowlan, Spiegel, "Tortured Reasoning", 823-824.

democratic states for selling to police or military officials torturing equipment such as electric shock tools, and for not training them adequately to prevent torturing offences. SPT follows the same provisions of CAT, and therefore it encourages the ban of all those circumstances that can lead to cases of torture, for example limiting the use of solitary confinement or providing an adequate healthcare system to all detainees[195].

In 2002, a further step was done by adopting an additional Optional Protocol (OPCAT), which entered into force in 2006. What encouraged the drafting of this additional instrument have been the successful results of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and its system of monitoring mechanism. The OPCAT provides a further effort for the establishment of a concrete strategy of prevention both at international and national level. Indeed, the work of OPCAT is based on a system of regular visits to places of detention, such as police stations, prisons or psychiatric hospitals, which are under the effective control of the state. This mechanism is then complemented by an international body called Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), and at domestic level by several bodies known as National Preventive Mechanisms (NPMs). SPM and NPMs are the two pillars of OPCAT as they foster the cooperation between international and national instruments in order to obtain the accomplishment of the provisions under the protocol. The protocol obliges SPT to draw up a set of unannounced visits in a specific state that culminate with the issue of a final report in which confidential recommendations are made by SPT to open the possibility of cooperation with the state. The same is for NPMs. The state must allow regular visits from them, which at the end draft a series of recommendations that, contrary to the SPT's ones, do not need to be confidential, as being them national evaluation bodies, they have fewer damaging consequences on states[196].

Despite its strengths and the recent struggles made to prevent the use of torture among state party to the convention, CAT still presents different deficiencies. The requirement of a state actor to commit an act of torture gives a limited application of the convention. However, everyday there are numerous evidences that an act of torture does not need to be committed by a state to be considered as such. An example is provided by the actions committed between 1970s and 1990s by the Irish Republican Army (IRA),

[195] Lippman, "The Development and Drafting", 325-8; Bank, "International Efforts", 613.
[196] Suzanne Egan, "The Optional Protocol to The Convention Against Torture: Paying the For Prevention. The *Irish Jurist,* Vol. 44 (2009): 182-195.

through the use of punishment beatings and coercive interrogations. All its acts would meet the main criteria of CAT, if it was not for its non-governative statue[197]. Since the convention was created and approved to universally ban torture and to eradicate this cancer it should have not restrained this precise provision, as it results being inconsistent with the main scope of the covenant.

2. The European response to the fight against the crime of torture

From the regional point of view, many progresses have been made in order to provide a well-constructed legal system which could move in the same direction of the other international legal measures. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms is the first instrument adopted by the Council of Europe to create an adequate and complete system of protection of human rights. This important convention leaves open the possibility to find a threshold to establish whether an act can be considered torture, inhuman or degrading treatment according to the characteristics of every single case[198]. The Convention is enforced by the European Court of Human Rights, a judicial organ authorized to solve inter-states complaints and that allows single individuals to bring cases of violations of human rights, committed by states, in front of the Court[199]. Therefore, it is possible to say that among the sources of international law that will be taken into exam in this chapter, the European Convention on Human Rights is the only one that benefits from this innovative aspect of having created a judicial body that can adjudicate state's offences against individuals.[200]

Always remaining in the field of European context, another important instrument to consider is the European Convention for the Prevention of Torture of 26 June 1987. This is not a normative instrument but takes as its basis art. 3 of the European Convention on Human Rights in order to create a system whose focus is on making the member states better comply with legal obligations deriving from art. 3. In doing this, the Convention has established a new system of unannounced and confidential visits, to all detention facilities under state's control, conducted by the European Committee for the Prevention

[197] Kenny, "The meaning of torture", 137-8.
[198] Weissbrodt, Heilman, "Defining Torture", 358.
[199] Ibid.
[200] Trione, *Divieto e Crimine di Tortura*, 30-31.

of Torture, in order to verify the treatment reserved to people deprived of their liberty[201]. With the entry into force of this new Convention it is possible to have a new binding instrument aiming at protecting prisoners' rights and at preventing acts of torture. Nevertheless, it is essential to underline that contrary to other binding conventions, the present instrument does not seek to establish new norms. The ECPT cannot be considered a normative instrument which makes provisions for judicial decisions, rather it has been intended to assess the implementation of the obligations deriving from article 3 of the European Convention by states parties.

2.1 An extensive interpretation of article 3 of the European Convention on Human Rights: Prohibition of Torture

In the European context, one of the most important achievements in the protection of human rights is the European Convention on Human Rights (ECHR) adopted in 1950 by the Council of Europe. The drafters of this Convention were largely inspired by the 1948 UDHR, also recalled in the Convention's preamble, whose main principles were used to be included in a legally binding instrument[202].

The Convention has considerably evolved since its entry into force, it is considered one of the most efficient instruments in the world. for the protection of human rights It has different strong points among which the fact that the jurisprudence of the European Court of Justice has been strongly inspired by the Convention, even though the European Union is not part of it, while its member states are[203].

Article 3 of the Convention is the focus of the analysis, as it firmly states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"[204]. The prohibition included in this article is absolute, this means that no derogations are admitted[205]. Indeed, the prohibition of torture is one of those rights to which article 15

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[201] 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, *La tortura nel nuovo millennio. La reazione del diritto* (Padova, Italia: CEDAM, 2010), 179.
[202] Trione, *Divieto e Crimine di Tortura*, 30.
[203] Bruno Alomar, Sébastien Daziano, Thomas Lambert, Julien Sorin, *Grandes questions européennes* (Paris, France : Armand Colin, Horizon, 2019), 525.
[204] See article 3 of ECHR available at https://www.echr.coe.int/documents/convention_eng.pdf [accessed 20 June 2021].
[205] Also articles 2 (right to life) and article 4, paragraph 1 (No one shall be held in slavery or servitude) are exempt from derogations.

does not allude. Article 15, which permits derogations to certain rules in time of emergency[206], excludes article 3 from its scope is, since the provision included in article 3 is part of the fundamental principles for the protection of human rights and dignity, and as such its non-derogable character is always applied[207].

The formulation of this article is extremely concise, that is why it presents another important difficulty given by the fact that the norm prohibits torture, inhuman or degrading treatment in wider terms, without exactly specifying when an act can be considered torture or other misbehavior. However, both the European Court of Human Rights (ECtHR) and the European Commission on Human Rights have confirmed the evolving character of the norm, stating that the definition provided is not fixed and objectively valid in any circumstance at any time, rather it can change in line with the present-day conditions[208].

Article 3 is normally divided into three components "torture", "inhuman" and "degrading" treatment or punishment, each of these invested with its own significance. The jurisprudence of the Court has tried to draw a sort of threshold that identifies and classifies the prohibited conducts. The origins of this approach must be found in the decisions of the Commission and the Court regarding two pivotal cases: *the Greek case* of 1969[209] and *Ireland v. UK* of 1976[210]. In the Greek case, the Commission has hierarchically divided the three components of article 3 affirming that torture is a form of aggravated inhuman treatment characterized by the intentionality of the act, which may be obtaining information. Therefore, torture distinguishes from the other two mistreatments because it causes a greater suffering and it is always carried out with a

[206] Article 15 of the ECHR reads: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law", for further references see the Convention available at https://www.echr.coe.int/documents/convention_eng.pdf [accessed 20 June 2021].
[207] Trione, *Divieto e Crimine di Tortura*, 31; Villani, *Dalla Dichiarazione Universale*, 132; Evans, Morgan, *Preventing Torture*, 72; Antonio Cassese, *The Human Dimension of International Law. Selected Papers* (New York: Oxford University Press Inc, 2008), 295.
[208] Cassese, *The Human Dimension*, 295; Ezgi Yildiz, "Interpretative Evolution of the Norm Prohibiting Torture and Inhuman or Degrading Treatment under the European Convention" in Joanna Jemielniak, Anne Lise Kiaer, *Language and Legal Interpretation in International Law* (Oxford, UK: Oxford University Press, 2020), 2.
[209] ECtHR, 5 November 1969, *Denmark v. Greece*, Applications No. 3321/67; *Norway v. Greece* No. 3322/67; *Sweden v. Greece*, No. 3323/67; *Netherlands v. Greece* No. 3344/67.
[210] Evans, Morgan, *Preventing Torture*, 74. Insert case references

purpose[211]. This case was brought in front of the Court by Denmark, Sweden and Norway against the Greek military junta. It is particularly relevant since it is the first case in which an international tribunal found a state liable for acts of torture[212].

There are numerous cases in which the Court found breaches of article 3. Among them, *Ireland v. UK* case must be cited as probably one of the most controversial. Indeed, in this case it is possible to find a discrepancy between the Commission's approach and the final Court's judgement. The Commission considered the five interrogation techniques used on IRA suspects by the UK's security forces as acts of torture. These included walls standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and water. The European Commission concluded that the systematic use of these techniques against prisoners for the clear purpose to obtain information was to be considered a breach of article 3 amounting to torture. However, after the publication of the Commission's report, the case was brought in front of the Court, which reaffirmed that the techniques were applied in combination and for a long period, however the suffering inflected through the use of these methods was not sufficiently severe to consider them as torture, rather inhuman and degrading treatment[213]. With this case the Court found for the first-time acts tantamounted to inhuman and degrading treatment, affirming that the pain that prisoners suffered during interrogations lacked the special stigma to be considered as torture[214]. The Court, therefore, explicitly distinguished torture as "an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment"[215]. On the other hand, the ECtHR considers treatment as inhuman when it causes serious physical and mental damages, it is premeditated and protracted in time[216].

Degrading treatment is placed at the last level of the pyramid. Both the Commission and the Court have argued that a treatment can be considered degrading when it grossly humiliates the victim before himself/herself or others, causing adverse psychological effects and feelings of anguish, inferiority, and humiliation[217]. One of the major cases, both the Commission and the Court pronounced on this issue is Tyrer v.

[211] Trione, *Divieto e Crimine di Tortura*, 34; Villani, *Dalla Dichiarazione Universale*, 135; Giulio Ubertis, Francesco Viganò, *Corte di Strasburgo e Giustizia Penale* (Torino, Italia: G. Giappichelli Editore, 2016), 67.
[212] Yildiz, "Interpretative Evolution", 11.
[213] ECtHR, 18 January 1978, Ireland v. United Kingdom, Application No.14038/88, paragraph 167.
[214] Yildiz, "Interpretative Evolution", 14; Cullen, "Defining Torture", 35-7.
[215] Weissbrodt, Heilman, "Defining Torture", 375.
[216] Villani, *Dalla Dichiarazione Universale*,135; Ubertis, Viganò, *Corte di Strasburgo*, 67.
[217] Ibid.; Trione, *Divieto e Crimine di Tortura*, 34.

UK[218]. In this case, the applicant had been subjected to a judicial corporal punishment, which did not cause him permanent physical effects, but the acts constituted an assault precisely on his dignity and physical integrity[219].

It is clear that there is no justification for the commission of such conducts and that a state should always prevent commission of such offences, however claiming that article 3 offers a general concept of the prohibition of torture, inhuman and degrading treatment is misleading. To be considered under the scope of the present article, the violation must reach a minimum level of severity in relation to the characteristics of the case and the individuality of the victim[220]. This includes the intensity and duration of the treatment, its physical and mental consequences, in some cases sex, age, feelings of fear or agony, and the state of health of the victim[221].

The attitude of the Court with respect to the interpretation of article 3 is not fixed and can evolve in line with the current social and political situation. In this respect, the Court has embraced a more dynamic approach to the article, which can be observed in two pivotal cases. In the Selmouni v. France case, the Court found several medical certified traumas on various parts of the victim's body, consistent with the infliction of prolonged beatings[222]. The Court established that the treatment was intentional and premeditated, declaring it amounting to torture. On the basis of the Court's final judgement, France claimed that similar acts were previously considered as inhuman and degrading, making reference in particular to the Irish case. The Court invoking the doctrine of the Convention as a living instrument, stated that it may be possible that certain acts, which previously were considered as inhuman and degrading, could be later classified as torture[223]. It also took the view that "an increasingly high standard was required in the area of human rights"[224].

Another relevant case is Kurt v. Turkey in which the applicant claimed was subject to inhuman and degrading treatment because of the state's failure to investigate after her son's disappearance[225]. Amnesty International intervened with an *amicus curiae* brief arguing that disappearance cases can bring to complex violations of the rights of the

[218] ECtHR, 25 April 1978, *Tyrer v. United Kingdom*, Application No. 5856/72.
[219] Trione, *Divieto e Crimine di Tortura*, 36; Cassese, *The Human Dimension*, 313.
[220] ECtHR, 18 January 1978, *Ireland v. United Kingdom*, Application No. 5310/71
[221] Trione, *Divieto e Crimine di Tortura*, 37-9; Ubertis, Viganò, *Corte di Strasburgo*, 66.
[222] ECtHR, 28 July 1999, *Selmouni v. France*, Application No. 25803/94.
[223] Rodley, "The Definition of Torture", 478; Yildiz, "Interpretative Evolution", 17.
[224] ECtHR, 28 July 1999, *Selmouni v. France*, Application No. 25803/94.
[225] ECtHR, 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94.

family, causing mental anguish and uncertain circumstances. The Court found violation of article 3 arising from the omission of the state to carry out proper and objective investigations. This sentence represents a turning point in the jurisprudence of the Court, as for the first time was declared that also an act of omission can give rise to violations of article 3[226]. Not surprisingly, the duty to carry out an effective investigation to identify and punish the perpetrator is one of the positive obligations deriving from the Convention. Beside this, every member state must guarantee all individuals under its own jurisdiction the rights and freedom enshrined in the text[227]. Whenever an infringement of the rights protected by the Convention is committed, an effective remedy is fundamental for the respect of the victim's individuality and dignity[228].

Among the negative obligations arising from article 3, the principle of *non-refoulement* requires attention. The state that would expel, extradite or refuse the entry of an individual must ensure that there is not the substantial and real risk of being subject to torture or other mistreatments, also in a third country where the individual may be sent by the country of origin[229]. The peculiarity of this negative obligation is that the state can be found indirectly liable for a possible breach of article 3[230]. The indirect responsibility of a state has been found in the famous Soering v. UK case[231]. This case concerned the extradition of a German national towards the US, where he would have faced death penalty because accused of murder. Since article 2, paragraph 1 does not ban death penalty, the Court concluded that its use would not have in itself amount to a breach of article 3. However, the Court concluded that the treatment that the eighteen applicant would have faced once extradited was incompatible with article 3, since he would have spent six or eight years on the death row and additionally at the time of the offence he was mentally disturbed. Also, the possibility of being extradited to Germany where he would not have faced death penalty, was a violation of article 3[232].

According to the Court's jurisprudence, a state can be responsible for a breach of article 3 when the violation is directly committed by state's organs, even when they are not state's officials but they indirectly act on behalf of the state, when it allows on its

[226] Yildiz, "Interpretative Evolution", 17-8.
[227] Trione, *Divieto e Crimine di Tortura*, 42-43.
[228] See article 13 of the ECHR.
[229] Villani, *Dalla Dichiarazione Universale*, 132.
[230] Marchesi, "La Proibizione della Tortura", 28.
[231] ECtHR, 7 July 1989, *Soering v. The United Kingdom*, Application No. 14038/88
[232] Evans, Morgan, *Preventing Torture*, 94-5.

territory foreign state's agents and when the offence is committed by a private individual and the state permits his/her behavior[233].

Regarding the probative standard requested by Court's judges, the jurisprudence is ample. More precisely, when the complaint involves two states, these are at the same level, and for this reason the proof of their findings must be" beyond reasonable doubt"[234]. Regarding individual cases, in order for an individual to usefully invoke article 3, he/she must be able to demonstrate that he/she is really exposed to the risk of being victim of torture or other mistreatments, since the only existence of a possible violation of human rights is not sufficient. Once the Court has analyzed all the information, the state must dismiss any doubt about. In this case, the probatory standard is not equal, since the individual is in a more disadvantaged position than the state, because it is more difficult for him/her to prove the mistreatments. In this case, the Court has drawn a threshold based on presumption of innocence, according to which even though there is not a solid evidence of the proof, this is deeply founded in agreement with a logical-probative parameter called *fumus*[235].

Any breach of article 3 creates an aura of dishonor for the responsible state, as there is not any legal justification for this kind of offence[236]. The present Convention and the Court have been having a pivotal role in criminalizing torture and in protecting human rights also because, as the Court stated, any other international treaty or set of rules, issued for the protection of human rights, does not entail a consistent proof for assessing the presence of a proper protection[237].

2.2 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments of 1987

During the last decades, both European governments and public opinion have increased their awareness about the adverse use of torture and other misconducts, becoming more and more sensitive to the need to adopt more specific instruments to

[233] Trione, *Divieto e Crimine di Tortura*, 43.
[234] Ibid., 57
[235] Ibid., 58
[236] Cassese, *The Human Dimension*, 326.
[237] Andrea Saccucci, "Diritto di Asilo e Convenzione europea dei diritti umani" in Chiara Favilli, *Procedure e Garanzie del Diritto di Asilo* (Padova, Italia: CEDAM, 2011) 160-1.

protect human dignity[238]. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) can be considered as one of the most successful outputs of the Council of Europe. Adopted on 26 November 1987 and entered into force on 1 February 1989 under the *aegis* of CoE, represents a fresh and preventive approach to the handling of human rights violations[239]. The main core of this Convention is the establishment of an innovative monitoring mechanism, known as European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), whose task is to conduct visits to any place of detention under states' jurisdiction in order to control life conditions of all people deprived of their liberty[240].

The birth of this Convention has to be linked to Jean-Jacques Gautier's idea. The founder of the Swiss Committee against Torture, after having seen the long-lasting work of the International Committee of the Red Cross (ICRC) in conducting visits in war camps prisons, where it could ensure the humane treatment of prisoners, convened a meeting of experts to develop a draft convention preventing torture on the basis of this kind of mechanism. Of course, ICRC had two important limitations, since visits could be conducted only with the agreement of the involved state, and the final findings would remain confidential; Gautier's draft was intended to overcome these difficulties, by making the ratifiers of the Convention automatically bound to a system of programmed visits and by permitting the monitoring body to publish final reports in cases of non-cooperation of the state. Also, in this case the principle of confidentiality would remain essential for a preventive approach[241]. Further, the proposal was intended to broaden the system of visits to be conducted not only in war periods, but also in time of peace, and to all states' institutions where individuals are deprived of their liberty such as prisons, police stations, psychiatric institutions and remand centers[242].

Gautier's efforts were rewarded with the adoption of the ECPT and the creation of a monitoring mechanism pursuant to article 1 of the Convention[243]. At the beginning,

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[238] Cassese, *The Human Dimension*, 328.
[239] Ibid., 343
[240] Yukata Arai-Yokoi, "Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR." *Netherlands Quartely of Human Rights*, Vol. 21, No.3 (2003): 405.
[241] Evans, Morgan, *Preventing Torture*, 107; Rodley, Pollard, *The Treatment of Prisoners*, 231-2
[242] Cassese, *The Human Dimension*, 340.
[243] Article 1 of the Convention reads "There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of

there was the danger that the new monitoring mechanism would conflict with the Court's jurisprudence, since there was the hypothesis that the CPT would have pronounced judicial interpretations of article 3. In reality, the ECHR and ECPT are intended to complement each other. The ECPT is not a normative instrument, and therefore is designed to reinforce the prohibition to subject individuals to torture, or inhuman or degrading treatment. Whereas the ECHR established a mechanism to respond to states and individual's complaints producing a judicial response[244]. The Committee does not operate in a legal vacuum, because it is not a judicial body, and its preventive task is focused on conducting visits and producing reports based on its own analysis[245]. The main difference between these two bodies is that the Court's activities are based on a "conflict solution on the legal level", instead the CPT's goal is based on "conflict avoidance on practical level"[246]. The famous Italian jurist Antonio Cassese, who was also a member of CPT, defines CPT inspectors as "doctors" who examine a peculiar situation at risk, and try to immediately find a possible solution in order not to make it even worse[247]. Therefore, in order to find a balance and to keep the work of the CPT suitable with the judicial mansion of the Court, it was decided to include the reference of article 3 in the preamble of the Convention and not as an article. By doing so, article 3 would serve as a point of reference, within which the CPT could concern itself whenever there will be situations amounting to torture or inhuman or degrading treatment[248]. It may also happen that the CPT refer also to other substantive norms contained in other legal instruments[249].

The CPT is composed of one person per each state party who serves in his/her own individual capacities remaining objective and impartial. He/she must have full competence in the proscribed area of work, and serves for a term of four years, renewable twice[250]. The adopted procedure by the CPT is based on a system of both periodic and *ad hoc* visits, conducted to any place of detention under the state's jurisdiction where

persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."

[244] Wolfang Peukert, "The European Convention for the Prevention of Torture and the European Convention on Human Rights" in Rod Morgan, Malcolm D. Evans, *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture in Context (*New York, USA: Oxford University Press Inc.,1999), 87.

[245] Cassese, *The Human Dimension*, 347.

[246] Peukert, "The European Convention", 86.

[247] Cassese, *Umano-disumano,*22.

[248] Evans, Morgan, *Preventing Torture*, 121.

[249] In this regard, the CPT has used the terminology found in article 10 of the ICCPR to describe a situation as incompatible with human dignity. Peukert, "The European Convention", 86.

[250] Rodley, Pollard, *The Treatment of Prisoners*, 233.

individuals are deprived of their liberty[251]. These visits have largely focused on prisons and detention centers, where the group of experts can examine the treatment of prisoners with the goal of strengthening the protection from torture, inhuman or degrading treatment[252]. It is possible that during visits, CPT members would use the assistance of other external experts, for example persons with a medical background or who have specific competences in the field of correctional system. However, the possibility is that a state may be reluctant to allow visits by people who are not themselves part of the Committee[253].

Of course, states are previously notified that there would be a CPT's visits in the country, but there is not a minimum period of notice, nor is the CPT required to earlier anticipate which institutions is intended to inspect[254]. Regular visits may be part of a scheduled program that consists of a visit every four years for each state. Additionally, the CPT can conduct also unannounced *ad hoc* visits within a state, especially when the Committee receives further information, by NGOs or other international bodies, about a suspected situation[255]. The Convention allows states to make reservations, provided that they are not against the object and purpose of the Convention itself as article 19 of the Vienna Convention on the Law of the Treaties reads[256]. However, only in exceptional circumstances, which are national defense, public safety, serious disorder in places of detention, and serious health conditions of the incarcerated individual, the state can decide to postpone the visit[257].

Once visits have taken place, the Committee drafts a report in which all the results, critical situations and recommendations regarding future methods to adopt are highlighted. The report is then sent to the state, and because of its sensitive work, it

[251] Ibid., see article 2 of ECPT.
[252] Egan, "The Optional Protocol", p 84.
[253] According to article 14, paragraph 3 of the Convention a state can exceptionally not allow an expert to take part to a visit within its territory and jurisdiction. Malcolm Evans, Rod Morgan, " The European Convention for the Prevention of Torture: Operational Practice." *The International Comparative Law Quarterly,* Vol. 41, No. 3 (Summer 1992): 597.
[254] Rodley, Pollard, *The Treatment of Prisoners*, 233.
[255] See article 7 of ECPT; Cassese, *The Human Dimension*, 349.
[256] Article 19 of the Vienna Convention on the Law of the Treaties reads: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is income patible with the object and purpose of the treaty.
[257] See article 9 of ECPT; Evans, Morgan, *Preventing Torture*, 131.

remains confidential unless the state itself requests its publication[258]. Confidentiality in this case is an essential characteristic used not only to protect states from possible attacks, but also to safeguard prisoners' conditions and individuality. If the state fails to cooperate or refuses to improve the situation in light of CPT's recommendations, the Committee may proceed "to make a public statement on the matter"[259]. This sort of "sanction" is central to the role of the CPT but may be resorted only with two third majority of CPT's members. The Committee has made public statements in respect of to Turkey, Russian Federation, Greece, Belgium and Bulgaria[260]. explain

In its annual report, the CPT drafts extracts from the different reports dealing with specific issues in a non-country way, which came to be known as CPT's Standards. These Standards have increased their importance over time and despite initial reluctance, the ECtHR often relies on them making references during judgements[261].

Thus far, there have been fourteen visits in Italy by CPT, both periodic and *ad hoc*, and they are mostly focused on administrative problems regarding detention establishments. All fourteen reports have been published in accordance with the Italian state[262]. Particularly, from 12 to 22 March 2019, the CPT has conducted an *ad hoc* visit with the purpose to examine prisoners' conditions within maximum security regime prisons, known as 41-bis regime. Beside the main scope of the visit, the CPT has also examined isolation and segregation measures implemented by the Italian administrative authorities, and the treatment of prisoners subject to a security detention measure, called "sicurezza detentiva"[263]. Visits were conducted in the prison establishments of Biella, Milan Opera, Saluzzo and Viterbo. The Committee has noted an increasing number in the prison population, with the subsequent result of prison overcrowding. It has then appointed that many detainees do not benefit from the minimum standard of 4 m2 of living space, which should be granted for each prisoner in a multiple occupancy cell[264]. Most of the prisons visited have not reported striking circumstances of physical ill-

[258] See article 11 of ECPT.
[259] See article 10, paragraph 2 of ECPT; Rodley, Pollard, *The Treatment of Prisoners*, 235; Evans, Morgan, "The European Convention", 608-9.
[260] See the public statements available at https://www.coe.int/en/web/cpt/public-statements [accessed 20 June 2021].
[261] Rodley, Pollard, *The Treatment of Prisoners*, 236-7.
[262] Too see all the activities of CPT regarding Italy https://www.coe.int/en/web/cpt/italy [accessed 20 June 2021].
[263] See the report available at https://rm.coe.int/16809986b4 [accessed 20 June 2021].
[264] See the executive summary available at https://rm.coe.int/16809986b5 [accessed 20 June 2021].

treatment, with the exception of sporadic cases confirmed also by medical evidence[265]. The CPT has particularly scolded Italian prisons' authorities for not having created a harmonious relationship with prisoners, and this is also due to the lack of specific training[266]. Generally, the living conditions within medium security regimes have been found sufficient, even if material deficiencies have been visible, such as lack of ventilation or light, and even the need to improve specialized healthcare systems in prisons. With regard to the 41-bis regime, CPT has encouraged Italian authorities to seriously reflect on the effectiveness of this kind of detention establishment. Further, it has stressed the importance to guarantee a wider range of activities for prisoners, and to increase visits or telephone entitlements[267].

This Convention is a unique instrument among other international treaties. Firstly, because it does not include substantive or normative setting provisions, instead its sole aim is to establish a mechanism of control and international supervision of compliance. Moreover, the convention makes a further step in the process of criminalization of torture, inhuman or degrading treatment, since by allowing the Committee to have inspections within all states' institutions where people are deprived of their liberty, results in an important turn because states agree to be scrutinized by an international organ. This courageous system has attempted to promote a new preventing approach to human rights, and its pioneering role has been possible not only thanks to states' will, but also to the role played by NGOs and the Council of Europe Consultative Assembly (nowadays Parliamentary Assembly) that have stimulated this instrument to move beyond the simplistic methods of protecting human rights[268]

3. Soft law instruments issued in order to prevent violations of human rights against people deprived of their liberty

In a century where human dignity and physical integrity have been largely threatened, the need to provide further complaints and inspection mechanisms, especially in the closed world of detention, has become stronger. For the protection of detainees'

[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Cassese, *The Human Dimension*, 362-3.

rights, the international community can rely on several binding instruments, such as articles 7 and 10 of the ICCPR, the CAT, article 3 of the ECHR, and the ECPT. Therefore, the convergence of an international and mutual cooperation among covenants is undeniable.

Recently, more and more bodies like ECtHR, the Committee against Torture and even the CPT itself have started relying more on various international standards, which are not intended to substitute the role of the above mentioned covenants, instead to serve as a support and an integration for the interpretation of normative provisions.

Among the most relevant set of standards in this field must be mentioned the United Nations Standards for the Treatment of Prisoners, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders, the European Prison Rules, and the CPT Standards. All these documents represent a set of rules thought to be seen and used as dynamic instruments for the evolving interpretation of prisoners' rights and social perception of life behind bars[269].

From the legal point of view the main feature that all these legal documents share is their non-binding character. Indeed, soft laws are standards, guidelines, ideas or proposals that might develop into rules of international law, but they have not been such yet. These principles can also be called *de lege ferenda* because they can be codified and become hard laws in the future[270]. Of course, the formation of a customary international law from a soft law requires time, and above all state practice, in establishing the content of the norm, and statement of legal obligation, also called *opinio juris ac necessitatis*, to affirm the evidence of the emerging custom[271].

The more recurrent use of non-binding normative systems in international law is evident. Usually states resort to soft laws for a variety of reasons, for example they are faster to adopt, easier to change and more useful for technical matters, as it is possible to see for the required minimum standards within prisons. Moreover, also non-state actors can sign on or participate[272].

It is therefore possible to say that these instruments of soft law about imprisonment conditions represent a further step by the international community to more

[269] Piet Hein van Kempen, Maartje Krabbe, *Women in Prison: The Bangkok Rules and Beyond* (Cambridge, UK: Intersentia Ltd, 2017), 131.
[270] Dixon, *Textbook on International Law*, 52.
[271] Antonio Cassese, *Diritto Internazionale* (Bologna, Italy: Il Mulino, 2006), 298.
[272] Evans, *International Law*, 169-170

compliance towards issues that are usually few debated within current society, and they constitute a more effective and efficient way to respond to common problems.

3.1 United Nations Standard Minimum Rules for the Treatment of Prisoners

The history behind the United Nations Standards for the Treatment of Prisoners (SMR) spans decades and nations. The main intention was to create a system of soft law practical measures that could protect the rights of prisoners behind bars, and therefore these guidelines establish the minimum conditions that, at least, should be accepted by all nations, even though the prison system varies from country to country.

The United Nations have always been concerned with the rights of prisoners and the complex responsibility of prison staff training. That is why, in 1955 the Economic and Social Council approved, by its resolution number 663 C, these rules that were finally adopted in 1957[273]. For more than sixty years, the SMR were universally acknowledged, becoming an international instrument that governed the treatment of prisoners, also focusing on the monitoring prisons inspection bodies engaging in the assessment activities. It is possible to say that they had a tremendous influence on the development of domestic prison laws, practices and policies, even though for different states they were only non-binding instrument concerning already known measures[274].

Reading the official UN document, it can be seen right from the preliminary observations its non-binding character, rather its power to allow the actors to coordinate with its common standards. Indeed, these measures are not intended to impose an ideal model of penal institution, instead they seek only to create the essential elements that can be at the basis for the development of a generally accepted penal system[275]. The SMR also take in consideration that all member states are characterized by different economic, social and geographical conditions that do not take for granted the immediate application of these rules. They should, however, stimulate a continuing struggle "in in the way of

[273] See the Standard Minimum Rules for the Treatment of Prisoners available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf [accessed 20 June 2021].
[274] Organization for Security and Co-operation in Europe, *"Guidance Document on The Nelson Mandela Rules. Implementing the United Nations Revised Standard Minimum Rules for The Treatment Of Prisoner"*, (Helsinki, Finland: Organization for Security and Co-operation in Europe, 2018), 2.
[275] See the preliminary Observations of the SMR, paragraph 1.

their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations"[276].

The standards are well organized and divided in two parts. In the first part they regard the general institutions' management and are applicable to all kinds of prisoners from convicted ones to prisoners who are serving corrective or security measures. Whereas in the second part, rules relate to special categories of prisoners, who can be classified according to the severity of their sentence[277].

Since human rights and international criminal law evolved considerably, the SMR needed to be reviewed, as many UN members considered them updated and, in some parts, also inconsistent with the development of international law. In 2011 the UN General Assembly formed an intergovernmental Expert Group whose main goal was the revision of the previous standards, in such a manner that they could be updated for current situations, although without minimizing them. It took three years of discussions among member states, with the help of the United Nations Office on Drugs and Crime and of many international organizations, when finally in December 2015 the General Assembly adopted by consensus the revised SMR, which were named "Nelson Mandela Rules" in honor of the former South African president, who dedicated much of his life fighting for prisoners' rights[278].

The Nelson Mandela Rules are not completely new, instead they are the result of a revision of more than one third of the original rules. In this subchapter will be analyzed some of the changes brought in different sections, but what must be bear in mind is that the main scope of the standards has not changed, it still covers "the general management of prisons, (…) applicable to all categories of prisoners" as well as "persons arrested or detained without charge"[279]. Among the main thematic areas that have undergone a revision, must be recalled the possibility for detainees to be incarcerated in centers near home in order to facilitate social rehabilitation[280] as well as the importance of addressing special needs in order to accommodate prisoners with physical or mental disabilities

[276] See the preliminary Observations of the SMR, paragraph 2.
[277] See the preliminary Observations of the SMR, paragraph 4.
[278] See General Assembly Resolution available at https://undocs.org/A/RES/70/175 [accessed 20 June 2021]; OSCE, *"Guidance Document*, 2; Penal Reform International, *"The revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)"*, (London, UK: Penal Reform International,2016), 3-4.
[279] OSCE, *"Guidance Document*, 2.
[280] See rule 59 of the SMR.

without any kind of allusive discrimination[281]; the provision of quality food and drinking water and the relative prohibition of depriving prisoners of them as a form of sanction, and the decision whether a child can be housed in prison where his/her parents are, accordingly to the best interests of the child[282].

Of particular importance are the update concerning discipline and sanctions, two of the main problematic areas within the scope of human rights. In particular, body searches must be conducted whether necessary and by always respecting human dignity and privacy. This practice must not be used as a way to harass or intimidate prisoners and the most invasive searches should be the last resort[283]. The same is for solitary confinement, which causing devastating physical and mental damages, should only be used in certain circumstances, taking into account that prolonged solitary confinement should be prohibited. Particularly, for certain categories of detainees, as pregnant women, this sanction is prohibited[284]. Instruments of restraints, whose use can amount to inhuman or degrading treatment, are legitimate only when there is the certainty of an actual risk. Restraints should be immediately removed once prisoners are in front of a court and are prohibited on women giving birth[285].

The Mandela Rules are based on five core principles that are fundamental for prison management. These are human treatment, as every individual must be treated with humanity and respect and must not be subjugated to torture or cruel, inhuman or degrading treatment; nondiscrimination of every kind; the duty of prison staff not to make sentencing life harder than what is already, and therefore making correctional conditions easier providing services and social reintegration support; the duty to guarantee safety and security and the need to creates *ad hoc* rehabilitation programs according to individuals' needs[286].

By putting this set of standards in practice, states can make a real difference in prisoners' lives. Furthermore, these soft laws can serve as an aid to the above mentioned legally binding instruments, in order to give more specific practical guidance to prisons' staff and to ensure safer and more humane custody.

[281] See rules 2-5 of the SMR.
[282] See rules 28-29 of the SMR.
[283] See rules 50-53,60 of the SMR.
[284] See rules 43-46 of the SMR.
[285] See rules 43,47-49 of the SMR.
[286] See https://www.unsdglearn.org/wp-content/uploads/2020/01/16-05081_E_rollup_Ebook.pdf [accessed 20 June 2021].

3.2 The UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders

Over decades, the number of women in prison has rapidly increased becoming more consistent. According to the most recent data released by Penal Reform International the current number of incarcerated women is 741.000, with an increase of female convicts of 105.000 since the adoption of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (Bangkok Rules)[287].

However, female prisoners have definitely different needs than male detainees, and these essential necessities are too often not satisfied since, as it is quite clear, the prison system has usually been designed with a male scheme in mind. Most obviously, women are psychologically and physically different from men, they are more vulnerable to violent abuses and self-harm, and they are the primary caretakers of family and children. For this reason, the stereotyped image of female incarceration, which is morally severe from the right beginning, may become even worse as they might run into a series of further problems that are sometimes not considered. In this sense, gender discrimination, oppression, violence, the possibility to be unnecessarily hold in a high security system far from home can create a fragile crystal bubble that should carefully handle[288].

Normally, the type of crimes committed by women differ from that done by men, who are more likely to engage in several violent acts. On the contrary, women are more docile, and when they are convicts is because of their desperation and lack of economic resources[289].

Even though women continue to be a small portion inside detention centers worldwide, their numbers continue a long ascent together with the rise of the total incarcerated population. In many countries what has caused this increase is the more

[287] See the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (Bangkok Rules), available https://www.refworld.org/docid/4dcbb0ae2.html [accessed 20 June 2021].
[288] Sara De Vido, *Donne, Violenza e Diritto Internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011* (Milano, Italy: Mimesis Edizioni, 2016), 233; Piera Barzanò, "The Bangkok Rules: An international response to the needs of women offenders', *Annual Report and Resource Material Series*, No. 90 (August 2013), 81; Van Kempen, Krabbe, *Women in Prison, 33.*
[289] Pat Carlen, Anne Worrall, *Analysing Women 's Imprisonment* (Devon, UK: Willan Publishing, 2004), 39.

frequent female engagement in small crimes, such as drug-related offences that are more seriously criminalized contributing to the even higher level of women imprisonment. In other parts of the world, especially in developing countries, characterized by strong moral values, women may be incarcerated for immoral religious acts. For example, in Afghanistan according several information collected by fifty-eight interviews to women, most of them were incarcerated for "moral crimes", which include unlawful forced marriage, sex outside marriage and forced prostitution[290].

Furthermore, this incessant incarceration for small crimes can also cause the possibility for women to be unnecessarily incarcerated in high security detention centers far from home just because there are not enough structures to hold them. The worst-case scenario is that they must share their conviction in prisons where men and women live together. The worst living conditions in prison can be proved by the fact that most of female detainees suffer from post traumas, usually caused by sexual violence or poverty, which can be intensified by conviction, with the subsequent possible development of mental illness, depression and even suicidal wish[291].

To respond to this increase in numbers, the prison system should be well equipped to satisfy all women's necessities. In reality, this is a very utopist view. Many prisons lack of services that can be useful for female prisoners, sometimes they do not offer a lawyer service, and in these places women still continue to be victims of harassment, gender discrimination and violence not only by prison staff, but also by prisoners themselves. Furthermore, one of the most debated issues regarding female imprisonment is the social construction of motherhood, that in many states continues to be much ignored. It is within this scenario that the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders take form, trying to break this spiral by introducing an effective response that best reflects the needs of women. Being the first instrument in this field, this set of rules has become a landmark for all those women, and men, who have been campaigning for a more egalitarian life behind bars.

Normally, rights of women in prison can be protected by different international sources, such as international treaties, as those above mentioned[292], domestic law, but also specific human rights conventions issued to defend these figures, for example the Convention on the Elimination of All Forms of Discrimination Against Women, which

[290] Barzanò, "The Bangkok Rules", 84.
[291] De Vido, *Donne, Violenza e Diritto Internazionale*, 233.
[292] See articles 3 and 8 of the ECHR.

does not contain provisions that expressively refer to imprisoned women, but can be relevant also for that female category deprived of liberty. For example, according to article 5 of this convention, states have the duty to modify the socio-cultural behaviors of both men and women "with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"[293].

Remaining in the context of specific human rights conventions, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence is another tool that tackles women violence against women. Even though it does not make explicit reference to women in prison, according to article 5 every state is responsible for the acts committed by its state-organs, and therefore this statement has validity also for prison staff. In this convention the protection on women's rights is generally guaranteed by article 1 that sets off the general prohibition of any kind of gender-based discrimination, and article 15 fosters the importance of adequately training relevant professionals, who have to closely deal with victims of violence, therefore including also prison staff[294].

It is within this context that the need to put an end to the huge problem of the invisibility of women's rights was exposed. Until 2010, the main instruments were the SMR and the 2006 European Prisons Rules issued by the Council of Europe. These two instruments refer to all individuals deprived of their liberty, containing also few rules related to female gender concerning female hygiene, nursing and children and prison staff[295]. Nevertheless, since then, what was needed was a specific instrument of rules that could complement and supplement the pre-existing standards. The Bangkok Rules were born in this context of search for more protection and equity. On 21 December 2010, the General Assembly took an important step towards providing global standards to be applied to women in prisons and female offenders. By adopting Resolution 65/229 without a vote, the Assembly approved the 70 rules that are addressed to prison staff and

[293] See article 5 of the CEDAW available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx [accessed 20 June 2021].
[294] De Vido, *Donne, Violenza e Diritto Internazionale*, 241; See Istanbul Convention available at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e [accessed 20 June 2021].
[295] See the SMR rules 8 (a), 23,43,53.

"criminal justice agencies involved in the administration of non-custodial sanctions and community-based measures"[296].

This instrument can be undoubtedly considered a benchmark in the field, though it is necessary to clarify why it was needed. As already said, the numbers of the female minority in prison continue to increase, for this reason and for others concerning their peculiar status, women's necessities needed to be better acknowledged and represented within the criminal justice system. Then, within the prison field there are countless problems regarding children custody both inside and outside prisons.

Many researches have proved that after a period of conviction is more difficult for women to reintegrate in the society and to find a stable job because of the stigmatization that characterizes them. Hence, the risk of losing children custody is more concrete, as they may not have the basic instruments to guarantee them a normal social life. The same is for children who live with their mothers in prison, many detention centers lack an appropriate environment in which children can grow without being physically and psychologically traumatized by the prison scenario. There is also a heightened vulnerability of women to mental and physical abuses inside prisons. These may have undeniable consequences leaving deep scars. Sexual violence can also increase the risk of unwanted pregnancy and HIV disease that is too often ignored without guaranteeing sufficient healthcare system[297].

Even though pregnant women should be a more protected category, they are subjects of different kinds of discrimination too. They should benefit from specific medical treatments, and moreover they should be immediately transferred into hospitals before giving birth. This practice seems to be largely used in many Council of Europe member states, instead it seems not to be so frequent in the United States. In many American federal states handcuffing women during birth or consenting to be supported by non-qualified male personnel is an evident violation of fundamental human rights[298].

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[296] Barzanò, "The Bangkok Rules", 86; Caroline Pradier, "Penal Reform and Gender: Update on the Bangkok Rules." Geneva Centre for Security Sector Governance, 11 July 2012, 1.

[297] "Briefing on the UN rules for the treatment of women prisoners and non-custodial measures for women offenders ('Bangkok rules')", Penal Reform International Quaker United Nations Office, February 2011, available at https://quno.org/sites/default/files/resources/ENGLISH_Briefing%20on%20Bangkok%20Rules.pdf [accessed 20 June 2021].

[298] According to De Vido, being handcuffed while giving birth is legal in 28 American states, but in the state of New York, thanks to a law adopted in 2009 by the former governor David Paterson, is now formally illegal. However, this practice continues to be used in many New York prisons, even though legally abolished. De Vido, *Donne, Violenza e Diritto Internazionale*, 234; See also

These are some of the challenges that the Bangkok Rules aim at providing a concrete answer.

Analyzing more in detail some of the central topics of the rules, they aim at preventing sexual abuses through training female staff[299], through providing special rules on searching, that should be conducted only be female staff[300] and by providing specific medical procedures once there is a case, or the risk, of abuse in prison[301]. Precisely because women need special attentions and require a completely different treatment than those of men, the Bangkok Rules promote the use of non-custodial measures whenever possible[302]. However, when conviction is the only solution this should be softer, guaranteeing parole[303], frequent visits by relatives[304] and a societal reintegration path that can help them after confinement[305].

One of the most meaningful topics of the rules is the protection of children's rights through protecting their imprisoned mothers' rights. The rules have specifically introduced a set of instructions on how to behave with children who accompany their mothers or who were born in prison. First of all, all custodial sentence for women with dependant children should be avoided[306]. However, when incarceration is necessary children can stay with their mothers and this decision has to be taken according to the best interests of the children[307]. Of course, children in prison must not be treated as prisoners and institutions must guarantee all the basic necessary instruments to create a comfortable environment as they were outside[308]. There is no time limit to stay in prison with their mothers, and prison facilities must be organized in order to enable women to stay with their children[309]. Pregnant women should be carefully treated: they must not be closed in solitary confinement, and they should have a specific diet for breastfeeding[310].

https://www.nytimes.com/2015/09/23/opinion/handcuffed-while-pregnant.html [accessed 20 June 2021].

[299] See Bangkok Rules 29-35.
[300] See Bangkok Rules 19-20.
[301] See Bangkok Rule 25.
[302] See Bangkok Rules 57-62.
[303] See Bangkok Rule 63.
[304] See Bangkok Rules 4, and from 26 to 28.
[305] Van Kempen, Krabbe, *Women in Prison*, 13.
[306] See Bangkok Rule 64.
[307] See Bangkok Rule 49.
[308] See Bangkok Rule 51.2.
[309] See Bangkok Rule 42.2.
[310] See Bangkok Rule 48.

Even though the Bangkok Rules are a set of soft law rules, they offer practical measures to protect female prisoners, and they encourage governments to go beyond the sole written rules by implementing national legislation or directives in order to improve the outcomes for this category. For example, rule 2 paragraph one grants women the free access to legal advice once in prison. However, many states do not guarantee this right either because there are not any lawyers to offer this service, or because this system must be paid. Another example concerns the right to express milk. According to article 42, paragraph 3 "Particular efforts shall be made to provide appropriate programs for pregnant women, nursing mothers and women with children in prison"[311]. Nevertheless, in order to take part to the programs, nursing mothers should have the right to express milk, and for this reason national legislations should supply breast pumps or their use in prisons, so that women, and clearly their children, could have the same rights as other mothers[312].

The Bangkok rules are undoubtedly one of the most successful achievements in the field of protection of women's rights in prison. However, further steps should be done to better institutionalize their content. As already said, the acceptance of these standards does not create legal obligations upon states, but their application by domestic and international courts can surely reinforce their legal weight. In order to win the fight against women disparity and discrimination, the Bangkok rules are a winning weapon in the field but this can be achieved only with the commitment by all international legal subjects, indeed international treaties should more use them in the application of their provisions, and on the other hand, governments should more engage in economically realizing the objectives the Bangkok rules set forth.

[311] See Bangkok Rule 42 (3).
[312] Van Kempen, Krabbe, *Women in Prison*, 29-30.

3.3 The European Prisons Rules issued by The Council of Europe

Within the European context, the European Prison Rules represent a blueprint for prison service. This set of rules was thought to establish basic standards to be used to develop more human conditions inside correctional buildings, and positive methods of treatment for all those people deprived of their liberty. The first attempt was made in 1973, through the CoE's Committee of Ministers' Resolution number (73)5, which approved and adopted the rules[313].

These rules took much of their inspiration from the UN Standards, and they were designed to provide dynamic stimulus for prison's management that, at the same time, could be updated with the evolving situation. In fact, in 1987 the rules were thoroughly revised in order to better deal with the entire prison environment, starting from the necessities and needs of detainees, to more advanced administrative rules for their treatment. The evolutionary changes within the society, criminal policy and prison law made this new version of the rules vital, in order to guarantee prison's standards that could be efficient[314].

An idea of the rules can be provided from the principles enunciated. Prisoners must be treated with dignity, respecting their humanity and without discriminating against them. Of course, as detention deprives individuals of their fundamental right to freedom, when confinement is the only solution, it must be proportionate, always taking into consideration the necessities of every single individual[315]. General treatment objectives should aim to minimize the main damaging effects of prison life. That is why, regular family contacts and the provision of recreational and leisure activities should be granted[316]. Rules also affirm the requirement to provide an adequate healthcare system and proper standards of hygiene.

It goes without saying that particular categories of detainees, who suffer from singular diseases must be warranted with appropriate medical treatments, and with the provision of all medicines they need. Though, the same fair healthcare service should be

[313] Council of Europe, *European Prison Rules* (Strasbourg, France: Council of Europe Publishing, 2006), 34; Jim Murdoch, *The Treatment of Prisoners - European Standards* (Strasbourg, France: Council of Europe Publishing, 2006), 34.
[314] Ibid.
[315] See European Prison Rules 1-3; Murdoch, *The Treatment of Prisoners*,34; Council of Europe, *European Prison Rules*, 106.
[316] See European Prison Rules 65-66 and 71-86.

provided for all prisoners, regardless of their pathologies. Every institution should examine their prisoners after the admission, and regular medical visits should be arranged. When hospital facilities are provided within prisons, they should be equipped with all necessary medical supplies and with specialized personnel. On the contrary, when a prisoner has to be transferred to another institution for medical reasons, these have to be specialized buildings or civil hospitals. It is clear that nobody must be submitted to medical treatment without his/her own consent or to medical experimentations[317].

European Rules focus mostly on the living condition of prisoners: cells must meet the basic requirements of hygiene and cleaning, and they must offer enough light and ventilation in order to guarantee a decent stay. Other fundamental issues in this area are also personal hygiene and clothing. Hygiene demands an adequate provision of water, shower, bath and toilet articles. The importance of personal hygiene is highlighted also by the fact that, when hygienic conditions are scarce, it is more likely to be found in combination overcrowding and degrading treatment that can amount to a possible breach of article 3 of the ECHR. Also, the supply of suitable clothes and bedding are closely related to hygiene. Prison staff shall supply clothes to detainees that do not have to degrade and humiliate them[318].

With regard to the protection of imprisoned women, European Rules dedicate a separate section. Prison staff and authorities have to pay particular attention to women's necessities and requirements. It must be guaranteed a safe place of living, where women will not experience discrimination, sexual violence and abuses. For this reason, they should be detained separately from men and the prison staff, who assist them should be mainly female personnel. If they are pregnant, they shall be allowed to give birth in hospital and whenever the child will remain in prison with the mother, a separate accommodation to protect his/her welfare must be granted[319].

The European Prison Rules have grown their status over time and are designed mostly to provide realistic criteria for prisons' administrators and inspectors in order to be able to make valid judgements in the subject. They have a non-binding force. However, despite their growing importance they have several deficiencies that will bring them to be superseded by CPT's standards that will eclipse them, since their measuring methods are

[317] See European Prison Rules 39-48; Murdoch, *The Treatment of Prisoners*, 222-3; Council of Europe, *European Prison Rules*, 107.
[318] See rules 19-20 and 48-49; Murdoch, *The Treatment of Prisoners*, 215.
[319] Van Kempen, Krabbe, *Women in Prison*, 141.

more consistent and clearer, granting more impact. One of the most evident rules' shortcomings is their vagueness, for example with the use of terms such as "as far as possible" when making formulations, which weaken their scope to be applied for domestic interpretation. Further, it is difficult to assess their impact as there is no mechanism for their monitoring, and their use in challenges by the ECHR seems minimal, even if some citations of rules are found in the jurisprudence especially referred to article 8[320].

What is possible to say regarding the use of rules and their application is that their national applicability, for which they were intended to be used, has been replaced by the external assessment of compliance of CPT's standards. Indeed, the rules are used as a stimulus for their domestic application, whereas the dynamic approach of CPT's standards improve at the same time prisoners' conditions and the management of penal establishment. In 2006 they were revised once again putting rehabilitation at the center of their scope, but they increasingly reflect the impact that CPT's standards have been having since 1987[321].

3.4 The CPT's standards for the treatment of all the persons deprived of their liberty

In detention centers, there can be often situations that can degenerate into ill-treatment, or it is even possible that certain circumstances may carry with them the risk of abuse. The prevention of torture and other mistreatment is the main goal, together with the protection of detainees' rights, at the basis of CPT work[322].

As already said, the monitoring mechanism established by the ECPT is the CPT, which organizes visits to places of detention in order to assess how people there are treated. Through its findings CPT has developed a significant body of requirements for national authorities regarding their treatment of people deprived of their liberty, the so-called CPT's Standards[323]. Over years, the dynamic system of CPT visits and its set of

[320] McCotter v. the United Kingdom Application No. 18632/91 in which the applicants complain that the refusal to transfer prisoners from a prison in England to one in Northern Ireland where they can be closer to their families is a violation of their respect to private and family life. Murdoch, *The Treatment of Prisoners*, 36; Council of Europe, *European Prison Rules*, 110.
[321] Murdoch, *The Treatment of Prisoners*, 36-7, 214.
[322] Council of Europe, *European Prison Rules*, 137.
[323] Ibid., 104.

Standards issued in order to provide to states an adequate instrument to be used by domestic authorities within penal buildings has gained more and more strength and popularity. The success of this mechanism has been proved by the fact that CPT's Standards have slowly surpassed the 1987 European Prison Rules. At the beginning, CPT has occasionally made reference to the European Rules in its reports, especially in urging full compliance by national authorities to meet international criteria regarding prisons' administration.

Nowadays, a substantial overlap between the 2006 revised Rules and the Standards is objective. In many circumstances there has been a convergence between some of the core principles found in the Rules and the approach of the CPT. Nevertheless, CPT's Standards benefit from a further advantage than the European rules, that is their tendency to be more specific in their formulations[324]. Further, albeit both instruments share the same substantive core and can be applied in the same fields, CPT's reports largely ignored the European Rules. This is due to the fact that the committee's goal is the one of preventing torture and ill-treatment, and the only compliance with the Rules might not achieve this aim, as they are issued in order to serve as a support for national criminal law, without establishing a system of monitoring that could assess how states implement these norms[325].

CPT's Standards in respect of imprisonment have gradually evolved, trying to keep pace with the evolution of society, prisons' management and prisons' population. In its reports the committee always deals with the focal points concerning the prevention of torture, making references to the specific situation of a single state. Of course, the draft of these standards is perfectly in line with what the previous system of non-binding rules presents in the field of prisoners' protection of fundamental rights.

Among the most problematic issues found by CPT there are staff-prisoner relations. At the basis of good living conditions in prison there is undoubtedly the humane relationship between inmate and prison authorities. As many conventions' norms affirm, the duty of a state to grant adequate training to all personnel in the correctional system is essential to prevent circumstances that may damage prisoners' physical and mental integrity in the future. Regrettably, the CPT has found many situations in which this harmonious relationship lacks. Circumstances where prison staff obliges detainees "to

[324] Murdoch, *The Treatment of Prisoners*,36; Council of Europe, *European Prison Rules*, 107.
[325] Ibid.

bow their heads and keep their hands clasped behind their back when moving within the establishment"[326]. What CPT encourages to do is to create a more empathic relationship with detainees, while paying attention to matters of security. Prison staff should conduct its work more as a vocation rather than a job, and this is possible only when staff present to have a proper education to deal with prisoners[327].

Another crucial point that is always tackled in CPT's reports is the huge problem of the healthcare system. According to the Standards, medical services within prisons must be well equipped in order to satisfy all prisoners' necessities, who are at the same time entitled to the same medical rights of people outside prisons. Therefore, appropriate medical tools, medical visits and specialized doctors must be granted. A justification for this remarkable element derives from the recognition of a drop in ill-treatment circumstances whenever an efficient healthcare system is provided[328]. However, in different reports the committee has been obliged to express serious concerns regarding the spread of transmissible diseases in a number of European prisons[329]. The need to use up-to-date mechanisms of screening, regular supply of medicines and medication materials, and specific diets are essential tools of an effective strategy to ensure the protection of prisoners' health[330]. Good health inside prisons can be granted also by the possibility for prisoners to have decent living conditions in penitentiary establishments, where light and fresh air are always available. Though, in several reports the committee recognizes that accommodations do not guarantee these basic needs. Prisoners should not be deprived of light and fresh air, even though the CPT recognizes that often it can be very expensive to make this kind of improvement. A possible proposed solution could be the removal of blocking devices from the windows of prisoners' cells, substituting them with security devices of a proper and better design[331].

One of the main core problems that CPT always faces during the draft of a report is the issue of prison overcrowding, that is directly proportional to life-sentenced and long-term convictions. The phenomenon of overcrowding affect most of Europe and it is probably one of the first factors that contribute to the creation of circumstances of torture

[326] See paragraph 26 of the Developments concerning CPT standards in respect of Imprisonment available at https://rm.coe.int/16806cd24c [accessed 20 June 2021].
[327] Ibid.
[328] Council of Europe, *European Prison Rules*, 107.
[329] See paragraph 31 of the "Developments concerning CPT Standards in Respect of Imprisonment".
[330] Ibid.
[331] Ibid., paragraph 30.

and mistreatments. What CPT has found is that a large number of condemnations is not due to the fact that there is an increasing crime-rate, rather the type of sentence decided by law enforcement agencies and the judiciary system may have increased the prison population[332]. That is why CPT's Standards encourage non-custodial sentences when possible[333].

To this problem must be added life or long-period imprisonment, which are often accompanied by special restrictions. Permanent separation from the rest of the prison community, recurrent handcuffing and prohibition of communication with other prisoners must be absolutely prohibited within the prison system when implemented without any reason. According to CPT's standards, prisoners have the right to recreational and educational activities that can prepare them to approach society once being released[334].

As other sets of rules do, also CPT's Standards deal with the difficulties that women face in prisons. The CPT's Standards tackle the fact that women need special attentions and completely different requirements than men, that is why separated prison systems are preferred, also to prevent any kind of situation causing discrimination, or even worse violence. Gender-sensitive tasks, such as body searching, must be carried out only by staff of the same sex, who has also the duty to protect women from violence among inmates. Concerning children in prison, also according to CPT's Standards there is not an age limit according to which a child can leave their mother, but the decision must be taken in accordance with the best interest of the child. When children grow in prison, a child-environment must be created as they must not be treated as prisoners and all essential facilities must be provided to them, as if they were outside in order not to cause possible psychological trauma[335]. Two important issues that CPT standards deal with are female health and hygiene requirements and pregnant women. Women in prisons are entitled to the same health standards as free women[336]. They must have access to any kind of medical visits, including gynecology, and they are entitled to continue taking medicines they use before being sentenced, such as contraceptives. Pregnant women must have access to all necessary medical treatments, they are entitled to have a special diet, and they must not be subject to degrading treatment, such as being handcuffed during

[332] Ibid., paragraph 28.
[333] Ibid.
[334] Ibid., paragraph 33.
[335] Van Kempen, Krabbe, *Women in Prison*, 138-9.
[336] Ibid.; De Vido, *Donne, Violenza e Diritto Internazionale*, 234.

gynecological exams or while giving birth. According to CPT, most of European countries advocate the practice to transfer women to hospitals to give birth[337].

In all its reports the committee tries to deal with the main topics, and the main deficiencies that a state may present in complying with rules and obligations to protect prisoners' rights under its own jurisdiction. CPT's Standards can be a help in achieving this but, at the same time, they cannot be considered a comprehensive survey, as they only make reference to general states' reports. What should be done in order to efficiently implement their impact within domestic jurisdiction is to regularly update them, since the chapter regarding women is more than a decade old, to contribute to a better understanding of their work[338].

4. The prohibition of torture as an international *jus cogens* rule

In international law, there are a set of rules which must not be altered neither by states' agreement, nor by international treaties, known as *jus cogens* or peremptory rules[339]. These rules represent fundamental values and encompass rules based on morality and natural law values, that is why no derogation is admitted, and they can be modified only by a new norm of general international law, which has the same value and character. Beside the prohibition of the use of force and the prohibition of crime of genocide, the prohibition of torture constitutes a peremptory rule, whose content is reasonably defined[340].

The particularity of this kind of norms is that they bind all states, regardless their ratification of specific international treaties, and they cannot be overridden or made subjects to derogations by treaties[341]. Articles 53 and 64 of the Vienna Convention on the Law of the Treaties are the only references in an international law covenant to *jus cogens* rules. According to the Vienna Convention, these rules are so fundamental that they cannot be modified by treaties, and any treaty provision, contrary to peremptory norms,

[337] Ibid.
[338] Van Kempen, Krabbe, *Women in Prison*, 240.
[339] Dixon, *Textbook on International Law*, 18.
[340] Ibid., 80; Evans, *International Law*, 150.
[341] Rodley, Pollard, *The Treatment of Prisoners*, 65.

makes the treaty void, and this is possible whenever or not *jus cogens* rules have formed before or after the entry into force of a treaty[342].

The ICTY has been the first international tribunal to discuss *jus cogens* rules. In the famous case Prosecutor v. Anto Furundzija the Court suggested *obiter dictum*, that the violation of a peremptory norm, such as the prohibition of torture, directly created "legal consequences for the legal character of all official domestic actions relating to the violation"[343]. The Trial Chamber emphasized that

> "Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force [...] Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of international community"[344].

The serious breach of a peremptory norm carries relevant consequences for the state. Firstly, other states must cooperate to bring the breach to an end, and secondly the violating situation must not be supported or recognized by other nations[345].

The concept of *jus cogens* norms has raised several debates within domestic courts regarding sovereign immunity[346]. Since international law has established a peculiar

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[342] Article 53 of the Vienna Convention states "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." and article 64 respectively affirms "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."; Dixon, *Textbook on International Law*, 41; see the Vienna Convention available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed 20 June 2021].

[343] Erika De Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law", *European Journal of International Law*, Vol.15, No. 1 (2004), 98.

[344] Prosecutor v. Furundzija, Judgement, Case No. IT-95-17/1-T, Trial Chamber (10 December 1998), see paragraph 153.

[345] Rodley, Pollard, *The Treatment of Prisoners*, 65.

[346] Two relevant cases are Hugo Princz v. Federal Republic of Germany brought in front of the Court of Appeals for the District of Columbia Circuit on 1 July 1994, and Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet, brought in front of House of Lords, Great Britain (UK) on 25 November 1998.

category of crimes having the characteristic of *jus cogens* norms, providing immunity to states which have committed violations of the peremptory norms would be misleading, as this kind of violation is illegal under the law of every sovereign state. Therefore, it is not possible to grant immunity to a state that has breached peremptory rules, such as the prohibition of torture, as by doing so international community would blind an eye to future impunity[347]. Even though article 38 of the ICC does not make any explicit reference to forms priority of the application of the sources of international law, in this case it may seem that a hierarchy among the sources of international is created, and the *jus cogens* are at the peak of this hierarchical system, for distinguishing themselves as grave breaches of international law[348].

A noteworthy example of a developing state practice is given by the Swiss case, in which the Federal Constitution has bound all levels of domestic law to the hierarchy of *jus cogens*. The legislative process was recognized in 1996, when both the Swiss parliamentary Chambers did not approve People's initiative to limit refugees' rights, including the principle of refoulement. The Conseil Fédéral recognized the peremptory character of the principle of refoulement, and a possible breach under international law, determined by the suggested constitutional law primarily based on the deportation of asylum seekers without possibility of appeal[349]. In accordance with article 3 of the ECHR, states must refrain from deporting or extraditing individuals towards countries where there is the real and imminent risk to subject them to torture, or inhuman or degrading treatment. The Federal authorities recognized that this proposal would be unconstitutional and illegal, because of the fundamental principles of the prohibition of refoulement as a *jus cogens* rule. If not invalidated, the constitutional amendment would have caused irreparable harm, not only for the Swiss state, but also for the entire community. The overriding character and the essential importance of peremptory norms resulted in the codification, within Swiss Constitution, of articles 139 (3), 193 (4), and 194 (2) which explicitly recognize *jus cogens* norms as limitations to the legislative constitutional process. Therefore, the Swiss practice is admirable, since it demonstrates that Swiss authorities have generally recognized the precedence of international law over national law[350].

[347] Evans, *International Law*,156-7; De Wet, "The Prohibition of Torture", 105-6.
[348] Dixon, *Textbook on International Law*, 25; Evans, *International Law*, 157.
[349] Evans, *International Law*, 157; De Wet, "The Prohibition of Torture", 101.
[350] De Wet, "The Prohibition of Torture", 101-4.

However, many states have not adopted the same position as Switzerland. Particularly after 9/11 attack, the worldwide fight against terrorism has put into question the peremptory and absolute character of the prohibition of torture. Indeed, it is evident that after the terrorist attack to the World Trade Center many western countries have adopted particular methods of torture, trying to justify them in the name of national security and defense of the entire community[351]. From this point of view, Courts' jurisprudence and states' sovereignty took two different approaches. On the one hand, tribunals' decisions have reiterated the absolute prohibition of the practice of torture, on the other hand many national regulations have imposed derogations on the basis of the maintenance of national security[352].

Among the most deplorable proposals the one of the former vice-president Dick Cheney must be cited. In October 2005, he proposed to exempt the Central Intelligence Agency's officials from the prohibition of torture during their interrogation methods[353]. Further, in several public statements Cheney spoke in support of torturing practices such as the one of waterboarding and miserably stated that the approved use of torture by state's officials was just a result of what Al Qaeda terrorists did on 9/11[354].

Regardless their place of detention, inmates will always be among the most vulnerable and fragile groups of the society, and in order to protect their fundamental rights and freedom from torture and ill-treatment, states should better comply with international norms and conventions. However, as it will be analyzed in the following chapter and as it can be seen from the Abu Ghraib case, individuals in prison are everyday at risk, and their rights are often threatened by the will to maintain security and discipline, sometimes in a wrong way, by prison authorities.

[351] Cataldi "La tortura è tra noi?",172.
[352] Ibid.
[353] Ibid., 175; See also https://www.nbcnews.com/meet-the-press/cheney-interrogation-tactics-i-would-do-it-again-minute-n268041 [accessed 20 June 2021].
[354] Ibid.

CHAPTER III

Violated human rights inside prisons: the deeply rooted problem of combating ill-treatment and torture

1. Prisoner's legal rights

It is now generally accepted that prisoners' human rights do not fade once individuals cross the prison gate. Over years, the problem of detainees' rights has always been underestimated. There has always been the common idea that prisoners are not entitled to the same rights of free individuals, probably because of their stigma of being recognized and considered as a danger for the community. Additionally, to these worries, politicians and justice have replied with the toughness of crime, in order to gain more credibility from a society that is apparently worried and does not feel safe when alleged criminals are not harshly sanctioned and prosecuted[355].

At international law level, there are a set of both binding and non-binding instruments, whose aim is precisely to safeguard, protect, and promote prisoners' rights. As explained in the previous chapter, Articles 7 and 10 of the ICCPR, together with articles 3 of the ECHR and 1 of the CAT play an important role in the protection of prisoners' rights and dignity. Nevertheless, a step forward in this field has been made by a series of standards and rules properly issued to provide a specific guidance for the treatment of prisoners. Among them the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), the European Prison Rules, the UN Bangkok Rules and the CPT's Standards must be mentioned. As previously affirmed, these non-binding instruments serve as a support for all the aforementioned legal instruments and they are more and more directly cited by courts' judges to improve the prison conditions within a country.

An intrinsic, and therefore inevitable consequence of imprisonment is the loss of the right to liberty. Although prisoners do not benefit from one of the fundamental values of

[355] Ilaria Giacomi, Irina Protasova, Alessio Scandurra, "The European Court of Human Rights and the protection of fundamental rights in prison", 3, available at https://www.antigone.it/upload2/uploads/docs/ECHR%20and%20rights%20in%20prison.pdf [accessed 20 June 2021].

human dignity, this does not make them devoid of other fundamental rights, and this does not permit prisons' authorities and staff to deny them[356].

As explained above, the 2006 revised European Prison Rules stress this fundamental principle that "all person deprived of their liberty retail all rights that are not lawfully taken away by decision sentencing them or remanding them in custody" and that "restrictions placed on person deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed"[357]. Also, the HRC hold that "Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment"[358]. The ECtHR has also added that all prisoners enjoy the rights included in the Convention, and that any kind of discrimination between incarcerated people and free individuals is misleading, and it does not have any sense, since all member states have the positive duty to protect human rights and individuals suffering regardless their status of prisoners[359].

Life behind bars has intrinsically an unavoidable level of suffering therefore, states and prisons' authorities have the duty to protect the fundamental values and rights that are already threatened by the correctional system. The assurance of a human right to a free individual is basically based on the negative obligation by the state not to breach that fundamental right. Whereas, in cases where prisoners are concerned, states are also required to actively shape the preconditions under which prisoners can benefit from that specific right. So, prison authorities not only have the negative obligation not to violate prisoners' rights, but also to provide the fundamentals to guarantee the enjoyment of the rights. For example, prisoners are fully entitled to express their own religion also in a cell, and so authorities should not interfere with their freedom of religion lives. However, it is impossible for detainees to fully enjoy the right to express their religion, because of the

[356] Piet Hein van Kempen "Positive Obligations to Ensure the Human Rights of Prisoners - Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family Under the ICCPR, the ECHR, the ACHR and the AfChHPR" in George Kellens, Roy Walmsley, Piet-hein Van Kempen, *Prison policy and prisoners' rights. The protection of prisoners' fundamental rights in international and domestic law* (Nijmegen, The Netherlands: 2008) 23.

[357] See rules 1-3 of the SMR.

[358] CCPR General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty), Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 April 1992, paragraph 3, available at https://www.refworld.org/docid/453883fb11.html [accessed 20 June 2021].

[359] ECtHR, 6 October 2005, *Hirst v. the United Kingdom (No. 2),* Application No. 74025/01.

specific of constraint and corrections. For instance, authorities should provide them all basic needs, such as providing special religious food or places where they can pray[360].

Therefore, it is true that prisoners are deprived of the fundamental right to be free but, on the other hand, inmates must be treated with dignity and humanity. This is a fundamental and universal rule that must be respected independently of the prison and state's material resources. Living in a correctional building can be hard in every respect, that is why granting prisoners a decent life not depriving them of their fundamental rights would also be a manner not to make their lives even more degrading and detrimental to their dignity[361].

The concept of dignity is inherent to all individuals, and it is also enshrined in article 10 of the ICCPR. It consists of creating an adequate living environment where prisoners do not feel humiliated or discriminated. This includes the provision of proper material conditions, such as food, potable water, and access to healthcare. Dehumanizing the dignity of prisoners can be caused also by forcing inmates to wear prison uniforms that can humiliate their individuality, for example in Texas and Rwanda male prisoners were forced to wear pink uniforms that was probably particularly humiliating and embarrassing for them as it is a color often attributed to female, or it is recurrent that female inmates have to wear uniforms that obligate them to undress every time they go to the toilet[362]. Protecting prisoners' dignity is not only a concrete task, authorities and prison personnel must also guarantee a secure and safe environment by preventing and avoiding possible abuses. From a human rights perspective, security and dignity go at the same pace. It is in fact true that when prisoners' rights are respected, it is more likely to create a better relationship between inmates and prison staff, reducing the risk of tensions and violence. Clearly, because of the limiting nature of the detention building, certain security measures must be taken, but they should never be overemphasized or disproportionate, because the manner in which they are implemented is the way they would pose a risk for the detriment of prisoners' dignity. That is why, establishing proper

[360] Van Kempen, "Positive Obligations", 21-2.
[361] United Nations Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. (New York and Geneva: United Nations Publications, 2003), 341.
[362] Penal Reform International, *Balancing security and dignity in prisons: a framework for preventive* monitoring, (London, UK: Penal Reform International,2015), 3.

procedures of behavior of personnel and allowing prison staff to be adequately trained is fundamental to implement security measures in the name of respecting human rights[363].

The prohibition of torture, or cruel, inhuman or degrading treatment and punishment is an absolute right that cannot be derogated even in cases of national emergency, and for this reason it can neither be derogated when it concerns incarcerated people. They have the right not to be subjected to torture or other mistreatments, and this right comprises the prohibition of corporal punishment, medical experimentations or treatments without prisoners' will[364].

In order to protect and safeguard prisoners' rights and personal security, they must be housed in officially recognized places of detention. The positive duty of the state is also recognized by several legal instruments, for instance the HRC stated that "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends"[365]. In addition, the ECtHR has highlighted that the unacknowledged detention of an individual can amount to a breach of article 5 of the Convention, since authorities have the responsibility to account individuals under their control, and therefore "to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since"[366]. Further, all persons deprived of their liberty must be correctly registered with detailed information of the individual, which must be promptly updated every time the prisoner is released or transferred. These registers must be available for all persons concerned, who may be relatives and lawyers to whom all information can be communicated ex officio[367].

Prisoners have the right to be accommodated in a living space respectful of their dignity and individuality. The CPT's minimum standards for a living space are 6mq, plus

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[363] Ibid., 3-6.
[364] United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 333, 337, 342.
[365] Compilation of general comments and general recommendations adopted by human rights treaty bodies, paragraph 11, 191, available at https://digitallibrary.un.org/record/576098 [accessed 20 June 2021].
[366] ECtHR, 8 July 1999, *Çakici v. Turkey*, Application No. 23657/94, paragraph 104.
[367] United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 337.

sanitary facilities for a single occupancy cell and 4mq, plus sanitary facilities for a multi-occupancy cell[368]. Of course, these standards are not rigid and depend also on the architecture of the establishment, but what is required is that cells would be properly ventilated and illuminated[369]. The ECtHR has often found violations of article 3 on account of insufficient cell space or inadequate living conditions, for instance in the cases of Mandić and Jović v. Slovenia and in the Torreggiani and Others v. Italy[370] that will be analyzed in the following chapter[371]. To be considered a breach of article 3 the insufficient surface area of the cell is not the only requirement, since it can happen that prisoners live in smaller cells, but they spend much of their time in open space areas doing recreational activities. The strong presumption for a breach of article 3 amounting to inhuman and degrading treatment is given by the reduction of living space, and by a reduction of out-of-cell activities[372].

Every person deprived of his/her liberty has the right to have access to proper equipped hygienic facilities. In this sense, it is not only taken into consideration hygiene and cleanness of a prisoner's body, but also his/her living conditions. That is why prisoners must have access to showers and toilets to preserve their good health status. It is also important that sanitary precautions should be taken, such as adequate disinfestation, provision of detergent products, fumigation and controls of cells[373].

A good hygienic environment can also help to prevent the spread of possible diseases inside the correction units. In the prison system the rate of individuals affected by severe illnesses is generally higher than in the society[374]. For example, the high incidence of inmates with HIV is probably due to the fact that always more people, engaged in drug trafficking and drug addicted, have been convicted. The right to health

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[368] See the "Living space per prisoner in prison establishments: CPT standards", paragraphs 9-10, available at https://rm.coe.int/16806cc449 [accessed 20 June 2021].
[369] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 8.
[370] ECtHR, 8 January 2013, *Torreggiani and Others v. Italy*, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10.
[371] ECtHR, 20 October 2011, *Mandić and Jović v. Slovenia*, Application Nos. 5774/10 5985/10.
[372] Council of Europe, *Guide on the case-law of the European Convention on Human Rights – Prisoner's rights,* last update 31 December 2020, 12-13.
[373] Ibid., 14.
[374] According to Kate Dolan, Andrea L Wirtz, Babak Moazen et al. on an average of 10 million of detainees around the world 3,8% suffers from HIV, 15,1% suffers from Hepatitis C, and 2,8% suffers from tuberculosis epidemics. For further references see Kate Dolan, Andrea L Wirtz, Babak Moazen et al., "Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees", *The Lancet* (July 2016): 1089, available at https://www.thelancet.com/action/showPdf?pii=S0140-6736%2816%2930466-4 [accessed 20 June 2021].

and freedom from torture are interdependent and indivisible, particularly in a prison setting. It is therefore true that the right to health does not only comprise the right to be healthy, but it also includes the right of access to adequate sanitation facilities, healthy environmental conditions, and a good health-related knowledge[375]. Under international human rights law, people deprived of their liberty have the right to freely access to an adequate healthcare system which should be as similar as possible to the one provided for the outside community. If the clinical situation of a prisoner become worse, he/she has the right to be transferred to a civilian or specialized hospital, and there to be treated with humanity, for example they should not be forcibly attached to their beds of furniture for custodial reasons[376]. Prisoners have the right to be treated and visited only by people who are in charge of taking medical decisions[377]. Moreover, in conformity with the basic principles, it is duty of the state to provide medicines and to guarantee to prisoners all medical treatments that they may have started before entering into prison. Knowing about the healthcare status of each prisoner is strongly recommended to all prison authorities[378]. Particular attention must be paid for prisoners affected by severe diseases such as HIV. As a transmittable disease a prevention and information campaign should be done in order to provide basic information needed to avoid the spread. At the same time, prison staff should be prepared and trained in order to adopt preventive measures about nondiscrimination and confidentiality. HIV prisoners should also not be taken in solitary confinement only because of their medical conditions[379]. The same attention must be paid also for prisoners affected by severe mental illness, who should be transferred as soon as possible to proper mental institutions[380].

Concerning the right to food, every prisoner should receive good quality meals with adequate nutritional values for health and strength. Further, insufficient provision of food may cause a breach of article 3 of the ECHR[381]. It may also be possible that prisoners

[375] Gen Sander, Rick Lines, "HIV, Hepatitis C, TB, Harm Reduction, and Persons Deprived of Liberty: What Standards Does International Human Rights Law Establish?", Health and Human Rights, Vol.18, No. 2, Special Section: Universal Health Coverage and Human Rights (December 2016): 172-3.
[376] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 18.
[377] United Nations, *Human Rights and Prisons. A Pocketbook of International Human Rights Standards for Prison Officials.* (New York, US: United Nations Publications, 2005), 6.
[378] Van Kempen, "Positive Obligations", 33.
[379] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 18.
[380] United Nations, *Human Rights and Prisons*, 7.
[381] United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 342; Council of Europe, *Guide on the case-law of the European Convention on Human Rights. Prisoners' rights,* 16.

undertake hunger strikes as a means of protest in prisons. In this context, the choice of the detainee must be respected, but it is quite recurrent that hunger strike incurs in strict reactions by prison's authorities, to the extent to use force-feeding, a medical practice that should be used only in cases of dying inmates. Nevertheless, if force feeding is required as a medical treatment, it must be barred out with proper means, not causing harm or humiliation to the detainee, otherwise it may amount to torture under article 3 of the ECHR[382].

Article 8 of the ECHR imposes positive obligations upon states to guarantee prisoners stable contacts and visits with their families and friends[383]. Also, in cases of transfers of prisoners, for the prisoner's physical and psychological well-being, contacts with families and visits should be assured also because particularly relevant in the process of rehabilitation[384]. However, the ECtHR has also recognized that a certain margin of appreciation must be applied regarding visiting rights according to the "ordinary and reasonable requirements of imprisonment and the resultant degree of discretion"[385]. A particular aspect of maintaining contacts with relatives regards conjugal visits and begetting children. It is inevitable that deprivation of liberty jeopardizes the possibility to have and to find a family, but it is also true that these kinds of restrictions are required by law and serve a legitimate aim. In this scenario the impossibility to guarantee intimate contacts with the partner is an obvious restriction of the right to private life and family, however there is no general obligation under international human rights law to allow such contacts within the prison system[386]. Taking as an example the case of Aliev v. Ukraine in which the applicant claimed that his right to private and family life had been violated, the ECtHR confirmed that it is the very nature of imprisonment that puts limitations on those rights, that is why prison's authorities must solve providing effective and recurrent contacts with relatives[387]. Nevertheless, as already said the ECHR is a living instrument and also the jurisprudence of the Court is evolving in this regard. One possible response by a state unwilling to allow conjugal visits may be artificial insemination, a natural way

[382] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 11.
[383] Murdoch, *The Treatment of Prisoners*, 241.
[384] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 9.
[385] ECtHR, 27 April 1988, *Boyle and Rice v. the United Kingdom*, Application No. 16580/90, paragraph 74.
[386] Van Kempen, "Positive Obligations", 37-8.
[387] ECtHR, 29 April 2009, *Aliev v. Ukraine*, Application No. 41220/98.

provided to prisoners to find a family through not denying rights to private and family life[388].

The Court has also stated that personal liberty is not a fundamental prerequisite to exercise the right to marry pursuant to article 12 of the ECHR. Prison authorities must not interfere with inmate's choices, and they shall arrange the practical aspects of the marriage since prison is not designed for this kind events[389].

In such a harsh environment prisoner have the right to engage in exercise and recreational activities, such as spending at least one hour outside of their cells, and having access to educational, cultural and informative material pursuant to article 9 of the ECHR[390].

According to article 3 of Protocol number 1 of the ECHR prisoners have the right to vote and to participate in elections unless differently provided by national law, which for motivated reasons can restrict the exercise of the right to vote for specific individuals[391].

These are only some of the many rights to which prisoners are entitled, however public opinion and states' authorities have been generally indifferent to the current situation of life behind bars and to the numerous violations of prisoners' fundamental rights. For instance, in the United States the Supreme Court has recognized that prisoners' rights are not coextensive with those of free individuals, idea rejected by the ECtHR which does not attach specific limitations to the status of prisoner, beside the one of being deprived of his/her liberty[392]. Over decades, public opinion has shared the common idea of a growing perception of insecurity, to which states have tried to reply with a more repressive response, most of times also causing the conviction of alleged criminals then found innocent. The reality is that prisoners still have civil rights, which do not fade away with incarceration.

[388] ECtHR, 4 December 2007, *Dickson v. the United Kingdom*, Application No. 44362/04.
[389] Council of Europe, *Guide on the case-law*, 25.
[390] Murdoch, *The Treatment of Prisoners*, 248; + 8 p 349
[391] Giacomi, Protasova, Scandurra, *The European Court of Human Rights*, 21.
[392] Genevra Richardson, "Time to Take Prisoners' Rights Seriously", *Journal of Law and Society*, Vol. 11, No. 1 (Spring 1984): 9.

1.1 Particular categories of detainees: women and minors

All individuals behind bars are entitled to the same rights regardless age, sex, religion or ethnicity. As already mentioned above, the very nature of the penitentiary system deprives prisoners of one of their fundamental values: right to freedom. Apart from this huge loss, they all must enjoy the same privileges as the individuals in the free society. Nevertheless, not all detainees are equal and need the same degree of attention; in particular women and juvenile offenders are particular problematic groups which deserve to be carefully treated and followed.

As already said in the previous chapter, several *ad hoc* instruments have been issued in order to protect imprisoned women's civil rights and fundamental values, since because of their sex and natural characteristics women are among the most vulnerable and discriminated groups within detention environment. The rate of women population living in prison has been periodically rising, and most of the causes that lead them to be convicted are usually emphasized by the same degree of discrimination and inequality they experience in the current society. It is rare for them to commit violent crimes or to be engaged in serious murders, they are often convicted because of secondary offences perpetrated because of economic uncertainty[393]. To this must be added that once a woman crosses the prison gate, she is not only seen as a convicted individual, but her image becomes stereotyped obtaining the deviant stigma of "failed mother", "bad wife" and "offender against her own femininity"[394]. On average, the sentences that women receive are shorter than those for male prisoners [395].

Nevertheless, it must be stressed that once in prison women require special attentions and treatments not only due to their vulnerability, but also because the penitentiary system has been realized having in mind men's necessities causing, as a consequence, a higher degree of difficulty in dealing with women's everyday needs[396]. Treating women within prisons is not an easy task and it requires high-level trained personnel. Many women who are convicted come from the most disadvantaged environments of the society and have spent much of their lives fighting against law. Most of the time, they have problems with

[393] Ciara O'Connell, Eva Aizpurua, Mary Rogan, "The European committee for the prevention of torture and the gendered experience of imprisonment", *Crime Law Social Change* (2021). https://doi.org/10.1007/s10611-021-09938-1 [accessed 20 June 2021].
[394] Ibid.
[395] Carlen, Worrall, *Analysing Women 's Imprisonment*, 40.
[396] De Vido, *Donne, Violenza e Diritto Internazionale*, 233.

alcohol, drugs or they suffer from mental diseases. Further, several of them have reported having been subject to sexual abuses during their childhood or adult age[397].

Although violence against women within prisons is likely to occur, creating a safe environment must be one of the main aims of prison authorities. Exactly like male prisoners, women enjoy the same right of being held in decent accommodations, which should be separated from male ones[398]. This arrangement permits both to protect women's personal safety avoiding further traumas, and to shape a healthy prison context. It is also important that the building where women are housed would be run by staff of the same sex, so that it would be easier to prevent sexual assault by male guards[399]. Having a smaller number of female offenders in prisons than men, this could have implications also in providing proper locations for women. Since it is sometimes too costly to create a separate sector for women within prison establishments, either they can be held in the same building with men, or they can be transferred to female-only detention centers far from their homes, which makes more difficult the planning of friends or relatives' visits[400]. During its several visits the CPT has observed that a lack of capacity and of proper specialized facilities for women may result in holding women in units used for specific restrict regime or worst in solitary confinement cells. In such cases, female inmates should be moved as soon as possible to proper accommodations, or when this is not possible in the short time, they must benefit from out-of-cell activities and human contacts[401].

Since women are often the primary caretakers in a family, contacts and regular visits with the family, children or in certain cases children's legal guardians are essential for women's quiet life. In this regard, longer visits should be encouraged, and financial assistance should be facilitated, if women do not have all the necessary means to maintain contacts with their relatives[402].

Women have the right to have access to the same meaningful activities, such as work training, education, sports, "on an equal footing with men". This means that too often,

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[397] Carlen, *Analysing Women 's Imprisonment,* 42.
[398] United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 341; United Nations, *Human Rights and Prisons*, 14; CPT's Factsheet "Women in prison", January 2018, available at https://rm.coe.int/168077ff14 [accessed 20 June 2021].
[399] Carlen, Worrall, *Analysing Women 's Imprisonment*, 56.
[400] Murdoch, *The Treatment of Prisoners*, 231.
[401] See paragraph 1 of the CPT's Factsheet "Women in prison".
[402] Ibid., paragraph 7.

also in the prison context, woman's figure is associated with activities that apparently seem to be more suitable for female vocations, such as sewing or handicraft[403]. In reality, excluding women from all other basic and ordinary activities, which are usually reserved for men, such as education, training, sport activities and work creates an *aura* of discrimination which does nothing but reinforces the outmoded stereotyped role of women in the society[404].

One of the most controversial aspects of lives of women within prisons is surely the difficulty to provide adequate hygiene items and healthcare treatments[405]. Indeed, the right to health and reproductive health of women is violated every time that prisons' authorities fail to guarantee and to offer proper hygienic and health measures. For this reason, these two rights should not be taken for granted since their enjoyment could face huge obstacles[406]. In its tenth General Report of 2000, the CPT stated that "The specific hygiene needs of women should be addressed in an adequate manner. Ready access to sanitary and washing facilities, safe disposal arrangements for blood-stained articles, as well as provision of hygiene items, such as sanitary towels and tampons, are of particular importance. The failure to provide such basic necessities can amount, in itself, to degrading treatment"[407]. It is quite clear that once in prison women require both hygienic and medical gender specific services, also in order to create a safe environment that aims at preventing the spread of possible diseases or situations that can amount to inhuman or degrading treatment[408].

Because of their natural physical characteristics, women have the right to have access to equivalent medical treatments, of which they would benefit if they were free individuals. Preventive healthcare should be guaranteed, and so screening of breast and cervical cancer should be available also for female inmates. The same logic is followed

[403] Murdoch, *The Treatment of Prisoners*, 231.
[404] See paragraph 2 of the CPT's Factsheet "Women in prison".
[405] Murdoch, *The Treatment of Prisoners*, 231.
[406] Sara De Vido, "Gender inequalities and violence against women's health during the CoViD-19 pandemic: an international law perspective", *BioLaw Journal*, Vol. 3 (2020): 80.
[407] See paragraph 31 of the 10th General Report in the CPT's activities covering the period 1 January to 31 December 1999, available at https://rm.coe.int/1680696a74 [accessed 20 June 2021]; De Vido, *Donne, Violenza e Diritto Internazionale*, 231.
[408] In Zambia many prisons do not provide basic tools for women's personal hygiene, such as toothpaste or soap, and bathrooms are usually dirty and low-equipped. Both in Zambian and Sri Lankan prisons blankets given to female inmates are infested with lice, rats and rags and beds, pillow and mats are often lacking. For further references see paragraph 50 of the United Nations Human Rights Council, "Pathways to Conditions and Consequences of Incarceration for Women", Special Rapporteur Rashida Manjoo, 21 August 2013, A/68/340, available at https://digitallibrary.un.org/record/758207 [accessed 20 June 2021].

also for the use of all those medicines that women used to take before being convicted. If contraceptive pills were for whatever reason prescribed, the same right must not be withheld during imprisonment. Also, safe forms of abortion should be available for women detainees[409].

Mental health problems must not be underestimated in the correctional context, as they can be caused both by imprisonment or by previous abuses or mistreatments. Since women generally experience more mental distress, forms of depression and anxiety, they should be provided with psychological support to avoid a possible suicide or impulsive acts. Further, it should be strongly recommended not to place mentally ill women in solitary confinement[410].

A form of violation of human rights, and of women's rights to health and reproductive health is involuntary sterilization. This practice has generally been conducted over marginalized women, such as women belonging to minorities, women in prisons, disabled women or women with a disadvantaged past. One of the reasons for which sterilization has been used as an instrument of health policy within corrections is to prevent and avoid the spread of highly infectious diseases such as HIV. A proof of this is given by the California State Auditor, which reported that from 2005 to 2012, 144 female prisoners were subjected to involuntary sterilization by bilateral tubal ligation[411]. In this context, involuntary sterilization is considered both as a violation of female prisoners' rights, which may amount to torture, inhuman or degrading treatment, but also a form of intersectional discrimination based on multiply interconnected grounds like gender, ethnicity, health and personal socio-economic conditions[412].

As already mentioned, the possibility of having pregnant inmates is quite recurrent. In this regard, the CPT has strongly recommended to use incarceration only as the last resort, and if it is not possible special attention must be given to pregnant women and juvenile mothers in prisons[413]. First of all, they should have the right to have access to adequate medical visits and treatments both before and after the delivery. Secondly,

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[409] De Vido, *Donne, Violenza e Diritto Internazionale*, 233; See paragraph 3 of the CPT's Factsheet "Women in prison"; Murdoch, *The Treatment of Prisoners*, 231-2.
[410] See paragraph 48 of "Pathways to Conditions and Consequences of Incarceration for Women"; O'Connell, Aizpurua, Rogan, "The European committee for the prevention of torture", available at https://doi.org/10.1007/s10611-021-09938-1 [accessed 20 June 2021].
[411] Sara De Vido, *Violence against women's health in international law* (Manchester, UK: Manchester University Press, 2020), 80.
[412] Ibid.,81
[413] See paragraph 4 of the CPT's Factsheet "Women in prison".

pregnant women and breastfeeding mothers should be provided with equilibrated diets and supplementary food. It is obvious that babies should not be born in prison, and that the recommended practice is to immediately transfer women to hospitals[414].

Nevertheless, the recurrent practice found by several monitoring mechanisms including the CPT is the one of shackling pregnant inmates to bed or other furniture[415]. This can happen both during gynecological examinations or delivery, and it represents a clear failure of the involved state to adequate prisons' protocols to unique situations that only women face[416]. Perinatal shackling represents a violation of female prisoners' right to health, which may amount to cruel treatment. Its intrinsic discriminated characteristic and the direct state involvement demonstrate once again the incapability of official prisons' authorities to provide appropriate measures of treatment in conformity with international standards. Despite the adoption of a law prohibiting shackling, this practice continues to be used in several prisons of the USA[417]. In this context, a pivotal case is the one of Shawanna Nelson v. Correctional Medical Services concerning a woman assigned to the McPherson Correctional Unit in Newport who was repeatedly shackled during labor and delivery. Due to the use of restraints during childbirth, which were removed only on the second night at the hospital, she experienced hip dislocation and umbilical hernia[418]. The Court found that prison's authorities acted with complete indifference regarding her right to health and safety, and the imposition of shackles was made without solid security justification, therefore constituting cruel and unusual punishment. What is striking about the Court's final judgement is that no reference was made about health and reproductive rights, except for describing the practice degrading, humiliating and a threat for both mother and child. Nevertheless, according to De Vido shackling imprisoned women while giving birth is a clear gender-based violence that is firmly anchored in the correctional environment[419].

Regrettably, there are no universal standards that determine the period of permanence of children in prisons with their mothers. What the authorities must do is to act according to the best interest of children, and in this regard the Convention on the Rights of the

[414] De Vido, *Donne, Violenza e Diritto Internazionale*, 233-4; See also paragraph 4 of the CPT's Factsheet "Women in prison".
[415] See paragraph 57 of "Pathways to Conditions and Consequences of Incarceration for Women".
[416] Ibid.
[417] De Vido, *Violence against women's health*, 92.
[418] Court of Appeals for the Eighth Circuit, 2 October 2009, *Shawanna Nelson v. Correctional Medical Services*, 583 F.3d 522; De Vido, *Violence against women's health*, 94.
[419] De Vido, *Violence against women's health*, 96.

Child emphasizes this principle in its article 3[420]. If children were born in prison, the place should not appear on their birth certificates, and as far as they remain in prison, authorities should create a safe and proper environment, providing them activities and education, as children must not be treated as inmates. Mothers have the right to spend much time with their children, and when children's transfer to the outside community is programmed, this should be determined according to each single case, in the light of pedo-psychiatric and medico-social opinion[421].

Juvenile offenders are among the most vulnerable groups in the prison context, together with women. Because of their ingenuity and immaturity their permanence in prison may be every day at risk, and thus they deserve a special vigilance[422]. A peculiar attention concerning their treatment within prisons, and the importance of their specific rights has been developed only in the recent years with some of the most important legal instruments such as the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the 1989 UN Convention on the Rights of the Child, the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty and the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines). Also at European level this concern has gained much more attention only in the last years, for example the CPT released a general Report on the subject only in 1998, and the Committee of Ministers adopted in 2008 the European Rules for juvenile offenders subject to sanctions or measures[423].

Assessing the loss of liberty of a juvenile is a complicated and risky assignment. The imposition and implementation of convicting measures shall always be based on the best interest of the adolescent, and they shall be proportionated to the committed crime. A

[420] Article 3 of the Convention on the Rights of the Child states."1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

[421] In the United States, the adoption of a child previously held in prison with her mother has been expedited since the approval of the Adoption and Safe Families Act of 1995. For further references see Jenni Gainsborough, "Women in Prison: International Problems and Human Rights Based Approaches to Reform", *William & Mary Journal of Women and the Law: 2007 Symposium: Women in Prison*, Vol. 14, No. 2 (2007-2008): 295; see paragraph 4 of the CPT's Factsheet "Women in prison"; Murdoch, *The Treatment of Prisoners*, 244-5.

[422] Barry Goldson, "Damage, Harm and Death in Child Prisons in England and Wales: Questions of Abuse and Accountability", *The Howard Journal*. Vol. 45, No. 5 (December 2006): 450.

[423] Murdoch, *The Treatment of Prisoners*, 313-4.

reasonable suspicion of the commission of an offence is inevitably required, and when imprisonment is the only solution, all the peculiar and individual characteristics of the young offender shall be taken in consideration[424].

Contrary to the most recurrent social belief, in the majority of cases juveniles are not the primary responsible for the committed offences, instead they may act on behalf of adults[425]. Therefore, it is not surprising that child prisoners come from the most disadvantaged social classes. They may be victims of abuses, drugs and alcohol addicted, homeless, or even suffering from mental pathologies[426].

According to a report issued by Human Rights Watch in 2016, estimating the precise number of juvenile prisoners is complicated since many states do not supply the exact rate of minors in prisons. However, it has been estimated that around one million juveniles may be incarcerated[427]. Clearly rates of juvenile detention change throughout states, for example by December 2019 over 49,000 juvenile offenders were confined in the USA because of their involvement in criminal offences[428]. In the European continent, Wales and England own the highest percentage of minors behind bars. The punitive criminal justice system has favored a higher rate of imprisonment, and particularly youth offenders have endured the toughness of this punitive criminal policy[429].

It would be redundant stating once again that minor prisoners' status is an excuse not to grant and protect fundamental human rights. It has long been advocated that deprivation of liberty for juvenile offenders should be implemented only as last resort, and for the minimum necessary period[430]. Indeed, incarceration for youths means not only a loss of their right to freedom, but also the incapacity to build and safeguard their future, to weave relationships, and the difficulty to reintegrate in the society because of their

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[424] Murdoch, *The Treatment of Prisoners*, 316; See Rule 5 of the European Rules for juvenile offenders subject to sanctions or measures, available at https://www.refworld.org/pdfid/4a7058c02.pdf [accessed 20 June 2021]; See paragraph 1 of the CPT's extract from the 24th General Report of the CPT, "Juveniles deprived of their liberty under criminal legislation", available at https://rm.coe.int/16806ccb96 [accessed 20 June 2021].

[425] Goldson, "Damage, Harm and Death", 451.

[426] Ibid., 454.

[427] See the 2016 Human Rights Watch Report available at https://www.hrw.org/world-report/2016/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north [accessed 20 June 2021].

[428] For further references see https://www.prisonpolicy.org/reports/youth2019.html [accessed 20 June 2021].

[429] Goldson, "Damage, Harm and Death", 450.

[430] See rule 49.1 of the of the European Rules for juvenile offenders; see rule 19 of the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), available at https://www.ohchr.org/documents/professionalinterest/beijingrules.pdf [accessed 20 June 2021].

smeared criminal record. The severe measures of just desert and retributive sanctions may have a negative impact on the individuality of such offenders, and as a consequence alternative forms of sanctions shall be encouraged, always bearing in mind to respond to juvenile prisoners' requirements[431].

When incarceration is inevitable, juveniles should benefit from the advantage of early release[432]. When sent to prisons, youth inmates have the right to stay in juvenile-only units, separated from adults[433]. Normally, the placement of a juvenile offender in the same building with adults does not raise an issue under article 3 of the ECHR. Nevertheless, there are situations in which minors, placed in correctional establishments with men, may be shocked and victims of the carceral environment that results not to be suitable for them[434]. This was the case of Güveç v. Turkey, in which the applicant, a fifteen years old adolescent spent more than five years of detention in an adult prison[435]. The critical circumstances in which he lived caused him severe psychological and physical problems, leading him to attempt suicide for three times. In this case Turkey was found in breach of article 3 of the ECHR, since holding the adolescent in an adult prison amounted to inhuman and degrading treatment[436].

Juveniles in prison run a higher risk of discrimination and ill-treatment that sometimes result in desperate acts. In order to prevent this, special attention should be paid for them, and a well-designed prison system with well-equipped and trained staff personnel should be ensured [437].

Detention centers should offer to juvenile detainees a planned and regular regime of activities. These tailored multidisciplinary projects should be specific to meet the singular necessities of youths and avoid the risk of long-term social maladjustment, through the employment of psychologists, trainers and teachers. Juveniles behind bars have the right

[431] See rule 17.1 of the Beijing Rules.
[432] See rule 49.2 of the European Rules for juvenile offenders.
[433] In this regard, article 37, paragraph c) of the Convention on the Rights of the Child must be seen as a *lex specialis,* compared to other international human rights instruments, Indeed, the article reads "[...] every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so [...]", for further references see United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice,* 341.
[434] Council of Europe, *Guide on the case-law,* 53.
[435] ECtHR, 20 January 2009, *Güveç v. Turkey*, Application No. 70337/01.
[436] Ibid.; Council of Europe, *Guide on the case-law,* 52; Giacomi, Protasova, Scandurra, *The European Court of Human Rights,* 10.
[437] See paragraph 3, b) of the CPT's extract "Juveniles deprived of their liberty under criminal legislation"; see rule 22 of the Beijing Rules.

to benefit from the same opportunities as adolescents in the free community, and for this reason recreational and educational programs are at the basis of the rehabilitative daily routine, and they are offered regardless their sex, age or ethnicity[438].

Because of the restrictive characteristic of the prison environment, contacts with the outside society and regularly scheduled visits should be arranged. Juveniles' fragile identity can be endangered in such environment, causing permanent effects that may have an impact on their normal social skills once released[439]. Placing juvenile offenders in prison is *per se* an act of violence. Because of their delicate individuality and mental health, the correctional environment may have irremediable consequences in the life of adolescents. It goes without saying that the use of force, physical restraints and weapons should not be allowed, or at least only when and in the measure, it is strictly necessary and justified[440].

Nevertheless, even if held in juvenile prisons they are always the favorite prey of the strongest. Bullying is a recurrent problem in most establishments. Victims are usually exposed to physical assault, including sexual one, verbal abuses, psychological threats, and even extortion and theft[441].

In light of such considerations, the prolonged incarceration of juveniles may be clearly punitive and without a sustainable justification. The goal of the correctional system has evolved during years, but nowadays its aim is committed to be rehabilitative. A more tolerant and system, in which punitive measures are used only as last resort, would have benefits both for male and female adults, but especially for juvenile inmates, who are always among the most vulnerable categories of the society.

2. Situations that can amount to torture and ill-treatment in detention centers

Imprisonment has always symbolically been the *ad hoc* form of sanction used by states to punish all those individuals who have been convicted for serious crimes, to coerce those who act against the law, or to confine those awaiting trial or who present a threat both for society and criminal justice system. As already explained, most of the time

[438] Murdoch, *The Treatment of Prisoners*, 321; See paragraph 3, c) of the CPT's extract "Juveniles deprived of their liberty under criminal legislation".
[439] Murdoch, *The Treatment of Prisoners*, 322.
[440] See rule 90.1 of of the European Rules for juvenile offenders.
[441] Goldson, "Damage, Harm and Death", 406.

this captive population includes people who come from the most disadvantaged social classes. However, what is really problematic is the incapacity and inadequacy of several prison systems to deal with offenders, and to provide them at least all the basic resources they need. Indeed, prison establishments are often overcrowded, administered by low-trained authorities and run-down buildings[442].

Conviction is not *per se* a form of ill-treatment or torture, unless aggravating conditions make it so[443]. It is clear that when an individual is taken into custody in good health but then is found injured at the time of release, the state must explain in a credible and convincible manner how it has been possible[444]. Indeed, conditions in which detainees are held may constitute torture, inhuman or degrading treatment or punishment, and the state may result liable for this form of violations. In this regard the ECtHR has found that

> " [...] the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance"[445]

Assessing when a violent act against a detainee amounts to torture, inhuman or degrading treatment is not always immediate and easy, since the Courts' jurisprudence has evolved and used different criterions in order to distinguish the various offences. It is generally accepted that an act of torture involves state-officials or individuals acting on behalf of the state, and it is characterized by a distinguishable purposive element, such as extracting information, or punishing and dehumanizing the victim[446]. Therefore, an act of torture has the special stigma to deliberately cause very serious and cruel suffering.

[442] Christine Bickell, Malcolm Evans, Rod Morgan, *Preventing Torture in Europe* (Strasbourg, France: Council of Europe Publishing, 2018), 109.
[443] Yokoi, "Grading Scale of Degradation", 407.
[444] Philip Leach, *Taking a case to the European Court of human rights* (Oxford, UK: Oxford University Press, 2017), 265-6. p265-6
[445] ECtHR, 26 October 2000, *Kudła v. Poland*, Application No. 30210/96, paragraph 94.
[446] Rodley, Pollard, *The Treatment of Prisoners*, 118.

Essentially, any physical use of force that involves the infliction of severe pain and suffering comes within the category of inhuman treatment or punishment[447]. On the other hand, degrading treatment is defined as treatment "designed to arouse in the victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance"[448].

Except for some practices that would be considered independently to constitute torture thanks to the evolution of Courts' jurisprudence, identifying certain practices as mere acts of either torture or inhuman or degrading treatment is complicated. These acts must be identified and analyzed in the context in which they happen[449]. Violence against detainees may give rise to possible breaches at international law level, however since ECtHR and other judicial bodies continue to use a different lower threshold to identify an act of torture, inhuman or degrading treatment, it may be possible that some findings of beatings against detainees may amount only to inhuman treatment and not to torture, even if there is a solid purpose that is expected to continue, or there is also the possibility that the use of force may constitute degrading treatment and not an inhuman one or even torture[450].

The use of violence against prisoners carries with it the risk that it will be done in a disproportionate and unlawful way[451]. Ill-treatment in places of detention has highlighted not only the authorities' responsibility to use violence only when strictly necessary, but also states' due diligence to prevent harm to detainees both from prison staff and inmates[452]. In coercive establishments, the main danger is that the relationship between security and order could be unbalanced, as the necessity to maintain order prevails over dignity and fairness. In this environment, individuals have no power and are particularly vulnerable to abuses that the infliction of ill-treatments can become an ordinary routine[453]. For instance, the recourse to physical force might itself amount to a violation of article 3 of the ECHR. It is possible to list a series of circumstances that

[447] Jim Murdoch, Vaclav Jiricka, *Combating ill-treatment in prison- A handbook for prison staff with focus on prevention of ill-treatment in prison* (Strasbourg, France: Council of Europe Publishing, 2016), 20.
[448] ECtHR, 18 January 1978, *Ireland v. United Kingdom*, Application No.14038/88, paragraph 167.
[449] Waterboarding, Palestinian hanging and falanga are generally recognized as acts of torture. For further references see Rodley, Pollard, *The Treatment of Prisoners*, 95-6.
[450] Rodley, Pollard, *The Treatment of Prisoners*, 132.
[451] Murdoch, Jiricka, *Combating ill-treatment in prison*, 21.
[452] Murdoch, *The Treatment of Prisoners*, 248.
[453] Penal Reform International, *Balancing security and dignity in prisons*, 2.

contribute to make life behind bars everyday more exposed to mistreatments. Relevant factors such as the living space of cells, the provision of lighting, running water, food, medical treatments, toilets, good facilities for sleeping and recreational activities are only a part of the instances to which the detainee can complain of[454].

There is evidence which prove that lack of prison management and trained-prison staff contribute to mar the relationship between correctional personnel and inmates, often leading to an increase of individual and collective violence[455]. A proper selection of adequate prison staff and the provision of training courses, including regarding human rights, will be a crucial solution to ensure safety and order in custody, without resorting to violence. At this regard CPT stated "the cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job"[456].

However, the implementation of disciplinary and security measures may sometimes give rise to possible violations of prisoners' fundamental human rights, also resulting in a violation of the prohibition of ill treatments. In this regard, the Strasbourg organs suggest to evaluate the severity of the imposed conviction, and of the conditions of sentencing life, referring to the conditions under which disciplinary measures are applied, the relevance of the aim of the measures pursued, and the physical and psychological repercussions of these measures on the personality of the detainee[457].

[454] Leach, *Taking a case*, 273.
[455] Ross Homel, Carleen Thompson "Causes and prevention of violence in prisons" in Sean O'Toole, Simon Eyland, *Corrections Criminology* (Sidney, Australia: Hawkins Press, 2005),102-3.
[456] See paragraph 26 of CPT's 11th General Report published in 2001, "Developments concerning CPT standards in respect of imprisonment", available at https://rm.coe.int/1680696a75 [accessed 20 June 2021].
[457] Yokoi, "Grading Scale of Degradation", 407.

2.1 Solitary confinement

The conditions of detention a prisoner is detained may also amount to an act of torture or ill-treatment. Similarly, isolation of individuals, through solitary confinement or incommunicado detention, might also lead to a breach of the prohibition of torture, or inhuman or degrading treatment[458].

Within the prison population, there is sometimes a group of prisoners who are held in solitary confinement, which means they are living in a prison within a prison. During solitary confinement periods, inmates spend twenty-three hours a day in their cells, only interrupted by one hour of exercises or recreational activities, usually carried alone[459]. The general reduction of external stimuli is both quantitative and qualitative, since the lack of social contacts and visits makes the permanence monotonous and less empathic[460].

The use of solitary confinement is not *per se* regulated by human rights instruments and conventions, however many cases of this form of detention have been brought in front of the courts, and have caught the attention of several international monitoring mechanisms, unearthing particular serious forms of solitary confinement and their consequences on prisoners[461].

Solitary confinement has always existed throughout the course of history. This model of imprisonment is attributable to the old Pennsylvania prison model where prisoners spent most of their time closed in their cells, where they also worked, without seeing anyone. This large-scale form of solitary confinement has become then a reality used in most of prisons of the world[462].

Nowadays, many international legal bodies deal with this subject: both the SMR and the European Prison Rules condemn the punishment by placing a detainee in a dark

[458] Rodley, Pollard, *The Treatment of Prisoners*, 126.
[459] Peter Scharff Smith, "Solitary confinement. An introduction to the Istanbul Statement on the Use and Effects of Solitary Confinement", *Torture: Quarely Journal on Rehabilitation of Torture Victims and Prevention of Torture*, Vol. 18, No. 1 (2008): 56.
[460] See the "Istanbul Statement on the use and effects of solitary confinement", adopted on 9 December 2007 at the International Psychological Trauma Symposium, available at https://pd-hub.icpa.org/wp-content/uploads/sites/3/2017/10/Istanbul_expert_statement_on_sc.pdf [accessed 20 June 2021].
[461] United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice*, 350.
[462]Smith, "Solitary confinement.", 57.

cell as a form of cruel, inhuman, or degrading treatment, and thus should be prohibited[463]. The HRC found violation of article 7 of the ICCPR in several cases, most of which the enforcement of isolation was more extreme than what was really required for discipline and security in a prison[464]. An example is the case of Lorrosa v. Uruguay, in which the applicant was held for more than a month in a cell without windows and artificial lighting of a small prison wing called "La Isla"[465].

According to the ECtHR, solitary confinement does not necessarily breach article 3 of the ECHR, but this depends on the particular conditions of isolation, its length, and its effects on the victim[466]. As reported in the 21st General Report, the CPT has always paid a particular attention to the delicate matter of solitary confinement and especially on its severe damaging effects[467]. Solitary confinement is liable to be imposed for several reasons, for instance as disciplinary sanction for sentenced prisoner, as an administrative way for specific dangerous categories of inmates, as an interest for criminal investigations, and as judicial sentencing[468].

Actually, the use of solitary confinement may change from country to country; some states use this practice for pre-trial isolation, while others confine inmates during death-row. In Denmark, for example, the maximum period of solitary confinement is four weeks for having violated prisons' rules. Whereas, in the USA there the common tendency to use complete isolation as an administrative tool, in order to isolate the most threatening individuals. This system is called Supermax and there are more than fifty Supermax prisons in the American federal states. The method consists of spending 22.5 hours a day in a cell surveilled with high-tech cameras. Recreational activities and exercises are fully carried in isolation, social contacts are forbidden, and visits or phone

[463] Murdoch, *The Treatment of Prisoners,* 254; see rule 31 of the SMR.
[464] Rodley, Pollard, *The Treatment of Prisoners*, 403, 405.
[465] Human Right Committee Eighteenth Session, 21 March – 8 April 1983, *Larrosa v. Uruguay*, Communication No. 88/1981; U.N. Doc. CCPR/C/18/D/88/1981
[466] Leach, *Taking a case,* 276.
[467] See the CPT's Extract from the 21st General Report "Solitary confinement of prisoners", published in 2011.
[468] Solitary confinement is usually applied to pre-trial prisoners. In particular, some European states seem to have used this practice enough to call it "Scandinavian phenomenon". In these circumstances, isolation can be a way to obtain important information by putting pressure on the victim, even if this is technically illegal. It is also well-known that this practice was also used by US officials, together with coercive methods, in the facilities of Guantanamo and Abu Ghraib. For further references see Smith, "Solitary confinement.", 60; Murdoch, Jiricka, *Combating ill-treatment in prison*, 69; see the "Instanbul Statement on the use and effects of solitary confinement".

calls are severely restricted. The permanence in this kind of prisons varies from years to decades[469].

The imposition of solitary confinement further restricts an already limited life behind bars. This kind of extra restriction does not go at the same pace as imprisonment; therefore, it should be separately justified and, only if necessary, imposed. Since solitary confinement intrinsically carries with it the risk of ill-treatment, a traditional test has been developed in order to attest if the imposition of this measure is fully justified. The test is enshrined in the provisions of the ECHR and has been shaped by the case-law of the ECtHR[470].

The principles summarized in the mnemonic "PLANN" are the following: first of all, solitary confinement must be proportionate. Since any further restriction in prison may give rise to a breach of prisoners' human rights, causing an elevate degree of potential harm, authorities should monitor the isolating circumstances to ensure they would not be disproportionate, and thus properly linked to the actual cause that brought to the imposition of this sanction[471]. Solitary confinement should be accountable because all the records and the reviews on the decision to impose it should be kept[472]. Necessity is another feature of isolation. It should be demonstrable that all the actions taken to impose solitary confinement have been necessary to protect and safeguard the other prisoners' lives. Even though alleged dangerous prisoners are isolated, they are entitled to the same rights as if they were in normal cells. Among them, visits, correspondence, of phone calls should not be restricted[473]. Finally, solitary confinement should not be discriminatory on any basis, since authorities not only have to take into consideration all the relevant matters, but they have also to ensure irrelevant ones are not considered[474].

Thus, solitary confinement must have a limited use, for a restricted period of time, used only in exceptional circumstances, and with appropriate safeguards[475]. Nevertheless, when an individual is placed in solitary confinement his/her physical and psychological conditions must be steadily monitored. Thus, medical authorities should visit prisoners in

[469] Smith, "Solitary confinement.", 58-9.
[470] See paragraph 55 of the CPT's Extract from 21st General Report.
[471] Ibid., paragraph 55, b).
[472] Ibid., paragraph 55, c).
[473] Ibid., paragraph 55, d).
[474] Ibid., paragraph 55, e).
[475] See paragraph 60 of the Interim Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment (a/68/295), available at https://www.unodc.org/documents/justice-and-prison-reform/SPECIAL_RAPPORTEUR_EN.pdf [accessed 20 June 2021].

isolation every day, and these visits should be guaranteed in the interests of detainees' rights[476]. The results of all visits must then be examined by competent authorities, in order to confirm, on the basis of data and foreseeable consequences, if the permanence in isolation can continue or not[477].

Both short and long solitary confinement may amount to torture, inhuman and degrading treatment. Clearly, the longer its duration, the greater and more serious will be its effects on prisoners and also the probabilities of a possible breach under international law. According to the Special Rapporteur on Torture, the conditions of application of solitary confinement, and those of the detainee, its length and the consequent effects can amount to a breach of article 7 of the ICCPR, and of articles 1 and 10 of the CAT[478].

The same logic is also followed and applied by the ECtHR. Indeed, in some cases the practice of solitary confinement was so hard to cause a breach of article 3 amounting to torture. In the case of Ilascu and Others v. Moldova and Russia the Court's judgement found a violation of article 3, since a series of ill-treatments on two of the applicants, combined with the imposition of solitary confinement for a period of eight years amounted to torture. Further, the prisoners were denied proper healthcare facilities, food and social contacts[479].

On the contrary, in the X v. UK case the applicant, held in solitary confinement for around seven hundred-sixty days due to his classification as a "Category A" prisoner, no breach of article 3 was found. Despite the length of his permanence in isolation justified for security reasons, he had good life conditions, with access to visits, recreational activities and to methods of information[480].

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[476] See paragraph 184 of the Subcommittee on Prevention of Torture Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, 17 September 2003, U.N. Doc. CCPR/CO/78/PRT, available at https://www.refworld.org/docid/4ef0bf362.html [accessed 20 June 2021].

[477] See paragraph 56 of the CPT's 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, available at https://rm.coe.int/1680696a3f [accessed 20 June 2021].

[478] The HRC has found that solitary confinement that exceeds fifteen days, *per se* constitutes a breach under article 7 of the ICCPR and must absolutely be banned. For further references see paragraph 6 of the General Comment 20, Article 7 (Forty-fourth session 1992), available at https://www.refworld.org/docid/453883fb0.html [accessed 20 June 2021]; See paragraph 80 of the Interim Report Of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment (a/66/268) of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement [accessed 20 June 2021].

[479] ECtHR, 8 July 2004, *Ilascu and Others v. Moldova and Russia*, Application No. 48787/99.

[480] ECtHR, 10 July 1980, *X v. The United Kingdom*, Application No. 8158/78.

When the imposition of solitary confinement is the only solution, certain material conditions must be respected. First of all, detainees must be held in adequate cells, fully equipped with heating, artificial lightning, ventilation, and means of communication with prison staff. The basic arrangements for the health and sanitary needs of inmates should be organized in order to provide toilets, showers, free access to medical visits and treatments, and particular diets when necessary. However, during its visits the CPT has repeatedly found that all the basic requirements for the imposition of solitary confinement are not met. Prisoners usually live in bare cells, devoid of furniture, light and ventilation and whose size measure as little as 3 to 4 m2[481].

The imposition of solitary confinement is often found applied to death-row prisoners. The HRC found that inmates in death row may be held in isolation for a protracted period of time, to be then executed without any prior notification. Nevertheless, as far as the committed crime is serious, any prisoner, including also the one serving life sentencing conviction and death-row, shall be held in isolation[482]. The CPT has always been concerned with this subject and during its visits uncovered particularly dangerous situations. For example, during a visit in Bulgaria the CPT found two death-row prisoners who were held in solitary confinement and whose primary necessities were severely restricted: they were allowed only one hour of exercise, and fifteen minutes of sanitary facilities per day[483].

When analyzing cases of solitary confinement, it is necessary to analyze its effects on prisoners' personalities. The ECtHR has reiterated that all forms of solitary confinement without appropriate mental and physical incitements can lead to a degeneration of mental and physical capacities of inmates[484]. Moreover, this kind of isolation completely conceals all forms of social contact provoking difficulties for many individuals to reintegrate in the society, and to maintain equilibrate and functional stimulus[485].

Reforms and policies should be revised about the imposition and the conditions of solitary confinement. This could be done through the work of monitoring mechanisms, which could establish basic standards to follow and by which policy makers and prison

[481] See paragraph 58,59,60 of the of CPT's 11th General Report.
[482] See paragraph 61 of the Interim Report of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment (a/68/295).
[483] Smith, "Solitary confinement.", 59.
[484] Murdoch, Jiricka, *Combating ill-treatment in prison*, 70.
[485] Smith, "Solitary confinement.", 61-2.

managers could be influenced. There is also the need to align solitary confinement methods with human rights standards, perhaps creating new norms that can both promote fundamental values of inmates, but also regulate how solitary confinement is imposed[486].

2.2 Methods of restraint

Forcible methods of restraint are a series of external mechanical devices designed to restrict prisoners' movements in whole or in part[487]. In order to understand the validity and the use of these instruments in prison, it is necessary to start from a case of the ECtHR. In the Raninen v. Finland case, the Court confirmed forceable methods are not *per se* a violation of article 3 of the ECHR, but every time their use exceeds the reasonably threshold of legality, it would be required to analyze all the circumstances that would lead to a possible breach under the Convention[488].

Exactly like solitary confinement, if these instruments are used for a justified cause, and in a proportionate way, they can be carefully used in cases of lawful arrest, to provide security within prison establishments and their forcible used can be legitimate in cases of self-defense[489]. However, due to their high-intrusive nature these instruments pose a possible risk for torture, inhuman or degrading treatment. If used in an unlawful and disproportionate way, they can become torturing instruments which deliberately cause pain and humiliation[490].

These methods of restraint differentiate themselves according to their characteristics, technology and side of application. They range from low technological instruments, such as handcuffs or ankle cuffs to the bodily electric shock restraints[491]. Some of these means have been increasingly condemned by international law. In particular body- worn and electric shock devices with remote control have been found to inflict severe mental and physical suffering that usually amount to a breach of article 16

[486] Ibid., 62.
[487] Murdoch, Jiricka, *Combating ill-treatment in prison*, 66.
[488] ECtHR, 16 December 1997, *Raninen v. Finland*, Application No. 152/1996/771/972, paragraph 56.
[489] See paragraph 1 of the Penal Reform International Factsheet, "Instruments of restraint-addressing risk factors to prevent torture and ill-treatment", available at https://www.apt.ch/sites/default/files/publications/factsheet-5_use-of-restraints-en.pdf [accessed 20 June 2021]; Murdoch, *The Treatment of Prisoners*, 252.
[490] See paragraph 1of the Penal Reform International Factsheet, "Instruments of restraint".
[491] Ibid.

of the CAT and article 3 of the ECHR. Both the SMR and the CPT have condemned the use of these alternative instruments of security during prisoners' movements according to the general prohibition of torture, inhuman or degrading treatment enshrined in the major Conventions' texts[492]. In its 2nd General Report, the CPT found that

> "In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Further, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners"[493].

Beyond the mere use for torture, methods of restraint are also typical to intimidate prisoners in order to extract confessions during interrogations[494]. The use of these instruments should never be applied as a form of punishment, rather they should be carefully prescribed on medical and exceptional ground[495].

The principle of proportionality and lawfulness applies also to the common use of handcuffs. Handcuffing a person must be proportionate and lawful, otherwise it can cause humiliating situations[496]. For example in the case of Erdoğan Yağiz v. Turkey, the Court found a violation of article 3 of the ECHR, since the applicant complained he was arrested and handcuffed at the working place in front of his family, even though there were no founded presumptions he would be violent. This clear humiliation actually has serious psychological consequences on the prisoner[497].

In order to allow a close examination whether forcible instruments have been legitimate and appropriate proper recording of the use of restraints should be compulsory[498]. It goes without saying that methods of restraint should not be used as discriminatory tools on the most vulnerable group of inmates. In the Hénaf v. France, the ECtHR found a violation of article 3, since a 74-year-old prisoner was shackled, the night before his operation, to his hospital bed not allowing him any movement or sleep. Taking

[492] Penal Reform International, *Balancing security and dignity in prisons*, 10-1.
[493] See paragraph 53 of the CPT's 2nd General Report.
[494] Murdoch, Jiricka, *Combating ill-treatment in prison*, 66.
[495] Murdoch, *The Treatment of Prisoners*, 253.
[496] Murdoch, Jiricka, *Combating ill-treatment in prison*, 68.
[497] ECtHR, 6 March 2007, *Erdoğan Yağiz v. Turkey*, Application No. 27473/02.
[498] Murdoch, Jiricka, *Combating ill-treatment in prison*, 68.

into consideration the age and the absence of an imminent risk of violence the Court reiterated that the use of restraints constituted inhuman treatment[499].

The use of forcible instruments on women during labor or delivery has been explicitly prohibited by the 2010 Bangkok Rules. Despite the several condemnations, shackling women during gynecological or while giving birth seems to be an anchored custom in several countries. Among them, the liberal and human rights promoting USA are probably the most striking. In 1999 Amnesty International published a report in which all these unlawful acts were highlighted generating considerable outrage particularly on the fact that female inmates were forced to give birth while handcuffed and with a male officer in front of them as a guard[500].

Maintaining order and discipline has always been the main aim within a prison establishment, however the way these instruments are used sometimes leads to a breach under international human rights law for their humiliating and painful features. Methods of restraint can be used only when completely lawful and proportionate. However, to prevent ill-treatments and humiliating circumstances deriving from the misuse of these restraints, state authorities should either abolish their use in certain completely unlawful circumstances, or find possible alternatives in line with human rights standards, such as fabric leg restraints that are more humane[501].

2.3 The routine of body searches

In the prison environment the practice of body searching may be necessary for security measures both on visitors and on prisoners themselves. Indeed, if carried out in

[499] ECtHR, 27 November 2003, *Hénaf v France*, Application No. 65436/01.

[500] See the Amnesty International document "USA: "Not part of my sentence" : Violations of the human rights of women in custody", available at https://www.amnesty.org/en/documents/amr51/001/1999/en/ [accessed 20 June 2021], the same document was then updated in 2001 in a report entitled "Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women"; Gainsborough, "Women in Prison, 290; for further references see also https://www.ohchr.org/EN/NewsEvents/Pages/dprk-report.aspx [accessed 20 June 2021] and https://www.theguardian.com/us-news/2020/jan/24/shackled-pregnant-women-prisoners-birth [accessed 20 June 2021].

[501] In 2013 the Thai government banned the practice of shackling for all those detainees in death row at the highest security prison in Thailand, Bangkwang prison in Nontaburi Province. The announcement was a turning point for human rights values, since previously death row inmates had to wear 5 kg leg irons for 24 hours a day, including while sleeping and bathing. For further references see Penal Reform International, *Balancing security and dignity in prisons*, 11; See paragraph 3.2 of the Penal Reform International Factsheet, "Instruments of restraint".

a legitimate and professional way, it is particularly useful to prevent the contraband of dangerous and prohibited tools and drugs[502]. However, because of the intrusive nature of such a measure, it has the inherent risk of being particularly humiliating and painful for prisoners' privacy[503]. Indeed, the analogy between body search and common torture techniques is quite evident, since prison authorities can traumatize and certain methods degrading and inhuman, even if this is not the goal[504].

The practice of body searching must be conducted in a proportionate and justifiable way, only run by trained staff of the same sex of the prisoner, and without the physical presence of custodial staff[505]. For instance, in the Valašinas v. Lithuania case, the ECtHR found violation of article 3 of the ECHR amounting to degrading treatment, as the applicant was obliged to strip naked in the presence of a woman and his private parts have been examined with bare hands[506].

It is possible to identify three different types of searches. Pat-down search that is the most frequent in custody. It involves the physical inspection of the clothed body, and it must be carried out in a professional manner without committing unequivocal gestures. As a matter of routine, pat-down searches can be freely performed when inmates return from work, and in certain cases may also include the visual inspection of the mouth[507].

Strip search requires the inspection of unclothed bodies in a nonintrusive manner, and thus without any kind of physical contact between prisoner and prison officials. However, it may be possible that for hidden parts of the body, for instance testicles or the female genital area, the competent authority would ask the prisoner to show them. This further requirement is known in certain correctional establishments as "visual body cavity search" and still does not imply physical contact. However, strip searching imposed routinely is inherently risky. Contrary to pat-down search, it carries with it a certain degree of degrading and harassing nature. Indeed, in order to be lawful, it should be

[502] See paragraph 1 of the Penal Reform International Factsheet, "Instruments of restraint".
[503] Murdoch, Jiricka, *Combating ill-treatment in prison*, 64; See paragraph 1 of the Penal Reform International Factsheet, "Body searches. Addressing risk factors to prevent torture and ill-treatment", available at https://cdn.penalreform.org/wp-content/uploads/2016/01/factsheet-4-searches-2nd-v5.pdf [accessed 20 June 2021].
[504] Pétur Hauksson, "Body Searches: The Problems And Guidelines To Solutions", Document prepared for the meeting of the Medical Group of 5 November 2001, available at http://www.krim.dk/undersider/straffuldbyrdelse/rettigheder-afsoning/kropsvisitation-faengsler-mv-anbefalinger-cpt-2001.pdf [accessed 20 June 2021].
[505] Murdoch, *The Treatment of Prisoners*, 253.
[506] ECtHR, 24 July 2001, *Valašinas v. Lithuania,* Application No. 44558/98.
[507] Hernán Reyes, "Body searches in detention", in Dominique Bertrand, Gérard Niveau, *Médicine, Santé et Prison* (Chêne-Bourg, Suisse : Editions Médicine et Hygiène, 2006), 399.

previously authorized by the chief executive officer and conducted only in proper hygienic conditions always considering the vulnerability and individuality of the victim[508]. An example of this is given by Van der Ven v. The Netherlands case, in which the ECtHR examined the routine practice of strip searching in a high-security prison. In this context the Court found that the imposition of frequent searches, together with the stringent correctional security measures, amounted to inhuman or degrading treatment. The high security prison is not *per se* incompatible with the Convention's provisions, but in this case correctional conditions and the weekly strip searches , conducted without any justifiable scope, diminished the applicant human dignity causing him feelings of anguish and inferiority that humiliated and debased him[509]. Another relevant case brought in front of the ECtHR is Iwanczuk v. Poland, in which the applicant claimed that before he could exercise his right to vote he was subjected to strip searching. Officials obliged him to undress and humiliated and mocked him about his body. When he refused to strip naked, he had been denied voting. In this case the ECtHR found violation of article 3 amounting to degrading treatment, since there was not any plausible justification to order strip-searching because the prisoner would not have been violent. Therefore, the guards' behavior was simply intended to humiliate the prisoner provoking him feelings of inferiority[510].

The last type of search, and surely the most physically and psychologically intrusive, is body-cavity search. This kind of bodily inspection involves physical investigation of body orifices, such as rectal and pelvic examinations[511]. Because of the particularly intrusive nature of strip and body-cavity searches, they should be used as last resort and only after a series of previous corporal examinations, perhaps with metal detector or pat-down search, but most importantly these measures should be formally written authorized, and not imposed by force, since they are likely to amount to ill-treatments[512]. Because of its cruel methods body-cavity searching is always degrading, and it may have a greater impact every time sexual and religious taboos are concerned.

[508] Reyes, "Body searches in detention",400-3; see paragraph 3.1 of the Penal Reform International Factsheet, "Body searches".
[509] ECtHR, 4 February 2003, *Van der Ven v. The Netherlands*, Application No. 50901/99.
[510] ECtHR, 15 November 2001, *Iwanczuk v. Poland*, Application No. 25196/94.
[511] See paragraph 1 of the Penal Reform International Factsheet, "Body searches".
[512] Reyes, "Body searches in detention", 405-8.

Only when strictly necessary, it must be explained in a comprehensive manner to the prisoner and conducted in a as human as possible way[513].

When conducting strip and body-cavity searches, the active figure of the doctor has always been controversial. During the 29th World Medical Assembly a series of guidelines for doctors concerning torture, cruel, inhuman or degrading treatment or punishment have been adopted. The final Declaration of Tokyo acknowledges that all medical doctors should not be involved with prison body searches, since this practice should be conducted only by correctional officials. However, it has also been affirmed that such searches should be carried only by prison authorities who have sufficient medical knowledge to perform searching safely[514]. Also, the CoE has issued a series of guidelines on body-cavity searches, affirming that

> "Body searches are a matter for the administrative authorities and prison doctors should not become involved in such procedures. However, an intimate medical examination should be conducted by a doctor when there is an objective medical reason requiring her/his involvement"[515].

The complete clinical task of the doctor is independent from searching methods. His/her task is to supervise prisoner's health for which he/she is medically responsible, and to alleviate prisoner's possible distress[516].

The practice of strip and body-cavity searches should never be conducted over vulnerable groups, among whom women are surely the most exposed to harassment and violence caused by improper touching during searches. The UN Bangkok Rules have recognized the central importance of security and violence prevention in prison, dedicating specific rules (from rule 19 to 21) to ensure female prisoners' dignity and respect. As these measured can be very distressing, especially for women victims of sexual abuses, they should be conducted in a lawful way by same-sex officials[517]. These measures are required, every reasonable effort should be done in order to make the event less dehumanizing as possible and to minimize embarrassment. Intrusive search, which

[513] Ibid.,414.
[514] See paragraphs 11-12 of Hauksson, "Body Searches".
[515] See paragraph 72 CoE's Recommendation No. R (98), available at https://rm.coe.int/09000016804fb13c [accessed 20 June 2021].
[516] See paragraphs 11 of Hauksson, "Body Searches".
[517] Barzanò, "The Bangkok Rules", 91-2.

consists of vaginal inspections should be conducted only when absolutely necessary in a way to preserve woman's dignity, safety and intimate nature[518].

Even if many cases of body searching violence and ill-treatments have been brought in front of courts, this practice is still widely recurrent. In 2012 the Special Rapporteur on violence against women reported that in the Australian Farlea prison, female inmates were treated like beasts[519]. They were obliged to weekly strip searching, when naked they had to touch their toes, to spread cheeks, to take their tampons out, and to piss in a bottle in front of correctional authorities. And again, during its visit in Greece in 2001, the CPT found that many women, who refused vaginal examination upon their arrival, were closed in isolation for several days and forced to take laxatives[520].

Body searches are an example of measures that, while lawful in certain cases, can constitute ill-treatment or even torture in others[521]. To prevent violence and protect prisoners' rights alternative and less intrusive screening methods should be adopted by prisons' authorities, for instance ultrasound examinations or electronic body scanning, which guarantee the same level of security and discipline in the correctional system[522].

3. Sexual violence as a form of torture and ill-treatment

Sexual harassment is probably one of the major forms of violence in prison[523]. The expansion of the prison population has not been an event without consequences. Apart from prison logistical problems, deriving from overcrowding and administrative deficiencies, sexual victimization in prison is a field that has been particularly unnoticed[524].

[518] See paragraph 6 of the CPT's Factsheet "Women in prison".
[519] Penal Reform International, *Balancing security and dignity in prisons*, 12.
[520] Ibid.
[521] See paragraph 4 of the Penal Reform International Factsheet, "Body searches".
[522] See paragraph 6 of the CPT's Factsheet "Women in prison"; see paragraph 1 of the Penal Reform International Factsheet, "Body searches".
[523] Daniel Lockwood, "Issues in Prison Sexual Violence", *The Prison Journal*, Vol. 63, No. 1 (April 1983): 73.
[524] Tonisha R. Jones, Travis C. Pratt, "The Prevalence of Sexual Violence in Prison. The State of the Knowledge Base and Implications for Evidence-Based Correctional Policy Making", *International Journal of Offender Therapy and Comparative Criminology*, Vol. 52, No. 3 (June 2008): 281.

Prison sexual violence, which can include rape, sexual coercive behaviors, sexual harassment, and sexual extortion, can cause permanent physical and psychological traumas that can lead also to the death of the victim[525]. Gender-based violence in prison is crystal clear. Inmates are conceived devoid of rights and power, and thus regularly victimized. Victims, who are targeted especially for their weakness and social status are likely to be repeatedly victimized and they can sometimes even react by becoming a sexual aggressor, continuing this vicious cycle also outside prison walls[526].

In many cases, sexual violence can be perpetrated either by prison staff or by inmates' gang rape, and it is not necessary that women are the only victims, on the contrary also men can suffer from sexual victimization, regardless their sexual orientation. Whenever committed by prison authorities or prisoners, sexual violence and in particular rape might be recognized internationally as a form of torture and ill-treatment[527].

Initially, sexual violence in prison was treated as a taboo. This behavior was simply described as a heterosexual or homosexual activity conducted because of the sexual needs derived from confinement. In this light, the distinction between voluntary sexual acts and coerced sexual violence is ambiguous. In reality the act of sexual harassment is vaster than what can actually appear. Perpetration of acts of sexual violence is not imposed by one's own sexual needs, rather by the perpetrator's will to impose his/her power and control over a victim. The subsequent feeling of gratitude, deriving from sexual assaults, reinforces perpetrator's personal worth and control within the prison establishment[528].

The perpetrator may employ several methods to control his/her victims that range from physical force to mental manipulation. They are used to resort to weapons, or even psychological tactics can be engaged, such as "conquest and control, revenge and retaliation, sadism and denigration, conflict and counteraction, and status and

[525] Robert W. Dumond, "Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79b the Prison Rape Elimination Act of 2003, The Symposium", *Journal of* Legislation, Vol. 32, No. 2 (2006): 144.
[526] Thomas Noll, "Sexual Violence in Prison", *International Journal of Offender Therapy and Comparative Criminology*, Vol. 52, No. 3 (June 2008): 251.
[527] See page 1 of the International Summary "Sexual Abuse in Prison: A Global Human Rights Crisis", issued by Just Detention International, available at https://justdetention.org/wp-content/uploads/2015/11/International_Summary_English.pdf [accessed 20 June 2021].
[528] Jones, Pratt, "The Prevalence of Sexual Violence in Prison.", 282.

affiliation"[529]. This seductive and manipulative process may have a serious impact upon prisoners' psyche, provoking feelings of shame, anxiety, guilty and humiliation[530].

Sexual violence in prison can take many forms. In some cases, inmates enter into a forced sexual relationship in order to obtain protection but in many prisons, gangs or personnel force fragile inmates to engage in forced prostitution. It is also possible that prison rape is perpetrated in exchange for food, drugs or favorable treatment, or even used as a form of political repression. Under prison circumstances, the power that authorities exercise over inmates is so strong that it is almost impossible for prisoners to refuse their demands, since inmates result to be completely devoid of his/her freedom of choice[531].

Rape in prison is certainly one of the most significant threats to inmates' lives, which is difficult to effectively quantify. Often, sexual victimized prisoners refrain from telling their stories, remaining silent. Sometimes, this is due to their feelings of shame and embarrassment, but this is often caused by the fear of being assaulted once again, if they break the prison's code by telling the authorities about these violent events[532].

Anyway, in international law it is generally recognized that because of its painful and suffering characteristics, rape may amount to torture. The emblematic recognition of sexual violence as ill-treatment can be found in both the ICTY and ICTR statues[533]. Particularly, in the Prosecutor v. Delalic case, the Court recognized

> "[...] rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting"[534].

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[529] Dumond, "Impact of Prisoner Sexual Violence", 149.
[530] Ibid.
[531] See page 1 of the Just Detention International Factsheet "Sexual Abuse in Prison: A Global Human Rights Crisis".
[532] M. Dylan McGuire, "The Impact of Prison Rape on Public Health", *Californian Journal of Health Promotion,* Vol. 3, No. 2 (2005): 72.
[533] Livio Zilli, "The crime of rape in the case law of the Strasbourg institutions", *Criminal Law Forum*, Vol.13 (June 2002): 263.
[534] ICTY, 16 November 1998, *Prosecutor v. Zenjnil Delalic,* Judgement IT-96-21-T, paragraph 495.

In conceiving rape as torture, it is also noteworthy to examine the Akayesu judgement of ICTR. This was the first ever judgement of an international tribunal concerning the crime of genocide, and it is unprecedented for two main reasons. First, this was the first attempt to define rape in international law, in which the ICTY stated

> "[...] Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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"[535].

And secondly, because rape and sexual violence are recognized as constitutive elements of genocide, whether perpetrated with the specific aim to destroy, in whole or in part, targeted individuals[536].

The Rome Statute of the International Criminal Court makes also reference to the crime of rape. In its articles 7 and 8, rape is codified as both a crime against humanity and a war crime, and in this analysis what is particularly interesting is that rape and sexual violence are no more considered as mere crimes that destroy only the honor and individuality of the victim, rather they acquire a deeper level of gravity[537].

In 1986, the UN Special Rapporteur on Torture acknowledged prison rape as a form used in jail to extract confessions and humiliate prisoners[538]. The same approach was used also by the Inter-American Court on Human Rights. In the Miguel Castro-Castro Prison Case, the Court took a broad view of the concept of rape, considering not only "non-consensual sexual vaginal relationship, as traditionally considered", but also "act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member"[539].

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[535] ICTR, 2 September 1998, *Prosecutor v, Jean-Paul Akayesu,* Case No. ICTR-96-4-T, paragraph 597.
[536] Zilli, "The crime of rape", 254.
[537] See articles 7 and 8 of the Rome Statute available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [accessed 20 June 2021];Zilli, "The crime of rape", 263.
[538] See paragraph 119 of the Special Rapporteur on Torture Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at https://ap.ohchr.org/documents/E/CHR/report/E-CN_4-1986-15.pdf [accessed 20 June 2021].
[539] Inter-American Court of Human Rights, 25 November 2006, *Miguel Castro-Castro Prison v. Peru*, Series C No. 60, paragraph 310.

In this case the Inter-American Court cited also the famous case of the ECtHR, Aydin v. Turkey that will be analyzed as a milestone in the following subchapter[540].

Over years, the ECtHR has addressed issues and renewed its interest relating the crime of rape as a breach of article 3 in a number of contexts. In relation to the offence of rape, it is quite clear that it satisfies the minimum requirements to be considered a breach of article 3 of the ECHR. This was clear since the applicability of the Convention's article to the case of Turkey v. Cyprus, in which acts of rape were perpetrated against civilians by Turkish forces. In its findings, the Commission found that the mass rape of Greek Cypriot women was not the result of sporadic acts, and that Turkish authorities did not take adequate measures to prevent rape from occurring[541]. Thus, sexual abuses and rape clearly outdo the minimum threshold require to apply article 3, however not all acts of rape amount to torture[542]. In Turkey v. Cyprus case, despite several indignation for this failure, the Commission found that mass rape amounted to inhuman treatment despite the striking evidence of the degree of suffering and pain endured by victims[543].

Within the prison system, if events of sexual abuses occur, direct state's responsibility arises. However, it is important to clarify that rape can occur also in the private sphere, and this is the case of domestic violence or rape perpetrated by non-state's actors. In these contexts, also private acts of sexual harassment can amount to torture, or inhuman or degrading treatment. The due-diligence standards are crucial in assessing the responsibility of the state for private individuals' actions, since the state has the obligations to prevent, prosecute and punish the offences committed by private actors, and, at the same time, to provide adequate reparation to the victim[544].

The ECtHR recognizes that in order to amount to torture, rape must extend far beyond physical injuries. However, this approach is quite misleading. Many rapes do not

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[540] Rodley, Pollard, *The Treatment of Prisoners*, 97.
[541] ECtHR, 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94; Clare McGlynn, "Rape, Torture and the European Convention on Human Rights", *The International and Comparative Law Quartely*, Vol. 58, No. 3 (July 2008): 570; Zilli, "The crime of rape", 252.
[542] McGlynn, "Rape, Torture", 579.
[543] The Commission's findings in relation to mass rape were dreadful. Women aged up to eighty were savagely raped, Greek Cypriot girls were forced to prostitution, many women remained pregnant after being raped, and there were also clear evidenced of physical a psychological damage caused by rape also perpetrated in public. For further references see Zilli, "The crime of rape", 250-1.
[544] See page 15 of *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences*, available at https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf [accessed 20 June 2021]; Felice D. Gaer, "Rape as a Form of Torture: The Experience of the Committee Against Torture", *Cuny Law Review*, Vol. 15, No. 2 (Summer 2012): 301.

leave physical injuries, but this does not mean that they are not brutal. Sometimes psychological wounds are even more piercing, causing serious post-traumatic stress disorder. Further, rape's long-term consequences can have effects also on future personal relationship and one's own individuality and behavior[545].

In this regard, the Court's approach should aim at gaining a more expansive view but, at the same time, this strategy can be a double-edged sword. On the one hand, the Court should recognize the several ways through which torture can be perpetrated, including sexual violence and rape. On the other hand, mainstreaming rape as a form of torture can be a danger, since such evil act is likely to be easily forgotten and less easily conceived as a gender-based violence[546].

Responding to prison sexual violence is a moral imperative in the best interest of the society, as most of prisoners will reintegrate in the outside community, and if the vast problems behind bars are not completely solved, they will be borne to the rest of the population. In this regard, the US have tried to solve the issue of prison rape through the adoption of the Prison Rape Elimination Act which, which has apparently decreased the rate of sexual abuses in the American prisons, while it has not completely level the discrepancy of people's indifference on the subject[547].

3.1 Rape as torture: the case of Aydin v Turkey

The case of Aydın v. Turkey[548] can be considered as a milestone in the recognition of rape as torture. Indeed, for the first time the ECtHR considered an act of rape amounting to torture and the progressive judgement was positively embraced by the international community as the development of proper human rights norms prone to criminalize perpetrators of sexual abuses[549].

The case, declared admissible by the Commission on 28 November 1994, concerned the rape in the state of custody of the seventeen years old Şükran Aydın, a

[545] McGlynn, "Rape, Torture", 571-2.
[546] Ibid., 579.
[547] Dumond, "Impact of Prisoner Sexual Violence", 161-3.
[548] ECtHR, 25 September 1997, *Aydın v. Turkey*, Application No. 57/1996/676/866.
[549] McGlynn, "Rape, Torture", 565.

Turkish citizen of Kurdish origins[550]. On 29 June 1993, a group of village guardians and of the Turkish gendarmerie arrived at her village. Four of them questioned her family concerning recent visits to their house by some members of the Workers' Party of Kurdistan (PKK), and after being insulted and threatened the applicant, her father and her sister-in-law were brought blindfolded to Derik gendarmerie headquarters[551]. Once taken into custody, she was separated from her relatives and her forcible detention lasted three days, during which "she was repeatedly beaten, sprayed with water while naked and when blindfolded raped"[552]. Before her release, she was forced to return to the room where she was raped, and there she was beaten by several members who threatened her not to tell anyone what they had committed[553]. When the applicant return to her village, she reported to the public prosecutor and to a local human rights association the mistreatments she suffered, and after being visited by a doctor it was confirmed she lost her virginity during the sexual assaults and that her "hymen was torn and that there was widespread bruising around the insides of her thighs"[554].

The case was brought in front of the ECtHR, which was not only asked to consider whether the perpetrated acts amounted to a possible breach of article 3 of the ECHR, but also to contemplate applicant's rape as a form of discrimination because of her race and ethnicity[555].

Before dealing with the applicant's allegations, the Commission undertook a series of examinations of the facts, since there was not any domestic determination of the events on which it could rely on[556]. After having analyzed oral evidences, several applications and the results of gynecological visits, the Commission stated that

> "In rape cases, the nature of the crime is often such that the credibility of the complainant is of particular importance. The Commission has not been persuaded of the existence of any motivation which would induce the applicant to lie and her family to support a fabricated story of this kind. On the contrary, both the applicant and her father were credible and convincing

[550] ECtHR, 25 September 1997, *Aydın v. Turkey*, Application No. 57/1996/676/866, paragraph 13.
[551] Ibid., paragraphs 16-18.
[552] McGlynn, "Rape, Torture", 567.
[553] ECtHR, 25 September 1997, *Aydın v. Turkey*, Application No. 57/1996/676/866, paragraph 20.
[554] Ibid., paragraphs 23-24.
[555] Zilli, "The crime of rape", 259.
[556] Report of the European Commission on Human Rights, 7 March 1996, Şükran Aydın against Turkey, paragraph 163.

> in their answers to questions and impressed as people who had suffered distressing events. The Commission regards the expression "dirty things" as a euphemism for sexual acts. It considers that the applicant's oral testimony regarding "dirty things" while naked can be considered in its context to support her statement to the public prosecutor and it would note that the Government do not deny that she complained of rape to the public prosecutor"[557].

The Commission's report highlights how "an article 3 finding would be based on the beyond any reasonable doubt standard of proof[558]. In its report, the Commission found that there had been a violation of article 3 of the ECHR, and with respect to her rape it reported:

> "[...] the nature of such an act, which strikes at the heart of the victim's physical and moral integrity, must be characterised as particularly cruel and involving acute physical and psychological suffering. This is aggravated when committed by a person in authority over the victim. Having regard therefore to the extreme vulnerability of the applicant and the deliberate infliction on her of serious and cruel ill-treatment in a coercive and punitive context, the Commission finds that such ill- treatment must be regarded as torture within the meaning of Article 3 (Art. 3) of the Convention"[559].

Sitting as a Grand Chamber, the Court decided that Turkey was in violation of articles 3 and 13 of the ECHR. In particular, recalling the Commission's findings, the Court's judgement confirmed that the degree of pain and suffering the applicant experienced while in detention, specifically her rape, amounted to torture[560]. The judgement of the Court states that

> "the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court

[557] See paragraph 180 of the Report of the European Commission on Human Rights.
[558] See paragraph 163, iii of the Report of the European Commission on Human Rights; Zilli, "The crime of rape", 260.
[559] See paragraph 189 of the Report of the European Commission on Human Rights.
[560] McGlynn, "Rape, Torture", 568.

> would have reached this conclusion on either of these grounds taken separately"[561].

In this case, the Court gave particular emphasis to some crucial factors that lead to the recognition of rape as a form of torture. Particularly, the fact that rape had been committed by state's agents with the intent and purpose to extract information, and the fact that rape happened while she was in detention, where the status of the detainee is usually exploited due to his/her weakness and vulnerability by the perpetrator[562]. Also, the CPT played a leading role in the recognition of mistreatments in police custody and detention systems, since in its public statement on Turkey it found the recurrent use of torture and ill-treatment against detainees[563].

As the applicant argued in her application to the Commission, her rape can be considered also from the point of view of a gender-based violence. However, such conceiving is absent in the Strasbourg judicial judgements, since her rape as a form of discrimination on the base of race and ethnicity is omitted[564].

Given the absolute nature of the prohibition of torture enshrined in article 3, whenever an act of torture is committed the state is required to promptly start a thorough and effective investigation into the acts committed. Since the public prosecutor did not act immediately to investigate the applicant's complaints, and did not consider the gravity of the crime suffered, the Court found Turkey in violation of article 13 affirming

> "the absence of an independent and rigorous investigative and prosecution policy, the prevalence of intimidation of complainants, their advisers and witnesses, and the lack of professional standards for taking medical evidence"[565].

It is possible to affirm that the case Aydin v. Turkey represents a triumph in the recognition of rape, perpetrated by state's officials in State detention, as a form of torture.

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[561] ECtHR, 25 September 1997, *Aydın v. Turkey*, Application No. 57/1996/676/866, paragraph 86.
[562] Ibid., paragraph 83; McGlynn, "Rape, Torture", 577-580.
[563] ECtHR, 25 September 1997, Aydın v. Turkey, Application No. 57/1996/676/866, paragraph 49.
[564] Zilli, "The crime of rape", 261.
[565] ECtHR, 25 September 1997, *Aydın v. Turkey*, Application No. 57/1996/676/866, paragraph 94.

Nevertheless, the Court's jurisprudence has developed, starting to recognize the rape not only as a form of torture that can be perpetrated only by state's authorities, but also committed by private individuals in the domestic sphere[566].

3.2 The Prison Rape Elimination Act

Inmates have always been considered a vulnerable and disenfranchised group in the US[567]. In particular, American prisoners' lives behind bars have always been characterized by several problems such as interpersonal violence, poor conditions of confinement, and deprivation of fundamental rights. Among those issues a particularly dark aspect, which have subsequently led to the adoption of the Prison Rape Elimination Act (PREA), is the problem of prison rape. A 2004 survey, conducted by the US Department of Justice, examines more than 2700 correctional establishments, and found 8210 allegations of sexual violence mainly caused by prison staff misconducts[568]. The US legal authorities and crime-control advocates have always tried to dismiss and hide the issue of prison rape depicting it as a manifest consequence of life in prison, however during years, it became more evident that sexual violence and rape in prison had particular complicated consequences not only for life in prison itself, endangered by the spread of sexual communicable diseases, but also for prisoners' lives once released, who are often affected by depression and attempt suicide[569].

Although prison rape was formally identified between 1930s and 1940s, the problem gained more attention only in the following years. The US Congress examined several data concerning the rate of sexual assaults in the prison system and the total number of people affected by violent sexual behaviors. What resulted was a high incidence of rape in prison, and of prisoners who were physically and psychologically traumatized by such violence. Clearly, rape behind bard can be perpetrated by group of inmates or by prison personnel, but what is undeniable is that a lack of staff training in

[566] McGlynn, "Rape, Torture", 594-595.
[567] Robert A. Schuhmann, Eric J. Wodahl "Prison Reform through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act", *Criminal Justice Policy Review*, Vol. 22, No. 1 (2011): 111.
[568] R. Alan Thompson, Lisa S. Nored, Kelly Cheeseman Dial, "The Prison Rape Elimination Act (PREA) An Evaluation of Policy Compliance With Illustrative Excerpts", *Criminal Justice Policy Review*, Vol. 19, No. 4 (December 2008): 414-5.
[569] Ibid., 415.

the prevention of rape can be a further alarming element that may lead to the sexual violence perpetration. To combat this problem, at least in the US prison system, the PREA was adopted by George W. Bush and became law on 4 September 2004. This federal mandate has been created to put an end to the non-recognition a non-criminalization of rape, conceiving a national understanding of the crime, useful and proper to establish standards to prevent and treat prison rape[570].

For the purposes of its creation and mandate the PREA has coined its own standard definition of rape, defining it as

> "a) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will; b) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; c) or the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury"[571].

The PREA applies to all detention facilities of the US and it acts a new-zero-tolerance policy for sexual assault in the prison system as one of its main goals[572]. Beside the prosecution of rape perpetrators and the criminalization of the offence, the PREA provides funding for research and program development, and also to collect useful data about prison rape and sexual assault[573]. The statistical task of collecting data is assigned to two agencies: the Bureau of Justice (BJS) and the National Institute of Justice (NIJ). Particularly, the BSJ considers and collects data relating rates of prison rape throughout US prison establishments. The examined information takes into consideration the numbers of victims and perpetrators, in order to provide a better national overview of the

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[570] Richard Tewksbury, John C. Navarro, "Prison Rape Elimination Act (2003)" in Kent R. Kerley *The Encyclopedia of Corrections* (Hoboken, USA: John Wiley & Sons, Incorporated, 2017), 1.
[571] See paragraph 30309, article 9 of the Prison Rape Elimination Act available at https://uscode.house.gov/view.xhtml?path=/prelim@title34/subtitle3/chapter303&edition=prelimn [accessed 20 June 2021].
[572] See paragraph 30302 of the Prison Rape Elimination Act.
[573] Aviva N. Moster, Elizabeth L. Jeglic, "Prison Warden Attitudes Toward Prison Rape and Sexual Assault Findings Since the Prison Rape Elimination Act (PREA)", *The Prison Journal*, Vol. 89, No. 1 (March 2009): 66.

issue[574]. Its first report was published in July 2005 and it uncovered 8210 allegations of sexual violence, with thirty-seven per cent of them relating non-consensual sexual acts among inmates[575]. On the other hand, the NIJ is charged with establishing a national clearinghouse of information about prison rape, and to push the PREA's aims by providing educational programs oriented to train federal and local prison authorities, making them more aware on the subject[576].

Two other important bodies responsible for the prevention of prison rape are the National Institute of Correction (NIC), which is responsible for training programs for prison authorities concerning rape prevention, and the National Prison Rape Elimination Commission (NPREC), composed of nine members, whose assignment is to study the impact of prison rape and developing new standards[577].

Further, in order to avoid the five per cent reduction of federal prison funds, each state has to comply with the national standards enshrined in the PREA, showing that each correctional department is in compliance with them[578].

The PREA is surely an important achievement in the fight against rape behind bars at national level. For this reason, more states should adopt *ad hoc* measures to oppose this recurrent phenomenon. Nevertheless, public opinion and a number of organizations recognized the intention of PREA, although well-founded, too broad. The Just Detention International (JDI) agency has recognized a lack of methodology in the reports and also a number of underreported testimonies of raped inmates[579]. Moreover, it is possible to see general difficulties in complying with national standards. Some federal states are moving too slowly in criminalizing and preventing prison rape acts, perhaps because they do not have the organizational correctional units capable to undertake development and implementation of PREA's proper policies[580].

[574] Navarro, "Prison Rape Elimination Act (2003)",2.
[575] Moster, Jeglic, "Prison Warden Attitudes", 67.
[576] Schuhmann, Wodahl "Prison Reform", 113.
[577] Schuhmann, Wodahl "Prison Reform", 113; Navarro, "Prison Rape Elimination Act (2003)",2.
[578] Thompson, Nored, Dial, "The Prison Rape", 416; Schuhmann, Wodahl "Prison Reform", 113.
[579] Navarro, "Prison Rape Elimination Act (2003)", 3.
[580] Thompson, Nored, Dial, "The Prison Rape", 416-7.

4. The detention centers as a risk area of the crime of torture in the twenty-first century: the Abu Ghraib scandal

The crime of torture has been included in several international legal instruments, and it is certainly seen as one of the most successful achievements in the field of the protection of human rights. Nevertheless, during the last decades the reactions to terrorist attacks have jeopardized the absolute prohibition of torture, which came under attack following the countermeasures taken for the "War on Terror"[581].

In the context of counter-terrorism strategies, the US has been a leader worldwide in proposing a series of apparently effective techniques used to oppose the international violation of the use of torture. Indeed, it is noteworthy to highlight that, after the Twin Towers attack, in order to protect and safeguard national security, the US had made any effort to derogate the absolute prohibition of torture in the name of national security interests[582].

The War on Terror has become the main goal of many national security policies throughout the world since 9/11. The UK, for instance, responded to the terrorist attacks by enacting the Anti-terrorism Crime and Security Act in 2001, which allows the British government to detain pending deportation any non-British individual, suspected to be an alleged terrorist, even if this deportation is prohibited[583]. And again, after the bombing attacks of July 2005 the British government concluded three Memoranda of Understandings with Jordan, Libya and Lebanon which provided diplomatic assurances concerning the use of torture and ill-treatments[584]. Together with Sweden, Britain proposed the development of these diplomatic assurances also to the CoE, which were rejected after strong criticism and worries by the main bodies[585].

What happened in the Abu Ghraib prison is no more a secret. In April 2004 the entire world was shocked by the publication of photos showing the abuses and torture practices the US military personnel systematically conducted on Iraqi prisoners. The shocking breaches of human rights in the name of "War on Terror", the American use of heinous practices, such as sexual violence, deprivation of food and water, physical and

[581] Nowak, "Obligations of the States", 17; Cataldi "La tortura è tra noi?", 121.
[582] Cataldi "La tortura è tra noi?", 172.
[583] Anwukah, "The Effectiveness of International Law", 3.
[584] Nowak, "Obligations of the States", 19.
[585] Ibid.

psychological torture resulted in several denunciations by states, international organizations and by CIA's interrogators themselves, who worried about possible recriminations and legal actions[586]. Thus, what came to the surface has been the image of a nation, which always tried to promote fundamental values and equality, miserably failing in protecting human rights.

What the US tried to do at first glance was to completely deny what state's officials perpetrated behind the Iraqi prison's walls. However, evidence shown in the photos was incontestable. The horrifying scenes photographed by the unsophisticated and arrogant soldiers documented once again the huge defeat at international level of the US. At this point, in order to gain credibility from the public opinion, the US solution was to minimize the denounced episodes, attributing them just to few "bad apples" within the military state apparatus, and therefore these unexpected events would not have questioned the prestige and excellence of the US state army[587].

It is certainly true that the US has been involved in these dynamics in the deep, and it is almost impossible to deny them. First of all, the prison of Abu Ghraib was under the US jurisdiction when these acts happened and, as a consequence, the US Constitution, the ICCPR and the CAT were fully applicable to the treatment of prisoners[588]. Indeed, even though the US asserted several times that the principle of non-refoulement enshrined in article 3 of the CAT was not applicable to detainees outside the national boundaries, the Committee Against Torture rejected this assertion[589]. It follows that the practice of extraordinary rendition is subjected to the principle of non-refoulement too. In practice, the detainees were apprehended and taken to clandestine "black sites" in defiance of the law, where they were not only denied of a fair process and *habeas corpus,* but also tortured[590]. However, article 3 of the CAT is fully applicable also when detainees under the US custody are transferred to Iraqi authorities. Examining the text of the article, the

[586] Lauren, *The Evolution of International Human Rights*, 277.
[587] Marchesi, *Contro la tortura.*, 15; Marchesi, "Tortura.", 542-3.
[588] Nowak, "Obligations of the States", 18.
[589] Ibid.,20.
[590] The system adopted by the US was called HVD Program. It was also known as Rendition Detention program (RDI Program) through which alleged terrorists were subjected to specific methods of interrogation, including torture. Another key factor of this program was its use of black sites for the commission of torture. Indeed, the state's authorities of one country detained alleged terrorists in another country, kidnapped and transferred to a second country where they were subjected to the same torturing interrogation techniques. For further references see Anwukah, "The Effectiveness of International Law", 13; Lauren, *The Evolution of International Human Rights*, 277.

terms "another state" must be interpreted as "another jurisdiction", otherwise the US could easily circumvent their obligations by sending alleged terrorists first to extraterritorial detention facilities under their jurisdiction, and then to domestic authorities without any risk of being incriminated for torture[591].

Apart from denying the fully implementation of the main convention, the US tried also to justify the recurrent use of torture during interrogations and in the prison of Abu Ghraib. The Bush administration did whatever in its capacity to overturn the situation, confirming the use of torture essential to avoid possible threats to national security interests. In August 2002, the Office Legal Counsel (OLC) of the US Department of Justice issued two memoranda which tried to give an alternative interpretation to the federal law concerning the prohibition of torture, more specifically to paragraphs 2340 and 2340A of the US Code[592]. The well-known "Bybee- Yoo Memorandum" formally authorized by the former defense secretary Donald Rumsfeld propose such a minimalist interpretation of the crime of torture, enough to make it prohibition an extreme phenomenon, almost nonexistent[593]. These "Torture Memos" were therefore seen as rules for interrogations techniques for prisoners in territories outside the US[594]. What the US succeed to do was to fix a higher threshold of physical pain and suffering to consider an act amounting to torture. The Bybee Memorandum of 1 August 2002 interprets in a questionable way also the possible justifications for the use of torture including self-defense, state of necessity and even the President's war powers[595]. The methods of interrogation used by the state officials are horrifying.

The impact of the photos of Abu Ghraib has been immense. The outrages shown are most of times attributable to dictatorship, and not to democracies, promoters of fundamental freedom and rights. Among the most impressive photos, the ones representing the several practices of torture are surely among the most debated. Prisoners were subjected to sleep and food deprivation, forced nudity, physical and psychological abuses, use of drugs to force confessions, electroshock, hanging, strangulation, and

[591] Nowak, "Obligations of the States", 20.
[592] See the paragraphs of the US Code available at https://www.law.cornell.edu/uscode/text/18/2340 [accessed 20 June 2021]; Weissbrodt, Heilman, "Defining Torture", 345.
[593] Marchesi, *Contro la tortura.*, 18
[594] Weissbrodt, Heilman, "Defining Torture", 345.
[595] Marchesi, "La Proibizione della Tortura", 19-20.

waterboarding[596]. Particularly, the latter consists of throwing on the face of the static victim simulating drowning. This technique has been long defended by authorities and by the Defense Office, which do not consider it as a form of torture, even if it was undoubtedly a clear breach of article 1 of the CAT[597]. Sexual humiliation and abuses were the order of the day in the Abu Ghraib prison. As the photos show, prisoners were obliged to assume degrading and sexual positions, and they were often submitted to a process of feminization which consisted of wearing female underwear or assuming the passive and subjugated role of women[598].

Combating terrorism implied compelling emotional responses that often are in contrast with the protection of human rights, however this goes beyond the purpose of the present research. What the events of Abu Ghraib have left to the current and future society is to show at which point human brutality can arrive. The fact that states are free to enact national *ad hoc* policies to fight terrorism does not mean that they do not have to comply with international obligations deriving from international law. These countermeasures have shown how the inderogability and absolute character of the prohibition of torture is in reality vague and not univocally understood[599]. The Obama administration adopted a completely different attitude than the previous president. On 22 January 2009 with an "Executive Order", Obama broke with all the previous regulations concerning the torturing interrogation practices that were in contrast with international law[600].

The impact of the damning photos and what a state like the US has done will not quickly vanish. However, the Abu Ghraib events can be seen as a model for the analysis and understandings o of other similar acts of torture, which happened also in the Italian correctional establishments. In fact, Italian officials as well, when facing charges of violation of the international prohibition of torture seem to follow the same scheme as the ones of Abu Ghraib by trying to minimize or even justify ill-treatment[601].

[596] Kenny, "The meaning of torture", 151; Lauren, *The Evolution of International Human Rights*, 277; Anwukah, "The Effectiveness of International Law", 10, 18.
[597] Sossai, "The Accountability Gap", 59.
[598] Eileen L. Zurbriggen, "Sexualized Torture and Abuse at Abu Ghraib Prison: Feminist Psychological Analyses", *Feminism and Psychology*, Vol. 18, No. 3 (2008): 306-7.
[599] Anwukah, "The Effectiveness of International Law", 4-5.
[600] Marchesi, "La Proibizione della Tortura", 20.
[601] Marchesi, *Contro la tortura.*, 20.

CHAPTER IV

The inadequacy of the Italian system in the fight against violence in prisons

1. The Italian deficiencies under article 3 of the ECHR

Italy has always been in the spotlight of the ECtHR and CPT for its violations of article 3 in the correctional context, and this has been confirmed by the numerous cases that have been brought in front of the Court because of alleged violations of article 3 by the Italian state. In recent years the Italian state has been imputed for cases falling within article 3, for instance the expulsion of aliens towards a country where they would be exposed to ill-treatment as in the Hirsi Jamaa and Others v. Italy[602], but in particular the correctional context, due to its complexity and dangerousness, has often been a crucial element in most cases in which Italy has been involved. Examples of this will be given throughout the chapter, but right at first glance it is possible to affirm that prison overcrowding that continues to be an important and serious problem behind the well-functioning of the Italian prison system[603]. Since the breaches of the Italian state under article 3 have been several and all distinguishable for their characteristics, in this last chapter the main violations of article 3 and some of the main cases in front of the ECtHR about the deficiencies of the prison system will be analyzed.

Generally speaking, the main human rights problems that concern the Italian prison system, and its quality of incarceration regards prison living conditions, the excessive and disproportionate use of force against detainees by state's authorities, the inefficient judiciary system, which because of its length it often does not provide adequate justice, and the recurrent incarceration of pre-trial convicted individuals[604]. International law strictly prohibits the practice of torture, and other cruel, inhuman or degrading treatment, but, as it will be analyzed throughout this final chapter, Italy must respect

[602] ECtHR, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09.
[603] Angela Colella, "La Giurisprudenza di Strasburgo 2011: il divieto di tortura e trattamenti inumani o degradanti (art. 3 CEDU)", *Diritto Penale Contemporaneo*, No. 3-4 (2012): 213.
[604] United States Department of State, 2012 Country Reports on Human Rights Practices - Italy, 19 April 2013, available at: https://www.refworld.org/docid/517e6e2214.html [accessed 20 June 2021].

international norms that has accepted by ratifying the major international conventions, and therefore it is not exonerated from the omission of these offences. Both NGOs and monitoring mechanisms, such as the HRC, the CPT and the Committee against Torture, have highlighted how occasionally state's authorities resort to this heinous practice against individuals behind bars, just to impose their authority and discipline[605].

The events of the Genoese G8, and the ones relating to the prison of Asti are just the tip of an iceberg of a series of multiple violations of human rights committed by the Italian state. Pursuant to all the vicissitudes that have involved Italy in front of the ECtHR is interesting and remarkable to evaluate how and when the Italian state has responded to one of its main deficiencies in the national criminal system: the absence of the crime of torture within the Italian Penal Code, which is has been recently included in the Penal Code, but although it has been tried to find a solution to this absence, the norm still presents contrasting elements that may lead to an incorrect implementation of the new rule.

1.1 The problem of the overcrowded prisons in Italy: the Sulejmanovic v. Italy and Torreggiani v. Italy cases

Living conditions inside prisons have always been a subject at the center of many ECtHR's judgements. The current trend of prison overcrowding, which is increasing over years, has led to the issue of a number of measures, such as recommendations or soft laws that have tried to attenuate the problem[606]. Many initiatives have been the result of the work of the European Committee on Crime and Problems (CDPC), the Council for Penological Co-operation (PC-CP), and the Council of Europe's Directorate-General on Legal Affairs (DG I), or recommendations by the Committee of Ministers, such as Recommendation N R (99) 2, to the CoE's member states[607]. Of particular relevance is the latter recommendation, also mentioned several times by the CPT itself. The first five basic principles of this recommendation, which were also used by the European Prison Rules, stress key assumptions useful to help the reduction of prison overcrowding, which "need to be embedded in a coherent and rational crime policy directed towards the

[605] Ibid., paragraph c.
[606] Murdoch, *The Treatment of Prisoners*, 209.
[607] Ibid.

prevention of crime and criminal behaviour, effective law enforcement, public safety and protection, the individualization of sanctions and measures and the social reintegration of offenders"[608].

On the other hand, the CPT has always been concerned with the issue of prison overcrowding since its "2nd General Report" of 1992[609]. According to CPT's view, European prisons have been facing an important increase in prison population that cannot convincingly be explained by the increasing crime rate, rather by the general attitude of enforcement agencies and judiciary systems to prefer sanctioning methods to softer alternative measures like semi-liberty, open regimes, prison leave or extramural placement[610]. The need to guarantee adequate living space for detainees should not be considered just for its own sale, rather it can be linked to other important parameters that are usually adopted assess a proper environment in prison[611]. Indeed, in its 30th Annual Report, the CPT states that the problem of prison overcrowding finally has a vast impact on what concerns many other aspects of ordinary life behind bars, such as "cramped accommodation", reduced access to out-of-cell activities, and also an overwhelm healthcare system[612].

However, initially the ECtHR did not recognize the inhuman living conditions, caused by overcrowding, as an element that could become a possible breach of article 3 of the Convention. Instead, the Court considered reduced living space as a violation of the Convention only when it was in combination with other risk factors for prisoners' lives, such as the length of detention, precarious hygiene and health conditions, the presence of lightning, heating and ventilation in the cells, the access to outdoor activities, and the loss of personal intimacy[613]. So, if on the one hand the ECtHR cared for living

[608] Recommendation No. R (99) 2 concerning prison overcrowding and prison population inflation, available at https://rm.coe.int/168070c8ad [accessed 20 June 2021].
[609] Murdoch, The Treatment of Prisoners, 211.
[610] See paragraph 28 of the "Developments concerning CPT Standards in Respect of Imprisonment".
[611] Federica Urban, "Il diritto del detenuto a un trattamento penitenziario umano a quattro anni dalla sentenza *Torreggiani c. Italia*", *Rivista di Diritti Comparati*, No. 3 (December 2017): 21.
[612] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *30th General Report of the CPT*, (Strasbourg, France: Council of Europe, 2021), paragraph 46.
[613] A. Tamietti, M. Fiori, F. De Santis, D. Ranalli, V. Ledri, "Note a margine della sentenza della corte europea dei diritti dell'uomo nel caso Torreggiani e altri", Rassegna Penitenziaria Criminologica, No. 1 (2013): 50-1.

conditions in which inmates have to live, on the other hand living space seemed not to be considered *per se* as a possible violation of article 3[614].

Between 2008 and 2010, several cases brought in front of the Court anticipated a change in facing the gravity of the problem. Because of the increase in the number of cases, the ECtHR has started considering the lack of adequate living space as the only element that can bring to a possible violation of article 3 of the Convention[615]. Relying both on European Prison Rules and CPT's standards, the Court jurisprudence follows the minimum living space requirements developed by the CPT that are 6m2 for a single occupancy cell and 4 m2 per prisoner for a multiple occupancy cell. According to the CPT, these measurements should exclude sanitary facilities and furniture inside the cell and

> "consequently, a single-occupancy cell should measure 6m² plus the space required for a sanitary annexe (usually 1m² to 2m²). Equally, the space taken up by the sanitary annexe should be excluded from the calculation of 4m² per person in multiple occupancy cells. Further, in any cell accommodating more than one prisoner, the sanitary annexe should be fully partitioned"[616].

The Court's jurisprudence, which takes for effective these parameters, has also affirmed that the lack of proper living space, unless extreme (less than 3 m2 per prisoner)[617] is not *per se* the only parameter that leads to a breach of article 3. Instead, the Court may consider other cumulative elements of prison conditions, for instance the lack of natural light or ventilation, that in addition to insufficient living space can provoke a violation under international law[618].

For what concerns Italy, also the national law establishes a series of parameters in line with the European ones. Article 6 of the N. 354/1975 Penitentiary Law does not provide specific measurements, but it simply states the necessity of prisoners to live in a

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[614] Ibid.; Urban, "Il diritto del detenuto", 26-7.

[615] Urban, "Il diritto del detenuto", 27-8.

[616] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2015), "Living space per prisoner in prison establishments: CPT standards", paragraphs 9-10, available at https://rm.coe.int/16806cc449 [accessed 20 June 2021].

[617] ECtHR, 20 October 2016, *Muršić v. Croatia*, Application No. 7334/13, paragraph 88.

[618] Francesca Graziani, "Prison overcrowding in Italy: the never-ending story?", *Romanian Journal of Sociological Studies*, No. 1 (2018): 54.

safe environment, well-equipped and illuminated, in which hygiene, health, and privacy are guaranteed[619]. Moreover, an Act adopted by the Minister of Justice by reference to the 1975 Decree of Ministry of Health includes surface area information that amounts to 9 m2 for a single occupancy cell and 5 m2 per prisoner for a multiple occupancy cell[620].

In Italy prison overcrowding has always been one of the main weaknesses of the national penitentiary system, repeatedly denounced in front of the ECtHR[621]. Statistics and numbers are undeniable: since 2010 the decrease in prison population has been slow and not so incisive. The current occupancy level, though in decline compared to the one of 2010, is equal to 105.4 percent, quite above the official capacity of the Italian prison system[622]. Despite the slight decrease in prison population throughout Europe, prison overcrowding continues to be a tangible problem. The density of prison population in Italy is still substantial with a number of 120 inmates per 100 available places in prison, classifying immediately after Turkey[623].

The ECtHR has dealt with overcrowding problem in the Italian penitentiary system since the Sulejmanovic v. Italy case, with which the Court was challenged with the difficult Italian prison situation for the first time[624]. In this case, the applicant, a Bosnian-Herzegovinan man repeatedly convicted for illegal acts, claimed that for a period of at least two months he was confined in a number of different cells, each measuring 16,2 m2, which up until 15 April 2003 he shared with other five people. As a consequence,

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[619] Article 6 of law N. 354/1975 of Penitentiary Law reads: "I locali nei quali si svolge la vita dei detenuti e degli internati devono essere di ampiezza sufficiente, illuminati con luce naturale e artificiale in modo da permettere il lavoro e la lettura; areati, riscaldati per il tempo in cui le condizioni climatiche lo esigono, e dotati di servizi igienici riservati, decenti e di tipo razionale. I locali devono essere tenuti in buono stato di conservazione e di pulizia"; Urban, "Il diritto del detenuto", 26; Graziani, "Prison overcrowding", 54.

[620] Ministry of Justice, "Scheda sulla capienza degli istituti penitenziari - Recepimento nell'ordinamento interno delle indicazioni CEDU e CPT (2015)", available at https://www.giustizia.it/giustizia/it/mg_1_12_1.page?facetNode_1=4_49&facetNode_2=0_2&contentId=SPS1189479&previsiousPage=mg_1_12 [accessed 20 June 2021]; Urban, "Il diritto del detenuto", 21; Graziani, "Prison overcrowding", 54.

[621] Graziani, "Prison overcrowding", 53.

[622] The above-mentioned data do include the numbers of prisons for minors. In 2009, the number of inmates in prison reached 67,961 equals to 112 percent per 100,000 of the national population. See the complete data available at https://www.prisonstudies.org/country/italy [accessed 20 June 2021].

[623] The data are taken from the CoE's news 2020-2021, available at https://www.coe.int/en/web/human-rights-rule-of-law/-/europe-s-imprisonment-rate-continues-to-fall-council-of-europe-s-annual-penal-statistics-released [accessed 20 June 2021].

[624] ECtHR, 16 July 2009, *Sulejmanovic v. Italy*, Application No. 22635/03.

each inmate benefited from only 2,70 m2 of living space. Then, from 15 April to 20 October 2005 he was confined to another cell, shared with no more than four other prisoners, in which the living space granted was equal to 3,40 m2[625]. Relying on article 3 of the ECHR, the applicant complained about his conditions of detention, and in particular the lack of an adequate living space and frequent out-of-cell activities[626]. After having examined the evidence, and reaffirming the parameters suggested by CPT of a living space equal to 7 m2 per each prisoner[627], the Court found that up until April 2003 his living space of 2,70 m2 was flagrantly insufficient, causing a violation of article 3 amounting to inhuman or degrading treatment[628]. The Italian state was therefore condemned in front of the Court for not having carefully respected the CPT standards for the penitentiary system, revealing how overcrowding was caused by a series of logistical problems typical of the prison concerned[629].

Nevertheless, the Sulejmanovic judgement played a pioneering role in the issue of prison overcrowding that caused inhuman and degrading situations for many inmates within the Italian correctional buildings. All these cases have culminated with the Torreggiani v. Italy[630] case, considered a pilot judgement procedure because it shows the structural and recurrent discrepancy between the Italian penitentiary system and law and the ECHR[631]. Indeed, according to the Court the deficiencies of the Italian penitentiary system can be attributed not to a single and sporadic case, rather to a "systematic problem caused by a chronic malfunctioning of the Italian penitentiary system which have affected

[625] Ibid., paragraphs 8-9-10.

[626] See the Press release issued by the Registrar "Chamber Judgement, Sulejmanovic v. Italy", available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145032%22]} [accessed 20 June 2021].

[627] The same parameters were also stated by the applicant in the paragraphs 25 and 26 of the final judgement, which read "Il ricorrente sostiene che, secondo il Comitato europeo per la prevenzione della tortura e dei trattamenti inumani e degradanti (CPT), ciascun detenuto dovrebbe poter trascorrere almeno otto ore al giorno fuori della cella e che lo spazio disponibile per ciascun detenuto nelle celle dovrebbe essere di 7 m2, con una distanza di 2 metri tra le pareti e di 2,50 metri tra il pavimento e il soffitto" and "Egli riconosce che il CPT si è limitato a presentare le regole summenzionate come « auspicabili », ma sottolinea che in più occasioni la Corte ha fatto riferimento ai parametri del CPT nella sua giurisprudenza (si veda, in particolare, Kalachnikov c/Russia, n. 47095/99, CEDU 2002-VI)."

[628] ECtHR, 16 July 2009, *Sulejmanovic v. Italy*, Application No. 22635/03, paragraphs 43-44.

[629] Urban, "Il diritto del detenuto", 29.

[630] ECtHR, 8 January 2013, *Torreggiani and Others v. Italy*, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10.

[631] Urban, "Il diritto del detenuto", 33-4.

future living conditions of several inmates"[632]. The seven applicants of the case were inmates detained in the prisons of Busto Arsizio and Piacenza for a period between fourteen and fifty-four months. Among the seven applicants, only one lodged a complaint before the Supervisory Magistrate of Reggio Emilia, explaining his insufficient living conditions caused by overcrowding and denouncing the violation of the principle of equal living conditions among inmates provided by article 3 of Law N. 375 of the Italian Penitentiary Law[633]. The appeal was then accepted in August 2010 by the Magistrate, who affirmed that the living conditions of the applicant were worsened by the overcrowding phenomenon in the Piacenza prison, and that the applicant shared a cell equal to 9 m2 with other two inmates. Therefore, the judge concluded that the applicant was subject to inhuman and degrading treatment and also discriminated against all those detainees that shared their cells with only a person[634]. Invoking article 3 of the Convention[635], all the applicants complained about their detention living conditions, since they were confined for several months in cells of 9 m2 together with two other inmates, having at the end only 3 m2 per person, further reduced by the presence of furniture in the cells. To this, they claimed also about reduces access to showers (only three times a week) due to problems related to the distribution of hot water[636]. In a preliminary phase, and perhaps also not to be sanctioned, the Italian state tries to highlight two possible exceptions that could contribute to the inadmissibility of the cases in front of the Court. First of all, the Italian state affirmed that when the applicants lodged their complaints,

[632] The main aims of the pilot judgement procedure are first to avoid the increasing number of similar cases brought in front of the Court. Indeed, the Court itself usually suspends the judgments of pending appeals that concerns the same subject of the pilot case. Secondly, and perhaps most importantly, by doing so the Court requires from the condemned state it will introduce further norms in order to avoid possible similar violations, trying to definitely solve the structural problem. For further references see Urban, "Il diritto del detenuto",39; Ibid.; ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraph 88.

[633] Article 3 of Law N. 354 of the Penitentiary Law of 26 July 1975 reads: "Negli istituti penitenziari è assicurata ai detenuti ed agli internati parità di condizioni di vita. In particolare il regolamento stabilisce limitazioni in ordine all'ammontare del peculio disponibile e dei beni provenienti dall'esterno", available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1975-07-26;354!vig= [accessed 20 June 2021]; Tamietti, Fiori, De Santis, Ranalli, Ledri, "Note a margine", 57.

[634] Ibid., 56-7.

[635] ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraph 34.

[636] Tamietti, Fiori, De Santis, Ranalli, Ledri, "Note a margine", 57.

except for one, they were all released or they were all moved to "less overcrowded" cells soon after their complaints in front of the Supervisory Magistrate, and as a consequence they could not be considered victims at the moment of their application in front of the ECtHR[637]. Rejecting this exception, the Court affirmed that "une décision ou une mesure favorable au requérant ne suffit en principe à lui retirer la qualité de « victime » que si les autorités nationales ont reconnu, explicitement ou en substance, puis réparé la violation de la Convention"[638]. Furthermore, the applicants recognized that their current status changed at the moment of the application, but it is not possible to affirm that the Italian state have provided effective reparations for the violations the victims suffered[639]. Concerning the second exception, the Italian state objected to the exhaustion of domestic remedies, since the applicants did not present a complaint in front of the Supervisory Magistrate, according to articles 35 and 69 of law N. 354 of the Penitentiary Law. Rejecting also this last exception, the Court stated that a simple remedy was not enough in front of all the presented denunciations regarding article 3. The provided remedy was completely devoid of a preventive aim useful and necessary to avoid the protracting of inhuman and degrading circumstances in which detainees used to live, and to improve material detention living conditions[640]. The Court unanimously recognized violation of article 3 of the ECHR, acknowledging the applicants' assertions that were not contracìdicted by the Italian government according to the burden of proof principle[641]. Therefore, following the same procedure adopted in the Sulejmanovic case, recalling the CPT's standards concerning living conditions, and considering aggravating factors such as lack of adequate lighting, ventilation and hot water[642], the ECtHR condemned Italy which had to provide a financial compensation between 10,600 and 23,500 € to each victim in respect of moral damages[643].

Beside the financial compensation imposed to the Italian state, the Court highlighted that overcrowding problem within the Italian penitentiary system was so

[637] ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraph 36; Urban, "Il diritto del detenuto", 35.
[638] Ibid., paragraph 38.
[639] Ibid., paragraph 39.
[640] Ibid., paragraph 50.
[641] Urban, "Il diritto del detenuto", 37.
[642] ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraph 77.
[643] Ibid., paragraphs 103-105.

widespread that all the legislative and logistical efforts made by the state to put an end to this inadequacy had been useless because of the incessant increasing of overcrowding rate[644]. The application of the pilot judgement procedure even though not accepted by Mr. Torreggiani[645], was seen by the Court as a valid method that would have solved this systematic problem intrinsic of the Italian correctional system[646]. Accordingly, the ECtHR allowed to the Italian state a period of one year from the date in which the Torreggiani judgement would have become definitive, to adapt the Italian prison system to the principle of human living conditions in prison establishments, and to create a system of remedies constituted of both preventive and compensatory aims in order to guarantee a definitive extirpation of the causes of overcrowding through the decrease of imprisoning sentences and "to the purpose of redressing any violation of the ECHR due to overcrowding in prison"[647].

On 27 November 2013, the Italian state brought in front of the ECtHR its own "Action Plan" developed on four lines of actions[648]. As encouraged by the Court's judges and by the Committee of Ministers' recommendations R (99) 22 and R (2006) 13, Italy provided an increase in alternative measures of detention in order to simultaneously decrease inflation within Italian prisons[649]. To do so, the Italian state modified the Criminal Code and the Code on Criminal Procedure, particularly with Law No. 67/2014 through which the government was delegated to reform penalty sanctions[650]. Through

[644] Ibid., paragraph 92.

[645] Mr. Torreggiani opposed the application of the pilot judgement procedure since he disagreed his case was compared to the cases of all the other applicants. For further references see Tamietti, Fiori, De Santis, Ranalli, Ledri, "Note a margine", 62.

[646] ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraphs 87-89; Tamietti, Fiori, De Santis, Ranalli, Ledri, "Note a margine", 62.

[647] Graziani, "Prison overcrowding", 55; Urban, "Il diritto del detenuto", 40-1.

[648] See http://www.ristretti.it/commenti/2014/aprile/pdf7/piano_governo.pdf [accessed 20 June 2021].

[649] ECtHR, 8 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, paragraph 95; see the Committee of Ministers' recommendations available at https://rm.coe.int/168070c8ad [accessed 20 June 2021] and https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282006%29+13+on+the+use+of+remand+in+custody%2C+the+conditions+in+which+it+takes+place+and+the+provision+of+safeguard+against+abuse.pdf/ccde55db-7aa4-4e11-90ba-38e4467efd7b [accessed 20 June 2021].

[650] See the law available at https://www.gazzettaufficiale.it/eli/id/2014/05/02/14G00070/sg#:~:text=Deleghe%20al%20Governo%20in%20materia,e%20nei%20confronti%20degli%20irreperibili [accessed 20 June 2021].

these alternative and "softer" measures, including "messa alla prova", home detention, probation and special early released, the state aimed at reducing the high rate of population behind Italian bars[651]. In its Action Plan the Italian state provided also the enlargement of the existing penitentiary systems and the construction of new correctional establishments. Furthermore, Italy was committed to guarantee greater freedom of movement to inmates[652].

In this plan a system of preventive and compensatory remedy for inmates' human rights violations was also provided. Regarding the preventive remedy, the new article 35-bis was inserted in the 1975 Penitentiary Law through Law Decree No. 146/2013[653]. According to this procedure, a prisoner can lodge a complaint in front of the Surveillance Judge against disciplinary measures he/she endured and that seriously damaged his/her rights, including the one of having a proper living space. At this point the magistrate is empowered to "order the Penitentiary Administration to remove any violation ascertained"[654]. Furthermore, the Surveillance Judge can "appoint a commissioner *ad acta*", invalidate the decisions of the Penitentiary Administration, organize a plan addressed to the prison's authorities that also includes ways of remedy for the violation[655]. Concerning the compensatory aim, the Italian state introduced article 35-ter through Law Decree No. 92/2014 and thanks to this, it is now possible "to obtain a reduction for imprisoned individuals of one day every ten days spent in violation of article 3" and a financial compensation amounting to 8 € for every day spent in contrary to the prohibition of torture, inhuman or degrading treatment[656].

The effects of the Italian strategic plan can be already seen and commented. For its struggles and for its apparently innovative measures, the Italian government received a substantial approval by the Committee of Ministers that expressed its own satisfaction about the punctual successes achieved in the fields of compensatory and preventive

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[651] Graziani, "Prison overcrowding", 57-8-9.

[652] Urban, "Il diritto del detenuto", 45.

[653] See the article available at https://www.giustizia.it/giustizia/it/mg_3_8_8.page#:~:text=35%20bis)%20rivolto%20a%20persone,condotta%20illegittima%20dell'amministrazione [accessed 20 June 2021].

[654] Graziani, "Prison overcrowding", 59.

[655] Ibid.

[656] Ibid.; see the article and decree law available at https://www.gazzettaufficiale.it/eli/id/2014/08/20/14A06523/sg [accessed 20 June 2021].

remedies[657]. After having examined the completed commitments of the Italian state, the Torreggiani case was definitely closed on 8 March 2016, welcoming all the new measures adopted by the Italian state to achieve solid and long-lasting solutions to the overcrowding problem [658].

However, the concrete application of the Italian Action Plan, and in particular of both compensatory and preventive remedies has proved to be limited because of remedies' length and costs, which discourage an individual like a prisoner who is in a disadvantaged position right from the beginning[659]. Furthermore, the deeply rooted problem of overcrowding has not been completely resolved. In a report concerning Italy published by the CPT on 8 September 2017, overwhelming data show that the number of prisoners and the use of mistreatment in the national corrections increased[660]. Some of the possible causes can be attributed to wrong decisions of the legislator. First of all, there is a general lack of confidence in alternative measures of detention by the judiciary system, and then the legislator should better tailor sanctions and punishments according to the specific crime committed. This is particularly relevant for what concerns drug-related crimes that have been having a huge impact over the increasing population in prison[661].

1.1.1 The effect of the coronavirus pandemic on the Italian prison system

Recently, because of the Coronavirus pandemic, the Italian state has adopted structural measures to combat the increasing number of cases within the prison buildings. Being prisons places highly susceptible to the creation of clusters since maintaining social distancing is almost impossible, thus the Italian government has found itself forced to use alternative sanctioning measures. Therefore, more than five thousand inmates have been

[657] See the document released after the Committee of Ministers' Meeting 1214 of 2-4 December 2014, available at https://rm.coe.int/native/09000016804ae1a2 [accessed 20 June 2021]; Urban, "Il diritto del detenuto", 56.

[658] See the Committee of Ministers Resolution CM/ResDH(2016)28, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a5b [accessed 20 June 2021].

[659] Graziani, "Prison overcrowding", 59.

[660] See paragraphs 24-25 of the CPT's report available at https://rm.coe.int/pdf/16807412c2 [accessed 20 June 2021].

[661] Graziani, "Prison overcrowding", 64.

released and placed in a half-freedom regime[662]. Although in times of pandemic the number of prisoners seems to be decreased allowing some air to a collapsing regime, structural problems at the basis remain[663].

It is therefore quite blatant how the overcrowding problem is a difficult to remove cancer anchored to the Italian prison system. The several attempts made by the state after the Sulejmanovic and Torreggiani cases have not been enough to put an end to this vicious cycle. Neither taking measures like the previous one called "Svuota Carceri" can guarantee a permanent solution, since it allows a prompt decrease in the number of inmates, which will drastically increase again after a few months[664]. Moreover, the structural problem of the Italian penal system, like the excessive length of proceedings and the growing number of pre-trial detention cases[665] have not brought the needed radical and permanent changes within an already difficult and lacerated system.

1.2 The absence of a real crime of torture in the Italian Penal Code and the glaring case of Cestaro v. Italy

Even though Italy ratified the CAT on 12 January 1989 after the enactment of Law N. 498 the Italian state have substantially wasted time in the adoption of a proper

[662] In order to safeguard inmates and prison staff's health, on 17 March 2020 the Italian state issued a Law Decree called "Cura Italia" in which there are articles 123 and 124 that strictly relates to prisoners' conditions and sentences. The two articles are available at https://www.sistemapenale.it/pdf_contenuti/1584523081_decreto-legge-18-2020-gazzetta-ufficiale-17-marzo-cura-italia-coronavirus-covid-19.pdf [accessed 20 June 2021]; for further references see Domenico De Stefano, Sara Jovanovic, Alessandro Panozzo, Fabio Vlacci, "Uno studio sull'affollamento delle carceri durante l'epidemia di Covid-19 in Italia", *Poliarchie*, Vol. 3, No. 2 (2020): 175.

[663] Ibid., 187.

[664] Ibid., 191-2.

[665] Italy is among the European countries that have the highest percentage of individuals in pre-trial detention, and this problem have resulted several times in a condemnation by the ECtHR for violations of article 5 of the ECHR, since according to the Court pre-trial detention should be used only when softer alternative measures have been useless. These two phenomena of pre-trial cases and excessive lengths of trials are therefore interconnected, and for several times the ECtHR affirmed that too long criminal proceedings resulted in a breach of the right to have a trial in a reasonable period of time. For further references see Graziani, "Prison overcrowding", 61-4.

and real crime of torture within its National Penal Code[666]. Particularly, Law N. 498 contains two implementing norms that have been wrongly interpreted by the Italian state and legislators. First of all, this norm was incorrectly used as an adjusting norm of the national set of rules, and by doing so the international rules contained in the Convention were considered as self-executing and therefore suitable to be used by the lawmaker, without the necessity to adapt the national Penal Code to the international rules through a further law. Furthermore, law N. 498 aimed at including in the national set of rules all those jurisdictional criteria included in article 5[667] of the CAT. This effort was in reality worthless without a proper crime of torture contemplated in the Italian criminal law. What in reality this law did was only to authorize the President of the Republic to ratify the Convention.[668]

The lack of a specific crime of torture has been long contested by several international bodies such as the Committee against Torture, which condemned this omission of an *ad hoc* incriminating norm[669], the CPT[670], and the HRC. In response to these warnings, the Italian government has tried to "clutch at straws" with a series of

[666] Antonio Marchesi, "Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)", *Journal of International Criminal Justice,* Vol. 6, No. 2 (2008): 202.

[667] Article 5 of the CAT reads: "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

[668] Antonio Marchesi, "Tortura. Qualcosa è cambiato.", in Luigi Stortoni, Donato Castronuovo, *Nulla è cambiato? Riflessioni sulla tortura* (Bologna, Italy: Bononia University Press, 2019), 361.

[669] See paragraph 5 of the 2007 "Consideration of reports submitted by states parties under article 19 of the Convention. Conclusions and recommendations of the Committee against Torture", available at https://undocs.org/en/CAT/C/ITA/CO/4 [accessed 20 June 2021].

[670] See paragraph 7 of the "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 (CPT) from 8 to 21 April 2016", available at https://rm.coe.int/pdf/16807412c2 [accessed 20 June 2021].

justifications that were then found inadmissible both for the monitoring bodies and also for the fundamental duties deriving from CAT itself.

Among the most striking, the Italian government justified the absence of the crime of torture within its Penal Code according to the idea that the self-executing characteristic of the norms prohibiting torture would have been enough to criminalize this practice, without necessarily issue a new repeating norm within the Italian legislation[671]. Nevertheless, this assertion is not technically correct. Ratifying a convention is not enough to adopt the national provisions to the international norms issued in international instruments, rather precise and specific national measures are requested. It is misleading affirming that the only reference to the CAT can guarantee the direct enforceability of the crime of torture within the national criminal law[672]. This is particularly true for what concerns penal norms because according to the constitutional principle of "*nullum crimen, nulla poena sine lege*" to fully apply a prohibition against torture inside the National Penal Code, what is necessary is an *ad hoc* norm that at least "defines the statuatory framework"[673].

The Italian state also argued that the necessity of a crime of torture within the Italian Penal Code was not so urgent as it could seem[674]. From this point of view, the Italian legal system could apparently be considered in breach of article 4 of the CAT, since a series of norms were already provided in the Penal Code, such as article 581 ("percosse"), article 582 ("lesioni personali"), article 594 ("ingiurie"), article 605 ("sequestro di persona"), article 606 ("arresto illegale"), article 607 ("indebita limitazione di libertà personale"), article 608 ("abuso di autorità contro arrestati o detenuti"), article 609 ("perquisizioni e ispezioni personali arbitrarie"), article 610 ("violenza privata"), article 612 ("minacce"), and article 613 ("stato di incapacità procurato mediante violenza")[675]. However, all these norms could not be considered sufficient to fill the void

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[671] Giuseppe Gioffredi, "Obblighi internazionali in materia di tortura e ordinamento italiano", *Eunomia. Rivista semestrale di Storia e Politica Internazionali*, No. 2 (2016): 424-5; Antonio Marchesi, "L'Italia e gli obblighi internazionali di repressione della tortura", *Rivista di Diritto Internazionale*, Vol. 82, No. 2 (1999): 463-4.

[672] Pugiotto, "Repressione penale della tortura", 132-3.

[673] Ibid.

[674] Gioffredi, "Obblighi internazionali", 424-5.

[675] See all the articles in the Italian Penal Code available at https://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale [accessed 20 June 2021]; Gioffredi, "Obblighi internazionali", 425; Pugiotto, "Repressione penale della tortura", 141-2.

of a proper crime against torture. Indeed it must be said that all these crimes have different disagreement with what is provided for the criminalization of the offence of torture at international level, indeed all the above-mentioned crimes are considered as common crimes ("reati comuni"), and therefore not committed by organs of the state. In reality, at international law level the crime of torture is contemplated as an offence specifically perpetrated by state's agents ("reato proprio") as it will be then analyzed in the last subchapter. Moreover, it is incorrect to believe that these norms can be placed at the same level of a norm prohibiting torture, as they do not take into consideration neither the purposive element that at international law level is at the basis of any torturing act, nor the aspect of psychological suffering and violence that is contemplated behind the main international instruments prohibiting such offence[676]. Nevertheless, even though the Italian state has not always completely fulfilled international law norms, it should be noticed that a proper crime of torture was instead already at that time included in the Italian Military Code applicable during war time under article 185-bis[677]

Despite the justifications provided by the Italian government, international authorities have repeatedly expressed their dissatisfaction with the Italian state's official position, and their reasonable doubts concerning what Italian law considered to be a legal approach used to oppose torture[678]. In expressing his opinion regarding the choice of Italy to cover facts that may amount to torture with several offences and not a specific one, the country rapporteur Gil Lavedra stated that those generic crimes are

> "des fragments épars de la définition de la torture, sans toucher à l'essentiel; ces infractions sont pour la plupart mineures et n'entraînent que des peines légères. Or la Convention veut que ce soit le concept

[676] Pugiotto, "Repressione penale della tortura", 142.

[677] Article 185-bis of the Military Code reads: "Salvo che il fatto costituisca più grave reato, il militare che, per cause non estranee alla guerra, compie atti di tortura o altri trattamenti inumani, trasferimenti illegali, ovvero altre condotte vietategli dalle convenzioni internazionali, inclusi gli esperimenti biologici o i trattamenti medici non giustificati dallo stato di salute, in danno di prigionieri di guerra o di civili o di altre persone protette dalle convenzioni internazionali medesime, e' punito con la reclusione militare da due (2) a cinque anni.", see the article available at http://www.difesa.it/Giustizia_Militare/Legislazione/CodicePenaleMilitarediGuerra/Libro_terzo/Pagine/TitoloIV.aspx#:~:text=O%20A%20DANNO%20DI%20BENI%20NEMICI,185.&text=Il%20militare%2C%20che%2C%20senza%20necessit%C3%A0,a%20cinque%20anni%20(1) [accessed 20 June 2021].

[678] Marchesi, "Implementing the UN Convention", 204.

même de torture qui soit repris dans la législation et que le châtiment soit proportionné à la gravité de l'infraction"[679].

The same conclusion was also drawn by the Committee against Torture in the concluding observations on 18 May 2007, in which the Committee re-asserted its skepticism about the lack of progresses in the adoption of the concept of torture in the national criminal law, and about the fact that acts of torture could be covered by generic crimes provided in the Italian Penal Code[680].

Affirming that the Italian state's authorities have never committed an act of ill-treatment or torture against individuals is inaccurate. On the contrary, Italy has been convicted several times in front of the ECtHR for its human rights violations and for its breaches under article 3 of the Convention, breaches that have never been properly punished and convicted because of the lack of a norm able to criminalize torture[681]. Among the most unmistakable cases that have been brought in front of the Court, but never nationally properly sentenced for their acts of torture, there are surely the events of the "macelleria messicana" or "notte cilena", as described by the local newspapers[682], about the violence and mistreatments perpetrated during the G8 hold in Genoa in 2001 both in the Diaz-Pertini school and in the Bolzaneto barrack. In those occasions, the impunity of most of the perpetrators, who regularly resorted to torture and violence against Italian and foreign demonstrators, must be attributed both to the impossibility to find the authors of those atrocious acts, and to the nonexistence in the Italian Penal Code of a norm capable of criminalizing and taking to trial the guilty party[683]. These events were probably considered the eclipse of a long history of democracy and one of the most

[679] See paragraph 19 of Italy's second periodic report of the Committee against Torture, CAT/C/SR.214 2 May 1995, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FSR.214&Lang=en [accessed 20 June 2021]; Marchesi, "Implementing the UN Convention", 204.

[680] See paragraph 5 of the 2007 "Consideration of reports submitted by states parties under article 19 of the Convention. Conclusions and recommendations of the Committee against Torture", available at https://undocs.org/en/CAT/C/ITA/CO/4 [accessed 20 June 2021]; Marchesi, "Implementing the UN Convention", 204.

[681] Marchesi, "Tortura. Qualcosa è cambiato.", 364.

[682] Silvia Buzzelli, "Tortura: una quaestio irrisolta di indecente attualità", *Diritto Penale Contemporaneo*, No. 3 (2013): 57-8.

[683] Marchesi, "Tortura. Qualcosa è cambiato.", 363-4.

serious crises of the protection of human rights by the Italian authorities[684]. In this regard, in this chapter will be then analyzed the Cestaro v. Italy case[685], considered for this final chapter of fundamental importance since it can be considered as the starting point for a turning point in the Italian legislative system.

These circumstances cannot be treated as sporadic events though. After the cases of the G8 in Genoa, Italy continued to be brought in front of the ECtHR because of its faults and violations of human rights. Another remarkable example is the one regarding the practice of torture and mistreatments perpetrated against two Italian prisoners in the Asti prison. After the judgement of the Asti criminal court, which recognized the practice of torture but could not criminalize it because of the absence of a proper sentencing law in the Italian Penal Code, was brought in front of the ECtHR on 26 October 2017[686].

Other cases like the ones of Federico Aldrovandi and Stefano Cucchi should not be forgotten. In the former, Aldrovandi a young boy apparently died of positional asphyxia, as it was initially affirmed, in reality after several examinations fifty-four injuries were found on his body and they were perpetrated by the police agents that stopped him. In the latter case, Cucchi died in the penitentiary department of the Perini hospital in Rome after being subjected to several physical violence by the police officials who arrested him because holding drugs[687]. The case of Stefano Cucchi has increased a strong awareness in the public opinion. Indeed, it has not only stressed the importance of a proper crime of torture in the Italian law, but it has also brought to the surface cases of institutional violence inside prison building, that most of time are ignored[688].

The Cestaro v. Italy[689] case can be considered as the starting point from which Italy had to face the problem of the absence of a crime of torture in its Penal Code, soon after being sentenced by the ECtHR which unanimously found Italy in violation of article

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[684] Buzzelli, "Tortura", 57.

[685] ECtHR, 7 April 2015, Cestaro v. Italy, Application No. 6884/11.

[686] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13; Giuseppe Serranò, "L'introduzione del reato di tortura in Italia: alcune riflessioni", *Rivista di diritto internazionale privato e processuale*, Vol. 54, No. 2 (2018): 337; Buzzelli, "Tortura", 57-8; Pugiotto, "Repressione penale della tortura", 136.

[687] Angela Colella, "La Repressione Penale della Tortura: Riflessioni De Iure Condendo", *Diritto Penale Contemporaneo*, 22 July 2014, available at https://archiviodpc.dirittopenaleuomo.org/upload/1406048334COLELLA_2014a.pdf [accessed 20 June 2021].

[688] Vincenzo Scalia, "The Rougue from Within: The Denial of Torture in Italian Prisons", *Critical Criminology*, Vol.23, No.3 (October 2015): 445-6.

[689] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11.

3 due to its systematic breaches caused by the failure of the government to adapt the national criminal law to the obligations deriving from the Convention[690]. During the G8 Summit held in Genoa in 2001, thousands of activists came to protest and demonstrate down the city's streets. After some insurrections between police agents and the anarchist black bloc movement, the demonstrators were then attacked at around twelve midnight of the 21 July by five-hundred police personnel of the "VII Nucleo antisommossa", who stormed the Armando Diaz school, used as a night shelter by the activists, and repeatedly beaten and subjected to both verbal and physical violence[691]. The applicant, a sixty-two years old man, was on the ground floor of the school at that time, and "when the police arrived, he sat down against the wall beside a group of persons with his arms in the air. He was mainly struck on the head, arms and legs, whereby the blows caused multiples fractures: fractures of the right ulna, the right styloid, the right fibula and several ribs"[692]. Soon after the police raid in the Diaz school, the blows and mistreatment against the activists continued in the Bolzaneto barrack, where they faced further violence, humiliations and violation of their human rights, such as insults, private violence, beatings and injuries[693]. The events of the Genoa G8 had a huge following at that time and also a great impact on the society and public opinion to the point that Amnesty International described them as "the most serious suspension of democratic rights in a western country since the Second World War"[694].

When the case was opened, the public prosecutor initiated a series of investigations "to ascertain the facts underlying the decision to storm the Diaz-Pertini School and to shed light on the methodology of the operation, the alleged knife attack on one of the officers and the discovery of the Molotov cocktails"[695]. After three years of investigations, the Court of Genoa sentenced twenty-eight agents, of whom "the Genoa Court found twelve of the accused guilty of providing false information (one accused),

[690] Domenico Carolei, "Cestaro v. Italy: the European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem", *International Criminal Law Review*, Vol. 17, No. 3 (June 2017): 568.

[691] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 31-33; Carolei, "Cestaro v. Italy", 568; Leach, *Taking a case*, 269.

[692] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 34.

[693] Carolei, "Cestaro v. Italy", 568-9.

[694] Ibid.; see also the article https://www.ansa.it/english/news/general_news/2015/04/09/de-gennaro-cannot-pay-for-all_f28c7f20-5528-421f-98f8-436e7a5047ae.html [accessed 20 June 2021].

[695] ECtHR, 7 April 2015, Cestaro v. Italy, Application No. 6884/11, paragraph 44.

simple slander (two accused) and aggravated slander (one accused), simple and aggravated bodily harm (ten accused) and the unlawful carrying of weapons of war (two accused). The court sentenced them to between two and four imprisonment, a prohibition of holding public office for the period of the main sentence and, jointly and severally with the Ministry of the Interior, payment of costs and expenses and of damages to the parties claiming the latter, to whom the court awarded advances of between 2,500 and 50,000 euros"[696].

Due to the general discontent with the first-instance judgement, "the prosecutor's office with the Genoa Court, the Principal State Prosecutor, the Ministry of the Interior (which was civilly liable) and most of the victims, including the applicant" appealed to the Genoa Court of Appeal[697] that "found the accused guilty of the following offences: providing false information (seventeen accused), aggravated bodily harm (nine accused) and the unlawful carrying of weapons of war (one accused)"[698]. The case was then brought in front of the Court of Cassation, before which the "applicant and the other victims claimed their civil damages"[699]. After having examined the objections, the Court of Cassation observed that "the violence perpetrated by the police during their storming of the Diaz-Pertini school [had been] egregious". The "utmost gravity" of the police conduct stemmed from the fact that the widespread violent acts committed throughout the school premises had been unleashed against individuals who were obviously unarmed, sleeping or sitting with their hands up; it was therefore a case of "unjustified violence [which], as rightly pointed out by the State Prosecutor, [was carried out] for punitive purposes, for retribution, geared to causing humiliation and physical and mental suffering on the part of the victims". According to the Court of Cassation, the violence might have qualified as "torture" under the terms of the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or else as "inhuman or degrading treatment" under Article 3 of the Convention"[700].

Despite the recognition of the perpetrated acts as torture, the Cassation Court was firm in stating and blaming the legislature for the absence of an explicit criminalizing norm against torture in the Italian Penal Code. This lack, therefore, brought the Court to

[696] Ibid., paragraph 49.
[697] Ibid., paragraph 59.
[698] Ibid., paragraph 60.
[699] Ibid., paragraph 75.
[700] Ibid., paragraph 77.

impugn the atrocious actions, and to prosecute them on the basis of other kinds of crimes, particularly "simple or aggravated bodily harm, which offences, pursuant to Article 157 of the Criminal Code, had been the subject of a discontinuance decision on the ground that the limitation period had expired during the proceedings"[701]. Therefore, several guilty actors could benefit from a three years remission of sentence, pursuant to Amnesty Law 241/2006, and in other cases the convictions exhausted by the status of limitations, and no imprisonment sentences were imposed[702].

The case was finally brought in front of the ECtHR, before which the applicant claimed he had been subjected to mistreatment and violence that could amount to torture according to the provisions of article 3[703]. Unanimously the Court found the Italian state in violation of the concerned article of the Convention, both from a substantive and procedural point of view[704]. As a matter of fact, the applicant had been victim of acts perpetrated by the police agents with a purposive punitive intention that according to the Court amount to torture[705]. Furthermore, the Court found those acts disproportionate and spontaneous, since the applicant was not in the condition to resist, and that violence provoked not only serious physical consequences, but also "feelings of fear and anguish"[706]. The Court was also able to demonstrate that the ill-treatment suffered by the applicant was the result of premeditated police operations, and not simply of operations to secure the building as it was supposed at the beginning[707].

However, the non-fulfilment of the Italian state can be found also from the procedural point of view. Indeed, remedies cannot be granted only through compensation to the victim of torture, rather the contracting state must fulfil its positive obligations to prosecute and penalize the alleged perpetrators of such acts[708]. In this regard, Italy was found in a faulty position since the criminal legislation applied by the Italian courts was not only inadequate to criminalize the acts of torture deriving from the police raid but also completely devoid of adequate deterrent provisions capable to prevent further violations

[701] Ibid., paragraph 78.
[702] Ibid., paragraph 60; Carolei, "Cestaro v. Italy", 569.
[703] Carolei, "Cestaro v. Italy", 569.
[704] Ibid.
[705] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 177.
[706] Ibid., paragraph 178; Carolei, "Cestaro v. Italy", 570.
[707] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 183; Carolei, "Cestaro v. Italy", 570.
[708] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 231; Carolei, "Cestaro v. Italy", 570.

of article 3[709]. According to the ECtHR judges the inadequacy to prosecute and criminalize the violations perpetrated was given by a major cause that can be found in the lack of proper criminal proceedings in the Italian Penal Code that aim at accurately punishing acts that may be contrary to article 3 of the ECHR[710]. The national judges proved to be unable to adopt proper criminal provisions to condemn the perpetrators before the national courts, and this was what the Strasbourg judges condemned Italy for. The legislative inability to fully criminalize the perpetrators for the acts of torture committed, and the consequent choice to impose a criminal penalty that did not denote the seriousness of such behaviors and that tolerate extinction or even statute of limitations, amnesty and pardon that cannot be conceived in such circumstances[711]. To sum up,

> "the absence of criminal legislation capable of preventing and effectively punishing the perpetrators of acts contrary to Article 3 can prevent the authorities from prosecuting violations of that fundamental value of democratic societies, assessing their gravity, imposing adequate penalties and precluding the implementation of any measure likely to weaken the penalty excessively, undermining its preventive and dissuasive effect"[712].

The Cestaro case can be considered as the outset of troubled legislative procedures that culminated in the issue of the articles 613-bis and 613-ter within the Penal Code that at first glance seems to solve the structural natural problem that has long characterized the Italian criminal law and its inability to impose proper penalties which have always resulted in measures incompatible with the ECtHR legal system[713]. However, the achievement of this new article cannot be defined as a victory for the lawmaker, since as it will be analyzed in the following subchapter, it entails a series of complexities and cavils that do not make it completely appropriate to the international jurisprudence of the Strasbourg Court and to the legal provisions of the CAT.

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[709] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 225.
[710] Ibid., paragraph 209; Carolei, "Cestaro v. Italy", 570.
[711] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 208; https://www.senato.it/1025?articolo_numero_articolo=13&sezione=120#:~:text=Non%20%C3%A8%20ammessa%20forma%20alcuna,dell'autorit%C3%A0%20giudiziaria%20%5Bcfr.1 [accessed 20 June 2021].
[712] ECtHR, 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11, paragraph 209.
[713] Ibid., paragraph 571.

1.3 The repeated mistreatments in the prison of Asti: a case before the European Court of Human Rights

Italian prisons are not exempted from acts of torture. Because of their very nature prisoners are much more likely to be subjected to possible human rights violations, as already stated in chapter two, and the Cirino and Renne v. Italy[714] case represents further proof of both the weakness of the Italian prison system is weak and the inadequacy of the sanctioning imposed by the penal system has been inadequate. The facts of the case date back to 2004, when in the Asti prison, which at that time was particularly overcrowded and clearly understaffed[715], two Italian prisoners claimed to be victims of ill-treatment and acts of torture[716]. What is probably the most striking aspect of these events is that everything was discovered by chance, indeed it was only thanks to a wiretapping concerning drug affairs, which involved some of the defendants, that it was possible to discover the magnitude of events within the prison[717].

According to the depositions of the applicants, after a fight between a prison official and Cirino, in which Renne interfered, the latter "was stripped of his clothes and led to a cell in the solitary confinement wing of the correctional facility"[718]. The kind of cells in which he was moved was known for not having anything inside it ("celle lisce")[719], indeed "the bed in the cell had no mattress, sheets or covers, and the cell had no sink. Initially there were no panes in the windows, which were covered with some plastic sheeting after an unspecified number of days"[720]. Renne remained in that cell for a period of at least two months, during which he spent the first days naked[721]. During his permanence in solitary confinement, he was "repeatedly punched, kicked and slapped"[722],

[714] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13.
[715] Buffa, "Tortura e detenzione", 132.
[716] Serranò, "L'introduzione del reato", 337.
[717] Jessica Marica Rampone, "Commento alla sentenza della Corte Europea dei Diritti dell'Uomo Cirino e Renne contro Italia del 26 ottobre 2017 – Ricorsi nn. 2539/13 e 4705/13", *Diritti Fondamentali*, No. 1 (2018): 17; Marchesi, *Contro la tortura*, 62.
[718] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 16.
[719] Rampone, "Commento alla sentenza", 10.
[720] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 16.
[721] Ibid.; Marchesi, *Contro la tortura*, 61.
[722] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 18.

and a symbol of this "special treatment"[723] "one prison officer ripped out a chunk of his hair"[724]. The ponytail was then given to the prison official who had been attacked by Renne during the fight against Cirino, and this act could be interpreted as the delivery of a trophy to the winner, symbolizing the ransom of violence that the police authority underwent by Renne, and as such the act of giving this price to Renne's superior highlights also the status of permanent inferiority of the prisoner, who is dehumanized, and deprived of his own subjectivity[725].

The same treatment was offered also to the other applicant Cirino, who was deprived of his clothes and was confined in a cell in which

> "the only item of furniture in the cell was a bed with no mattress, bed linen or covers. As to sanitary facilities, the cell had a squat toilet without running water and was not equipped with a sink. The cell window had no windowpanes and the only source of heating was a small, malfunctioning radiator, which provided little protection against the December weather"[726].

His permanence lasted twenty days and no food was provided to him, and in certain cases also water was rationed[727]. Clearly, he was kicked, punched and beaten by prison authorities and on daily basis he was subjected to verbal offences and to sleep deprivation [728]. The cherry on the top of these brutal events was that during his period on solitary confinement one of the defendants pinned his head on the ground with his boot[729].

The case was first brought in front of the Asti Court that pronounced its judgement on 30 January 2012. After having examined the evidences gathered during investigation,

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[723] Marchesi, *Contro la tortura*, 61.

[724] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 18.

[725] According to Buffa these acts can be compared to the publications of the photos of Abu Ghraib prison, in which the clear supremacy of US military authorities have been shown through those images that not only symbolized a degree of revenge by US state's officials and their social superiority, but also the feelings of inferiority and dehumanization that characterized prisoners' faces. For further references see Buffa, "Tortura e detenzione", 140.

[726] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 11.

[727] Ibid., paragraph 12; Marchesi, *Contro la tortura*, 62.

[728] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 14.

[729] Marchesi, *Contro la tortura*, 62.

the national Court was able to establish for the first time that in the Asti prison the use of ill-treatment and violence was deeply rooted as a way of "moral rules" dedicated to certain categories of prisoners[730]. The Court then found that both the applicants had been subjected to ill-treatment, consisting in physical and verbal violence, and food, water, sleep deprivation; but because of the absence of a crime of torture within the Italian Penal Code at the time of the of the events, it was not possible for the Asti Court's judges to condemn the offences as such[731]. The two perpetrators were, as a consequence, absolved due to statute barred of the crime of torture, and even though the acts committed could fall within the scope of both the CAT and the ECHR, the defendants were accused for acts that establish a kind of crime much less serious than the one of torture[732].

The case was subsequently brought in front of the Court of Cassation, before which the public prosecutor lodged an appeal, disagreeing and arguing with the Asti Court's final judgement. Indeed, the prosecutor asked for the application of article 572 of the Italian Penal Code, which regulates habitual acts of oppression and humiliation, in conjunction to the already cited article 608[733]. Despite this proposal, the Court of Cassation found the application inadmissible, expressing " its agreement with the prosecutor's contention as a matter of principle but, as the statute of limitations had been likewise applicable to the offence of aggravated ill‑treatment, a decision in favor of the prosecution would have been devoid of any practical effect"[734].

The case was finally brought in front of the ECtHR that found a double breach of article 3, at both a substantive and procedural levels[735]. In particular, what the Court had to examine was whether the acts perpetrated "attained the minimum level of severity to

[730] Buffa, "Tortura e detenzione", 138.
[731] Marchesi, *Contro la tortura*, 63.
[732] The complete absence of a crime of torture within the Italian criminal law gave the possibility to judges to condemn the alleged individuals for a crime of less intensity and gravity, particularly "abuse of authority against arrested and detained individuals", pursuant to article 608 of the Italian Penal Code. For further references see Serranò, "L'introduzione del reato", 338.
[733] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 36; Marchesi, *Contro la tortura*, 65.
[734] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 37.
[735] Marchesi, *Contro la tortura*, 65; Rampone, "Commento alla sentenza", 1.

bring it within the scope of Article 3 and, if so, how it is to be classified"[736]. In examining all the evidence and events, in its final judgement the Court reiterates

> "that the treatment may be regarded as having caused them considerable fear, anguish and mental suffering. As an overarching consideration, the Court is mindful of the fact that the treatment was inflicted in the context of the applicants being in the custody of prison officers, and thus already in a situation of vulnerability. The applicants' state of further isolation due to their placement in the solitary confinement wing must have intensified their fear, anxiety, and feelings of helplessness"[737].

Furthermore, the Court notices that these physical and verbal abuses were in conjunction to other "extremely serious material deprivations"[738], like the recurrent lack of food, water and sleep[739].

Nevertheless, a limiting judgment affirming the breach of article 3 as acts of inhuman or degrading treatment is not completely correct in this case. The Court, indeed, affirms that the acts of violence perpetrated against the applicants were recurrent in the Asti correctional building and, what is more, the Court found that these offences were committed with the specific intent to damage certain inmates, and to deliberately inflict them humiliation and pain that went far beyond the disciplinary and security measures deriving from solitary confinement[740]; moreover these acts were clearly premeditated and systematically well-organized[741]. In this view, the ECtHR found a substantive violation of article 3 of the ECHR amounting to torture, seeing as these acts not only showed a gap and a malfunctioning of the Asti correctional system, but they also represented a degree of brutality and inhumanity voluntary committed against prisoners[742].

The Cirino and Renne case is, on the other hand, the umpteenth demonstration of how the Italian penal system was inadequate in sanctioning acts under article 3 of the ECHR. Proof of this is given by the fact that "the applicants submitted that, following the

[736] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 78.
[737] Ibid., paragraph 80.
[738] Ibid., paragraph 81.
[739] Ibid.
[740] Ibid., paragraph 84.
[741] Ibid., paragraph 83.
[742] Ibid., paragraph 86-7; Rampone, "Commento alla sentenza", 11-2.

criminal proceedings, the first-instance court had recognized the seriousness of the ill-treatment to which they had been subjected, but that those responsible for that ill-treatment had not been punished. This occurred because the offences with which the prison officers had been charged pursuant to the Italian Criminal Code had become time-barred during the criminal proceedings"[743]. The ECtHR observes that the penalty imposed by the Asti Court's judges was not appropriate to the extent of the crime of torture, and in its final judgement the Court

> "considers that the core of the problem resides not in the conduct of the domestic judicial authorities but rather in a systemic deficiency which was characteristic of the Italian criminal law framework at the material time, as had already been identified in Cestaro. In the present case, this lacuna in the legal system, and in particular the absence of provisions penalizing the practices referred to in Article 3 and, where appropriate, providing for the imposition of adequate penalties, rendered the domestic courts ill-equipped to perform an essential function, namely that of ensuring that treatment contrary to Article 3 perpetrated by State agents does not go unpunished. This, in turn, may be viewed as having had the broader effect of weakening the deterrent power of the judicial system and the vital role it ought to be able to play in upholding the prohibition of torture"[744].

Exactly in the Cestaro case, the events of the Asti prison proved once again the inadequacy of the Italian penal system in criminalizing torture and in preventing future similar breaches of article 3[745].

Nevertheless, another lack in the ability of sanctioning the perpetrator can be seen, according to the Court, in the fact that a mere disciplinary sanction cannot be considered enough to respond to the breaches of article 3 by state's agents. Only a criminal prosecution can have positive deterrent effects in this sense[746]. However, the Court found that

[743] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 91.
[744] Ibid., paragraph 111.
[745] Ibid., paragraph 112; Rampone, "Commento alla sentenza", 13-4.
[746] ECtHR, 26 October 2017, *Cirino and Renne v. Italy*, Application Nos. 2539/13 and 4705/13, paragraph 114.

> "the officers were not suspended from duty during the investigation or trial. The Court has frequently held that, in cases where State agents have been charged with offences involving ill‑treatment, they should be suspended from duty while being investigated or tried. The Court stresses the particular significance of such measures in a correctional context. In this connection, it emphasizes the importance of safeguards ensuring that persons who may have been the victims of ill-treatment by State officials in custody – who are already in a state of particular vulnerability – are not discouraged, whether directly or indirectly, from lodging complaints or reporting ill-treatment"[747].

Overall, the events of the Asti prison highlight one of the darkest problems of the Italian penal system and of the national correctional structure. The decision to apply other kind of less serious crimes to sanction and prosecute the defendants shows how Italy could not continue without introducing a proper crime of torture in its legislation, and that the decision to compare the crime of torture to other less brutal offences demonstrates how it was still a taboo and a slap in the face of democracy even in those countries that have been promoters and defenders of fundamental rights and freedom. It was only thanks to the ECtHR's judgement that both the applicants (for Renne his daughter)[748] have been able to obtain their compensations, even if what should be stated in front of such events is that a proper criminal legal system, which guarantees criminalization and prosecution of individuals committing torture, can avoid right from the beginning the commission of such acts.

1.4 Article 613-bis of the Italian Penal Code

Looking beyond the international obligations that derive from the major international legal instruments, and without considering the inadequacy of the Italian criminal law, at least until 2017, the Italian Constitution, which was historically written by the fathers of democracy who suffered the atrocities of Fascism, includes, as probably the only crime imposed and required to be criminalized, the prohibition of physical and

[747] Ibid., paragraph 115.
[748] Marchesi, *Contro la tortura*, 66.

moral violence for all those individuals deprived of their liberty under article 13, paragraph 4[749].

It took twenty-eight years since the ratification of the CAT, before the Italian government recognized torture as a crime with the entry into force of Law No. 110 of 14 July 2017[750] that established the criminalization of the offence of torture with article 613-bis, and the crime of instigation of a state official to perpetrate torture within article 613-ter[751].

Together with the introduction of the crime of torture, article 2 of Law 110/2017 enshrines the prohibition to use the statement and confessions obtained through the use of force and torture, by modifying article 191 of the Penal Code about illegitimately obtained proofs[752]. Article 3 of the same new law confirms the prohibition of non-refoulement, with the constraint to expel or return immigrants towards a state where there are reasonable proofs that they can be subjected to torture or other ill-treatment[753]. Finally, article 4 comprises the non-recognition of diplomatic immunity to all those diplomatic

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[749] Article 13 (4) of the Italian Constitution reads: "E` punita ogni violenza fisica e morale sulle persone comunque sottoposte a restrizioni di libertà" and it also refers to article 27 (3) that states "Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato", see the articles available at https://www.senato.it/1025?articolo_numero_articolo=13&sezione=120#:~:text=Non%20%C3%A8%20ammessa%20forma%20alcuna,dell'autorit%C3%A0%20giudiziaria%20%5Bcfr [accessed 20 June 2021]; Giovanni Flora "Il nuovo articolo 613-bis C.P.: meglio che niente" in Luigi Stortoni, Donato Castronuovo, *Nulla è cambiato? Riflessioni sulla tortura* (Bologna, Italy: Bononia University Press, 2019), 343; Carolei, "Cestaro v. Italy", 578.

[750] See the text of Law 110/2017 available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2017;110 [accessed 20 June 2021].

[751] Marta Picchi, "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", *Criminal Law Forum*, Vol. 28, No.3 (March 2017): 772; Stefania Amato, Michele Passione, "Il reato di tortura. Un'ombra ben presto sarai: come il nuovo reato di tortura rischia il binario morto", *Diritto Penale Contemporaneo*, 15 January 2019: 2, available at https://archiviodpc.dirittopenaleuomo.org/d/6407-il-reato-di-tortura [accessed 20 June 2021].

[752] See article 191 of the Italian Penal Code available at https://www.brocardi.it/codice-di-procedura-penale/libro-terzo/titolo-i/art191.html#:~:text=1.&text=Le%20dichiarazioni%20o%20le%20informazioni,la%20responsabilit%C3%A0%20penale(2) [accessed 20 June 2021].

[753] Article 3 of Law 110/2017 modifies article 19 of the "Testo unico immigrazione", for further references see Ilaria Marchi, "Il delitto di tortura: prime riflessioni a margine del nuovo art. 613-bis c.p.", *Diritto Penale Contemporaneo*, No. 7-8 (2017): 156.

state's agents who are under investigation of convicted in their state of origin for acts of torture[754].

The new law that has brought to the introduction of the new crime of torture inside the Italian Penal Code appears to be ample and well-structured. In reality, articles 613-bis and 613-ter hide a series of critical aspects that need to be considered.

The first criticism concerns the choice of the lawmaker to define torture as a common offence ("reato comune"), and not as an offence specifically committed by a public official ("reato specifico"), as article 1 of the CAT meticulously provides. For this reason, anyone can commit an act of torture, from a private individual to a state's agent. The decision of the Italian legislator is therefore to enlarge the scope of the national norm providing not only a crime that is vertically applicable, but that comprises also the horizontal relationship between the perpetrator and the victim, and as such the use of torture among private subjects[755].

The choice to opt for a common offence could, at first glance, have several advantages for what concerns the duties of the Italian state at international level. Indeed, it must be said that both the ICCPR and the ECHR provide measures of sanction and criminalization for all those acts of torture committed by private individuals[756]. From this point of view, the implication of a common offence can be seen as an added value that enlarges the scope of the criminalization of the crime of torture, without restricting it only to those crimes committed by public officials[757]. However, it must be said that the decision to attribute the crime of torture to private individuals, and then to public agents, who are instigated to commit it, has been strongly denounced by the Committe Against Torture that in its "Concluding Observations" considers that

> "article 613 bis of the Criminal Code is incomplete inasmuch as it fails to mention the purpose of the act in question, contrary to what is prescribed in the Convention. Moreover, the basic offence does not include specifications relating to the perpetrator namely, reference to the act being committed by, at the instigation of, or with the consent or

[754] Marchi, "Il delitto di tortura", 156; Picchi, "Prohibition of torture", 773.

[755] Angela Colella, "Il nuovo delitto di tortura", in *Treccani. Il libro dell'anno del diritto 2018* (Roma, Italy: Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, 2018), 153; Carolei, "Cestaro v. Italy", 580; Amato, Passione, "Il reato di tortura.", 5.

[756] In this case, the examples of torture resorted by private individuals or sexual violence are taken. For further references see Paolo Lobba, "Obblighi internazionali e i nuovi confini della nozione di tortura", in Luigi Stortoni, Donato Castronuovo, *Nulla è cambiato? Riflessioni sulla tortura* (Bologna, Italy: Bononia University Press, 2019), 148.

[757] Ibid., 149.

> acquiescence of a public official or other person acting in an official capacity. Despite the explanations given by the delegation as to the non-cumulative nature of the elements mentioned in article 613 bis, the Committee considers that this definition is significantly narrower than the definition contained in the Convention, and establishes a higher threshold for the crime of torture by adding elements beyond those mentioned in article 1 of the Convention (art. 1)"[758],

adding also that "the State party should bring the content of article 613 bis of the Criminal Code into line with article 1 of the Convention by eliminating all superfluous elements and identifying the perpetrator and the motivating factors or reasons for the use of torture"[759].

Another relevant aspect that contrasts with the definition of torture provided by article 1 of the CAT is the choice of the Italian lawmaker not to adopt the intentional and purposive element ("dolo specifico") behind an act of torture perpetrated both by a private individual and by a state's agent, and which is fundamental in the definition of the Convention. This omission has been a highly thought decision for many Italian authorities and politicians, who right from the beginning considered the specific intent of an act of torture as something strictly related to the figure of the state's official, for whom they have given a special consideration[760]. Indeed, during the preparatory works the two alternatives of considering an act of torture either as a common offence, or as a crime specifically committed by a state's agent has brought to several discussions and obstacles. The political scenario was in fact divided in two: on the one hand, the Italian center-right politicians pressed to recognize torture as a common crime that would not have directly involved state's forces. On the other hand, the left-wing politicians supported the recognition of the act of torture as an offence perpetrated by state's agents, and as a consequence with their arraignment before a Court. Due to this demanding issue, which made the attempt of the introduction of the crime in the Italian legal instruments even

[758] See the Committee against Torture "Concluding observations on the combined fifth and sixth periodic reports of Italy" of 18 December 2017, paragraph 10, available at https://atlas-of-torture.org/en/document/9dxg7yff0bf?page= [accessed 20 June 2021].

[759] See the Committee against Torture "Concluding observations on the combined fifth and sixth periodic reports of Italy" of 18 December 2017, paragraph 11, available at https://atlas-of-torture.org/en/document/9dxg7yff0bf?page= [accessed 20 June 2021]; Francesca Cancellaro, "Pubblicate le osservazioni del comitato ONU contro la tortura sulla situazione italiana", *Diritto Penale Contemporaneo*, No. 1 (2018): 302.

[760] Marchi, "Il delitto di tortura", 164; Colella, "Il nuovo delitto di tortura", 155.

more serious, the only possible solution was the one to introduce the offence as a common breach that would be aggravated if instigated by a public official[761].

When analyzing the figure of the perpetrator provided by article 613-bis, it is necessary also to pay attention to the usefulness of the fourth clause of the article. Both at international and European level, the main legal instruments do not impose a period of time of sanction or imprisonment that the perpetrator should serve. On the contrary, what is simply stated and recommended is that the alleged criminal should be punished with an *ad hoc* sentence that is in line with the gravity of the offence committed[762]. Article 613-bis punished the offence of torture with a period from four to ten years of imprisonment[763]. However, it is essential to notice that this precise clause provides aggravated factors, for example the years of imprisonment are increased from five to twelve years, if the offence is perpetrated by a state's agent. Then, an already long period of imprisonment may be aggravated by visible grievous bodily harms and injuries, committed by the torturer, that would contribute to protract the years of imprisonment up to fifteen years[764]. Lastly, the Italian lawmaker has decided to establish aggravated factors, if the perpetrator causes the death of the victim. In this case, when a murder is unintentionally committed, years of imprisonment are extended to thirty years, on the other hand when death is intentionally provoked, the final judgement will be life sentence[765].

After having analyzed the problem behind the configuration of the perpetrator, it is necessary to highlight how the victim is depicted by article 613-bis. The status of the victim, as represented by the new law, has caused no less complications especially when compared to the notions included in the major international legal instruments. With respect to the offended individual, the Italian lawmaker has imposed three prerequisites that should be respected and followed when assessing the condition of the victim. First of all, the victim to be considered as such, must be deprived of his/her liberty, and therefore there should be certain degree of limitation of personal freedom[766]. Then, the victim can

[761] Marchesi, "Tortura.", 549.
[762] Carolei, "Cestaro v. Italy", 583.
[763] Ibid.
[764] Ibid.; Colella, "Il nuovo delitto di tortura", 156.
[765] Colella, "Il nuovo delitto di tortura", 156; Serranò, "L'introduzione del reato di tortura in Italia", 351-2.
[766] Alberto Crespi, Federico Stella, Giuseppe Zuccalà, Gabrio Forti, Sergio Seminara, *Commentario Breve al Codice Penale* (Padova, Italy: CEDAM, 2017), 2117.

be recognized as such also when between him/her and the perpetrator a relationship of subjugation exists. Indeed, article 613-bis circumscribes the crime of torture only when the victim is entrusted to an authority, custody of supervision of a state's agent[767]. The last prerequisite is the victim's defenseless status ("stato di minorata difesa"). This requirement is particularly difficult to define since it seems that it does not take into account all the factors that contribute the develop the status of the victim of torture, such as sex and age. Therefore, the defenseless position of the individual appears to be not suitable with the major concepts of torture provided by the major international legal instruments that also consider the physical and psychological characteristics of the victim at the time of the offence[768]. All those requirements that aim at characterizing the victim are ironically deceptive. Indeed, taking for granted these fundamentals, article 613-bis in reality excludes from its scope the possibility to recognize and criminalize acts of torture perpetrated by state's authorities during police operations because the offended individual is not completely under the authority or custody of the police[769]. This provision would therefore not punish the events of the Diaz-Pertini school, and as such would also fail to sanction and prevent the commission of future similar events that only due to complicated requirements will remain unpunished, exposing Italy to further condemnation in front of the ECtHR[770].

Other doubts have been raised for what concerns the commission of the offence within the meaning explicitly provided by article 613-bis. The choice of the language and terms appears to be very vague and inaccurate[771]. Indeed, the description of an act of torture, as defined by the Italian legislator requires the use of "threat and violence"[772] and the necessity provoke visible "severe physical suffering"[773]. Actually, it is quite obvious that torture is not necessarily performed following mere threatening and violent methods and, as a consequence, this definition is quite narrower than the one provided by article 1

[767] Ibid.; Paolo Lobba. "Punire la torture in Italia. Spunti ricostruttivi a cavallo tra diritti umani e diritto penale internazionale", *Diritto Penale Contemporaneo*, No. 10 (2017): 237; Picchi, "Prohibition of torture", 773.

[768] Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2117; Colella, "Il nuovo delitto di tortura", 153; Marchi, "Il delitto di tortura", 157.

[769] Colella, "Il nuovo delitto di tortura", 153; Picchi, "Prohibition of torture", 773; Carolei, "Cestaro v. Italy", 581.

[770] Lobba, "Obblighi internazionali", 239; Picchi, "Prohibition of torture", 773.

[771] Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2115.

[772] Carolei, "Cestaro v. Italy", 581; Picchi, "Prohibition of torture", 773.

[773] Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2116.

of the CAT, since at international level torture is defined as "any act" committed to cause pain and suffering on the victim, but as it can be observed, any kind of offence may be suitable to amount to torture, as well as the methods that can be used to inflict torture can largely vary[774]. At the same time, so that there is an act of torture, article 613-bis provides that the offence is the result of a plurality of criminal actions (at least two)[775]. At this regard, it seems not essential that all the offences are perpetrated in a fragmented way, and so in different periods of time and places, but what remains a clear problem is the difference between unanimity and plurality of actions that exists between the perpetrator and the victim. In this regard an example can be provided by the forms of torture chosen during the War on Terror by US officials, for instance whether to consider the several sessions of waterboarding either as a single act of torture of a plurality of actions afflicted over a period of time and place[776].

Always remaining in the field of description of the conduct of torture also acts of omission and psychological torture are two problematic aspects that deserve to be examined. Concerning the former, it is undoubtedly that both the CAT and the ECHR considered and torture also acts committed in an omissive way, but what comes to light from an analysis of article 613-bis is that the requirements of the acts of torture committed through the use of threat and violence is a chance to consider acts of torture as only limited to active conducts[777].

Concerning psychological torture, the issue is equally problematic. According to the provisions established by the Italian legislator, to recognize the offence of physical torture, severe physical suffering must be caused, whereas to assess an act of psychological torture it is necessary to observe a "verifiable psychological trauma"[778]. The decision to limit the acknowledgement of an act of psychological torture is actually particularly risky, as it limits the scope of the norm by imposing the necessity to be able to demonstrate a certain degree of psychological suffering that the victim has really suffered. At this point, it is logic to highlight that the degree and quality of suffering and pain that an individual feel is something extremely subjective that is even impossible to

[774] Carolei, "Cestaro v. Italy", 581.
[775] Lobba, "Obblighi internazionali", 226; Marchesi, "Tortura. Qualcosa è cambiato.", 365.
[776] Lobba, "Obblighi internazionali", 226.
[777] Ibid., 228; Carolei, "Cestaro v. Italy", 581.
[778] Marchesi, "Tortura. Qualcosa è cambiato.", 365; Lobba, "Obblighi internazionali", 233; Colella, "Il nuovo delitto di tortura", 154; Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2116.

define, measure and limit[779]. By affirming and remarking the necessity to verify concrete injuries, the new article is arbitrarily limited only to objective evidences also when the methods through which torture is inflicted go far beyond physical injuries[780].

At international level, as already stated in the second chapter, the ECtHR's jurisprudence has always remained on a threshold that has been established in order to distinguish acts of torture, from inhuman or degrading treatment. When analyzing article 613-bis, it is possible to notice that the common methods used to determine the intensity and gravity of the offence seem not to be considered by the new Italian law. Indeed, the lawmaker has decided to level the always used threshold, putting torture and inhuman or degrading treatment at the same level[781]. The choice to use clear parameters to distinguish the various offences is quite reprehensible. This provision is in stark contrast with the ECtHR's jurisprudence that has always indeed resorted to a threshold to distinguish and punish the various offences, and especially because by considering all those kinds of crimes equal would be inaccurate and would debase the crime of torture, as it would be criminalized as an act of inhuman or degrading treatment[782]. Furthermore, it must be said that at international level, particularly in the CAT where the two crimes are provided by two separate articles, these offences are treated as independent crimes that as such entail different international obligations and ways of sanction and punishment. By considering them the same offence, what can happen is a banalization of the crime of torture, when in reality a specific scheme and requirements must be followed to consider torture as such[783].

The prohibition of torture is an absolute and non-derogable right, and as such there is not any kind of special circumstance that can legitimize its use[784]. However, article 613-bis does not exclude the applicability of exonerating provisions or even amnesty or pardon, conversely from what is enshrined in the CAT and ECHR which re-mark the imperative and absolute value of the prohibition of torture, which does note entail "exceptions, limitations, compensation and derogations"[785]. by admitting limitations to

[779] Amato, Passione, "Il reato di tortura.", 9.
[780] Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2116.
[781] Lobba, "Obblighi internazionali", 153.
[782] Ibid.; Paulo Pinto de Albuquerque, Ciro Grandi, "Il nuovo delitto di tortura. Tutto sommato, un passo avanti", in Luigi Stortoni, Donato Castronuovo, *Nulla è cambiato? Riflessioni sulla tortura* (Bologna, Italy: Bononia University Press, 2019), 400.
[783] Lobba, "Obblighi internazionali", 154-5.
[784] Crespi, Stella, Zuccalà, Forti, Seminara, *Commentario Breve al Codice Penale*, 2117.
[785] Picchi, "Prohibition of torture", 774.

the crime of torture, not only the Italian penal legislation continues to be in stark contrast with the main international legal instruments, but also it encourages a dissuasive effect that alleged acts of torture may remain unpunished[786].

Through the analysis of article 613-bis, on the one hand it is possible to affirm that the Italian penal system has put an end to a series of non-fulfillment related to the introduction of the crime of torture in its Penal Code, whereas on the other, it is still possible to see several omissions that seem not to be filled in the short time. At this regard, the 2017 final observations of the Committee against Torture regarding Italy have highlighted these defects in the recent law[787]. It is not an easy task deciding what kind of choice would have been the suitable one to introduce the crime within the criminal legislation, according to Flora for example the best option was to reclaim the same structure and legal language of article 1 of the CAT to integrate it in the national legal system[788]. What is indisputable is that although this new article has been criticized for all its defective aspect by many monitoring mechanisms and NGOs such as Amnesty International[789], this norm gives a glimmer for the criminalization of torture, which in Italy has been concealed and not punished for too many years; what probably leaves hope of a better improving legal system is that nowadays the word "torture" takes form and gain value every time is pronounced before a national court[790].

[786] Carolei, "Cestaro v. Italy", 582.
[787] See paragraph 10 and 11 of the Committee against Torture 2017 Final observations, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsrcLgPII26jRu6si7MAAE4jraLHqWr9%2B2%2FAP28xTQtOlsTwwjAIACRxD2YL%2FsgIQQ%2FLGUGMR3SRktWz9x3aLCRkmOABdrugHAzm2AaSNF3G%2B [accessed 20 June 2021].
[788] Giovanni Flora, "Il nuovo articolo 613-bis c.p.: meglio che niente?", in Luigi Stortoni, Donato Castronuovo, *Nulla è cambiato? Riflessioni sulla tortura* (Bologna, Italy: Bononia University Press, 2019), 344.
[789] Marchesi, "Tortura. Qualcosa è cambiato.", 366-7.
[790] Ibid.

Conclusion

This final dissertation explores the impact that the use of torture, or more in general of ill-treatment and violence, has over individuals deprived of their liberty, specifically those detained in prison establishments. More precisely, it aims at shedding a light on all those circumstances that, in a correctional environment, can cause possible violation of fundamental human rights of inmates and that, at the same time provoke an international response that brings to the surface what the society cannot see, or it can even not imagine.

The analysis develops in four chapters. The first one is completely dedicated to an historical overview of the crime of torture and the prison system, two concepts that apparently seems to have nothing in common, but in reality, their correlation has secrets and circumstances difficult to plainly unearth. The second chapter, whose focus is legal, has the aim to introduce the reader to the international law subject, providing and examining all those peculiar and strictly necessary legal instruments that have been created and accepted by the international community. In this chapter, different subchapters have been written to explain which are the soft law standards, most of times also recalled by monitoring mechanisms and courts themselves, used to protect prisoners and to avoid human rights violation behind bars. The third chapter provides the reader clear events of offences within prisons. These instances, that many times amount to torture or inhuman or degrading treatment, are meticulously accompanied by concrete examples of cases brought in front of courts. The last chapter has been deliberately dedicated to the Italian scenario. For many years the Italian state has been considered in breach of not having adopted a proper law criminalizing torture within its Penal Code, as article 4 of the CAT reads and imposes. Many cases of mistreatments, violence and torture were not condemned for the offences they were, rather for less serious crimes that most of the times have been statute barred or nowhere comparable to offences of torture, or inhuman or degrading treatment. Many events of violence have seen as protagonists state's authorities in correctional buildings, and most of them have been ignored until the Stefano Cucchi case, the main inspiration for this thesis. The Italian lawmaker has tried to remedy this lack, and the 2017 norm seems to be a glimpse of light in this vicious cycle. In reality, what has been possible to see from the present analysis is that as far as the new norm criminalizes and prosecutes the crime of torture, it still has several pretexts not to fully fulfill international law norms.

Concluding this analysis is not easy, just as it is not simple trying to give an answer to the initial research question because of the complexity and sensitivity of the study. The subject concerned has always been part of a large group of issues disguised from the world, and to which public opinion has often reacted with firm indifference. Perhaps this can be proved by the fact that the society still seems to have a wrong attitude towards the figure of the detainee. As it has been affirmed at the beginning of the third chapter, there has always been the common idea that prisoners should be treated in relation to the crime they have committed, and therefore what authorities have tried to do has been to tailor an *ad hoc* punishment that can testify that politics and justice are fundamental and present every time there is the need to defeat the crime.

What is in reality misleading and unprecise to affirm is that whatever the crime is, detainees are all entitled of the same rights of free individuals, and the stereotype that characterizes them as dangers and threats for the entire society does not question what is really undeniable: their human rights must be respected. As far as they are criminals, this does not permit nobody, and in particular official authorities, to deprive them of a normal routine in prison, of all the basic necessities they require, of food, healthcare, and sleep. Furthermore, this does not allow them to be violent, and to beat detainees to death. This is not only a matter of law, this is also an issue of humanity and morality, which in some circumstances misses.

However, after having examined international legal instruments, documents, and reports, it is possible to affirm that international law has been playing a fundamental role in the fight against torture and ill-treatment. It is only thanks to monitoring mechanisms, NGOs and international courts that such offences have been unveiled to the society and then prosecuted. Without the essential function of international law, it would not be possible to reach a moment in which justice prevails over these offences.

And yet, the vital character of international law in some circumstances has not been enough or completely successful in combating this criminal parasite. As it has been seen, events of torture happen every day and everywhere and the belief of wanting to attribute these heinous practices only to despotic authorities is not credible anymore. The USA is an example. During the War on Terror, and particularly in the previously analyzed case of Abu Ghraib, human rights of individuals, who most of times were innocent, were violated. Italy is another example. Apart from the aforementioned cases, the events of the deaths of Federico Aldrovandi and Stefano Cucchi has showed society what institutional violence is and can cause.

Nevertheless, it is not completely right to become aware of this problem only when detainees die. Sensitizing public opinion should be a priority to have and live in a state where human rights of every single person under the state's jurisdiction are guaranteed, promoted and protected. In its little, this final thesis aims precisely at this: helping possible readers become more aware of the secret and fragile world of prisons.

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