JUDGMENT NO 192 YEAR 2023

In this case, the Constitutional Court considered a referral order from the Ordinary Court of Rome raising questions as to the constitutionality of two provisions applicable to criminal trials in the absence of the accused. The referral highlighted the fact that, under existing law, courts could not proceed with trials *in absentia* where defendants were unaware of the trial even if their lack of awareness was the result of non-cooperation or obstruction by their home or host country. This important gap in the law applied even to the serious crime of torture, creating the potential for a de facto area of immunity for torture crimes. The Constitutional Court was asked to rule on the tension between the fundamental right of defendants to be present at their trial, the duty of the State to prosecute crimes amounting to acts of torture and the right of the victim and the victim's family, but also of humanity as a whole to procedural integrity in prosecuting such crimes.

The case involved four agents of the Egyptian National Security Agency accused of torturing and killing Giulio Regeni, an Italian PhD student in Egypt. Service of process on the alleged perpetrators was frustrated by the Egyptian authorities, who had closed their own investigation of the agents and refused even to provide their addresses to the Italian courts to allow them to be served.

The Constitutional Court first traced the history of increasing legal protections for criminal defendants, at both the domestic and international levels. Following various reforms, Courts may proceed *in absentia* if a defendant has been personally served with a summons; has not been personally served but is, according to the evidence, aware of the proceedings; or has intentionally avoided being informed of proceedings, as in the case of fugitives. Since the case of the Egyptian officials could not fit into one of these scenarios, the referring court concluded that its only option was a declaration of absence and a judgment that the trial cannot proceed.

The Court found that the referring court raised relevant questions, as well as evidence of intentional non-cooperation by the Egyptian authorities, not least of which was a European Parliament Resolution urging Egypt to cooperate in the Regeni case. The Court then observed that torture is a crime against humanity and a human rights violation under national and international laws, including the New York Convention on Torture, which sets a minimum definition for torture by public authorities. Italian law expands upon this minimum definition, criminalising torture by private parties, which is aggravated if the perpetrator is a public official. Acts of torture carried out abroad by foreign nationals against Italian citizens may be punished under Italian law upon request of the Justice Minister – this request was made in 2016 in the Regeni case.

Citing the European Court of Human Rights, the Court pointed out that the ban on torture could be violated not only by substantive infliction of torture, but also by procedurally refusing to carry out thorough and effective investigations of allegations of torture, in violation of the right to truth. It held that, notwithstanding the presumption of innocence of the four Egyptian agents, the Egyptian system's failure to investigate amounted to granting them unlawful immunity incompatible with the ban on torture and rights to truth and due process. By failing to provide the defendants' addresses to the Italian courts to allow them to be served, Egypt had impeded legal proceedings imposed by the Convention of New York, in keeping with

general international law. It thus created a de facto immunity preventing torture investigations.

Current Italian law does, indeed, according to the Court, require a judgment that the trial cannot proceed, precluding trial for torture. This, the Court held, offends human dignity and compromises the fundamental right not to be a victim of acts of torture, and also breaches the Constitution both in reference to international law protections of such rights and in reference to internal rights.

The Court then referred to international law, which allows for proceedings *in absentia* even without informing defendants, where the defendants cannot be found despite "reasonable efforts", provided that their right of self-defence is protected in other ways, such as the right to challenge the ruling and obtain a new trial and fresh determination of the merits of the case when they are apprehended. A right to a new trial would fulfil the obligation on States to allow defendants to be present at their trial.

In conclusion, the Court ruled that the provision's failure to allow trial to go forward in cases like Regeni's was unconstitutional, and indicated where in the law the exception should be added by the legislature. It also held that any legislative remedy must comply with the principle of a fair trial, in particular by recognising that, should the defendants appear, they should have broad rights to a new trial, even if the one pending is not yet concluded. The Court specified that this right to re-start proceedings if the defendants chose to appear did not undermine the legitimacy of the trial carried out *in absentia*.

[*omitted*]

THE CONSTITUTIONAL COURT

[*omitted*]

gives the following

JUDGMENT

[*omitted*]

Conclusions on points of law

1.– By Referral Order No 89/2023, the Preliminary Investigations Judge (*Giudice per le indagini preliminari*) [correction: Preliminary Hearing Judge (*Giudice dell'udienza preliminare*)] of the Ordinary Court of Rome (*Tribunale ordinario di Roma*) has raised questions as to the constitutionality of Article 420-*bis*(2) of the Code of Criminal Procedure, "to the extent that it fails to provide that the court shall proceed in the absence of the accused, even when it finds that their absence from the hearing is due to a lack of judicial cooperation or a refusal to cooperate by the accused's home or host country". It has also questioned the constitutionality of Article 420-*bis*(3) of the same Code, "to the extent that it fails to provide that the court shall proceed in the absence of the accused even in cases not listed in paragraphs 1 and 2, when it finds there is sufficient proof that the accused is not aware of proceedings due to a lack of judicial cooperation or to a refusal to cooperate on the part of the accused's home or host country".

The challenged lacunas in the law allegedly violate Articles 2, 3, 24, 111 and 112 of the Constitution, as well as Article 117(1) of the Constitution in relation to the New

York Convention against Torture, in that they prevent the court from initiating fact-finding proceedings in the crimes committed against Giulio Regeni. Regeni was an Italian citizen and doctoral student at Cambridge University, who was found dead on 3 February 2016 along the Cairo-Alexandria Desert Road in Egypt.

2.– According to the referring court, the State Prosecutor for the Court of Rome requested the indictment of four Egyptian National Security Agency officers, on charges of aggravated false imprisonment for having kept Giulio Regeni inside the Cairo subway and having deprived him of his personal liberty for nine days, from 25 January to 2 February 2016, by cooperating amongst themselves and with unidentified individuals. One of the defendants was also charged with assault and homicide, with multiple aggravating factors, for having caused, together with unidentified individuals, severe and extensive injury to Regeni over a number of days, in a depraved and cruel manner, causing the victim's death.

The referring court adds that the Preliminary Hearing Judge of the Court of Rome ruled on 25 May 2021 that proceedings should go forward in the absence of the defendants, and referred them to the Assize Court of Rome for trial. The Assize Court held a hearing on 14 October 2021 during which it vacated the ruling that the case should proceed *in absentia* as well as the referral for trial, sending the case back to the Preliminary Hearing Judge.

2.1.– According to the referral order, the Preliminary Hearing Judge, after the failure of additional attempts to locate the defendants, suspended proceedings on 11 April 2022 pursuant to the version of Article 420-*quater*(2) of the Code of Criminal Procedure in force at the time.

The State Prosecutor for the Court of Rome challenged the ruling as unusual, but the First Criminal Division of the Court of Cassation held that the appeal was inadmissible, with Judgment No 5675 of 15 July 2022-9 February 2023.

2.2.– After later, unsuccessful attempts to find the defendant for service of process, and following the negative outcome of the Ministry of Justice's attempts to cooperate with the Public Prosecution Office of the Arab Republic of Egypt, the referring court, on the Prosecutor's initiative, raised the questions as to constitutionality at issue here.

2.3.– With regard to the relevance of the questions, the referring court argues that, due to the order suspending the proceedings, the temporary scheme under Article 89(2) of Legislative Decree No 150/2022 must apply. Under this scheme, when the court expects that locating a defendant will continue to be impossible, a judgment that the case cannot proceed must be issued, pursuant to the revised Article 420-*quater* of the Code of Criminal Procedure. The court allegedly cannot avoid this conclusion through a constitutionally conforming interpretation of the provision, given its unequivocally clear textual and logical meaning.

2.4.– The referring court alleges that this breaches Articles 2, 3 and 24 of the Constitution, because it would allow foreign states to institute "an impermissible 'free zone' of impunity for its citizen-functionaries". This would cause irreparable damage to the inviolable rights of victims, which include that of access to justice.

The referring court also alleges that Article 111 of the Constitution is breached because "there is no more 'unjust' trial than one that is willingly blocked by a government authority".

The referring court also alleges that the principle of the mandatory nature of criminal prosecution, enshrined in Article 112 of the Constitution, is breached due to the fact that the demand for punishment, in concrete terms, ends up being "subordinated to the executive power of the foreign State".

Finally, considering the factual aspects of the charges, the referring court also alleges that Article 117(1) of the Constitution is breached in relation to the New York Convention against Torture, which was ratified by both Italy and Egypt. The Convention provides the basis for the Italian courts' criminal jurisdiction concerning acts of torture committed abroad against Italian citizens and obliges contracting States to provide maximum, mutual assistance to prosecute the acts prohibited under the convention.

3.– This Court is called upon to rule on a case marked by the unresolved tension between a defendant's fundamental right to be present at their trial, the duty of the State to prosecute crimes amounting to acts of torture and the right (of not only victims and their families, but of all of humanity) to ascertain the facts as revealed by legal proceedings concerning the perpetration of these crimes.

The flashpoint of this tension is the law governing trials *in absentia*, which provides the only situations and conditions under which a defendant may be tried without being present.

The referring court asks for an additive ruling on this law; therefore, it is appropriate to retrace its evolution which has, among other things, been shaped by repeated interventions by the European Court of Human Rights (ECtHR)

4.– Until the entry into force of Law No 67 of 28 April 2014 (Delegations to the Government in the areas of non-prison detention and health system reform. Provisions on suspended proceedings for probation and in the event of untraceable defendants), the rules governing the absence of defendants revolved around the institution of contumacy, a holdover from the Code of Criminal Procedure of 1930.

With the new Code of Criminal Procedure of 1988 and, before it even entered into force, with Law No 22 of 23 January 1989 (New rules on contumacy), the legislature introduced changes that paid greater attention to defendants' need to participate, extending so-called *ex post* guarantees – remedies that allow absentee defendants to recuperate the procedural rights of which they have been unjustly deprived or which they have not been able to exercise because the time limits expired without them being responsible for it.

In particular, the legislature's choice was influenced by an ECtHR decision that underscored the need to ensure that unwitting absentee defendants should have the right to a new trial, and, therefore, "a fresh determination of the merits of the charge" (*Colozza v. Italy*, judgment of 12 February 1985).

4.1.– The principal provision for purposes of this *ex post* guarantee, Article 175 of the Code of Criminal Procedure on granting new time limits to challenge the default judgment, was nevertheless held to be insufficient by the ECtHR Grand Chamber in *Sejdovic v. Italy* on 1 March 2006, above all because of the burden of proof falling on the defendant. In order to regain their right to challenge the case against them, they had to prove that they had no knowledge of the judgment, through no fault of their own. This cast doubt on the effectiveness of their access to a "fresh determination".

In the meantime, even before *Sejdovic*, Decree-Law No 17 of 21 February 2005 (Urgent provisions on challenging default judgments and convictions), converted by parliament, with amendments, into Law No 60 of 22 April 2005, had, among other things, switched the burden of proof in favour of defendants, providing that they be granted new time limits to challenge convictions "upon request", unless the court had ascertained that they had real knowledge of the "proceedings" or of the "decision" and had voluntarily declined to appear at the former or challenge the latter.

In addition, a ban on new time limits for defendants whose designated lawyers had already challenged their convictions was eliminated. Later, this Court (in Judgment No 317/2009) struck down Article 175(2) of the Code of Criminal Procedure in the part in which it failed to allow for granting defendants who had no knowledge of proceedings or orders against them new time limits to challenge a default conviction, when an analogous challenge was previously brought by defence lawyers for the same defendants.

4.2.– Despite increased safeguards for defendants, the mere fact that the contumacy model generated massive amounts of litigation related to granting new time limits for challenges highlighted the irreversible flaws with the model and the need for a comprehensive reform.

Then again, as this Court observed in Judgment No 102/2019, the legislature may very well, "in its discretion, have chosen to govern cases of proceedings carried out in the absence of the accused differently, and it did so with Law No 67/2014, making a radically different choice: no longer offering an *ex post* restitution-based remedy to protect defendants convicted in default, but rather *ex ante* protections of defendants convicted in their absence".

4.3.– With the 2014 reform, the old contumacy model was replaced by the absence model, which enhanced *ex ante* protections, while *ex post* protections maintained a key role in fully safeguarding defendants' rights.

In particular, the update modified Article 420-*bis* of the Code of Criminal Procedure, which had been introduced by Article 19(2) of Law No 479 of 16 December 1999 (Changes to the provisions on proceedings before a single judge and other changes to the Code of Criminal Procedure. Changes to the Criminal Code and judicial system. Provisions concerning pending civil litigation, compensation for justices of the peace and the practice of law).

Rewritten by Article 9(2) of Law No 67/2014, Article 420-*bis* of the Code of Criminal Procedure provided that, in the event a defendant was not present at a hearing and had expressly declined to attend, the court could proceed in their absence (paragraph 1); that the court should proceed in the absence of a defendant who has, during the course of proceedings, declared or chosen an address for service; or has been arrested, detained, or placed under precautionary measures; or has appointed a defence lawyer; as well as in the event the absentee defendant has been personally served notice of the hearing or it can be in some other way established with certainty that they have knowledge of the "proceedings" or that they have voluntarily declined to have knowledge "of the existence of the proceedings or documents thereof" (paragraph 2). It also provided that, when courts proceeded *in absentia*, the defendant was to be represented by their defence lawyer, just as when a defendant who has appeared leaves the courtroom, or when a defendant who has appeared for one hearing fails to appear for the following hearings (paragraph 3).

Under the reformed model, the *ex post* protections were distributed throughout the course of proceedings and applied both when a court declared the absence of the defendant improperly, and when the absence was declared correctly but the defendant could prove that they had been, through no fault of their own, unable to exercise one of their procedural entitlements (Articles 420-*bis*(4), 489(2), 604(5-*bis*) and 623(1)(b) of the Code of Criminal Procedure).

It also provided a further safeguard: convicted persons whose trials were carried out entirely in their absence could request that the judgment be vacated where they could prove that their absence was due to an "unintentional lack of knowledge that the trial is being held", that is a specific lack of awareness of the summons to stand trial, irrespective of their awareness of the "proceedings" (which they may very well have), with the radical effect of vacating the conviction and sending the charges back to the court of first instance for a new trial (Article 625-*ter* of the Code of Criminal Procedure).

The prerequisites and effects of vacating the judgment remained the same even when the model was reformulated, as part of broader reforms, in Article 629-*bis* of the Code of Criminal Procedure (under Article 1(71) of Law No 103 of 23 June 2017 on "Changes to the Criminal Code, the Code of Criminal Procedure and the rules on the prison system"). The 2014 reform concluded by providing for the suspension of proceedings. Rewritten by paragraphs 3 and 4 of Article 9 of Law No 67/2014, in fact, Article 420-*quater* of the Code of Criminal Procedure provided that, when proceedings could not continue in the absence of the defendant, and neither could notice of the hearing be personally served upon the defendant, the court must issue an order suspending the proceedings. The following Article 420-*quinquies* provided that, in the case of suspension, the court should renew its efforts to locate the defendant approximately once per year, in an attempt to serve them with process and then re-open the proceedings against them.

4.4.– More recently, Legislative Decree No 150/2022 further reformed the rules on trials *in absentia*.

4.4.1.– Rewritten by Article 23(1)(c) of the Decree, Article 420-*bis* of the Code of Criminal Procedure today provides, at paragraph 1, that if a defendant is not present at a hearing, courts shall proceed *in absentia*: a) when the defendant was ordered to appear by summons served by personal service upon them or upon a person the defendant expressly delegated to receive the summons; b) when the defendant has expressly declined to appear or when a legitimate impediment exists that prevents them from appearing, but they have expressly declined to invoke it.

Paragraph 2 of Article 420-*bis* provides that courts likewise shall proceed *in absentia* if they find sufficient proof that the defendant had actual knowledge of the existence of the trial and that their absence is a matter of voluntary and informed choice. To ascertain such proof, courts are to take into consideration the method of service, the defendant's participation in proceedings prior to the hearing, the appointment of a defence lawyer and any other relevant circumstance.

Paragraph 3 of Article 420-*bis* provides that the court should proceed *in absentia* in scenarios not falling under paragraphs 1 and 2 when the defendant has been declared a fugitive or has, in some other way, intentionally avoided knowledge of the existence of the trial.

In the cases envisaged by paragraphs 1, 2 and 3, the court declares the defendant absent and, as such, represented by their defence lawyer (Article 420-*bis*(4)). Vice versa, for situations not falling under paragraphs 1, 2 and 3, the court postpones the hearing before proceeding pursuant to Article 420-*quater*, and orders that the relevant notification, the summons and the transcript of the hearing are personally served upon the defendant by the judicial police (Article 420-*bis*(5)).

4.4.2.– Because the possible scenarios involving so-called non-impediment absence (when a defendant's absence does not prevent trial) are limited to the ones set forth in the first three paragraphs of Article 420-*bis* of the Code of Criminal Procedure. They are mandatory in nature. Therefore, if these scenarios do not apply, and additional attempts at service of process on the defendant fail, the mechanism under the new Article 420-*quater* is triggered and halts the proceedings.

In broad strokes, based on an overview of the relevant paragraphs of Article 420-*bis*, three non-impediment absence scenarios may be identified: that in which the defendant has, personally or through their appointed delegate, received the summons to appear at a hearing or has expressly declined to either appear or invoke a legitimate impediment excusing their appearance; that in which the court, considering the method of service of the summons (clearly not by personal service of process), the defendant's participation in proceedings prior to the hearing, the appointment of a defence lawyer and any other relevant circumstance, holds that the defendant had knowledge of the existence of the trial; that in which the defendant is a fugitive or has, in some other way, intentionally avoided knowledge of the existence of the trial, a concept that evokes the current image of "false ignorance", that is, not knowing because one does not wish to know, which is tantamount to, in a certain sense, pretending not to know.

4.4.3.– Rewritten by Article 23(1)quarter of Legislative Decree No 150/2022, Article 420-*quater* of the Code of Criminal Procedure provides that, if a defendant is not present, and no non-impediment absence scenario applies, nor is there a legitimate impediment to the defendant's appearance, the court must issue a non-appealable judgment that the trial cannot go forward due to the defendant's having no knowledge of the existence of the trial.

The transformation of impediment absences from a cause for suspending proceedings to grounds for dismissal is in line with the solution adopted for infirm defendants "always subject to judgment" under Article 72-*bis* of the Code of Criminal Procedure, added by Law No 103/2017, as this Court observed in Judgment No 65/2023, which struck down Article 72-*bis*(1) in the part in which it referred only to the defendant's "mental" state, rather than their "psycho-physical" state.

Given the form and contents of judgments pursuant to Article 420-*quater* of the Code of Criminal Procedure, containing both a ruling of virtually final dismissal and a summons to trial to a pre-determined hearing in the event the defendant is located, its "two-pronged" nature is notable. This ambivalence, however, diminishes over time since, pursuant to paragraphs 3 and 6 of Article 420-*quater*, when for all offences subject to charges, the time limit laid out in the last paragraph of Article 159 of the Criminal Code is reached (that is, double the statute of limitations for each specific offence) and the defendant has not been located, the judgment that the case cannot proceed becomes irrevocable.

Therefore, unless the offence at issue has no statute of limitations, a suspension order due to the defendant's lack of knowledge becomes able to irreversibly affect the outcome of the proceedings.

4.4.4.– In addition to redefining the requirements for declaring a defendant absent, and thus the system of *ex ante* protections, Legislative Decree No 150/2022 also modified the framework of *ex post* protections, following two-fold reasoning depending upon the type of event they seek to remedy.

Generally, when a defendant's absence has been declared "improperly", that is, the declaration does not correspond to any of the legal scenarios in which proceedings may go forward *in absentia*, the remedy is unconditional and retrogressive, and automatically restores proceedings to the point at which the null declaration occurred. Where, on the contrary, an absence was "properly declared", in conformity, that is, with one of the legal scenarios of non-impediment absence, the remedy is conditional upon certain requirements and restitution-based. That is, the defendant may succeed in being reintegrated into the proceedings even after forfeiting their right to attend if they can prove that the forfeiture was unintentional (pursuant to Articles 489, 604 and 623 of the Code of Criminal Procedure, respectively, for the trial courts, courts of appeals and Court of Cassation, and Article 420-*bis*(6) when the defendant appears at the preliminary hearing).

Still with regard to *ex post* protections, Legislative Decree No 150/2022, doing the inverse of Law No 67/2014, narrowed the margins for vacating the defendant's conviction, but simultaneously broadened those of the granting of new time limits for regular appeals, particularly by linking this with scenarios in which the defendant does not have knowledge of the decree of summons to trial. In fact, Article 629-*bis* of the Code of Criminal Procedure, modified by Article 37(1) of the legislative decree, makes the extraordinary post-judgment remedy dependent upon the convicted person's ability to prove that their absence was declared despite not meeting the prerequisites under Article 420-*bis* of the Code of Criminal Procedure, and was, therefore, "improperly declared". At the same time, Article 11(1)(b) of Legislative Decree No 150/2022 added paragraph 2.1. to Article 175 of the Code of Criminal Procedure, under which a new time limit to bring a challenge is granted to defendants convicted *in absentia* upon request if, in the cases prescribed by Article 420-*bis*(2) and (3), they provide proof that they had no actual knowledge of the trial and were not able to bring the challenge within the time limit through no fault of their own, irrespective of whether the court erred in declaring them absent.

5.– Having established the major architecture of the scheme governing absentee defendants, it is possible for this court, first of all, as it considers the admissibility of the questions as to constitutionality, to define its purpose and verify, in particular, if the contents of the challenged provisions apply to the present case.

5.1.– The referring court has challenged Article 420-*bis* of the Code of Criminal Procedure, particularly paragraphs (2) and (3) of the text modified by Legislative Decree No 150/2022 rather than those of the text that was in force at the time of the declaration of absence, despite the fact that the declaration was handed down on 25 May 2021, prior, that is, to the entry into force of the decree.

The referral order points out that, by effect of the applicable provision of Article 89(2) of Legislative Decree No 150/2022, the trial has been suspended by court order

pursuant to the prior text of Article 420-*quater* of the Code of Criminal Procedure. Since the defendants have not yet been located, the court should proceed by issuing the judgment ordering that the case may not go forward, based on the new text of Article 420-*quater*.

The temporary rule provides that, in cases in which a court has, prior to the entry into force of the legislative decree, at the preliminary hearing or in its ruling at the trial level, ordered that the trial be suspended under the previous version of Article 420-*quater* of the Code of Criminal Procedure, and the defendant has still not been located, the court shall not proceed with its further inquiries and act in accordance with the modified text of 420-*quater*.

The modified text provides that the courts shall issue a judgment that the case cannot proceed because the defendant has no knowledge of the trial only in cases "not falling under the cases envisaged by Articles 420-*bis* and 420-*ter*".

It is, therefore, clear that the referring court, by challenging Article 420-*bis* of the Code of Criminal Procedure as rewritten by Legislative Decree No 150/2022, intended to trigger a review of the constitutionality of a new declaration of absence as an alternative to a judgment that the case cannot proceed.

5.2.– The referring court did not fail to make a constitutionally conforming interpretation of the challenged provision.

The referring court argues that it is inappropriate to interpret the provision in order to allow for a presumption that the defendants have knowledge of the proceedings or a presumption that they have intentionally avoided having knowledge of them as the premise for making a declaration of absence, as this would conflict with both the letter and the spirit of the challenged provision.

This reasoning, which is highly plausible and was reviewed by the Court of Cassation in the aforementioned Judgment No 5675/2023, suffices to fulfil the court's duties concerning constitutionally conforming interpretation.

As this Court has consistently held, the interpretative burden is diminished, making way for a referral to the Constitutional Court, where a referring court has knowingly ruled out the possibility of finding a constitutionally conforming interpretation due to the literal contents of the challenged provision (among many, see, most recently, Judgments No 104 and 25 of 2023 and 193 and 96 of 2022).

5.3.– The intervening modifications to Article 169 of the Code of Criminal Procedure, concerning service of process upon defendants located abroad, also has no impact on the relevance of the present questions.

Article 10(1)(v) of Legislative Decree No 150/2022, which replaced paragraph 1 of Article 169 of the Code of Criminal Procedure, allowed service of process not only at an accused person's place of residence or dwelling, but also at the "place in a foreign country in which the person habitually carries out their work activity".

Nevertheless, this capacity does not encompass the object of the current complaint, and cannot, therefore, make the questions irrelevant, since – as stated above (at points 4.4.1. and 4.4.2.) – pursuant to the new version of Article 420-*bis* of the Code of Criminal Procedure, notice has been sufficiently served for purposes of proceeding *in absentia* only if it was personally served upon the defendants themselves or upon a person expressly

delegated by them. In the other cases, on the contrary, the methods of service of process are simply an indication for evaluating whether a defendant has actual knowledge of the existence of the trial.

5.4.– Finally, looking still at the relevance of the questions raised, it is necessary to consider that the referral order describes the act it considers to be constitutionally relevant as "lack of judicial assistance" or "refusal to cooperate on the part of the defendant's home or host country". The order ascribes this conduct to the Arab Republic of Egypt, on the basis of a detailed list of factual elements.

In accordance with its longstanding case law, this Court performs an external review of the reasoning of the referral order as to the relevance of the questions, applying the criterion of non-implausibility (among many, see, most recently, Judgments No 164, 151, 145 and 113 of 2023).

As a clear indication of the Egyptian authorities' unwillingness to cooperate, the referring court points to the fact that they invoke the *ne bis in idem* principle, as the correspondence with the Ministry of Justice reveals, merely on the basis of a dismissal decree made by the investigating body, with no third-party court review.

The referral order underscores that the completed, irrevocable closing of the investigation into the four National Security Agency officers by the Egyptian Prosecutor General was invoked against the delegation from the Italian Ministry (as the Ministry itself reported) even to deny it access to the officers' addresses so as to notify them of the start of criminal trial in Italy.

These facts are suitable to corroborate the referring court's international non-cooperation framing as not-implausible, also in light of the other grounds laid out in the report submitted by the Department for Justice Affairs (*Dipartimento per gli Affari di Giustizia*) which the referral order quotes directly.

Another important element comes from the European Parliament resolution of 24 November 2022 on the human rights situation in Egypt, in which it "urges Egypt to fully cooperate with the Italian authorities' investigation into the murder of Italian PhD student Giulio Regeni, who was tortured to death by security officials in 2016", in particular reiterating "its call to notify General [S.T.], Colonel [I.M.A.K.], Colonel [H.U.] and Major [S.A.M.I.] of the judicial proceeding against them in Italy" (point 6).

6.– Therefore, nothing prevents this Court's review on the merits of the questions as to constitutionality raised by the Preliminary Hearing Judge of the Court of Rome.

Limited to the concrete case and the need to balance the interests underlying it, the questions are well-founded in reference to Articles 2 and 3 of the Constitution, as well as Article 117(1) of the Constitution in relation to the New York Convention against Torture.

7.– Torture is an offence against the person and a crime against humanity.

It is, in fact, prohibited both under international criminal law and under international human rights rules, so constantly and so unequivocally as to be considered an absolute prohibition, making it part of the customary *jus cogens*.

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, proclaims at Article 5 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

The International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, establishes at Article 7 that, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Article 3 of the ECHR states that, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The Rome Statute of the International Criminal Court, signed on 17 July 1998, lists torture among the crimes against humanity (Article 7(1)(f)) and, notwithstanding the collective dimension associated with these crimes when they are carried out in the context of extended or systematic attacks on civilian populations, it also envisages acts of torture carried out even against a single person ("severe physical or mental pain or suffering upon one or more persons": *Elements of Crimes*, Article 7.1.*f*, point 1).

7.1.– The referring court refers to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984 (hereinafter CAT) as a rule interposed through Article 117(1) of the Constitution.

The CAT was ratified both by Italy, with Law No 498/1988, and by Egypt, on 25 June 1986. Its Article 1(1) provides a definition of torture: "[f]or purposes of this Convention, the term 'torture' means 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 sanctions".

Paragraph 2 of the same article makes clear that this definition provides a minimum standard, which "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".

7.1.1.– By indicating the relevant actor as "a public official" (or, as an equivalent, another "person acting in an official capacity" or "at the instigation of or with the consent or acquiescence" of such a person), Article 1 of the CAT limits its scope to so-called State torture, also known as "tortura verticale" or "tortura propria" in Italian ("vertical torture" or "proper torture"), in keeping with the international law tradition, which represses torture as an abuse of public power.

The Convention lays out the other elements that make up the crime of torture by specifying the seriousness of the suffering it inflicts ("severe") and the intentional nature of the act inflicting it, which is communicated in terms of specific malice ("intentionally inflicted […] for such purposes as"), which corresponds to the four-part concept of torture: 'judicial', 'punitive', 'intimidating' and 'discrimination based'.

7.1.2.– In the Italian system, the crime of torture, as a separate offence, was introduced by Law No 110 of 14 July 2017 (Introduction of the crime of torture in the Italian system). Article 1(1) of that law added Articles 613-*bis* and 613-*ter* to the Criminal Code, covering torture and instigation to commit torture by a public official, respectively.

The national legislature intended to surpass the minimum standard established in Article 1 CAT, as Article 613-*bis* of the Criminal Code punishes even so-called private torture, also known as "tortura orizzontale" or "tortura impropria" in Italian ("horizontal torture" or "improper torture") (paragraph 1), while providing for a harsher punishment in cases of torture by public officials (paragraph 2), even though torture by public officials is not connected with private torture, but is a separate offence (Court of Cassation, Third Criminal Division, Judgment No 32380 of 25 May-31 August 2021).

The fact that Law No 110/2017 postdates the commission of the acts for which the defendants have been charged in this case does not raise a problem of detrimental retroactive application since the charges make no reference to the new type of offence. Rather, as the referral order not implausibly concludes, it describes "facts that may be subsumed in the concept of torture provided by Article 1 of the Convention", which were "already punishable in February 2016 based on the criminal rules specified in the indictment request" (false imprisonment, assault causing injury and homicide, aggravated by depravity, cruelty and abuse of public power).

7.1.3.– To avoid leaving areas of impunity, Article 5 CAT provides for double or triple national jurisdiction over torture cases. They must be prosecuted both by the State in the territory of which the crime was committed (paragraph 1(a)) and by the alleged offender's State (paragraph 1(b)), while it is left up to the victim's home State to decide whether or not to exercise its jurisdiction (paragraph 1(c)).

This discretionary option was passed through Law No 498/1988, Article 3(1)(b) of which provides that foreign nationals who commit offences abroad against Italian citizens amounting to acts of torture under Article 1 CAT must be punishable under Italian law at the request of the Ministry of Justice.

This provision supplements Article 7(1)(5) of the Criminal Code, pursuant to which a foreign national who commits a crime on foreign soil for which a special legal provision or international convention establishes that Italian law applies is punishable under Italian law.

As per the referral order, on 23 March 2016, the Ministry of Justice formally requested that fact-finding in the case of the acts of torture inflicted upon Italian citizen Giulio Regeni take place in Italy.

7.1.4.– Under Article 9(1) CAT, the State Parties "shall afford one another the greatest measure of assistance" for all criminal proceedings brought for the crime of torture, including "the supply of all evidence at their disposal necessary for the proceedings".

Providing the addresses of the suspects, information necessary for the service of process, clearly falls under this requirement to provide "the greatest measure of assistance".

8.– In its case law on Article 3 ECHR, the European Court of Human Rights has repeatedly made the distinction between the "procedural aspect" and the "substantive aspect" of the prohibition of torture. The prohibition may be breached not only by the material infliction of cruel and depraved treatment, but also by the failure to carry out a complete and effective investigation of accusations of torture since, when an investigation involves serious accusations of human rights violations, the "right to the truth" concerning the relevant circumstances of the case does not belong exclusively to the victim of the

crime and their family, but also to the victims of similar violations as well as to the general public, who have "the right to know what had happened" (ECtHR, Grand Chamber, 13 December 2012, *El-Masri v. The Former Yugoslav Republic of Macedonia*; see also ECtHR, 31 May 2018, *Abu Zubaydah v. Lithuania,* and 24 July 2013, *Al Nashiri v. Poland*).

In other words, Article 3 ECHR requires an "efficient criminal-law response", without which its "procedural limb" is breached irrespective of the substantive aspect (ECtHR, 16 February 2023, *Ochigava v. Georgia*).

9.– The procedural conundrum described by the referring court reveals a lacuna in the system that readily demonstrates characteristics of a constitutional breach as soon as it is taken together with the special legal status of the crime of torture.

Without prejudice to the presumption of innocence enjoyed by the four Egyptian officials, it is undeniable that, as a matter of fact, the objective circumstances of this case grant them a de facto and irregular immunity which is incompatible with the right to fact-finding proceedings, as the primary expression of the international prohibition of acts of torture and States' duty to prosecute them.

9.1.– Regardless of its underlying motives, the Egyptian State's failure to provide the addresses of its employees has thus far impeded, and will continue indefinitely to impede, a trial from going forward as required by the New York Convention against Torture, in line with general international law.

In fact, under the current domestic regulatory framework, the impossibility of personally serving the defendants with the summons to the preliminary hearing and the indictment, thereby making them aware of the start of trial, means the court has no choice but to hand down a non-appealable ruling that their case may not proceed. This ruling may never truly fulfil its secondary function of acting as a summons to trial, although this is one of its official purposes. On the contrary, with the passage of time it is sure to become irrevocable for three of the four defendants, since they are charged with a crime subject to a statute of limitations, i.e. false imprisonment.

9.2.– The universal character of the crime of torture – described above on the basis of international declarations and treaties – goes hand in hand with the radical impact it has on the dignity of the human person, which is at the centre of the preamble of the New York Convention against Torture.

The alleged lacuna in the regulatory framework, precluding judicial scrutiny of the commission of torture crimes, thus offends human dignity and compromises the fundamental right of the person not to be a victim of such acts. Note that, pursuant to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, "victims" include the relatives of the person whose death has been directly caused by the crime itself (Article 2(1)(a)(ii)).

9.3.– Therefore, the regulatory lacuna raised by the referring court violates Article 117(1) of the Constitution, in relation to the New York Convention against Torture, and at the same time Article 2 of the Constitution in that, by preventing the court from holding a trial for the crime of torture indefinitely, it cancels out an inviolable right of the victim

of that crime. Considering the exceptional character of the crime at issue, the right to judicial scrutiny is, truly, the procedural facet of the duty to safeguard dignity.

9.4.– The regulatory lacuna to which the referring court objects also violates the principle of reasonableness under Article 3 of the Constitution.

Indeed, the lacuna unreasonably opens up an area of criminal immunity, which emerges in a legal framework that prevents the kind of judicial scrutiny required under international agreements from going forward – scrutiny rendered all the more necessary given that, when Italy ratified the CAT, it opted to exercise its criminal jurisdiction over torture crimes carried out abroad against its own citizens.

10.— Defendants' right to be present at trial is a fundamental right, and it is protected by Article 111 of the Constitution and Article 6 ECHR, first of all through the full, adversarial legal process.

In particular, Article 111(3) of the Constitution, in harmony with Article 6(3) ECHR, provides that, "[i]n criminal law trials, the law provides that the defendant shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a court the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted".

As this Court reiterated in Judgment No 65/2023, defendants' right to participate also serves to allow them to exercise so-called self-defence, which is separate and apart from technical defence.

The constitutional breach produced by the regulatory lacuna at issue must, therefore, be made constitutional by means internal to the system of protections, without sacrificing or placing conditions on defendants' right to participate, but only with a different timeframe for exercising them.

Incidentally, this is possible under the European rules on proceedings *in absentia*.

11.– Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings establishes that "Member States shall ensure that suspects and accused persons have the right to be present at their trial" (Article 8(1)).

The Directive adds that the Member States "may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of nonappearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State" (Article 8(2)).

Moreover, "[w]here Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person

cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced". In that case, "Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9" (Article 8(4)).

Directive (EU) 2016/343, in fact, contains a teleological link between the "right to be present at trial" in Article 8 and the "right to a new trial" in Article 9, the overlapping objective of both of which is – *ex ante* or *ex post* – for defendants to have access to the full range of capacities associated with participation.

Article 9 provides that, "Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence".

11.1.– Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States provides that an arrest warrant issued for a sentence imposed by a decision rendered *in absentia* may be executed provided that the defendant is informed of their "right to a retrial", which allows "the merits of the case […] to be re-examined" and "may lead to the original decision being reversed" (Article 4a(1)(d)(i)).

11.2.– The Court of Justice of the European Union (CJEU) has specified the reasons for and conditions applying to proceedings *in absentia*, with regard to the right of the defendant to a new trial on the merits.

The CJEU has explained that repeating trial steps taken with the defendant present, such as witness testimony that was previously heard in their absence, has a renewing effect for purposes of the new trial assured by Directive 2016/343/EU (Case C-688/18, *TX and others*, 13 February 2020).

In the interpretation of Article 4a of Framework Decision 2002/584/JHA, the Court of Justice also rejected the notion that executing a European arrest warrant for a conviction handed down *in absentia* can be refused due to doubts that the State taking custody of the defendant will guarantee their right to a new trial under Articles 8 and 9 of Directive 2016/343/EU since, in any case, the defendant may request its application in that State itself (Case C-416/20, *TR*, 17 December 2020).

Of utmost importance, both in general terms and for the case at issue, is another Court of Justice Decision, in case C-569/20, *IR*, of 19 May 2022, which held that Articles 8 and 9 of Directive 2016/343/EU must be interpreted to mean that "an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information regarding his or her trial may be tried and, as the case may be, convicted *in absentia*, but must in that case, in principle, be able, after notification of the conviction, to rely directly on the right, conferred by that directive, to secure the reopening of the proceedings or

access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case". The accused may only be denied this right "if it is apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial" (point 59).

Given, therefore, that a defendant may only be tried *in absentia* if the authorities have first made "reasonable efforts" to locate them for service of process, this decision reverses the burden of proof of the old contumacy model, ruling that defendants convicted *in absentia* because they could not be located must be unconditionally ("in principle") permitted to exercise the right to a new trial on the merits, and that authorities who wish to deny them that right must present "precise and objective indicia" showing that the defendant was sufficiently informed of the trial.

The convergence with the case law of the ECtHR on defendants' right to a "fresh determination of the merits of the charge" is clear, and the Court of Justice even refers to it explicitly (points 51-53).

12.– In conclusion, the constitutional breach alleged by the referring court can and must be remedied by reorganising the participatory protections of defendants. This reorganisation should be neither quantitative nor qualitative, but only temporal, remaining within the pre-existing lines of the rules governing absences, as stated above.

The added scenario of non-impediment absence, which will prevent the kind of procedural paralysis that could not be tolerated under constitutional and international law, must, in any case, comply with the principle of a fair trial.

12.1.– The referring court challenges paragraphs 2 and 3 of Article 420-*bis* of the Code of Criminal Procedure, in the version modified by Legislative Decree No 150/2022, but the proper place for the addition it requests, and which the Constitution demands, should specifically be identified as paragraph 3 because, aiming at the full protection of defendants' rights ("even in scenarios not falling under paragraphs 1 and 2"), it governs the scenarios in which a defendant's absence is not an impediment even in the absence of proof concerning their "knowledge of the existence of the trial".

As already stated above, the scenarios currently indicated in Article 420-*bis*(3) have to do with fugitives and any "other way" a defendant might voluntarily avoid having "knowledge of the existence of the trial".

It involves situations in which the legal system does not consider an absence to be an impediment to proceeding with a trial even though a defendant does not have "knowledge of the existence of the trial", and which, nevertheless, assume knowledge of the proceedings, that is, taking on the role of the accused person under Article 335 of the Code of Criminal Procedure.

Indeed, in order to "voluntarily" avoid having knowledge of the existence of the "trial", and thus avoid being served notice of the criminal action, an accused person must know that that is what they are, despite putting themselves in such conditions as to ignore the summons to trial.

12.2.– The legal landscape currently in force thus reveals that, in some exceptional cases, courts may go forward with trial in the absence of the defendant even without proof

that they have knowledge of the existence of the trial, when it is certain that they have knowledge of the proceedings.

The scenario presented by the questions under review must be added to these exceptional cases. Otherwise, both the lacuna in the governing legal scheme and the breach of the aforementioned constitutional provisions it entails will be allowed to persist.

13.– Staying within the current system, as this Court made clear earlier, the added non-impediment absence scenario must replicate its two levels, having to take into account a defendant's potential knowledge of the proceedings, and limiting its impact to the plane of their awareness of the summons to trial.

The external review of the referral order's reasoning concerning relevance reveals that the abstract scenario adapts to the concrete case.

Indeed, the referral order states that the action taken by the Assize Court of Rome to vacate the declaration of absence concerning the four Egyptian officials recognised "the defendants' general knowledge of the existence of criminal proceedings against them for serious crimes against the researcher Giulio Regeni", even "without demonstrating, to a reasonable degree of certainty, sufficient knowledge of the criminal action and charges".

The assessment by the Assize Court, together with the resulting suspension order handed down by the Preliminary Hearing Judge of the Court of Rome, was held to be free of errors by the Court of Cassation in the aforementioned Judgment No 5675/2023. There, too, the focus was not knowledge of the proceedings, but rather of the summons to trial, with particular emphasis on the fact that some signs that the defendants had knowledge "predated the start of the criminal action in Italy", and were, therefore, unable to ensure that they had knowledge of the "precise timing of the trial".

13.1.– It is very clear that the Italian legal system has progressively shifted the focus of how it assesses absences away from knowledge of "proceedings" and toward knowledge of the "trial".

In an even earlier judgment, the Court of Cassation had established that knowledge of the charges based on receiving the notice that a preliminary investigation had been concluded was not enough to prevent granting a new time limit to challenge a conviction under the contumacy model pursuant to Article 175(2) of the Code of Criminal Procedure. That scenario, on the contrary, required awareness of the trial itself based on an official notice of summons to trial (Joint Criminal Divisions, Judgment No 28912 of 28 February-3 July 2019).

Even more importantly, a later ruling on the evidentiary value of designating the court-appointed defender's office as the address for service of process for purposes of declaring a defendant absent under the previous version of Article 420-*bis* of the Code of Criminal Procedure rejected the idea that knowledge of trial could be presumed, since "[t]he foundation of the system is that the party be personally informed of the contents of the charge and of the day and place of the hearing". Indeed, the Court went on with regard to the modifications to Article 175 of the Code of Criminal Procedure, this is "the reason why the system, introducing the rule of certainty of knowledge of the trial, did not include the "unconditional" right to a new trial on the merits for persons convicted *in absentia*" (Court of Cassation, Joint Criminal Divisions, Judgment No 23948 of 28 November 2019-17 August 2020).

Finally, a comparison of the text of Article 420-*bis* of the Code of Criminal Procedure prior to Legislative Decree No 150/2022 and that modified by the decree itself makes clear that the parameter for declaring a defendant's absence has been changed from "knowledge of the proceedings" to "knowledge of the existence of the trial".

13.2.—It is patently clear that the extension of this evolution of the requirements for proceeding to trial to include the case under review entails paralyzing the trial at the onset, since the failure of the defendants' home State to cooperate makes personal service of the official summons to trial upon the defendants impossible, making it irrelevant whether they are aware of the criminal proceedings against them or not.

This outcome of radical frustration of the trial is not acceptable, under domestic constitutional, European and international law, when it results in the creation of a de facto immunity that blocks judicial scrutiny of torture crimes.

This kind of immunity would be, as stated above, simultaneously in breach of the inviolable rights of the victim with respect to an extreme crime against the dignity of the person (Article 2 of the Constitution), unreasonable in light of the Republic's right/duty to prosecute such wrongs (Article 3 of the Constitution), in conflict with the international standards of protection of human rights, adopted and promoted by the CAT (Article 117(1) of the Constitution).

14.– The referral order calls for an additive ruling that is not limited by the type of crime.

The ruling upholding the referring court's challenges must, nevertheless, be circumscribed in keeping both with the premises for the relevance of the questions as identified above and with international obligations, which, for the crime of torture, justify arranging the participatory protections in the terms laid out here below.

The unconstitutionality of the challenged lacuna in the legal scheme, along with the need to rectify it by means of the requested additive ruling, thus does not concern all hypothetical cases in which personal service of the summons on the accused is rendered impossible due to a lack of assistance from their home country, but applies exclusively to charges of torture, which are the only ones for which the block on proceeding with a trial, as described, translates into a violation of Articles 2 and 3 of the Constitution, as well as 117(1) of the Constitution in relation to the New York Convention against Torture.

The constitutionally appropriate additional scenario is, therefore, limited to trials for crimes committed by means of the acts of torture defined by Article 1(1) CAT.

14.1.– The objective delimitation by type of crime corresponds to a subjective delimitation by the position of its author. This, pursuant to Article 1(1) CAT, can only be a "public official", or the equivalent "other person acting in an official capacity" or at their "instigation or with the[ir] consent or acquiescence".

This subjective delineation assumes special relevance with respect to the scenario at issue – that is, the lack of assistance of the defendant's home State – given the tie that binds the public apparatus to its own functionaries.

15.– As stated above (point 12), the constitutional breach can and must be remedied by rearranging the participatory protections in a way that remains faithful to the fundamental rights enshrined in Article 111 of the Constitution and Article 6 ECHR.

To use the brief formula laid out in Article 9 of Directive 2016/343/EU, it is necessary to safeguard the "right to a new trial", which, by playing out in the presence of the defendant and upon their request, allows for "a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed" (above point 11).

According to the terms established by ECtHR case law, defendants must be guaranteed unconditional access to "a fresh determination of the merits of the charge" (point 4 of the *Conclusions on points of law*).

This result, which will depend upon the implementation of the ordinary courts in each individual, concrete case, may be reached by dint of reopening the trial, which the defendant in the hypothesis in question has the right to obtain due to the very reasons of their absence.

15.1.– The additional scenario for proceeding to trial *in absentia*, the object of the present decision, does indeed allow defendants unlimited and unconditional access to the remedy laid out in Legislative Decree No 150/2022.

As described above, this has two-fold implications: an absence declared by a court in error triggers the unconditional remedy of resetting the proceedings to the moment of the null declaration, while a "properly declared" absence is associated with a conditional remedy that allows the restoration of trial procedures where the defendant can prove that their absence therefrom was unintentional (above point 4.4.4.).

Thus, what is at issue here, that is, that personal service of the summons to trial upon the defendants was not possible due to the uncooperative inertia of their home State, is a scenario in which proof that the defendant is not at fault must be considered *in re ipsa*, which results from the same elements that make up a non-impediment absence.

Kept in the dark about the proceedings by a *factum principis* (the uncooperative conduct of their home country), a defendant must be presumed to be ignorant of the timing of the proceedings without fault, despite potentially being aware of proceedings against them, and is, therefore, free to request that their rights associated with participation in the proceedings against them be reinstituted.

In other words, in keeping with the rules established in Judgment *IR* (above point 11.2.), when a defendant cannot be located by the prosecuting authorities despite their "reasonable efforts", they can be tried *in absentia*, but they can "directly" invoke the right to a new trial that leads to a fresh examination of the merits of the case in their presence. It falls to the authorities who wish to reject a request to reopen the case to present "precise and objective indicia" showing that the defendant, despite their home country's failure to cooperate, "received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial".

15.2.—Therefore, even if the absence at issue in this request for an additive ruling was "properly declared", the defendant may still obtain restitution of their rights to participate in the proceedings, and at any time, simply by appearing. This may occur even before a verdict is reached, and so does not require challenging the verdict.

This conclusion is supported by the fact that, in the case under review, restitution-based remedies available under the provisions of the Code of Criminal Procedure apply

– these, in reference to various steps and stages of the trial, variously require the defendant to demonstrate that they were unaware of the trial or that they could not intervene, through no fault of their own, to exercise their related rights.

In particular, Article 420-*bis*(6) has to do with the possibility to revoke the order declaring the absence; Article 489(2-*bis*)(b) has to do with the preliminary hearing, Article 604(5-*ter*)(b) has to do with rulings on appeal, and Article 623(1)(b-*bis*) has to do with proceedings before the Court of Cassation.

Granting new time limits to challenge convictions *in absentia* is subject to the same prerequisites, pursuant to Article 175(2.1.) of the Code of Criminal Procedure, with the additional requirement that, pursuant to paragraph 2-*bis* of the same Article, the timeframe in which the defendant may present the relevant request begins to run only when they have personal knowledge of the judgment ("effective awareness of the ruling") or, in the case of extradition from abroad, "from the time the convicted person is handed over" (which, in turn, presupposes personal knowledge of the judgment being executed).

16.– The case of absence here under review does not entail any intervention relating to the protections laid out in Legislative Decree No 150/2022, which is, conversely, applicable to it as is, except for the relief from the burden of proof concerning uncontested facts, which is to the advantage of the defendant due to the objective facts of the case itself.

On the other hand, given the patent violation of constitutional and international principles that immunity for crimes of torture would entail, the fact that procedural matters are reserved to the discretion of the legislature cannot be an impediment to reaching a decision, although this Court stated so in the past with regard to the methods of providing notice of summons and of carrying out trials *in absentia* (Judgment No 31/2017).

17.– The extremely broad possibility to reopen and renew the trial to which the defendants in the case under review are entitled, which is necessary for complying with Article 111 of the Constitution and Article 6 ECHR, nevertheless does not reduce the trial itself to an empty gesture.

Fact-finding concerning crimes of torture in the public forms of criminal litigation is a constitutional and international duty, and this reason alone suffices to make it useful, even in the event that outside circumstances deprive it of its adversarial character.

And for the defendants' part, every opportunity to make their voice heard is ensured.

18.– For the reasons above, Article 420-*bis*(3) of the Code of Criminal Procedure must be declared unconstitutional due to its breach of Articles 2 and 3 of the Constitution, as well as Article 117(1) of the Constitution in relation to the New York Convention against Torture, to the extent that it fails to provide that courts shall proceed *in absentia* for crimes committed by acts of torture as defined by Article 1(1) of the same Convention when, due to non-cooperation by the defendant's home country, it is impossible to obtain proof that the defendant, even if aware of the proceedings against them, has been notified of the existence of trial, and without prejudice to the defendant's right to a new trial in their presence for a fresh examination of the merits of the case.

In the light of the finding of incompatibility between the challenged provision and

Articles 2, 3 and 117(1) of the Constitution, no examination of the further complaints in reference to Articles 24, 111 and 112 of the Constitution is necessary.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares Article 420-*bis*(3) of the Code of Criminal Procedure unconstitutional to the extent that it fails to provide that the court proceed *in absentia* for crimes committed through the acts of torture defined by Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984, ratified and enacted with Law No 498 of 3 November 1988, when, due to a lack of assistance from the defendant's home country, it is impossible to obtain proof that the defendant, even if aware of the proceedings against them, has been made aware of the existence of the trial, without prejudice to the defendant's right to a new trial in their presence for a fresh examination of the merits of the case.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 27 September 2023.

Signed:

Silvana SCIARRA, President

Stefano PETITTI, Judge Rapporteur