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The *Aydin* Case of the ECtHR: An Emblematic Case of Violation of the Prohibition of Torture*

Elena Bindi

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1. Introduction

Even after more than twenty years since its delivery, the judgment of the European Court of Human Rights (ECtHR) *Aydin v. Turkey* is worth being analysed once more. The decision relating to this case was delivered on 25 September 1997 and entailed an emblematic case of application of the prohibition of torture enshrined in article 3 of the European Convention on Human Rights (ECHR). In fact, the Court qualified the rape of a girl who was a minor at the time of the facts as torture. In fact, this particularly cruel conduct affecting both the physical and moral integrity of the victim, was aggravated by the fact that it was committed by a person exercising authority against someone that was more vulnerable because she was deprived of freedom.

The European Court therefore considered that sexual violence was particularly cruel and brutal in this case since it simultaneously violated the body and mind of the victim. Thus, this characteristic should be considered as sufficient to envisage a form of torture. Then, the Court considered other elements, such as the victim's young age, according to which the conduct should be undoubtedly qualified as torture instead of inhuman treatment.

The Court also emphasised the principle of contextualisation of the conduct, in the light of which, one must, first consider the aim pursued by those that have perpetrated the conduct entailing the crime of torture. In the present case, this aim

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consisted in the search for information. This purpose can be never considered as a justification, but rather as an aggravating circumstance. Secondly, The Court considered another aggravating circumstance: namely, the fact that the perpetrators of the conduct were representatives of the State and that they were acting against a person deprived of her liberty and entrusted to their custody. In light of the above, the Court recognised the particular vulnerability of the victim who should have been protected against the abuse of the officer, who can very easily carry out violent acts in the absence of witnesses and controlling authorities.

The additional analysis of the *Aydin* judgment thus provides an opportunity to review the development of the ECHR's case-law on the prohibition of torture, starting from the 1976 *Ireland v. United Kingdom* case[1]. Moreover, this jurisprudence has not so far developed in a linear manner. Nevertheless, it has undoubtedly adopted an expansive interpretation of the protection granted by article 3 ECHR. Retracing this case-law will allow us to identify the guidelines of the physiognomy of the prohibition of torture, which is defined by the Court as a fundamental principle of democratic societies.

The analysis of the *Aydin* judgment also represents an opportunity to consider the right to an effective remedy under article 13 ECHR, once more in the light of the interpretation that has been also provided by the European Court of Justice (ECJ). The ECJ has made it clear that, to make a remedy "effective", its exercise must be not unjustifiably hindered by acts or omissions of the authorities of the respondent State.

The Court is also aware of the close correlation between the guarantee of an effective remedy and the protection of the victim of the crime of torture. The very nature of the right guaranteed by article 3 of the Convention necessitates an «effective remedy» because only thorough and effective investigations can lead to identify and punish the responsible persons for acts of torture. The *Aydin* case is therefore exemplary in this regard, as it demonstrates how, in the case of rape, the way the investigation is conducted may or may not lead to the identification of the perpetrators and, therefore, influence the possibility for the victims to obtain protection.

Finally, the *Aydin* case is a sad example of how the investigation process can lead to a prolonged suffering. When the conduct of torture entails sexual acts, the interrogation and investigation of the victim is often a continuation of the torture, causing psychological damage that may discourage other victims from reporting the acts of torture, as it often happens in cases of sexual violence.

[1] See the ECtHR, *Ireland v. The United Kingdom* (Application no. 5310/71), 18 January 1978.

2. The Facts

It is therefore necessary to establish the facts in the cases of violation of the prohibition of torture to analyse this Court's decision.

To put the case in context, it is useful to recall that already in 1985, a harsh conflict between the security forces and members of the PKK (Kurdistan Workers' Party) was taking place in South-Eastern Turkey. In fact, almost all the Country's provinces had been placed under a state of emergency. According to the Government, this conflict would have continued to escalate until the mid-1990s. In 1997, it claimed the death of 4036 civilians and 3884 members of the security forces[2]. During these clashes, a group of police officers broke into the house of the applicant, who was seventeen years old at the time of the events[3], and violently tried to obtain information about the family's alleged relations with members of the rebel movement who, according to the gendarmes, had visited the family's house[4].

After being subjected to threats and insults, Şükran Aydın and her family were forcibly removed from their home and then taken to the village square where other villagers had also been taken. Once there, Şükran, her father and her sister-in-law were singled out from the rest of the villagers, blindfolded, and driven away to Derik gendarmerie headquarters[5].

Şükran was separated from her family. For more than three days she was severely beaten, stripped, sprayed with cold water from high-pressure jets after being placed inside a tyre. She was then taken blindfolded to an interrogation room, where a man

[2] See the ECtHR, *Aydin v. Turkey* (Application no. 23178/94), 25 September 1997, para. 14: «The situation in the south-east of Turkey. Since approximately 1985, serious disturbances have raged in the South-East of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces. At the time of the Court's consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule».

[3] See ECtHR, *Aydin v. Turkey*, cit., para. 13: «Mrs. Şükran Aydın, is a Turkish citizen of Kurdish origin. She was born in 1976. At the time of the events in issue she was 17 years old and living with her parents in the village of Tasit, which is about ten kilometres from the town of Derik where the district gendarmerie headquarters are located. The applicant had never travelled outside her village before the events which led to her application to the Commission».

[4] See ECtHR, *Aydin v. Turkey*, cit., paras. 16-17: «According to the applicant, a group of people comprising village guards and a gendarme arrived in her village on 29 June 1993. Although the applicant put the time of their arrival at 5 p.m., the Commission, relying on the recollection of the applicant's father and sister-in-law, found that it was more likely that this occurred early in the morning of 29 June at around 6 a.m.

Four members of the group came to her parents' home and questioned her family about recent visits to the house by PKK members (see paragraph 14 above). Her family were threatened and subjected to insults. They were then taken to a village square where they were joined by other villagers who had also been forcibly taken from their homes».

[5] See ECtHR, *Aydin v. Turkey*, cit., para. 18: «The applicant, her father, Seydo Aydın, and her sister-in-law, Ferahdiba Aydın, were singled out from the rest of the villagers, blindfolded and driven away to Derik gendarmerie headquarters».

in military uniform stripped off her clothes, hit her in the back and raped her. When in severe pain and covered in blood, Şükran was then ordered to dress and go to another room. Before her release, she was thus taken back to the room where she had been raped, beaten for about an hour by several people, who threatened her not to tell anyone what they had done to her[6].

After returning to the village (about 2nd July 1993), Şükran, together with her father and her sister-in-law, went to the Derik public prosecutor's office to report what had happened (8th July 1993)[7]. The public prosecutor sent Şükran to Dr. Deniz Akkus to ascertain her virginity and to document any signs of physical violence or injury. In the report, it was stated that Şükran's hymen had been torn and that there were widespread bruises around her thighs, but that Dr. Akkus could not establish when the hymen had been torn. Moreover, Dr. Akkus had no previous experience in examining rape victims[8].

Following this report, the public prosecutor requested two more medical examinations of Şükran and asked the two doctors to determine whether and when she had lost her virginity. Nevertheless, the response of both doctors was that after

[6] See ECtHR, *Aydin v. Turkey*, cit., para. 20: «The applicant alleges that, on arrival at the gendarmerie headquarters, she was separated from her father and her sister-in-law. At some stage she was taken upstairs to a room which she later referred to as the 'torture room'. There she was stripped of her clothes, put into a car tire, and spun round and round. She was beaten and sprayed with cold water from high-pressure jets. At a later stage she was taken clothed but blindfolded to an interrogation room. With the door of the room locked, an individual in military clothing forcibly removed her clothes, laid her on her back and raped her. By the time he had finished she was in severe pain and covered in blood. She was ordered to get dressed and subsequently taken to another room. According to the applicant, she was later brought back to the room where she had been raped. She was beaten for about an hour by several persons who warned her not to report on what they had done to her».

[7] See ECtHR, *Aydin v. Turkey*, cit., para. 23: «On 8 July 1993 the applicant together with her father and her sister-in-law went to the office of the public prosecutor, Mr. Bekir Özenir, in Derik to lodge complaints about the treatment which they all alleged they had suffered while in detention. The public prosecutor took statements from each of them. The applicant reported that she had been tortured by being beaten and raped. Her father and sister-in-law both alleged that they had been tortured. According to the applicant, she confirmed her account of what happened to her in a statement given to the Diyarbakir Human Rights Association on 15 July 1993, which was submitted, undated, to the Commission along with her application».

[8] See ECtHR, *Aydin v. Turkey*, cit., para. 24: «All three were sent the same day to Dr Deniz Akkuş at Derik State Hospital. The public prosecutor had requested Dr. Akkuş to establish the blows and marks of physical violence, if any, in respect of Seydo and Ferahdiba. In respect of the applicant, he requested that she be examined to establish whether she was a virgin and the presence of any marks of physical violence or injury».

In his report on the applicant dated 8 July 1996, Dr Akkuş, who had not previously dealt with any rape cases, stated that the applicant's hymen was torn and that there was widespread bruising around the insides of her thighs. He could not date when the hymen had been torn since he was not qualified in this field; nor could he express any view on the reason for the bruising. In separate reports he noted that there were wounds on the bodies of the applicant's father and sister-in-law. ».

7/10 days it was no longer possible to determine when the loss of virginity had occurred[9].

Following the opening of the investigation, Şükran and her family were subjected to continuous harassment and intimidation to force them to withdraw their complaints.

According to police reports, she and the other members of her family had never been detained by the gendarmerie. In a letter of 14th July 1993, the police commander stated that these persons had never been taken into custody. Moreover, on 21st July, he provided a copy of the custody register of the year, in which only six names were listed; among these, their names did not appear[10].

In a report dated 13th May 1994, in response to a request for information dated 9th May 1994, the public prosecutor informed the Mardina public prosecutor's office that there was no basis for the applicant's allegations. Yet, the investigation was still ongoing.[11]

[9] See ECtHR, *Aydin v. Turkey*, cit., paras. 25-26: «On 9 July 1993 the public prosecutor sent the applicant to be examined at Mardin State Hospital with a request to establish whether she had lost her virginity and, if so, since when. She was examined by Dr. Ziya Çetin, a gynaecologist. According to the doctor's report, dated the same day, defloration had occurred more than a week prior to her examination. No swab was taken and neither the applicant's account of what had happened to her nor whether the results of the examination were consistent with that account were recorded in his report. Dr Çetin did not comment on the bruising on her inner thighs because of he was a specialist in obstetrics and gynecology. He did not frequently deal with rape victims.

On 12 August 1993 the public prosecutor took a further statement from the applicant who by that stage was married. On the same day he referred the applicant to Diyarbakir Maternity Hospital requesting that a medical examination be carried out to establish whether the applicant had lost her virginity and, if so, since when. The medical report dated 13 August 1993 confirmed Dr. Cetin's earlier findings (see paragraph 25 above) that the hymen had been torn but that after seven to ten days defloration could not be accurately dated». Similar situation arose in the case ECtHR, *Akkoç v. Turkey* (Applications nos. 22947/93 and 22948/93), 10 October 2000, where there have been inadequate forensic medical examinations, including a lack of examination by appropriately qualified medical professionals.

[10] See ECtHR, *Aydin v. Turkey*, cit., para. 27: «On 13 July 1993 the public prosecutor wrote to Derik gendarmerie headquarters enquiring as to whether the applicant, her father and her sister-in-law had been held in custody there and, if so, as to the dates and duration of the detention and the names of those who carried out the interrogations. By letter dated 14 July 1993, the commander of the gendarmerie headquarters, Mr. Musa Çitil, replied that they had not been taken into custody. On 21 July 1993, he supplied the public prosecutor with a copy of the entries for 1993. There were only six entries for that year».

[11] See ECtHR, *Aydin v. Turkey*, cit., paras. 30-31: «The public prosecutor wrote to the chief of security in Derik on 18 January and 17 February 1994 requesting that the applicant be brought to the office of the Attorney-General. In a follow-up letter of 18 April 1994, the public prosecutor referred to the fact that he had received no reply to his earlier letters. In a further letter dated 13 May 1994, the public prosecutor informed the chief of security at Derik that the applicant, her father, and her sister-in-law should attend at his office.

On 18th May 1994, the public prosecutor took two new statements from the applicant's father confirming his earlier version of the events of 29th June 1993. The father further stated that the applicant and her husband had left the district in March 1994 to look for work elsewhere and that he did not know their new address.[12]

3. The Court's Ruling: The Prohibition of Torture as a Fundamental Principle of the Democratic Society

Considering these facts, the Court upheld the claim, finding the violation of articles 3 and 13 ECHR. The Court noted that the rape of a 17-year-old detainee, who was also subjected to other forms of physical and mental suffering by a state official, is *an especially grave and abhorrent form of ill-treatment amounted to torture* (violating art. 3 ECHR). The failure of the authorities to conduct an effective investigation relating to her alleged suffering while in detention resulted in the denial of access to a court to seek reparation (contrary to art. 13 ECHR. The Court also held, by twenty votes to one, that it was not necessary to consider the applicant's complaint under article 6.1 of the Convention). Finally, the Court unanimously affirmed that there had been no violation of Article 25.1 of the Convention, recognising an insufficient factual basis to enable it to conclude that the authorities of the respondent State have intimidated or harassed either the applicant or the members of her family in circumstances which were calculated to induce her to withdraw or modify her complaint or otherwise interfere with the exercise of her right of individual petition.[13]

Already in the *Akdivar and Others v. Turkey judgment*[14], the Court «stresses that it is of the utmost importance for the effective operation of the system of individual petition instituted by article 25 of the Convention that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints».

By report dated 13 May 1994 in reply to a request for information of 9 May 1994, the public prosecutor informed the office of the Attorney-General in Mardin that there was no evidence to support the applicant's claims but that the investigation continued».

[12] See ECtHR, *Aydin v. Turkey*, cit., para. 32: «On 18 May 1994 the public prosecutor in Derik took two further statements from the applicant's father who confirmed his earlier account of the events of 29 June 1993. Her father also declared that the applicant and her husband had left the district in March 1994 to find work elsewhere and that he did not know of their whereabouts».

[13] See ECtHR, *Aydin v. Turkey*, cit., para. 117: «Against this background, the Court's evaluation of the evidence before it leads it to find that there is an insufficient factual basis to enable it to conclude that the authorities of the respondent State have intimidated or harassed either the applicant or members of her family in circumstances which were calculated to induce her to withdraw or modify her complaint or otherwise interfere with the exercise of her right of individual petition. […]».

[14] See the ECtHR, *Akdivar and others v. Turkey* (Application no. 21893/93), 16 September 1996 (Grand Chamber), para. 105.

However, in the present case (Aydin judgment) «neither the applicant nor her family have adduced any concrete and independent proof of acts of intimidation or harassment calculated to hinder the conduct by her of the proceedings which she brought before the Convention institutions»[15].

Accordingly, the Court can only conclude that «there has been no breach of article 25.1 of the Convention»[16]. Therefore, the ECtHR only envisaged the breach of article 3, as to the prohibition of torture, and article 13, about the right to an effective remedy. Article 3 states that no one shall be subjected to torture or to inhuman and degrading treatment, thus providing for the absolute and non-derogable prohibition of torture and inhuman and degrading treatment.

The prohibition laid down in article 3 ECHR is a constant element in all international human rights instruments and in most of the modern constitutions. As such, the Court has repeatedly reiterated the importance of the prohibition of torture as a «fundamental principle of a democratic society»[17].

This definition has been used by the Strasbourg judges for the first time in the 1989 *Soering v. The United Kingdom* judgment[18], concerning a case of extradition of a German national from the United Kingdom to the United States, where he would have been sentenced to death for an alleged murder. After affirming that the prohibition of torture is a fundamental principle of a democratic society, the Court stated that this prohibition also covers cases of extradition, expulsion, and removal from the territory of a signatory State. This statement entails the positive obligation of Member States to ensure that the removed persons do not risk being subjected to treatment contrary to article 3. Therefore, article 3 may also have an extraterritorial application; namely, the prohibition of inhuman treatment also affects conducts that may occur beyond the jurisdiction of any signatory State.

Moreover, it is noteworthy that this article is one of the most concise norms of the ECHR and that it does not provide for the exceptions or derogations laid down in article 15 of the ECHR[19]. The prohibition of torture is therefore absolute and

[15] See ECtHR, *Aydin v. Turkey*, cit., para. 116, where the Court also affirms that «The Commission has relied heavily on the failure of the authorities to provide more than a simple denial of the substance of her allegations that her house was raided, her husband beaten by police officers and that she and members of her family were repeatedly and without due justification contacted and questioned by the authorities about her application to the Commission. However, before the Court the Government reaffirmed that the allegations of intimidation and harassment had not been substantiated. They acknowledged that contacts and questioning did take place but have sought to justify these by referring to the needs of the criminal investigation being conducted into her complaints and to facilitate her attendance at the delegates' hearings».

[16] See ECtHR, *Aydin v. Turkey*, cit., para. 117.

[17] *Ivi*, para. 81: «As it has observed on many occasions, article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment […]».

[18] See the ECtHR, *Soering v.* The *United Kingdom (*Application no. 14038/88),*7 July 1989*.

[19] See the ECtHR, *Aksoy v. Turkey* (Application no. 21987/93), 18 December 1996, para. 62; ECtHR, *Aydin v. Turkey*, cit., para. 81: « […] article 3 admits of no exceptions to this fundamental value

mandatory and cannot be balanced against other rights nor it can be suspended. This prohibition remains fully valid even in the circumstances in which the very existence of a State may be at risk, such as in the cases of the threat of terrorism and national security (see *Tomasi v. France*, 1992)[20]. One could notice that the inflexibility of the prohibition of torture is only shared with the prohibition of slavery; on the other hand, rights that are considered inviolable - such as the right to life and the principle of legality in criminal matters - are not entirely excluded from being balanced with respect to the protection of other equally important interests.

4. The Three Types of Conduct Prohibited under Article 3 ECHR

Article 3 of the ECHR has always afforded a specific protection to the right of everyone not to suffer a violation of his or her physical or mental integrity because of torture or inhuman and degrading treatment or punishment.

One should ask how it is possible to identify the three conducts prohibited under article 3, namely torture, inhuman treatment, and degrading treatment. In fact, the broad and general purpose of article 3 is not followed by any indication on the meaning to be given to the prohibitions. While the lack of definition has given judges the possibility of adapting the content of the provision to the protection requirements demanded by society from time to time, the general terms used to indicate the prohibited conduct have needed to be clarified. Three different levels of *severity* of ill-treatment committed against persons deprived of their liberty have been identified.

The first attempt of categorisation of the three types of conduct under article 3 ECHR was done by the Human Rights Commission with reference to the so-called "Greek case", where it stated that each torture must necessary be also considered as an inhuman and degrading treatment, while each human treatment cannot but also be degrading[21].

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and no derogation from it is permissible under article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities».

[20] See the ECtHR, *Tomasi v. France* (Application no. 12850/87), 27 August 1992, paras. 115-116: «The Court cannot accept this argument. It does not consider that it must examine the system of police custody in France and the rules pertaining thereto, or, in this case, the length and the timing of the applicant's interrogations. It finds it sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr. Tomasi and their intensity; these are two elements which are sufficiently serious to render such treatment inhuman and degrading. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly regarding terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals». In conclusion «[t]here has accordingly been a violation of article 3 (art. 3) ». See also the ECtHR, *Chahal v. the United Kingdom* (Reports 1996-V), 15 November 1996, p. 1855, para. 79.

[21] See the European Commission of Human Rights, *Denmark v. Greek, Norway v. Greek, Sweden v. Greek, Netherlands v. Greek* (Applications nos. 3321/67, 3322/6712, 3323/67, 3324/67), 1 December

Consequently, to define the three types of conducts prohibited by the Convention, it is necessary to consider the degree of severity of the action[22]. Torture consists in a particular form of ill-treatment specifically aimed at causing a cruel and very serious suffering, such as inhuman treatments that deliberately cause severe and cruel sufferings. This is the element that distinguishes torture from inhuman or degrading treatment or punishment. Torture constitutes the highest level of severity of the unlawful conduct, and it is characterised by the presence of a deliberate intention to inflict such suffering; it is precisely this definition that the Strasbourg judges referred to in the 1978 *Ireland v. The United Kingdom* case[23], which is the leading case in the analysis of prohibited conducts.

In that case, the Court had to decide in which of the types of conducts provided for in article 3 ECHR, it should have included the five sensory-deprivation techniques used to deprive the subject of his or her sensory capabilities to easier obtain relevant information techniques (consisting of hooding, standing for long periods of time, constant noise, sleep deprivation, water, and food deprivation).

Ireland had asked the Court to recognise the practices described above as techniques of torture.

The Court replied that torture constitutes an inhuman treatment that inflicts such a severe level of suffering on the victim that it requires a further definition with the aim of attaching a special stigma to deliberate inhuman treatment causing very serious and cruel suffering; torture constitutes the most serious form of aberration of a human being. According to the judges, the above-mentioned five techniques of sensory deprivation, while undoubtedly constituting an inhuman treatment, do not entail torture in their severity and violence.

In the same year, the Court had to decide a further episode of alleged violation of article 3, in the *Tyrer v. The United Kingdom* case[24].

The fact that gave rise to the sentence was the infliction of corporal punishment to a 15-year-old boy, namely three strokes of the birch, after being pleaded guilty before the local juvenile court for unlawful assault occasioning actual bodily harm to a senior pupil at his school.

The Court made it clear that an exception to the rule is not permissible, even when the punishment inflicted rests on very deep legal roots, constituting a normative tradition that identifies corporal punishment as an effective crime-prevention tool by recalling the mandatory nature of the rule.

1969. In this regard, see J. Becket, *The Greek Case Before the European Human Rights Commission*, in *Human Rights*, 1, 1, 1970, p. 91 ff.

[22] See A. Cassese, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in in R.St.J. Macdonald - F. Matscher - H. Petzold (eds.), *The European system for the protection of human rights*, Dordrecht and Boston, 1993, p. 241.

[23] See ECtHR, *Ireland v. The United Kingdom*, cit.

[24] See ECtHR, *Tyrer v. The United Kingdom* (Application no. 5856/72), 25 April 1978.

Moving from this definition, the Court held that the punishment imposed on Mr. Tyrer did not contain the severity required for torture and that the applicant's suffering was not such as to amount to inhuman treatment. The punishment was therefore qualified as degrading.

In the twenty years that have passed between these first steps and the Aydin decision, in the Strasbourg case-law there has been no lack of convictions for atrocious acts falling within the types of conducts sanctioned under article 3 of the European Convention on Human Rights; the list of cases would be long and since it is not possible here to reconstruct all the steps in the jurisprudential evolution, it can certainly be said that the Court's case-law, albeit with some fluctuations, has undoubtedly been characterised by an expansive trend. While in *Ireland v. The United Kingdom*, the Court initially set the threshold for torture extremely high, it was not until *Aksoy v. Turkey* in 1996 that the Court made its first finding of torture[25].

However, it is only with the *Aydin* judgment that the Court came to affirm that rape is sufficient to constitute an act of torture. As has been rightly pointed out, «[a] finding that the rape, in and of itself, was sufficient to constitute torture, marked a very clear departure from the previous approach of the European Commission in Cyprus v. Turkey which had dismissed the suggestion of torture despite evidence of mass rape by security forces. But the context had changed. Aydin v. Turkey was handed down at a time when public consciousness about the prevalence and egregious nature of rape in conflict zones had been heightened, especially in Europe with the conflict in the former Yugoslavia»[26].

Moreover, the *Aydin* judgment is an important case because the Court drew a definitive distinction between torture, inhuman treatment and degrading treatment, identifying, in the wake of its own precedents, the three conducts and enucleating a whole series of criteria developed in the light of concrete cases.

According to the case-law of the European Court of Human Rights, following a mainly empirical criterion, it emerges that *inhuman treatment* is the treatment which deliberately causes mental and physical suffering of a particular intensity, whereas *degrading treatment* is the treatment, less serious than the inhuman treatment, which is nevertheless capable of severely humiliating the individual before others and which can make him act even against his/her will or conscience[27].

Basically, to describe whether the treatment is degrading, it is necessary to consider whether the action is of such a nature as to create, in its victims, feelings of fear and anguish and a sense of inferiority, if it is capable of humiliating and annihilating their physical and moral resistance. Finally, *torture* cannot be defined

[25] See the ECtHR, *Aksoy v. Turkey*, cit., para. 62.

[26] See C. Mc Glynn, *Rape, torture, and the European convention on human rights*, in *International and Comparative Law Quarterly*, 58, 3, 2009, p. 568, citing the European Commission of Human Rights, *Cyprus v. Turkey* (Applications Nos. 6780/74 and 6950/75), 10 July 1976.

[27] See F. Fiorentin, *Il condannato. Il danno da esecuzione della pena detentiva*, in G. Spangher (ed.), *La vittima del processo: I danni da attività processuale penale*, Torino, 2017, p. 481.

independently of the two previous categories of treatments. Torture must be considered an aggravated form of inhuman treatment and therefore capable of causing a more intense suffering[28].

As it is emphasised by the Court, «rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim»[29].

It is then possible to range from the minimum threshold required for finding a violation of article 3 ECHR, as in the 2012 *P. and S. v. Poland* case[30], to more serious cases such as the *Aydin* or the *Maslova and Nalbandov v. Russia* of 2008 ones[31]. Also in the latter case, as in the *Aydin* case, the Court held that the rape of a detainee by an official of the State had to be considered as an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. The physical violence, especially the cruel acts of repeated rape, to which the applicant had been subjected, entailed torture, in violation of article 3 (prohibition of torture and inhuman or degrading treatment) of the Convention. Finally, it emerges from these definitions – and it cannot be otherwise – that the Court maintains a certain vagueness ensuring flexibility in the application of article 3[32], depending on «all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of

[28] See ECtHR, *Ireland v. The United Kingdom*, cit., para. 167; see also ECtHR, *Aydin v. Turkey*, cit., para. 82: «In order to determine whether any form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering».

[29] See ECtHR, *Aydin v. Turkey*, cit., para. 83, which goes on affirming that: «Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally».

[30] See the ECtHR, *P. and S. v. Poland* (Application no. 57375/08), 30 October 2012. The applicants P. had been treated by the authorities in a deplorable manner and her suffering had reached the minimum threshold of severity under article 3.

[31] See the ECtHR, *Maslova and Nalbandov v. Russia* (Application no. 839/02), 24 January 2008. The applicant, who had been called in for questioning at her local police station, was coerced by police officers into confessing to involvement in a murder. One police officer put thumb cuffs on her, beat her, raped her, and then forced her to perform oral sex. Subsequently he and another officer repeatedly hit her in the stomach, put a gas mask over her face, blocking the air to suffocate her, and ran electricity through wires attached to her earrings. When allowed to go to the lavatory, she tried to cut the veins of her wrists. Three prosecution officers, after interrogating her at the police station, drank alcohol and continued to rape her.

[32] See the ECtHR, *Selmouni v. France* (Application no. 25803/94), 28 July 1999, para. 101.

health of the victim»[33], in view of clarifying that there can be rape even without resistance, as in the case of acquaintance rape. In fact, in the case of *MC v. Bulgaria*, the Court found that the victims of sexual abuse, especially young girls, often failed to resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence[34].

In addition, in the 2019 *E.B. v. Romania* case[35], the Court held that there had been a violation of article 3 (prohibition of inhuman or degrading treatment) and of article 8 (right to respect for private life) of the Convention in the applicant's case. The Romanian authorities failed to adequately investigate a complaint of rape made by a woman who was raped while returning home by a man with a previous record for the same offence. The authorities essentially dismissed the case simply because the woman did not call for help and her body showed no signs of violence. The Court noted that the Romanian authorities had failed to carry out a proper investigation and had overly emphasised the fact that the applicant had not resisted her alleged attacker[36].

[33] See the ECtHR, *Moldovan and others v. Romania* (Applications nos. 41138/98 and 64320/01), 12 July 2005, para. 100.

[34] ECtHR, *M.C. v. Bulgaria* (Application no. 39272/98), 4 December 2003. The Court found a violation of article 3 (prohibition of degrading treatment) and article 8 (right to respect for private life) of the Convention, noting the universal trend towards recognising lack of consent as the essential element in determining rape and sexual abuse. The Court held that states are required to prosecute any non-consensual sexual act, even where the victim had not resisted physically. For these reasons, the Court found both the investigation in the case and Bulgaria law to be defective. See for example: I. Radacic, *Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations*, in *European Human Rights Law Review,* 2008, p. 357 ff.; C. Pitea, *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v Bulgaria*, in *Journal of International Criminal Justice*, 3, 2, 2005, p. 447 ff.; P. Londono, *Positive Obligations, Criminal Procedure and Rape Cases*, in *European Human Rights Law Review*, 2007, p. 158 ff.

[35] See the ECtHR, *E.B. v. Romania* (Application no. 49089/10), 19 March 2019.

[36] But there have also been cases in which the Court has preferred to uphold the application only under article 8, such as in the *Valiuliene v. Lithuania* judgment [see ECtHR, *Valiuliene v. Lithuania* (Application no. 33234/07), 26 March 2013]. However, as is clear from the concurring opinion of Judge Pinto de Albuquerque: «All the available data shows worldwide that domestic violence is in most of the cases violence perpetrated by men against women, and violence by women against men accounts for a very small percentage of domestic violence. Hence, the full effect utile of the European Convention on Human Rights (the Convention) can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives. In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at belittling the dignity of the partner, conveying a message of humiliation and degradation. It is precisely this intrinsic element of humiliation that attracts the applicability of article 3 of the Convention. The imputation of an article 8 violation would fall short of the real and full meaning of violence in the domestic context and would thus fail to qualify as a "gendered understanding of violence».

5. The Contextualisation of the Conduct

In the Aydin case, even before the judgment of the Court, the Commission had already pointed out in its opinion that rape, a particularly cruel act, affecting the physical and moral integrity of the victim, was in those circumstances aggravated because it was committed by a person with authority against a person who was more vulnerable because as prisoner and, moreover, a minor[37].

The Court, accepting this approach, reiterated that the accumulation of acts of physical and mental violence, and in particular the cruelty of the rape, to which she had been subjected, were acts of torture; as to the purpose, the situation in the geographical region was such to push to police to elicit information, so that the suffering inflicted on the applicant must be regarded as underlying the same aims[38].

As above mentioned, the absolute and inderogable nature of this prohibition means that it does not tolerate compression even when national security is at stake. This last point is decisive because it finally identifies a generally applicable principle, which does not only require to ascertain the degree of the suffering inflicted and the act, which is already particularly serious and cruel, but that it also needs to assess the contextualisation of the conduct and the purpose to which it is subjected lead to it being undoubtedly classified as an act of torture. In the present case, the fact that the conduct was carried out by representatives of the State and that they acted against a person deprived of her liberty and entrusted to their custody, plays the role of an aggravating circumstance external to the offence[39].

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[37] See ECtHR, *Aydin v. Turkey*, cit., paras. 78-79, where it is stated: «The Commission concluded that the deliberate ill-treatment inflicted on her by being beaten, being placed in a tyre, and hosed with pressurised water, combined with the humiliation of being stripped naked, fell clearly within the scope of the prohibition of article 3. The Commission also found that rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim's physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering.

The Commission found that the applicant had been the victim of torture at the hands of officials in violation of article 3».

[38] See ECtHR, *Aydin v. Turkey*, cit., para. 85, where it is stated: «The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region […] and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes».

[39] See ECtHR, *Aydin v. Turkey*, cit., para. 84, where it is stated: «The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating

The status of a State official may in fact make the victim even more vulnerable, as the person appear "untouchable" to the victim who may weaken his/her resistance, leading him/her not to report the crime. As highlighted in the *Aksoy v. Turkey* case, the most immediate precedent of the *Aydin* case, the victim's severe ill-treatment at the hands of State officials « would have given him cause to feel vulnerable, powerless and apprehensive of the representatives of the State»[40].

In addition, the International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that the «condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official»[41].

Much emphasis is placed by the ECtHR on the fact that the victim was young, which affects the vulnerability of the victim, both emotionally and physically.

The same emphasis is also placed on the location of the criminal events, since the «rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim»[42]. As it has been highlighted in the literature, «it is essential that the term 'detainee' in Aydin is not interpreted to mean a particular physical place, such as a state detention facility, but should instead denote either a physical place, but not limited to a state facility and including therefore the home, or even better a psychological condition such that the individual considers that they have no means of escape»[43].

Finally, treatments that are prohibited under article 3 cannot be justified even if they entail the response to serious crimes or threats of terrorism, as affirmed in the 1992 *Tomasi v. France* judgment. In fact, this was the first case in which the Court stated that nothing can justify the infliction of treatments prohibited under article 3 even if

circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre».

[40] See ECtHR, *Aksoy v. Turkey*, cit., para. 56. See also C. Yeo, *Agents of the State: When is an Official of the State an Agent of the State?*, in *International Journal of Refugee Law*, 14, 4, 2002, p. 523.

[41] See International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, Judgment, IT-96-21-T, *Prosecutor v. Delalic*, para. 495.

[42] See ECtHR, *Aydin v. Turkey*, cit., para. 83, where it is stated: «The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre».

[43] See again C. Mc Glynn, *op. cit.*, p. 577-578, recalling how Deborah Blatt has stated, a «woman's home can become her torture chamber»: see D. Blatt, *Recognizing Rape as a Method of Torture*, in *New York University Review of Law and Social Change,* 19, 4, 1991-1992, p. 851.

the alleged offences of the person charged are particularly serious, such as serious organized crime and terrorism[44].

Therefore, one could be perplexed by the dissenting opinion of the Turkish judge of the ECtHR, Gölcüklü, who invokes the theory of the "social risk", according to which the State must ensure public order and welfare of the population. In the context of terrorist violence, the State may not be able to perform this primary function even if the security forces are granted exceptional powers under state of emergency legislation; if in such circumstances some people suffer violence, harm, loss, physical and material damage, they must be compensated even if they have been negligent or careless, and regardless of the identity of the perpetrator of such acts, whether unlawful or lawful. The only causal link to be established in these cases is the one concerning the alleged damage or cause. Conversely, it does not involve the link of the damage and the alleged perpetrator. This is the collective responsibility of the rule of law towards the individual who becomes a victim simply because of his/her belonging to the community[45].

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[44] See ECtHR, *Tomasi v. France*, cit., para. 115, where it is stated: « […] The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals».

[45] Individual Dissenting Opinion of Judge Gölcüklü, para. 9, where it is stated: «The following observations apply to all the judgments submitted for consideration, which reflect the same concerns as the judgments of the French administrative courts.

(a) In all the appended judgments, which are only non-exhaustive examples of administrative case-law, the courts ruled in the victims' favour.

(b) These judgments are based on very detailed operative provisions revealing a legal reasoning which is extremely sensitive to the rights and interests of those claiming compensation as the victims of various terrorist acts.

(c) The facts underlying these decisions are very varied and include violent death, shooting from aircraft (see A24), assault, wounding, and physical damage.

(d) In most cases the operative provisions of the judgments concerned refer to article 125 of the Constitution, which provides that all administrative decisions shall be subject to review by the courts.

(e) The decisions make no distinction between acts committed by the PKK (see, for example, A13), by the security forces (see A5) or by unidentified persons (see, for example, A3, A17 and A24) since they follow a more general approach going beyond determination of fault in the execution of one's duty (see A25) or even objective liability on the administrative authorities' part; the argument which underpins the reasoning of the administrative courts' judgments is based on the theory of 'social risk'.

(f) The theory of social risk as developed in the judgments submitted includes the following elements:

(i) the State must ensure public order and the well-being of the population.

(ii) in a context of terrorist violence, it sometimes happens that the State cannot perform this essential function, even when special powers have been conferred on the security forces under state of emergency legislation (see in particular A3, A13 and A14);

(iii) if, in such circumstances, some people suffer violence, civil wrongs, damage, bodily injury or physical damage, they must be compensated even where they have been guilty of negligence

The conclusions deriving from the social risk thesis could have very serious implications: there is the collective responsibility instead of the liability of the individual who commits acts of torture, from which it follows that the victim must only be compensated rather than being entitled to obtain justice through the condemnation of the perpetrators of the acts of torture.

Moreover, as it has been rightly affirmed, «[it] follows that compensation alone, in the absence of action being taken against perpetrators of violations of the Convention, would in effect permit a state, for example in the case of torture, to pay for the right to torture»[46].

6. The Presumption of State Liability

An important achievement for victims of torture offences is the reversal of the burden of proof in cases where the claimant suffers injuries while deprived of liberty. In these cases, there is thus a presumption of liability of the defendant State.

As stated by the ECtHR in the 1992 *Tomasi v. France* judgment, when an individual claims to have suffered injuries during detention, it is incumbent on the government to provide a full and sufficient explanation of the origin of such injuries. In essence, there is a presumption of liability with respect to the State that is based on the circumstances in which the events occurred[47].

Before the *Tomasi* judgment, the picture was very complex from the point of view of the applicants, because the Court required a strict demonstration of the fault of State authorities to establish the violation of article 3 ECHR. As a result, applications were very often found to be *inadmissible as manifestly unfounded.* Instituting proceedings in such circumstances may present difficulties that are often insurmountable, such as the possibility that the appellant is the only witness of the violation, which may have been perpetrated in "private" or in closed environments by persons representing public powers, and, as such, almost covered by the public authority benefiting from a presumption of innocence that is more extensive than the one that is usually granted with respect to private citizens.

Moreover, as we shall see, the State has a major stake in not exposing the fault of its officials, since the state itself is responsible for the violation of the rights protected under the ECHR. The State must also take all measures to sanction the

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or imprudence and irrespective of the identity of the person responsible for the acts concerned, whether these were criminal or lawful. The only causal connection to be established in these cases is that between the alleged damage and the act which caused that damage, not between the damage and the alleged perpetrator (see, for example, A17). The issue involved (particularly in A14) is the collective».

[46] See A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights*, 6 July 2003, p. 43 (in *http://www.supremecourt.ge/files/upload-file/pdf/article3eng.pdf*).

[47] See ECtHR, *Tomasi v. France*, cit., paras. 108-111.

violation of the prohibition of torture (art. 3) by its officials. Moreover, there is a growing pressure in international law with respect to States to be more proactive in ensuring the protection of human rights, given the many ways in which they can be violated.

The problem did not only arise in relation to acts carried out by public officials, but also about the conduct perpetrated by private persons[48]. The ECtHR has clarified that there is the violation of the prohibitions of article 3 of the ECHR in cases where private persons have been able to act "undisturbed" because the State has failed to fulfil its *positive obligations* to prevent victims from being subjected to acts of torture or inhuman or degrading treatments[49]. For example, in the *Z v. the UK* case, the failure by British authorities to provide children appropriate protection against serious, long-term neglect, and abuse amounted to inhuman and degrading treatments in breach of article 3 of the ECHR. The Court held that States are required «to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals»[50]. The Court noted that such measures should «include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge»[51].

In addition, in the 2014 *O'Keeffe v. Ireland* case, the Court found that there had been the violation of articles 3 (prohibition of inhuman and degrading treatment) and 13 (right to an effective remedy) of the Convention due to the Irish State's failure to

[48] It was then the Istanbul Convention that «crosses the public/private dichotomy, placing detailed positive obligations on States' behalf holding them (as well as private persons and non-States actors), responsible for committing acts of violence, and even for having omitted to prevent their occurrence». On this, see C. Nardocci, *Gender-based violence between the ECHR and the Istanbul Convention,* in M. D'Amico - C. Nardocci (eds.), *Gender-based violence between national and supranational responses. The way forward*, Napoli, 2021, p. 163, dwelling on the ECtHR's case-law before the 2011 Istanbul Convention and after the Istanbul Convention (p. 151 ff.).

[49] More broadly on the article 3 that imposes a State both a negative and a positive obligation, see S. Palmer, *A Wrong Turning: article 3 ECHR and Proportionality*, in *Cambridge Law Journal*, 65, 2, 2006, p. 438 ff. On this see also I. Pellizzone, *Positive obligations, due diligence of the States and outcomes of the Osman Test in matter of gender-based violence cases: first steps for a gender sensitive approach?*, in M. D'Amico - C. Nardocci (eds.), *op. cit.*, p. 165 ff.

[50] See *Z and others v. The United Kingdom* (Application no. 29392/95), 10 May 2001, para. 73.

[51] See *Z and others v. The United Kingdom*, cit., para. 115. As highlighted by C. Mc Glynn, *op. cit.*, p. 592, «While in both *Z v the UK* and *Kaya v Turkey* the State was held responsible for the ill-treatment, not torture, of the individuals involved, there is nothing to suggest that a similar finding could not be made in respect of torture. In *Z v the UK* the Court includes reference to torture when outlining its approach and in Kaya v. Turkey it considered the possibility of torture but rejected that claim only based on the medical evidence, not principle. The Court classifies these cases as ones involving 'state responsibility' where the «authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they know or ought to have known».

protect the applicant from sexual abuse and her inability to obtain recognition at the national level of this failure[52].

With specific reference to cases in which the applicant suffers injuries at the hands of public officials, the presumption of liability therefore becomes the only way for the victims of the crime of torture to obtain justice. If the Court does not consider it sufficient that the applicants' allegations are proved beyond reasonable doubt, it will become impossible to establish the violation of article 3 ECHR.

The *Aydin* judgment is emblematic in this respect and reveals how difficult it is to reconstruct the facts when a person is in custody or deprived of liberty and he/she is the only witness to the violation.

Therefore, «the Court considers that it should accept the facts as established by the Commission, having been satisfied on the basis of the evidence which it has examined that the Commission could properly reach the conclusion that the applicant's allegations were proved beyond reasonable doubt, it being recalled that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences»[53].

As it is highlighted by the Court, «it would also note in this regard that the Government have been unable to adduce any evidence collected in the course of the criminal investigation into the applicant's allegations[54], which would have served to contradict this conclusion and that the medical evidence which they rely on cannot be taken to rebut the applicant's assertion that she was raped while in custody»[55].

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[52] See ECtHR, *O'Keeffe v. Ireland* (Application no. 35810/2000), 28 January 2014 (Grand Chamber). This case concerned the question of the responsibility of the State for the sexual abuse of a schoolgirl, aged nine, by her school principal when attending primary school in the early 1970s.

[53] See ECtHR, *Aydin v. Turkey*, cit., para. 73, referring to the *Ireland v. The United Kingdom*, cit., para. 161.

[54] See ECtHR, *Aydin v. Turkey*, cit., para. 73, recalling para. 56, where it is stated: «In support of their assertion that the complaints should be declared inadmissible, the Government relied heavily on the fact that at the time the applicant lodged her application with the Commission a criminal investigation had been opened by the public prosecutor into her allegations. This investigation was in fact still being actively pursued. The decision of the Commission to declare the application admissible and its subsequent pronouncement on the merits completely disregarded the steps which were being taken under Turkish criminal procedural law (see paragraphs 42 and 43 above) to establish the veracity of the applicant's account of the events at the relevant time and were in contradiction to the principle of subsidiarity which underpinned the functioning of the Convention system».

[55] See ECtHR, *Aydin v. Turkey*, cit., para. 73, recalling para. 67, where it is stated: «As to the alleged rape and ill-treatment while in detention, the Government stressed that neither Dr Akkuş nor Dr Çetin had found any bruising or injury to the applicant's body which was consistent with rape or violent assault. The applicant maintained that she struggled during the alleged rape. However, there were no signs of bruising to her wrists or back or genitalia which would have suggested the use of violence to overcome her resistance. The bruising found on her inner thighs could be explained by factors other than the forcing a part of her legs to effect a sexual assault. In fact, the report drawn up by the Faculty of Medicine of the University of Hacettepe (see paragraph 39 above), which the Government had submitted to the Commission, indicated that the bruising could have been attributed to the fact that the applicant rode a donkey. While it was true that the medical examinations confirmed that her hymen had

This approach will be confirmed two years later with the 1999 *Selmouni v. Francia* judgment, in which the threshold of seriousness fixed for identifying a case of torture is even lowered than in *Aydin*[56].

Therefore, the dissenting opinion in the *Aydin* case, stating that the applicant's allegations have not been proved beyond reasonable doubt, are unconvincing. In fact, the investigation has not provided the necessary certainty as to the reality of the facts because of the lack of sufficient evidence, notably the lack of effective cooperation on behalf of the Government, as the dissenting Judge *Matscher* himself admits[57].

Even in the *partly concurring and partly dissenting opinion of Judge Pettiti*, the investigation did not provide the necessary certainty as to the reality of the facts, as usually required by the Court's case-aw; moreover, Judge Pettiti points out that the shortcomings of the investigation are attributable not only to the prosecution, but also to the appellant's negligence[58].

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been torn, this could not justify a conclusion that defloration had resulted from the alleged rape. It was in fact medically impossible to estimate the date of defloration after a lapse of seven days from the date of the initial tear of the hymen. Had the applicant not waited as long as she did before going to the public prosecutor the medical evidence may have yielded further results. However, her delay in so doing led to the loss of vital evidence and was fatal to any medical corroboration of her account».

[56] See ECtHR, *Selmouni v. France*, cit., paras. 100-105.

[57] See the Partly Dissenting Opinion of Judge Matscher, para. 2: «There can be no doubt that the matters alleged would, if proved, constitute an extremely serious violation of article 3 of the Convention.

But in my opinion that condition is far from satisfied even though I recognize that the delegates of the Commission who conducted the inquiry at the scene were faced with a difficult position in view of contradictory statements on both sides, the conflicting interests of those concerned and the lack of any effective cooperation by the respondent Government. However, where, as occurred here, contradictory statements are made, a 'criminal' inquiry must be conducted in much greater detail and more objectively and regard must be had to all relevant factors so that reliable conclusions are reached.

I shall not comment on the inconsistencies and errors of detail which appear in the depositions made by witnesses on both sides, save to say that there are aspects, which are referred to in the joint dissenting opinions (see below), that are puzzling and cast serious doubt on the truthfulness of the version of events put forward by the applicant with the support of the Diyarbakir Human Rights Association and accepted in substance by the Commission and the Court.

In these circumstances, and without being able to say what the 'truth' of the matter was in this case, I am far from convinced that the applicant's allegations have been proved beyond all reasonable doubt. I therefore conclude that no violation of article 3 of the Convention can be found, for want of sufficient proof of the facts relied upon».

[58] See the Partly Concurring, Partly Dissenting Opinion of Judge Pettiti, which states as to article 3 of the Convention: «I concur in the joint dissenting opinion as regards article 3 (see below). In common with my colleagues in the minority, I consider that the investigation did not provide the necessary certainty that the events alleged really took place, as customarily required by the Court's case-law. If the facts had been established with certainty, it is obvious that there would have been an extremely serious violation».

As to article 13 of the Convention: «The applicant had a remedy which she used (complaint to the prosecuting authorities), which gave rise to an investigation that has not been closed».

I agree with the observations made in the joint dissenting opinion concerning article 13 (see below) on the shortcomings of the investigation, the negligence of the prosecuting authorities and the

Such considerations seem to underestimate too much the obstacles encountered by a victim that is even more vulnerable because he/she is deprived of liberty and that must prove with certainty the reality of the facts. It is precisely on these difficulties that the Government concerned relies on the possibility of escaping a conviction for the violation of article 3, not to mention, in the present case, the blatant inconsistencies in the list in the custody register where only six names were recorded for the whole of 1993[59]. In the light of the facts established, one cannot but agree with the reversal of the burden of proof.

Even in the Joint Dissenting Opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk and Gotchev it is highlighted, with reference to the violation of art. 3 ECHR, «that no evidence has been adduced from an independent source in support of the allegations made by the applicant, her father, and her sister-in-law and that it has not been shown beyond reasonable doubt that the allegations were true. Proof of the detention, ill-treatment and, more particularly, rape has not been adduced with the degree of rigour that the Court must require. In a matter as serious as this, particularly in view of the background of conflict, an impression of 'credibility' such as that made on the Commission by the applicant and her father cannot suffice»[60].

The Government's defense is also astounding when it states that: «the applicant's claim that she was raped did not prevent her from marrying and conceiving a child shortly after the alleged event. In the view of the Government her decision to marry and her ability to be sexually active so soon after her claimed traumatic experience were scarcely consistent with the behaviour of a rape victim. It was equally surprising that, given the cultural context, her alleged loss of virginity did not create any obstacle to her marriage»[61].

Finally, the assertions of the Turkish government's defense are also echoed in some passages of the dissenting opinions, stating that «the applicant married her cousin Adidin Aydin only a few days after the alleged events at Derik gendarmerie headquarters […] – which is surprising in the cultural context of the region – and that,

mistakes and negligence of the complainant. Admittedly, the remedy has not been effective so far, but the responsibility for this lack of effectiveness is to some extent a shared one, so that the requirements for the application of article 13 have not been satisfied in this case».

[59] See ECtHR, *Aydin v. Turkey*, cit., para. 27: «On 13 July 1993 the public prosecutor wrote to Derik gendarmerie headquarters enquiring as to whether the applicant, her father and her sister-in-law had been held in custody there and, if so, as to the dates and duration of the detention and the names of those who carried out the interrogations. By letter dated 14 July 1993, the commander of the gendarmerie headquarters, Mr. Musa Çitil, replied that they had not been taken into custody. On 21 July 1993, he supplied the public prosecutor with a copy of the entries for 1993. There were only six entries for that year».

[60] Joint dissenting opinion of Mr. Gölcüklü, Mr. Matscher, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha, Mr. Makarczyk and Mr. Gotchev, para. 4, (as for the alleged violation of art. 3 ECHR).

[61] See ECtHR, *Aydin v. Turkey*, cit., para. 68.

secondly, she would appear to have had her first child very shortly after the marriage […]»[62].

Even if they are dissenting opinions, thus not majoritarian ones, it seems nonetheless impossible that the judges of the ECHR could use such arguments.

7. The Violation of the Right to an Effective Remedy (Article 13 ECHR)

The other issue addressed by the ECJ in the *Aydin* case is the infringement of the right to an effective remedy under article 13. As the Court correctly points out, «the remedy required by article 13 must be 'effective' in practice as well as in law, in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State»[63].

«Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure»[64].

The recognition of the breach of the prohibition of torture guaranteed in article 3 ECHR is closely related to the modalities of application of article 13 ECHR; «the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13». Indeed, the fundamental importance of the prohibition of torture and the particularly vulnerable situation of victims of torture impose an obligation on States to conduct a thorough and effective investigation of cases of torture, without prejudice to any other remedy available under domestic law[65].

The role of the prosecutor in the Aydin case was therefore crucial, not only in prosecuting those responsible, but also in enabling the applicant to use her other remedies to obtain compensation for the damage suffered. For these remedies to be effective, the prosecutor had to perform his functions properly, but he did not do so.

«The public prosecutor was content to conduct this part of the inquiry by correspondence with officials at the headquarters […]. He accepted too readily their

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[62] Cfr. joint dissenting opinion of Mr. Gölcüklü, Mr. Matscher, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha, Mr. Makarczyk and Mr. Gotchev, para. 3.

[63] See ECtHR, *Aydin v. Turkey*, cit., para. 103, referring to ECtHR, *Aksoy v. Turkey*, cit., para. 95.

[64] See ECtHR, *Aydin v. Turkey*, cit., para. 103.

[65] *Ibidem*, where it is stated: «Furthermore, the nature of the right safeguarded under article 3 of the Convention has implications for article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims […], article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture».

denial that the Aydın family had been detained and was prepared to accept at face value the reliability of the entries in the custody register»[66].

Moreover, «the focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint», and not trying to establish whether the applicant had lost her virginity at the time of the events reported (at the time of the alleged events)[67].

In fact, none of the doctors expressed an opinion on the presence of bruises, although this was an investigation of a rape case. In such cases, the victim should instead be examined by doctors with special expertise in this field[68].

«In the light of the above considerations, it must be concluded that no thorough and effective investigation was conducted into the applicant's allegations and that this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies, including the pursuit of compensation. In conclusion, there has been a violation of article 13 of the Convention»[69].

In addition, in this case, the joint dissenting opinion of Mr. Gölcüklü, Mr. Pettiti, Mr. De Meyer, Mr. Lopes Rocha and Mr. Gotchev on domestic remedies (article 13 of the Convention) gives ground for concerns when it dwells on the behaviour of the applicant and of the Diyarbakir Human Rights Association. Moreover, it highlights that «Firstly, the applicant only lodged a complaint some eight days after the alleged events had taken place, when it was no longer possible to determine with any precision the date of penetration. About the rape, she did not arrange to be examined by a qualified gynecologist as she did shortly afterwards in connection with the paternity of her eldest child. She disappeared from the region sometime after the alleged events […]»[70].

Furthermore, the Diyarbakir Human Rights Association «does not appear at any time to have considered bringing a civil or administrative action»[71].

In the light of this, the dissenting judges consider that «it is not possible in the present case to disregard the applicant's and, especially, her representatives' conduct.

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[66] See ECtHR, *Aydin v. Turkey*, cit., para. 106.

[67] *Ivi*, para. 107.

[68] See more the ECtHR, *Aydin v. Turkey*, cit., para. 107, where it is stated: «In this respect it is to be noted that neither Dr Akkuş nor Dr. Çetin had any experience of dealing with rape victims […]. No reference is made in either of the rather summary reports drawn up by these doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse […]. Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to those of a rape victim».

[69] See ECtHR, *Aydin v. Turkey*, cit., para. 109.

[70] See the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev (on Domestic Remedies (article 13 of the Convention), para. 3.

[71] See more the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev, para. 3.

It did not make the investigation any easier and was more a factor contributing to its failure»[72].

Considering how the investigation was conducted, this argument seems to be hardly tenable.

The *Aydin* case confirms what had already been stated a few months earlier in the *Aksoy v. Turkey* case[73], where the Court had already identified the requirements to consider an investigation as adequate: namely, it must lead to the identification and punishment of the responsible persons. Two years after the *Aydin* case, the Court specified that in addition to being thorough and effective, the investigation must be conducted with diligence (*Selmouni v. France*)[74]. And certainly, in the *Aydin* case it was not conducted diligently or even expeditiously.

In the *Aksoy v. Turkey* judgment, the Court had also highlighted «that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order»[75]. This approach had also been confirmed in the 2015 *I.P. v. the Republic of Moldova* judgment[76].

The Court then linked the right to a proper official enquiry directly to article 3, without the need to read it in conjunction with article 13: whenever a person complains of ill-treatment in custody, a thorough and effective enquiry must be carried out diligently and expeditiously. If it does not happen, the State could incur in a violation of article 3, as it happened for example in the *Labita v. Italy* case[77], concerning an alleged abuse in a prison.

Mr. Labita complained that he had suffered mistreatment of the right in question in the Pianosa prison, in violation of article 3 ECHR. In the light of evidence such as the criticisms made by the Livorno magistrate and by the Inspectorate of Prisons of

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[72] See more the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev, para. 4.

[73] See ECtHR, *Aksoy v. Turkey*, cit., paras. 95-96.

[74] See ECtHR, *Selmouni v. France*, cit., para. 115.

[75] See ECtHR, *Aksoy v. Turkey*, cit., para. 95, which then goes on highlighting «The effect of this article (art. 13) is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the way they conform to their obligations under this provision (art. 13) […]. Nevertheless, the remedy required by article 13 must be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State».

[76] See ECtHR, *I.P. v. the Republic of Moldova* (Application no. 33708/12), 28 April 2015. The Court noted that there had been a procedural violation of article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding that the investigation of the applicant's case had fallen short of the requirements inherent in the State's positive obligations to effectively investigate and punish all forms of rape and sexual abuse. It also held that there had been a violation of article 13 (right to an effective remedy) of the Convention taken in conjunction with article 3 in so far as the applicant's complaint about the lack of civil remedies was concerned.

[77] See ECtHR, *Labita v. Italy* (Application no. 26772/95), 6 April 2000.

the Region of Tuscany, the Livorno Public Prosecutor's Office had opened a criminal proceeding against two prison guards. Nevertheless, the Florence Court of Appeal had dismissed the offence in a judgment handed down about eight years after the complaint was lodged[78].

The Strasbourg Court condemned Italy for failing to comply with European requirements, censuring the slowness of the proceedings and negligence in identifying the alleged perpetrators. However, in this case it is worth noting that while the Court was divided in rejecting the appeal from the point of view of ascertaining the ill-treatment[79], it unanimously recognised the violation of article 3 from the point of view of the effectiveness of the official investigation and reiterated that in order to make the prohibition of article 3 effective, an official investigation must be carried out and lead to the identification and punishment of the perpetrators[80].

On the violation of article 3, from the point of view of the effectiveness of diligent and speedy investigations, the Court has subsequently returned in more recent rulings, such as in the 2012 *P.M. v. Bulgaria* case[81]. The Court, finding that the investigation into the applicant's rape complaint had been ineffective even though the facts of the case and the identity of the offenders had been established, found that there had been the violation of article 3 (prohibition of inhuman and degrading treatment) of the Convention, under its procedural limb[82].

Not to mention the 2015 *M.A. v. Slovenia* case, in which the relevant criminal proceedings lasted almost 26 years[83].

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[78] See ECtHR, *Labita v. Italy*, cit., para. 27 ff.

[79] The evidently divided court (with 9 votes against and 8 in favour of infringement) affirmed that there had been no ill-treatment because the plaintiff had failed to provide proof against all reasonable doubt (in this case the reversal of the burden of proof was not triggered because there had been no injuries).

[80] See ECtHR, *Labita v. Italy*, cit., paras. 131-136.

[81] See EctHR, *P.M. v. Bulgaria* (Application no. 49669/07), 24 January 2012. This case concerned the applicant's complaint that, raped at the age of thirteen, the Bulgarian authorities took *more than fifteen years* to complete the ensuing investigation. The applicant was therefore unable to benefit from effective remedies due to the reluctance of the authorities to prosecute the perpetrators of the rape.

[82] In a similar sense, see ECtHR, *I.G. v. the Republic of Moldova* (Application no. 53519/07), 15 May 2012; *M. and others v. Italy and Bulgaria* (Application no. 40020/03), 31 July 2012; *W. v. Slovenia* (Application no. 24125/06), 23 January 2014; *E.B. v. Romania*, cit.; *S.Z. v. Bulgaria* (Application no. 29263/12), 3 March 2015; *B.V. v. Belgium* (Application no. 61030/08), 2 May 2017

[83] See the ECtHR, case *M.A. c. Slovenia* (Application no. 3400/07), 15 January 2015. In a same sense *N.D. c. Slovenia* (Application no. 16605/09), 15 January 2015, in which the related criminal proceedings lasted over nine years. In both cases the Court held that there had been a procedural violation (prohibition of inhuman and degrading treatment) of the Convention, finding that the criminal proceedings regarding the applicants' rape did not comply with the procedural requirements imposed by article 3.

8. Conclusions

The solution adopted by the Court is undoubtedly acceptable, both about the violation of the prohibition of torture (article 3) and the violation of the right to an effective remedy (article 13).

With reference to article 3, the Court, besides clearly defining the three types of conduct prohibited therein, but also indicating the act of rape as an undoubted case of torture, considered the contextualisation of the facts for the purpose of defining torture. Rape, which is a particularly cruel act, was in those circumstances aggravated because it was committed by a person in authority against a person who was more vulnerable because he or she was deprived of freedom.

Furthermore, the Court confirmed the reversal of the burden of proof if the claimant suffers injuries while in the custody of the public official.

The Court's interpretation of the right to an effective remedy, provided for in article 13, has undoubtedly contributed to strengthening the protection afforded by article 3 on the prohibition of torture. Without *thorough and effective investigations*, it is impossible to identify and punish the perpetrators of the crime of torture and to provide the victim with protection. The Court has therefore correctly stated that the general duty imposed on States to recognise the rights and freedoms of every person subject to their jurisdiction requires the existence of an adequate official investigation into the conduct complained of (confirmed most recently by the ECHR judgment of 2 February 2021, *X and others v. Bulgaria*)[84].

Considering the way in which the investigation was conducted in the Aydin case, one must therefore firmly reject both the arguments of the Turkish Government's defence and the assertions of certain dissenting judges that «it is not possible in the present case to disregard the applicant's and, especially, her representatives' conduct. It did not make the investigation any easier and was more a factor contributing to its failure»[85].

[84] See ECtHR, *X and others v. Bulgaria* (Application no. 22457/16), 2 February 2021 (Grand Chamber). In the present case, the Court held that there had been no violation of the substantive limb of article 3, finding, in particular, that it did not have sufficient information to conclude that the Bulgarian authorities knew or ought to have known of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to an obligation to take preventive operational measures to protect them against such a risk. The Court held, however, that there had been a violation of the procedural limb of article 3. In this respect, it considered that the investigating authorities, who had not made use of the available investigation and international cooperation mechanisms, had not taken all reasonable measures to shed light on the facts of the present case and had not undertaken a full and careful analysis of the evidence before them. In the Court's view, the omissions observed appeared sufficiently serious for it to be considered that the investigation carried out had not been effective for the purposes of article 3 of the Convention, interpreted in the light of the other applicable international instruments and the Council of Europe "Lanzarote Convention".

[85] See the Joint Dissenting Opinion of Judges Gölcüklü, Pettiti, De Meyer, Lopes Rocha and Gotchev (on Domestic Remedies (article 13 of the Convention), para. 4.

Lastly, a very important lesson to be learnt from the *Aydin* judgment is that the so-called *secondary victimization* must be combated and curbed. It is that phenomenon that affects women who have already been victims of violence and who become victims again when they report it to the police, before the courts, in the media and in the social context in which they live and work.

This happened for example in the 2015 *Y. v. Slovenia* judgment, concerning a young woman's complaint about the criminal proceedings brought against a family friend, whom she accused of repeatedly sexually assaulting her while she was a minor, alleging that the proceedings were excessively long and traumatic.

The Court held that there had been a violation of the State's procedural obligations under article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court also found that there had been the violation of article 8 (right to respect for private and family life) of the Convention, finding that the Slovene authorities had failed to protect the applicant's personal integrity during the criminal investigation and trial. They should have prevented the alleged assailant from using offensive and humiliating remarks while cross-examining her during the trial[86].

The considerations of the government's defense, also taken up in some dissenting opinions, in the *Aydin* judgment therefore leave one speechless when it states: «It was equally surprising that, given the cultural context, her alleged loss of virginity did not create any obstacle to her marriage»[87]. In view of these considerations, the solution must be found mainly in a cultural path. In other words, we need to set out on the road of adequate training to improve the gender sensitivity of the police apparatus and the judicial system towards women victims of violence. And above all, to strengthen the skills of the professional figures of the judicial police apparatus, who meet women victims of violence (one could for example think about the doctors involved in the investigation by the public prosecutor, who wrote in their reports that they did not have the specific skills to answer the questions put to them by the public prosecutor). This all contributes to a more effective implementation of national, European, and international legislation on violence against women, to foster a victim-centered approach to their rights.

This seems to be the path recently indicated by the ECtHR in the 2021 *J.L. v. Italy* case, another case of secondary victimization. The judgment states that «The Court is convinced that criminal prosecution and punishment play a crucial role in the institutional response to gender-based violence and in combating gender inequality. It is therefore essential that judicial authorities avoid reproducing gender stereotypes in court decisions, minimising gender-based violence and exposing women to secondary

[86] See the ECtHR, *Y. v. Slovenia* (Application no. 41107/10), 28 May 2015. As regards the nature of the cross-examination by the defendant himself, the Court held that, while the defense had to be allowed a certain leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses.

[87] See the ECtHR, *Aydin v. Turkey*, cit., para. 68.

victimisation using guilt-tripping and moralising language that discourages victims' confidence in the justice system»[88].

As it has been rightly said in literature, «this judgment has a historical and legal value of proportions never known in Europe and in the world because, beyond the case examined, it lays bare an unspoken hypocrisy: the judge, in the face of gender violence cannot be impartial and does not use impartial arguments, except when he makes the cultural effort to see first and then eradicate his own stereotypes on the female and male gender. But the judiciary, everywhere in the world, is not always aware of this limitation, which is why, on the one hand, it perpetuates the impunity of men perpetrators of violence and, on the other hand, blames the women who report them»[89].

In sum, the lesson that emerges from the *Aydin* case is still relevant after more than twenty years, as evidenced by the above-mentioned *J.L. v. Italy* judgment. Moreover, it shows us the way forward: the solution can only be the education of the people with whom the woman victim of violence must deal. To this end, it is necessary that, in addition to the indispensable repressive instruments, a profound cultural process is promoted, involving all institutional and social actors in the perception and solution of the problem of gender-based violence, to be able to affect behaviour closely related to the hegemonic role traditionally played by men in the family, society, institutions, economy, and politics.

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Abstract: The paper, which deals with the ECtHR' decision *Aydin v. Turkey* dating from 1997, dwells on the two parameters in the light of which the appeal was deemed admissible: articles 3 and 13 ECHR. With reference to art. 3 ECHR, the *Aydin v. Turkey* case provides to the European Court the occasion to evaluate the definition of the crime of torture, considering any particularly punitive inhuman treatment as an act of torture, having regard to the factual circumstances. This sentence also represents an emblematic case as for the evolution of the Strasbourg case law in terms of article

[88] See the ECtHR, *J.L. v. Italy* (Application no. 5671/16) 27 May 2021, para. 141: «*La Cour est convaincue que les poursuites et les sanctions pénales jouent un rôle crucial dans la réponse institutionnelle à la violence fondée sur le genre et dans la lutte contre l'inégalité entre les sexes. Il est dès lors essentiel que les autorités judiciaires évitent de reproduire des stéréotypes sexistes dans les décisions de justice, de minimiser les violences contre le genre et d'exposer les femmes à une victimisation secondaire en utilisant des propos culpabilisants et moralisateurs propres à décourager la confiance des victimes dans la justice*». Unofficial translation from French by the author.

[89] See P. Di Nicola Travaglini, *La Corte EDU alla ricerca dell'imparzialità dei giudici davanti alla vittima imperfetta*, in *Questione Giustizia*, 20 July 2021, p. 2 (in *https://www.questionegiustizia.it/articolo/la-corte-edu-alla-ricerca-dell-imparzialita-dei-giudici-davanti-alla-vittima-imperfetta*). The text has been translated from Italian by the author.

3 ECHR. The applicative path of this latter, although not always being coherent, has still being characterised by an extensive trend.

The other parameter put as basis of the decision is article 13 ECHR, ensuring the right to an effective remedy. In fact, to grant effectiveness to the prohibition of torture, an official investigation, conducted with diligence and rapidity and able to identify the perpetrators is needed. From this point of view too, the analysis of the case law is particularly useful, since it demonstrates that only an official investigation, conducted within an appropriate time, allows the victims of torture to obtain justice.

Abstract: Il presente testo, che ha ad oggetto la sentenza *Aydin c. Turchia* della Corte Edu del 1997, si sofferma sui due parametri alla luce dei quali è stato accolto il ricorso: gli articoli 3 e 13 Cedu. Con riferimento all'articolo 3 Cedu, il caso *Aydin c. Turchia* offre l'occasione alla Corte europea per fare il punto sulla definizione del reato di tortura, indicando come atto di tortura qualsiasi trattamento inumano particolarmente afflittivo, tenuto conto delle circostanze di fatto. Questa sentenza rappresenta altresì un caso emblematico dell'evoluzione della giurisprudenza di Strasburgo in tema di articolo 3 Cedu, le cui tappe applicative, pur non seguendo sempre linee coerenti, sono comunque caratterizzate da una tendenza espansiva. L'altro parametro, posto a fondamento della sentenza, è l'articolo 13, che sancisce il diritto ad un ricorso effettivo. Affinché il divieto di tortura non sia inefficace, occorre difatti un'indagine ufficiale, svolta con diligenza e rapidità, che deve potere condurre all'identificazione dei colpevoli. Anche sotto questo profilo, l'analisi dell'*excursus* giurisprudenziale è assai utile, perché dimostra che solo un'inchiesta ufficiale, condotta in tempi adeguati, permette alle vittime di atti di tortura di ottenere giustizia.

Keywords: ECtHR – *Aydin v. Turkey* – torture – Article 3 ECHR – Article 13 ECHR.

Parole chiave: Corte Edu – *Aydin c. Turchia* – tortura – art. 3 Cedu – art. 13 Cedu.

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Elena Bindi - Full professor of Public Law, University of Siena (Italy) (elena.bindi@unisi.it)