UNIONE FORENSE PER LA TUTELA DEI DIRITTI DELL'UOMO

OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF ITALY TO THE COMMITTEE AGAINST TORTURE

(CAT/C/67/Add.3)

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This report has been drafted by Anton Giulio Lana, Andrea Saccucci, Anna Paola Specchio and Francesca Raimondi, to whom the UFTDU expresses its gratitude.

1. The introduction of the crime of torture in the Italian legal system

1. It is well-known that Italy is among the few States parties to the Convention which so far have not provided for an autonomous crime of torture within their criminal legislation as required by Article 4 of the Convention. The UFTDU wishes to stress once again that the obligation to do so is at the core of the Convention and must be promptly complied with in order to ensure its full implementation at the domestic level. This is all the more true considering that the prohibition of torture is now generally regarded as a peremptory norm of international law.

2. It is therefore unacceptable for a State party to avoid its fundamental duty to criminalize the acts of torture and other cruel, inhuman or degrading treatment as such by relying on ordinary crimes provided for by its existing legislation. The UFTDU cannot but note with regret that the Italian Government is still seeking to justify its failure to comply with Article 4 of the Convention by referring to the fact that the Italian legal system allegedly "provides sanctions for all conducts that can be considered to fall within the definition of torture, as set forth in Article 1 of the said Convention" (see written replies to the list of issues, p. 7). On the contrary, the criminal provisions in force (such as those concerning bodily injures, violence and assault) are far from being adequate for the purpose of punishing acts of torture or cruel, inhuman and degrading treatment.

3. The absence of an autonomous crime of torture in the Criminal Code has become, if possible, even more unacceptable following the introduction in 2002 of Article 185-*bis* of the Military Criminal Code applicable in Time of War, which punishes acts of torture or other inhuman treatment committed by military personnel in time of war (see written replies to the list of issues, p. 8, § 22). Although this provision has a limited scope of application and provides a lenient penalty that clearly does not match the standard of gravity required by Article 4 of the Convention, it is odd, to say the least, that in the Italian legal system acts of torture are nowadays punishable as an autonomous crime if committed in time of war and not if committed in time of peace.

4. As announced in the report of Government of Italy, a legislative process is still in motion with a view to introduce the

crime of torture in the Criminal Code. Several draft laws have been submitted to the Parliament in the latest years, none of which, however, upon proposal by the Government. Notably, the draft law No. A.C. 1483 mentioned in the report was submitted to the Chamber of Deputies on 2nd August 2001, and assigned to the II Permanent Commission (Justice) on 13th November 2001. This draft envisaged the insertion of the crime of torture in Article 593-*bis* of the Criminal Code (I Part, XII Title, II Book). The proposed text was subject to several changes: in particular, the new provision has been moved from the section concerning the crimes against life and personal integrity to the section concerning the crimes against moral liberty (III Section, III Part, XII Title of the Criminal Code). This change can be explained with the intention to make the crime of torture applicable to any form of moral coercion or pressure, including the conduct of police officers in the course of investigation or judicial proceedings aiming at obtaining information or a confession. However, the draft was not approved by the Chamber of Deputies before the end of the past Legislature.

5. More recently, new drafts were submitted to the Chamber of Deputies in the course of the XV Legislature (No. C. 915, No. C. 1206, No. C. 1272 and No. C1279), introducing the crime of torture in Articles 613-*bis* of the Criminal Code: a unified text was approved by the Chamber of Deputies on 13th December 2006 and transmitted to the Senate (No. S. 1216). During the work of the II Permanent Commission (Justice) of the Senate to which the draft was assigned for examination, the text approved by the Chamber of Deputies was subject to several amendments resulting into the following new unified text adopted on 20th March 2007:

> "Art. 613-*bis* – (*Torture*) – The public official or the person entrusted with a public service who inflicts to a person, with any act, injuries or sufferings, physical or mental, notably for the purpose of obtaining from him or her or from a third person information or declarations, of punishing him or her for an act which he or she or a third person has committed or is suspect to have committed, of intimidating him or her or of making pressure upon him or her or upon a third person, or of discriminating him or her for any other

founded reason, shall be punished with imprisonment from four to ten years.
The punishment is increased if the conduct provided for in the first paragraph causes a severe or very severe injury. If it causes death, the punishment cannot be less than thirty years.
The same penalties provided in the first and second section apply to the public official or to the person entrusted with a public service who instigates others to the commission of the act or who fails to prevent the act or who tacitly agrees to it".

6. The UFTDU expresses its concerns regarding the late changes adopted by the II Permanent Commission of the Senate which have the effect of narrowing down remarkably the scope of application of the new provision. Notably:

1. the words "everyone who is responsible" have been replaced with the words "public official or the person entrusted with a public service";
2. the words "serious violence and menace", "cruel, inhuman and degrading treatment", "racial, religious, political and sexual" have been erased;
3. the punishment has been reduced from 12 to 10 years, as to the maximum;

It follows that torture would be punishable only if committed by a public official or by a person entrusted with a public service, while any private individual would be exonerated even when acting "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

7. In conclusion, the new unified text of the draft law adopted by the II Permanent Commission of the Senate on 20th March 2006 and currently under discussion reduces significantly the scope of application of the crime of torture and lessens the regime of applicable penalties in a way which raises concerns as to the compatibility of the new provision with the obligations ensuing from Articles 1, 4 and 16 of the Convention.

8. The UFTDU notes that the Italian Government has not offer in its report any statistical data concerning the cases of alleged torture or inhuman or degrading treatment for which investigation or judicial proceedings are pending or have been

completed. Due to the **lack of official collection of such data**, it becomes more difficult if not impossible to assess objectively whether the existing criminal provisions are effectively used by Italian authorities for prosecuting acts of torture and whether the obligations laid down in Articles 12, 13 and 16 of the Convention have been complied with.

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2. RIGHT TO ACCESS TO A LAWYER BY A PERSON TAKEN INTO CUSTODY; DETENTION AND COERCIVE TAKING OF SAMPLES FOR IDENTIFICATION PURPOSES

9. As indicated in the report of the Italian Government, Article 104, par. 3, of the Code of Criminal Procedure provides that in the course of the preliminary investigations, when there are specific and exceptional reasons of prevention, the judge, upon request of the public prosecutor, may delay the exercise of right the person placed in custody to have access to a lawyer up to five days. Moreover, Article 104, par. 4, provides that, in the case of arrest or provisional detention of a suspect, the decision to delay the latter's access to a lawyer is taken by the public prosecutor.

10. In this respect, the UFTDU shares the reservations expressed by the Human Rights Committee of the United Nations as to the compatibility of the above mentioned provision with the right to liberty protected by Article 9 of the International Covenant on Civil and Political Rights. Notably, in its concluding observations on the fifth report submitted by Italy adopted on 2nd November 2005, the Human Rights Committee recommended that "the maximum period during which a person may be held in custody following arrest on a criminal charge be reduced, even in exceptional circumstances, to less than the present five days and that the arrested person be entitled to access to independent counsel as soon as he or she is arrested" (cfr. CCPR/C/ITA/CO/5, § 13).

11. Even more serious concerns arise from the new provisions on personal identification embodied in the Law 31 July 2005, No. 155 (hereinafter "Law No. 155/2005"), which enacted as a law, with amendments, Decree Law 27 July 2005, No. 144, on "Urgent measures for the fight against international terrorism". Those provisions allow, on the one hand, coercive taking of

samples of hair or saliva without the consent of the person (Art. 349, para. 2-*bis*, of the Code of Criminal Procedure), and, on the other, the extension from 12 to 24 hours of the permissible period of deprivation of liberty by the police for identification purposes (Art. 349, para. 4, of the Code of Criminal Procedure). The measures in question have a general character and apply regardless of the kind of criminal offence allegedly committed, and even regardless of whether the person is subject to criminal investigation[1].

12. According to Article 10, par. 2, of Law No. 155/2005, which amended Article 349, par. 4, of the Code of Criminal Procedure, the permissible period of police custody for identification purposes of persons subject to investigation or individuals who are able to give information useful to the establishment of facts has been extended **from 12 to 24 hours**. Notwithstanding the right of the person concerned to ask to inform a family member or a co-habitant (but not a lawyer), the application of the new provision significantly reduces the safeguards to which a person deprived of his or her liberty is entitled.

13. First of all, the extension of the period of deprivation of liberty applies automatically when the provision of consular assistance or of an interpreter is necessary (that is to say where the person concerned is a foreigner), irrespective of the actual complexity of the operations of identification to be carried out. This may result in less favourable treatment of aliens without any objective justification connected to their personal identification (especially when the required assistance of consular authorities or of an interpreter may be provided immediately), which could raise an issue of compliance with the prohibition of discrimination on the ground of nationality.

14. Secondly, in spite of a considerable extension of the period of deprivation of liberty, the person concerned is not entitled to legal assistance by a lawyer of his choice and no review by a

[1] Indeed, Art. 349, para. 4, of the Code of Criminal Procedure also applies to persons who are able to give information useful to the establishment of facts ("persone informate dei fatti"). Moreover, Art. 10, para. 4-*quarter*, of Law No. 155/2005 extends the applicability of (new) Art. 349, para. 2-*bis*, of the Code of Criminal Procedure to the procedure of identification set forth in Art. 11 of Law 18 May 1978, No. 191, according to which: "Police officers and agents can accompany to their offices whoever, being so asked, refutes to give his or her personal details, and hold him or her there for the time strictly necessary for the sole purpose of identification and no longer than 24 hours".

judicial authority is envisaged on the legality of the measure. Only "notice" of the measure to the public prosecutor is required, who, under Art. 349, para. 5, of the Code of Criminal Procedure, may order the release of the person if the preconditions for his or her detention are deemed to be lacking. Such a regime is hardly reconcilable with the guarantee of *habeas corpus*.

15. This is all the more true considering that, after the lapse of the 24-hour period, the police or public prosecutor could order the provisional detention of the suspect ("fermo di indiziato") pursuant to Art. 384 of the Code of Criminal Procedure. In addition, the public prosecutor may, in the following 48 hours (within which he must request validation of the provisional detention by a judge), delay the exercise of the right of access to a lawyer when "specific and exceptional reasons of prevention" so require according to Article 104, par. 4, of the Code of Criminal Procedure. Moreover, the exercise of said right could be further delayed by the judge, up to a maximum of five days, if the provisional detention is validated and an order of detention on remand is issued. In other words, a combination of the provisions in question makes it possible for the person suspected of having committed an offence to be held in police custody and in the hands of the public prosecutor for at least three days without being able to speak with a lawyer.

16. As to the coercive taking of samples, it should be noted that such action by its nature implies the exercise of moral and to a certain extent even of physical coercion against the person, not subject to any particular condition (like the impossibility of resorting effectively to other less invasive techniques of identification, for instance), nor to any judicial control by an independent tribunal (the law only requires an authorization by the public prosecutor). Moreover, no specific rule is in place concerning the collection, storage and use by public authorities of the personal data gathered by means of coercive taking, either in relation to persons later subject to criminal proceedings or to persons released immediately after the control without charges being raised, or in relation to persons held only for identification purposes in accordance with Art. 11 of Law No. 191/1978. The person concerned is not even entitled to seek

access to the collected information, and, if need be, to refute it and obtain its erasure or correction.

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3. THE RIGHT TO ASYLUM

17. The UFTDU notes that currently the procedure for the recognition of the status of refugee is regulated by the Decree of the President of the Republic 16 September 2004, No. 303. This Regulation does not make any distinction between the status of refugee pursuant to Article 1 of the Geneva Convention of 28 July 1951 and the political asylum pursuant to Article 10 of the Italian Constitution. In fact, Article 1 of the Regulation in question defines the "asylum seeker" as the alien who seeks the recognition of the status of refugee under the Geneva Convention. Furthermore, the Regulation provides the establishment of centres of identification where the aliens are held pending a decision on their application for asylum. In this way, asylum seekers are placed in a sort of detention, despite the fact that they are vulnerable persons by definition who need assistance rather than a restriction of their personal liberty.

18. As to the procedure before the local or central Commission competent to decide on the application for asylum, the UFTDU regrets that professional service of translation of relevant documents is usually lacking, and that the asylum seekers is not entitled to obtain legal aid if he or she wishes to be represented by an attorney. Furthermore, the timing of the procedure before the Commissions is usually very stringent: in case of a negative decision by the local Commission, the asylum seeker has only five days at disposal to challenge the decision before the central Commission, which makes it remarkably more complicated for him to contact a lawyer and to have adequate time and facilities for the preparation of his case

19. In the UFTDU's view, the system actually in force does not ensure full respect for the dignity and liberty of the asylum seeker. It emphasises, however, that a new draft law on asylum (No. C. 2410) was submitted to the Chamber of Deputies on 19th March 2007 by Hon. Roberto Zaccaria and is about to be assigned to a Permanent Commission for examination. The text has been drafted by the Italian Council for Refugees (CIR), with

the contribution – among others – of the UFTDU, and constitutes the first proposal for an comprehensive law on the right of asylum and humanitarian protection (http://www.camera.it/_dati/lavori/stampati/pdf/15PDL0024800.pdf).

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4. NEW PROVISIONS CONCERNING THE EXPULSION OF ALIENS SUSPECT OF BEING INVOLVED IN TERRORIST ACTIVITIES

20. The above mentioned Law No. 155/2005 has introduced a new procedure of expulsion of aliens suspect of being involved in terrorist activities, which will be in force until 31 December 2007 as an exceptional measures of prevention. In particular, Art. 3 of the said law empowers the Minister of the Interior or, upon delegation, the Prefect to order the expulsion of an alien "against whom there are well-founded reasons to believe that his or her stay in the State's territory might in any manner facilitate terrorist organizations or activities, also of an international character".

21. The use of this power – which counts already many cases in practice – raises a number of issues as to its compliance with the relevant provisions of the Convention, especially considering the unfettered discretion conferred upon the competent authorities and the lack of effective judicial control. The most serious concern is, without any doubt, the **expulsion of persons to countries in which there is a real risk that they could be deprived of their life or subject to torture or inhuman or degrading treatment**, in violation of Article 3 of the Convention. This concern is, furthermore, aggravated by the **immediate enforcement** of expulsion orders, without any judicial validation (provided for by Art. 3, para. 2, of Law No. 155/2005, but with effect until 31 December 2007), as well as by the impossibility for the Regional Administrative Tribunal competent to review the lawfulness of the order **to stay its execution** (provided for, in absolute terms and without any time limit, by Art. 3, para. 4 and 4-*bis*, of the Law).

22. Although one may expect and hope that the competent authorities will make use of their power while taking carefully into account any possible risk for the life and limb of the person

once in the receiving country, the possibility that an expulsion order may be issued without any such assessment or on the basis of only superficial appreciation of situation, or by giving priority to security interests[2], so as to result in encroachment on the right to life and the prohibition of torture cannot be ruled out. The likelihood of such a dreadful occurrence is not particularly remote, given that the expulsion order is adopted by the authorities only on the basis of information available to them and without a hearing of the persons directly concerned, who might thus be unable to confirm the existence of specific risks or to submit relevant evidence.

23. This new mechanism of prevention may give rise to a despicable *vulnus* to the absolute nature of the prohibition of *refoulement* enshrined in Article 3 of the Convention, which according to prevailing opinion reflects a peremptory norm of general international law as well as the prohibition of torture and of inhuman or degrading treatment or punishment to which the former is ancillary.

24. It is also to be noted that the immediate enforcement of the expulsion order coupled with the legislative prohibition on administrative courts to stay its execution "in any case" may give rise to a violation of the right to an "effective domestic remedy", especially where the person concerned alleges the existence of a real risk of irreparable damage in the State of destination. According to the well-established case-law of international supervisory bodies, the State's obligation to provide an effective domestic remedy requires that such remedy be capable of preventing the execution of measures of expulsion allegedly contrary to the rights guaranteed, the effects of which might be potentially irreversible.

25. In addition to the exclusion of suspensive effect, there is another procedural constraint that may significantly hinder the effectiveness of any judicial remedy against the expulsion order. Notably, the two-year stay of proceedings provided for by Art. 3, para. 5, of Law No. 155/2005 (when decision depends on

[2] A clear indication of the prevalence of general interests of security comes from the drafting works of Law No. 155/2005, during which the Minister of the Interior and several MPs emphasised the need to ensure "the prevalence of the 'precise and unavoidable duty' of the legal system to safeguard the democratic order and public security against terrorism and subversion, even with regard to other constitutional principles".

knowledge of confidential documents) has the clear-cut intention of stalling, for a long period of time, the administrative court's power to review the lawfulness of the expulsion order and, in so doing, renders virtually meaningless a possible favourable outcome for the alien who has meanwhile been expelled. This is all the more worrying if one considers that the same rules will also be applicable to judicial review of ordinary orders of administrative expulsion under Art. 13, para. 11, of Legislative Decree No. 286/1998; thus, in cases where the need to prevent terrorism could be thoroughly irrelevant.

26. The serious procedural flaws affecting judicial review of expulsion orders for the purpose of preventing terrorism may have further relevant implications. The absence of an effective domestic remedy giving to the person concerned the possibility to avoid his exposure to the risk of irreparable damage in the receiving State will compel the victims to apply to the international supervisory human rights bodies, including the Committee against Torture, for the indication of provisional measures, before the decision of the administrative court or even without previously challenging the expulsion order. This has already happened in a few cases pending before the European Court of Human Rights, where provisional measures were adopted in order to avoid the expulsion of some aliens whose deportation had been decided pursuant to Article 3 of the Law No. 155/2005 after their final acquittal from criminal charges of terrorism brought against them.

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5. OTHER ANTI-TERRORISM MEASURES AFFECTING HUMAN RIGHTS

27. The new provisions concerning the "preventive" freezing of funds or financial assets (Art. 14, para. 6 and 7, of Law No. 155/2005), which are intended to complement those embodied in Law 14 December 2001, No. 431, as subsequently amended, also raise some serious concerns from the point of view of compliance with the human rights obligations. These provisions – which envisage the possibility of ordering "preventive" freezing when there is a risk that the funds or financial assets in question could be dispersed, hidden or used for financing terrorist activities prior to a formal decision by the Sanctions Committee of the United Nations or by other competent

international bodies – are framed in the context of a procedure that has already been severely criticized under international human rights commitments, especially because of the lack of adequate legal safeguards in relation to the persons and entities included in the lists annexed to the decisions of the United Nations or of the European Community, which provide for the freezing.

28. Independent of the more general question of the lawfulness of such decisions from the point of view of general international law and EC law (answered in the affirmative by two recent judgments of the Court of First Instance[3]), the UFTDU believes that measures affecting private assets, adopted without any possibility of judicial review on the basis of the alleged existence of sufficient elements (as determined by government authorities with unfettered discretion) for submitting proposals to the competent international bodies or concerning persons or entities whose names have already been forwarded to those bodies, are capable of impinging on the right to peaceful enjoyment of possessions, including immaterial properties and commercial reputation (Art. 1 of Protocol No. 1 to the ECHR), the right to access to a court for a determination of civil rights and obligations (Art. 6, para. 1, ECHR and Art. 14, para. 1, ICCPR), the right to an effective remedy (Art. 13 ECHR and Art. 2 ICCPR), as well as the right to the protection of honour and reputation (Art. 8 ECHR and Art. 17 ICCPR).

29. The risk of such an occurrence becomes even higher when, as in the case at issue, the absence of judicial review on the lawfulness of the measures goes hand in hand with the absence of a previous decision by the competent international bodies in relation to the freezing. Indeed, even if one were to uphold the view that decisions adopted by the UN Sanctions Committee (and their implementation by EC organs) may derogate from human rights obligations – since they are grounded in obligations stemming from resolutions adopted under Chapter VII of the UN Charter and, as such, prevail over all other international obligations pursuant to Art. 103 of the Charter[4] –

[3] See EC Court of First Instance, judgment 21 September 2005, case T-306/01, *Ahmed Ali Yusuf v. Council and Commission*, and judgment 21 September 2005, case T-315/01, *Kadi v. Council and Commission*.

[4] This was the position upheld by the EC Council and Commission before the Court of First Instance in the context of the proceedings mentioned in the foregoing note. Instead, the Court of First Instance, while

the same line of reasoning could not be applied in relation to measures States might adopt unilaterally in view of a possible proposal of freezing to be submitted to, or of a possible decision of freezing to be adopted by, the competent international bodies. Moreover, such proposals or decisions may never actually be submitted or adopted, and – if submitted or adopted – would leave, once again, the individuals concerned without any effective legal protection at the domestic or even at the EC level.

30. A number of concerns also arise out of the new criminal law provisions on terrorism (Art. 15 of Law No. 155/2005), especially in light of the principle of legality and of the related requirement of sufficient determination and foreseeability of criminal offences. This concern is particularly acute with regard to the new criminal offence of "conduct with the aim of terrorism" provided for by Art. 207-*sexies* of the Criminal Code, whose definition – largely in line with the definition contained in the Framework Decision on the fight against terrorism adopted on 13 June 2002 by the Council of the European Union[5] – outlines punishable conduct in a very broad fashion and is, moreover, construed as an "open provision", due to the reference to "other conduct defined as terrorist or committed with the aim of terrorism by conventions or other provisions of international law binding upon Italy".

31. Through this atypical mechanism of *renvoi*, the legislator has virtually created a blanket criminal offence, the application of which will give rise to a number of formal and substantive issues, carrying dodgy implications also under the specific point of view of compliance with international human rights standards. In particular, the concrete definition of punishable conduct might

stating that "with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community", found to be empowered "to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*" and "to determine whether the superior rules of international law falling within the ambit of *just cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate (...)" (see, respectively, para. 275-282, and para. 226-231). On the merits, however, the Court came to the conclusion that the peremptory human rights provisions (including the right to a fair trial and to an effective judicial remedy) were fully complied with in the specific cases.

[5] See Framework-decision No. 2002/475/GAI, in O.J.E.C. 22 June 2002, L 164, p. 3 ff.

turn out to be quite troublesome for judicial authorities, since it will require a preliminary determination of the legal force and of the scope of relevant international provisions. In addition to this, in itself a demanding task, such a determination could lead to unforeseeable punitive consequences for the author of particular conduct, whose criminal liability will be established on a case by case basis – depending, at least in part, on circumstances external to the national legal system, such as entry into force of a treaty at the international level (for which no adequate system of publicity is in place[6]) – and without even the possibility of relying on the existence of established case-law.

32. Moreover, in such cases parliamentary involvement in the formulation of international treaty provisions defining further terrorist conduct (which would then be automatically adapted in the internal legal system as incriminating provisions by means of the *renvoi* embedded in Art. 207-*sexies* of the Criminal Code) will be limited to mere once-and-for-all acceptance, through adoption of the law authorizing ratification with the order of execution. Consequently, by way of negotiating and adopting international treaties, the Government will assume decisive and largely uncontrolled leadership in the definition of a criminal offence relevant at the domestic level.

33. Another measure introduced by Law No. 155/2005, which deserves to be highlighted for its potential implications under international human rights obligations, regards the carrying out by secret services ("Servizi informativi e di sicurezza") of the preventive interception of communications (including home surveillance) regulated by Art. 226 of the "final provisions" ("*Norme di attuazione, di coordinamento e transitorie*") of the Code of Criminal Procedure, as thoroughly revised by Law Decree 18 October 2001, No. 374, enacted, with amendments, into Law 15 December 2001, No. 438.

[6] One may take the example of terrorist conduct as defined by a treaty ratified by Italy (and published in the Official Gazette together with the law of authorization to ratification), whose entry into force at the international level is subject to the deposit of a certain minimum number of ratifications. In such a case, the conduct would begin to be criminally punishable under Article 207-*sexies* of the Criminal Code only from the date on which the condition provided for by the treaty is realised. But the entry into force of a treaty is given only limited official cognisance, by way of yearly publication of the list of treaties in force for our State.

34. Notably, Art. 4 of Law No. 155/2005 provides that the President of the Council of Ministers may delegate the directors of the Services to seek from the General Prosecutor of the Court of Appeal the authorization to carry out such interception and surveillance activities, when they are deemed to be "indispensable for the prevention of terrorist activities or of subversion of the constitutional order". The excessive broadness of the conditions for the exercise of said activities – notwithstanding the explicit interdiction to use their results as evidence at trial – raises several concerns as to compliance with the conditions required for lawfully interfering with the right to respect for private life, home and correspondence. Indeed, according to well-established case-law, both treaty provisions require that any interference by public authorities (such as measures of secret surveillance and interception of communications) be based on legal provisions that are sufficiently accessible, clear and foreseeable, and include adequate safeguards to avoid any risk of arbitrariness by authorities.

35. Against this background, there might be more than good reason to argue that the new powers granted to the secret services by Law No. 155/2005 do not meet a sufficient level of clarity and determination. This is all the more true if one considers that the relevant provisions are phrased in such a generic fashion as to grant the services unfettered discretion in deciding when and in relation to whom to exercise their powers of preventive surveillance; that the activities of interception will be carried out with technical means different from the official ones at the disposal of the Prosecutor's offices; that there is no required temporal limitation of the authorization issued by the General Prosecutor; and eventually that there is no supervision by an independent judicial authority.

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6. The case of Lampedusa and the Centers of Temporary Detention of migrants (CPT-CPTA)

36. Over the last three years, the UFTDU has devoted special attention to the dramatic events occurring between 2004 and 2005 at Lampedusa, where thousands of migrants travelling by boat from Libya have been intercepted, held in camps and then collectively returned to Libya, which was not their country of origin. In April 2005, two members of UFTDU (Mr Anton Giulio Lana and Mr Andrea Saccucci) filed applications to the European Court of Human Rights on behalf of 87 migrants alleging that their deportation to Libya amounted to a violation of Article 2 and 3 of the European Convention on Human Rights, because of the risk of them being deprived of their life or subject to torture or inhuman or degrading treatment in Libya or elsewhere; of article 4 of Protocol No. 4 to the Convention, because of the collective character of the deportation; of Article 13 of the Convention, because the applicants were not able to have adequate access to lawyers in order to challenge the lawfulness of their deportation; of Article 34 of the Convention, because the deportation was enforced before the European Court could give a ruling on the request for indication of provisional measures and because the applicants were denied full access to their representatives before the Court.

37. Given the imminent risk of irreparable damage, the members of UFTDU requested the Court to adopt provisional measures under Rule 39 of its Rules of Procedure seeking a stay of the applicants' deportation. The Court requested the Italian Government to submit detailed information about the situation at Lampedusa and in the light of such information it decided on 10 May 2005 to indicate to the Italian Government the provisional measures sought in relation to 11 applicants, the others having been deported in the meantime.

38. The applications were examined jointly and declared admissible on 11th May 2006 (see European Court, decision 11 May 2006, application No. 10171/05, *Hussun and 4 others v. Italy*, application No. 10601/05, *Mohamed and 1 other v. Italy*, application No. 11593, *Salem and 78 others v. Italy*, and application No. 17165/05, *Midawi v. Italy*). The French association GISTI was granted leave to intervene in the procedure and filed its observations.

39. The procedure is still pending before the Court which is now called to give a final ruling on the merits of the case in the following months. The UFTDU wishes to express its dismay for the way in which the Italian Government is dealing with the case in question, by thoroughly denying the serious shortcomings of the procedure followed for deporting thousands of migrants to Libya and even by challenging the validity of the authorities signed by the applicants to their representatives in relation to those names for which there it had no official record. In particular, the Government argues that several authorities had been signed by the same person under different names in order...to have more chances of success before the European Court! For this reason, the Court has decided to appoint an expert in order to examine the signature of the authorities. On the other hand, the representatives of the applicants have submitted a declaration signed by members of the Italian Parliament (Sen. Francesco Martone, Sen. Antonio Iovene, Hon. Tana de Zulueta, and Hon. Maria Chiara Acciarini) who were present when the authorities were signed in the camp of Lampedusa and Crotone and who are ready to be heard as witnesses by the European Court.

40. As reported by several national and international institutions, the situation of Lampedusa in 2004 and 2005 has been dramatic. Since 2004, many thousands of migrants fleeing from Africa and the Middle East reached the Italian shores from Libya. In particular, in October 2004, the Centre of Temporary Detention (CPT) of Lampedusa hosted over 1.200 migrants, although its structure had a capacity of barely 200 persons. Similar events occurred in December 2004 and in March 2005, when over 1.500 migrants were held at the island of Lampedusa.

41. The vast majority of those migrants have been forcibly and collectively returned to Libya, despite the fact that they were not nationals of that country, and they were then repatriated from Libya through the desert to their respective countries of origin in conditions which imperilled their life and physical integrity (as dramatically shown by the accident occurred in 2004 which caused the death of over 100 people who were being repatriated to the southern border with Niger). The UFTDU invites the

Committee against Torture to refute the Italian Government assertion according to which "all the irregular immigrants expelled to Libya or Egypt were repatriated to their countries of origin and did not suffer from ill-treatment" (see written replies to the list of issues, p. 28, § 111).

42. The repeated massive deportations to Libya have been carried out on the basis of a secret agreement allegedly signed in Tripoli between Mr Berlusconi and Mr Gheddafi. The text of this agreement was never released publicly and even the members of the Parliament were unable to obtain access to it.

43. The UFTDU wishes to emphasise that Libya did not ratified the 1951 Geneva Convention on the status of refugees: moreover, Libya has very poor human rights records, especially with regard to the treatment of aliens and asylum seekers (see in particular the concluding observations of the Human Rights Committee adopted on 6th November 1998, where the Committee expressed its deep concerned about the "allegations of extrajudicial, arbitrary or summary executions" and about "persistent allegation of systematic use of torture and cruel, inhuman or degrading treatment or punishment": UN Doc. CCPR/C/79/Add.101, § 7 e 10).

44. In April 2005, the Deputy Secretary of the Minister of Interiors defined the secret agreement with Libya as "a cooperation agreement for the fight against illegal immigration" having a two-folded aim: on the one hand, that of assisting Libya in the repatriation of the illegal immigrants to their countries of origin, and on the other hand, that of helping Libya in the management of the centres of detention of illegal immigrants.

45. The gravity of the situation in Lampedusa was so serious that in March 2006 the UNHCR decided to permanently place a member of its staff at the Temporary Detention Centre, following a special arrangement signed by the Minister of Interiors. The treatment of migrants held in custody at the camp of Lampedusa was grossly inhuman and degrading. The report of the Italian Government fails to give any specific indication as to the living conditions of those persons, which were far below the minimum standard of human dignity as acknowledged by the European Committee for the Prevention of Torture (see Report

published on 27th April 2006 on the visit carried out from 21 November to 3 December 2004, notably §§ 56, 57, 63, 64 and 66) and by the Commissioner for Human Rights of the Council of Europe (see Report of 14th December 2005, CommDH(2005)9), as well as by many national and international NGOs.

46. The UFTDU has closely cooperated with the FIDH in carrying out a fact-finding mission on the treatment of asylum seekers in Italy and their access to asylum procedures, whose results are laid down in the report of the FIDH released on 15th June 2005 (see http://www.fidh.org/IMG/pdf/eu_asylum419a.pdf).

47. More recently, on 31st January 2007, the Commission of independent experts appointed by the Minister of Interiors and presided by Mr Staffan de Mistura released its report on the functioning of and conditions of stay in the Temporary Detention Centres. The report contains a rather precise description of the rules governing the CPTs and a number of statistical data about the number of persons held in the centres and about the conditions of their expulsion from the Italian territory. The report does not analyse the living conditions of each centre, but provides a general overview of the situation. Notably, the Commission has acknowledged the lack of adequate information and legal assistance, of spaces to share with other people, of spaces reserved to families, of activities for employing the free time; it also found situations of overcrowdings and promiscuity, insufficient hygienic and sanitary conditions, difficulties in the treatment of sick and drug-addicted persons (http://www.interno.it/assets/files/1/2007131181826.pdf).

48. In the light of the results of the investigations carried out by international and national bodies and institutions, the UFTDU cannot but reiterate once again its deep concern for the existing situation in the Temporary Detention Centres, emphasising in particular
- the lack of adequate sanitary conditions and medical care;
- the frequent overcrowdings of the centres and the absence of prompt structural intervention to increase their capability and resources;
- the serious impediments faced by asylum seekers and migrants in general in having access to effective legal procedures and remedies to challenge their expulsion;

- the lack of sufficient guarantees against expulsion or deportation to countries where there is a real risk of exposure to torture or to other inhuman or degrading treatment or punishment;
- the conclusion of readmission agreement with countries which do not offer sufficient safeguards of respect for human rights
- the systematic deprivation of liberty of migrants and asylum seekers unlawfully entered into the Italian territory and the absence of any effective mechanism of review of the lawfulness of their detention;
- the hardship to which migrants (especially minors and women) are subject in the CPTs and the limited possibility for them to have contacts (also by phone) with persons outside the centres, including lawyers;
- the absence of external independent control over the functioning and the management of the centres, and the overwhelming presence of law enforcement personnel;
- the limitation imposed on access to the centres by lawyers, NGO's staff, volunteers, journalists and sometimes even members of the Parliament.

49. In more general terms, it should be noted that, according to a report of the Italian Audit Court ("Corte dei Conti"), the total public funding in the field of immigration for the period 2002-2004 amounts to € 476.831.073,00, of which € 131.100.705,00 used for activities of support and assistance to migrants and € 345.730.268,00 used for actions of contrast and repression of illegal immigration (expulsions, deportations, CPTs, etc.). In the light of this information, the UFTDU is deeply concerned by the sparse financial effort of the Italian Government aimed at the protection and integration of migrants as compared to the increasing amount of resources destined to the implementation of coercive measures against persons who are by definition particularly vulnerable and often victims themselves of illicit trafficking.

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7. The proposed ratification of the Optional Protocol to the Convention against Torture and the setting up of an independent supervisory body

50. The UFTDU observes that the procedure of ratification of the Optional Protocol was started both before the Chamber of Deputies and the Senate, but not upon proposal of the Government.

51. Three drafts have been submitted to the Chamber of Deputies:
- the draft law No. C. 404 filed on 3rd May 2006 by Hon. Katia Zanotti, and assigned to the III Permanent Commission (foreign and community affairs) for examination on 3rd July 2006;
- the draft law No. C. 1174 filed on 22nd June 2006 by Hon. Ramon Mantovani, and assigned to the III Permanent Commission (foreign and community affairs) for examination on 19th September 2006: this is the only draft that embodies a delegation to the Government for the establishment of an independent authority for the protection of persons deprived of their liberty as commanded by the Optional Protocol;
- the draft law No. C. 1271 filed on 3rd July 2006 by Hon. Tana de Zulueta, and assigned to the III Permanent Commission (foreign and community affairs) for examination on 27th September 2006.

52. Draft law No. S. 1101 has been submitted to the Senate on 19th October 2006 by Sen. Francesco Martone, and assigned to the III Permanent Commission (foreign and community affairs) for examination on 21st November 2006.

53. Examination has not started yet for any of the above mentioned drafts. The UFTDU emphasises that only draft law No. C. 1174 envisages the actual implementation of the Optional Protocol within the domestic legal system by authorizing the Government to adopt legislative measures necessary for the institution of the national mechanism of prevention provided thereby. The other drafts, by simply authorizing the President of the Republic to ratify the Protocol and executing it in the domestic legal system, are not sufficient to give full effect to its provisions. The UFTDU is troubled by the possibility that ratification of the Optional Protocol will be enacted without providing the necessary arrangements for the institution and functioning of a national mechanism of prevention in conformity with the provisions of the Protocol.

54. Concerning the institution of an independent body for the protection of the rights of detainees, three separate proposal have been submitted to the Chamber of Deputies to set up a *Guarantor for the rights of detainees and persons deprived of their liberty*. Notably,
- draft law No. C. 626, submitted on 10th May 2006 by Hon. Erminia Mazzoni, and assigned to the I Permanent Commission (constitutional affairs) on 6th June 2006;
- draft law No. C. 1090, submitted on 2nd June 2006 by Hon. Graziella Mascia, and assigned to the I Permanent Commission (constitutional affairs) on 4th July 2006;
- draft law No. C. 1441, submitted on 21st July 2006 by Hon. Marco Boato, and assigned to the I Permanent Commission (constitutional affairs) on 24th July 2006.

55. On 1st August 2006, the drafts were incorporated into a unified text, which was adopted by the Commission and then by the *plenum* of the Chamber on 5th April 2007. The draft law is now waiting to be examined by the Senate, where it was assigned to the I and II Permanent Commissions on 11th April 2007 with No. S. 1463.

56. The text approved by the Chamber of Deputies envisages the institution of a National Commission for the Promotion and Protection of Human Rights, and independent supervisory body composed of a president appointed by the Chairman of the Chamber of Deputies and by the Chairman of the Senate, and of 4 members half of which elected by the Chamber of Deputies and the other half by the Senate. The new body will also have competence with regard to the protection of the rights of persons deprived of their liberty.

57. The UFTDU observes that election by the Parliament of the members of the National Commission is likely to lead to a politicization of the new body which might undermine its credibility, objectivity and impartiality. It would be preferable that all members of the Commission be appointed by the Chairmen of the Chamber of Deputies and of the Senate. Furthermore, the UFTDU is alarmed about the provision of Article 3, par. 2, of the draft, whereby the Commission can require the parties concerned to submit information and documents, and is empowered to apply a pecuniary sanction (from € 4.000 to €

24.000) in case of failure to do so without any reasonable justification, which can be raised up to € 48.000 when the information or documents submitted by the parties are false.

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