**ITALY**



***MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION***

***inter-ministerial committee for human rights***

**ITALY’S CONTRIBUTION**

**“Input to the Report of the Special Rapporteur on Torture”**

*November 25, 2022*

**ITALY’S CONTRIBUTION**

*hrc-sr-torture@un.org*

Italian Authorities are in a position to provide the following contribution, **for your information only**.

**Introduction**

The Italian (rigid) Constitution (1948), coeval with the Universal Declaration of Human Rights, promotes and protects fundamental human rights. Its **Art. 13** stipulates as follows: **“***Personal liberty is inviolable. No form of detention, inspection or personal search nor any other restriction on personal freedom is admitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law. In exceptional cases of necessity and urgency, strictly defined by the law, law-enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should such measures not be confirmed by the judicial authorities within the next forty-eight hours, they are revoked and become null and void. All acts of physical or moral violence against individuals subject in any way to limitations of freedom shall be punished. The law establishes the maximum period of preventive detention”*. Its **Art.27, para.3**, also stipulates: (..) Punishment cannot consist in inhuman treatment and must aim at the rehabilitation of the convicted person (..).

**Specific Issues**

**As for the regulatory/normative framework**, mention can be made of the following (not exhaustive list).

By Act No. 15/2002, it was introduced the crime of torture in the penal military code of war. It envisages at its **Art.185-bis,** as follows**: *Other offenses against persons protected by international conventions****. Unless the act constitutes a more serious offense, a military person who, for causes unrelated to war, engages in acts of torture or other inhumane treatment, illegal transfers, or other conduct prohibited by international conventions, including biological experiments or medical treatment not justified by the state of health, against prisoners of war or civilians or other persons protected by those international conventions, shall be punished by military imprisonment from two to five years.*

Over the decades, long before the formal introduction of the crime of torture in the ordinary penal code in 2017, the Italian legal system has been providing that conducts such as beating (Penal Code, art. 581), bodily harm (Penal Code arts. 582-583), criminal coercion (Penal Code, art. 610), threatening (Penal Code, art. 612) and kidnapping (Penal Code, art. 605) are criminal offences; in this way "all acts of torture" are considered as infringements of the Italian criminal law.

Law No. 110/2017 introduces the crime of torture and incitement of public officials to commit torture in Articles 613-bis and 613-ter, Criminal Code (c.c.), respectively.

Compared to Article 1 of UNCAT Convention, the national provision has a broader scope. The commission of the offence by a public official or a person in charge of a public service, precisely because of the greater seriousness of the conduct, is provided for as an aggravating circumstance in paragraph 2, and is punished with a higher penalty: from five to twelve years’ imprisonment. Further aggravating circumstances are provided, including life imprisonment if the conduct results in the victim’s death as an intended consequence. As for the latter, Article 157, last para., c.c., applies and the statute of limitations does not extinguish the offence. For the other aggravated circumstances, pursuant to Articles 157 and 161 c.c., the maximum limitation period is: when very serious bodily harm results from torture, 22 years and 6 months; when death results as an unintended consequence, 37 years and 6 months.

As earlier indicated, Law No. 110/2017 also introduces the offence of inciting a public official to commit torture. It also provides in Article 4(2) for extradition in cases of torture, besides amending Article 191, of the Criminal Code of Procedure (acronym, c.c.p.). Moreover, Article 4(1) excludes diplomatic immunity for foreigners subject to criminal proceedings or convicted of torture in another State or by an international court, to be extradited for.

More specifically, Art. 1 of Law No. 110 of 2017 introduced the **offences of torture** (Art. 613-bis) and of **incitement to torture** in the Criminal Code (hereinafter CC) - Title XII (Offences against the person), Section III (Offences against moral freedom); being a **common offence,** this offence has a wider scope which, therefore, only partially overlaps with the 1984 UN Convention, which instead defines torture as **an offence that can be committed by public officials only and is a “form-free” offence (***reato a forma libera*). The latter case is an aggravating circumstance in the domestic system.

Under the explicit wording of Art. 613-bis CC, torture takes the shape of different conducts that can be carried out by anyone and consist of **serious violence or threats or acting with cruelty against persons subjected to any form of custody, control or care who are in a situation of diminished defence.** However, it can be inferred from the wording that the offence of torture is committed also when **any treatment that is inhuman and degrading to the dignity of a human being** is involved. In this case, a criminal charge does not require several conducts, as the seriousness of the offence is based on a cause-oriented form-free offence (see Court of Cassation, Fifth Chamber, 15 October 2019, no. 4755, Court of Cassation, Fifth Chamber, 08 July 2019, no. 47079; Court of Cassation, Fifth Chamber, 15 October 2019, no. 4755; Court of Cassation, Fifth Chamber, 08 July 2019, no. 47079; Court of Cassation, Fifth Chamber, 11 October 2019, no. 50208).

Art. 613-bis then provides for aggravating cases of the offence of torture: the first, which derives from the offence being considered as a common offence, concerns the offender’s qualification as a public official or person acting in an official capacity through abuse of power or in violation of the duties inherent in their functions or service; in this case, the sanction is imprisonment for a term of five to twelve years.

However, the third paragraph of Art. 613-bis specifies that **the aggravated offence does not apply in the case of suffering resulting solely from the execution of lawful measures that deprive or limit a person’s rights**.

The second group of aggravated cases consists in having caused ordinary (sentence increased by one-third), serious (sentence increased by one-third) or very serious (sentence increased by half) personal injury. However, the sentence is life imprisonment if the offender intentionally causes the victim’s death.

Law No. 110/2017 then introduced Art. 613-ter which punishes the **incitement of public officials to commit torture.** In particular, the sentence is imprisonment for a term from six months to three years for public officials or persons acting in an official capacity who, in the performance of their duties or service, incite other public officials or persons acting in an official capacity, in a way appropriate to the individual case, to commit the offence of torture, if instigation is not consented to or if it is consented to but the offence is not committed. This offence clearly has a further deterring goal than the main criminal offence.

**Limits to diplomatic immunity and extradition**

As earlier indicated, Art. 4 of Law No. 110 of 2017 excludes the **recognition of any “form of immunity” to foreign nationals** who are under investigation or have been sentenced for the offence of torture in any other State or by any international court (paragraph 1). The **obligation to extradite** a foreign national under investigation or sentenced for the offence of torture to the requesting State is provided for; in the case of proceedings before an international court, the foreign national is extradited to the Country identified under international law.

Moreover, it seems appropriate to refer to the principles and safeguards contained in
the Code of Criminal Procedure, including, inter alia, Article 64 of the Code of Criminal Procedure, which provides that, during the interrogation, the person under investigation, whether detained or under provisional arrest, should not be subjected to any kind of physical constraint.

The above 2017 reform also introduced a procedural provision providing for the **inadmissibility, in criminal proceedings, of any statement obtained as a result of torture**: Art. 191, para. 2-bis, of the Code of Criminal Procedure. The only exception to this rule is when these statements are used against offenders and only for the purpose of proving their criminal liability. Therefore, the instruments to protect victims of torture in criminal proceedings are strong: besides being granted many procedural rights, which can ensure effective criminal proceedings to identify and adequately punish offenders, victims do not have to bear any evidentiary consequence from the extorted confession, in line with the indications of the ECtHR (ECtHR, Grand Chamber, 11 July 2006, Jalloh v. Germany, § 105).

* Specifically, Article 191, Code of Criminal Procedure - **Unlawfully Acquired Evidence** (as amended in 2017), envisages as follows 1. Evidence acquired in violation of prohibitions established by law cannot be used. 2. The non-usability is also detectable *ex officio* at every stage and level of the proceedings. **2-bis. In any case, statements or information obtained through the crime of torture shall not be usable, except against persons accused of that crime and for the sole purpose of proving their criminal liability.**

With regard to **investigations**, there are no specific provisions for the offences of torture, which have the same safeguards afforded by the system to the finding of any offences according to the rules of due process, given that the legal system provides for **compulsory criminal prosecution** when the “*notitia criminis*” reaches a public official and is punishable *ex officio* and not on party’s complaint (Art. 112 Const.), as well as for **impartial Public Prosecutors** (Art. 108 Const.), who are members of the judiciary and whose independence is guaranteed.

Additional measures to prevent forms of cruel, inhuman or degrading treatment of persons in detention have been introduced by and include: Law-Decree No. 78/2013, converted into Act No. 94/2013; Law-Decree No. 146/2013 on extension of the electronic tagging to those under house arrest, converted into Act No. 10/2014; Legislative Decree No. 101/2014, transposing EU Directive 2012/13, on the right to be informed in the criminal proceedings, which amends the Criminal Procedural Code by envisaging – as per general rule - the submission, in writing, of a list of rights to which s/he is entitled; (to improve the efficiency of the judiciary in the penal sector) Act No. 67/2014 envisages *inter alia* probation and the clustering of crimes, the penalty of which can be transformed into an administrative sanction; and Law-Decree No. 92/2014, converted into Act No. 117/2014. This Act No. 117/2014 envisages specific compensation for prisons’ inmates, if inhuman and degrading living conditions in jail are ascertained. Act No. 47/2015, to further reduce the resort to precautionary detention measures; Act No. 28/2015, in case of light conducts.

As for Law No. 110/2017, please kindly refer to information above.

At a legislative level, it is also worthy of mention Act No. 103/2017, entitled "Changes to the Criminal Code, the Code of Criminal Procedure, and the Penitentiary Act (*Ordinamento Penitenziario*)", the novelties of which include, inter alia, as follows: (a) Possibility to extinguish the offense by means of a redress-type conduct; (b) Modification of the procedural rules for certain offenses; c) Extension of the rights of the injured party; d) Clear timelines to conclude preliminary investigations by the Public Prosecutor; and amendment to the statute of limitation-related legislation, specifically by suspending the statute of the limitation period for eighteen months after the first instance decision and for eighteen more months after the second instance one (the amendment applies to offenses committed after the entry into force of the law under reference); a delayed statute of limitation regime applies for offenses committed against children, meaning that the statute of limitation starts from when the victim comes of age; e) Rise in the use of the financial penalty replacing the detention - with the possibility of reducing the fine, in light of the economic situation of the defendant; f) Reform of the Penitentiary Act, by delegation entrusted to the Government, to be implemented by decrees aimed at: simplifying procedures before the oversight magistrate; facilitating the use of alternative measures; eliminating foreclosures for the access to penitentiary-related benefits; promoting reparative justice further; increasing access to labour for detainees within and outside prison facilities; valuing volunteering; f) recognition of what we define “the right to affectivity” (including easier access to spouses and children, family events, and so forth) and other constitutionally guaranteed rights ensuring the dignity of the person detained; g) Concrete implementation of the re-education purpose of the penalty.

Moreover, the Ministry of Justice set up in 2015 a General Directorate of Training at the Penitentiary Administration Department. The latter envisages integrated training formulas for the whole staff of the penitentiary administration, as well as for the juvenile and community justice service. Against this background, permanent lifelong training remains a key issue for all law enforcement agencies. In this regard Carabinieri Corps and *Guardia di Finanza* have been developing specific activities, including e-learning courses. Further, OSCAD core teaching areas are included within the in-service training intended for the whole State Police staff (additional information in Italy’s reporting to CAT).

On a more general note, Art.111 of the Constitution sets forth State’s duty to ensure and to implement the principle of the right to a fair trial within reasonable time. Accordingly (chronological order), Act 89/2001 has introduced a legal remedy in case of failure to comply with the above principle. In positive terms, the reasonable time occurs when the proceeding does not exceed before: the Court of first instance, a 3-year term; the Court of second instance, a 2-year term; and the Court of last instance (namely the Court of Cassation), a 1-year term.

**As for mechanisms/institutions/entities involved in complaints, investigations and prosecution,** by recalling information above, mention has to be also made of Italy’s NPM.

As for the NPM, Presidential Decree of February 1, 2016, on the appointment of President and member of the Collegiate Panel, was followed by Presidential Decree of March 3, 2016, on the appointment of the third member.

At present, the collegiate formation of the monitoring body is complete. The law establishing this Authority clearly establishes the independence of the collegiate Panel, which is appointed by the President of the Republic; it reports to the Presidents of the Chamber of Deputies and Senate of the Republic; cannot be renewed after its five-year term, neither is it removable save criminal responsibility.

NPM has been operational since March 25, 2016. The staff have been identified in different areas (legal and pedagogical, administrative, IT and security expertise) of the prison, judicial, juvenile and public security administrations. Such staff are exclusively at the service to the Authority and cannot be sent to other offices without its favourable opinion (Article 4, para. 2, of Ministerial Decree 36/2015); this allows for the functional independence of the Office’s staff. By Ministerial Decree 36/2015, the Authority shall adopt a Code of self-regulation, as later adopted on May 31, 2016. Article 3 of the Code explicitly states that the Authority freely exercises its mandate carrying out totally independently and without any interference its institutional duties to protect the rights of those detained or deprived of their liberty.

In line with OPCAT Article 17 et seq., the Code highlights the possibility of access to places and documentation without restrictions (except for the need to obtain the consent of the person deprived of his/her liberty, in order to examine documents contained in his/her personal file, in particular health documents). Moreover, Article 4 of the Code also establishes the need to protect the confidential information obtained, the obligation of secrecy about what has been acquired during the institutional visits and, in general, in the performance of the other tasks of the Authority, the obligation of confidentiality about the outcome of the visits, until it is published and the obligation to timely transmit any *notitia criminis* committed against persons deprived of their liberty to the judicial authorities. Article 4, para. 2, provides for protection from possible reprisals (Reports - though not exhaustive list - can be found on the National Authority website at: www.garantenpl.it).

At the end of 2020, Italy significantly intervened on the matter enacting a law that considered some observations proposed by the National Guarantor (hereinafter, NPM) pursuant to Article 19(c) OPCAT. This Law defines the National Guarantor as the only NPM for Italy, thus modifying the overall structure of the NPM network as considered in 2014. This designation of the NPM has entailed the definitive exclusion from its composition of the local Guarantors (regional and sub-regional), who have become the recipients of delegated powers on specific issues by the NPM (only on matters related to the deprivation of liberty and migrant persons, and the deprivation of liberty in the field of social and health care assistance), and when particular circumstances occur. Nevertheless, the local Guarantors maintain their characteristic of being institutions spread nationwide, guaranteeing the rights of persons deprived of liberty in cooperation with the NPM. This new arrangement has thus strengthened the functional, structural and financial organisation of the NPM that meanwhile completed the selection of its Office’s staff, supplementing it with external experts and further strengthening its accounting autonomy. The above Law, to highlight that the NPM’s powers since the outset have covered all de jure and de facto areas of deprivation of liberty, modified the name of the NPM Institution by eliminating the specific reference to criminal detention.

The independent control activity of the NPM is based on guidelines, constantly seeking cooperation and dialogue, locally and centrally. The results of this activity are primarily translated into: formal interchange with the Authorities concerned, relevant to the persons deprived of liberty; annual reports to the Parliament; observations on existing or draft legislation - in compliance with Article 19(c) OPCAT; reports on conducted visits, and recommendations, which constitute the established “elementary” standards by the NPM; and the follow-up to reports and complaints received by the NPM. Moreover, the NPM has reflected this approach in courses and training activities, MoUs, European projects, and projects with third sector. (..) In 2020, NPM inaugurated amicus curiae.

- Article 3 of the Self-Regulatory Code explicitly states that NPM exercises its mandate freely by conducting unannounced visits to any locations, independently and without any interference from public Authorities.

- The exchange of views with Authorities, access to all documents as well as the free and private discussion with individuals are established.

- NPM’s reports, following its visits, sent in first place to competent Administrations and subsequently published on its website - after allowing those Administrations a predetermined period of time, normally corresponding to 30 days to provide a reply - together with the Administrations’ replies, contain observations and recommendations to improve the overall protection of the rights of persons deprived of their liberty, in a cooperative spirit. Moreover, the monitoring of forced returns by NPM is not limited to the verification of the operational phases, but also extends from pre- to post-return.

Of relevance is Decree-Law No. 130/2020, introducing the possibility for foreigners in detention to address oral or written requests or complaints, even in sealed envelopes, to the NPM and regional/local Guarantors, concerning the treatment suffered in the places where they are detained.

Against this background, with regard to the right of complaint, Arts 35, 35 bis and 35ter of the Penitentiary Order are to be recalled.

Decree Law No. 92 of June 26, 2014 introduced Article 35-ter into the prison system, which provides compensatory remedies in favor of prisoners and internees who have suffered treatment in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*"). Those who have been subjected to treatment that does not comply with the criteria set forth in the Convention for a period of time of not less than fifteen days may obtain, as compensation for damages, a reduction of the prison sentence still to be served equal to one day for every ten during which the violation of their right occurred. Those who have served a sentence of less than fifteen days and those who are no longer in a state of detention (or whose sentence yet to be served does not allow the full deduction of the benefit just described), on the other hand, are entitled to compensation equal to 8.00 Euros for each day of detention spent in the above conditions (Additional information is contained in the last two national periodic reports to UNCAT).

**With regard to the protection of victims of violent offences, the procedural system guarantees the participation of victims in criminal proceedings in order to obtain compensation, understood as full redress of damage, as is generally provided for every victim of offences under Art. 76 of the Code of Criminal Procedure**.

The victim of an offence is the affected party in criminal proceedings and, as such, is to be served the notice of criminal proceedings in order to join as a civil party. In the case of death, the victim's next of kin have legal standing.

Specifically, Directive 2012/29/EU established minimum standards on the rights, support and protection of victims of violent crime. It was implemented by Decree Law No. 212 of 15 December and Law No. 122 of 7 July 2016. These provision are referred to with regard to the possibility given to victims to have a voice right after the assault, with immediate access to the necessary assistance, including legal assistance, paid by the State, and the guarantee of an interpreter, if necessary (see Art. 4-ter on legal aid, amending Art. 76 of Presidential Decree No. 115 of 30 May 2002, on a “Consolidated Text of legislative and administrative provisions on legal costs”, as amended by Art. 2, para. 3, Decree Law No. 93 of 14 August 2013, converted, with amendments, by Law No. 119 of 15 October 2013).

In particular, in the criminal trial stage, if a victim of violent offences joins as civil party bringing an action for damages, he or she must be assisted by a lawyer, and in such cases can be granted **legal aid at the State’s expense** under Italian law, regardless of the victim’s financial situation. This provision determines the victim’s automatic admission to legal aid in cases of offences referred to in Arts. 572, 583-bis, 609-bis, 609-quater and 612-bis, as well as, when committed against minors, of the offences referred to in Arts. 600, 600-bis, 600-ter, 600-quinquies, 601, 602, 609-quinquies and 609-undecies CC, regardless of the income limits laid down in paragraph 1 and without any discretion being afforded to judges.

Provided that the offence of torture is a complex offence that generally takes the form of abuse and injury, the same favourable legislation must be considered to apply to the victims of torture, even though this offence is not formally included in the 2013 list, which was drafted prior to its introduction into the system.

Being passive subjects of the offence, unlike defendants, victims of violent offences are required to testify as witnesses.

Victims are also entitled to autonomously appealing criminal judgments on points of law, and when the criminal trial ends favourably for a defendant (e.g., because the defendant is acquitted or the offence has been struck off with the prosecutor not challenging it) and the civil party's appeal is instead upheld in the proceedings on a point of law, the civil party is allowed to continue the action in a civil court to obtain the establishment of the wrongful act and the consequent damages by its perpetrator, even if the latter is definitively acquitted in criminal proceedings (Art. 622 Code of Criminal Procedure; see Court of Cassation in Joined Chambers, judgment of 04 June 2021, no. 22065 - def. Cremonini - ).

In compliance with Directive 2012/29/EU, the Ministry of Justice is establishing a widespread **network of public services** on a regional basis for victims of violent offences **to assist victims of any type of offence** beyond criminal proceedings and to promote restorative justice solutions.

**Conclusion**

The Italian Authorities take this opportunity to reaffirm their full commitment to effectively cooperating with UNSPMHs.