

BIOETHICAL AND BIOPOLITICAL IMPLICATIONS OF TORTURE

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ABSTRACT

The article analyses from a philosophical point of view the bioethical and biopolitical implications of torture as an attempt to justify violence according to the (alleged) benefits for defending the State or obtaining information potentially useful for the prevention of a terrorist attack. The core argument of the paper is that the regulatory framework of the prohibition of torture would be strengthened establishing a *qualitative* definition of torture as the control of political authority over individual human life.

Mentioning some claims appeared in the period after the tragic events of September 11, 2001, the article shows that in the juridical and political debate torture has been increasingly defined in a *quantitative* way, basing it e.g., on the measure of pain and on the consequences for the victim. The Author then briefly describes bioethics and human rights perspective; main categories of biopolitics envisioned as politics *over life* are then sketched according to Foucault's and Agamben's views. Both bioethics and biopolitics, from different perspectives, deal with individual human life; a classical account (Aristotle's one) of this issue offers the basis for a conceptualization useful to compare critically bioethical and biopolitical perspectives and to set a qualitative definition of torture. From this perspective, torture can be seen as violence on individual human life, aimed at the annihilation of the victim's identity and as an act of domination by political authority over the victim.

KEYWORDS

Bioethics, biopolitics, torture, individual human life

1. INTRODUCTION. BIOETHICAL AND BIOPOLITICAL IMPLICATIONS OF TORTURE

In this article we analyse from a philosophical point of view the bioethical and biopolitical implications of torture as an attempt to justify violence according to the (alleged) benefits for defending the State or obtaining information potentially useful for the prevention of a terrorist attack. Our proposal is that it is necessary to reaffirm a qualitative definition of torture, i.e., a definition of what is at stake in the act of torture itself independent from its hypothetical good effects. We maintain that torture should be identified as an act of violence on individual human life, a category

which bioethics and biopolitics deal with from different perspectives. We argue that the clear regulatory framework of the prohibition of torture would be strengthened by establishing a qualitative definition of torture as the control of authority over individual human life, resulting ultimately in dominion over the victim's individual life and in an intrinsically illegal act.

Mentioning some of the claims that appeared in the debate on torture in the period immediately after the tragic events of September 11, 2001 (of which 2021 marked the twentieth anniversary), we firstly show that in the juridical and political debate torture has been increasingly defined in a *quantitative* way, basing it for example on the measure of pain and on the consequence for the victim.

Secondly, we briefly describe the bioethical and human rights perspective, and sketch the main categories of biopolitics envisioned as politics *over life*, according to Michel Foucault's and Giorgio Agamben's views. Bioethics from the perspective of human rights deals with individual human life considered in its deepest sense, i.e., including all its dimensions (biological, psychological, social, cultural and spiritual ones); on the other side, according to biopolitics as *politics over life*, individual human life is considered only in its natural dimension, as the ultimate object of power. On the one hand, bioethics aims at strengthening justice as it concerns individual human life; on the other hand, biopolitics deals with individual human life, managing it according to a self-referential view of power (i.e., only for power's sake). As both approaches lead to the need of a conceptualization of individual human life, we sketch then a philosophical account individual human life basing on Aristotle's view.

From the bioethical and biopolitical perspective, torture can be seen precisely as violence on individual human life, in its structure aimed at the annihilation of the victim's identity; it is configured as an act of domination and power by political authority over the victim. This is because violence or pressure on bodily or psychic life affects human identity, dominating the victim through the control of the torturer.

2. THE DEBATE AFTER 9/11: "QUANTITATIVE" DEFINITIONS OF TORTURE

Torture is a site of intense contestation at the intersection of human rights and security practice¹. Torture is almost universally declared as a violation of human rights and prohibited by international ad hoc legal instruments². In the 1984 United

¹ F. FOLEY, *The (de)legitimation of torture: rhetoric, shaming, and narrative contestation in two British cases*, in "European Journal of International Relations" 2021, Vol. 27(1), pp. 102-126.

² Forbidden by UDHR, art. 5 ("No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment") and by the European Convention on Human Rights, art. 3 Prohibition of torture ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), in addition to the four Geneva Conventions (1949) and their additional Protocols

Nations *Convention against Torture and Other Cruel and Inhuman Treatments* (1984), torture is clearly defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions³.

The prohibition of torture is an example of *jus cogens*, which refers to the binding legal status that certain prohibitions attain, becoming the most important among those belonging to international customary law⁴. The classification of a crime in terms of *jus cogens* has legal consequences that oblige all legal systems (*obligatio erga omnes*). The crime under discussion here is stated by the international community as one of the most serious attacks on the fundamental and inviolable rights of every human being⁵.

On a practical level, despite the absolute and non-derogable prohibition and the multiple national, regional and international mechanisms monitoring States' compliance with the relevant obligations and standards, torture and ill-treatment are far from being eradicated, and are still practiced in all parts of the world⁶.

On a theoretical level, in the legal and political discussion, in particular immediately after the tragic acts of 9/11, torture has become again an issue in debate⁷. It

(1977 and 2005) we should mention here ad hoc legal instruments against torture: UN Convention against Torture and Other Cruel and Inhuman Treatments (1984) and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

³ UN Convention against Torture and Other Cruel and Inhuman Treatments (1984), art. 1.

⁴ For some considerations on the prohibition of torture as *jus cogens* and the relationship with national legislations, see E. DE WET, *The prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, in "European Journal of International Law", 15, 2004, pp. 97-121.

⁵ See F. TRIONE, *Divieto e crimine di tortura nella giurisprudenza internazionale*, Editoriale Scientifica, Naples 2006, pp. 176.

⁶ See THE UN HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22 January 2021, available at <https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx>.

⁷ In fact, torture as an absolute prohibition has been discussed again. For documents and reconstructions about the debate, see K.J. GREENBERG (ed.), *The Torture Debate in America*, Cambridge University Press, Cambridge, Massachusetts, 2005; J. WALDRON, *Torture and Positive Law: Jurisprudence for the White House*, in "Columbia Law Review", Vol. 105, No. 6 (Oct., 2005), pp. 1681-1750; M. C. BASSIOUNI, *The Institutionalization of Torture under the Bush Administration*, 37 in "Case W. Res. J. International Law" 389 (2006), <https://scholarlycommons.law.case.edu/jil/vol37/iss2/14>; M. SKERKER, *An Ethics of Interrogation*, University of Chicago Press, Chicago 2010. K. J. GREENBERG, J. L. DRATEL (EDS.), *The Torture Papers. The*

has been considered at least as a possibility in those cases in which it is supposedly needed to defend the State: it has been written that “torture has come to life again”⁸. The appearance of claims for legitimating torture could perhaps be assumed as a (condemnable) matter of fact in a totalitarian government or in a dictatorship. On the contrary, in countries governed by the rule of law, assertions in favour of regulating torture challenge democracy and rule of law itself⁹.

The above-mentioned practical and theoretical reasons make worth discussing again the main arguments used to support a hypothetical legalization of torture. With different articulations according to the different perspectives, attempts for a redefinition or a re-interpretation of the concept of torture have been made, reducing the definition of torture to a quantitative delimitation of the act¹⁰. For example, it would be torture only in the presence of serious physical damage such as organ compromise or significant psychological damage, with lasting effects in terms of months or years, as was argued in a memorandum from the Office for Legal Counsel of the White House in 2002¹¹. On the other hand, A. Dershowitz¹², professor

Road to Abu Ghraib, Cambridge University Press, New York 2006, pp. 1249, collecting all the legal materials regarding the U.S. Government decisions in the so called “war on terror”. On torture exists also an online database of US governmental materials on torture: https://www.thetorturedatabase.org/search/apachesolr_search.

⁸ J. WALDRON, *Torture and Positive Law: Jurisprudence for the White House*, cit., p. 1684.

⁹ D. REJALI, *Torture and Democracy*, Princeton University press, Princeton and Oxford, 2007, pp. 849; B. CLUCAS, G. JOHNSTONE, T. WARD (Eds.), *Torture: Moral Absolutes and Ambiguities*, 2009; M. LALATTA COSTERBOSA, M. LA TORRE, *Legalizzare la tortura? Ascesa e declino dello Stato di diritto*, Il Mulino, Bologna 2013; M.D. GARASIC, *Torture*, in ten Have H. (ed.), *Encyclopedia of Global Bioethics*, Springer, Cham 2014, pp. 2800-2809; AA.VV., *Nulla è cambiato? Riflessioni sulla tortura*, a cura di L. Stortoni e D. Castronuovo, BUP, Bologna 2019, p. 382; BEA E., *Tortura, ¿Nunca más? Reflexiones ante el riesgo posthumanista*, in J. BALLESTEROS, E. FERNÁNDEZ (eds.), *Biotecnología y posthumanismo*, Thomson/Aranzadi, Pamplona 2007, pp. 109-137 highlights the change of paradigm implied by admitting even discussion about torture in the legal debate, in countries governed by the rule of law.

¹⁰ See J. WALDRON, *Torture and positive law. Jurisprudence for the White House*, cit., pp. 1698-1699; M. LALATTA COSTERBOSA, *Il silenzio della tortura. Contro un crimine estremo*, DeriveApprodi, Roma 2016, pp. 136, p. 76; both authors highlight strategic re-definition of torture by the arguments raised in favor of it in the debate after 9/11.

¹¹ See for example J. BYBEE, Memo 16, August 1st, 2002, in K. J. GREENBERG, J. L. DRATEL (EDS.), *The Torture Papers. The Road to Abu Ghraib*, cit., pp. 172-217, p. 172: “Physical pain amounting to torture must be equivalent in intensity to pain accompanying serious physical injury, such as organ failure, or impairment of bodily function, or even death” (J. BYBEE, Memo 16, August 1st, 2002). A critical analysis of this thesis can be found in M. C. BASSIOUNI, *The Institutionalization of Torture under the Bush Administration*, cit., p. 397 e sgg.; J. WALDRON, *Torture and Positive Law: Jurisprudence for the White House*, cit., pp. 1681-1750.

¹² Open supporter of the theses in favor of torture, expounded during his courses at Harvard and in scientific texts such as A. DERSHOWITZ, *The Torture Warrant*, in “New York Law School Review”, 48, 2004 and in particular A. DERSHOWITZ, *Why Terrorism Works. Understanding the Threat, Responding to the Challenge* (2002) (see in particular the fourth chapter “Should a terrorist who knows of an imminent attack be tortured? A specific analysis of how a democracy should know how to make dramatic choices” in which he considers the possibility of torturing suspects in case of direct threat to innocent civilians).

of law at Harvard and criminal lawyer, suggested a hypothetical consideration of the practice - applicable through a warrant - of an act of “non-lethal” torture that does not fatally compromise the health of the one suspected of having information about an imminent attack¹³. Diminishing the amount of suffering, in this perspective, would be an argument in favor of using torture to defend civilians from a dangerous threat. Again, torture carried out for the purpose of saving one or more human lives would be practicable in certain cases, as stated by the supporters of “lifesaver” torture (*Rettungsfolter*) or in the famous “ticking-bomb scenario”¹⁴. In different ways, these assertions aim at identifying a line between a licit and illicit act.

A first series of attempts to justify torture can be found in the legal *memoranda* prepared by technical members of the *Office of Legal Counsel*¹⁵ of the U.S. government. This attempt to justify torture - although with technical as well as substantial limitations¹⁶ - focuses on three points in particular: the proposed exclusion of certain subjects (the so-called enemy combatants) from the guarantees of protection of the prisoners under the Geneva Conventions; the attempt to redefine the notion of torture, which would be linked to serious or severe physical or mental harm - thus a definition of a “quantitative” nature, excluding from incrimination acts of infliction of lighter suffering (i.e. inhuman and degrading treatment); the justification of advanced (*enhanced*) practices of interrogation actually attributable to acts of torture on the basis of the state of necessity. We will explore there the issue regarding the definition of torture. The second point in fact concerns the redefinition of what is torture. On the contrary to what is contained in the UN Convention against Torture¹⁷, within these documents we find a real redefinition of the act of torture, in a sense that is not only *narrow* but above all *quantitative*, that is, linked to a certain threshold of suffering or pain or in general to the seriousness of the act or its effects. This, in theory and in fact, means wanting to establish an arbitrary boundary for the

¹³ See A. DERSHOWITZ, *Why Terrorism Works? Understanding the threat, responding to the challenge*, Yale University Press, New Haven - London, 2002, pp. 135-142.

¹⁴ W. BRUGGER, *May Government Ever Use Torture? Two Responses from German Law*, in “The American Journal of Comparative Law” 48, No. 4 (Autumn, 2000), pp. 661-678; these arguments are related to the ticking bomb scenario, which is discussed critically with important arguments by D. LUBAN, *Liberalism, torture, and the ticking bomb*, in “Virginia Law Review” 91 (2005), pp. 1425-1461 and by M. SANDEL, *Justice. What Is The Right Thing To Do?*, Farrar, Strauss and Giroux, 2009, pp. 47-50 (“Shall torture ever be justified?”).

¹⁵ The complete materials-which include notes, opinions, correspondence-between the OLC and the various branches of U.S. executive power (particularly the President himself and the Department of Defense), as mentioned above, are collected in the extensive volume K. J. GREENBERG, J. L. DRATEL (Eds.), *The Torture Papers. The Road to Abu Ghraib*, cit.

¹⁶ This is pointed out, among others, by M. C. BASSIOUNI, *The Institutionalization of Torture under the Bush Administration*, J. WALDRON, *Torture and Positive Law: Jurisprudence for the White House*. Both point out that the memoranda recognize forced interpretations of the UN Convention against Torture and Other Cruel and Inhuman Treatments (particularly Article 1, which defines what constitutes torture) and Title 18 of the United States Code (§ 2340 and § 2340A).

¹⁷ See UN Convention against Torture and Other Cruel and Inhuman Treatments, art. 1.

act of torture, to exclude from the perimeter a wide range of acts and behaviors. In Memo 14 ("Standards for Conduct of Interrogation"), dated August 1, 2002¹⁸, the author, jurist Bybee, offers an interpretation of the Convention Against Torture made effective by sections 2340-2340A of Title 18 of the U.S. Code¹⁹, which prohibits acts that inflict or are intended to inflict severe pain and suffering, both mental and physical. However, the document concludes that these must be acts of an extreme nature for them to be considered torture ("we conclude that the law, taken as a whole, makes it clear that only extreme acts are prohibited"²⁰); certain acts may be cruel, inhuman, or degrading but still not produce pain or suffering of the intensity necessary to fall within the prohibition of torture. To reach these conclusions, the jurist proposes, in fact, a redefinition of torture according to which it would occur exclusively in the presence of a concrete "imminent threat of death" and "prolonged psychic damage" for the subject undergoing the "treatment" in question. The suffering connected to the treatment qualified as "torture" must be equivalent to the pain that accompanies a serious physical injury, such as, for example, the cessation of the functioning of an organ, the impairment of a vital function, or even death²¹. Psychological harm, to fall within the definition of torture, must also be significant in nature, with effects of considerable duration²². Therefore, anything below this threshold cannot be considered to constitute torture. Torture would only occur where the infliction of severe suffering is the immediate and direct purpose of the conduct in question. If the suffering is not the object of a specific intention and is presented as a side effect of the main effect pursued, there would be no torture and therefore no punishment for the act in question²³.

Among the voices that, after September 11, 2001, have been raised in favor of a supposed reintroduction of torture in the legal system, often recurs that of Alan Dershowitz, as previously mentioned. His premise is that if we abandoned moral,

¹⁸ J. BYBEE, Memo 16, August 1st, 2002, in K.J. GREENBERG, J. L. DRATEL (Eds.), *The Torture Papers. The Road to Abu Ghraib*, cit., pp. 172-217.

¹⁹ A definition of torture corresponding to that of the UN Convention against Torture, Article 1 (<https://www.govinfo.gov/content/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap113C-sec2340.pdf>) is readily found in these sections.

²⁰ J. BYBEE, Memo 16, August 1st, 2002, p. 172: "We conclude that the statute [Convention CAT 1984], taken as a whole, makes it plain that it prohibits only extreme acts".

²¹ "Physical pain amounting to torture must be equivalent in intensity to pain accompanying serious physical injury, such as organ failure, or impairment of bodily function, or even death" (J. BYBEE, Memo 16, August 1st, 2002, p. 172).

²² For example, suffering must last for months or years (!), see *Ibid*.

²³ Under section 2340A the penalty would be a fine as well as imprisonment for up to 20 years (and with the death penalty if the torture resulted in the death of the victim). It should be noted, importantly, that the document of December 30, 2004, ("Standards of Conduct under 18 U.S.C. §§ 2340-2340A"), the so-called "Levin Memo", from the name of its author, interprets the federal criminal prohibition of torture in a manner consistent with the definition of the UN Convention of 1984 and makes a decisive conversion of course, overcoming and canceling the Memo 16 of August 1, 2002; https://www.thetorturedatabase.org/document/olc-memo-definition-torture-under-18-usc-%C2%A7%C2%A7-2340%E2%80%932340a?search_url=search/apachesolr_search/Levin%20memo.

legal, and humanitarian constraints, terrorism could be effectively reduced²⁴. That is, in front of the threat of terrorism, which does not recognize any legal rule, all kinds of responses should be allowed. This is a choice that, according to Dershowitz, would be necessary in times of war, but not only then. That is, the choice of torture is taken as an example:

If the rationale for allowing nonlethal torture is based on the case of the imminent attack, why then not limit it exclusively to precisely such a compelling but, at the same time, equally rare situation? Furthermore, if you believe that non-lethal torture is justifiable in the case of imminent attacks, why not require the prior approval of a judge, a kind of "torture warrant"? [...] The purpose of that proposal was, and remains, to reduce the use of torture to the minimum amount and degree possible, while creating public accountability in the rare instances where it is used. I did not see this proposal as a compromise with civil liberties, but rather as an attempt to maximize civil liberties in the face of the alas very realistic possibility that torture would already be taking place anyway under the radar screen of official accountability.²⁵

The main argument made is a factual one, namely the recognition that torture would be practiced anyway. Since torture is practiced, why not legalize it in relation to the rare case of the "ticking bomb", where self-defense would come into play?²⁶ According to this author, there are some elements that should lead to the possibility of torturing the terrorist who is aware of imminent attacks²⁷: it would be better to inflict non-lethal pain on a guilty terrorist who is illegally hiding information necessary to avert an act of terrorism, than to allow the death of many innocents. This would therefore be a purely numerical, quantitative assessment: in fact, in this specific and rare case the benefits of limited use of torture would outweigh the costs (in terms of human lives). If the death penalty is allowed in some cases, *a fortiori* it should be possible to assume the possibility of torture in rare cases. The proposal, therefore, is that the law can provide the legal framework for such activity, adhering to the principle of legality, but "turning a blind eye". The ticking bomb scenario has also been framed within the famous argument of "dirty hands", by M. Walzer²⁸; in this perspective, torture is not justified (as it is considered morally wrong) but is admitted as a political ineludible choice to defend the polity and save human lives²⁹.

²⁴ See A. DERSHOWITZ, *Why Terrorism Works*, cit., chapter 3, pp. 101-124.

²⁵ A. DERSHOWITZ, *Why Terrorism Works*, cit., p. 134.

²⁶ A. DERSHOWITZ, *Why Terrorism Works*, cit., p. 134.

²⁷ See A. DERSHOWITZ, *Why Terrorism Works*, cit., pp. 135-142.

²⁸ See M. WALZER, *Political action: the problem of dirty hands*, *Philosophy & Public Affairs*, Winter, 1973, Vol. 2, No. 2 (Winter, 1973), pp. 160-180.

²⁹ "Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean" (M. WALZER, *Political action: the problem of dirty hands*, cit. p. 168); to read more about torture and the problem of dirty hands, see T. MEISELS, *Torture and the problem of dirty hands*, *Canadian Journal of Law and Jurisprudence*, Vol. XXI, No.1 (January 2008), pp. 149-173.

A third argumentative strategy is a generically utilitarian one, which starts again from the borderline case of the *ticking* bomb³⁰. A utilitarian perspective is not interested in the moral quality of the act, but in balancing the usefulness of the consequences; therefore, it is admissible to torture a suspect if there is the possibility of averting danger for many people. This is the thesis put forward by Niklas Luhmann in the already mentioned conference in Heidelberg in 1992³¹, in which starting from torture - practiced in a case in which it would make it possible to save lives - he exemplifies the apparent impossibility of thinking about indispensable norms for society. The German W. Brugger had previously moved along this line, precisely on the theme of torture³². Brugger theorizes that torture should be allowed to be practiced when the possibility of saving many lives is at stake, that is as “salvation” torture; the author argues that it is an evil not to torture, that is an affront to the dignity of the victim. According to Brugger, the gaze of justice should also see the condition of the victim: “torture would be a way of restoring and rebalancing the balance of justice between victim and aggressor, opening the hitherto blindfolded eye of justice to the suffering of the victim (who is no longer here eminently the tortured)”³³. Moreover, according to the same author, in some circumstances, it would be possible at the legal level to admit the possibility of torture³⁴.

The shift towards a quantitative definition of torture drives to reflect about individual human life, which in practice is questioned by torture. Quantitative definitions of torture in fact accept the possibility of exercising physical and psychological pressure on the body of the victim, although at least hypothetically regulating it. According to above-mentioned redefinition strategies, we would be in presence of torture, only when it encompasses e.g. “severe suffering”, or an act that “does not fatally compromise the health” or namely a “serious physical damage such as organ

³⁰ There is a very large literature on this example, which on a theoretical level has its roots in the utilitarian approach to the problem, according to which to promote the general interest the sacrifice of the interest of the individual would be justified. The example is referred to by N. LUHMANN in a lecture given in Heidelberg in 1992, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?*, Heidelberg, C.F. Müller, 1993 (of which there is also an English version, N. LUHMANN, *Are There Still Indispensable Norms in Our Society?*, in “Soziale Systeme” 14 (2008), vol. 1, pp. 18-37. For discussion of this topic, see B. BRECHER, *Torture and the Ticking Bomb*, Blackwell, Oxford, 2007; F. ALLHOF, *Terrorism, Ticking Time - Bombs, and Torture*, Chicago, University of Chicago Press, 2012. In the extensive debate, specific criticism in D. LUBAN, *Liberalism, torture, and the ticking bomb*, cit., pp. 1425-1461; see also M. SANDEL, *Justice. Our Common Good* (2009), transl. it. Feltrinelli, Milan 2010, pp. 47-50 (“Can torture ever be justified?”): Sandel uses the example of torture to show the limits of a utilitarian analysis of morality.

³¹ See N. LUHMANN, *Are There Still Indispensable Norms in Our Society?*, *Soziale Systeme* 14 (2008), vol. 1, pp. 18-37, https://soziale-systeme.ch/pdf/sozsys_1-2008_luhmann-norms.pdf.

³² See W. BRUGGER, *Würde gegen Würde*, in *Verwaltungsblätter Baden- Württemberg*, 1995, pp. 414 ff; also ID., “Darf der Staat ausnahmsweise foltern?”, *Der Staat*, 35, pp. 67-97, cited in M. LALATTA COSTERBOSA, M. LA TORRE, *Legalizzare la tortura? Ascesa e decline dello Stato di Diritto*, cit., p. 120.

³³ M. LALATTA COSTERBOSA, M. LA TORRE, *Legalizzare la tortura? Ascesa e declino dello Stato di Diritto*, cit., p. 120.

³⁴ W. BRUGGER, *May Government Ever Use Torture? Two Responses from German Law*, in “The American Journal of Comparative Law”, Vol. 48, No. 4 (Autumn, 2000), pp. 661-678.

compromise or significant psychological damage”; starting from (even if controlled) attacks on bodily and psychical integrity, this kind of situations are directly against life of the individual.

3. BIOETHICS, BIOPOLITICS AND THEIR RELATIONS TO INDIVIDUAL HUMAN LIFE

On a theoretical level, even if starting from different perspectives, both bioethics and biopolitics deal with individual human life and call for a significative account of this issue. A classical view such that of Aristotle helps in identifying most relevant aspects of individual human life to compare these two perspectives and to set a qualitative definition of torture.

Bioethics is a discipline that aims at fortifying justice as it concerns human life³⁵. From the perspective of bioethics and human rights expressed in the 2005 UNESCO Universal Declaration on Bioethics and Human Rights (UDBHR)³⁶, the principle of respect for human dignity holds a prominent position³⁷, calling for the respect of “the fundamental equality of all human beings in dignity and rights, which are to be respected so that all human beings are treated justly and equitably”³⁸. Dignity is the source of from which all rights derive³⁹. In the perspective of bioethics and human rights, human dignity as the overarching principle⁴⁰ is inherent to

³⁵ Bioethics has a long and studied history which goes back to the 1970s and to the need of a moral reflection as a bridge between natural and bio-experimental sciences and human sciences (see the famous book of R.V. POTTER, *Bioethics: Bridge to the future*, Englewood Cliffs, N. J. Prentice-Hall, 1971, pp. 196). Bioethics deals with distinction between licit and illicit in the techno-scientific field (see L. PALAZZANI, *From bioethics to biolaw. Theories and questions*, Giappichelli, Torino, 2018, pp. 176, p. 1; this book also include a recognition of the ethical debate in bioethics, discussing main bioethical theories which have different approaches to bioethics itself). Justice, alongside with autonomy, beneficence and non-maleficence is part of the four classical principles of bioethics (see T. BEAUCHAMP, F. CHILDRESS, *Principles of Biomedical Ethics*, Oxford University Press, Oxford New York, 2013⁷, pp. 459).

³⁶ UNESCO, Universal Declaration on Bioethics and Human Rights, 2005, <<https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights>> (February 17th 2021).

³⁷ See UNESCO, Universal Declaration on Bioethics and Human Rights, Art. 3 - Human dignity and human rights.

³⁸ UNESCO, Universal Declaration on Bioethics and Human Rights, Art. 10 - Equality, justice and equity.

³⁹ R. ANDORNO, *Dignity*, in N. EMMERICH, P. MALLIA, B. GORDIJN, F. PISTOIA (eds.), *Contemporary European Perspectives on the Ethics of End-of-Life Care*, Springer, Dordrecht 2020, p. 147-155, p. 151.

⁴⁰ R. ANDORNO, *Human dignity and human rights as a common ground for a global bioethics*, *The Journal of Medicine and Philosophy*, 34,3 (2009), pp. 223-240, p. 227.

human condition and it is inseparable from it⁴¹. The respect and equitable treatment recommended throughout the Declaration start from the protection of individual identity, carefully preventing any attempt to justify an unrestricted use of force⁴² when exercised in violation or manipulation of individual human life.

According to this perspective, bioethics deals with individual human life⁴³ considered in its deepest sense, i.e., integrating all its dimensions⁴⁴. Individual human life is strictly related to natural life, going beyond the material life of the human body itself. Fortifying justice as it concerns human life is the same as defending and sustaining the protection of the individual in the different choices and challenges related to the human body, to protect individual identity. Therefore, individual human life is extremely relevant for bioethics.

Biopolitics, on the other hand, has deconstructive implications for individual human life. Biopolitics is considered in the present paper not only as a descriptive concept, but that in an approximate way could also be defined as the political and juridical aspects of bioethical issues; we refer here instead to a normative concept that implies an evaluation of biopower, i.e., power when it is exercised over individual human life, reduced to a merely disposable object⁴⁵. The latter view is grounded on the concept of authority as *power over life*, a perspective according to which individual human life becomes a product (instead of the presupposition) of public governance and power.

Assertions like these have their roots in Foucauldian thought⁴⁶, which contains similar formulations: biological and bodily life is managed by the political system, the human body is completely in the hands of power itself and, lastly, the authority defines individual human life, starting with the definition and control of the human

⁴¹ R. Andorno, *Human Dignity and Human Rights*, in H.A.M.J. ten Have, B. Gordjin, *Handbook of Global Bioethics*, Springer, Dordrecht 2014, pp. 45-57, p. 46.

⁴² Human dignity as a principle is at the heart of most international human rights instruments, especially those banning torture, slavery inhuman and degrading treatments and discrimination of all sorts (see R. ANDORNO, *Human dignity and human rights*, in H. TEN HAVE, M. S. JEAN, *The UNESCO Universal Declaration on Bioethics and Human Rights. Background, principles and application*, UNESCO, Paris 2009, pp. 370, p. 91).

⁴³ "Individuality is the fundamental bioethical matter" (F. D'AGOSTINO, *Bioetica e biopolitica: ventuno voci fondamentali*, Giappichelli, Torino 2012, p. 45, translation is ours).

⁴⁴ See also the Preamble of UDBHR, where it is included the expression "Also bearing in mind that a person's identity includes biological, psychological, social, cultural and spiritual dimensions".

⁴⁵ We discussed further the definition of biopolitics in M. DAVERIO, *Biopolitica: una prospettiva valutativa*, in M. BERTOLASO, M. DI BERNARDO (a cura di), *Biodisciplines*, Scienze e Ricerche n. 30 (1° giugno 2016), pp. 41-50.

⁴⁶ As widely known, Foucauldian thought is not systematic. Particularly relevant for the definition of biopolitics, are the already quoted her 1975-1976 lectures at the Collège de France ("Society must be defended"), the chapter M. FOUCAULT, *Right of Death and Power over life*, in M. FOUCAULT, *The History of Sexuality. Vol. I, The Will to Knowledge*, Pantheon Books, New York, pp. 168, pp. 136-158, and ID., *Security, Territory, Population. Lectures at the Collège de France 1977-78*, Palgrave MacMillan, New York, 2009, pp. 417.

body⁴⁷. Foucault describes authority on life in many places of his works, one of the most famous is the following:

I think that one of the greatest transformations political right underwent in the nineteenth century was precisely that, I wouldn't say exactly that sovereignty's old right-to take life or let live-was replaced, but it came to be complemented by a new right which does not erase the old right but which does penetrate it, permeate it. This is the right, or rather precisely the opposite right. It is the power to "make" live and "let" die. The right of sovereignty was the right to take life or let live. And then this new right is established: the right to make live and to let die⁴⁸.

Starting with the approaches to biology and human sciences that took place in the eighteenth and nineteenth centuries, Foucault in fact identifies and criticizes biopolitics as an interpretative tool of the relationship between power and life, between political authority and precisely individual human life. Biopolitics for Foucault is associated with a particular form of power, where power and knowledge are inextricably bound together, such that knowledge itself is shaped and determined by power relations which, in turn, perhaps simultaneously, are themselves shaped and developed by the uses to which such knowledge is put⁴⁹. Although here we cannot enter a critical analysis of Foucault's thesis, we can briefly recall his view of biopower, intended as "power's hold over life"⁵⁰. By biopower, Foucault means "the acquisition of power over man insofar as man is a living being, that the biological came under State control, that there was at least a certain tendency that leads to what might be termed State control of the biological"⁵¹. Within this conception, two fundamental points can be highlighted: firstly, the ancient right "to take life or let live"

⁴⁷ In Foucault's perspective, in fact, sexuality and in general corporeality and biological life are a product of political power intended as biopower. For a reconstruction of the concept of biopolitics discussing its origin in Michel Foucault's thinking, see among the wide bibliography, some recent books: T. CAMPBELL, A. SITZE (eds.), *Biopolitics. A reader*, Duke University Press, Durham NC, 2013, pp. 446; T. LEMKE, *Biopolitics. An advanced introduction*, New York University Press, New York and London, 2011, pp. 144; P. KAKUK, *Bioethics and Biopolitics. Theories, applications and connections*, Springer, Cham (Switzerland), 2017, pp. 135; S. PROZOROV, S. RENTEA, *The Routledge Handbook of Biopolitics*, Routledge, New York, 2017, pp. 351. In Italian, a recent book on Foucault's general conception of power, including biopolitics, is M. BRIGAGLIA, *Potere. Una rilettura di Michel Foucault*, Editoriale Scientifica, Napoli 2019, pp. 386, anticipated in ID., *Foucault e il potere. Una sistemazione analitica*, "Diritto e questioni pubbliche", vol. 14/2014, pp. 519-596.

⁴⁸ M. FOUCAULT, *Society must be defended. Lectures at the Collège de France 1975-76*, Picador, New York, 2005², pp. 310, p. 241.

⁴⁹ D. GUNSON, "On the Relationship Between Bioethics and Biopolitics: What Bioethics Can Learn from Biopolitics", in P. KAKUK, *Bioethics and Biopolitics*, cit., pp. 119-135, p. 130. The relation between knowledge and power relates not only to the emerging field of biology but also to the development of different fields of knowledge concerned with life in general.

⁵⁰ M. FOUCAULT, *Society must be defended. Lectures at the Collège de France 1975-76*, cit., p. 239.

⁵¹ M. FOUCAULT, *Society must be defended. Lectures at the Collège de France 1975-76*, cit., pp. 239-240.

was replaced, in the nineteenth century, by a power to foster life or disallow it to the point of death. Secondly, the management of the corporeality and life of the species, more generally of biological life, implies the control by the public sphere not only of the corporeality of the individual (which according to Foucault had already been taken by the end of the eighteenth century) but also of all aspects related to the existence of the population. In this perspective, Foucault refers to a “biopolitics of the population”:

To say that power took possession of life in the nineteenth century, or to say that power at least takes life under its care in the nineteenth century, is to say that it has, thanks to the play of technologies of discipline on the one hand and technologies of regulation on the other, succeeded in covering the whole surface that lies between the organic and the biological, between body and population. We are, then, in a power that has taken control of both the body and life or that has, if you like, taken control of life in general -with the body as one pole and the population as the other⁵².

This extension of power over life is a way of “taking charge” of life, which ultimately defines life itself⁵³. As far as the relationship between authority and life is concerned, in Foucault’s perspective life is the area of the extension of power; power has a space for action over life, namely individual human life, controlling the latter in its totality. Ultimately, the extension of power over life results in overcoming life itself.

As regards the relationships between politics and life, it may be of interest to briefly recall here also the view of biopolitics of G. Agamben⁵⁴. In Agamben’s view, in connection with Foucault’s thought, although with some distinctions with the Foucauldian view of biopolitics⁵⁵, there is an original implication between sovereign power and life, namely human life understood as natural life. Agamben refers to the concept of “bare life”:

In the notion of bare life the interlacing of politics and life has become so tight that it cannot easily be analyzed. Until we become aware of the political nature of bare life

⁵² M. FOUCAULT, *Society must be defended. Lectures at the Collège de France 1975-76*, cit., p. 253.

⁵³ “Power would no longer be dealing simply with legal subjects over, whom the ultimate dominion was death, but with living beings, and the mastery, it would be able to exercise over them would have to be applied at the level of life itself; it was the taking charge of life, more than the threat of death, that gave power its access even to the body” (M. FOUCAULT, *Right of Death and Power over life*, cit., p. 143).

⁵⁴ G. AGAMBEN, *Homo sacer: sovereign power and bare life*, Stanford University Press, Stanford CA, 1998, pp. 199. “Homo sacer: sovereign power and bare life” is the first book of a monumental research on politics made up of nine books appeared between 1995-2015; the whole research has recently been published in one volume: G. AGAMBEN, *The Omnibus Homo Sacer*, Stanford University Press, Stanford (CA) 2017, pp. 1336. The Italian version is G. AGAMBEN, *Homo sacer. Edizione integrale 1995-2015*, Quodlibet, Macerata 2018, pp. 1367.

⁵⁵ See for example, P. SLONGO, Homo sacer e la produzione della nuda vita. Agamben e la “correzione” di Foucault, *Etica & Politica / Ethics & Politics* 31, 3 (2019), pp. 629-645.

and its modern avatars (biological life, sexuality, etc.), we will not succeed in clarifying the opacity at their center. Conversely, once modern politics enters into an intimate symbiosis with bare life, it loses the intelligibility that still seems to us to characterize the juridico-political foundation of classical politics⁵⁶.

Agamben insists on the connection between sovereign power and biopolitics: biopolitics, in his view, constitutes the core of the sovereign practice of power⁵⁷. Inclusion in a political society is possible only through the simultaneous exclusion of human beings who are denied full legal status; these are those who are reduced to “bare life”, which is on the other side of the logic of sovereignty. In Agamben’s perspective, biopolitics is therefore intrinsically thanatopolitics (politics for death) because life we are talking about is the life of *homo sacer*, whom one could kill with impunity since he was banned from the political-legal community and reduced to the status of his physical existence⁵⁸; namely, the power of the sovereign is the “hold” that exercises itself in the act of excluding: “Bare life is the life of *homo sacer* (“sacred man”), who may be killed and yet not sacrificed, and whose essential function in modern politics we intend to assert. An obscure figure of archaic Roman law, in which human life is included in the juridical order solely in the form of its exclusion (that is, of its capacity to be killed), has thus offered the key by which not only the sacred texts of sovereignty but also the very codes of political power will unveil their mysteries”⁵⁹. In the “sacredness” of bare life there is, on the one hand, the threshold of uncertainty in which there is the blurred distinction between theology and politics, biopolitics and thanatopolitics; on the other, in the concept of bare life there is the form through which the original paradox of power is exposed: to exclude by including or to include by excluding⁶⁰. *Homo sacer* is described by the ambivalence between natural life and political life: his life is pure natural life (as he does not have the same rights as other citizens) and it is “held” by power, totally in its hands. It is the situation of a total politicization of natural life. Agamben sketches a totalizing logic, no active or strategic resistance is possible, as it was instead in Foucault, for whom all power relations are contingent and ultimately reversible; therefore, this view of biopolitics always tips towards thanatopolitics⁶¹. In this biopolitical

⁵⁶ G. AGAMBEN, *Homo sacer: sovereign power and bare life*, cit., p. 120.

⁵⁷ Cfr. T. LEMKE, *Biopolitics. An advanced introduction*, cit., p. 53.

⁵⁸ “The life caught in the sovereign ban is the life that is originally sacred—that is, that may be killed but not sacrificed—and, in this sense, the production of bare life is the originary activity of sovereignty. The sacredness of life, which is invoked today as an absolutely fundamental right in opposition to sovereign power, in fact originally expresses precisely both life’s subjection to a power over death and life’s irreparable exposure in the relation of abandonment” (G. AGAMBEN, *Homo sacer: sovereign power and bare life*, cit., p. 83).

⁵⁹ G. AGAMBEN, *Homo sacer: sovereign power and bare life*, cit., p. 8.

⁶⁰ P. SLONGO, *Homo sacer e la produzione della nuda vita*, cit., p. 642.

⁶¹ See C. SALZANI, *Foucault and Agamben on Sovereignty. Taking Life, Letting Live, or Making Survive*, in S. Achilleos, A. Balasopoulos (eds.), *Reading Texts on Sovereignty: Textual Moments in the History of Political Thought*, Bloomsbury Academic, London 2021, pp. 171-178, p. 175: “Agamben’s vision

perspective described by Agamben, life is also totally held in the extension of power. The notion of “sacred life” occupies the gap, the distance, between natural life and the life of the citizen, natural life, and individual human life of man as a political animal. According to the approach of biopolitics as *politics over life*, power extends itself over natural life, decreeing its entry into the public dimension, because at the origin there is bare life. According to Agamben we find at the beginning of all politics the establishment of a borderline and the inauguration of a space deprived of the protection of the law: the original political relationship is the exclusion of life implied by sovereignty. **At the end of *Homo sacer*, Agamben writes that three theses have come out from his enquiry:**

1. The original political relation is the ban (the state of exception as zone of indistinction between outside and inside, exclusion and inclusion).
2. The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, *zoé* and *bíos*.
- 3 Today it is not the city but rather the camp that is the fundamental biopolitical paradigm of the West⁶².

Deprived of the rights related to subjectivity that belong to individuality, natural life is the ultimate object of power. In this perspective, the dominion of authority over biological life leads to the consideration of the human body just as a tool; it also changes the symbolic dimension of the belonging of the human body to the person, transforming it into something which cannot find a place in the public sphere. The existence of human bodies without subjectivity is the premise of the availability of the human body to a self-referential power not only in the public sphere but even in the private one (the subject with his will becomes the “owner” of the body). Human body reduced to stuff and to a machine becomes a mean, a possession, with the subject as a sovereign. The subject owns the body/object and then decides for it completely on his own. If the human body is reduced to an available object, here we have the theoretical premises for its exploitation, as it also becomes an object of experimentation, selling, manipulation, and destruction.

It could be worth considering how the concept of individual human life could represent a *telos* to be protected and respected, philosophically grounding bioethical approach and criticizing the biopolitical one, where life instead is intended as a mere *mean* of power as described in the above-mentioned view of biopolitics. To this aim, a conceptualization of individual human life is needed. As regard to a classical account, in *Politics* Aristotle writes about the differences

is much more drastic and bleaker, since sovereignty’s hold on life for him is always negative, repressive, deadly: biopolitics always tips towards “thanatopolitics” (the politics of death)”. Agamben dedicated a whole book (G. AGAMBEN, *Remnants of Auschwitz. The Witness and the Archive* (1998), Zone Books, New York, 2002, pp. 176) to the exploration of the paradigmatic extreme where biopolitics coincides immediately with thanatopolitics.

⁶² G. AGAMBEN, *Homo sacer: sovereign power and bare life*, cit., p. 181.

among the direction of a family and the corresponding person in charge of it, the head of the household (the *despotés*, in the Greek language), a company directed by a chief (*oikónomos*) and the city governed by the politician (*politikós*):

It is an error to suppose, as some do, that the roles of a statesman, of a king, of a household-manager and of a master of slaves are the same, on the ground that they differ not in kind but only in point of numbers of persons - that a master of slaves, for example, has to do with a few people, a household-manager with more, and a statesman or king with more still, as if there were no differences between a large household and a small state⁶³.

Among these figures there is not just a quantitative difference but a qualitative one, which Aristotle discusses through his work; it is a distinction of kind, which follows different categories of life. On the one hand, as far as the *oikos* - the home environment - is concerned, natural life (*zoé*) is strictly oriented to the private sphere, to the natural survival of the members of the family and the order of the generations. The concept of *zoé*, from this perspective, can be explained as the vitality in common with all the living beings. On the other hand, the meaning of life, which is relevant to the context of the *polis*, *bíos*, is the individual form of life, oriented to happiness; it is precisely in the *polis* - in the social and political dimension of life - where man reveals himself as a political animal. The concept of life is grounded in the concept of *psyché* (the soul), which marks the distinction between the natural bodies with life and those without life, and in man results in the activity of thought⁶⁴ and includes both natural and individual human life. In this view, thus, *bíos* is individual human life, the irreducible expression of identity, i.e., the place where the vitality in common with all the living beings (*zoé*) appears as psychic and spiritual life (*psyché*)⁶⁵.

Referring precisely to Aristotle's *Politics*, Hannah Arendt highlights theoretically the Aristotelian view of human life, distinguishing between *zoé*, the cyclical life in common with all living beings, and *bíos*, as a conjunction of biology and biography.

⁶³ ARISTOTLE, *Politics* I, 1 (1252a7), translated by T.A. SINCLAIR, revised and re-presented by T. J. SAUNDERS, Penguin Books, London, 1992.

⁶⁴ We read in Aristotle, *On the soul*: "Soul, then, has to be a substantial being [...] as the form of a natural body that has life as its potency. But this kind of substantial being is being-fully-itself; so soul is the being-fully-itself of such a body" (Aristotle, *On the soul*, 412a19-22, English translation by M. Shiffman, Focus Publishing/R. Pullings Company, Newbury Port (MA), 2011, pp. 108, p. 48).

⁶⁵ The Italian legal philosopher F. D'Agostino drives interesting reflections on the relations among *zoé*-*bíos*-*psyché* in several places of his books. See for example F. D'AGOSTINO, *Parole di bioetica*, Giappichelli, Torino, p. 31: "The *bíos* has a value - and can lose it, too - just because it can receive (from *psyché*) an identity and a meaning. [...] This does not imply that the *bíos* has no value in itself: on the contrary, it is the only place where life can reveal as *psyché*, i.e. as the form of individuality every axiology presupposes. And this is confirmed not only from philosophy but also from cultural anthropology, which shows that the I (*psyché*) comes into the world, revealing its value, only through the *bíos* and in particular through the human body, even in very different ways: whether fed or hungry, faced or exhibited, respected or violated, the human body" (translation is ours).

As Arendt underlines, while *zoé* relates to the “ever recurrent cyclical movement of nature” which includes “the movement of the living organism”⁶⁶, *bíos* is the uniquely human way of life, that can be told as a story. This view is worth recalling here, in Hannah Arendt’s words:

The word “life”, however, has an altogether different meaning if it is related to the world and meant to designate the time interval between birth and death. Limited by a beginning and an end, that is, by the two supreme events of appearance and disappearance within the world, it follows a strictly linear movement whose very motion nevertheless is driven by the motor of biological life which man shares with other living things and which forever retains the cyclical movement of nature. The chief characteristic of this specifically human life, whose appearance and disappearance constitute worldly events, is that it is itself always full of events which ultimately can be told as a story, establish a biography; it is of this life, *bíos* as distinguished from mere *zoé*, that Aristotle said that it “somehow is a kind of *praxis* (Politics 1254a7)”⁶⁷.

Human life most broadly conceived nevertheless shares elements with natural life understood as *zoé* insofar as it still requires the biological motor of life shared with other living beings and things, but it has certain unique elements. The distinction made by Aristotle between *polis* and *oikós* is crucial because if, on the one hand, it allows us to deepen the political characterization of man, on the other, it does not lead to the conclusion that humanity is only of the political dimension—that is, the core of our matter. The very contrary is true: precisely because man is brought up in the *oikos* he can open up to (and take part in) the *polis*; precisely because he acquires language in the *oikos*, he can achieve political communication (which is a total form of communication)⁶⁸.

In other words, a real political life is possible only for those individuals whose bare life can be adequately recognized in pre-political contexts⁶⁹. Biopolitics denies the relevance of those contexts (even denying their existence), claiming to be the only instance with the right of qualifying them.

⁶⁶ H. ARENDT, *The Human Condition*, The University of Chicago Press, Chicago, 1998² (1st ed. 1958), p. 96 (italics is ours).

⁶⁷ H. ARENDT, *The Human Condition*, cit., p. 97.

⁶⁸ These considerations are inspired by F. D’Agostino’s reflections on the issue of biopolitics, F. D’AGOSTINO, *Bioetica e biopolitica*, Giappichelli, Torino 2012 (in particular the Chapter “Biopolitica”). It could also be interesting to deepen Hannah Arendt’s conception of human nature, sociality and the issue of natality as a biological, social (human) event (see H. ARENDT, *The Human Condition*, cit).

⁶⁹ F. D’AGOSTINO, *Bioetica e biopolitica*, cit., p. 53 (translation is ours).

4. A BRIEF ANALYSIS OF TORTURE IN LIGHT OF BIOETHICS AND BIOPOLITICS

According to the bioethical and biopolitical perspective, and through the sketched account of individual human life, we can return now to torture, enlightening its phenomenology as that of an action affecting specifically individual human life and doing so to establish control and dominion over the victim.

The core of the issue is the action on the identity of the subject, the victim of torture, who is the final target of the violence on the body, and this independently from the secondary aims of torture (defending the State, obtaining information useful for preventing from attacks, or even saving many lives); the violence on the body and/or psyche involved in the structure of torture is aimed at the annihilation of the victim's identity. Starting from the control exercised on the *bíos*, on individual human life, torture is configured, in the last instance, as an act of domination over the victim.

The *phenomenology* of torture shows, in fact, that the act of torture in its structure is aimed at the annihilation of the victim's identity. Torture is primarily "systematic, organized, methodical violence - all the more violent because it does not escape, but remains under control, and with firm will, with voluptuous tenacity, returns to strike the victim"⁷⁰. It implies the annihilation and abandonment of the victim⁷¹.

A second element is the annihilation of the victim's world. Torture is a system of identity destruction through the totality of suffering, thus causing the indistinction between the inner and outer worlds of the victim, as the inner world is totally objectified in the infliction of suffering and the outer world becomes infliction of total suffering for the victim⁷². Torture is the deliberate destruction by the system of the dignity and identity of the victim through cruelty to the psyche and/or body of the victim⁷³. The physical suffering, the sensory deprivation, the programmed

⁷⁰ D. DI CESARE, *Tortura*, cit., p. 112.

⁷¹ "Those who are tortured are brought to the vicinity of death, there where, if need be, they can be pushed over the edge, into Nothingness. Torture is Vernichtung, annihilation. There is no place for autonomy or resistance. [...] Without defense, without help, the tortured person is abandoned to himself" (D. DI CESARE, *Tortura*, Bollati Boringhieri, Torino 2016, pp. 216, p. 103, translation is ours).

⁷² This is how E. Scarry describes this process, which begins with suffering as an act distinct from the subject itself and ends with the exclusion from the subject itself of all that is not suffering: "Pain begins by being 'not oneself' and ends by having eliminated all that is 'not itself'. At first, occurring only as an appalling but limited internal fact, it eventually occupies the entire body and spills out into the realm beyond the body, takes over all that is inside and outside, makes the two obscenely indistinguishable, and systematically destroys anything like language or world extension that is alien to itself and threatening to its claims" (E. SCARRY, *The body in pain. The making and unmaking of the world*, cit., pp. 54-55).

⁷³ M. LALATTA COSTERBOSA, *Il silenzio della tortura*, cit., p. 85 (translation is ours). The Author continues: "It is paradoxical, but torture does not want to make people talk, as we think following common sense or the most widespread legitimizing strategies. It wants, on the contrary, to silence forever. It is not a

alternation of extreme violence and moments of “understanding” serve to provoke, in those who suffer them, a situation of emotional and cognitive catastrophe⁷⁴. The dehumanizing aspect of torture, moreover, is not complete in the inhuman, unbearable pain and inhumanity of those who inflict it, but also attacks the humanity of the victim⁷⁵.

Ultimately, the mark of torture - even of so-called "white torture" or *no-touch*⁷⁶ torture - is, as mentioned, a domination over the victim, what we might call the domination of man or the system of power⁷⁷ over another man. Elaine Scarry, author of the volume *The body in pain. The making and unmaking of the world*⁷⁸, describes the structure of the phenomenon of torture according to three elements that are always present and that can be distinguished in the abstract: firstly, the increasingly intense suffering; secondly, the suffering that is totally objectified in the body; thirdly, the pain totally objectified in the body that is denied as suffering and affirmed as the power of the perpetrator over the victim⁷⁹. This leads to a real control/domination over the helpless victim; precisely through⁸⁰ suffering the power relationship is realized.

This act can be identified as a form of biopower, or as the exercise of power over the body, from the perspective of biopolitics as politics *over life* which we have sketched above. In this perspective, domination is exercised by the fact that the victim is overpowered through physical pain, is denied material freedom to deprive his/her freedom of thought, in among other things not being able to know the plans and to predict reactions⁸¹.

coincidence that torture victims in conversation with therapists recurrently affirm that what continues to lacerate them internally, to persecute them, is not the pain experienced, unimaginable [...] but the expectation of new torments" (p. 85).

⁷⁴ See M. LALATTA COSTERBOSA, *Il silenzio della tortura*, cit., p. 87.

⁷⁵ See M. LALATTA COSTERBOSA, *Il silenzio della tortura*, cit., p. 91.

⁷⁶ This is a form of torture, usually psychological torture, which leaves no physical traces: M. MONTAGUT, *Che cos'è la tortura?*, in "Rivista di Filosofia del diritto" IV, 2/2015, pp. 323-334, in particular pp. 326-331 ("The Specificity of White Torture").

⁷⁷ As C. MAZZA, *La tortura in età contemporanea. Un sistema relazionale e di potere*, Bonanno, Rome, 2010.

⁷⁸ E. SCARRY, *The body in pain. The making and unmaking of the world*, Oxford University Press, New York 1985.

⁷⁹ Torture is in its largest outlines the invariable and simultaneous occurrence of three phenomena which, if isolated into separate and sequential steps, would occur in the following order. First, pain is inflicted on a person in ever-intensifying ways. Second, the pain, continually amplified within the person's body, is also amplified in the sense that it is objectified, made visible to those outside the person's body. Third, the objectified pain is denied as pain and read as power, a translation made possible by the obsessive mediation of agency. The workings of these three phenomena will very gradually emerge during the following description of the place of body and voice in torture" (E. SCARRY, *The body in pain. The making and unmaking of the world*, cit., p. 28). C. MAZZA effectively summarizes the structure of torture according to Scarry (see the diagram on p. 86 in C. MAZZA, *La tortura in età contemporanea. Un sistema relazionale e di potere*, cit.).

⁸⁰ C. MAZZA, *La tortura in età contemporanea. Un sistema relazionale e di potere*, cit., p. 86.

⁸¹ C. MAZZA, *La tortura in età contemporanea. Un sistema relazionale e di potere*, cit., p. 78.

Always accompanied by traumatic effects⁸², torture is a real dominion over the defenseless victim⁸³; through suffering, the power relationship is affirmed. In addition, the control over biological and bodily life can even lead to the erasure of the conditions for the exercise of freedom:

Above all torture is completely incompatible with respect for humans as persons, not because it hinders them from harmful action, for this hindrance can be necessary, but because it forces them to abdication as free subjects, it reduces them to instinctual beings and wants to beat them down to a subhuman kind of reaction. To affect the body of a human always means to affect a human⁸⁴.

The key point here is not just the modification of the *zoé* (natural life) but the offence to the subject in his/her most intimate essence, which is individual subjectivity and the possibility to act according to truly individual human life (*bíos*) because of the reduction to a subhuman kind of a reaction⁸⁵.

Torture operates by the political authority emptying the *bíos* of meaning, for example with acts of torture that modify biological rhythms of the body. Considering this, it is possible to understand the biopolitical implications of this action: a form of authority exercised over the *bíos* starting from the control of natural life (bare life or *zoé*), reducing it to the latter form of life, which the environment of the *oikos* should protect and cultivate. In the end, individual human life is totally in the hands of power, namely biopower as described in the Foucauldian analysis, which tragically ends with the definition of the *bíos* by political authority. Through torture the person is used and controlled apart from his individuality, his life is reduced to the vitality in common with all the living beings: deprived of subjectivity, the tortured in the torturer's hands is transformed into a body as an object, so that he/she loses his/her individual identity. The situation of a victim of torture in addition becomes closer to the *homo sacer*, the figure we mentioned before in sketching G. Agamben biopolitics, whose life remains indiscriminately between natural and political life;

⁸² "Post-traumatic stress disorder has been demonstrated to be the most common specific and common mental disorder after torture" (T. WENZEL, S. EKBLAD, M. KASTRUP, S. MUSISI, *Torture and sequels to prosecution: a global challenge*, in A. JAVED, K. N. FOUNTOULAKIS (Eds.), *Advances in Psychiatry*, Springer, Cham (Switzerland) 2019, pp. 405-418, p. 407). In addition, torture and human rights violations have been demonstrated to lead to long-term sequels affecting not only the victim but also family members, helpers and society at large. They perpetuate war, political unrest and suffering in countries in a process which may span generations (T. WENZEL, S. EKBLAD, M. KASTRUP, S. MUSISI, *Torture and sequels to prosecution: a global challenge*, cit., p. 418).

⁸³ "Torture is particularly morally revolting because it is aimed at a non-consenting, defenseless person. Torture practices presuppose that the torturer has control over the victim's body and degrades the victim to a mere object" (M. BERENPAS, *The Ethics of Torture*, in N. LEVIN (Ed.), *Introduction to Ethics: An Open Educational Resource*, N.G.E. Far Press., Huntington Beach (CA) 2019, pp. 44-49, p. 45).

⁸⁴ R. SPAEMANN, *Happiness and Benevolence*, T. & T. Clark, Edinburgh, 2000, pp. 168-169.

⁸⁵ See R. SPAEMANN, *Basic Moral Concepts*, Routledge, London-New York, 1989.

the same is valid for the above-mentioned condition of “enemy combatants” deprived of the fundamental guarantees of prisoners and prisoners of war.

In this perspective, it is critical that a condemnation of torture includes a condemnation of the violation of human life in its individuality starting from the violation of natural life.

5. INSIGHTS FOR A QUALITATIVE REDEFINITION OF TORTURE

Although in the above-described (par. 2) debate torture has been increasingly defined in a quantitative way, depending for example on the measure of pain and on the gravity of the consequences of torture on the victim, it seems that a similar quantitative description of torture makes the prohibition weaker. As it has been observed, “in almost all cases when we replace a vague standard with an operationalized rule, the cost of diminishing vagueness is an increase in arbitrariness. We specify a number, but cases just below that number might seem to be excluded arbitrarily. That sort of arbitrariness can itself reflect badly on the normative investment we have in the relevant provision. So why is this cost worth risking?”⁸⁶.

Even though the regulatory framework of the prohibition of torture is clear and encompasses an unambiguous definition of torture⁸⁷, it would be in fact supported by legal philosophy reflection setting a qualitative definition of torture as the control of political authority over individual human life, resulting ultimately in the dominion over the victim’s individual life. This would be critical to prevent from attempts to justify torture basing of the (alleged) benefits for the State or for the polity, and in general from interpretations of the regulatory framework based mainly on power rather than on law, as it was the case of the arguments aimed at redefining torture in the legal and political debate after September 11, 2001.

In this perspective, we would like to offer here some insights for a qualitative redefinition of torture. The possibility of a qualitative definition of torture relies upon the recognition of torture as a structurally illegal act, for its radical violation of human dignity dependent upon the manipulation of the *bíos*, individual human life, transforming the victim into an object.

The redefinition of torture performed in different way by the OLC jurists and by A. Dershowitz, even if seemingly restricting it to precise limitations, implies an action on the life of the prisoner/suspected, provoking damage, whether physical or psychological. The adjective “serious” or “severe” before “physical or mental harm” does not change the nature of the related substantive; the same is valid for the expression “non-lethal” used by Dershowitz: a “non-lethal” act of torture is still torture.

⁸⁶ J. WALDRON, *Torture and positive law. Jurisprudence for the White House*, cit., pp. 1698-1699.

⁸⁷ See the UN Convention against torture, art. 1.

Establishing a quantitative boundary, after all, induces those who may have every interest in torturing for information to go “as far as possible” in the *continuum* of violence of which a certain element (fixed after all arbitrarily) would represent the threshold. For example, during an interrogation, it is one thing to prepare a chair for the defendant with or without arms, or with or without a cushion; it is quite another to prepare a chair that causes the person sitting in it to suffer to bend his or her will. The second option is in the *continuum* of torture, the first is not⁸⁸. To break out the logic of this *continuum*, it is necessary to recognize that torture is a crime with a specific purpose, including the deliberate infliction of pain to bend the will of the victim.

In the case of an act such as torture, which implies the intentionality to dominate the victim, it is not necessary to detail its modalities and consequences on the victim itself to determine its prohibition; it is critical to recognize the act as an intrinsically violent one, aimed at acting on the identity of the victim and ultimately to exert control and power over the same.

In addition, the mark of violence, that distinguishes it from force, is the denial of respect: “Both the etymology and the ordinary use of the word violence imply the denial of the respect due to a person or a rule. Thus, the Latin verb *violo*, from which the word originates, means to mistreat, outrage, dishonor, or profane, i.e., the opposite of the verb *parco*, which is equivalent to respect, care, forgive. In ordinary language, to violate a person, a law, or a contract, similarly indicates the omission of due respect”⁸⁹.

The denial of respect is an element that makes torture incompatible with any system that wants to be authentically legal⁹⁰ in respect to ontological equality⁹¹. Moreover, torture as an act of violence is in no way measurable (in fact, violence has no “measure” in general)⁹². A manipulation of corporeality to humiliate the person is radically different from punishment intended as a legal measure for expiation of a sin or of an evil action condemned by law that can inflict a measure of pain as

⁸⁸ Considerations in the present paragraph and the reference to the logic of the continuum with torture are from J. WALDRON, *Torture and positive law. Jurisprudence for the White House*, as well as the example of the chair during the interrogation: “Failing to provide a comfortable armchair for the interrogation room may or may not be permissible, but it is in a different category from specifically choosing or designing furniture in a way calculated to break the will of the subject by the excruciating pain of having to sit in it. That latter choice is on a continuum with torture and I want to question whether that is a continuum an official has a legitimate reason for being on. The former choice failing to provide an armchair or a cushion is not” (J. WALDRON, *Torture and positive law. Jurisprudence for the White House*, cit., p. 2005).

⁸⁹ Cf. J. BALLESTEROS, *La violencia hoy. Sus tipos, sus raíces*, in ID., *Repensar la paz*, Ediciones Internacionales Universitarias, Madrid 2006, pp. 17-60, p. 17, translation is ours.

⁹⁰ See S. COTTA, *Perché la violenza? Una interpretazione filosofica*, cit.

⁹¹ See S. COTTA, *Il diritto nell'esistenza*, cit., Giuffrè, Milano 1991, pp. 229.

⁹² These are the core elements of violence identified by S. COTTA, *Perché la violenza? Una interpretazione filosofica*, Japadre Editore, L'Aquila, 1978, p. 69.

expiation of the violation of law. In the case of torture, the pain inflicted⁹³ by torture is subjective and therefore not quantifiable: it is, in its nature, an outsized act, as the limit is set only by the victim's ability to withstand the pain: "Pain, being not scientifically measurable by a doctor and therefore by a judge, is that component of the crime of torture that makes it less objective. It is the concept through which the criminal case of torture is individualized"⁹⁴.

Against a quantitative definition of torture, we can moreover observe that the state is not an individual to whom the principle "what is not forbidden is allowed" applies, since the state is created by man himself to protect and promote common freedom. The state does not have plenary power, but specific functions with which it is entrusted. In the case of an act such as torture, which implies the intentionality to dominate the victim, it is not necessary to detail its modalities and consequences on the victim itself to determine its prohibition⁹⁵. According to modern political thought, the state exists precisely to protect dignity and human rights⁹⁶. In addition, as intrinsically illegal, torture cannot be used as an act of war, even in a just war⁹⁷.

In the end, torture could perhaps produce (alleged) advantageous effects to defend the polity according to the intentions of those who promote them (as maintained in the perspective of so called "salvation torture") or to the consequences (as according to utilitarian views), but it must be refused precisely because of the dehumanization of the victim, removing the *bíos* identity, leaving it without meaning, inappropriately reducing it to the biological life.

Torture in this perspective should be reasserted as a violation of the common dignity of every human subject, independently of his culpability⁹⁸; it is characterized

⁹³ Pain is inflicted on a person in ever intensifying way" (E. Scarry, *The body in pain. The making and unmaking of the world*, cit., p. 28); the Author points out that in the structure of torture, the first element is that pain is inflicted in an ever-intensifying way.

⁹⁴ P. GONELLA, *La tortura in Italia*, DeriveApprodi, Rome 2016, pp. 160, p. 55, translation is ours.

⁹⁵ "Is the state in the same position as the ordinary individual in having a liberty interest in bright lines and an interest in not having its freedom of action chilled? I do not think so: We set up the state to preserve and enlarge our liberty; the state itself is not conceived as a beneficiary of our libertarian concern. Even the basic logic of liberty seems inapplicable. In the case of individuals, we say that everything that is not expressly forbidden is permitted. But it is far from clear that this principle should apply to the state" (J. WALDRON, *Torture and positive law. Jurisprudence for the White House*, cit., p. 1699).

⁹⁶ R. ANDORNO, *Human Dignity and Human Rights*, cit., p. 49: "At present, the entire national human rights system is based on the assumption that people do really have inherent dignity. In modern political thought, the State exists to protect dignity and human rights. The validity of human dignity and human rights is thought of as not conditional upon their explicit recognition by states".

⁹⁷ Torture as structurally illegal act is always in contrast with the requests of the *ius in bello* because it implies an unrestricted use of force in order to undermine the other's freedom.

⁹⁸ Dignity as inherent as it recognized in the human rights perspective is the same for all, cannot be gained or lost, and does not allow for any degree (see R. ANDORNO, *Human Dignity and Human Rights*, cit., p. 46 and R. ANDORNO, *Dignity*, cit.; in the chapter the Author on dignity in the end of life, even in vulnerability conditions).

as an explicit way of control over the victim, starting from the control and the manipulating of the *bíos*, revealing the thanatopolitical outcomes of biopolitics when the mentioned violence is enacted by someone representing, at different levels, political authority. According to the proposed approach, the prohibition of torture established in international law could be strengthened by legal philosophy reflection about a qualitative definition of torture, based on the condemnation of violence on individual human life, a violation of dignity as a fundamental human rights principle⁹⁹.

⁹⁹ This aspect could be also deepened according to the juridical function of natural law requirements, for example according to the neoclassical theory of natural law (see one for all J. FINNIS, *Natural Law and Natural Rights*, Oxford University Press, Oxford-New York, 2011, pp. 494) and to the concept “juridical good” in the perspective of classical juridical realism (see J. HERVADA, *Critical Introduction to Natural Right*, Translated by Mindy Emmons. 2nd ed. Montréal: Wilson & Lafleur, 2020).