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re: Questions for Italy's UPR – 2019 cycle

Hands Off Cain is a league of citizens and parliamentarians for the abolition of the death penalty worldwide. It was founded in Brussels in 1993. **The name "Hands Off Cain" is inspired by the Genesis.** The first book of the Bible includes not only the phrase "an eye for an eye" but also "And the Lord set a sign for Cain, lest any finding him should smite him". Hands off Cain stands for justice without vengeance. **The UN moratorium campaign** was launched in Italy on Hand Off Cain's urging.

Sincerely,

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Treasurer

Life imprisonment in Italy

1. In Italy there are two forms of life imprisonment. The life imprisonment (*Ergastolo*) is provided as the maximum punishment by Article 22 of the Italian criminal code. It stands for a penalty where the convicted person can access to conditional release after 26 years in the case of "verified repentance" (art. 176 cp). The life imprisonment without parole (*Ergastolo ostativo*) is provided by article 4 *bis* O.P. and derogates from this discipline.

2. This provision has been introduced by Law No. 152/1991 only for few and specific offenses, making possible, for those who had cooperated with justice to access alternative measures of detention by anticipating the usual time limits, when links with criminal organisation were excluded. After the Mafia bombing attack of Capaci (23 May 1992), the law was radically amended by Article 15 Law-Decree No. 306/1992 (passed with further amendments into Law No. 356/1992), with the purpose of adopting strong measures against the rise of mafia crimes.

3. In order to counteract such acts, the Italian Parliament which could not extend the length of a penalty, existing the life imprisonment, decided to abolish its executive flexibility through the ban of the grant of penitentiary benefits.

4. For those sentenced or persecuted under crimes of Article 4 *bis*, no release on parole and any other form of early release, could be granted in the absence of substantial cooperation of the prisoner in the investigation. The article 41-bis was introduced with the same Law in 1992 as a special regime which could be imposed by the Minister of Justice for those accused or sentenced for crimes listed in Article 4 *bis*. In the following years, the number of crimes listed in Article 4 *bis* was expanded to include, in addition to the original acts of terrorism, international terrorism, subversion of the democratic order and mafia-type association, also: enslave, child prostitution, child pornography, gang rape, criminal association with the purpose of smuggling foreign manufactured tobacco and ultimately acts of facilitating illegal immigration. Also the Constitutional Court has repeatedly pointed out this expansion (lastly, Judgment No 239 of 2014, § 3 and § 9 Cons. Dir., where the Court expressly said that the list refers to crimes "notably heterogeneous" and "deeply diversified ").

5. In detail, Article 4 *bis* O.P. provides that those who have been sentenced to imprisonment upon conviction for a number of crimes listed therein (among which mafia and terrorism) do not have access to probation measures and alternative measures to detention, unless they cooperate with the investigative authorities pursuant to Article 58 *ter* O.P.

6. In turn, Article 58 *ter* O.P defines the cooperation with the investigative authorities as the action, taken by the convicted person, to avoid further consequences of the criminal act or to provide a

concrete, substantial assistance to the investigating authorities in assessing the facts or in indicting and prosecuting other offenders.

7. Evidently, when coupled with life imprisonment, these provisions put in place the sentence of "actual life imprisonment", or "life imprisonment without parole".

8. The person convicted and sentenced to life imprisonment for one of the crimes listed in Article 4-*bis* O.P. will not enjoy the possibility to be assigned to work release programs (Article 21 O.P.), special leaves (Article 30-*ter* O.P.), community service (Article 47 O.P.), home detention (Article 47-*ter* of the Penitentiary Regulation), semi-liberty (Article 48 O.P.), unless they cooperate within the meaning of Article 58-*ter*, par. 1, O.P.

True, Article 4 *bis* O.P. does not deny access to early release (Article 54 of the Penitentiary Regulation) and to leaves of necessity (Article 30 of the Penitentiary Regulation).

9. Neither of the two, however, does amount to that "real prospect of release" required by the case-law of the Court under Article 3 ECHR.

10. In fact, early release remains but an illusion in the absence of the cooperation required under Articles 4 *bis* and 58 *ter* O.P., while leaves of necessity are so exceptional and temporary in nature that cannot be seriously invoked to argue the compliance of the form of life imprisonment imposed with the rights and freedoms enshrined in the ECHR. (According to Article 30, par. 1, O.P., leaves of necessity are granted in cases of imminent threat to the life of a family member, or a partner (*"nel caso di imminente pericolo di vita di un familiare o di un convivente"*) and merely allow detainees to leave prison to visit him or her. According to the second paragraph of the same provision, leaves of necessity may also be granted for exceptional and particularly serious family need (*"[…] possono essere concessi per eventi familiari di particolare gravità"*).

11. In outline, Article 4 *bis* introduces an absolute and unrebuttable legal presumption of equivalence between "repentance" and "cooperation".

12. However, there is a profound difference between collaboration (ex Article 58 *ter* O.P) and repentance (ex Article 176 c.p.), also to consider both as criteria for assessing the dissociation of the condemned from the criminal organization. There are many conducts, other than collaboration, that unequivocally constitute a certain signal of the interruption of links with the criminal organisation: explicit dissociation; public positions against the original criminal organization or against the ideology that inspires it; the clear adherence to associative legality models that are antithetical to the previous; the manifest interest in the victims of the crimes; the commitment to fulfill the obligations

arising out of the sentence. However, the legal system of the *Ergastolo ostativo* remains totally indifferent to this.

13. In other words, Article 4 *bis* establishes another absolute and unrebuttable legal presumption based on the type of offense: those who have committed or are believed to have committed one of the associative offenses listed in paragraph 1, are presumed to maintain a social danger and adherence to criminal organisation, unless collaboration. Their status of "dangerous" by law, prevents the supervising magistrate, as well any other Authority, from taking into account the results of purposeful activities in the perspective of the re-education and to evaluate them for the purpose of granting penitentiary benefits and alternative measures, thereby nullifying the work of the penitentiary staff. This is because, the supervising magistrate can measure by law the repentance only on the basis of the legal presumption, for which only a collaborative conduct cuts the links with the criminal organization of origin. However, there is no equivalence between collaboration and repentance and to assume the first as the only lawful conduct to demonstrate the second responds only to a well-defined criminal policy option: to transform the prison apparatus into a useful tool for investigative action.

14. What is more, those in *Ergastolo Ostativo* are entitle to be subjected to: the threat of a possible imprisonment under the harsh detention regime of art. 41-bis o. p.; restriction of the system of visual talks and telephone conversations; the assignment to the High Security Circuit (AS) in its first and most severe sub-circuit (AS.1), characterized by enhanced surveillance and the inability of contacts with the detainees placed in the other two medium safety sub-circuits (AS.2) and attenuated custody (AS.3) and the exclusion from the possibility of being admitted to the detention mode of so called open custody (see Circular DAP, 23 October 2015, No.3663/6113).

15. In fact, the Constitutional Court deemed it necessary to intervene in order to reduce the rigidity of this automatic ban to the grant of penitentiary benefits, in case the collaboration is "irrelevant", "impossible" or otherwise "uncollectible/unaskable" (see sentences 306/1993, 357 and 361/1994, 68/1995). In this way, however, the Court has not abolished the absolute nature of the legal presumptions of social danger and of the maintenance of criminal association in absence of collaboration as the only criteria for evaluating the repentance, but has only reduced its scope. With the sentence 135/2003, the Constitutional Court has maintained the Article 4 *bis* inplant in the event of collectible collaboration, that is to say with regard to the offender who - although able to cooperate - decides not to cooperate. The Court asserts that in this case "the admission to penitentiary benefits and alternative measures always depends on a possible and free choice, left to

the convicted, whether or not to cooperate with justice", so there would be no automatic ban of benefits.

16. It is not always true, however, that the condemned has the possibility to choose if cooperate or not. What, for example, in the extreme, but not impossible, case of judicial error, so that an innocent person has no names or facts to denounce? Or when the supervising judge acknowledges the need for a collaboration that, on the other hand, the "ostativo" lifer claims to be impossible or irrelevant? In such a hypothesis, it happens what exactly is excluded by judgment 135/2003, namely that the impossibility of conditional release is, indeed, a consequence that automatically descends from Article 4 *bis*.

17. In addition, the "ostativo" lifer does not have the right to know the exact time when the review of his or her sentence will take place or may be required. It does not apply to him the reference to the twenty-six years referred to in art. 176, paragraph 3, c.p. because, on the one hand, the institution of conditional release is precluded by law, on the other hand, the possibility of accessing it is linked to an event (the collaborative conduct under Article 58-ter o.p.) unpredictable over time, as absolutely unforeseeable is the judicial recognition of an irrelevant, impossible or anyway uncollectible/unaskable collaboration.

18. The "ostativo" lifer has no right to know, at the time when the sentence is pronounced, which treatment route to follow in order to aspire to an early release. Indeed, the condemned to the perpetual punishment may find it to fall within the category of "ostativo" lifer even after years, when he is denied to be assigned to a penitentiary benefit or to an alternative measure to which he considered he had acquired the right to.

19. Lastly, some further observations have to be considered. First of all, there is the irrefutable right to defence, which consists primarily in the right not to provide any evidence against oneself, as well as the refusal to respond, or the use of the lie (Article 14 §3 (g) Civil and Political Rights, adopted in New York on December 19, 1966, ratified and executed by Italy under l. 881 of 1977). According Article 4 *bis*, the offender has no choice but to transform his right to silence in its opposite: the *"nemo tenetur se detegere"* reverses in the inquisitive *"carceratus tenetur alios detegere"*.

20. In this sense, it is also necessary to reflect on the fact that, in a legal sense, there is a difference between rewarding collaboration and sanctioning non-collaboration: the conduct of the offender who can assist investigative action can legitimately be incentivized by the law, but it can not be demanded through the use of the normative instruments of criminal law. This is what happens in the dynamic of the *Ergastolo ostativo*: the utilitarian behaviour imposed by art. 4-bis, para. 1, o.p. is

required not to bring an advantage to the perpetrator but to avoid a disadvantage (ie foreclosure to any form of early release).

21. No data has been provided regarding the number of accused or sentenced to *Ergastolo Ostativo* who have decided since 1991 to cooperate with justice.

22. There is only one available data: as of September 30, 2016, according to the Ministry of Justice, on the total of 1,678 lifers, 72.5% are "*ostativi*", ie 1.216, which means 3/4 of the Italian lifers. [1]

23. What measures does the Italian government intend to undertake to overcome this situation counter to fundamental principles contained in the Italian Constitution and international human rights instruments to which it is a signatory?

1

 The former data are of October 12, 2015, when, according the MInister of Justice, the were 1.619 lifers, 72.5% in *ergastolo ostativo*, that is 1.174: the percentage is the same but in absolute terms those in *ergastolo ostativo* are grooving.