

TWO-LANE BLACKTOP: REFUGEES & TORTURE

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Abstract: The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right of asylum have, individually considered, an extensive field of application", but it is possible to point out some traits in common. Firstly, in both rights undelie the moral spirit of the Universal Declaration of Human Rights. At the same time, according to the recent reports of the main human rights organisations, both rights are in deep political crisis. Furthermore, is possible to see that sometimes they cross each other: there is a triple «zone of intersection between the right of asylum and the right not to suffer torture, inhuman or degrading treatment: one of the reasons for escaping from a country is to avoid suffering torture ("refuge after torture") secondly, sometimes inhuman and degrading treatment occur precisely in the process of seeking asylum ("inhuman treatment in the refuge"), finally, there are countries with strong deficiencies in their immigration policies and this can produce a perverse effect: the transfer of potential asylum seekers to countries where they are at risk of torture or inhuman treatment again ("torture or inhuman and degrading treatment after asylum").

Keywords: Torture; Refugees; Human Rights; International Law; Human Rights Effectiveness

Summary: I. INTRODUCTION; II. RIGHT OF ASYLUM AND RIGHT NOT TO SUFFER TORTURE: SAME NATURE AND COMMON DESTINY; II.1. A pretty similar starting point;. II.2. A common destin; III. FROM TORTURE TO ASYLUM SEEKING; IV. TORTURE (INHUMAN AND DEGRADING TREATMENT) IN THE SEEK FOR ASYLUM; V. TORTURE OR INHUMAN TREATMENT AFTER SEEKING ASYLUM; VI. SYNTHESIS AND RECAPITULATION.

I. INTRODUCTION

Both the right not to suffer torture or the right to asylum have, individually considered, case-by-case, broad fields of application. Torture is, unfortunately, a very widespread reality and, at the same time, the reasons of the refugees to escape from their countries are very varied.

However, there are at least two common notes between them that allow us to understand and approach them together. Firstly, we can agree that both are at the center of the big concerns that allowed historically the main human rights declarations since 1948. Neither asylum nor the interdiction of torture, inhuman or degrading treatment are just two more human rights among others, but rather they synthesize very well the *core* of the essential worries of the issue of the Universal Declaration of Human Rights and the subsequent Covenants: the imposition of a better world committed with the legal

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and political demands derived from the fundamental budget of the whole catalog of human rights: the human dignity.

The second common note is the existence of a zone of intersection between the right of asylum and the right not to suffer torture, inhuman or degrading treatment. This intersection belongs to the normative configurations of both rights as well to the real, empirical field of their effectiveness (the physical space where rights violations are committed). This can be understood in a triple way: firstly, the crossroads of both rights is due to the fact that one of the reasons for escaping from a country is precisely to avoid suffering torture in it ("refuge after torture" as we could call that encounter); Secondly, –and this is already a real feature of our present time–: inhuman and degrading treatment or punishment, occur precisely in the process of seeking asylum ("inhuman treatment in the refuge"); A last area of intersection results from the fact that there are countries with strong deficiencies in their immigration policies and this can produce a perverse effect: the transfer of potential asylum seekers to countries where they are at risk of torture or inhuman or degrading treatment or punishment ("torture or inhuman and degrading treatment after asylum").

But let us begin with their common nature and similar destinies.

II: RIGHT OF ASYLUM AND RIGHT NOT TO SUFFER TORTURE: SAME NATURE AND COMMON DESTINY

II.1. A pretty similar starting point

The right to asylum and the right to be free from torture have a common feature: both were part of the deepest beliefs and *raison d'être* of the World Declaration of Human Rights (1948). The prohibition of torture is, in a political philosopher Ronald Dworkin's fine expression, «a fixed point in the moral universe», but in addition, and as professor Javier De Lucas recalled a few years ago with regard to the extension of torture into democracy, the experience of that destructive capacity which can reach the policy of instrumental torture, was so serious that the *malheur de conscience* of the twentieth century, which the very birth of the UN has as one of its priority objectives, for the purpose of eradicating it.

In the twentieth century there were so many cases of systematic cruelty, including experimentation with human beings, that this explains perfectly the need, not only for the right not to be tortured, but also for the emphasis on its absolute character. The right not to be tortured is reflected in article 5 of the 1948 Declaration of Human Rights and article 7 of the Covenant on Civil and Political Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Both torture and cruel, inhuman or degrading treatment are prohibited practices at all times and in all places, even in times of war.

On an ethical perspective, the moral conviction that a human being can not be tortured by other human beings was, at a moment of our intellectual history (a zig.zag

civilizational process), so powerful, that it spread in the most important juridical texts and endowed, for that reason, of the most serious of the binding legal forces. The prohibition of torture is still (these are times when it must be remembered) a rule of *ius cogens* integrated at the bottom of the big principles that reflect superior values that bind the whole humanity. The moral and legal imperative –do not torture, any time, anywhere, in any circumstances– is mandated by the UN convention against torture and other cruel, inhuman or degrading treatment or punishment. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency,” says the convention, can “be invoked as a justification of torture.” All the declarations of rights stand out their absolute character: there are no exceptions.

That same compromise affects the meaning of the principle of *non-refoulement* as regards the right of asylum: no person should be sent back to a country where he or she may be subjected to torture. Such a prohibition against repatriation is set out in Article 33.1 of the 1951 Geneva Convention. It is an essential guarantee of the right of asylum: No contracting state may, by expulsion or refoulement, place a refugee in any borders of territories where their life or freedom is endangered because of their race, religion, nationality, membership of a particular social group, or their political opinions. Although there are exceptions on security and final conviction for serious crimes, the fact is that the principle of non-refoulement has evolved into an absolute standard, there are no exception or derogation²

With regard to the real effectiveness of the right of asylum, the United Nations High Commissioner for Refugees (UNHCR) has developed a large number of documents in recent decades to adapt protection mechanisms to new dynamics of persecution. It has also done so on theoretical currents for the recognition of refugee status in situations of danger to life or physical and mental integrity not contemplated at the time of its promulgation. In all these cases, the principle of non-refoulement is a fundamental component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment.³

In fact, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits (Article 3.1.) states parties to expel, return or extradite a person to another state "where there are reasonable grounds to believe that they would be in danger of being subjected to torture". In this sense, the European Court

² Indeed, the non-refoulement rule contained in human rights treaties covers a broader range of situations than that set out in 1951 and, in addition to not allowing exceptions or exceptions, does not require that the danger be linked to civil status Or politician of the individual, but can derive from any cause, and covers, in addition to the return and expulsion, also extradition. Among others: UNHCR, *Handbook of Procedures and Criteria for Determining Refugee Status under the 1951 Convention And the 1967 Protocol relating to the Status of Refugees*, Ginebra, 1988; GOODWIN-GILL, G., *The Refugee in International Law*, Clarendon Press, Oxford, 1996, STENBERG, G., *Non-Expulsion and Non-Refoulement. The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, IUSTUS Förlag, Uppsala, 1989.

³ ACNUR «Opinion 97: Sir LAUTERPACHT, E. y BETHLEHEM, D., *Refugee Protection in International Law*, Cambridge, 2001.

of Human Rights (ECHR) has ruled (Soering case) that the prohibition of art. 3 of the European Convention against ill-treatment "is also absolute with regard to expulsión". According to the Human Rights Committee, "it would be unreasonable to interpret the responsibility of States under the terms of article 2 of the Covenant (referring to the Covenant on Civil and Political Rights, which refers to the commitment to respect and guarantee it) In such a way as to enable them to perpetrate violations of the pact in the territory of another State which they could not perpetrate in their own territory". That is to say, the European Court of Human Rights has interpreted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment as prohibiting States which have ratified the Convention not only from inflicting torture or inhuman or degrading treatment, But also to send asylum seekers to countries where there is a real risk of such treatment or of being sent back to others where that danger is predictable.

In short, if both rights summed up well the wide ethical convictions of the second half of the twentieth century (at least in its first decades) was by a serie of strong believes probably based on the recent memory of a nameless atrocities and te consequent need to protect not only life or phisical integrity of the human being, but also his dignity. And there is no greater affront to this dignity than the impossibility of finding refuge in the world or that humna being's "reification" that we call "torture". We can go even further, after analyzing the recent arguments that claim the lawfulness of torture, professor La Torre has developed the thesis that there is a conceptual connection between torture and illegality, a *phenomenological contradiction* between law and torture⁴. At the same time, all the organizations committed to the defense of human rights insist today in a fact: the legal status of refugees is obligatory for all States that form the international system of law, established in the Geneva Convention and in the Protocol of New York.

II.2. A commom destiny

I think it is possible to agree that there are two human rights that are in global crisis today: the right to asylum and the right not to suffer torture. The importance of each of them is such that this crisis climate can also be understood as a crisis of political institutions, that is, as a political crisis.

Regarding the first, and as Javier de Lucas has been insisting for more than a decade, asylum and refuge rights are not one of the catalog of rights, but are at the core of any political project that respects human rights. That is why the current 'refugee crisis' can be understood as the EU crisis as a political project: a common area of freedom, security and justice, chaired by the theorical notion of human rights⁵. The International Organization for Migration estimates that more than 3,770 refugees and

⁴ LA TORRE., M., «A Dangerous Liaison. Tortura and Law», *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, nº 28, 2013, pp. 25-38.

⁵ DE LUCAS, J., «Sobre el proceso de vaciamiento del derecho de asilo por parte de los Estados de la UE», *Ars Iuris Salmanticensis*, vol. 4, junio 2016, pp. 21-27; Id., *Mediterráneo, el naufragio de Europa*, Tirant lo Blanch, Valencia, 2016.

migrants died last year trying to cross the Mediterranean Sea to Europe ⁶, at the same time, we are witnessing an strong retreat in the “defense” of tradiitonal national borders with sospicious xenophobic arguments

As far as torture is concerned, scandals such the so-called "CIA flights"⁷ together with the impunity in the well known Abu Ghraib⁸ and Guantanamo cases⁹, the success of the populist «ticking bomb» argument¹⁰, or the very existence of secret detention centers in Europe give an idea of the scope of the serious implications to which we referred earlier.

So, definitively, one of the issues that brings the destiny of the prohibition of torture closer to the norms on asylum is a common basic crisis (a type of political crisis) concretized in the lack of seriousness with which they are assumed the legal and political obligations arising from the legal nature of both rights. Furthermore, the future seems even worse¹¹: it is not posible to measure exactly the consequences¹² of this "emptying", again in the words of De Lucas,¹³ in which national policies overlap political ideals, but also supranational commitments (those of the United States vis-a-vis the UN, those of the member states vis-a-vis EU).

⁶ INTERNATIONAL ORGANIZATION FOR MIGRATIONS, *Fatal Journeys Volume 2: Identification and tracing of dead and missing migrants*, Geneva, 2016.

⁷ KALECK W., «Justice and accountability in Europe: discussing strategies», CIA – “Extraordinary Rendition” flights, torture and accountability – a European Approach, European Center for Constitutional and Human Rights, Second Edition, 2008, p. 15.

⁸ BENNET, W. L., LAWRENCE, R. G., LIVINGSTON, S., «None Dare Call It Torture: Indexing and the Limits of Press Independence in the Abu Ghraib Scandal», *Journal of Communication*, 56, 2006, pp. 467-485. SANDS, Ph., *The Torture Team. Rumsfeld’s Memo and the Betrayal of American Values*, Palgrave-Macmillan, New York 2008.

⁹ Vid., LA TORRE, M., «La teoría del derecho de la tortura» *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, nº 17, 2007, pp. 71-87.

¹⁰ The ticking-bomb argument, where a terrorist is tortured in order to extract information of a primed bomb located in a civilian area, is often invoked as one of those extreme circumstances where torture becomes justified. As the War on Terrorism intensifies, the ticking-bomb argument has become the dominant line of reasoning used by both academics and policy advisers to justify a legalized, state-sponsored program of torture. Buffani and Arrigo have argued for the unconditional refutation of any attempt to justify torture, without exceptions beacuse the empirical evidence suggests that the institutionalization of torture practices creates serious problems. «Torture interrogation fails to fulfil its initial purpose as a low-cost life saver, while its long-term potential is the devastation of democratic institutions». BUFACCHI, V. and ARRIGO, J. M., “Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument”, *Journal of Applied Philosophy*, 23, 2006, pp. 355-373. On the inefficacy argument: CARVER, R., HANDLEY. L., (Eds.); *Does Torture Prevention work?*, Liverpool University Press, 2016.

¹¹ HUMAN RIGHTS WATCH; “Trump’s National Security Choice Won’t Rule Out Torture” <https://www.hrw.org/news/2016/11/18/us-trumps-national-security-choice-wont-rule-out-torture> 15/11/2016.

¹² HARBURY, TJ. K., *Truth, Torture and the American Way. The Historical Consequences Of U. S. Involvement in Torture*, Beacon Press, Boston, 2005.

¹³ DE LUCAS, J., «Sobre el proceso de vaciamiento del derecho de asilo por parte de los Estados de la UE», cit., p. 21.

Both the attacks of 11 September and the EU “refugee crisis” of recent years seem to have allowed, in a context of urgency and exceptionality, the idea that it is possible for the governments to avoid taking on the basic demands of these two human rights developed in a historical phase of extraordinary consensus. Accordingly, both the right not to suffer torture or inhuman and degrading treatment, as well as the requirements of the right of asylum, could be redesigned by the existence of contexts of exceptionality (defined as such by the political actors themselves) Which will allow them to no longer ignore the regulative ideal or "ethical encouragement" of them, but rather the basic political and juridical implications derived from their binding force.

So, the actuality of both rights is quite similar: both are in a critical situation. The years after the September 11 attacks allows establishing a genuine global network that, in the shelter of the fight against terror, includes a complex structure of dark detention centers where human rights violations are fragrant and impunity including inhuman treatment and torture¹⁴. Moreover, even before the Ankara agreement, it seems to be a kind of «rights local markets» whose message to the population is that there is no longer any space safeguarded by the human rights system that is not susceptible to give in to short time political and economic interests of the rulers of national states, the populist parties’ s pression¹⁵ and, apparently, also the worst demandings of their voters.

Our time should be characterized as being an historical phase of human rights way in which the protagonism would rest on the empirical work and the statistics¹⁶. The essence of this phase should be the development of the priority of the measurement¹⁷, material means, tools and guarantees for the effectiveness (or real effectiveness) of human rights.¹⁸ However, we are facing a setback that seems to be far behind the starting point. In the first case (the right not to suffer torture or inhuman or degrading treatment), rather than a stagnation of the traditional format of its prevention (another form of real effectiveness), the main feature seems to be the revision of the foundations of non-exceptionality. One of the key questions is whether states can use methods of “coercive interrogation” that do not qualify as torture. On the issue of regulation, there are those –Alan Dershowitz, for example– who believe that banning torture and coercion outright is unrealistic. Instead, Dershowitz said, the practice should be regulated by court warrants.¹⁹ In our opinión, all these positions are part of an immoral

¹⁴ HUMAN RIGHTS WATCH, «No more excuses: A Roadmap to Justice for CIA Torture», 2015. <https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture>. 7/09/2016

¹⁵ GALE, P., «The refugee crisis and fear. Populist politics and media discourse», *Journal of Sociology*, 40(4), 2004, pp. 321-340.

¹⁶ CLAUDE, R., JABINE, Th.; “Exploring Human Rights Issues with Statistics, in, *Human Rights and Statistics, Getting the Record Straight*, University of Pennsylvania Press, 1992, p. 23.

¹⁷ LANDMAN, T., «Measuring Human Rights: Principle, Practice and Policy», *Human Rights Quarterly*, 26, 2006, pp. 906- 931.

¹⁸ GARCÍA CÍVICO, J. «¿Qué es un indicador de derechos humanos y cómo se utiliza?», *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, Año nº 15, Nº 24, 2011, p. 179.

¹⁹ Memorandum for Alberto R. Gonzales, Counsel to the White House, from Jay S. Bybee, Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, Standards of Conduct for Interrogation under 18 U.S.C, Section 2340-2340A, 2002; Memorandum for John A. Rizzo, Acting General Counsel, CIA, from Jay S. Bybee, Assistant Attorney General, Interrogation of al Qaeda

debate²⁰ (quite truculent, to be honest), including the wrong and dangerous expression "war on terror". As Michael Ignatieff wrote the judicialisation of torture, and of coercive interrogation techniques involving stress and duress, physical abuse, sleep deprivation and so on, could lead to torture and coercion becoming routine rather than an exception²¹. That is, a position in favour of outright prohibition of both torture and coercive interrogation has gained strength from the abuses at Abu Ghraib, and from the memos of the office of legal counsel and the White House parsing the torture convention into permission for coercive interrogation. It seems clear from the dire experience of Abu Ghraib that outright prohibition of both torture and coercive interrogation is the only way to proceed.

That is to say, the traditional main problem concerning the effectiveness of the right not to be tortured had been the continued existence of torture in the world, but nowadays, we can add new justifications in a worrying path of exceptionality (excepcionalities), trivialization and/or strange normalization (including legalization) of torture practices. According to Amnesty International's most recent report, during the past five years torture has been reported in 141 countries. In addition, 2015 has been the first year in which torture has spread as much as in World War II. Immediately linked to the extent of the crime of torture, we find the question of its impunity. The diagnosis is worrying in itself, but it also translates into population movements, exodus that have as main motive truly terrifying situations: threats of murder, torture, imprisonment without guarantees, enforced disappearances, etc.

Finally, if we want to highlight the novelties in the area of conjunction of both rights (and the assets that are protected with them), another feature that points to a common destination is the fact that both torture and asylum are affected by another legal novelty: the rise of private actors in human rights violations²². The Convention against Torture definition contains a requirement that the actor be a public official or other person acting in an official capacity but there are facts that allow a new trend in the jurisprudence of the Committee against Torture, the European Court of Human Rights and the UN Human Rights Committee to admit a wider reading of 'the actor' in international human rights law²³. We refer to the open cases against international corporations for human rights violations that point in particular to the crime of torture as

Operative, 2002. DERSHOWITZ, A. D., «Is there a torture road to freedom?», *Los Angeles Times*, 8 de noviembre de 2001. YOO, J., *The Powers of War and Peace*, University of Chicago Press, Chicago, 2005.

²⁰ The immoral character of the debate itself, has been pointed out in many places, among others, by Massimo La Torre, LA TORRE, M., «La teoría del derecho de la tortura» *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, nº 17, 2007, pp. 71-87. As Slavoj Žižek wrote, those who are not openly pro-torture, make it a legitimate subject of debate, are even more dangerous than explicit support. ŽIŽEK, S., «Sobre terrorismo y tortura», in *Pasajes: Revista de pensamiento contemporáneo*, Nº. 17, 2005, pp. 21-27 p. 23.

²¹ IGNATIEFF, M., *Torture: Does it Make Us Safer? Is it Ever OK?*, Kenneth Roth and Minky Worden, (eds.), The New Press / Human Rights Watch, 2006.

²² ROSEMANN, N.; «The Privatization of Human Rights Violations – Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq», *Non-State actors and international law*, 5, 2005, pp. 77-100.

²³ SIVAKUMARAN, S., «Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals», *Leiden Journal of International Law*, 2005, pp. 541-556.

well as forced displacement (basically in the case of *Land grabbing*²⁴). These facts are not isolated but integrated in a more general trend²⁵ and if we had to identify some specific cases, among them would be the hiring of mercenaries and private forces in the conflicts that the US maintains in Iraq and other countries in the zone («Blackwater case» and others²⁶), while on the other side (dealing with refugees) we could talk about the increasing business of illegal people trafficking. That is, there is a final convergence that has to do with what the Dutch sociologist Saskia Sassen studies as “power issues arising from the globalization process”: there are more and more populations displaced or imprisoned, more destruction of the land, etc. And this explains why at the origin there is a complex knot of private institutions and systems that we do not know still well, even when this causes the blurring between refugee and economic immigrant as well as their gradual loss of semantic relevance.²⁷

III. FROM TORTURE TO ASYLUM SEEKING

Daily, millions of refugees and migrants fleeing war and persecution in countries like Syria, South Sudan, Myanmar and Iraq suffer intolerable misery and human rights violations²⁸. Refugees are people who have had to flee their country because of armed conflict, serious human rights abuses or persecution and the threat of inhuman treatment or torture is one of the traditional motives for fleeing a country. In recent years the number of people forced to seek refuge in a third state due to this scourge (torture) growing especially in unstable territories and areas of conflict, has increased.

According to UNHCR, more than 60 million people have left their countries or become displaced; although the reasons why people migrate remain diverse and often complex, the truth is that there are thousands of people running away from abuses and crimes such as torture. Syria, Afghanistan, Somalia, Sudan, South Sudan, the Democratic Republic of the Congo, the Central African Republic, Myanmar, Iraq and Eritrea are countries with extraordinary human rights deficits, in particular, as regards torture and inhuman or degrading treatment.

²⁴ ZAMORA CABOT, F., «Acaparamiento de Tierras (*Land Grabbing*) y Empresas Multinacionales: El Caso Mubende-Neumann», in *Papeles El Tiempo de los Derechos*, 2013, (5).

²⁵ AYMERICH, I., «Orígenes ideológicos de la distribución de responsabilidades públicas y privadas en la garantía de los derechos humanos», in ZAMORA, F. J., GARCÍA CÍVICO, J., SALES PALLARÉS, S., (eds.), *La responsabilidad de las multinacionales por violaciones de derechos humanos*, Cuadernos Democracia y Derechos Humanos, Universidad de Alcalá, Madrid, 2013, pp. 21-40.

²⁶ As the journalist James Scahill has denounced as Dirty Wars, drawn from the ranks of the Navy SEALs, Delta Force, former Blackwater and other private security contractors, the CIA's Special Activities Division, and the Joint Special Operations Command (JSOC), these elite soldiers are operating worldwide, with thousands of secret commandos working in more than one hundred countries, including torture and other abuses. SCAHILL, J. *Guerras Sucias. El mundo como campo de batalla*, Barcelona, Paidós, 2013.

²⁷ SASSEN, S., *Expulsions, Brutality and Complexity in the Global Economy*, Harvard University Press, 2014.

²⁸ UNHCR, *Global Trends, Forced Displacement in 2015*, p.8:

<http://www.unhcr.org/uk/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>

In Syria, according to recent reports by the United Nations, Amnesty International, Human Rights Watch and the Syrian Observatory for Human Rights, government forces and non-state armed groups committed countless war crimes and enforced disappearances with impunity. Between 2011 and 2015, thousands of deaths were in custody due to torture. The Islamic State armed group imposed sieges and attacks with chemical weapons in civilian areas. There are already 400,000 more dead, 7.6 million internally displaced persons and 4.6 million refugees in other countries.

In general terms, the refugees who are arriving to Europe at the moment, come from territories with a high level of conflict and violence. In addition to the Syrian refugees, there are a significant number of Afghans and Iraqis who also try to reach Europe across the Mediterranean. The hell of torture is particularly aberrant and scandalous in another country where refugees come from, Eritrea, where, in addition, young people are forced into military service similar to slavery.

In Eritrea, since the dictatorship was hardened in 2008, some 50,000 people have fled the country to Europe or Israel. According to the UN, some 3,000 people are trying to flee every month. By the end of 2014, the organization had registered 48,400 Eritrean asylum applications in 44 industrialized countries. In the last decade, about 305,000 Eritreans (5% of the population) have fled. The Eritreans form the second group, behind the Syrians, who cross from North Africa to Europe by boat, and in recent months hundreds of them have died in the attempt.

But that already leads us to the second intersection: when suffering, due to serious human rights violations, occurs in the search for refuge or in the arrival to the country on which asylum depends.

IV. TORTURE (INHUMAN AND DEGRADING TREATMENT) IN THE SEEK FOR ASYLUM

A second area of very wide intersection is characterized by inhuman and degrading treatment in the search for asylum and refugee reception. Amnesty International has described many human rights violations (including torture and abuses) in transit; recently many refugees and migrants in Italy in 2016 have described their journeys, facing abuse at every stage from their arrival in Libya until they reached the Mediterranean coast.

The abuses included abductions, extortion, sexual violence, killings, torture and religious persecution by people smugglers, traffickers, organized criminal gangs and armed groups. Women whom Amnesty International interviewed said rape was so commonplace along the smuggling routes that they took contraceptive pills before travelling. 116 Refugees and migrants have reported that people-smugglers hold them captive to extort a ransom from their families. They are kept in deplorable and often squalid conditions, deprived of food and water and repeatedly beaten, harassed and insulted. Testimonies also reveal shocking abuses by the Libyan coastguard and at immigration detention centres in Libya. Refugees and migrants have described

shootings and beatings while being picked up by the coastguard as well as further torture and other ill-treatment at detention centres.²⁹

Many refugees are living in grinding poverty without access to basic services and without hope for the future, many are desperate to move elsewhere and some are willing to risk dangerous journeys to try and find a better life. On the first situation, we have already pointed out the thousands of drowning deaths in Mediterranean Sea; this phenomenon is not even exclusive (although it is especially lacerating, given the wealth of Europe compared to the countries of the world which host the largest number of refugees³⁰), the migration routes in Southeast Asia are, as Amnesty International points out, equally dangerous; on the Balkan route, refugees and migrants face arbitrary detention, ill-treatment by security forces, abuse, exploitation by smugglers, summary returns, including death. In Central America, thousands of people attempting to cross Mexico are kidnapped, raped or killed on one of the world's most dangerous journeys. During the journey they are exposed to abuse by officials of the migration services, police officers, military personnel, human traffickers and criminal gangs.³¹

Although the weakening of asylum policies and social convictions around them must have been gradual, it has been in the last two years, as a result of the arrival of refugees from conflicts in the countries of North Africa and the Middle East, but above all the terrible war in Syria, which is already remarkably visible the phenomenon we are paying attention to. Among the facts that demonstrate the hostility of the EU is the rise of far-right and racist/xenophobic parties; the *pressure* on the African border (Ceuta and Melilla) where a group of emigrants was shot by the Spanish *Guardia Civil*; the replacement of the Mare Nostrum rescue operation by military border control devices (“Operation Sofía”), EU outsourcing policies which have led the African Union countries to restrict the arrival of refugees or bilateral treaties (Spain with Mauritania, Nigeria, Senegal or Morocco, France with Mali, or Italy with Gaddafi's Libyan regime).

In the case of the Eritrean dictatorship, for example, about 50,000 young people have fled from the country to Europe or Israel, but to refer to a case already mentioned in the previous section (the torture that gives rise to the search for refuge). About 10,000 have disappeared along the way: a brutal network of people trafficking abducts refugees

²⁹ AMNESTY INTERNATIONAL, *Tackling The Global Refugee Crisis: From Shirking To Sharing Responsibility*, Report p. 24.

³⁰ When we break the global refugee crisis down by the numbers, the inequality in the response of states is stark. This is because the problem is not the number of refugees but that the vast majority (86% according to figures from UNHCR, the UN refugee agency) are hosted in low- and middle-income countries. Meanwhile, many of the world's wealthiest nations host the fewest and do the least. For example, the UK has accepted approximately 8,000 Syrians since 2011, while Jordan – with a population almost 10 times smaller than the UK and just 1.2% of its GDP – hosts over 656,000 Syrian refugees. The total refugee and asylumseeker population in Australia is 58,000 compared to 740,000 in Ethiopia. Such unequal sharing of responsibility is at the root of the global refugee crisis and the many problems faced by refugees. AMNESTY INTERNATIONAL, *Tackling The Global Refugee Crisis: From Shirking To Sharing Responsibility*, Report; www.amnestyinternational.org. 16/09/2016. Id., «Refugio e inmigración»: <https://www.es.amnesty.org/en-que-estamos/temas/refugio-e-inmigracion/> 17/09/2016.

³¹ AMNESTY INTERNATIONAL, *Tackling The Global Refugee Crisis: From Shirking To Sharing Responsibility*, cit., p. 24-48.

in the Sinai Peninsula, where they are locked up and savagely tortured while Bedouin groups demand astronomical rescue of families.

Another crossroad between inhuman treatment and asylum seeking takes place around the lifting of fences³². The words of a Kurdish Syrian from Kobani after the double wire fence in Hungary ("this is like Guantanamo", he said) graphically supports the label of this epigraph. Indeed, the deplorable images of hundreds of mostly refugee migrants crowded into the Hungarian countryside of Roszke, near the Serbian border, many of them with children, crying over the ground are a difficult argument. Human Rights Watch was one of the first organizations to denounce inhuman treatment before half a world could see the distribution of food thrown into bags through a fence similar to the way that human feeds the most dangerous animals in the zoo.

In addition, according to UNICEF data, in 2015 a quarter of all refugees who arrived in Europe, more than 100,000, were minors and about 10,000 crossed the border of their country alone. One year later, in 2016 and already according to Europol figures, about 10,000 children would have disappeared within the EU. These "disappearances" are not only another evidence of the failures in the community asylum system but also a disturbing fact in the confluence of the juridical goods that protect the two rights about we are writing now. The examples are very numerous, but we wanted to add a concrete one that illustrates the possibility of this section (inhuman and degrading treatment in response to attempts to apply for asylum on arrival). It is an example that has to do with a prophylactic conception of the political management of the refuge. On the one hand, the path followed by Australia that culminated in the so-called "Pacific Solution"; on the other hand, the answer of the EU, that is the pact with Turkey. In both cases it seems that "we" want to avoid direct contact with the refugees. We will leave the second scenario (the EU agreement with Turkey) for the third possibility of which we wrote in this work: torture after the search for refuge.

In the first case, Australia began by maintaining policies conforming to the standards of instruments relating to asylum and refugee rights. In 1976, for example, this country welcomed more than 124,000 refugees from the Vietnam War and a decade later did the same with more than 147,500 Lebanese when the civil war razed their country³³. But the flow of refugees provoked a social rejection against the newcomers. A rejection that the political parties tried to take advantage of. In 1992, the Government had already decided to detain any person who arrived in Australia without a valid visa, including asylum seekers. A decade later, they launched the "Pacific Solution". This plan consisted of the diversion of ships with immigrants and refugees. The ships were forcibly taken to internment centers on the Manus and Nauru islands in Papua New Guinea. As Amnesty International denounced, Australia's "Operation Sovereign Borders" is the country's military-led border control operation. It began in late 2013 and

³² AMNESTY INTERNATIONAL, *Fear And Fences Europe's Approach To Keeping Refugees At Bay*, http://www.amnesty.eu/content/assets/Doc2015/2015_Documents/Report_-_Fear_and_Fences.pdf

³³ Like the United States and Canada, Australia was a young, large, relatively sparsely populated country seeking to increase its population and economic growth through immigration. «La solución de Australia, la pesadilla de los refugiados», *El País*, 12/08/2015.

involves a number of agencies which include the Australian Federal Police, Australian Defence Force, Australian Border Force and Department of Immigration and Border Protection. The mandate of Operation Sovereign Borders is to stop anyone –including asylum-seekers and refugees– from reaching Australia irregularly by boat. In operations that are called “pushbacks” or “turnbacks.”³⁴

Never before has a country signatory to the UN convention on refugees (both countries ratified it) completely closed the door to potential refugees³⁵. Although this is a fact with clear analogies with the intentions of not a few governments around us, starting with ours, as an example of new paradigm³⁶, Australia is the only country in the world that encloses irregular immigrants and refugees in detention centers outside its borders³⁷. Since then there have been cases of suicide and many other cases of worsening of the physical and mental health of thousands of immigrants, including children and sick people. According to Amnesty International, by forcibly transferring refugees and people seeking asylum to Nauru, detaining them for prolonged periods in inhumane conditions, denying them appropriate medical care, and in other ways structuring its operations so that many experience a serious degradation of their mental health, the Australian government has violated the rights to be free from torture and other ill-treatment and from arbitrary detention, as well as other fundamental protections.

In recent years, Australian vessels have towed to people fleeing conflict zones or countries such as Iran, Afghanistan or Pakistan. In many of these cases, when non-governmental bodies agreed to the testimony of some of them, they found that they were fleeing precisely for having suffered torture, inhuman treatment or threats of torture.

³⁴ AMNESTY INTERNATIONAL, *Australia: Appalling abuse, neglect of refugees on Nauru*, <https://www.amnesty.org/en/latest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/> - 02/10/2016 also see *The Guardian*, “The Nauru files”: <https://www.theguardian.com/news/series/nauru-files> 133 AMNESTY INTERNATIONAL, *Annual Report 2015/2016*, Australia country page:

<https://www.amnesty.org/en/countries/asia-and-the-pacific/australia/reportaustralia/>

³⁵ McMASTER, D., «Asylum-seekers and the insecurity of a nation», *Australian Journal of International Affairs*, 56:2, 2002, pp. 279-290.

³⁶ CRISP, J., A new asylum paradigm? Globalization, migration and the uncertain future of the international refugee regime (Working Paper No. 100). Geneva, United Nations High Commissioner for Refugees, 2003. CREAMER, C., SIMMONS, B.; “Ratification, Reporting, and Rights: Quality of Participation in the Convention against Torture”, *Human Rights Quarterly*, Vol. 37, Num. 3, 2015, pp. 579-608.

³⁷ The United Nations' top official on refugees has slammed Australia before an international audience, saying he is "dismayed" by the country's treatment of asylum seekers in detention in the context of the accelerating migration crisis in south-east Asia and Europe. The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, told the Human Rights Council overnight in Geneva that he was "alarmed" by the current migration crises, calling on countries to put human rights first and to approach the issue "far more" comprehensively. <http://www.smh.com.au/federal-politics/political-news/un-high-commissioner-for-human-rights-dismayed-at-australias-treatment-of-asylum-seekers-20150527-ghajj7.html>

There is no enough space here for an exhaustive development of the rest of the analogous cases neither. We will just mention something that affects our country: in its report of 2015, the Committee against Torture of the United Nations implicitly referred to what we call «devoluciones en caliente», and in general to the expulsion and extradition of persons "without prior assessment of the risk of return and impede access to procedures for determining refugee status".

The UN urged Spain to review immigration legislation "with a view to unconditionally respecting the right of non-refoulement" as reflected in the concluding observations on the sixth periodic report³⁸.

The case of mistreatment and death caused by «concertinas» fits the possibility of inhuman or degrading treatment occurring in the context of the search for refuge (or arriving there); Amnesty International Report 2002 "Spain: Identity Crisis: Torture and Racist Abuse by State Agents" collected more than 300 different cases of immigrants who had undergone these practices at border posts, reception centers, police stations or in the streets.³⁹ The Temporary Immigrant Shelter Centers (CETI) of Ceuta and Melilla, public administration establishments, are still very illustrative examples of the dangerous path of something theoretically conceived as first-time reception devices intended to provide basic social services and benefits to immigrants and asylum seekers identification and medical check-ups are carried out.⁴⁰): the 2015 report expressed concern about the high levels of overcrowding and the deplorable material conditions of its facilities. These were described as a threat to the health and the physical and psychological integrity of the people there.

V. TORTURE OR INHUMAN TREATMENT AFTER SEEKING ASYLUM

There is also a third case: the possibility (an actual perversion of the asylum system) that an asylum seeker ends up in a country where he is at risk of being tortured or suffer cruel, inhuman or degrading treatment... *again*. This risk has great relevance due to the number of people (including children) wandering unprotected along Europe (or in countries in transit and international waters). We will concentrate in some of the consequences of the agreement between the EU and Turkey that entered into force on

³⁸ It was also criticized the "excessive use of force" by the Police and Civil Guard in border controls and demonstrations. Attitudes that, according to this UN agency, remain unpunished for lack of prevention measures and mechanisms to be supervised. The report recalls that some agents who have made disproportionate use of their force even became pardoned. The UN considered in that report that the crime of torture, as contained in the Criminal Code, is poorly developed and the penalties "are still not adequate considering their seriousness." Spain is requested to amend the articles in order to bring it into line with that of the International Convention against Torture.<http://www.europapress.es/sociedad/noticia-onu-insta-espana-revisar-legislacion-inmigracion-asilo-20150515180958.html> 18th september 2016

³⁹ ZÚÑIGA LÓPEZ, L., «Instrumentos jurídicos para prevenir la tortura y los tratos inhumanos y degradantes» in ARARTEKO, *La prevención y erradicación de la tortura y los malos tratos en los sistemas democráticos*, Colección «Jornadas sobre derechos humanos» n° 7, 2004, p. 137.

⁴⁰ On the legal regulation of these centers: articles 264-266 Reglamento de la Ley Orgánica 4/2000, aprobado por Real Decreto 557/2011, 20th April.

20th March 2016 and which authorized the return of asylum seekers to Turkey under the assumption that it is a safe country for refugees.

According to Human Rights Watch, the first round of deportations authorized by the EU from the Greek island of Chios to Turkey in April 2016 was hasty and chaotic and violated the rights of the deportees. Moreover, the Turkish authorities have not allowed visits by human rights groups or UN agencies once there.

The EU and Greece, in this kind of “race” to find a populist solution outside the legal mechanisms already foreseen for the cases of asylum and refuge (those we underlined in the first section) ignored the basic rights of all people, including those who wanted to apply for asylum. These are evictions that highlight the fundamental problems of large-scale EU-wide accelerated returns to an unsafe country. The authorities did not inform them that they would be deported, nor where they would be taken, and some people were not allowed to take personal belongings.

In addition, and according to UNHCR, thirteen of the deportees of Chios had expressed their desire to apply for asylum in Greece. The Greek authorities precipitated the forced returns from Chios and Lesbos, in order to meet a deadline announced for the commencement of the deportations. According to *Europe’s Gatekeeper*⁴¹, a quite recent Amnesty International report, the EU is in danger of becoming complicit in another serious violation of human rights against refugees and asylum seekers due to Turkish pressure on applicants to return to Iraq or Syria as well as police arrests and collective deportations forced into war zones.

Finally, Human Rights Watch has denounced another side effect of the EU-Turkey agreement: after its entry into force, cases of Syrian refugees returned from the Turkish borders to Syria have been documented after being brutally beaten, some of them to death.⁴²

VI. SYNTHESIS AND RECAPITULATION

Firstly, we linked the *raison d’être* of human rights of asylum and the right of not suffering torture, inhuman and degrading treatment with its common *nature* but also with its current global crisis situation, both are not two simple rights but, installed in the same nucleus of human rights declarations and covenants, they exemplified very well the *spirit* that accompanied the first phase of the history of human rights. The beginning of the second half of the twentieth century was an era characterized by the widest reflection and consensus. However, today, in the first decades of the 21st century, it is possible to see that, precisely because of a context of the opposite nature, a pattern of exception, urgency and fear –terrorist attacks and massive refugee flows– is quite irresponsible and full of nuances, the fate of both rights is again, unfortunately, similar.

⁴¹ AMNESTY INTERNATIONAL, *Europe’s Gatekeeper: Unlawful Detention And Deportation Of Refugees From Turkey*: <https://www.amnesty.org/en/documents/eur44/3022/2015/en/> 14/09/2016.

⁴² HUMAN RIGHTS WATCH, *World Report*, 2016.

Both rights limit the powers that governments can justly exercise over the human beings under their power (torture) or in their territories (asylum), and these limits include an absolute ban on subjecting individuals to forms of pain that strip them of their dignity, identity and even sanity. However, the end of the seriousness conception with which the obligations and implications of the legally binding force of both rights were assumed paralleled a worrying retreat in the socio-political perception of the demands stemming from the "hard core" of human rights catalogs. We argued here for the unconditional refutation of any attempt to justify torture, without exceptions. The extension of instrumental torture as a fundamental part of the "war on terror" is becoming, in the words of Massimo La Torre, a veritable "legal nightmare." Similarly, the "refugee crisis" is –and here we come to the expression of Javier de Lucas– a "political emptiness" of the EU. It is not the only case, the "Pacific Solution" in Australia, as well as some background of the referendum on the exit of the EU (so called "Brexit") by the UK, the fences against the immigrants of the Hungarian president Viktor Orbán and the sinister referendum to reject the quotas refugees imposed by the EU, or the rise of extreme right-wing parties to the fears of European citizens (from Austria to Finland) for the arrival of refugees, make clear the new paradigm: the abandonment of the basic legal obligations of the right of asylum.

Secondly, we wanted to draw a picture of the (very current) state of a triple zone of intersection between the right not to suffer torture or inhuman or degrading treatment and the rights of asylum and refuge: a) torture as the cause of the search of refuge; b) torture and/or inhuman and degrading treatment in the search for shelter; c) torture and/or inhuman or degrading treatment after the search for shelter.

With regard to the first question, the seriousness of the crimes against the Syrian population, the extent of torture in Eritrea, Iraq, Afghanistan, Pakistan, Sudan, South Sudan, the Democratic Republic of the Congo, the Central African Republic and other refugee origins continues to explain the arrival of potential asylum seekers to the EU (and many other countries). At the same time, if the real danger of torture or escape from it is today one of the most worrying causes of the ungrateful, dangerous and obstacle-free refugees seeking asylum in Europe, another scandal derives from the most basic abuses and violations of human rights in this quest for refuge, from torture itself: from the terrible case of Eritrean refugees on their journey through Africa to the thousands of dead people in the Mediterranean Sea. Finally, the agreement between the EU and Turkey which entered into force in March 2016 authorizing the return of asylum-seekers to Turkey under the assumption that it is a safe country illustrates the possibility that violations of rights at the end of the refugee journey.

We mentioned in the title of his work the image of a paved road in two directions, a nod to the famous film of Monte Hellman, but regarding with cinemaphropic images, we would particularly like to finish with the recent film by Anton Corbijn based on John Le Carre's novel *The Most Wanted Man* (2014) as it perfectly illustrates the devilish two-way road in this article's title: at the beginning of this film, a young Chechen with aspect of having been brutally tortured leaves naked of a dark sewer of Hamburg. His past is a past of torture in Russian prisons, his present is

the desperate seek for refuge and peace through strong pacifist convictions expressed in his Muslim faith, his future will be become him just in an object coveted by his "informative value" by the new intelligence agencies that are permanently removed from the principles and values (if any) of the old spies of that distant time full of contradictions, but a time as well, when it was possible to achieve that normative code of universal validity that we called human rights covenants.

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