NATIONAL REPORT

ITALY

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Content:

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PART I – ECtHR case law in Italy

Introduction

The main ECtHR decisions concerning Italy, related to the protection of prisoners' rights, have covered, during the last decade, the field of prison overcrowding and prison conditions.

Before then, the Court had examined the situation of the Italian prison system in connection with ill-treatments perpetrated by police officers in prison in the case *Labita v. Italy*[1]. This judgment represents the condemnation of a persistent practice of systematic ill-treatments (namely slapping, squeezing of testicles, beatings, as well as insults and intimidation) related to a system of slow and ineffective investigation by the Italian government.

Concerning overcrowding, since the attestation of the deleterious prison conditions, in the *Sulejmanovic*[2] judgment, and up until the enactment, in the *Torreggiani*[3] case, of a Pilot Judgment Procedure (PJP), the Strasbourg Court has censored the Italian general prison situation due to the lack of an effective solution for the problem. As a consequence of the Pilot Judgment Procedure, the Italian Government has put in place a series of measures, focusing on the set of preventive and compensatory remedies recommended by the Court as the first step in order to redesign the penitentiary system in light of the protection of the prisoners' fundamental rights.

Another important issue covered by the Strasbourg Court is the prisoners' right to vote and the disenfranchisement practices around Europe. The Italian context has been the object of a leading case on the matter, the Grand Chamber judgment in *Scoppola n.3*[4], which didn't result in a condemnation but was nonetheless pivotal in the shaping of the Strasbourg case law.

1. Ill-treatments in prison and the ineffectiveness of investigations. The case of *Labita v. Italy*

The *Labita* case is the first judgment in which the ECtHR examines and condemns the situation of improper treatments in Italian prisons, relating, in particular, the violation of Article 3 ECHR to the lack of a fast and effective investigation from the part of the Italian Government.

As for the factual limb, the applicant complained about a series of actions against him, an alleged Mafia suspect, including almost 3 years detention without trial (violation of Article 5.3, Length of pre-trial detention), alleged beatings in prison and ineffectiveness of investigation (violation of Article 3, inhuman and degrading treatments), confiscation of personal correspondence (violation of Article 8, respect for privacy), delay in implementing release following acquittal (violation of Article 5.1, lawful arrest or

[1] *Labita v. Italy*, application no. 26772/95, 6 April 2000.
[2] *Sulejmanovic v. Italy*, application no. 22635/03, 16 July, 2009.
[3] *Torreggiani and Others v. Italy*, application n. 43517/09.
[4] *Scoppola (n.3) v. Italy*, [GC] 22.5.2012.

detention) and disenfranchisement of voting rights (violation of Article 3, Protocol 1, right to free elections); and restrictions on movement of suspected *Mafioso* (violation of Article 2, Protocol 4, freedom of movement).

The facts:
The applicant was arrested in April 1992 on suspicion of belonging to the mafia, on the basis of uncorroborated statements of a former *mafioso* (*pentito*), whose information was second-hand. The applicant was acquitted in November 1994, but as he did not arrive back at the prison until after midnight and the registration officer was absent he could not be released until the following morning. He claimed that he was subjected to ill-treatment during his detention in Pianosa prison, where he alleged that the ill-treatment of inmates (slapping, squeezing of testicles, beatings, as well as insults and intimidation) was systematic. At a hearing in October 1993, the applicant and other inmates complained about ill-treatment which they claimed had occurred until October 1992. This was borne out by a judge's report. However, criminal proceedings were discontinued because the pepetrators could not be identified. During his detention, the applicant was kept under a special security regime until January 1995. Moreover, his correspondence was censored, partly on the basis of court decisions and partly on the basis of an order of the Minister for Justice, but at one stage without any basis. After the applicant's acquittal, preventive measures ordered during his detention were applied for three years (curfew between 8 p.m. and 6 a.m., obligation not to leave his home without informing the supervisory authorities, obligation to report weekly to the police, prohibition on going to bars or public meetings or associating with persons with a criminal record) and he was ordered to live in a particular place. His attempts to have these measures lifted were rejected on the ground that although there had been insufficient evidence for a conviction there was enough to justify preventive measures. The measures also had the effect of depriving the applicant of his voting rights. In January 1998 the applicant was awarded 64 million lire by the State, as compensation for his "unjust" detention.

Scope of the protection:
Significantly, although not being able to assess a violation of Article 3 due to the lack of any conclusive evidence in support of the applicant’s allegations of ill-treatment (the only concrete evidence he had furnished, prison medical register and certain specific reports, was not considered sufficient to fill that gap), the Court found a violation of Article 3, reasoning on the ground of the lack of an effective investigation. As a matter of facts, the applicant's complaints did give reasonable cause for suspecting that he may have been subjected to improper treatment, and an effective official investigation was therefore required. Certain investigations were carried out, but the Court was not satisfied that they were sufficiently thorough and effective to satisfy this requirement. The investigation was slow and no effort was made to allow the applicant to identify the perpetrators in person, although he maintained that he would be able to do so.

Concerning the length of the pre-trial detention and the possible violation of Article 5-3, the Court discusses the Italian legislation and policies concerning the phenomenon of *pentiti*[5] and assessing the conventionality of those legal instruments and practices, stating that while the cooperation of *pentiti* is a very important weapon in the fight against the mafia, the risk that a person may be accused and arrested on the basis of unverified statements must not be underestimated. Statements by *pentiti* must therefore be corroborated and hearsay must be supported by objective evidence, especially when deciding whether to prolong detention, since such statements necessarily become less relevant with the passage of time. In view of the applicant's acquittal due to the absence of other evidence, very compelling reasons would be required for his lengthy detention to be justified. The other grounds relied on by the courts (risk of pressure on witnesses and interfering with evidence, dangerous nature of the accused, complexity, requirements of the investigation) were reasonable, at least initially, but the decisions referred to the prisoners as a whole and did not point to any factor capable of showing that the risks actually existed or establish that the applicant posed a danger. No account was taken of the fact that the accusations against him were based on evidence which had become weaker rather than stronger. Accordingly, the grounds were not sufficient to justify the length of the detention and the Court found a violation of Article 5-3.

Concerning the issue of the violation of Article 5-1, i.e. the alleged delay in implementing release following acquittal, the Court determined that while some delay in implementing a decision to release from detention is often inevitable, the delay in the case of the applicant was only partly due to the relevant administrative formalities, the additional delay being due to the absence of the registration officer. In these circumstances, the continued detention of the applicant after his return to the prison did not amount to the first step in the execution of the order for his release and constituted a violation of Article 5-3 of the Convention.

Investigating the alleged violation of Article 8, i.e. the censorship of private correspondence, the Court made a distinction between the periods when the censorship of the applicant's correspondence was based on Law no. 354 of 1975 and the period when censorship was based on an order by the Minister for Justice. Both periods, for different reasons appear to be lacking any legal basis in violation with the provisions of Article 8 of the Convention. In the first period the censorship did not comply with Article 8 due to the lack of clarity in the relevant legislation's provisions. With regard to the period when censorship was based on an order by the Minister for Justice under the provisions concerning the special regime, since the Court of Cassation has held that the Minister had no power to take measures concerning prisoners' correspondence, the interference was not in accordance with the law.

The finding of a violation of Article 2 of Protocol No. 4 concerning freedom of movement, was assessed by the Court not on the ground of the legitimate aim of the Italian legislation on preventive measures for suspected mafia members (namely the maintenance of *ordre public* and the prevention of crimes), but rather on the refusal of revoking the measures after the applicant's acquittal. The said restrictions to the freedom of movements were no more justifiable and constituted a violation of Article 8 of the Convention.

[5] Pentiti, "those who repent", technically *collaboratori di giustizia*, is the Italian term to designate a person, formerly

Concerning Article 3 of the First Protocol to the Convention, the Court had no doubt that temporarily suspending the voting rights of persons against whom there is evidence of mafia membership pursues a legitimate aim. However, it did not accept the Government's view that the serious evidence against the applicant had not been rebutted during his trial. Thus, when his name was removed from the electoral roll there was no concrete evidence on which a suspicion that he belonged to the mafia could be based, and the measure cannot be regarded as proportionate.

2. Prison overcrowding and prison conditions as a violation of Article 3 of the Convention

During the last decade, the Court has developed a consistent case law aiming at interpreting Article 3 of the Convention as to include a right for prisoners to be held in decent detention conditions.
Italy has, since the beginning, became one of the most relevant context for the analysis of the Strasbourg Court's case law on the issue of prison conditions and overcrowding.
The first step taken by the Court to challenge the domestic prison condition in Italy is the Grand Chamber judgment *Sulejmanovic v. Italy*. While domestic prison policies struggled in finding appropriate solutions for the problems highlighted by the Court, the phenomenon of overcrowding in Italy showed its persistent and endemic nature and the ECtHR had to deal, during times, with several hundred pending applications raising the issue of the compatibility of the conditions of detention in a number of Italian prisons with Article 3 of the Convention. This situation led the Court to apply a Pilot Judgment Procedure concerning the phenomenon of overcrowding in Italian prisons. The judgment, *Torreggiani and Others v. Italy*, acknowledged the structural and systemic nature of overcrowding in Italy, and, in view of the growing number of persons potentially concerned and of the judgments finding a violation liable to result from the applications in question, called on the authorities to put in place a combination of remedies providing redress in respect of violations of the Convention resulting from overcrowding in prison.
Finally, the pilot judgment procedure ended with the case *Stella v. Italy* (application no. 49169/09). The Court noted that, following the application of the pilot judgment procedure in *Torreggiani and Others*, the Italian State had enacted a number of legislative measures (namely a preventive and a compensatory remedy[6]) aimed at resolving the structural problem of overcrowding in prisons, reforming the law to allow detained persons to complain to a judicial authority about the material conditions of detention and had introduced a compensatory remedy providing for damages to be paid to persons who had been subjected to detention contrary to the Convention. The Court considered that it had no evidence on which to find that the remedies in question did not offer, in principle, prospects of appropriate relief for the complaints submitted under Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights. Consequently, litigants complaining of the overcrowding in Italian prisons were under an obligation

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part of a criminal organization, who decide to collaborate with the judicial system, helping the investigations.

to use them. It followed that the applicants' complaint concerning overcrowding in prisons had to be rejected for non-exhaustion of domestic remedies.
Significantly, the Court reminded that this conclusion in no way prejudged a possible re-examination of the remedy's effectiveness and the capacity of the domestic courts to establish a uniform case-law that was compatible with the requirements of the Convention[7].

2.1 The *Sulejmanovic* case. The first declaration of the general overcrowding condition in Italy.

The Court, in the *Sulejmanovic* judgment found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights regarding the applicant's conditions of detention.

The facts:
Following his arrest in 2002, the Applicant was put in a number of different cells, each measuring 16.20 square metres (m2). He claimed that up until 15 April 2003 he had shared his cell with five other inmates, each having an average personal space of 2.70 m2, and, from 15 April to 20 October 2003, with four other inmates, each thus having an average personal space of 3.40 m2. He also alleged that he had spent more than eighteen hours per day in his cell and could only go out for four and a half hours.
Relying on Article 3, the applicant complained about his conditions of detention, in particular prison overcrowding and insufficient daily exercise outside his cell.

Relevant Sources:
The Court presents the relevant domestic sources, contained in the Italian Penitentiary law (law n. 354/1975), namely article 6, and in the Presidential decree n. 230/2000, namely articles 6 and 7. Those domestic norms generally state the need for appropriate prison conditions in terms of space, light, heating, privacy and hygiene.
Concerning the international relevant sources the Court indicates the second part of the Recommendation Rec(2006)2, adopted on 11 January 2006 by the Committee of Ministers of the Council of Europe to member States on the European Prison Rules, which replaced Recommendation No. R (87) 3 on the European Prison Rules accounting for the developments which had occurred in penal policy, sentencing practice and the overall management of prisons in Europe according to the principle of the human dignity.

Principles and obligations:

[6] Respectively Articles 35 bis and 35 ter of the Italian Penitentiary Law (Law n. 354/1975).
[7] In the words of the Court: "68. La Cour précise encore une fois qu'elle se réserve la possibilité d'examiner la cohérence de la jurisprudence des juridictions internes avec sa propre jurisprudence ainsi que l'effectivité des recours tant en théorie qu'en pratique. En tout état de cause, la charge de la preuve concernant l'effectivité des recours pèsera alors sur l'État défendeur (Reinhold Taron c. Allemagne (déc.), § 45, no 53126/07, 29 mai 2012)."

As far as general principles are concerned, the Court reiterated the absolute nature of the right enshrined in article 3 of the Convention (*Saadi v. Italia* [GC], n. 37201/06, § 127, and *Labita v. Italia* [GC], n. 26772/95, § 119) and connected that same right with an obligation for the State "to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance[8]".

The Court went on discussing the parameters established by the CPT, recalling[9] that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment ("the CPT") has set 7 m² per prisoner as an approximate, desirable guideline for a detention cell (see the 2nd General Report - CPT/Inf (92) 3, § 43). Nevertheless, and as a statement of principle, the Court made it clear that it is not for her to apply this criteria or to decide, once and for all, how much personal space should be allocated to a detainee in terms of the Convention: "that depends on many relevant factors, such as the duration of detention in particular conditions, the possibilities for outdoor exercise, the physical and mental condition of the detainee, and so on. This is why, whereas the Court may take into account general standards in this area developed by other international institutions, such as the CPT (see *Kadiķis v. Latvia* (no. 2), no. 62393/00, § 52, 4 May 2006), these cannot constitute a decisive argument."[10].

Nevertheless, the Court reminded that in some cases the lack of personal space constitutes a sufficient element in order to attain the "minimum level of severity" requested by the scope of Article 3. As a rule of thumb, and according to a consistent case law[11], those are cases in which the available space is inferior to 3 m².

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[8] *Kudła v. Polonia* [GC], n. 30210/96, § 92-94. Always in Kudla we find the counterweight to the absolute nature of article 3, namely the fact that: " 91. … ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, the Raninen v. Finland judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, pp. 2821-22, § 55).

92. The Court has considered treatment to be "inhuman" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see, mutatis mutandis, the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 15, § 30; the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, § 100; and V. v. the United Kingdom cited above, § 71).

93. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.".

[9] As already stated in *Kalachnikov v. Russia*, n. 47095/99, §97.

[10] *Trepashkin v. Russia*, n. 36898/03, § 92.

[11] See for this jurisprudence: *Aleksandr Makarov v. Russia*, n. 15217/07, § 93, 12 marzo 2009; see also *Lind v. Russia*, n. 25664/05, § 59, 6 dicembre 2007; *Kantyrev v. Russia*, n. 37213/02, §§ 50-51, 21 giugno 2007; *Andreï Frolov v.*

With this affirmation the Court creates a positive procedural obligations for the States to provide an individual space not inferior to 3 m² per prisoner.

The Court established another positive procedural obligation by stating that in other, less flagrant in term of space, cases, further relevant elements need to be taken into consideration, namely the possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. "Thus, even in cases where a larger prison cell was at issue – measuring in the range of three to four sq.m per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting."[12]

When applying those principles and procedural obligations to the *Sulejmanovic* case, the Court found that the flagrantly insufficient amount of personal space available to the prisoner until April 2003 (2.70 m²) had in itself constituted inhuman or degrading treatment, in violation of Article 3.

On the other hand, after being transferred in May 2003 the applicant situation improved: up until his release he had a personal space of 3.24 m², 4.05 m² and 5.40 m² respectively. The Court noted that whilst the prison overcrowding in Rebibbia Prison complained of by the applicant was extremely regrettable, it had not reached alarming proportions at the material time. The Court pointed out that Mr Sulejmanovic had not complained of heating or hygiene problems and had not specified any actual consequences of his detention for his state of health. Lastly, in accordance with the prison regulations, the total time an inmate could spend outside his or cell was 8 hours and 50 minutes per day.

Accordingly, the Court held that the treatment imposed on Mr Sulejmanovic after April 2003 had not reached the minimum level of severity that would bring it within the scope of Article 3 of the Convention. It concluded that there had been no violation of Article 3 regarding the applicant's conditions of detention after April 2003.

Concurring and dissenting opinions. Trying to shape a new jurisprudence:

Judge Sajó delivered a concurring opinion, stating that the lack of space is not, in this case, a sufficient element in itself and declaring that the inhumanity of the situation derives from the State inability to provide compensatory measures in order to lessen the seriousness of the overcrowding conditions. It is the State's indifference, according to this concurring opinion, more than the lack of personal space alone, to increase the level of severity under the minimum standard accepted.

This concurring opinion highlights the resistances to the establishment of a clear European standard concerning the minimum personal space available for prisoners and the need to keep the door open for further adjustments.

Russia, n. 205/02, §§ 47-49, 29 marzo 2007; *Labzov v. Russia*, n. 62208/00, § 44, 16 giugno 2005, e *Mayzit v. Russia*, n. 63378/00, § 40, 20 gennaio 2005.

[12] *Moisseiev v. Russia*, n. 62936/00, § 123; See also *Vlassov v. Russia*, n. 78146/01, § 84,; *Babouchkine v. Russia*, n. 67253/01, § 44,; *Trepashkin*, cited above, and *Peers v. Greece*, no. 28524/95, §§ 70-72.

The separate dissenting opinion of judge Zagrebelsky, joined by judge Jočienė, shows more of a theoretical and methodological concern. Focusing on the absolute nature of Article 3, the dissenting judge argues against the fact that the prison conditions in which *Sulejmanovic* had been held attained the minimum level of severity requested.
The dissenting opinion marks a strict difference between what is intolerable and what is desirable in terms of prison condition[13], confining the analysis of the Court to the former term, in order not to dilute the strength and absolute nature of Article 3:
"*La tendance que cet arrêt semble mettre en lumière, à savoir que la Cour place son examen dans le cadre de ce qui est « souhaitable », devrait avoir pour effet d'accroître la protection contre les traitements prohibés par l'article 3. Or, même si cette tendance se nourrit de générosité, elle favorise en réalité une dérive dangereuse vers la relativisation de l'interdiction, puisque plus l'on abaisse le seuil « minimum de gravité », plus on est contraint de tenir compte des raisons et circonstances (ou bien de réduire à néant la satisfaction équitable).*"[14]

The *Sulejmanovic* judgment appears to consolidate the previous Strasbourg jurisprudence concerning prison overcrowding, prison conditions and the scope of Article 3 of the Convention. At the same time it provides a practical approach and a set of clear principles and procedural obligations for member states, consolidating a jurisprudential trend that presumes a violation of Article 3 when the personal space available to prisoners is inferior to 3 m² and assuming that when the available space in the cell falls between 3 m² and 4 m² the violation can be assessed in the presence of other relevant factors such as such as the possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. In any other case the Court should rely on elements such as the duration of detention in particular conditions, the possibilities for outdoor exercise, the physical and mental condition of the detainee, and so on.

Impact of the decision and implementation:
The *Sulejmanovic* judgment was final in 2009 and a first set of measures was presented in an action plan of 29 June 2012 by the Italian Government. These measures included changes to the law and a programme to build new prisons.

[13] See Sulejmanovic, cited above, Dissenting Opinion by Judge Zagrebelski, pp. 18,19: "L'article 3 prévoit une interdiction absolue de la torture et des traitements inhumains ou dégradants. Même le droit à la vie (article 2) n'est pas aussi absolu. Je crois que la raison de la nature absolue de l'interdiction des traitements prohibés par l'article 3 réside dans le fait que, dans la conscience et la sensibilité des Européens, de tels traitements apparaissent comme intolérables en soi, en toute occasion et dans toute situation. Or, entre ce que l'on considère dans le cadre de l'article 3 comme étant intolérable et ce que l'on peut considérer comme étant souhaitable, il y a, à mes yeux, la même différence que celle qui a cours entre le rôle de la Cour et les rôles du CPT, du Conseil de l'Europe, des organisations non gouvernementales et des Parlements nationaux."
[14] Ibidem.

As far as general measures are concerned the first Action Plan against prison overcrowding submitted by the Italian government[15] presented a project for new prisons, called *Piano Carceri*[16] and a Special Commissioner of the Government for the Prison Infrastructures was appointed. According to the subsequent update communication by the Italian Government (26 July 2012)[17] the fulfilment of the so-called *Piano Carceri* would have created 1.323 new prison places, with 50% decrease rate of the general overcrowding rate.
Concerning alternative measures to detention, the Action plan and its update communication presents a legislative measure taken with the law n. 199/2010 creating a new form of house arrest alternative to up to one year of prison sentence (subsequently raised to 18 months by the law n. 9 of 17 February 2012), sensibly expanding the existing ordinary house arrest measure. According to the Government Communication of 2012, on May 31 2012, 6.528 prisoners were assigned to this form of house arrest.
With the legislative decree n. 161 of 7 September 2010, Italy also implemented the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.
Those measures entailed a decrease in the number of the Italian prison population. From 68.258 prisoners on the 30 of June 2010 the prison population went down to 66.487 prisoners on the 31 of May 2012.

One very important issue, though, remained dramatically unsolved. The internal way of complaining to a judicial authority about the material conditions of detention in Italy endemically showed a lack of effectiveness due to the generic nature of the measure itself. As stated by the Constitutional Court in the judgment n. 26/1999 the so-called Surveillance Court (*Tribunale di Sorveglianza*) was the judicial authority appointed to protect and guarantee the fundamental prisoners' rights against any detrimental acts or decisions of the prison administration according to the principles and procedures set in Articles 35 and 69 of the Italian Penitentiary Law. This principle was subsequently confirmed in the Constitutional Court decision n. 266/2009 but lacked a proper implementation in term of a shared normative ideology from the part of the Surveillance Judges and due to the practical ineffectiveness of the eventual judgments establishing a violation. The dearth of a defined judicial procedure in this domain only increased the difficult access to a substantial protection for prisoners in the event of a administrative violation of their fundamental rights.

The *Sulejmanovic* judgment constitutes the first serious intervention of the European Court of Human Rights in the field of prison overcrowding and conditions in Italy, requiring a reflection over the domestic prison policy and legislation and demanding a revision of the persistent paradigm of systemic violation of some of the more basic prisoners' human rights.

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[15] Available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2016607&SecMode=1&DocId=1835758&Usage=2

[16] http://www.pianocarceri.it

[17] Available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2125765&SecMode=1&DocId=1911538&Usage=2

The judgment has also shown the potential strong impact of the European Court in a topical matter and has been received with great interest by the Italian media, prison professionals and scholars[18].

2.2 The *Torreggiani* Judgment and the enactment of the Pilot Judgment Procedure against Italy

Despite the plan to decrease the prison population rate, the overcrowding situation in Italy remained a structural problem and the internal complaints system remained one of the main fragility of the Italian penitentiary architecture. The situation was acknowledged as such in the further *Torreggian*i judgment, where a Pilot Judgment Procedure was enacted by the Court. The Court decided to apply this procedure in view of the growing number of persons potentially concerned in Italy and of the judgments finding a violation liable to result from the applications in question.

Relevant sources:

As a matter of facts, considering the domestic relevant sources, the Court comments upon the internal case law concerning prison overcrowding and the possibility to enact compensatory remedies. After citing the only retrievable case of a Surveillance Judge acknowledging a violation and granting a symbolic compensation[19], the Court points out that this jurisprudence remains isolate in the Italian case law scenario, mainly due to the strong belief that the Surveillance Court lack the prerogative to grant compensatory protection and to condemn the prison administration accordingly (a position repetitively confirmed by a number of domestic judgments[20]).

The Court, contrary to the *Sulejmanovic* judgment and according to its new jurisprudential trends in prison overcrowding cases, also considers the relevant international sources in the matter under consideration, citing the Second and Seventh General Report prepared by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[21] where it is significantly stated that "the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint.".

The Court also reminds that on 30 September 1999 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation and its appendix, which provides in particular as follows:

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[18] See, inter alia:
https://antonellamascia.wordpress.com/2009/08/07/nel-caso-sulejmanovic-c-italia-la-cedu-accerta-per-la-prima-volta-la-violazione-dell%E2%80%99articolo-3-della-convenzione-per-eccessivo-sovraffollamento-carcerale/
http://camerepenali.it/public/file/Documenti/Documenti%20osservatorio%20carcere/Passione%20-%20commento%20Torregiani%20e%20altri.pdf
http://www.duitbase.it/database-cedu/sulejmanovic-c-italia
http://www.sidi-isil.org/wp-content/uploads/2010/02/Di-Perna-SIDI.pdf

[19] Surveillance Judge of Lecce, Ordinance n.17 of June, the 9th, 2011.

[20] See, *inter alia*, Surveillance Judge of Udine, Ordinance of 24 December 2011 and Surveillance Judge of Vercelli, Ordinance of 18 April 1012.

[21] (CPT/Inf (92) 3) and (CPT/Inf (97) 10).

> "Considering that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions;
> Considering that the efficient management of the prison population is contingent on such matters as the overall crime situation, priorities in crime control, the range of penalties available on the law books, the severity of the sentences imposed, the frequency of use of community sanctions and measures, the use of pre-trial detention, the effectiveness and efficiency of criminal justice agencies and not least public attitudes towards crime and punishment...
> Recommends that governments of member states:
> - take all appropriate measures, when reviewing their legislation and practice in relation to prison overcrowding and prison population inflation, to apply the principles set out in the appendix to this recommendation...".

Lastly, the Court recalls that on 11 January 2006 the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2006)2 to member States on the European Prison Rules, which replaced Recommendation No. R (87) 3 on the European Prison Rules accounting for the developments which had occurred in penal policy, sentencing practice and the overall management of prisons in Europe and directly referring to the allocation and accommodation of prisoners, stating that:

> "18.1. The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.
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> 18.2. In all buildings where prisoners are required to live, work or congregate:
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> a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;
>
> b. artificial light shall satisfy recognised technical standards; and
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> c. there shall be an alarm system that enables prisoners to contact the staff without delay.
>
> 8.3 Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.
> 18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.
> 18.5 Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation.

18.6 Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

18.7 As far as possible, prisoners shall be given a choice before being required to share sleeping accommodation.

18.8 In deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain:

a. untried prisoners separately from sentenced prisoners;

b. male prisoners separately from females; and

c. young adult prisoners separately from older prisoners.

18.9 Exceptions can be made to the requirements for separate detention in terms of paragraph 8 in order to allow prisoners to participate jointly in organised activities, but these groups shall always be separated at night unless they consent to be detained together and the prison authorities judge that it would be in the best interest of all the prisoners concerned.

18.10 Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

Assessing the effectiveness of the existing remedies:

Considering the law and specifically the Government exception of the non-exhaustion of domestic remedies, the Court significantly states that the existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Vernillo v. France*, 20 February 1991, § 27, and *Johnston and Others v. Ireland*, 18 December 1986, § 22).

However, the Court goes on by stating that there is no obligation to have recourse to remedies which are inadequate or ineffective. As a matter of facts, according to the "generally recognised rules of international law" to which Article 26 (art. 26) makes reference, there may be special circumstances that absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (*Aksoy c. Turchia*, 18 December 1996, § 52).

Concerning the burden of proof, the Court reminds that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible and capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.

In the area of complaints about inhuman or degrading conditions of detention, the Court reiterates, as already established in the previous case law and consolidated in the *Ananyev*[22] judgment, that two types of relief are

[22] *Ananyev and others v. Russia,* 10 january 2012, § 98.

possible: an improvement in the material conditions of detention and a compensation for the damage or loss sustained on account of such conditions (a preventive and a compensatory protection). If an applicant has been held in conditions that are in breach of Article 3, a domestic remedy capable of putting an end to the ongoing violation of his or her right not to be subjected to inhuman or degrading treatments, is essential. Once, however, the applicant has left the facility in which he or she endured the inadequate conditions, he or she should have an enforceable right to compensation for the violation that has already occurred.

Assessing the effectiveness of the remedies, the Court affirms that it is not a question of the administrative or judicial nature of the remedies provided in Articles 35 and 69 of the Italian Penitentiary Law, being an established principle in the Strasbourg case-law that even administrative remedies can prove effective (See, *Norbert Sikorski v. Poland*, 22 October 2009, § 111). The evaluation of the Court, therefore, needs to be grounded in the effectiveness of the remedies provided at a national level. In this respect the Court establishes that the procedure of filing a complaint to the Surveillance Court according to Articles 35 and 69 of the Italian Penitentiary Law, appears, even in the present case, lacking effectiveness in the sense that the judgment's enforcement is uncertain. Moreover, as the Court has noted in previous conditions-of-detention cases (See *Ananyev*, cited above, §111), the malfunctioning of such a preventive remedy in a situation of overcrowding is to a large extent due to the structural nature of the underlying problem. The Court rejects the exception of non-exhaustion of domestic remedies due to the ineffective nature of those same remedies. This appears as an early condemnation of the measures provided at a national level.

Principles and obligations:

On the merit of the violation of Article 3 of the Convention the Courts begins by reminding a well established positive procedural obligation for member States to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (See *Kudla v. Poland*, 26 October 2000, §94 and *Norbert Sikorski v. Polonia*, cited above § 131).

As a principle, then, the Court reiterates that in condition of persistent and serious overcrowding the Court considers the extreme lack of space as a central factor in its analysis of compliance of the applicant's detention conditions with Article 3 (See, *Karalevičius c. Lituania*, 7 April 2005, § 39). Therefore, as a rule already proposed and consolidated in the previous prison overcrowding cases[23], the Courts stated that a personal minimum space available inferior to 3 m^2 (even if the minimum space desirable according to the CP is 4 $m^{2)}$ constitutes in itself a patent violation of Article 3 of the Convention.

On the other hand, in cases in which the prison overcrowding does not attain a level of seriousness as to constitute itself a violation of Article 3 of the Convention, other elements need to be taken into account,

[23] *Kantyrev c. Russia*, n. 37213/02, §§ 50-51, 21 June 2007; *Andreï Frolov c. Russia*, n. 205/02, §§ 47-49, 29 March 2007; *Kadikis c. Lettonia*, n. 62393/00, § 55, 4 May 2006; *Sulejmanovic c. Italia*, n. 22635/03, § 43, 16 July 2009.

namely the possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. Therefore, whenever the available space falls between $3m^2$ and 4 m^2, the Court found a violation when the lack of space combined with lack of ventilation and light, limited access to open space, total lack of intimacy within the cell.
The Court observed that the applicants' living space (inferior to 3 m^2) had not conformed to the standards deemed to be acceptable under its case-law. This already degraded situation was further aggravated by several other conditions that amounted to additional suffering, such as the lack of hot water over long periods, and inadequate lighting and ventilation in Piacenza prison.

The Pilot Judgment Procedure:
Concerning Article 46, in order to assess the structural and systemic nature of this problem and to enact the PJP, the Court evaluated the statistical data of the prison condition in Italy (§54), as well as the acknowledgment of the situation at a national level, emerging clearly from the terms of the declaration of a national state of emergency issued by the Italian Prime Minister in 2010. (§§ 23-29). The structural nature of the problem was further confirmed by the number of similar applications concerning prisons overcrowding and the violation of Article 3 of the Convention.

Specific obligations resulting from the PJP:
With regard to the general measures, the Court, reminding its subsidiary role, observed that the PJP's aim is not to dictate to States their choice of penal policy or how to organise their prison systems; these raised complex legal and practical issues which, in principle, went beyond the Court's judicial remit. Nevertheless, the Court stressed the importance of the the Recommendations of the Committee of Ministers of the Council of Europe inviting States to encourage prosecutors and judges to make use of alternative measures to detention wherever possible, and to devise their penal policies with a view to reducing recourse to imprisonment, in order to tackle the problem of the growth in the prison population (Rec(99)22 and Rec(2006)13).
As far as domestic measure are concerned, the Court confirmed the approach taken in *Ananyev and Others v. Russia*, indicating a standard of procedural obligations to be followed by the State, enucleating two necessary measures, a preventive remedy and a compensatory remedy, that need to be put into effects and to coexist, in order to solve the identified structural problems. Consequently, where an applicant was being held in conditions contrary to Article 3, the most appropriate form of redress was to bring about a rapid end to the violation of his right not to be subjected to inhuman and degrading treatment. Where the person concerned had been, but was no longer held in conditions undermining his dignity, he must be afforded the opportunity to claim compensation for the violence to which he had been subjected.
The Court concluded that the State must have put in place, within a year from the date in which the judgment became final, a set of effective domestic remedies combining a preventive and a compensatory function.
Contrary to the ruling in *Ananyev*, the Court decided that the examination of applications dealing solely with

overcrowding in Italian prisons would be adjourned during that period, pending the adoption by the domestic authorities of measures at national level.

The last provision, compared to the PJP in the *Ananyev* case, represents a sort of "double standard" concerning the adjournment of similar cases. In the *Ananyev* case the Court, after having reminded that adjournment is a possibility rather than an obligation, as clearly shown by the inclusion of the words "as appropriate" in the text of Rule 61 § 6 and the variety of approaches used in the previous pilot-case judgments, evaluates that due to the fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatment, does not consider it appropriate to adjourn the examination of similar cases. On the contrary, the Court observes that continuing to process all conditions-of-detention cases in a diligent manner will remind the respondent State on a regular basis of its obligations under the Convention and in particular those resulting from this judgment. On the *Torreggiani* case, on the contrary, the Court chooses to adopt a more deferential approach and to adjourn all similar cases.

State of execution:

Following the delivery of the Torreggiani pilot judgment, the authorities submitted an Action plan (Torreggiani) (29/11/2013) DH-DD(2013)1368, which the Committee considered at its last examination of the case in March 2014.

The situation is currently as follows:

Establishment of a remedy

Preventive remedy: Law-Decree No. 146/2013 of December 2013 establishes a new remedy allowing an inmate to complain about any violation of their rights to a supervisory judge. This remedy, according to the authorities, is able to provide redress of a situation of detention in conditions contrary to Article 3; for example the judge has the power to order the transfer of an applicant out of an overcrowded cell. Following a recent judgment of the Italian Constitutional Court (135/2013), legal means are now available to enforce such an order if it is not executed by the penitentiary authorities. The first applications for this remedy have been filed and the authorities are monitoring its effectiveness.

Compensatory remedy: Law-Decree 26 June 2014, converted in the Law 117/2014 provides for the possibility of a reduction of sentence for prisoners still serving their penalties and pecuniary compensation for prisoners who have already been released. The effectiveness of such a remedy needs to be assessed in the Committee of Ministers DH meeting in June 2015 at the latest. The Court, for its part, in the cases *Stella v. Italy* (application no. 49169/09) and 10 other applications, and *Rexhepi v. Italy* (no. 47180/10) and seven other applications, has unanimously declared the applications inadmissible. After having examined the new individual remedies introduced by the Italian State following the application of the pilot judgment procedure, the Court considered that it had no evidence enabling it to find that those remedies did not offer, in principle, prospects of appropriate relief for the complaints submitted under Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights. It followed that the applicants'

complaint concerning overcrowding in prisons had to be rejected for non-exhaustion of domestic remedies. An interpretive dispute is currently occurring in Italy focusing on whether the requirement of an ongoing prejudice is necessary one in order to apply for the specific remedy. If the interpretation requiring an ongoing prejudice will prevail, this will result in a consistent decrease of the scope and the effectiveness of the compensatory remedy.

The Italian Surveillance Courts, engaged in this interpretive dispute, has so far split into two groups[24] Recently a comprehensive analysis of the jurisprudential issue has been elaborate, at a scholarly level[25], in order to highlight the main critical questions arising from the interpretive front that requires an ongoing prejudice and arguing for the practical and theoretical reasons for the *non attualisti* perspective, discussing from a legal reasoning, philosophical and sociological standpoint.

Substantive measures

Additionally, a certain number of measures foreseen in the Action plan of 29/11/2013 were introduced by the Law-Decree No. 146/2013. These measures notably increased the number of days of imprisonment per semester for a prisoner to become entitled to early release; increased use of electronic tagging as an alternative to imprisonment, as well as house arrest; and introduced more lenient penalties for minor drug-related offences.

In relation to the ongoing monitoring of the situation, the Law-Decree establishes the office of National "Garante", a type of Ombudsman for persons deprived of their liberty. Also, over the last year, the Department of Prison Administration has developed a computerised system for monitoring prison space and population, which guides reallocation of prisoners detained in overpopulated facilities (taking into account other factors such as proximity to family).

Statistics on the scale of overcrowding and monitoring

The European Court indicated in its judgment that in April 2012 the occupation rate of Italian prisons was 148% and according to the most recent information, the occupation rate in March 2014 was 124%. However, 1,972 persons are still detained in spaces of less than 3m2. Other statistics show an increased use of measures alternative to detention, a decrease of the overall prison population and a slow but steady decrease in the number of people detained on remand.

A communication of 23/05/2014 was submitted by an NGO (Radicali Italiani). This questions the statistical data provided by the Italian authorities and criticises the adequacy of the measures taken, indicating that the only urgent measure capable of redressing immediately the systematic violation is a provision of amnesty and pardon.

The Committee of Ministers examined the execution of these cases during its 1201st DH meeting (June 2014) and will resume consideration at its DH meeting in June 2015 at the latest, to make a full assessment

[24] See *supra* p. 9, so called *attualisti* and *non attualisti*.

[25] E. Santoro, "Contra CSM: parlare a nuora perché suocera intenda, Pedanti osservazioni sulla competenza dei magistrati di sorveglianza a riconoscere l'indennizzo ex art. 35-ter per la detenzione inumana e degradante", in *Penale Contemporaneo*, 22 January 2015, available at: http://www.penalecontemporaneo.it/area/3-societa/-/-/3604-contra_csm__parlare_a_nuora_perch___suocera_intenda/

of the progress made in light of an updated action plan/report to be provided.

2.3 The *Stella* judgment and the conclusion of the Pilot Judgment Procedure against Italy

With the decision in Stella v. Italy[26], the ECtHR, following the application of the pilot judgment procedure in *Torreggiani and Others v. Italy*, determined the end of the pilot procedure, considering that there is no evidence enabling the Court to find that those remedies did not offer, in principle, prospects of appropriate relief for the complaints submitted under Article 3 (prohibition of inhuman or degrading treatment) of Convention. It followed that the applicants' complaint concerning overcrowding in prisons had to be rejected for non-exhaustion of domestic remedies.

Interestingly enough, the applications in the present case had been lodged before the entry into force of the new legislative provisions, thus allowing the Court to examine the situation at a time in which no remedy was available for the applicants. Nevertheless, respectfully asserting the crucial importance of its subsidiary role, the Court considered that there were grounds in the Stella case for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged and that this exception could apply to all similar cases pending before it[27]. Those exception seems to include specifically situations in which, after a Pilot Judgment Procedure, the State enacts a number of measures aimed at resolving the structural problem at a national level[28].

The Court stress again that a combination of preventive and compensatory measures is needed in matter concerning material condition of detention. With regard to the preventive remedy, the Court noted that, as of 22 February 2014, persons detained in Italy could lodge a judicial complaint with the Surveillance judge in order to complain of serious breaches of their rights, including the right to enjoy sufficient living space and to enjoy appropriate physical living conditions (according to article 6 of the Law n. 354/1975).

Great importance is given to the effectiveness of the remedies and in order for the preventive measure to constitute an effective remedy, this should be implemented by an authority capable of rendering binding and enforceable decisions indicating appropriate redress with a speedy procedure and in respect of the adversarial principle.

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[26] *Stella v. Italy*, application no. 49169/09, 16 September 2014.

[27] §45 "*Soucieuse d'affirmer l'importance cruciale du caractère subsidiaire de son rôle, la Cour estime qu'une exception au principe général selon lequel la condition de l'épuisement doit être appréciée au moment de l'introduction de la requête (paragraphe 40 ci-dessus) se justifie en l'espèce et doit s'appliquer à toutes les affaires similaires pendantes devant elle et qui n'ont pas encore été déclarées recevables. Par conséquent, la Cour examinera l'exception du Gouvernement à la lumière de l'état actuel du système juridique national.*"

[28] §41. "*L'épuisement des voies de recours internes s'apprécie en principe à la date d'introduction de la requête devant la Cour. Toutefois, comme elle l'a dit à maintes reprises, cette règle souffre des exceptions qui peuvent se justifier par les circonstances d'une affaire donnée (Baumann c. France, no 33592/96, § 47, CEDH 2001‑V, et Brusco, précité). Parmi ces exceptions, il y a sans doute les situations dans lesquelles, à la suite d'un arrêt pilote dans lequel la Cour a constaté une violation systémique de la Convention, l'État a instauré une voie de recours pour redresser au niveau national les griefs soulevés dans les requêtes pendantes devant elle concernant des problèmes similaires (Łatak c. Pologne (déc.), no 52070/08, § 79, 13 octobre 2010 ; voir aussi Demopoulos et autres, précité, §§ 87-88 ; Broniowski c.*

With regard to the compensatory remedy, the Court noted that the new remedy introduced by Legislative Decree no. 92/2014 was accessible to everyone who alleged that he or she had been imprisoned in Italy in physical conditions that were contrary to the Convention.

This remedy provided for both a reduction in sentence and monetary compensation for persons who had been imprisoned in conditions contrary to Article 3 of the Convention. The firs remedy is possible for prisoners who are still in prison, while the second one is available for former prisoners who are no longer incarcerated.

It is worthy to note that, considering the measure of reducing the sentence of the person concerned in proportion to each day that he or she has spent in inhuman or degrading conditions, the Court, in *Ananyev and Others* (§§ 222-26) expressed some misgivings in relation to this form of redress. However in *Stella* it upheld it as capable of providing adequate and sufficient redress to persons who are still incarcerated if it entails an acknowledgement of the breach of Article 3 of the Convention and provides measurable reparation of this breach. Obviously, such a remedy can only be adequate in respect of persons who are still in detention.

Considering the second form of redress, the provision of monetary compensation – the only one possible in respect of persons who are no longer incarcerated – the Court, again showing a deferential approach, assesses that once a state has decided to introduce in its legal system a compensatory remedy for a violation of the Convention, the widest possible margin of appreciation must be granted, in order for it to organize this remedy consistently and in accordance with the national legal system and its traditions and in conformity with the national quality of life. Accordingly, the Court, is able to accept the determination of a sum inferior to its standard and nonetheless "not unreasonable"[29].

Significantly, the Court also reminds that is the task of the Committee of Ministers to monitor and evaluate the scope and effectiveness of the general measures adopted by the member state in order to redress the violation, nonetheless a compensatory remedy, although important, is not a way for the state to relinquish its duty to carry out the structural reforms needed as a key answer to the issue of overcrowding.

In conclusion, the Court considered that it had no evidence on which to find that the remedies in question did not offer, in principle, prospects of appropriate relief for the complaints submitted under Article 3 of the Convention. Nevertheless, the Court underlines that this current evaluation does not undermine an eventual future re-assessment of the effectiveness of the remedies, notably considering the ability of domestic Courts to provide a uniform case-law that is compatible with the requirements of the Convention[30].

Pologne [GC], no 31443/96, §§ 191-193, CEDH 2004‑V, et Nagovitsyn et Nalgiyev c. Russie (déc.), nos 27451/09 et 60650/09, §§ 25-26 et 33-44, 23 septembre 2010)."

[29] §61"… Ainsi, la Cour peut parfaitement accepter qu'un État qui s'est doté de différents recours et dont les décisions conformes à la tradition juridique et au niveau de vie du pays sont rapides, motivées et exécutées avec célérité, accorde des sommes qui, tout en étant inférieures à celles fixées par la Cour, ne sont pas déraisonnables" (idem, § 96).

[30] §63. "*La Cour estime qu'elle ne dispose d'aucun élément qui lui permettrait de dire que le recours en question ne présente pas, en principe, de perspective de redressement approprié du grief tiré de la Convention. La Cour souligne toutefois que cette conclusion ne préjuge en rien, le cas échéant, d'un éventuel réexamen de la question de l'effectivité du recours en question, et notamment de la capacité des juridictions internes à établir une jurisprudence uniforme et compatible avec les exigences de la Convention (Korenjak c. Slovénie, no 463/03, § 73, 15 mai 2007, et Şefik Demir c. Turquie (déc.), no 51770/07, § 34, 16 octobre 2012), et de l'exécution effective de ses décisions. Elle conserve sa*

The findings in Stella have been recently confirmed in two subsequent pilot procedure judgment: *Neshkov and Others v. Bulgaria*[31] and *Varga and Others v. Hungary*[32].
The Court in Neshkov assessed the effectiveness of the Italian preventive measure (art. 35 bis, Law 354/1975), proposing the Italian model to Bulgaria, underlining the nature of the authority supervising prisons, monitoring violations of prisoners' rights and capable or rendering binding and enforceable decisions, indicating appropriate redress:

> 282. …Examples of such authorities are the Independent Monitoring Boards (formerly Boards of Visitors) in the United Kingdom and the Complaints Commission (beklagcommissie) in the Netherlands (see *Ananyev and Others*, cited above, § 215), as well as judges for the execution of sentences in Italy, with the powers that they were granted in 2014 (see *Stella and Others*, cited above, §§ 18 and 48-49, as well as *Orchowski*, cited above, § 154 *in fine*).

Discussing about possible model of compensatory remedies to be introduced in Bulgaria, the Court also evaluate positively Italy as a paradigmatic experience for tackling down the issue of prison condition and violations of article 3. In order for the Bulgarian State to comply with the need for a general remedy allowing protection at domestic level of the rights and freedoms enshrined in the Convention, in this case, the right not to be subjected to inhuman or degrading treatment:

> Another option is to put in place special rules laying down in detail the manner in which claims concerning conditions of detention are to be examined and determined, as was recently done in Italy (see Stella and Others, cited above, §§ 19-20 and 56-63).

In the *Varga* judgment, the Court makes an even more general statement, ratifying the favour for the Italian experience, by saying that:

> The recent example of Italy shows that such measures, implemented in the context of a pilot procedure, can contribute to solving the problem of overcrowding (see Stella and Others v. Italy (dec.), nos. 49169/09, 54908/09, 55156/09, 61443/09, 61446/09, 61457/09, 7206/10, 15313/10, 37047/10, 56614/10, 58616/10, §§ 11-14, 21-24 and 51-52, 16 September 2014).

This positive evaluation of the Italian context will, in a recent future, need to take into account the real

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compétence de contrôle ultime pour tout grief présenté par des requérants qui, comme le veut le principe de subsidiarité, ont épuisé les voies de recours internes disponibles (Radoljub Marinković c. Serbie (déc.), no 5353/11, §§ 49-61, 29 janvier 2013)."

[31] *Neshkov and Others v. Bulgaria*, Applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.

[32] *Varga and Others v. Hungary*, application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10March 2010.

effectiveness of the interpretation and application of the new remedies by the Surveillance Judge (see *infra*), an issue that has so far shown a reluctant attitude and a restrictive legal reasoning approach that are potentially undermining the real reach of the "Italian model".

3. Article 3 of the First Protocol to the Convention and the infringement of prisoners' right to vote: *"there has been no violation". Scoppola v. Italy n.3*

The prisoners' right to vote saga within the Strasbourg case law:
Article 3 of the First Protocol to the Convention (P1-3) has long been considered as a norm imposing specific positive obligations upon member states, namely the obligation to "hold free elections at reasonable intervals by secret ballot" in order to "ensure the free expression of the opinion of the people in the choice of legislature". Only with *Mathieu-Mohin and Clerfayt v. Belgium*[33] the Court, following the path already taken by the Commission, recognized that P1-3 implied "subjective rights of participation – the right to vote and the right to stand for election to the legislature[34]".
As political in nature the said rights are not to be considered absolute:

> Since Article 3 (P1-3) recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations (see, *mutatis mutandis*, the Golder judgment of 21 February 1975, Series A no. 18, pp. 18-19, § 38). In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (P1-3) (Collected Edition of the "Travaux Préparatoires", vol. III, p. 264, and vol. IV, p. 24). They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.[35]

The recognized wide margin of appreciation granted a sort of immunity from condemnations to member States for almost two decades, until some important case reverted the scenario.
The leading jurisprudence on this new trend concerned cases of disenfranchisement and *Hirst (n.2) v. U.K.*[36] is unanimously considered as one of the most important Grand Chamber judgment on P1-3[37].

[33] *Mathieu-Mohin and Clerfayt v Belgium*, 2.3.1987.
[34] Ivi, §51.
[35] Ivi, §52.
[36] *Hirst (n.2) v. UK* [GC], 6.10.2005.
[37] D J Harris, E Bates, M O'Boyle, C Warbrick and C Buckley, *Law of the European Convention on Human Rights*, OUP, Oxford, 2009; Rory O'Connell, *Realising political equality: the European Court of Human Rights and positive obligations in a democracy*, NILQ 61(3): 263–79.

The Court in *Hirst* significantly reminds that prisoners continue to enjoy every fundamental rights and freedoms enshrined in the Convention, with the exception of the right to freedom. Specifically voting needs to be understood not as a privilege but as a right:

> the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see Mathieu-Mohin and Clerfayt, cited above, p. 23, § 51, citing X v. Germany, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41)[38].

Any restrictions imposed on this right need to comply with the *Mathieu-Mohin and Clerfayt* test, concerning the legitimacy of the aim and the proportionality of any restrictive measure taken by the State. As the Court states:

> The severe measure of disenfranchisement must not, however, be resorted too lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.[39]

The U.K. legislation on disenfranchisement[40] did not pass the test on the ground of proportionality, because of its "automatic and indiscriminate nature", thus showing that no attempts of weighting the competing interests or assessing the proportionality of a blanket ban on the right of a convicted prisoner to vote had ever been sought by the English Parliament.

Due to the open texture of the *Hirst* judgment, many questions had been left unsolved or simply implied by the reasoning. As a consequence, the findings in *Hirst* were open to two different kind of readings, a minimalistic and a dynamic one. The latter was further developed in a subsequent case: *Frodl v. Austria*[41].

The Court in Frodl developed an idea sketched in the legal resoning of *Hirst*, when, expressly referring to the Venice Commission, the Court stated that "as in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.[42]"

The findings in *Frodl* offered a more specific guidance than those in *Hirst* in order for member states to comply with P1-3, creating what the Court called the "*Hirst* test" that entailed that any decision on

[38] Ivi, §59.
[39] Ivi, §71.
[40] Section 3 of the Representation of the People Act 1983 ("the 1983 Act") provides: "(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election."
[41] *Frodl v. Austria*, 8.4.2010.
[42] Hirst, cited above, §71.

disenfranchisement should be taken by a judge and that there must be a link between the offence committed and issues relating to elections and democratic institutions[43].

In *Greens and M.T. v United Kingdom*[44] (November 2010) the Court adopted, on the other hand, a minimalist reading of the *Hirst* case, directly rejecting the test, as interpreted by the Court in *Frodl* and reminding that the Grand Chamber in *Hirst* "declined to provide any detailed guidance" to render the State legislation compatible with P1-3, thus confirming the subsidiary role of the Court itself as well as the wide range of policy alternatives in the given context[45].

The next step of this ping-pong like case law is a clear overturning of the *Frodl* legal reasoning by the Grand Chamber case: *Scoppola v. Italy (n.3)*[46] that confirm and settle the minimalist approach of the Court in *Greens*. Before then, in January 2011, the *Scoppola* Chamber judgment[47] applied *Frodl* confirming the judicial decision on disenfranchisement as an essential point in any legislation compatible with P1-3 (as well as the respect for the nature and gravity of the offence committed). In 2012, however, the Grand Chamber panel agreed to the Italian Government rehearing request. As a matter of fact the discrepancy between *Frodl* and *Greens* needed to be solved and a new Grand Chamber judgment was felt as urgent and necessary. The British Government intervened in *Scoppola* with a third-party intervention seeking to re-open the margin of appreciation debate and asking the court to reverse the outcome and possibly the law in *Hirst*.

The judgment took a clear position in the *Frodl-Greens* dispute rejecting the broad view of the *Hirst* principle taken by the Court in *Frodl*[48], thus referring to a strict interpretation of the *Hirst* judgment and adopting a textualist approach, reminding that the wording of *Hirst* made no explicit mention to the intervention of a judge "among the essential criteria for determining the proportionality of a disenfranchisement measure[49]":

> While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed[50].

As a consequence, the absence of an *ad hoc* judicial decision concerning disenfranchisement is not sufficient for the finding of a violation of P1-3. The national measure needs to be found disproportionate to the

[43] It must be noted that on 4 October 2010 the panel of the Grand Chamber declined to accept a referral request from the respondent Government in Frodl.
[44] *Greens and M.T. v United Kingdom*, 23.11.2010.
[45] Ivi, §113.
[46] *Scoppola (n.3) v. Italy*, [GC] 22.5.2012.
[47] *Scoppola (n.3) v. Italy,* 18.1.2011
[48] *Scoppola,* [GC], cited above, §99.
[49] Ibid.
[50] Ibid.

legitimate aim pursued "in terms of the manner in which it is applied and the legal framework surrounding it[51]".

The Italian legislation[52] passed the proportionality test, as interpreted in *Scoppola*, in virtue of its "concern to adjust the application of the measure to the particular circumstances of the case[53]" and thanks to the rehabilitation procedure that allows *inter alia* to recover the right to vote after three years after having finished serving a sentence.

The minimalist, textualist and self-restraint oriented approach taken in *Scoppola* was able to regain the vote of the missing dissenting judges in *Hirst* and was contested, in a dissenting opinion, only by judge David Thór Björgvinsson. Starting by examining the legitimate aims pursued by disfranchisement policies, namely preventing crime and enhancing civil responsibility and respect for the rule of law, the dissenting judge argues that if disfranchisement is to be understood as a penal measure, then *Frodl* applies and a judicial intervention for each individual case is a mandatory requirement. As for the second aim, it could be questioned whether "disenfranchising a whole sector of the population…contributes to the proper functioning and preservation of the democratic process[54]". Focusing, then, on the alleged differences between the English and Italian legislation, the dissenting opinion argues that a slight difference could be eventually retrieved insofar that the Italian legislation "is stricter in the sense that it deprives prisoners of their right to vote beyond the duration of their prison sentence and, for a large group of prisoners, for life[55]". Eloquently the dissenting judge concludes:

> In sum, I find the distinction made in this judgment between these two cases as a ground for justifying different conclusions to be unsatisfactory. The present judgment offers a very narrow interpretation of the *Hirst* judgment and in fact a retreat from the main arguments advanced therein. Regrettably the judgment in the present case has now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners' voting rights in Europe[56].

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[51] Ivi, §104.

[52] As indicated by the Court : « 33. In the Italian legal system a ban from public office is an ancillary penalty (Article 28 of the Criminal Code) which entails forfeiture of the right to vote (Presidential Decree no. 223/1967) and for which express provision is made by law in connection with a series of specific offences, irrespective of the duration of the sentence imposed – such as embezzlement of public funds, by a public official (peculato) or otherwise, extortion, and market abuse (punishable, respectively, under Articles 314, 316 bis, 317 and 501 of the Criminal Code); certain offences against the judicial system, such as perjury by a party, fraudulent expertise or interpretation, obstructing the course of justice and "disloyal counsel" (consulenza infedele) (punishable, respectively, under Articles 371, 373, 377 and 380 of the Criminal Code); and offences involving abuse and misuse of the powers inherent in public office (Article 31 of the Criminal Code).
34. Conviction for any offence punishable by imprisonment also results in the offender being banned from public office. The ban from public office may be temporary (where the sentence is three years or more) or permanent (for sentences of five years or more and life imprisonment).

[53] *Scoppola,* (GC), cited above, §106.

[54] Ivi, Dissenting Opinion, p. 26.

[55] Ivi, Dissenting Opinion, p. 28.

[56] Ivi, Dissenting Opinion, p. 29.

Norms and Relevant Sources used by the ECtHR:
The analysis of the norms used by the Court in assessing a violation of Article 3 of the First Protocol with respect to disenfranchisement laws appears relevant, particularly considering the variety and richness of international and comparative perspectives.
It can be argued that on a so unexplored ground, performing a dynamic and activist jurisprudence, the Court need to rely on a multitude of different sources of international dimension or of persuasive authority.
In its first judgment concerning the prisoners' right to vote, *Hirst (n.2) v. U.K.*, the Court provides a list of the relevant international legal sources that cover the issue.

First of all The Court makes reference to Article 25[57] and Article 10[58] of the **International Covenant on Civil and Political Rights**, along with Comment no. 25(57) adopted by the Human Rights Committee under Article 40 § 4 of the International Covenant on Civil and Political Rights on 12 July 1996. The Committee stated, *inter alia*, concerning the right guaranteed under Article 25: "14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote."

Secondly the Court cites **The European Prison Rules (Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe).** The Court explicitly cites the following principle: "64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this."

The Court also considers the **Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners.** This recommendation, adopted on 9 October 2003, noted the increase in life sentences and aimed to give guidance to member States on the management of long-term prisoners.

[57] "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:
(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) to vote ..."
[58] "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. "
3. "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. ..."

Code of Good Practice in Electoral Matters

This document adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002 includes the Commission's guidelines as to the circumstances in which there may be a deprivation of the right to vote or to be elected.

the **United Nations Human Rights Committee**: in its General Comment no. 25 (1996) on Article 25 of the International Covenant on Civil and Political Rights, the Human Rights Committee expressed the following view: "14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote". In its views on the *Yevdokimov and Rezanov v. Russian Federation* case (21 March 2011, no. 1410/2005), the Human Rights Committee, referring to the Court's judgment in *Hirst (no. 2)* [GC] (cited above), stated: " 7.5 ... the State party, whose legislation provides a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment, did not provide any arguments as to how the restrictions in this particular case would meet the criterion of reasonableness as required by the Covenant. In the circumstances, the Committee concludes there has been a violation of article 25 alone and in conjunction with article 2, paragraph 3, of the Covenant..."

The Court, in a broad overview take also into account an instrument related to a different international regional system for the protection of rights, the **American Convention on Human Rights** of 22 November 1969 which includes Article 23[59]: "Right to Participate in Government".

Finally the Court cites again the Venice Commission Code of Good Practice in Electoral Matters. This document, adopted by the European Commission for Democracy through Law ("the Venice Commission") at its 51st plenary session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002, lays out the guidelines developed by the Commission concerning the circumstances in which people may be deprived of the right to vote or to stand for election.

Since the *Hirst* judgment the Court has also engaged in a **comparative analysis of the different legislations and practices in the contracting states** in order to assess whether a certain ground of uniformity could be retrievable. The result shows a quite uneven context: eighteen countries allow prisoners to vote without

[59] "1. Every citizen shall enjoy the following rights and opportunities:
a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."

restriction[60], thirteen countries where all prisoners are barred from voting or unable to vote[61], while in twelve countries prisoners' right to vote could be limited in some other way[62].

In *Scoppola*, the Court updated the situation (post-*Hirst*) and attests the steps toward the abandoning of the discretional and absolute disenfranchisement in Europe:

> **COMPARATIVE LAW**
>
> A. The legislative framework in the Contracting States
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> 45. Nineteen of the forty-three Contracting States examined in a comparative law study place no restrictions on the right of convicted prisoners to vote: Albania, Azerbaijan, Croatia, Cyprus, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Moldova, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia" and Ukraine.
>
> 46. Seven Contracting States (Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and the United Kingdom) automatically deprive all convicted prisoners serving prison sentences of the right to vote.
>
> 47. The remaining sixteen member States (Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Romania, San Marino, Slovakia and Turkey) have adopted an intermediate approach: disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence. Italy's legislation on the subject resembles that of this group of countries.
>
> 48. In some of the States in this category the decision to deprive convicted prisoners of the right to vote is left to the discretion of the criminal court (Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Poland, Portugal, Romania and San Marino). In Greece and Luxembourg, in the event of particularly serious offences disenfranchisement is applied independently of any court decision.

Lastly, both in the *Hirst* and *Scoppola* cases, the Court engages in an interesting overview of the jurisprudential trends at a global level, on the issue of disenfranchisement and of prisoners' right to vote, openly integrating the ongoing transnational **judicial dialogue** among courts at a global scale. Through the

[60] Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, "the former Yugoslav Republic of Macedonia", Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland and Ukraine.

[61] Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia , Turkey and the United Kingdom

[62] Austria , Bosnia and Herzegovina , France , Greece , Italy , Luxembourg , Malta , Norway , Poland , Romania and Spain.

use of this argumentative tool, also called judicial borrowing, the Court, in the *Hirst* case, considers the legal reasoning of the Supreme Court of Canada and of the Constitutional Court of South Africa[63].
As a matter of facts in the issue of disenfranchisement, the leading case at a global level is the Canadian *Sauvé v. the Attorney General of Canada (no. 2)* where the Supreme Court on 31 October 2002 held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional as it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, thus providing what can be considered the highest point of protection for the prisoners right to vote at a global scale. As the Court notes:

> The majority opinion given by McLachlin CJ considered that the right to vote was fundamental to their democracy and the rule of law and could not be lightly set aside. Limits on this right required not deference, but careful examination. The majority found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives[64].

Interestingly enough, the Strasbourg Court chooses to quote also from the dissenting opinion of Justice Gonthier in *Sauvé* to show the opposite legal reasoning justifying possible (not absolute) limitations to the right in question:

> The disenfranchisement of serious criminal offenders served to deliver a message to both the community and the offenders themselves that serious criminal activity would not be tolerated by the community. Society, on this view, could choose to curtail temporarily the availability of the vote to serious criminals to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, were prerequisites to democratic participation. The minority referred to the need to respect the limits imposed by Parliament and to be sensitive to the fact that there may be many possible reasonable and rational balances.[65]

Gonthier's dissenting opinion serves the scope of the Strasbourg Court, showing a persuasive reasoning for the legitimacy of the aims pursued by the UK legislation, thus echoing the wide margin of appreciation left

[63] *August and Another v. Electoral Commission and Others (CCT8/99: 1999 (3) SA 1).* On 1 April 1999, the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. It noted that, under the South African Constitution, the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms and it underlined the importance of the right:
"The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."
[64] *Hirst* , cited above, §36.
[65] Ivi, §37.

to states in the organization of their electoral system. Gonthier's deferential approach *vis à vis* the Canadian legislative power matches the need for self-restraint that the European Court wants to show *vis à vis* the member states, implying that limitations to the rights enshrined in P1-3, even if subject to the scrutiny of the Court, are abstractly possible.

In *Scoppola* the Grand Chamber add references to another South African case[66] and to a new Australian case[67], both ruling against a general ban on prisoners' right to vote.

This distinct attitude to a highly performative argumentative tool (i.e. the transnational judicial borrowing) represented at the time a rare model for the European Court of Human Rights and was open to criticisms, in the light of the wide margin of appreciation and of the sensitiveness of the issue at stake (the shaping of a democratic order through elections). And criticisms came immediately within the joint dissenting opinion of judges Wildhaber, Costa, Lorenzen, Kobler and Jebens in the *Hirst* judgment. Arguing against a European trend for the protection of prisoners' right to vote and supporting a wider margin of appreciation for states member (also due to the lack of a consensus among contracting parties to the European Convention on the matter), the dissenting judges remark the excessive weight given by the majority to the transnational case-law concerning disenfranchisement at the expense of an in depth European comparative analysis:

> The majority submit that "it is a minority of Contracting States in which a blanket restriction on the right of serving prisoners to vote is imposed or in which there is no provision allowing prisoners to vote" (see paragraph 81 of the judgment). The judgment of the Grand Chamber – which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa – unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States[68].

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[66] *Minister of Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* (no. 3/04 of 3 March 2004). The ECtHR considered that : « 1. The Constitutional Court of South Africa examined whether the 2003 amendment to the Electoral Act, depriving of the right to vote those prisoners serving sentences of imprisonment without the option of a fine, was compatible with the Constitution.
2. The Constitutional Court found the measure unconstitutional, by nine votes to two, and ordered the Electoral Commission to take the necessary steps to allow prisoners to vote in elections.
3. Chaskalson CJ, for the majority, concluded that in a case such as this where the government sought to disenfranchise a group of its citizens and the purpose was not self-evident, there was a need for it to place sufficient information before the court to enable it to know exactly what purpose the disenfranchisement was intended to serve. Moreover, in so far as the Government relied upon policy considerations, there should be sufficient information to enable the court to assess and evaluate the policy that was being pursued (see paragraphs 65 and 67 of the judgment). Chaskalson CJ further noted that this was a blanket exclusion aimed at every prisoner sentenced to imprisonment without the option of a fine, and that there was no information about the sort of offences concerned, the sort of persons likely to be affected and the number of persons who might lose their vote for a minor offence.
4. Madala J, for the minority, considered that the temporary removal of the vote and its restoration upon the prisoner's release was in line with the Government's objective of balancing individual rights and the values of society, particularly in a country like South Africa with its very high crime rate (see paragraphs 116 and 117 of the judgment). »

[67] *Roach v. Electoral Commissioner* [2007] HCA 43 (26 September 2007) : The Strasbourg Court observed on the case : « 60. The High Court noted, *inter alia*, that the earlier legislation took into account the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process, beyond the bare fact of imprisonment (see paragraph 98 of the judgment). »

[68] *Hirst*, cited above, joint dissenting opinion, §30.

Nevertheless the transnational comparative approach on the subject of disenfranchisement[69], has taken root in the Court's case-law and has been confirmed and developed (as shown) in the *Scoppola (n.3)* judgment.
As Nicolas Hervieu noted[70] this transnational comparative approach that searches for persuasive legal reasoning well beyond the regional dimension of the Council of Europe, is used as a symbolic tool to inscribe the Strasbourg jurisprudence in the global judicial context, showing a trend for the protection of prisoners' right to vote and allowing the Court to neglect or minimize the previous cases in which the Commission tolerated blanket ban on prisoners' right to vote[71].

Procedural obligation:
As far as procedural obligations are concerned worthy is to note that the Court missed an important occasion in establishing another implicit procedural obligation. The story begun with the *Frodl* judgment, as described above. The court in *Frodl* attempted to provide a clear guidance establishing a positive procedural obligation concerning the need for a judicial adjudication on disenfranchisement matters:

> Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law but by the decision of a judge following judicial proceedings[72].

This jurisprudential trend was further reinforced in the Chamber judgment in *Scoppola*[73], where the Court stated:

> La Cour rappelle enfin avoir considéré dans sa jurisprudence récente qu'en application des critères établis dans l'affaire Hirst c. Royaume-Uni (no 2) ([GC], précité), il est essentiel que la décision portant sur l'interdiction du droit de vote soit prise par un juge et qu'elle soit dûment motivée. Cette décision doit expliquer notamment les raisons pour lesquelles, compte tenu des circonstances

[69] For a comparative analysis of judicial reasoning on the issue of disenfranchisement at a global level, see M. Plaxton et H. Lardy, "Prisoner Disenfranchisement: Four Judicial Approaches", Berkeley Journal of International Law, Vol. 28, n° 1, 2010, pp. 101-141; see also, R. Ziegler, "Legal Outlier, Again? US Felon Suffrage : Comparative and International Human Rights Perspectives", Boston University International Law Journal, Vol. 29, n° 197, pp. 233-255. The first court to reject a ban on prisoners' right to vote was Israel. The issue of prisoner voting rights arose in the case of Yigal Amir, the assassin of Prime Minister Yitzak Rabin. Yet the Court upheld his right to vote, along with other incarcerated persons, in the case of *Alrai v. Minister of the Interior50(2) PD 18 [1996] (Isr.)*, declaring that we must separate "contempt for this act" from "respect for his right". Significantly the Supreme Court of the US is not playing any role in this dialogue (see D. Parkes, "Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws", Temple Political & Civil Rights Law Review, 2003, Vol. 13, n° 1, pp. 71-112).
[70] N. Hervieu, "Le droit de vote des détenus : histoire sans fin pour un contentieux décisif", *Revue Trimestrielle des Droits de l'Homme*, 2013/94, p. 439.
[71] See above, p. 2, footnote n.7.
[72] *Frodl*, cited above, §28.
[73] *Scoppola*, §43.

> particulières de chaque affaire, l'interdiction litigieuse se révèle nécessaire (Frodl c. Autriche, no20201/04, §§ 34 et 35, 8 avril 2010).

Here, along with the obligation of a judicial decision another implicit procedural obligation appears: the necessity of detailed reasoning of judicial decision. As the Chamber judgment was repealed by the Grand Chamber in *Scoppola (n.3)*, those procedural obligations were blatantly erased[74].
This overruling is particularly significant within the European case-law on P1-3 for it is clearly opposed to the procedural obligations on P1-3 resulting from the reasoning of the Court in *Alajos Kiss v. Hungary*[75], a case concerning the right to vote for mentally disabled persons. Here the Court considers that:

> an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote[76].

The differentiated treatment poses a series of critical questions, the main being an internal incoherence within the Strasbourg case law as to the protection of two liminal and vulnerable groups within our societies[77].

From *Hirst* on the question of the margin of appreciation has been at the core of the Strasbourg case law. Formally the principles set in that landmark judgment have been constantly mentioned and ratified by the Court, but effectively the *Scoppola* case showed how sensitive is the dispute between self-restraint and activism and to what extent the concept margin of appreciation has became a symbolic issue, open to different and conflicting modulations.
Nevertheless the constant reluctance to offer a proper guidance as to the parameters to be followed by the states in order to comply with P1-3 is a proof of the difficult balance between setting a minimum standard of protection and exposing the Court to harsh criticisms. As Judge Caflisch argued in his concurring opinion in *Hirst*, the ECtHr had the authority to set minimum standard, while according to the five dissenting judges in that case, that same common standard is not retrievable in the practices and policies of the member states and cannot be artificially built up by the Court.
The dispute is still on going, but the deferential approach can be considered the actual trend. *Scoppola* was able to gather together the dissenting judges around a minimalist reading of the findings in *Hirst* at the expenses of a persisting rhetorical and practical ambiguity. A single dissenting opinion was registered in *Scoppola*, but significantly judge Björgvinsson begins by pointing out that:

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[74] For a critical analysis of the ping-pong like case-law on this particular issue, see N. Hervieu, op.cit., p. 433.
[75] *Alajos Kiss v. Hungary*, 20.5.2010. For a comment see, J. Dos Santos, "La privation du droit de vote frappant les incapables majeurs", *Revue Trimestrielle des Droits de l'Homme*, 2012/90, p. 347.
[76] *Alajos Kiss*, cited above, §44.
[77] See N. Hervieu, cited above, passim.

> In the context of this case Article 3 of Protocol No.1 has two important aspects to it. One relates to the organisation of the electoral system in a given country, that is, the organisation of the electoral process, division into constituencies, the number of representatives for each constituency, and so on. The other relates to the rights of individuals to vote in general elections. As regards the former, the Contracting States have, and should have, wide discretion or a wide margin of appreciation in the organisation of the electoral system and the electoral process in general. However, as to the latter point, which relates directly to the individual's right to participate in the electoral process, the margin is much narrower. It follows that the necessity of limitations on the rights of citizens in a democratic society to vote in the election[78].

This clear statement seems to be a minority position for now, but it has the advantage to present a distinct reasoning to solve the "margin of appreciation" issue in a substantial way.

[78] *Scoppola*, cited above, p. 25.

PART II - National legal systems for prisoners' rights protection

1. Preventive remedies for the protection of prisoner's rights before the ECtHR's decision Torreggiani and Others v. Italy (08.01.2013)

1.1 Nature of the remedy and competent Judge

Penitentiary law provided few special remedies for the protection of prisoners' rights (art. 4). Traditionally, the only judicial authority competent for the protection of prisoners' rights in Italy has been the Surveillance Court ("Tribunale di Sorveglianza").

According to the article 69 of Italian Penitentiary Law[79] this special Court has:

1) the duty to supervise the organization of prison and to advise the Ministry of Justice;

2) the power to decide for the application of security measures for offenders considered "socially dangerous", such as: mentally disordered individuals unfit to plead convicted (psychiatric hospital detention), deportation of foreigner convicted at the end of the execution;

3) To supervise and approve the treatment program provided by the prison staff;

4) To supervise the respect of prisoners' rights;

5) To apply alternative measure to imprisonment (such as probation, home detention, etc…);

6) To supervise the correct application by Prison authorities of the disciplinary sanctions to prisoners;

According to the Italian Penitentiary law, the Surveillance Court has the special and exclusive duty to decide all cases - although with few exceptions - in which a decision of the prison administration violates the prisoners' rights (art. 35). It's important to highlight that this norm excludes the jurisdiction of the Administrative Courts for any prisoners' claims. In the Italian system, Administrative Courts have the general duty to assess the lawfulness of administrative decisions and have the power to annul them when those decisions are defective for lack of jurisdiction, breach of law or abuse of power. The Penitentiary Law gives the duty to assess the lawfulness of prison administration decisions to the Surveillance Court that, we'll see, has not the same powers of the Administrative Courts.

1.1.2 Competent Judge 2: claims concerning prison labour.

Additionally, Surveillance Courts used to be competent for the protection of prisoners' rights in the field of prison labour (Art. 69 of Penitentiary law). A Constitutional Court decision (No. 341 of 2006) has ruled the unconstitutionality of Article 69 and stated the competence of the Ordinary Courts in the field of prison labour. The decision of the Court was based on that fact the procedure of the Surveillance Court didn't guarantee a proper litigation since not all counterparts had the right to appear in front of the judge:

[79] Bill 26 July 1975, n. 354, *Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*.

1) According to the Court the procedure provided by the Penitentiary Law, Article 14.ter, allows the inmates to be present, but prison authorities can just send a written pleading and a private employer is not allowed to appear or to present any pleading. The constitutional right to defence (Article 24 of the Italian Constitution) of the employer was not guaranteed.
2) For the same reasons the constitutional right to defence of the detainees was not guaranteed because all the procedure is mainly based on written pleading without a proper litigation trial, as requested by Article 24 of the Constitution.
As a result, although for protective reasons, the Constitutional Court's decision has made much more complicated to access to a Court in case of violation of prisons labour's rules. Now the prisoner needs to be assisted by an attorney and the ordinary labour trial lasts on average 2 years, thus most of the prisoners are discouraged by the length and the costs of the procedure. The old procedure was faster: the prisoner could directly apply to Surveillance Judge and the decision used to arrive in few months. As we will discuss further, the reform following the ECtHR's *Torreggiani* decision could have an impact on this issue

1.2 Protected categories

Even if penitentiary law didn't define explicitly the categories of prisoners covered by the protection of art. 35, it included both convicted prisoners and prisoners on remand, since art. 35 generically referred to "prisoners" and "internati"[80]. Furthermore prisoners on remand, although they could not receive a treatment program, they could still ask to be admitted to prison labour and educational programs, consequently they could apply to the Surveillance Judge for violations concering these issues.

1.3 Procedure and powers of the Court

Article 69 of the Penitentiary law assign to Surveillance Courts the task to protect prisoners' rights and the power to give mandatory orders to prison authorities in case any violation occurred. There has been a long dispute about the judicial nature of the procedure to appeal against a prison authority's violation and about the effectivity of the powers of the judge.

1.3.1 Procedure.

Before the *Torreggiani* judgment, there were only two cases in which a prisoner could appeal to the Surveillance Court against a prison authority's decision, namely violations of the norms concerning the disciplinary sanctions or the prison labour system (Article 69 of the Penitentiary law). In these cases, according to Article 14 ter of the Penitentiary law, the procedure was as follows: the prisoner could appeal personally (no need of lawyer to apply) within 10 days from the violation and the Court had to decide within the following 10 days. The prisoner and the prison authority couldn't appear in front of the Court, they were

[80] "Internati" are mentally ill prisoners serving the security measure of psychiatric hospitals.

only allowed to send written pleadings. The chamber audition only allowed for the participation of the prisoner's attorney and of the prosecutor.
In all other cases a proper judicial appeal against a prison authority decision or behaviour that violated a prisoner's rights was not provided. Inmates could just send non-judicial claims to the Court: Article 35 of the Penitentiary law stated that prisoners are able to communicate with the Judge with an oral or written complaint contained "in a sealed envelope".
This gap in the system of protection of prisoner's rights had been filled by the national jurisprudence that had progressively expanded the scope of the judicial appeal (art. 14.ter) to all the violations of prisoners' rights, beyond violations concerning disciplinary power and prison labour's rules.
Firstly the Constitutional Court, with its decision no. 212 of 1997, recognized that generic claim provided by art. 35 had to be considered a judicial appeal. Subsequently, the same Constitutional Court, in its decision No 26/ 1999, urged the legislator to expand the judicial appeal provided in the field of disciplinary measures and prison labour in Articles 69 and 14-ter, to all cases in which a detainee alleges a violation of a right.
In the lack of a new norm provided by the legislator, only with a decision of the Corte di Cassazione (no. 25079 of February 26, 2003) the right of the prisoners to appeal against any violation of their rights, following the procedure of Articles 69 and 14ter, was judicially recognized.
The generic complaint (Article 35), supplemented by the procedure provided by Articles 69, 71 and 14-ter, thus became a general remedy and a pivotal norm of the system, to be applied in all cases of violations not equipped with a specific legal remedy.

1.3.2 Powers of the Court

For a long time the Surveillance Courts' case law in the field of prisoners' rights was based on the principle that the Courts' decisions or orders weren't mandatory for prison authorities, they were considered discretionary. This interpretation of its powers frustrated the potential effectiveness of the Surveillance Courts' decisions and discouraged prisoners from appealing against violations of their rights.
Only in 2009 a Constitutional Court's judgment (No. 266/2009) made clear that the decisions of the Surveillance Courts are mandatory since they are judicial decisions and that prison authorities have the duty to implement them. However this case didn't resolve the effectiveness issue, because Surveillance Courts still lacked the power to annul a prison authority's decision violating a prisoner's right, along with the power to appoint an *ad acta* Commissioner in all cases in which the prison authority failed in eliminating the violation.

2. Preventive remedy for the protection of prisoner's rights after the ECtHR's decision Torreggiani and Others v. Italy (08.01.2013)

On January, the 8th 2013, the European Court of Human Rights, acknowledging the endemic and persistent overcrowding situation in Italy, decided to enact a Pilot Judgment Procedure in the *Torreggiani* Judgment. This case followed and expanded on the findings of the Court in the previous *Sulejmanovic v. Italy* case (application no. 22635/03). The *Sulejmanovic* judgment was final in 2009 and a first set of measures was presented in an action plan of 29/06/2012. These measures included changes to the law and a programme to build new prisons. Despite this plan, the overcrowding situation in Italy remained a structural problem and was acknowledged as such in the further *Torreggian*i judgment. The Court decided to apply the pilot-judgment procedure in view of the growing number of persons potentially concerned in Italy and of the judgments finding a violation liable to result from the applications in question[81].

2.1 Nature of the remedy: general Preventive remedy for prisoners' rights protection

On December 23, 2013 a new general judicial remedy for the protection of prisoner's rights was enacted. Under the pressure of the ECtHR, the Italian legislator adopted a bill[82] aiming at enforcing the right of prisoners to appeal to a Court in case of violations of their rights, thus covering the issue of prison overcrowding.

The law contained a wide range of norms, some of them with the task to give an effective remedy for prisoners' rights protection (the provision of a national ombudsman and a new judicial procedural remedy to apply to Surveillance Courts) and others to face overcrowding (reform of drug law to decrease sanctions and inhibit pre-trial custody for minor offenses, a temporary expansion of day release benefit for most of crimes).

Following the same scheme adopted to analyse the preventive remedies before the reform (competent judge, procedure and powers of the Court), we are going to analyse the new judicial preventive remedy (art. 35bis of Penitentiary Law)

2.2 Protected categories.

The new doesn't contain any news concering the protected categories. So even if penitentiary law doesn't define explicitly the categories of prisoners covered by the protection of art. 35 and art. 35 bis, it included both convicted prisoners and prisoners on remand, since art. 35 and art. 35 bis generically refers to "prisoners" and "internati". Furthermore prisoners on remand although they could not receive a treatment program they could still ask to be admitted to prison labour and educational programs, consequently they could apply to the Court for violations concering these issues.

[81] For a thorough analysis of the Torreggiani judgment, see *infra*, p. 18.
[82] Decreto Legge NO. n° 146 23.12.2013, G.U. 21.02.2014

2.3 Competent judge.

After the reform, the general judge competent for the protection of prisoners' rights remains the Surveillance Court, still competent in all the fields provided for by Article 69, except for prison labour claims that have to be addressed to ordinary Courts.

So Surveillance Judge (monocratic) has:

1) The duty to supervise the organization of prison and to advise the Ministry of Justice;
2) The power to decide for the application of security measures for offenders considered "socially dangerous", such as mentally disordered individuals unfit to plead convicted (psychiatric hospital detention), deportation of foreigner convicted at the end of the execution;
3) To supervise and approve the treatment program done by prison staff;
4) To supervise the respect of prisoners' rights;
5) To apply alternative measure to imprisonment (such as probation, home detention, etc);
6) To supervise the correct application by Prison authorities of the disciplinary sanctions to prisoners;

2.4 Procedure and powers of the court.

A prisoner can appeal directly, at every time and without any term, to the competent Surveillance Court claiming a violation of a norm of the Penitentiary law by the prison authorities. The damage deriving from the violation has to be ongoing at the time of the claim. In the special case of a complaint concerning disciplinary measures, the prisoner has to apply within 10 days from the adoption of the disciplinary action.

After the reform, the procedure to be followed is the general one, established for the criminal execution and provided for by Articles 666 and 678 of the Italian code of criminal procedure, instead of the previous one, contained in the Penitentiary law (Article 14ter). According to the general norms of the code of criminal procedure, the prisoner has to be assisted by an attorney who needs to be present, together with the Prosecutor, to the chamber audition. The proceeding follows the general rules of litigation trial and the prisoner can take part to the debate. Also, the prison administration can now participate to the debate and/or send written pleadings. The competence is given to the Surveillance Court in its monocratic composition (Surveillance Judge). The decision of the judge can be appealed to the Surveillance Court in its collegial composition (Surveillance Court) within 15 days, the decision of the Court can also appealed to the Supreme Court (Corte di Cassazione) within 15 days.

When the Court finds a violation of a norm concerning the system of disciplinary sanctions, it can annul the prison authority's decision. In all the other cases the norm doesn't explicitly gives to the Surveillance Court the power to annul any administrative decision, but it nonetheless states that the judge, "once verified the existence of an actual damage, orders to the administration to amend it within a certain time frame".

The new norm goes beyond the limits of the precedent rules that didn't provide any special tool to implement the Judge's decisions. Indeed, when prison authorities don't enforce the judge decision, it's now possible to appeal again to the Surveillance Judge that, now, has the power to:

a) Schedule a detailed action plan addressed to prison authority to remedy the violation ;

b) Annul the decisions of the prison authority that violate the Court's decision;

c) Assign an *ad acta* Commissioner.

IN PROGRESS: jurisprudence, doctrine and effectiveness of the new remedy. The new remedy has been poorly used since it has been enacted. We are monitoring its application and update this part afterwards.

2.5 Map of complaints covered falling under the scope of preventive remedy (art. 35bis)

After the reform, the new judicial remedy to supervise the correct application of disciplinary sanctions and the violation of the rights recognized by Penitentiary law, is the one provided by Article 35 bis. Every detainee can appeal to the competent Surveillance Courts to claim a violation of a right and to obtain protection. The preventive remedy provided for by Article 35 bis seems to protect all prisoners, including prisoners on remand and mentally ill prisoners of psychiatric hospitals, since it's generically imply the term "detainees", instead of "convicted prisoners". We will monitor whether Italian case law will adhere to this interpretation[83].

The new remedy distinguishes between the general case of a violation of any of the rights recognized by the Penitentiary law and the special case of a violation of a norm ruling on the application of disciplinary sanctions.

Prison authorities can impose disciplinary sanctions to prisoners following the procedure of articles 38, 39 and 40 of the Penitentiary Law when a prisoner breaches the law or violates one of the rules stated in articles 77-81 of the Implementing Regulation of the Penitentiary law[84]. A prisoner can claim, in front of the Judge, the violation of one of these rules.

In all the other cases the prisoner can apply to the Judge, when the administration breaches one of the norms of the Penitentiary law and/or its Implementing regulation. Italian Penitentiary law doesn't contain a chart of prisoners' rights but, following the influence of the UN Standard minimum rules, it contains rules addressed to the prison administration and concerning the treatment of prisoners and the organization of prison institutions. Thus prisoners' rights aren't explicitly listed, but they are an indirect consequence of the rules concerning the prison administration. Article 4 of the Italian Penitentiary Law states that detainees can "directly exercise their rights", formally recognizing that the rules contained in the Penitentiary law indirectly provide individual rights.

A brief list of the main rules of the Penitentiary law that indirectly recognize rights to prisoners includes:

[83] We have not yet any decisions of Surveillance Courts on this topic.
[84] DPR n. 230/2000.

1) art. 1-4 basic principles concerning the "right to treatment" and principle of equality;
2) art. 5-12 basic rules concerning accommodation, clothing, personal hygiene, food, exercise and sport, medical care[85] ;
3) art. 13-16 treatment of convicted prisoners;
4) art. 17-18 contact with outside world (NGO and family): visits and phone calls;
5) art. 19 education of prisoners;
6) art. 20-25 prison labour;
7) art. 21bis childcare for female prisoners' children;
8) art. 26 freedom of religion;
9) art. 27 sport and cultural activities;
10) art. 28,29 and 45 family relationships;
11) art. 32-34 and 36- 40 disciplinary regime: sanctions, procedure, competent authorities;
12) art. 35, 35bis and 35ter right to judicial claim;
13) art. 41 limits on instruments of restraint;
14) art. 41bis (high security regime) - limits to the rights of organized crime prisoners;

2.6 Possible impact of preventive remedy on claims concerning prison labour.

In paragraph 1.1.2 we have analysed the impact of the Constitutional Court's decision No. 341 of 2006, that has moved the judicial competence, in the field of prison labour, from Surveillance Court to Ordinary Court. This decision was mainly based on the reasoning that the Penitentiary law didn't provide a proper litigation trial and respect of the right to defence of the counterparts (both employer and employees).
Since the new preventive remedy has solved those problems, a predictable consequence could be to move back the competence to the Surveillance Court in the field of prison labour. It's a controversial issue because the Surveillance Court would have now an important preventive remedy, for instance it would have the power to annul prison authorities' decisions concerning prison labour. Prisoners would have an effective remedy, faster and less expensive than the one provided by the Ordinary Courts. At the same time the Surveillance Court still lack a general compensatory remedy for the violations of prison labour rules, therefore the Surveillance Court couldn't provide an effective remedy every time a violation of the rules, e.g. concerning the salary [86], is claimed.

[85] In 2008 medical care has been moved from the competence of Ministry of Justice to the one of Ministry of Health, thus prisoners' right to health is ruled by D.P.C.M. 30 maggio 2008, n. 126.
[86] This is one the most usual claims of prisoners in Italy. Indeed Prison authorities, violating art. 22 of penitentiary law, don't update the prisoners salary since 1994

3. Compensatory remedy for the protection of prisoner's rights after the ECtHR's decision Torreggiani and Others v. Italy (08.01.2013)

3.1 Nature of the remedy: Special compensatory remedy for the violation of Article 3 of the Convention

Following a decision of the Committee of Ministers of the Council of Europe[87] - that appreciated the new preventive remedies (art. 35bis) but had also asked to the Italian Government to carry forward the reform's process - a new bill has introduced a specific remedy (art. 35ter) to be used in cases of violation of Article 3 of the European Convention[88].

3.2 Protected categories.

In this case the penitentiary law defines explicitly the categories of prisoners covered by the protection of art. 35 ter: all prisoners including those convicted and on remand.

3.3 Competent Judge

According to art. 35 ter of Penitentiary law:

1) the Surveillance judge (monocratic) is competent for claims coming from convicted prisoners;

2) Ordinary civil courts are competent for claims coming from prisoners on remand and former prisoners.

3.4 Map of complaints covered falling under the scope of compensatory remedy (art. 35ter)

According to the new law, the Judge can use special measures every time a violation of a right is so serious to constitute a violation of Article 3 of the Convention. To guide the domestic judge in the interpretation of Article 3, the norm explicitly refers to the jurisprudence of the ECtHR, that is binding for the national courts.

3.5 Procedure and powers of the Court

According to art. 35 ter of the Penitentiary Law, the Surveillance Judge, in addition to the usual measures to be adopted in case of violation of a prisoners' rights, has a further remedy to face serious breach of the national law and of the Convention: pending the prison execution, a mitigation of the sentence in the measure

[87] Cases No. 10, 1201st meeting, June 5th, 2014

[88] Decreto legge No. 92/2014, convertito. con modifiche in l. No. 117/2014

of 1 day every 10 days spent in condition that violate Article 3 of the Convention must be granted. This remedy can be applied only when the violation has last not less than 15 days. The norm has a compensatory *ratio* as well as a deflationary one, since it aims to reduce the rate of prison overcrowding.

The 10% of day release compensation cannot be applied in the following cases:

1) prisoners on remand, since a day release measure can be applied only to a final sentence;

2) released prisoners;

3) prisoners kept in breach of Article for 3 for less than 15 days and prisoners that do not dispose of enough remaining time to serve to benefit of the 10% compensation.

In all of these cases the norm provides a monetary compensation of 8,00 euros for every day spent in breach of article 3.

While in the first and second case, released prisoners and prisoners on remand have to apply to Ordinary Civil Courts, in case 3) the competent Judge is again the Surveillance Court that can decide to give the day release compensation and, for the remaining days, it can grant the monetary compensation.

Consequently, the procedure differs according to the possible alternatives:

1) Convicted detainees can apply, directly or through an attorney, to the Surveillance Judge. The decision of the Judge can be appealed to the Surveillance Court and its decision can be appealed to the Supreme Court (Corte di Cassazione). The Supreme Court in a recent decision[89] has confirmed that the procedure for the compensatory remedy ex art. 35 ter has to be the same that applies to the preventive remedy ex art. 35 bis.

Thanks to the explicit refer to the ECtHR jurisprudence the burden of proof is on the Prison authorities.

2) Former prisoners and detainees on remand, directly or through an attorney, can apply to Civil Courts. Unlike the case of convicted prisoners, for which the procedure is the one provided by Penitentiary law (articles 69 and 35bis), the procedure to access to Civil courts is the one provided by procedural civil code art. 737 and following. Civil judge's chamber decision can be appealed to the Civil Court within 10 days.

3.6 Effectiveness and interpretation and of the compensatory remedy in the jurisprudence of Surveillance's Courts

Up to now the compensatory remedy has been variously applied and interpreted by doctrine and jurisprudence. The different interpretations are seriously compromising its potential effectiveness. The jurisprudential and doctrinal debate is linked, on one hand, to problem of harmonization of the new remedy (art. 35 ter) with the preventive remedy (art. 35bis). Indeed, the new norm doesn't provide a special procedure for the compensatory remedy but it refers to the one provided for the preventive remedy and this

[89] Suprema Corte di Cassazione, decision No. 315, January 8th, 2015

has created a misinterpretation that we will analyse below. On the other hand, the debate has its cause on the different possible interpretations of the ECtHR jurisprudence in the field of overcrowding.

Let's analyse briefly the first kind of interpretation's problems. We have already mentioned that the norm providing the compensatory remedy (Art. 35 ter) refers to Article 69 of the Penitentiary law that rules the competences of the Surveillance Judge. Article 69 recognizes the Surveillance Courts competent for cases of violation of the prisoners' rights and it refers, as far as procedural aspects are concerned, to the norm ruling the preventive remedy (art. 35bis). Art. 35 bis is a preventive remedy and, consequently states that the damage caused by the violation has to exist at the moment of the Judge's decision. According to a technical advice of the Consiglio Superiore della Magistratura (CSM)[90] this requirement has to be applied also to the compensatory remedy, thus Surveillance Courts could recognize the 10% day release or the monetary compensation only in cases in which the violation is still existing at the time of the decision. So the compensatory remedy doesn't apply to past violations of Article 3 of the Convention, but only to current, ongoing ones. According to this interpretation, all claims coming from prisoners who are no more in a situation of overcrowding have to be rejected.

This kind of interpretation will produce relevant effects on all pending claims for violation of overcrowding. Indeed, prison population, thanks to deflationary measure adopted by the government, is decreased from 68.000 to 54.000 units, thus most of the prisoners are no more in the situation of a serious breach of Article 3 of the Convention. This interpretation has been accepted by part of the doctrine as well as by a relevant part of the Surveillance Courts, especially the Courts of the biggest districts.

This interpretation, however, appears to have a bearing on the effectiveness of the new compensative remedy and to outflank the decision of the ECtHR in the *Torreggiani*'s case. The Surveillance Judges who adheres to this interpretative front seems to be reluctant to play the new role assigned to them by the reform. Traditionally, Surveillance Courts have had many resistances in embracing the task of the protection of prisoners' rights and have concentrated their jurisprudence mainly on decisions concerning alternative and security measures. For long time they have justified this position on the ground that Penitentiary law didn't give them any effective power to protect prisoners' rights against decisions of prison authorities. They refused to adapt to this task even when, in 2009, the Constitutional Court made clear that Court's decisions are mandatory for the prison administration. This decision had been neglected by most of the Italian Surveillance Judges. As a matter of facts, the misinterpretation of the compensatory remedy and the lack of decisions based on the preventive remedy, confirm the traditional attitude of Surveillance Judges in refusing their role.

[90] CSM is the self-governing body of judges and prosecutors, competent for their careers and applications of disciplinary sanctions. Its activity of interpretative orientation has no binding authority, nonetheless it can appear to be significantly persuasive for the community of interprets.

Part of the legal doctrine and jurisprudence is rejecting this interpretative position[91], arguing that it's based on a wrong textual interpretation of the norm and it nullify the intent of the legislator to provide the effective remedies requested by the ECtHR in the *Torregiani*'s case. The misinterpretation is a consequence of the unclear distinction between the two remedies: when enacting the compensatory remedy for violation of Article 3, the legislator should not have referred to the same procedure already provided for the preventive remedy. Indeed, the preventive and compensatory remedies have different *ratio* and scopes, the first aiming to stop a current damage, obviously requires an ongoing violation at the time of the application to the Court, while the second one aims to give a compensation when the damage is over. The norm concerning the compensative remedy (art. 35 ter) gives a 6 months term from the end of incarceration to former prisoners and prisoners on remand for applying to the Court. So it would be totally unreasonable to give such term and, at the same time, require that the damage should be ongoing at the time of application. If the legislator had provided a clear distinction between the two remedies, we would not face this kind of interpretative problems (even if, eventually, we could have faced different interpretative issues).

The new judicial remedy has been establish to provide an effective remedy to prisoners kept in condition of serious violation of Article 3 of the Convention as a consequence of the overcrowding situation. However, the remedy generically refers to violations of Article 3 of the Convention and to the ECtHR jurisprudence, with two consequences: it can be considered as a general compensatory remedy for all the cases of breach of Article 3, not only for overcrowding. Secondly, Italian Courts have to conform to the whole jurisprudence of the ECtHR, not only to decisions concerning Italy, but any decision concerning breaches of Article 3 perpetrated by any Member States.

Also, if the Italian debate, doctrinal and jurisprudential, is now focused only on ECtHR's decisions in cases of overcrowding, in the future it could be expanded to other prisoners' rights such as the right to health.

The cross-reference to the ECtHR's jurisprudence is creating a debate on the criteria for calculating the minimum living space to be guaranteed to prisoners in order not to violate Article 3. Firstly, it's important to say that the ECtHR's principle, according to which the burden of proof is on the Prison authorities, is not contested by Surveillance Judges when evaluating the prisoners' claims. One of the most common controversial issues is the one concerning the inclusion or not of the cell's furniture into the personal space available to prisoners. The common agreement seems to be that the space to be considered is the "floor space", the bathroom being excluded. According to Surveillance Judges, part of the furniture is indubitably excluded by the living space, such as closet, while another part (such as beds and tables) are part of the living space since "prisoners can use them for various purposes and, as a consequence, they are not intended to reduce the living space but they allow its full enjoyment"[92]. According to the Spoleto Surveillance Judge [93] a distinction is needed between fixed and mobile furniture: only the first one should be considered out of the

[91] For a complete overview of this alternative opinion: E. Santoro, *Contra CSM: parlare a nuora perché suocera intenda,* Penale contemporaneo, 2015, http://www.penalecontemporaneo.it/tipologia/4-/-/-/3604-contra_csm__parlare_a_nuora_perch___suocera_intenda/

[92] Ordinanza Magistrato di sorveglianza di Verona, 12 novembre 2014

[93] Ordinanza Magistrato di sorveglianza di Spoleto 14 ottobre 2014

living space and, once again, bed, tables and chairs should be considered "mobile furniture" as they are part of the living space. The Judge seems to ignore that in a lot of cells the bed is fixed to the floor and technically it cannot be considered a "mobile furniture". Again, according to Padova[94] and Genova[95] Surveillance Judges, the bed is a "usable space" since it can be employed to sleep during the night and to have a rest during the day.

The issues concerning the calculation of the available personal space are relevant since ECtHR jurisprudence clearly distinguishes the cases in which the flagrantly insufficient amount of personal space available (under 3mq) is enough to demonstrate a breach of art. 3 from the cases in which the insufficient amount of space (between 3 and 4mq) has be associated with other bad living conditions and violations. Up to now the jurisprudence of the Italian Courts has focused its attention on the flagrant violations and has not yet considered the second kind of violation, thus there aren't yet any common standards related to it. There are hundreds of pending claims in front of the Courts of prisoners kept in a space between 3 and 4 mq and we will monitor the future Court's decisions.

3.7 Interpretation and effectiveness of the compensatory remedy in the jurisprudence of Civil Courts

(in collaboration with Roberto Mariotti, barrister in Florence)

Introduction

According to article 35 ter of the Italian Penitentiary Law, Ordinary civil courts have jurisdiction over all claims coming from prisoners on remand and former prisoners. This ad hoc compensatory remedy add up to the general system of compensatory remedies in Italy and can be claimed alongside with an ordinary compensatory action (asking for the greater injury that may be suffered).

We, as Altro diritto, are monitoring the cases presented in front of the Ordinary civil courts of Florence.

Nature of the remedy

An interpretative dispute has arisen from the introduction of this new ad hoc form of compensatory remedy. This has some major consequences on the statute of limitation. As a matter of facts, either we consider Article 35 ter as a form of non-contractual damages, according to it a statute of limitations of 5 years from the discovery of the damage (limiting considerably the scope of the remedy). On the contrary, supported by an opinion given by the CSM (the Italian Superior Council of the Magistrates, Opinion of 30th of July, 2014) we consider, that Article 35 ter can be interpreted as a contractual damage, on the specific form of the 'contatto sociale' (proximity), with a consequential statute of limitations of 10 years. Some Italian

[94] Ordinanza Magistrato di sorveglianza di Padova 25 settembre 2014
[95] Ordinanza Magistrato di sorveglianza di Genova 27 settembre 2014

Surveillance Courts, nonetheless, have interpreted Article 35 ter as a form of compensation without statute of limitations.

Accessibility

This form of action appears to be less accessible to prisoners and former prisoners than the simple procedure in front of the Surveillance Judge. As a matter of facts, the case in fron an Ordinary civil courts requires a legal registration cost (100 euros) , mandatory legal assistance and an increased length of the procedure due to the endemic overload within the Italian civil courts system. Moreover, once a prisoner is released it is difficult for lawyers and NGOs' members to keep in contact with him, consequently the number ofits application under Article 35 ter in front of the Ordinary civil courts appears to be significantly low

Competent authority: Ordinary civil court

Procedural aspects:

This is one of the major critical point of the new remedy. As a matter of facts, we can assume that the ordinary civil courts and will follow the general compensatory discipline developed in the Italian legal system, therefore applying the general principles and full powers of investigation.

Burden of proof:

Considering the issue of the burden of proof, following a general principle of the Italian legal system on compensatory remedy, we assume that on this issue the reverse burden of proof applies, considering the unbalanced positions between the prisoner and the Prison administration on the availability of documents and data regarding the conditions of detention.

One of the issue under interpretation is the possibility of apply specific previous Interim measure in order to verify thoroughly the state and conditions of the cells within prison institution under consideration. The results of these Interim Mesures could then form a proof in the subsequent case for compensation.

Another principle, concerning the burden of proof, is the principle of non rebuttal, whenever a fact, presented by the plaintiff is not contested, the Judge has to assume it as a non rebutted proof. This is an important procedural principle, as in many cases the Prison administration defence and written pleading is a standard report of the general condition of detention in the specific prison institution, without a detailed defence on all factual points presented by the prisoner.

Length of the procedure

The endemic overloading of the Italian civil justice, sanctioned at a European level, by many ECtHR cases (see inter alia the Bottazzi v. Italy case Application no. 34884/1997) that led to the approval of the so called Pinto law (Law no. 89/2001), is still a structural problem that affects any civil case. As a result, the civil remedy under Article 35 ter is affected by this situation. As a matter of facts, being a chamber procedure with full power of investigation given to the Judge, this remedy should in theory be a speedy procedure, but

the experience so far shows that it is nonetheless a long and burdensome for the prisoner and former prisoner. As an example, we can cite a case that we are following, in front of the Civil Court in Florence. The prisoner's lawyer filed the application in May 2015 and the first hearing has been scheduled the 31st of March. The case is pending and the next hearing has been postponed to the 20th of June 2016. In the meantime the file has been lost two times. Asked to give an explanation to this situation the Court has claimed the difficult cataloguing of this type of cases. This ,shows, not only the excessive length of the procedure, but also (and the two facts can be linked) that the heterogeneity of this remedy appears critical and is not yet systematized within the Italian legal order.

Powers of the judge (comparison with the general compensatory discipline in the Italian legal system)
The judge has full powers of investigation. This is also due to the specific procedure to be followed. Article 35 ter applications follow a chamber procedure, a form of procedure entirely managed and directed by the Judge himself/herself.

Statute of limitations
The statute of limitations under Article 35 ter has been of the most critical issues both for the courts and for the doctrine. As a matter of facts, either we consider Article 35 ter as a form of non-contractual damages, according to it a statute of limitations of 5 years from the discovery of the damage (limiting considerably the scope of the remedy). On the contrary, supported by an opinion given by the CSM (the Italian Superior Council of the Magistrates, Opinion of 30th of July, 2014) we consider, that Article 35 ter can be interpreted as a contractual damage, on the specific form of the 'contatto sociale' (proximity), with a consequential statute of limitations of 10 years. Some Italian Surveillance Courts, nonetheless, have interpreted Article 35 ter as a form of compensation without statute of limitations.

Nature of the compensation
The remedy under Article 35 ter provides a compensation as a fixed amount of 8 euros for each day spent in violation of Article 3 of the Convention. This lump sum poses a number of critical questions concerning the lack of individualization and personalization of the actual damage. Furthermore this kind of compensation doesn't leave space for the discretional power of the judge in the assessing of the violation and in the consequential compensation. This appears not in line with the general parameters of the compensatory remedy tradition in Italy, i.e. with the principles of entirety and personalization of the damage.
Considering this, we can assume that this remedy is not alternative to the ordinary civil compensatory remedies of the Italian legal system, because only those remedies can offer the full protection of the compensatory rights. As a result this remedy add up to the ordinary compensatory remedies and can be understood as a way of providing the prisoner with an ad hoc protection that should therefore be managed

through a speedy procedure and does not exclude the possibility of applying with the ordinary remedies in order to claim also the compensation for the greater damages.

Effectiveness of the remedy

As a result of the above detailed analysis we can assume that the effectiveness of this remedy, as ad hoc tool for a speedy compensation of a forfeit amount is seriously undermined. The length of the procedure, the difficult access to the remedy by a prisoner or former prisoner, the legal cost for the registration and the legal assistance, the inadequacy of the compensation (8 euro per day) make the remedy under Article 35 ter almost ineffective.

PART III. Soft law and National Human Rights and non-jurisdictional Structures and authorities (such as ombudsmen, human rights commissions and equality bodies)

1.1 The role of NGO

Traditionally NGOs have always had a limited role in protection of prisoners' rights. Penitentiary law recognizes that NGOs can take part of treatment and/or resocialization program. Italian penitentiary model has been designed firstly on the basis of United Nations' Standard Mininum rules that propose the principle of rehabilitation and individualized treatment of prisoners and, secondly, on the basis of 1987's European prison rules that emphasize the role of penitentiary welfare as a tool for resocialization. Consequently, the article 17 of penitentiary law (n. 354/1975) frames the role of NGO as a tool for social reintegration, not directly for promoting rights:

> shall be admitted to prisons, with authorization and in accordance with the directives of the Surveillance Judge, on approval of the director, everyone having real interest in re-socialization of inmates and useful to promote contacts between the prison community and free society.

In another norm penitentiary law explicitly refers to the role of civil volunteers in treatment activities, art. 78 of penitentiary law states that volunteers may be involved in treatment programs and recreational activities inside prisons and, secondly, in probation and alternative measure's programs. According to this legal framework most of NGOs, mostly catholic, have always been involved only in educational or work programs inside prisons or have been asked to provide material or moral support to prisoners.

The judicial system for prisoners' rights protection neither before nor after the reform followed to Torregiani's case has recognized any role to NGO in litigation. So NGO aren't entitled to seize the surveillance court and cannot be called to testify. Also if there's any legal impediment, reports provided by NGO have never been used by Courts in any case. But in a penal trial where inmates are victim of a crime (for instance in police abuses cases), NGO involved in prisoners' rights protection (Altro Diritto and Antigone) have been allowed to submit a civil action against the perpetrator[96].

In spite of this poor legal framework, some NGO have started, in second half of 90s, to have a role also in judicial protection of prisoners' rights. Indeed, thanks to the facts that the litigation is mainly written and that most of the claims to Surveillance Court may be submitted directly from prisoners without any attorney, some NGOs (mainly Altro Diritto and partly Antigone) have developed expertises in extra-judicial legal counseling and in assisting prisoners to fill the claims. Once that these

[96] Nota con caso altro diritto

claims are submitted they are be discussed according to the procedure described in previous chapter, without the participation of any NGO member or representative.

1.2 List of main NGOs and other associations involved in prisoners' rights protection and their field of work

Antigone (public campaigns, observatory on prison condition)
http://www.associazioneantigone.it/

Antigone is an Italian Ngo born in 1991 and dealing with human right protection in penal and penitentiary system. Antigone in not involved in litigation but it's mainly focused on public campaigns and cultural movement on prison issues (through education, media, publications and the academic review «Antigone»). Antigone runs an Observatory on Italian prisons, involving around 50 people, active since 1998, when Antigone received from the Ministry of Justice special authorizations to visit prisons with the same power that the law gives to parliamentarians.
Every year Antigone's Observatory publishes a Report on Italian penitentiary system[97]. Online version of the report describes the situation of each prison involved in the project, while the paper version is mainly based on essays describing the general situation of Italian prison system. Antigone leads also a European Observatory on prisons involving nine European Countries and funded by the European Union.
Through a prison Ombudsman to which it gave birth, Antigone also collects complaints from prisons and police stations and mediates with the Administration in order to solve specific problems.

Altro Diritto (litigation, legal counseling, documentation centre)
http://www.altrodiritto.unifi.it/

The Documentation Centre *L'altro Diritto*, established in 1996 at the Department of Theory and history of law of Florence University, is actively engaged in theoretical reflection and sociological research in the fields of social marginality, deviance, prison and detention institutions, and makes the most relevant and accomplished results of this activity available to social operators and scholars through its Web site. Born as a documentation Center l'Altro Diritto has become an important NGO actively involved in prisoners' rights protection, through litigation and mediation with penitentiary administration, thanks to its Extrajudicial Counselling Service. In 2010 Altro Diritto has signed an agreement with the Ministry of Justice that formalizes the role of the centre in promoting prisoners' rights and giving them free legal counseling.

[97] Antigone, *XI rapporto nazionale sulle condizioni di detenzione: oltre i tre metri quadri*, edizioni gruppo Abele 2015

Altro Diritto is active in most of Tuscany's prisons and in Bologna, Palermo and Brescia's prisons. The 160 members of Altro Diritto are students, researchers and professors of the faculty of law. They give legal advices, help prisoners to fill claims and to seize the Court. At the same time they mediate with prison administration to solve cases and to effectively allow prisoners to access their rights.
In 2012 Altro Diritto has been named Ombudsman of San Gimignano's prison. It's the first time in which the role of ombudsman in recognized to an NGO and not to an individual.
Recently Altro Diritto has been deeply involved in supporting prisoners to apply to Italian surveillance Courts for compensatory remedy (art. 35 ter of Penitentiary Law) for violation of art. 3 of European convention. Altro Diritto has directly assisted inmates detained in Tuscany and in Bologna's prison. The application form and a guide have been made public on the website and, thanks to the network of Ombudsmen, have been made available in all Italian prisons. Information and qualitative data collected by Altro Diritto for assisting and supporting prisoners have been used to realize the present report.

Osservatorio Camere Penali (observatory on prison condition)
http://www.camerepenali.it/banner/43/Osservatorio-Carcere.html

Osservatorio Camere Penali is the Prison observatory of Bar association-Criminal justice section. It's an interesting source of qualitative data about the prison conditions. It was established in 2006 and it's organized in regional observatory centers, one for each district. Members of the Observatory contribute, with documents and proposals, to the debate in the field of criminal justice. Regularly they visit prisons for monitoring the respect fundamental rights of prisoners. Reports of the visits are published on their website and have been used for compiling this report.

Ristretti Orizzonti (documentation centre, public campaigns)
http://www.ristretti.it/

Ristretti Orizzonti is one of the main source of data and information about Italian prison system. It's an NGO active in Padova's prison, involving in its activities more than 80 inmates, and collects, elaborates and publishes all kind of data related to the penitentiary world, together with a daily newsletter with press reviews and a newspaper written by the inmates.
This report uses data published by Ristretti orizzonti, especially those contained in the report about food suppliers and in the one about deaths in prison.

1.3 Map of complaints covered by NGO activity

1.3.1. Complaints related to social and educational programs

According to data of Antigone's observatory[98] and official data of Ministry of Justice[99] limited number of social and educational activities inside the prison are available. Especially in "Casa circondariale" type prisons[100] most of prisoners don't have access to any social, treatment or entertainment's programs except for a weekly access to sport activities (mainly soccer).

According to Ministry of Justice data[101] only the 28% of prisoners in 2013-2014 have attended to educational programs. Not only the quantity of programs is complained, also the quality and level of educational courses is a usual complain: most of educational programs consist in literacy and primary school courses, in the 2/3 of cases arranged for foreigner prisoners.

Only the 4,5% of prisoners have attended, in 2014, training courses[102]. There are very few programs funding training courses for prisoners and usually they are focused more on entertaining activities than on training: 40 cooking courses (with a total of 539 students) , 24 courses in gardening and agriculture (320 students), 22 courses of construction (294 students), 21 courses of informatics (205 students).

Prisoners detained in "41bis" regime complain for the very limited access to this kind of programs[103], especially when they are detained in special wings of "casa circondariale" where they cannot have any contact with common prisoners.

1.3.2. Limited contacts with social workers and educational staff members

The work of educational staff is a usual concern for prisoners. According to penitentiary law provisions, each convicted prisoner should be subject to "personality observation" and should receive a treatment program. Usually educational staff begins observation's activity only in case in which a prisoner applies to Surveillance Court for an alternative measure (probation or home detention) or a benefit (such as temporary

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[98] Data are available on Antigone's website (http://www.associazioneantigone.it/Index3.htm). Quantitative and qualitative data about each single Italian prison are arranged on regional basis, but they aren't updated n regular basis. Some prisons' descriptions are not updated since 2005, especially those related to small prisons located in in outlying areas. Nevertheless most of the data related to big prisons are generally updated on regular basis.
The national Report (Antigone, *XI rapporto nazionale sulle condizioni di detenzione: oltre i tre metri quadri*, edizioni gruppo Abele 2015) is released yearly and it's updated to 2013 or 2014's data

[99] Official data are published on Justice department's website: http://www.giustizia.it/giustizia/it/mg_1_14.wp

[100] Italian penitentiary system distinguishes between two main type of prisons: "casa circondariale" for pre-trial detention and convicted prisoners usually with less than 5 years to serve, while "casa di reclusion" hosts convicted prisoners with long sentences. According to Ministry of Justice the 78% of prisoners are hosted in casa circondariale (http://www.giustizia.it/giustizia/it/mg_1_14_1.wp;jsessionid=CB15F7A44AD3AEC06A953087CBE043A1.ajpAL02?previsiousPage=mg_1_14&contentId=SST1153317)

[101] Official data on educational programs and stiscs are available on Ministry of Justice website:
http://www.giustizia.it/giustizia/it/mg_1_14_1.wp?previsiousPage=mg_1_14&contentId=SST1102103

[102] According to Antigone in the second half of 2014 there were 214 training courses, but 57 were non completed, involving 2,598 inmates (599 foreigners) , less than 4.5 % of the population.

[103] 41 bis of Penitentiary Law ("Law no. 354 of 1975") allows application of the ordinary prison regime to be suspended, with an order of Ministry of Justice reviewed by Surveillance Court, in whole or in part for reasons of public order and restrictions to family visits. Restrictions may regard any family contacts, meetings with non-family members,

permit to leave the prison or "good time credit"), because they have to fill a report to the judge regarding the behavior of inmate. This fact has the consequence the all the inmates ineligible for alternative measures and benefits, often don't have any contact with educational staff and don't receive any treatment program. Another consequence is that the work of educational staff results standardize and bureaucratized since it has the only purpose to report to the Judge without any real interest in improving the prisoner's condition.

1.3.3. Complains regarding right to family contacts

1) Family contact are often limited due to *bureaucratic obstacles*. Family visits follow different rules and meet different obstacles according to the nationality of inmate.
   - Italian or Eu prisoners. Relatives of european prisoners can meet them simply with their identity document and a self-certification of family relationship. The self-certification form usually simplify the access of relatives to visits.
   - Non Eu-prisoners. Relatives of non-Eu prisoners, in addition to their i.d., need to attach also authenticated certificates that may be expensive and may require a long bureaucratic proceeding.

2) Family contacts should be made easier thanks to "*territoriality principle*" that imposes to prison administration to detain inmates in facility close to their homes. This principle if often derogated due to security reasons (e.g. inmates cause of disciplinary issues are usually transferred to a different prison) or organizational reasons (e.g. overcrowding's management).
3) *Facilities are often inadequate* for family visits, especially for children, and in some prison rooms still have table barrier between the inmate and visitors[104]. Prisoners use to complain for the shortness of visits (usually 1 hour).
4) Penitentiary law doesn't allow any kind of *conjugal visit*: visits must always be under visual control of penitentiary police.
5) *41bis prisoners* may have strong limits for family visits, regarding their number, modality and length, depending on the special rules imposed by the Ministry of justice decree that imposes the regime.
6) *Visits with non-relatives* are subject to the discretional approval of the director of the prison. The authorization usually follows a long and, often, complicated proceeding that may last several months.

limitation on using the telephone, ban or limits on cultural, recreational or sports activities, limits on contacts with other prisoners, solitary confinement, etc. This special regime is usually applied to prisoners convicted for organize crime.

[104] According to Antigone in 2013, 45 of 205 prisons still had table barriers.

1.3.4. Right to food and drinkable water

One of the main complains of prisoners is the one related to the quality of food. According to a study of Ristretti Orizzonti[105] meals provided by the prison administration are inadequate, in quality and quantity, to feed people. The amount of money for feeding one prisoner (breakfast, lunch and dinner) is considered insufficient: € 3.80.

Ristretti Orizzonti has also reported the excessive costs of the food that prisoner can buy by themselves from private retailers under contract with prison administration. The suppliers have been repeatedly accused of selling goods at a higher rates to prisoners[106].

In some prisons, especially prisons located in old facilities, there are complains for the quality of drinkable water.

1.3.5. Complains regarding hygiene and cleanliness of the institution and the prisoners

It's really hard to draw a picture of the conditions of all the Italian prisons related to their *hygienic conditions*. Situations may vary a lot from prison to prison and, sometimes, also inside the same prison. Nevertheless applications presented by prisoners with the help of Altro Diritto and the reports of Osservatorio Camere penali and Antigone, show a general and systematic violation of the right to be detained in facilities with acceptable hygienic conditions. This situation was only partially consequence of overcrowding, since it often consequence of the fact that prisoners are hosted in old and dilapidated building. Often prisoner complains that administration doesn't give enough detergents and other tools for cleaning the cells and for their personal hygiene. Another major concern is about the conditions of the beds (especially mattresses), linen and towels.

1.3.6. Sanitation, heating, lighting and ventilation of the institution

As in the case of hygiene and cleanliness, also in the case of sanitation, heating, lighting and ventilation it's really hard to give a coherent description of the reality. The applications of Altro Diritto and information contained in the reports of Antigone and Osservatorio Camere Penali describe the bad conditions of the facilities. Cells not adequately heated or not heated at all for long part of the day because of lacks of the heating systems. Sanitary facilities are often describes as inadequate: sometimes prisoners have to use one single sink for their personal hygiene, for washing dishes, clothes and for cleaning the cell. In most of the prisons showers are out of the cells and inmates have limited access to them depending on the limits of the heating systems. According to Antigone 138 of 205 prisons sanitary are inside the cell without any proper

[105] Ristretti Orizzonti, *Dossier sugli appalti per il vitto e il sopravvitto nelle carceri italiane*, http://www.ristretti.it/commenti/2011/luglio/pdf2/dossier_vitto.pdf

[106] The Italian Court of Auditors (Corte dei Conti) has investigated on some contracts (Ristretti Orizzonti, *Dossier sugli appalti per il vitto e il sopravvitto nelle carceri italiane*)

separation. Lighting and ventilation of the cells are often one the major concern of the above mentioned reports. In 20 prisons windows of the cells have barriers that don't allow a good circulation of air and light. There are prisons in which toilet.

1.3.7. health problems

To understand the complains related to the right to health, it's necessary a premise to explain the reform that has recently changed the healthcare services inside prisons.

In 2008 medical care has been moved from the competence of Ministry of Justice to the one of Ministry of Health[107]. The basic principle of the reform is the equivalence of care: prison health services have to provide prisoners with care of a quality equivalent to the ones provided for the general population. The law states also the non-discrimination principle: non-Eu prisoners have same rights of european prisoners and have to receive the same health services.

But with the reform prison healthcare has been jeopardized, since Italian healthcare system is organized on regional basis. Also if the basic levels of care to be guaranteed to all citizens are defined on national level[108], each Region may use its budget discretionally to meet the standards required by the national law.

In this context when healthcare was transferred to Ministry of health, each Region has adopted its own law for prisoners' rights to health[109], using the limited budget transferred from the ministry of justice to the ministry of health. Consequently, some rich Regions have improved the budget to guarantee an improvement in healthcare standards, while others have kept a poor budget and low healthcare standards.

For the reasons explained above, it's hard to give a general description of healthcare in Italian prison system, but it's possible to outline some major issues. Reports of the NGOs (Antigone and Osservatorio carcere) and Altro Diritto applications may help to outline the main issues and concerns related to prisoners' healthcare services.

1) There's a general complain reporting the *poor level of health* services in prison.
2) All the reports confirms a general trend to *medicalize the treatment* of prisoners, at least the 50% of prisoners receives drug, but only 1/3 of them has psychic diseases or mental illness[110].
3) Prison population is generally composed of *sick individuals*[111]: according to Antigone's report 1 prisoner of 2 suffers by infectious diseases and 1 of 3 by psychic diseases.

[107] D.P.C.M. 30 maggio 2008, n. 126
[108] Decreto del presidente del consiglio dei ministri 29 novembre 2001.
[109] Only in Sicily the local government has not yet adopted the required law for competence's transfer, so only in this region prisoners' healthcare is still in the hands of penitentiary administration.
[110] In literature we have only one study at national level (V. De Donatis, O. Sagulo, *Il divenire della medicina penitenziaria attraverso la conoscenza dello stato di salute della popolazione detenuta*, M. Esposito (a cura di), *Malati in carcere,* Franco Angeli, Milano 2007, pp. 124-159), while at local level the only region that has published a comprehensive epidemiologic study is Tuscan Region (ARS Toscana, *La salute dei detenuti in Toscana*, 2012, www.ars.toscana.it). Emilia Romagna Regioni is the only region that has almost completed a program of digitalization of all the medical-files of prisoners, but there not yet public data.
[111] The study of Tuscan region (ARS Toscana, *op. cit.*) shows that 71.7 % of prisoners is sick : 41% suffer of from mental disorders , 14.4 % from digestive disorders and 11% from infectious and parasitic diseases

4) In most of prisons there's a general complain about the *lack of medical specialties*.

5) There are complains about the difficulties to access to *civil hospital* due to long wait lists and slowness of the transfers, in addition prisoners often complain that they are never aware, for security reasons, of the schedule of medical treats and transfers.

6) *Prison doctor are not considered truly independent* by the prison administration, prisoner's right to health is often bent to the needs of custody and security. One of the effects of the transfer of prison health services had to be the independence of medical staff from custodial staff, but after the reform the medical staff have remained the same, there haven't been any new training for the staff and any change in human resources.

7) *Death in prison*. Ristretti orizzonti is monitoring all the deaths in prison (not only those classified as suicide but all deaths of prisoners)[112]. According to Ristretti there are cases in which the cause of death is not clear, where the death is generically achieved as " cardiac arrest" or cases in which the official versions seem unreliable and inconsistent, maybe, to hide ill treatment perpetrated by police officers or other inmates.

8) *Suicide prevention*. According to Ristretti Orizzonti suicide monitoring observatory, prisoners' suicide rate is 19 times higher the suicide rate in general population[113]. Most of suicide happen in prison with the worst living conditions, where there are few social and educational programs and where there's a limited presence of NGO. In 2014 there were 44 suicides and 933 attempts.
Suicide prevention strategies of penitentiary administration seems to be inadequate. Usually prisoners at risk of suicide are treated with drugs and controlled by penitentiary police with a "suicide watch" order[114].

9) *Self-harm* is very common in Italian prisons: according to official data[115] between 1992 and 2010 the 8-9% of prisoners self-harmed. Only in 2014 there were 6.919 inmates self-harmed[116].

10) *No digital records of health of prisoner*. With the reform Regions had to start to use digital files in order to guarantee the continuity of treatment in case of release or transfer and to guarantee to prisoners a simplified access to their health records. According to Antigone only in Emilia Romagna and, partially, in Lombardia this improvement has been adopted, while other Regions keep using paper files.

11) Prisoners have difficulties to access to their *files containing health status and treatment* records and when they get the access they discover it contains poor records often unreadable.

[112] Ristretti Orizzonti, *Morire di carcere: dossier 2000 – 2015. Suicidi, assistenza sanitaria disastrata, morti per cause non chiare, overdose*, http://www.ristretti.it/areestudio/disagio/ricerca/
[113] Ristretti Orizzonti, *op. cit.*, http://www.ristretti.it/areestudio/disagio/ricerca/2003/suicidi.htm
[114] Suicide watch order ("Grande sorveglianza") is ordered by the prison's director when medical staff reports that a prisoner is at suicide risk. Prisoners are not moved in any special cell and are not video monitored, but they are simply visually controlled by police every 15, 30 o 60 minutes (depending on the order).
[115] Dipartimento Amministrazione Penitenziaria, *Eventi critici negli Istituti penitenziari, Anno 2010* http://www.ristretti.it/commenti/2013/luglio/pdf3/eventi_critici_2010.pdf
[116] Antigone, *op. cit.*

12) Unlike free citizens, prisoners haven't the *right to choose their doctor* or the *civil hospital*, but they have to accept the one imposed by healthcare services.

1.3.8 Right to vote ban

As an effect of the *right to vote's ban* to lifers and sentenced to more than 5 years, Antigone reports that during last political election (24 and 25 February 2013) only 3.426 of 66,000 inmates voted (30,000 were eligible for the right to vote).

1.3.9 Prison labour

Prison labour is one of the main concerns for prisoners, since it's considered the only way for prisoners to gain money for buying food and to fill other basic needs.

1) Limited numbers of jobs available in prison. According to official data[117] 28% of prisoners work in prison, 83% of them for penitentiary administration Actually most of the prisoners work for few weeks during an year (usually one month or two), because prison labour is subject to an intense turn over, consequently the official data overestimate the quantity of work in prison, since it says how many prisoners have the chance to work, but it doesn't explain how many real jobs are made available for prisoners.
2) Quality of jobs. The jobs available in prison don't allow to learn or improve skills, since they usually consist in activities for facilities' maintenance and prison support jobs (e.g. laundry, cleaning, cooking, etc.).
3) Poor remuneration. Italian prison administration is paying prison work less than it should be done according to the Italian penitentiary law. Prison administration has been convicted twice by the Supreme Court. Despite the convictions, salaries for prison labour are still under the law provisions and there's a structural violation of the rights of working prisoners. Usually a prisoner is paid 3€ per hour, but from this amount should be deducted the cost of maintenance and compensation.
4) Obstacles for accessing to social security. According to penitentiary law, working prisoners have the right to social security (unemployment insurance, family benefits, insurance against accidents and illness, old-age pension system, etc) as free workers. Actually the poor salaries allow prisoners to pay poor contributions for social security, so they have lower economic benefits compared to a free worker. In addition prisoners have difficulties to apply for social security benefits to the Department of Welfare (INPS), since most of the

[117] Ristretti orizzonti, *Statistiche sul lavoro in carcere e semilibertà, aggiornamento al 30 giugno 2014*, http://www.ristretti.it/commenti/2015/gennaio/pdf5/lavoro_detenuti.pdf

applications needs a special assistance and counselling usually provided by trade unions that in most of cases don't give any kind of support to working prisoners[118].

1.3.10. Gender

10.1 Female detention:

The Italian female prison system is primarily affected (as in Europe and worldwide) by the constantly low women incarceration rate (an average rate of 4,5% of the total prison population in Italy[119]).

Historically the female detention in Italy was entrusted, by the first post-unification general prison regulation[120], to "charity institutes", preferably managed by religious staff. This situation changed with the enactment of the Penitentiary Law, in 1975 when the two models of detention (the justice model of the male penitentiary and the care model of the female penitentiary) merge and the female prison population appears to be confined in the invisibility by the scarcity of the number compared to the general prison population.

The exclusively female prisons are only 5 in the Italian prison system (Trani, Pozzuoli, Roma Rebibbia, Empoli, Venezia Giudecca); while the female sections within the male prison are 52.

This data reveals the first issue related to the female detention in Italy, i.e. the high risk of "deterritorialization of the detention" of women imprisoned.

Another relevant aspect of the low female incarceration rate is the endemic lack of disaggregated data and qualitative research on the specificity of the female condition in prison.

No specific norms exist on the penitentiary execution or the treatment for female offenders in Italy (despite the various international and European rules on the specificity of the female detention[121]). Recently this gap has been partly filled by the Circular n.0308268, 17 September 2008 that introduce a model of internal regulation for female sections[122]. Unfortunately this model is still not operative in many female sections (for example the Sollicciano prison female section has not adopted it, despite the number of female prisoners detained in Florence).

One of the main issue concerning female detention is the focus on the need of the women imprisoned, specifically related to hygiene, health care, sexuality, maternity, self perception.

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[118] Since 2004 Altro Diritto has created a counselling service to support prisoners to apply for social security benefits in Firenze's prison.

[119] According to the statistics of the Ministry of Justice, available at: https://www.giustizia.it/giustizia/it/mg_1_14.wp?frame10_item=4).

[120] Royal Decree, 1 february 1891, n. 260.

[121] See: Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules; CPT Standards, [CPT/Inf/E (2002) 1 - Rev. 2015]; European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life (2007/2116(INI)); UNODC (United Nation Office on Drugs and Crime) Kyiv Declaration on Women's Health in Prison; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

[122] Available at: https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_2&facetNode_2=0_2_1&previsiousPage=mg_1_12&contentId=SPS60122

Recently the case of the female section within the Florence-Sollicciano prison in the light of the poor material condition of detention, particularly related to the international and European standards concerning female detention, has been the object of a number of applications (still waiting for a decision) for the preventive and compensatory remedies introduced with the articles 35 bis and ter of the Penitentiary Law.
The situation originated from the endemic structural deficiencies of the section and the cells aggravated by a special security regime that reduced significantly the access to the shower and hot water for all the female prisoners of the relevant unit.
The Italian legislation takes into account the specificity of the female detention only in respect to maternity. Article 11 of the Penitentiary Law allows imprisoned mothers with children aged three or younger to keep the children in prison in a dedicated mother with child unit, called Nido.
Currently 12 Nido exist in Italy in the regions of Abruzzo, Calabria, Campania, Lazio, Liguria, Lombardia, Piemonte, Puglia, Sardegna, Sicilia, Toscana, Umbria, Veneto (5 Nido are present but not functioning) and data shows that 28 children are currently in prison with their mother[123].
Law 40 of March 8, 2001, amended the Code of Criminal Procedure allowing imprisoned mothers with children aged three or younger to benefit from alternatives to incarceration. Law 40 also provides that convicted mothers with children aged ten or younger may be allowed to serve their sentences in their own residence, in another private residence, or in a place of care or assistance, in order to provide care or assistance to their children, if there is no specific danger of recidivism and the possibility of restoring cohabitation with their children exists. This latter benefit accrues to mothers who have served one-third of their sentence, or at least fifteen years in the case of a life sentence. Under Law 40, special home detention may also be granted to an incarcerated father when the mother is dead or incapacitated and there is no possibility of entrusting the children to persons other than the father.
Law No. 62 of April 21, 2011 introduced a series of amendments aimed at protecting the relationship between incarcerated mothers and their minor children. In particular, Law 62 states that when the criminal defendant is a pregnant woman or the mother of children six years of age or younger (or the children's father when the mother is deceased or absolutely incapable of caring for the children), she/he may not be subject to preventative imprisonment unless exceptional precautionary measures are needed. Additionally, the judge may order the mother or father's custody in a minimum-security institution (ICAM) for children aged 10 or younger. Currently only three ICAM are functioning in Italy (Milano-San Vittore, Venezia-Giudecca, Senorbì).

[123] According to the statistics of the Ministry of Justice, available at:
https://www.giustizia.it/giustizia/it/mg_1_14_1.wp?facetNode_1=0_2&facetNode_2=0_2_1&previsiousPage=mg_1_14&contentId=SST1125421

10.2 Transgender detention[124]

In Italy, since the shattering of the male monopoly, the structural problem of managing the inmate population has been tackled by separating prisoners according to sex, following a strict male/female normative binarism. This binary opposition adhered to the existing legal categories and, at the same time, indirectly solved the problem known in penitentiary jargon as "promiscuity" (i.e. sexual or affectionate liaisons) through a strategy of "risk avoidance".

No legislation or policies have been developed for the mode of incarceration of transgender persons. Consequentially, for many years, the mode of incarceration of transgender people was informally defined by the procedures adopted in individual correctional facilities. The question of the space and the treatment lies at the core of the problematic issues related to transgender detention.

Traditionally, two model of informal incarceration have been adopted:

1. to house transgender prisoners according with their birth gender (genitalia based placement);

2. to impose protective measures which almost always involve punitive isolation and deprivation of rights (administrative segregation, "protective" segregation, solitary confinement for protective purposes, the so called "pod-model");

In Italy, solutions to the issue of "transsexual incarceration" varied, with a prevalence of the pod-model[125], involving coping with gender diversity through protective custody units[126], situated in the male wing[127]. This

[124] Due to the lack of official data, this section draws upon the findings of a research conducted by two researcher of L'Altro diritto, S. Ciuffoletti - A. Dias Vieira, "Section D: a Tertium Genus of Incarceration? Case-study on the Transgender Inmates of Sollicciano Prison", *Journal of Law and Criminal Justice,* December 2014, Vol. 2, No. 2, pp. 209-249 (See Appendix n.1)

[125] Interestingly enough the protective model of incarceration (the so called pod-model) has been sanctioned by the ECtHR in a recent and very relevant case. In *X. v. Turkey* the Strasbourg Court ruled that the Turkish prison authorities had subjected a young "gay male" to "inhuman and degrading" treatment in violation of the European Convention on Human Rights. In 2008, soon after being detained, he requested a transfer from a cell where he was being bullied to one shared with other gay inmates. Instead, he was placed in solitary confinement for over eight months. The Court "notes the prison authorities' concern that the applicant risked being physically abused. Admittedly, such fears cannot be said to be totally unfounded in so far as the applicant had himself complained of intimidation and bullying while he had been detained with other inmates. However, even if those fears made it necessary to take certain security measures to protect the applicant, they do not suffice to justify a measure totally isolating the applicant from the other prison inmates. In that connection the Court notes that the Government were unable to explain why the applicant was not given the opportunity to take regular open-air exercise and, in accordance with his many requests (see paragraphs 12, 13 and 15 above), was not allowed even limited contact with other inmates". The Court further assessed that "the state must ensure treatment that did not cause "hardship beyond that which is an unavoidably inherent feature of detention." Ankara was ordered to pay the defendant 22,000 euros, and a precedent was established. Even if the case concerns solitary confinement, it is interesting to note how the protective model cannot justify ex se a violation of prisoners rights.

[126] See art. 32 of the DPR 230/200 for the concept of "protective custody": Art. 32. Placement and grouping for precautionary reasons

1. Prisoners whose behavior requires specific care, for reasons such as the protection of other prisoners from potential harm, are assigned to specific institutions or sections designed to facilitate the implementation of the above- mentioned precautionary measures.

2. The persistence of the need for precautionary measures is verified every six months.

3. Moreover, those prisoners who are at risk of being harmed by other prisoners should be transferred to a more suitable placement. For this purpose, special sections can be used, but the assignment to such sections must be frequently reexamined for each individual case, in order to verify the persistence of the need to separate the individual from the community.

[127] We talk about male sections because the phenomenon of the incarceration of transgender people was (and still is) characterized by the prevalence of male-to-female transgender inmates

procedure was made official through a 2001 departmental memorandum[128] entitled "The so-called 'protected' sections. Inmate placement criteria," stating that protected sections were "established to meet the need to protect specific categories of inmates due to objective reasons, even if these are at times based on the subjective characteristics of the inmates in question (for instance, transsexualism.)".

This general model, which was based on a strong discriminatory paradigm, albeit for precautionary reasons, has been superseded in a few cases, on a merely practical level, by a different model which radically disrupts the classification of inmates according to their genital identity. As a matter of fact, some correctional facilities have introduced an alternative form of incarceration for transsexual inmates by assigning them to as autonomous spaces as possible.

The case of Florence-Sollicciano prison perfectly exemplifies this trend and can be used in order to illustrate the problematic issues that, this informal mode of detention, involves. Since the end of 2005, following a reorganization of the facility[129], the selected space for transgender persons' incarceration has been transferred in the female section, above the unit where inmates with partial mental illness are housed. The section in question is detached from the female compound, which occupies a whole wing. Originally, this space was not meant to function autonomously; as a consequence, significant flaws and structural shortcomings can be detected, first and foremost the absence of a room devoted to socialization, as well as the lack of rooms specifically devoted to meetings with lawyers and other professionals such as social and health workers. Meetings with volunteers and lawyers must now be improvised in the duty officer's office. This solution entails a number of problems, notably with respect to the protection of the right to privacy. This problem is currently tackled by resorting to an alternative and informal solution: the officers agree to leave the room for the duration of the interview, thus protecting—though only as a result of negotiation—the right to privacy.

This condition of structural and spatial isolation is aggravated by the inadequacy of treatment, which the inmates of Section D receive only when men and women (formally recognized from a legal perspective, and thus gaining the right to all activities and services) have already made use of the facilities, according to a formula which acknowledges their right to treatment (expressed in Article 27 of the Italian Constitution) only in an exceptional and marginal fashion.

Another relevant issue is constituted by the lack of a basic ideological framework within which the topic of incarceration can be addressed from a gender perspective. Signs of the difficult integration of a third category of incarceration can be found in the most banal, everyday procedures: the distribution of clothes, the possibility of buying products for personal hygiene, the possibility of getting a haircut, and the way in which the penitentiary administration addresses the inmates of Section D.

Access to basic services, such as schools or libraries, is extremely limited: indeed, the segregation of transgender inmates from those of the male and female sections turns marginality into the ruling criterion for Section D.

[128] Departmental Memorandum of the Penitentiary Administration Department, Prot. N. 500422 of May 2nd, 2001.

[129] All data pertaining to the cases of transgender inmates in Sollicciano were obtained from the research projects and legal advice activities of the non-profit organization L'Altrodiritto-onlus.

A final relevant issue concerns the health related question. The possibility of being treated by specialist and provided with hormonal therapy and medical-psychiatric assistance appears to be one of the most neglected point. Taking again the case of Sollicciano at the moment, in the absence of a formal convention, the interaction of a specialized unit: the CIADIG (Interdepartmental Center for Gender Identity Disorder of the Careggi university hospital center) with Sollicciano prison is irregular and affected by the systematic structural inadequacy of the facility. The medical examination of inmates from Sollicciano at the University Hospital in Careggi began in June 2013, but the majority of inmates have not yet had a session with the CIADIG workers and are not under the care of the Careggi work team, not even for hormonal therapy.
In the absence of relevant sources of law concerning the incarceration of transgender people: Sollicciano is one of the few Italian prisons in which a *tertium genus* of incarceration, not provided for by law, has been informally established.
Currently the facilities housing transgender inmates are the prison of Alba, Belluno, Bergamo, Bollate, Firenze Sollicciano, Milano S. Vittore, Napoli, Poggioreale, Rimini, Roma, and Rebibbia NC, for a total of 80 inmates as of October 2009. No official public data exist on the number of transgender inmates in the Italian prison system.

1.3.11. Access to legal aid

Access to legal aid is another major concern for prisoners. Italian legal aid system is a private/public model: legal aid is provided by private attorneys to persons with an income less than 11.369,24 and it's paid with public money and it's called "gratuito patrocinio a spese dello stato"[130]. Private attorneys available for this service apply to the local bar association and their names are included in a list. There's a variety of obstacles for the access to legal aid in prison:

1) While european prisoners may apply attaching a self-certification of their income, non-eu prisoners have to attach an authenticated certifications. This requirement prevent non-eu prisoners from accessing to legal aid, because the proceeding for getting original certificates and for their authentication may take several months (often embassies don't even answer to the applications of prisoner and don't provide any certificate) and because many of them are irregular migrants declaring false information.
2) Many prisons don't provide a list of legal aid's attorneys, so prisoners have difficulties to reach lawyers.
3) Often attorneys refuse legal aid services, so prisoners have to contact several attorneys before finding one available for legal aid.

[130] DPR 30 maggio 2002 n. 115

4) The Legal aid's reimbursement is paid from the State 2-3 years after the refund request, that's the reason for which sometimes attorneys refuse to provide legal aid services
5) The legal aid service must be authorized by the Court that has to verify that the applicant is eligible. Sometimes legal aid's attorney ask money to prisoners for the work they do before the judge's authorization.

1.4 The role of Ombudsmen in Italian legal system

The Ombudsman for the rights of detainees has been introduced only in 2008 in Italian legal system. Before this time it had been introduced thanks to the initiative of local political government.
The Ombudsman was initially introduced by the municipality of Rome in 2003[131] for the promotion of rights of detainees in the municipality of Rome, soon after a similar Ombudsman was introduced at regional level by the Government of Lazio[132] and then they were followed by the Ombudsman of Milan's county[133], Bologna[134], Firenze[135], Nuoro[136], and Torino's[137] municipalities. These first Ombudesman had no effective power, since they were not recognized by the law, but they were only political institutions with the aim of promoting public debate about prison issues and the respect of prisoners' rights.
From 2003 to present time the following Ombudsmen have been appointed by local governments:

1) Regional ombudsman: Abruzzo, Campania, Emilia Romagna, Lombardia, Marche, Piemonte, Puglia, Sardegna, Sicilia, Toscana, Umbria, Val D'Aosta, Veneto.
2) County ombudsman: Enna, Ferrara, Lodi, Massa e Carrara, Milano, Trapani
3) Bergamo, Bologna, Bolzano, Busto Arsizio, Brescia, Ferrara, Firenze, Ivrea, Livorno, Milano, Nuoro, Parma, Pescara, Piacenza, Pisa, Pistoia, Prato, Reggio Calabria, Roma, Rovigo, San Severo, San Gimignano, Sulmona, Sassari, Torino, Trieste, Udine, Venezia, Verona, Vicenza.

Only in 2008[138] the Ombudsmen have been recognized in Italian legal system. They still haven't any real and effective power but now they have the right to enter into prisons without any authorization (art. 68 of penitentiary law[139]) and the prisoners have the right to ask meeting and to send letters (art. 18) or to file a claim to ombudsmen (art. 35). But they haven't any power to promote investigations or inspections, they

[131] Delibera comunale n. 462 del 30.07.2003.
[132] Legge regionale n. 31 del 6 ottobre 2003
[133] Delibera Consiglio provinciale del 16 dicembre 2004
[134] Delibere di Giunta e Consiglio n. 11/2004 del 26/01/2004
[135] Delibera comunale n. 666 del 09.10.2003
[136] Delibera comunale del 28.02.2005
[137] Delibera comunale del 07.06.2004
[138] Decreto Legge 207/2008 convertito nella Legge 14/2009
[139] The same power is recognized to members of the national and regional parliaments.

have no access to the prisoners' files and they cannot appeal to the Court. Most of Ombudsmen use these limited powers to sensitize public opinion and to publicly denounce rights violations. They can have a role in urging and mediating with penitentiary administration to solve cases.
With the above mentioned reform that has introduced the new preventive remedy for protection of prisoners' rights (art. 35bis of penitentiary law)[140], it has been created the *national Ombudsmen* for prisoners' rights, for the implementation of obligations deriving from Torregiani's case and from the Opcat Protocol ratified on April 2013. The National Ombudsman is a collegiate body, composed by one chairman and two members, that remain in office once for 5 years without any remuneration but with a reimbursement. Ombudsmen are chosen by the President of Republic, but the proposal comes from the Council of Ministers. The office of Ombudsman is inside the department of ministry of justice and its staff is composed by personnel of this department. At the present time the National Ombudsmen has not yet been appointed.

According to the art. 7 of the Decree NO. 146 23.12.2013, National Ombudsmen has the following powers:

a) *monitoring* that any form of detention or custody, both penal or administrative, respect the rules and principles established in the Constitution, the international conventions on human rights ratified by Italy, the State laws and regulations;
b) *visiting* all kind of detention or custodial facilities, without any preventive authorization, it's necessary to inform in advance only for visiting local police's jail, for not interfering with police investigations;
c) *accessing to the files* of any person under custody, with the consent of the person: if the administration doesn't give access to the files within 30 days, Ombudsmen apply for a Surveillance Court's order to release the file;
d) *giving recommendations* to the administration responsible of a violation: the administration may refuse to follow the recommendation notifying a dissenting opinion within 30 days
e) *reporting* every year to the Parliament.

[140] Decreto Legge NO. 146, 23.12.2013, G.U. 21.02.2014

PART IV. Other sources

4.1 CPT reports

The CPT has carried out six periodic visits (in 1992, 1995, 2000, 2004, 2008 and 2012) as well as four *ad hoc* visits (in 1996, 2006, 2009 and 2010) to Italy. Except for the report on the 2010 visit, all visit reports and related Government responses have been published on the CPT's website: http://www.cpt.coe.int/en/states/ita.htm

Next visit is scheduled for 2016 (http://www.cpt.coe.int/en/visits/2015-03-30-eng.htm).

The last visit took place from 13 to 25 May 2012. The following report was adopted by the CPT at its 79th meeting, held from 5 to 9 November 2012.

The delegation visited the following prisons[141]:

- Bari Prison
- Florence-Sollicciano Prison
- Milan-San Vittore Prison (remand prisoners and Centre for Neuropsychiatric Observation – CONP)
- Palermo-Ucciardone Prison (health-care services and situation of remand prisoners)
- Terni Prison (Unit for « 41-bis » prisoners)
- Vicenza Prison

In addition, the delegation went to Messina Prison, in order to interview newly-arrived remand prisoners. It also paid a brief visit to Palermo-Pagliarelli Prison, in order to collect information on admission procedures.

[141] As well as Law enforcement establishments:
- Florence State Police Headquarters (Questura)
- Messina State Police Headquarters (Questura)
- Milan State Police Headquarters (Questura)
- Palermo State Police Headquarters (Questura)
- Rome State Police Headquarters (Questura)
- Messina Gazzi Carabinieri Station
- Milan Ponte di Magenta Carabinieri Station
- Milan Municipal Police Headquarters (Ufficio Centrale Arresti e Fermi)
- Messina Municipal Police Station - Caserma "Orazio di Maio"

Detention centres for foreigners:
- Bologna Identification and Expulsion Centre (Centro di Identificazione ed Espulsione, via Mattei)

And Psychiatric establishments:
- Barcellona Judicial Psychiatric Hospital (OPG) and Care and Surveillance Centre (Casa di Cura e Custodia)
- Psychiatric Service for Diagnosis and Care (SPDC) at the Milazzo General Hospital
- Naso Therapeutic Community Centre (Comunitá Terapeutica Assistita – CTA).

Significantly, this last visit took place after the *Sulejmanovic* judgment and immediately before the *Torreggiani* case. The issue of prison overcrowding is therefore at the core of the CPT report. The question for the delegation is to assess whether the remedies put in place by the Italian government to solve the systematic and persistent problem highlighted by the ECtHR.

Overcrowding:

The first critical point raised by the CPT directly connects the overcrowding rate to the material conditions of detention, negatively affecting various aspects of prison life for prisoners and staff alike.

Taking into account the prison population statistics, since the last visit of 2008, the prison population had increased from some 59.000 to 66.258 prisoners. Contextually the official capacity had increased less than proportionally (from 43,012 to 45,584 places), with a rise of the overcrowding rate from 37% of 2008, to 45% of 2012.

The CPT estimates that the above mentioned increase appears to be the result of a number of reforms in the Italian legislation, which introduced more severe sanctions for drug-related offences (Law 49/2006) and a reduction of non-custodial sanctions for recidivists (Law 251/2005). The systematic overcrowding condition of the Italian prison system became an issue (even at a national level) only after the exposure by the ECtHR in the *Sulejmanovic* case. After this judgment, the Italian government put in place a set of measures, limited in scope. The evaluation of the report on the effectiveness of those measure is clear: "The CPT acknowledges the efforts being made by the Italian authorities to tackle the problem of prison overcrowding. That said, according to the information available, the direct impact of the ongoing reforms on the level of overcrowding has thus far been somewhat limited. In particular, in the context of the above-mentioned "Piano Carceri", only 1,323 additional detention places have to date been created. Further, from June 2010 until June 2012, the total number of prisoners has been reduced from 68,258 to 66,487, which represents a decrease of some 2.60% only[142]".

Therefore the CPT: "recommends that the Italian authorities pursue vigorously their endeavours to combat prison overcrowding, including through increased application of non-custodial measures during the period before any imposition of a sentence. In this respect, the authorities should be guided by Recommendation Rec(99)22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation, Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures, Recommendation Rec(2003)22 on conditional release (parole), Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse and Recommendation Rec(2010)1 on the Council of Europe Probation Rules.[143]"

[142] CPT, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 25 May 2012 (2012 Report), § 44, available at: http://www.cpt.coe.int/documents/ita/2013-32-inf-eng.pdf

[143] Ivi, p. 24.

Worthy is to note, to further detail the systematic and persistent nature of the overcrowding in the Italian prison system, as well as the lack of intervention in this respect up until the enactment of the pilot judgment procedure by the ECtHR, that since its first visit, in 1992, the CPT has attested this phenomenon. In its 1992 reports, the CPT affirms that: "*En résumé, les conditions de détention observées par la délégation dans les maisons d'arrêt Regina Coeli et San Vittore (hormis les deux sections pour peines) laissaient fortement à désirer. D'abord, ces établissements étaient sérieusement (Regina Coeli), voire outrageusement (San Vittore) surpeuplés*[144]", and concluding that "*soumettre des détenus à un tel ensemble de conditions de détention (surpeuplement, hygiène médiocre et pénurie d'activités), équivaut, de l'avis du CPT, à un traitement inhumain et dégradant*.[145]".

2. Ill treatment

Going on discussing about physical ill-treatments in prison by prison officers, the delegation observed a "humane and constructive attitude on the part of custodial staff", with the exception of one prison (Vicenza) with allegations of physical ill-treatments and/or excessive use of force by prison officers, mostly in relation to disciplinary incidents where inmates had displayed aggressive behaviour, leading the CPT to recommend, specifically that outside body competent for the protection of prisoners' rights, namely the competent supervisory judges "be informed without delay of the allegations received by the delegation.".

It is interesting to note that the CPT invoke the competent Supervisory judge as a body responsible for monitoring the violations of prisoners' rights inside prisons even before the pilot judgment and the enactment of the preventive remedy established by the Italian legislator via the art. 35 bis of the Penitenciary Law.

3. Condition of detention of the general prison population

Considering the material condition of detention, the CPT reports affirms that a great deal of variety exists from one establishment to another, as well as from one unit to another within the same establishment. This is an important statement to certify the level of inequality of treatment existing in the Italian prison system. As an example, at "Florence-Sollicciano many parts of the establishment were affected by major water infiltrations and, at Vicenza, the heating system appeared to be deficient (due to the erosion of one of the major water pipes). At Bari Prison, material conditions were on the whole adequate in all renovated detention blocks, but left much to be desired in some unrenovated parts (in particular, in the unit for female prisoners). Interestingly enough, due to lack of funding, the renovation of the entire unit for female prisoners had repeatedly been postponed.[146]". In the Palermo prison of Ucciardone, "several blocks (i.e. Blocks Nos. 2, 5, 6) were so dilapidated that they had been withdrawn from service. In other accommodation areas, cells and sanitary facilities were in a poor state of repair and the level of hygiene left much to be desired. Another

[144] CPT, Rapport au Gouvernement de l'Italie relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Italie du 15 au 27 mars 1992 (1992 Report), §77, available at: http://www.cpt.coe.int/documents/ita/1995-01-inf-fra.pdf.
[145] *Ibidem*.
[146] 2012 Report, cit., p. 25.

major shortcoming lies in the fact that, in a number of cells in Block No. 930, windows were covered with metal shutters which reduced access to natural light to a minimum. Further, throughout the prison, numerous complaints were received about the lack of heating in the cells. In addition, a number of prisoners complained about an insufficient supply of personal hygiene products[147]".

All of the above considerations concerning the material prison condition are worsen by the endemic rate of overcrowding that constitutes, on the contrary, a spread and common phenomenon of the Italian prison system. All the establishments visited were operating far above their official capacity at the time of the visit, the overall occupancy level being in the region of some 200%[148].

Accordingly with its standards, the CPT recommend that "the Italian authorities take steps to reduce cell occupancy levels in all the prisons visited (and, in particular, at Bari Prison), so as to provide for at least 4 m² of living space per prisoner in multi-occupancy cells; for this purpose, the area taken up by in-cell sanitary facilities should not be taken into account. Further, any cells providing less than 8 m² of living space should be used for single occupancy only[149]".

As regards to the regime the CPT uses various indicators, such as a daily program of outdoor exercise and sport activities, the provision of on a rota basis work[150] and other activities (such as education) to prisoners. On this particular respect, the number of offered remunerated work activities in the visited prisons appeared to be highly insufficient.

Considering the treatment, the delegation noted that some circulars[151] had begun the so-called "open cell" strategy: "aiming at relaxing the regime for medium-security prisoners by extending the period during which prisoners can remain outside their cells, on the basis of a more developed security classification. At the time of the visit, the aforementioned circulars were still at an early stage of implementation and were basically limited to pilot projects. For instance, at Florence-Sollicciano Prison, the management had recently decided to extend the period of out-of-cell time for specially selected remand prisoners in one particular unit, provided that the prisoners concerned had successfully completed a counter-addiction therapy".

As a matter of fact, the delegation is forced to note the difference between remand prisoners who are almost entirely excluded by any kind of activities and the sentenced prisoners who can enjoy a program of activities, though largely insufficient. In conclusion, the CPT stress the fact that: "The objective should be to ensure that remand prisoners are able to spend a reasonable part of the day outside their cells engaged in purposeful

[147] *Ibidem.*

[148] According to the 2012 Report, pp. 25-26: "The most severe overcrowding was observed at Bari Prison, where cells31 measuring 19.60 m² 32 were accommodating up to eleven prisoners, the living space per prisoner thus being a mere 1.78 m². Further, cells measuring 20.10 m² were accommodating up to nine prisoners (i.e. 2.23 m² per person). Such a state of affairs is not acceptable. It should also be noted that the delegation found two women in the female unit who had to share a cell measuring only 6.30 m²; a cell of such a size is scarcely adequate for one person, let alone two. The situation was more favourable but still far from satisfactory at Palermo-Ucciardone Prison, where it was not uncommon for cells measuring some 22 m2 to accommodate up to eight
prisoners. Cramped conditions were also observed at Florence-Sollicciano and Vicenza Prisons, where cells measuring some 13 m2 (including a fully-partitioned sanitary annexe) and initially designed for single occupancy only were accommodating up to three prisoners."

[149] *Ibidem*.

[150] The number of prisoners able to participate being increased by the sharing of places on a part-time basis.

[151] See Circulars No. 3594-6044 of 25 November 2011 and No. 0206745 of 30 May 2012.

activities of a varied nature. Regimes of sentenced prisoners should be even more favourable; this is the only way of giving a true sense to a term of imprisonment[152]".

4. Prisoners subjected to the "41-bis" regime

The "41-bis" regime was introduced in 1992 as a temporary emergency measure and became institutionalised on a permanent basis in 2002, following an amendment to the Penitentiary Act. The regime exclusively applies to prisoners who have been convicted of or are suspected of having committed an offence in connection with mafia-type, terrorist or subversive organisations, and who are considered to maintain links with such organisations.

The CPT has continuously made a number of recommendations in the previous visits and has always paid special attention to the restrictions of prisoners' rights connected with this kind of regime.

Since the 2008 visit, the Italian legislation had undergone a set of reforms and changes[153], unfortunately, as the CPT sharply note, Italian authorities have failed to implement those recommendations and have, on the contrary, imposed a number of additional restrictions:

"The main changes can be described as follows:

(1) The maximum number of persons per socialisation group has been reduced from five to four prisoners. Contacts with prisoners from another living unit remain strictly prohibited.

(2) The time prisoners are allowed to spend outside their cells has been reduced from four to two hours per day (one hour of outdoor exercise and one hour in a communal room). During these two hours, prisoners are allowed to associate with the other inmates of the same living unit; for the remaining 22 hours, prisoners must be locked up alone in their cell.

(3) The possibilities for prisoners to maintain contact with the outside world have been further curtailed. They are now only allowed to make one ten-minute telephone call43 per month if they do not receive a visit from a family member during the same month (the entitlement of one one-hour visit per month, under closed conditions and with audio-surveillance and video-recording, as well as the prohibition of accumulation of unused visit entitlements remain unchanged). In addition, the frequency of contacts with a lawyer has been limited to a maximum of three contacts per week (one-hour visits or ten-minute telephone calls).

The only positive change in terms of prisoners' regime is that they are now allowed to meet not only their children but also their grandchildren below the age of twelve under open conditions (i.e. without a glass partition) for ten minutes per visit[154]".

The visit at the Terni prison allow the delegation to assess that those new norms were strictly followed in practice[155] and the CPT concludes by stating that: "The accumulation of such an impoverished regime and

[152] 2012 Report, cit., p. 27.

[153] By Law No. 94 on 15 July 2009 which forms part of the so-called "Security Package" (Pacchetto di Sicurezza). See also, among others, Circular No. 592/6042 of 9 October 2003, Circular dated 4 August 2009, Circular No. 8845/2011 of 16 November 2011 and Circular dated 12 March 2003.

[154] 2012 Report, cit., p. 29.

[155] *Ibidem*: "As regards the regime, all prisoners were offered one hour of outdoor exercise per day in a yard (measuring some 70 m²) where they could also play football or basketball with their fellow inmates from the same living unit. In all

severe restrictions on contacts with the outside world as described in paragraph 55, constitutes a form of small-group isolation which may, if applied for prolonged periods, have harmful effects of a psychological and physical nature[156]".

As already mentioned in the previous reports (on the 2004 and 2008 visits), such a system of additional restrictions and the last legislative reforms seems to be a tool to increase the pressure on the prisoners concerned in order to induce them to co-operate with the justice system.

In this respect, the CPT: "calls upon the Italian authorities to take the necessary steps to ensure that all prisoners subjected to the "41-bis" regime are:

- provided with a wider range of purposeful activities and are able to spend at least four hours per day outside their cells together with the other inmates of the same living unit;
- granted the right to accumulate unused visit entitlements;
- allowed to make telephone calls more frequently, irrespective of whether they receive a visit during the same month[157]".

The delegation further states that during the visit in the Terni Prison and according to some misgivings, all the prisoners were subjected to permanent CCTV surveillance inside their cells. This practice dramatically infringes upon the right to privacy, the CPT then recommends to the Italian authorities to: "review the use of CCTV surveillance in prison cells at Terni Prison and, where appropriate, in other prisons in Italy, in the light of these remarks. Steps should also be taken to ensure that prisoners subject to CCTV surveillance are guaranteed reasonable privacy when using the toilet, wash basin and shower[158]".

5. Health-care services

Traditionally, the CPT pays a particular attention to the provision and standard of health care in prison, with a detailed analysis conducted during its visits on a number of sensitive relevant issues.

The delegation notes that the transfer of responsibility for prison health care from the Ministry of Justice to the Ministry of Health has been fully implemented, and all prison health-care services are now administered by the relevant regional health authorities (Aziende Sanitarie Locali - ASL). In Sicily, health care in prison is still provided exclusively by the Ministry of Justice (Department of Prison Administration). This holds true except for the region of Sicily where the health care in prison is still provided (up until today, June 2015) exclusively by the Ministry of Justice (Department of Prison Administration). This is a relevant issue likely to be subject to the special attention of the CPT delegation during its next visit of 2016.

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other respects, the regime was very impoverished. During the one hour of association in the communal room, prisoners could only play cards or board games and use an indoor exercise bicycle. For the rest of the day (i.e. 22 hours), prisoners were confined to their cells, with the reinforced door open (but the grille closed) from 7 a.m. to 8 p.m. in winter (and to 10 p.m. in summer), their only occupation being reading, watching television or listening to the radio. It is of particular concern that, apart from one prisoner who was enrolled in a distance learning programme, none of the prisoners concerned was engaged in any regime activity".

[156] *Ibidem*.

[157] Ivi, p. 30.

[158] Ivi, p. 31.

Concerning all the aspects related to the health care service, the delegation certified a number of serious shortcomings, going from the deplorable state of hygiene (the central infirmary and all five infirmaries in the detention areas at Palermo-Ucciardone Prison), to the need for new equipment and a reinforced nursing covering to make sure that two nurses are present during the day within the establishment (Bari prison). Other relevant shortcomings appears to be the deficient handling of requests for medical consultations (Bari prison) and the limited budget earmarked for specialist consultations (Bari prison and Palermo Ucciardone prison, where doctors were on occasion compelled to suspend their services (excepting emergencies) in the middle of the month, because the resources available for that month had been exhausted.

Deficiencies have been found on the transport of prisoners to outside specialists (Bari prison and Palermo-Ucciardone prison) and the lack of a stable dental care service.

Concerning specifically disabled persons the CPT discusses the issue of *piantoni*[159], first of all assessing the need that employed *piantoni* receive appropriate training. Further, the Committee stress that any involvement of piantoni in the care of disabled prisoners should never lead to a total delegation of staff responsibilities and that the work of piantoni should always be adequately supervised by a qualified member of staff.

Concerning the medical screening the delegation certifies an improvement of the situation since the 2008 visit as regards the quality of the recording of detected injuries. In most of the establishments visited, it appeared to be standard practice for prisoners who displayed visible injuries upon arrival to be transferred to a local hospital for a medical examination before being formally admitted to the prison (provided that the hospital pronounced them fit for detention). In addition, injuries were described in detail by the admitting duty doctors in the medical file of the prisoners concerned (together with the doctor's conclusion as to the consistency between allegations made and the medical findings).

Unfortunately, the delegation also notes that the so called "Register 99", a dedicated register for all injuries observed by medical staff on prisoners (both on admission and during imprisonment), was no longer in use and calls the Italian authorities to ensure that a dedicated register for the recording of injuries observed on prisoners is kept in all Italian prisons.

Another highly relevant and sensitive issue is detected by the delegation in respect to the medical confidentiality: "The delegation was struck by the almost total lack of medical confidentiality in almost all the establishments visited[160]". This is a persistent and long-standing question of the Italian prison system, where it is usual for prison officers to be present during medical examinations (the delegation found a positive exception in the prison of Florence-Sollicciano). The CPT recommends to ensure specifically that all medical examinations of prisoners (whether upon arrival or at a later stage) are conducted out of the hearing and – unless the doctor concerned requests otherwise in a particular case – out of the sight of prison officers. Moreover, medical data should be, as a rule, not accessible to non-medical staff.

[159] *Piantoni* being the fellow inmates that care for disabled prisoners in the Italian prison jargon. They are employed by the prison and paid a monthly salary. As a rule, they shared the cell with the prisoner in need of care and de facto provided support on a 24-hour basis.

[160] 2012 Report, p. 37.

6. Other issues:

a. mothers with children in prison

The CPT delegation visited the mother with child unit, the so called Nido of the Florence-Sollicciano prison, which is one out of 20 units of this kind in the Italian prison system. The delegation notes with favour the amendment to the Penitentiary Law[161]. In particular the recent reform expand the legal basis for the granting of a "special house arrest" in a new typology of custodial institution, the so called ICAM (open prison for mother with child) where convicted mothers and their children up to the age of six years for remand prisoners and 10 years for convicted prisoners may be accommodated (with the approval of the competent supervisory judge). Such houses operate under the authority of the Department of Prison Administration and are guarded by plain clothes prison officers. The underlying goal is to allow mothers and their children to live, to the extent possible, in a non-carceral environment.

At the moment there are three functioning ICAM (Milano-San Vittore prison, Venezia-Giudecca prison, Senorbì) with very few places available. The delegation was also informed that at Florence-Sollicciano plans were afoot to create such a protected family house in Florence, and it would appear that similar projects also exist in other parts of the country. Unfortunately up until today (June 2015) the plans for the Florence institution appear to be halted. The same can be said for the other projects.

b. staff

The delegation notes that the the number of custodial staff appears to be insufficient; in some detention units, up to 100 prisoners were supervised by only one prison officer. Moreover, from discussions with staff representatives in various prisons, it transpired that many prison officers felt a need to receive more continuous training in inter-personal skills and, more specifically, in the handling of inmates who display behavioural and/or mental disorders.

c. contact with the outside world

In compliance with Section 18 of the Penitentiary Law and Sections 37 and 39 of Presidential Decree No. 230 of 30 June 2000 in all the establishments visited, prisoners were usually allowed to receive six one-hour visits per month and to make four ten-minute telephone calls per week (Prisoners subject to a high-security regime were allowed to receive four one-hour visits and to make two tenminute telephone calls every month). The possibility of physical contacts with visitors in decent condition remains nonetheless an issue in many prisons in Italy, particularly due to the existence of waist-level wall and a low glass partition on the upper side of the wall (see the case of Bari prison),

d. discipline

Taking into account the various recommendations made by the Committee after the 2008 visit concerning

[161] Law No. 62/2011.

disciplinary procedures, the delegation attest that none of them have been implemented in practice.

In particular, the CPT noted that disciplinary decisions often contained very little reasoning if any, and prisoners usually did not receive a copy of the decision itself but only a notification of the sanction pronounced by the disciplinary commission. In addition, prisoners were not allowed to have a lawyer present during disciplinary hearings, and they were often not informed in writing of the avenues to lodge an appeal. It also remains the case that supervisory judges examined appeals only on procedural grounds, but not on the merits.

The Committee is forced to repeat the recommendations to revise the current legislation and practice "in order to ensure that prisoners facing disciplinary charges:

- are allowed to call witnesses on their behalf and to cross-examine evidence given against them;
- are allowed to have a lawyer present during hearings before the disciplinary commission;
- receive a copy of the disciplinary decision, informing them about the reasons for the decision and the avenues for lodging an appeal. The prisoners should confirm in writing that they have received a copy of the decision [162]".

Interestingly enough, after the *Torreggiani* pilot judgment, the preventive remedy discussed in part I of this report[163], introduce a possibility of apply in front of the supervisory for a violation of a norm ruling on the application of disciplinary sanctions. This could, potentially, answer to the recommendation made by the Committee that: "all necessary steps be taken to ensure that appeals against disciplinary sanctions are also examined on the merits by supervisory judges[164]".

At this stage we are still not able to assess the effectiveness of the said remedy (as already discussed *supra*), but the implementation of article 35 bis on this respect will, without a doubt, constitute the ground for a new evaluation in the next 2016 visit.

Another repeated recommendation concerns the fact that prison doctors were still members of disciplinary commissions and thus actively took part in disciplinary proceedings against prisoners, accordingly to article 40 of the Penitentiary Law. In order to secure a positive doctor-patient relationship (a major factor in safeguarding the health and well-being of prisoners), the Committee calls for the abolishment of this practice in the entire prison system.

e. prisoners subject to Section 72 of the Penal Code

Pursuant to Section 72 of the Penal Code, prisoners sentenced to life-imprisonment may, under certain circumstances, be ordered by the criminal court (as part of the sentence) to serve a fixed period (ranging from two months to three years) in solitary confinement (so-called "isolamento diurno"). The prisoners concerned are in principle entitled to work or to participate in educational activities (such as distance learning programmes), but they are not allowed to have any contact with other prisoners during the entire

[162] 2012 Report, cit., p. 40.
[163] See supra, p. 38.
[164] 2012 report, cit., p. 41.

period of solitary confinement. The Committee repeat that solitary confinement should never be imposed – or be imposable at the discretion of the court concerned – as part of a sentence, therefore urging the Italian authorities to review the relevant criminal legislation.

4.2 Government response

The Italian Government replied to the CPT Report of 2012 in the Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the visit to Italy[165].

Addressing mainly the issue of overcrowding, the Italian Government highlights the introduction of a series of measures devoted to reduce the overcrowding rate in the Italian prison system.

First of all, Law No. 199/2010 introduced a new regulation aimed at enabling the execution of short prison sentences (term not exceeding one year, then raised at eighteen months by Article 3 of Law Decree No. 211/2011) in house detention (home of the offender or other public or private care , assistance and welcome).

As a result of raising the threshold from twelve to eighteen months of minimum penalty of imprisonment, including residual one, for access to house detention, provided for by Article 3 of Law Decree No. 211/2011, the number of inmates admitted to home detention has increased significantly.

Unfortunately, it appears that the Italian Government can't provide data on the impact of the aforementioned provisions due to the fact that: "the computerization of the records of the courts and on-site supervision for the processing of the relevant data is newly implemented. The standardization of registration and cases management allows just this year to be able to have some meaningful data, although not exhaustive, of judicial activity in this area[166]".

Other prospective measures includes:

"Always by December 2013, the interventions carried out in the framework of the so-called "Prison plan" will put at the disposal of our Administration 1,430 more places.

The restructuring (achieved almost always thanks to the employment of the detainees' handlabor) of the unsafe blocks will allow, by March 2014, an overall availability of 1,960 more places.

By the end of March 2014, the judicial psychiatric hospitals will be closed and, by transferring the individuals who are currently under their care, may be transformed in new prison facilities which will accommodate 900 prisoners."

Unfortunately the Prison Plan is still unachieved and the closure of the judicial psychiatric hospitals has been postponed of another year and it is not yet completely accomplished.

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[165] *Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the visit to Italy*, available at: http://www.cpt.coe.int/documents/ita/2013-33-inf-eng.pdf

[166] Ivi, p. 14.

These last measures concerns the creation of new prisons or new places, showing the difficulties of the Italian Government in providing a structural response to the problem of overcrowding and material prison conditions.
The subsequent intervention of the Pilot Judgment Procedure against Italy in the *Torreggiani* case completely subverted this situation, forcing the Italian authorities to implement a set of preventive and compensatory remedies in case of violation of article 3 of the Convention, therefore calling for a new kind of strategy for the solution of the endemic situation of the Italian prison system.

4.3 OPCAT update

Italy signed the OPCAT in 2003 and it ratified the treaty in April 2013. The OPCAT obliges each State Party to designate independent national bodies for the prevention of torture and ill-treatment at the domestic level. These Preventive National Mechanisms must be established one year after the entry into force of the OPCAT by each State party. In February 2014[167], Italy established by law the National Authority-Ombudsmen (Garante nazionale) for the Rights of Persons Detained or Deprived of Personal Liberty, which will constitute the National Preventive Mechanism together with the Local Authorities for the rights of persons deprived of liberty at regional and city levels.
The selection process of the three members of the National Authority for the rights of persons deprived of liberty is still pending.
A specific regulation, implementing the law, is still lacking and need to be implemented by the Ministry of Justice in coordination with the members of the National Authority following their appointment.
The Subcommittee on the Prevention of Torture (SPT) has announced its next visit to Italy from 16 to 22 September[168]. The mandate of the SPT is threefold: to visit places of detention in States Parties; to advise and assist both States Parties and National Preventive Mechanisms concerning their establishment and functioning[169]; and to co-operate with other international, regional and national organisations and institutions working to strengthen protections against torture and ill-treatment.

[167] Law N°10, 21 February 2014.
[168] http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx
[169] See Article 11 of the OPCAT.

Prison Litigation Network
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ITALY- Annex to national report: empirical research findings

1. Methodology and scope of the empirical research

The empirical research had the purpose to analyze the effectiveness of the new Italian system of judicial protection of prisoners' rights. Semi-structured interviews have been conducted with: 2 judges from the Surveillacence Court, 3 lawyers, 2 NGO Members (Altro Diritto and Antigone), 10 prisoners. Interviews with all mentioned categories will be set up for answering to the questions suggested in guidelines for gathering of empirical data:
(i) What are the strategies of practitioners and detainees confronted to existent legal remedies?
(ii) Even when they exist, is the access to these legal remedies effective?
(iii) Are the decisions of Court implemented in prisons and with what effect of prison daily life?
Starting from this common basis, the semi-structured interviews have focused on specific issues according to each category of interviewees:

1) Interview with Surveillance judges have focused on the judge's perception of the prisoners' access to legal remedies and Court and on their perception of the effectiveness of their decisions on prison daily life. Judges have been asked how they perceive their role after the ECtHT decisions regarding Italy and after the reforms that have introduced a new system for the judicial protection of prisoners' rights. Do they perceive themselves as judge for sentence implementation or of prisoners right protection?
2) Interviews with lawyers have focused on the different strategies for litigation in the field of prisoners' rights protection and for the access to justice and to the new remedies.
3) Interviews with prisoners have focused on their perception of the accessibility of the remedies (before and after the reform) and on their effects on prison daily life. Prisoners have been asked to talk about the access to the information concerning the new remedies introduced in Italy after the Torreggiani judgment, as well as to consider the effectiveness of those same remedies in terms of speedy trial and of their tangible repercussions on prison's everyday life.
4) Interviews with NGO members have involved both NGO that have a public role (such as Antigone) and NGOS that are involved in the everyday practice inside prisons, such as Altro Diritto. NGO's members have been asked to discuss about their perception concerning the potentiality of the new remedies and their actual results in terms of reducing the prison population and tackling down the issue of material condition of detention.

2. Effectiveness of the preventive remedy

Surveillance Court's role of judge of prisoners' rights. Concerning the previous system of prisoners' rights protection, described above, our empirical research shows that the Surveillance Judges didn't feel their role to be the protection of prisoners' rights. This is due to the fact that the assumed not to have real power of intervention against the prison administration, even though since 1999 a judgment from the Italian Constitutional Court clearly affirmed that the judgment of the Italian Surveillance Judiciary were to be considered binding for the prison administration.
This perception is confirmed by the members of L'Altro diritto and Antigone when they affirm that all of the applications filed to the Surveillance Court on the basis of the general remedy ex Article 35 of the Penitentiary Law, remained unanswered.
The introduction of the new remedy (i.e. Article 35 bis specifically) seems to be potentially able to change this state of affairs, influencing the self-perception of the Italian Surveillance Judges toward the real protection of prisoners' rights.

General evaluation of the remedy. Concerning the general evaluation of the scope and potentiality of Article 35 bis, according to the NGO's members interviewed, this remedy has a positive impact on the system of protection of prisoners' rights. First of all because Article 35 bis imposes on the Judge the obligation to answer to any application filed. Secondly, because this new remedy clearly affirms the binding nature of the Surveillance Courts' judgments and provide a detailed procedure for the orders' execution (i.e. the *ad acta* Commisioner procedure).

Ineffectiveness of the remedy. On the negative side, the NGO's members interviewed underline the issue of the complexity and length of the procedure. Moreover, not a single judgment has been executed so far, therefore it is impossible to test the real effectiveness of the procedural aspects of the said remedy. One of the most critical aspects stressed by the NGO's members is the incompatibility of the urgent nature of the remedy with the length and complexity of the procedure. This is all the most true considering that the order of the Surveillance Judge and the *ad acta* commissioner procedure, become executive only once the Supreme Court (Corte di Cassazione) has pronounced on the matter. This is felt, by our interviewees as a critical aspect able to infringe upon the effectiveness of the remedy. This is particularly serious taking into account the preventive nature of the remedy.
In order to substantiate their affirmations, our NGO's interviewees provided a series of cases of 35 bis applications.
Ineffectiveness of the remedy: the female detention case. One of the first cases of application on the basis of Article 35 bis filed by L'Altro diritto concerns the inhuman and degrading situation of the female section of the Sollicciano Prison. As a matter of facts the female section traditionally enjoyed an open regime. Nevertheless, due to a number of thefts in the same section, the open regime was revoked and a stricter regime was imposed (the confinement in the cell with a reduction of out of the cell activities). One of the main issue of this new situation resulted in a rationing of the access to the shower (the result being that an everyday access to the shower was no more guaranteed). This, combined with the structural critical issues of the section (i.e. poor hygienic condition at the level of the cell, the sanitary and the showers, the presence of rats, bugs and pigeons and bird droppings in the cell, the absence of available hot water, cleanliness of bedding, sheet and blankets, water infiltrations with consequent flooding and creation of mould, inadequate ventilation, lighting and heating, access to minimum medical care, restricted access to social and educational activities) resulted in a serious ongoing violation. In March 2015 a number of Article 35 bis applications were filed to the Surveillance Court claiming a reinstatement of the open regime and the ending of the structural critical hygienic conditions. The Surveillance Court answered after four months declaring the inadmissibility of all of the applications on the basis of the fact that the open regime was reinstated, without considering the global conditions of detention and the ongoing violations in terms of the structural poor hygienic conditions of the female section.
Ineffectiveness of the remedy: the criminal psychiatric hospital case. Another relevant case concerns the Article 35bis applications followed by L'Altro diritto in order to ask for the closure of the criminal psychiatric hospital (Ospedali Psichiatrici Giudiziari, OPG) in Italy as stated by Law n. 81/2014. As a matter

of facts, the mentioned Italian Law declared the closure of the said institutions and stated the transfer of the inmates in special hospitals (REMS) under the control of the Ministry of Health. According to the law each Italian region had to built the REMS, but the majority of the Regions didn't respect the deadline of March 31st, 2015[170]. L'Altro diritto drafted a model of Article 35 bis application in order to denounce the violation of the Italian Law and of the Italian Constitution (Article 13 of the Italian Constitution, Personal Liberty). The application asked the competent Surveillance Judge to declare the ongoing violation and to order the closure of the OPGs.

- 58 applications were filed in July 2015 from the OPG of Tuscany, Montelupo Fiorentino to the Surveillance Judge of Florence;
- 28 applications from the OPG of Barcellona Pozzo di Gotto on September 2015 to the Surveillance Judge of Messina;
- 24 applications from the OPG of Reggio Emilia on October 2015 to the Surveillance Judge of Reggio Emilia.

Even though this application concerned a preventive remedy, the length of the procedure frustrated the need for a speedy judgment and the urgency of the case. If we take the example of Florence, due to procedural issues (i.e. an error of notification from the part of the Surveillance Court itself) and to a change of the proceeding competent judge, the hearings were constantly re-adjourned and the decision was rendered only on November 2015 (after 4 months from the filing of the applications). The Surveillance Judge's decision assessed the violation of both the domestic legislation and the Constitution and ordered the Region of Tuscany to build the REMS, giving a time limit of 3 months to execute the order. The deadline passing in vain, the *ad acta* commissioner procedure has to be installed. The decision has recently been appealed by the same Region of Tuscany (who had not intervened in the proceeding in front of the Surveillance Judge) and the deadline of three months, as well as the *ad acta* commissioner procedure, is now suspended because of the appeal in front of the Surveillance Court. This state of affairs prolongs the unlawfulness of the condition of the mentally ill inmates who are still interned within the OPG of Montelupo Fiorentino.
As for the other Surveillance Judges, we are still awaiting a decision, after three months from the filing of the applications (as at the end of November 2015).
Even Antigone refers about a generally critical situation concerning Article 35 bis applications in terms of speedy procedure and respect of the urgent nature of the remedy. Nevertheless, the NGO member interviewee speaks about a positive case (even if an isolated one) concerning an inmate with serious health related problems and lack of proper health-care in the prison of …
In this case the Surveillance Judge answered within a two-months time-limit respecting the urgent nature of the remedy and providing an effective redress of the violation.

Knowledge of the remedy, risks of retaliation, impartiality of the body. As for to the prisoners interviewed, the empirical research findings show the general lack of knowledge of the preventive remedy as a way of claiming ongoing violations from the part of the prison administration. Moreover, as experienced in the case of the female section of Sollicciano (see above), even when the prisoners had been informed by NGO members or others of the existence of the preventive remedy and of the concrete possibility of filing an application under this same remedy, some of them still renounce to it. As a matter of facts, after further investigation, the prisoners affirmed that this reluctance was due to the fear of potential retaliation by prison agents.
According to Antigone, this reluctance can also be explained by the fact that prisoner fear that claiming the protection of their rights will result in a potential backlash. Specifically, due to the fact that the same Surveillance Judge is competent both for the application under article 35 bis and for any other issues concerning the judgment implementation (alternative measures, benefits etc.): "if the prisoner complains too much, he/she won't have access to benefits".

[170] The first deadline was fixed on March 25th, 2013 (Law No. 9, 17/02/2012). Due to the delays and the persistent inactivity of the Regions it was first postponed to April 1st 2014 (Decree No. 24, 25/03/2013) and, after that, to March 31 2015 (law No. 81, 30/05/2014). After this date, no deadline extension was granted by the Government.

As for the Surveillance Judges, their opinion on the preventive remedy is positive. They feel for the first time empowered by a clearly binding judicial tool. As the other interviewees, the Judges denounce the intricacy of the procedure.
As for the change in the perception of their role, the Surveillance Judges seems to be still reluctant to assume their role as protector of prisoners' rights, even after the introduction of Article 35 bis remedy. They still perceive themselves as primarily judges for the sentence implementation. As stated by one of the judges, he/she refuses the role of control of the prison administration, preferring to talk about a cooperation with the administration itself. He/she significantly affirms that the proceeding in front of the Surveillance Judge is a way to explain to the prisoner the reason behind his/her disciplinary sanction. This, in his/her opinion is due to the fact that the prison administration does not thoroughly communicate its orders and decision to the prisoners.

Burden of proof. Concerning the burden of proof, the NGOs members refer that it is highly difficult for the prisoners to have access to any kind of documentation supporting and substantiating his/her claim. Taking the example of the medical reports, in many Regions of Italy this documentation is not digitally archived and can only be found on paper support. Moreover it is often incomplete or unclear and the prisoners have to pay to gain access to it. In other cases the prisoners is unable to have access to official reports or orders by the prison administration.
Significantly, the Surveillance Judges interviewed, affirmed that when the word of the prisoners is set against the word of the prison administration, the latter prevails, completely reversing the principle constantly stated by the ECtHR case law on this aspect.
Discussing about the applications decided by the Surveillance Judges interviewed, they affirmed that the cases of violations claimed under this remedy appeared to be inconsistent and specious. At the same time it is interesting to note the paucity of Article 35 bis applications pending or decided in front of them.

3. Effectiveness of the Compensatory Remedy

General Evaluation. Concerning Article 35 ter, i.e. the compensatory remedy recently introduced in Italy, the general evaluation by the Surveillance Judges seems to be negative. As a matter of facts, this remedy seems to have an ambiguous nature as per its formulation. On one side it aim at providing a judicial protection in cases of violations of Article 3 of the European Convention of Human Rights. On the other hand it has an explicit deflationary purpose. This induces the Surveillance Judges to conduct a personalized investigation in order to assess the seriousness of the violation and its entity. Nevertheless, the compensation is either a fixed sentence reduction or a flat rate monetary compensation, with no judicial discretion. This is perceived as a critical aspect by the interviewed Judges and it leads them to affirm that another kind of remedy would have been more suitable. Specifically they all state that the deflationary and compensatory nature of the remedy is not consistent with the jurisdictionalization provided for by Article 35 ter and that an automatic way of redress would have been more effective.
One of the Judges complained about the fact that for the first time the legislator impose on the Judiciary, as a binding source of law, to consider the precedent, i.e. the case law of the ECtHR in order to assess a violation of Article 3 of the Convention. This is seen as inconsistent with the civil law tradition and with the principle that the judge is subject only to the law. Moreover, the same Judge argues that most of the judges do not speak English or French, therefore they are unable to fully understand and interpret the precedent by the ECtHR[171].
As for the impartiality of the competent judge for the compensatory remedy, no issues arise on the Civil Judge who is perceived as impartial. On the contrary, the NGO's members interviewed affirmed that the impartiality of the Surveillance Judge appears to be compromised by their role as judges for the implementation of the sentence.

[171] A translation of the most important judgments against Italy is provided by the Ministry of Justice and anyway this is not the official language of the decisione, but only a translation.

Procedural aspects. Concerning the procedural aspects of the remedy, one of the critical aspects stressed by the NGOs members is the length of the proceeding connected with the investigation issue. As a matter of facts, the correctness of the investigation is biased by the fact that the documentation is entirely provided by the prison administration. The prisoners have no chance to get access to the official documentation in order to support their claims and the Surveillance Judges practically decide on the basis of a single report expressly drafted by the prison administration after the proceeding in which it declares the conditions of detention, the regime imposed on the prisoners and answer to all the allegations moved by the applicant. No official prison register, order, documents are provided also due to the fact that the official documentation is not digitally archived. Another critical aspect is connected to the fact that often an application for the compensatory remedy refers to the prison condition experienced by the prisoners in different prison institutions. As confirmed by the interviewed Judges, at the beginning the proceeding judge used to ask a report to all of the prison institutes involved in the case, with a drastic increase of the investigation time in order to wait for all of the answers. On the contrary now the last prison institute detaining the applicant is the one competent for providing the report including all of the information by the other institutes.
As stated above, even for the compensatory remedy procedure, the burden of proof imposed on the prison administration seems to be reduced to an *ex post* report of declarations by the prison administration. Even in this case when the word of the the prisoner is set against the word of the prison administration, the latter prevails as clearly stated by the interviewed Surveillance Judges.
One of the concerns of the Surveillance Judges seems to be the fact that many times the application appears to be standardized and not substantiated, precluding the personalization of the evaluation. This is due, on the opinion of the NGO's members, to the impossibility of accessing the official documentation supporting the applicant's claim. Moreover the violations often are related to past detention in different prisons and the prisoners sometimes are unable to retrace all the material conditions of detention.
Moreover, it is true that Antigone and L'Altro diritto provided a draft model of Article 35 ter application. This model was spread all over Italy through the mediation of the local Ombudsman. This fact allowed an high percentage of prisoners to have knowledge of the remedy and to concretely apply for the compensation. Unfortunately the personalization of the application form was only possible in prisons and cases in which NGO's members were able to assist the prisoners in completing the application. This shows another critical issue, i.e. the insufficient access to legal aid by prisoners. Very rarely the prisoners were assisted by a lawyer with legal aid in the drafting of the application under Article 35 ter. Only later on, during the proceeding in front of the Surveillance Judge, a lawyer is appointed and legal aid is eventually provided. The problem is that the lawyer only knows the case on the first hearing with a clear infringement of the right to the technical defence.

Length of the procedure. One of the most critical issue in assessing the effectiveness of the remedy is the length of the procedure, specifically connected with the length of the investigation. The Surveillance Judges admit that a 4 months limit is the average time for the investigation, eventually delayed up until 6 months. As a matter of facts, after an initial period in which the Surveillance Judge awaited for the prison administration to provide the requested documentation for months, a line of interpretation arose expressly applying the civil procedural principle of the "non-rebuttal" (i.e. whenever an allegation by the applicant is not explicitly rebutted by the part, it is to be considered as proven)[172]. Unfortunately this line of reasoning is not gaining a uniform approval and the Italian Surveillance Judges case law shows that it is more likely for the judge to await the prison administration answer for up to six months than to declare the non-rebuttal principle. If we compare this situation with the interviewed NGO's member and prisoners we are forced to ascertain that the total time of the proceeding can last up to one year or more.

Other controversial interpretative issues:

The necessity of an ongoing violation. The Italian Surveillance Judges case law shows a number of controversial interpretative issues able to influence the potential effectiveness of the compensatory remedy.
One of the first issue is the necessity of an ongoing violation in order to assess the admissibility of the claim under Article 35 ter. On this issue the interviewed judges of the Surveillance Court of Florence, affirmed that after a brief initial period in which it was unclear whether an ongoing violation was necessary in order to

[172] Tribunale di Sorveglianza di Firenze, Ordinance 23/01/2015.

decide on the application, it is now undisputed, at least in their office, that this is not required. This line of interpretation is still not validated by the Italian Supreme Court (Corte di Cassazione), that recently delivered two judgments affirming two opposite view on this same issue.

The Cadastral jurisprudence. On the issue of the scope of the evaluation in order to assess the violation of Article 3, the Italian case law shows a persistent line of reasoning that we can define as a cadastral jurisprudence, overestimating the 3 sq.m. This case law appears to be predominantly focused on the personal space criterion, eluding the assessment of the violation of Article 3 in the light of human dignity, considering the global detention conditions of each individual case. On this particular issue, the interviewed judge confirm the said tendency affirming that the 3 sq.m. is a criterion able to offer a direct and clear directive for the assessment of the violation.

The fate of the pending application to ECHR. According to the experience of Antigone and L'Altro diritto, one of the most critical issue, directly nullifying the effectiveness of the remedy for a significant part of prisoners, is connected with the ECtHR decision in Stella v. Italy. This is the judgment ending the pilot judgment procedure enacted against Italy by the Torreggiani case. The European Court considered that there were grounds in the Stella case for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged and that this exception could apply to all similar cases pending before it. Those exception seems to include specifically situations in which, after a Pilot Judgment Procedure, the State enacts a number of measures aimed at resolving the structural problem at a national level. Therefore all of the applications already lodged in front of the Court were declared inadmissible for failure to exhaust domestic remedies. The Italian law gave a 6 months time-limit, starting from the date of the enactment of the law (June 2014) to prisoners who had already lodged an application to the ECtHR. The time frame between the Stella (September 2014) and the end of the 6 months limit (December 2014) left almost no time to prisoners to be able to have knowledge of this deadline and to file an application in front of the domestic judiciary on time.

The "nonsuit" case. Another critical issue is the case of a prisoner that file his/her application in front of the Surveillance Court while he is still in prison and in the course of the proceeding (often due to the length of the proceeding) end to serve his/her time. According to the law a former prisoner has to file his/her application in front of the ordinary Civil Court. Now two interpretations have been provided by the Italian case law. The first one claims that the Surveillance Judge directly loses its competence and declare a nonsuit. As a consequence the former prisoner is forced to lodge a new application in front of the civil judge with the necessity of a technical defence, the procedural expenses. According to the Penitentiary Administration data, the 5,2% of the total application decided so far have been declared nonsuit because of this (829 out of 16.085).
Another line of reasoning, shared by one of the interviewed judges, assume that once an application is registered in the Surveillance Court roll, the competence remain within the Surveillance judge, no matter what happened to the prisoner. This is due to the fact that the procedural delay cannot be ascribed to the prisoner. We are still experiencing a multitude of interpretations on this relevant issue, due to the lack of a clear formulation in the law and the Italian case law scenario.

4. Testing the effectiveness of compesatory remedy: the prisoners' perspective

L'Altro diritto has initiated in October a litigation campaign on material conditions of detention, drafting a form (see http://www.altrodiritto.unifi.it/sportell/cedu/index.htm) that takes into account all the parameters that the case-law of the ECHR has set as relevant for the assessment of a violation of Article 3. This form potentially enables all the prisoners who are suffering violations of their rights in the context of Article 3 of the European Convention on Human Rights to demand compensation for damages. The forms have been distributed (and continue to be) directly by the volunteers of L'Altro Diritto in Bologna's prison and in all prisons of Tuscany. In these premises volunteers meet the inmates individually and help them to complete the forms.

The empirical research was conducted among male prisoners between September the 14th and October 23rd 2015, detained in the Sollicciano prison. The prisoners were chosen among the ones who had been supported by L'Altro diritto in drafting and filing the application under Article 35 ter.
Their answers are useful in order to assess the real effectiveness and potentiality of this new remedy.

The majority of the applications drafted by L'Altro diritto were lodged between September and November 2014. The main claims of the prisoners were related to:
Limited access to air and ventilation;
Insufficient heating;

- Absence of available hot water in the cell;
- Insufficient hot water in the shower;
- Restricted access to social and educational activities;
- Lack of emergency alarm system in the cell;
- Lack of privacy in the toilet;
- Poor Hygienic condition;
- Presence of rats, pigeons, insects and bird-droppings;
- Formation of Mould;
- Overcrowding (between 3 and 4 sq.m.)

Contradicting the affirmation of the Surveillance judge on the maximum time of the proceeding, most of the prisoners declare that after one year their application is still pending.
When asked about possible improvement in their living conditions within the prison context, all of the prisoners answered that the only two improvements concerned the limited reduction of the overcrowding (the prison population in Sollicciano decreased of some 30% between 2013 and 2014, the number of prisoners in a 12 sq.m. cell passed from 3 to 2) and the access to a more open regime.
Since May 2014, 9 out of 13 sections of the male prison enjoy a semi-open regime within the section for 8 hours per day. The Italian prison administration, in order to counteract the structural problem highlighted by the Torreggiani pilot judgment, adopted an administrative order introducing the "dynamic" surveillance. This was the only strategy implemented by the prison administration. No improvements concerning educational and working activities have been introduced. As a result, while before this order, prisoners were abandoned idling in the cell, now they appear to be abandoned idling in the corridors.
Moreover, due to the opposition to this new regime by the penitentiary police trade unions, a new administrative order was adopted, limiting the scope of the semi-open regime. The new decision imposes to classify the prisoners according to their potential dangerousness, after an observation period of one month and to distribute them accordingly in semi-open regime sections or in sections with closed regime.
All of the other material conditions of detention listed above have not changed, according to the prisoners' answers.

It is worthy to note that the slight improvement in the material conditions of detention, experienced by the prisoners, is not directly linked with a judicial protection, but rather with an administrative policy.

5. Statistical overview of compensatory remedy's application

Methodological premise: reliability and coverage of data. The statistical office of penitentiary administration didn't do any comprehensive and systematic data collection of compensatory remedy's applications, proceedings and final decisions. The statistical data used in present paragraph have been collected by the Section on Judiciary Applications of penitentiary administration and they are based only on the decisions that local Courts have voluntarily sent to the Regional centers of the same admnistration: most of the Courts sent data, but not all of them. Every regional office sent data collected in different ways and related to different periods. So they don't cover the whole phenomenon. The only reliable data is the number of positive decisions (976

cases), because the conviction of Administration has always to be notified. The number of inadmissibility (12.379, the 77% of the total) is not totally reliable: Courts have notified to legal office of penitentiary administration only the decisions that, according to the judges' opinion, could result in an appeal from the applicant. In cases in which, for instance, the application was declared inadmissible because found totally unfounded, the inadmissibility decision could have not been notified to the office. So the number of inadmissibility (12.379) is perhaps underestimated. Similar considerations may be done for the number of applications in which the recurrent complained for an ongoing violation (12.009): also this data may be not totally reliable. Anyway the significant number of applications communicated to the office (23.600) makes the data reliable only as an overview of the general trend.

Applications to Surveillance Court	
Number of applications under art. 35ter for violation of article 3 of the Convention	23.600
Number of notifications of the hearing in front of the Judge	4.773
Number of cases in which the applicant complains for an ongoing violation	12.009

Decisions of Surveillance Court		
Number of applications decided	accepted (6,1%),	976
	rejected (7.3%)	1176
	Non suit (5,2%)	829
	inadmissible (77%)	12.379
	other (4,5%)	725
	Total	**16.085**
Number of pending applications		6.430
TOTAL *(decided + pending)*		**22.515**

According to the data of Penitentiary administration, up to October 13rd 2015, 23.600 inmates applied to Surveillance Court[173], but only in 4.773 of them the administration was notified for taking part to the proceeding.
The reason of the poor number of cases in which Judges have started the proceeding have to be found in the great number of applications found "inadmissible" (77% of the cases) or "non suitable" (5,2%).
We haven't data related to the arguments used by the judge but, according to the legal office of Penitentiary administrations they can be classified as follows

1) In many cases the application was "generic". This data can be explained with the lack of a proper assistance of a lawyer or of an NGO;
2) Few cases of prisoners that have applied to more than one Surveillance Court

[173] Data coming from regional penitentiary authority (Calabria. Emilia Romagna, Umbria e Veneto - Friuli Venezia Giulia - Trentino Alto Adige) are updated to september 2015, those coming from Lombardia and Toscana are updated to June 2015, those from Sardegna to april 2015.

3) Most of the cases have being rejected because the violation wasn't ongoing at the time of the decision

According to the legal office of Penitentiary administration only the Courts of four regions (Puglia, Toscana, Emilia Romagna and Sicilia) are accepting applications coming from prisoners that aren't in a situation on ongoing violation, while all the others (the majority) are declaring their inadmissibility. It's just a general trend, since in some Regions, single judges may not be following the majority.
The 976 cases in which the application has been upheld have given an average compensation of 215€ per inmate and an average sentence reduction of 54 days per inmate. So according to the Surveillance Court decisions, only 976 prisoners have been detained in a situation of violation of art. 3 of the Convention due to overcrowding for an average time of 540 days each. This data in itself is able to show the ineffectiveness of the remedy provided by article 35ter. According to the ECHR decision in the *Torreggiani* case the overcrowding in Italy was structural[174]. This fact is confirmed by the 23.600 applications of prisoners under the scope of art. 35ter. And by the 12.009 applications in which the applicant complained for an ongoing violation. In spite of this, the surveillance court has found violation only in 976 cases, only the 6.1% of the cases, contradicting the affirmation of the ECHR and indirectly affirming that overcrowding wasn't structural. Moreover, data shows that in the 77% of the cases the national courts haven't verified the violation of art. 3 of the Convention declaring the application "inadmissible", because the violation wasn't ongoing at the time of the decision.

Civil Courts		
Number of applications	1.507	
Accepted	87 (5,7%)	36% of decided applications
Rejected	155 (10,3%)	64% of decided applications
Pending application	1.265 (84%)	

According to official data shown above, 1.507 have been applied to Civil Courts. We haven't any data available to understand how many of these applications were formerly presented to Surveillance Court. We can guess that some of the 829 applications declared "non suit" from Surveillance Court have been re-applied to Civil Courts. We have no data available related to the arguments used by Civil Courts.

[174] According to the data of Council Europe, in 2012 the prison capacity of Italy was 45.568 units but the prison population was 65.701: an overcrowding rate of 144% of the capability