PRISONERS
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Focus On Facts

Article 3. Prohibition of torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Torreggiani Case

2013 started with a Sword of Damocles hanging over Italy, and it remained so for the whole year and beyond. In fact, on 8 January the European Court of Human Rights (ECtHR) issued the so-called "Torreggiani Judgment", condemning Italy for having violated Article 3 of the European Convention on Human Rights (ECHR) in the light of the conditions of its prisons. The judgment is named after Mino Torreggiani, a man who applied to ECtHR, together with six more people.

The seven applicants - Torreggiani, Bamba, Biondi, Sela, Ghisoni, El Haili, and Hajjoubi - had been detained in the prisons of Busto Arsizio and Piacenza for a period ranging from 14 to 54 months, and were complaining of shortage of space (9-sq. metre cells, to be shared with two more prisoners), lack of hot water and consequent limited access to showers, and reduced lighting of the cells due to the metal bars on the windows.

Only one of the prisoners in question had applied to the Italian *magistrato di sorveglianza* (the judge responsible for the execution of sentence), who upheld the complaint and forwarded it to the director of the prison of Piacenza, the Ministry of Justice, and the Prison Administration, "so that each one of them could urgently take the necessary measures within their own scope of competence." Nevertheless, it was only after six months that the prisoner was transferred to another cell, which he shared with one person, instead of two. In its defence, the Italian State did not question the accusations of the applicants (except when declaring that the cells were of 11 sq. metres and not 9, albeit this was not supported by evidence); rather, it focused on the fact that the applicants had not exhausted all domestic remedies.

In evaluating this objection, the ECtHR noted that the possibility of applying to the *magistrato di sorveglianza* is not "effective in practice", since said instrument cannot put an end to the reported violations, as these are a structural problem of almost all Italian prisons, particularly in the case of overcrowding; because of this, all seven applications were declared admissible.

The European Committee for the Prevention of Torture (CPT) stated that 4 sq. metres is the minimum desirable living space for shared cells, and that, in cases of serious prison overcrowding, having less than 3 sq. metres at one's disposal represents a violation of Article 3 of the ECHR. The ECtHR stated that the applicants had been subject "to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention." The judgment, however, goes a step beyond: the ECtHR, in fact, chose to adopt the so-called "Pilot judgment" procedure, envisaged by Article 46 of the Convention. The Pilot judgment is adopted by the Court when it holds that the violation reported does not derive from a specific situation but, rather, from a general or structural condition that generates said violation. After a careful analysis of the facts - confirmed by the declaration of a National state of emergency as regards prisons, issued by the Council of Ministers in 2010 - the ECtHR affirmed that the issue of

overcrowding in prisons has a "structural and systemic nature" which reveals a "chronic dysfunction" of the Italian prison system. This was also confirmed by the numerous applications pending before the ECtHR for the same reason: this proves that the situation has involved and might involve numerous individuals. As compensation for non-pecuniary damage, caused by the poor conditions of detention, the ECtHR ordered Italy to pay almost €100,000.

The ECtHR's judgment became final on 27 May 2013 and, as of then, Italy was given one year to adjust the conditions of its prisons to the standards deemed respectful of human dignity, and to put in place an effective domestic remedy or a combination of such remedies capable of affording an adequate and sufficient redress in cases of overcrowding in prisons. Once this term expires, all applications still pending before the ECtHR relating to overcrowding and "frozen" while waiting for the Italian Government to act, will be considered. Should the situation be unchanged, those applications are likely to be declared admissible, thus resulting in an enormous expenditure for the Italian State, which would have to pay compensation for the damage suffered by the applicants.

"State deaths"

Francesco Mastrogiovanni and death "by restraint"

Francesco Mastogiovanni was a 58-year-old teacher at a Primary school. On 31 July 2009 he was camping in San Mauro del Cilento, where he usually spent the summer. With an enormous deployment of forces (*Carabinieri*, Traffic wardens, Coast guard), he was picked up from the sea and subjected to a TSO (*Trattamento Sanitario Obbligatorio* – coercive medical treatment) because the previous night he had allegedly driven at high speed through the pedestrian

area of the city of Pollica. TSO was introduced in the Italian system by Law No.180 of 1978, the so-called "Basaglia Law", reforming the Italian system of psychiatric hospitals. TSOs are performed on patients who refuse to be treated and/or are not aware of their illness. This type of treatment is to be performed using adequate, extra-hospital health measures, and exclusively in cases of "such psychiatric alterations that require an urgent therapeutic intervention." TSOs can also be performed in hospitals and, in this case, there are a number of safeguards to protect the patient: the treatment is to be ordered by the Mayor of the City where the patient resides, upon a physician's proposal; it is to be then countersigned by a second physician belonging to a public health care structure; finally, the competent *Giudice tutelare* (the judge supervising over guardianship) has to validate the treatment within 24 hours.

Mastrogiovanni was admitted to the psychiatric unit of the San Luca hospital (in Vallo della Lucania) at 12.30 p.m., with a diagnosis of "schizoaffective disorder." At 2.30 p.m. Mastrogiovanni was tied by the hands and feet to the iron sides of the bed, and remained this way for more than 80 hours. During his hospitalization, Mastrogiovanni was not given food nor water, and was only intravenously infused a saline and a sugar solution. Following a long agony of four days and three nights, Mastrogiovanni died because of the treatment he underwent. The video monitoring system, installed in all rooms of the hospital, recorded the torture. After his death, a trial was opened, to discover the causes that led to Mastrogiovanni's death and, before it was destroyed, the attentive Public Prosecutor ordered the seizure of said footage.

On 30 October 2012, the Court of First Instance of Vallo della Lucania delivered its judgment, sentencing the head physician of the unit, Michele Di Genio, to imprisonment for 3 years and 6 months on charges of kidnapping, death as a consequence of another crime, and forgery of public documents. Five more physicians were convicted of the same offences: Raffaele Basso and Rocco Barone were sentenced to 4 years' imprisonment, and Americo Mazza and Anna Ruberto

to 3 years, whilst Michele Della Pepa was sentenced to 2 years' imprisonment for kidnapping and forgery of public documents. All doctors - except for Della Pepa - were disqualified from practicing medicine for 5 years. Twelve male nurses were acquitted because their conduct did not amount to a criminal offence. In the reasons for the judgment, which was registered on 27 April 2013, the judge states that restraint cannot be deemed illicit in itself, but it becomes illicit when there are no justifications for it, or when the criteria for its application are not respected. The judge underlines that restraint is a medical procedure, since only a medical doctor can order and cancel it; moreover, it was proved that the nurses were unprepared (from a scientific and therapeutic point of view) as regarded the measures to be adopted with the patients under restraint. The judge mentions "alterations affecting the will-forming process of the nurses" because of the frequent resort to restraint in the Psychiatric Service of Diagnosis and Treatment unit of the San Luca hospital along with the absence of the mandatory Register of restraints and nursing charts. According to the judge, the order to restrain Mastrogiovanni was unlawful, as he was not being aggressive (as seen in the images shown during trial). The judgment relating to Mastrogiovanni's death was the first in Italy under which doctors were convicted of kidnapping after having resorted to restraint.

Even though there are no specific researches and studies, the recourse to restraint is still widespread as a practice in many Italian health care facilities (Geriatric units, Intensive care, nursing homes, psychiatric wards and judicial psychiatric hospitals) and at different levels (Regions, Local health authorities, hospitals). Given the lack of uniformity at national level, guidelines have been drafted and adopted supposedly to regulate this practice.

The death of Stefano Cucchi and the judgment of the Court of First Instance

Stefano Cucchi, a 31-year-old from Rome, was arrested by the Police on 15 October 2009 as he was handing a sachet containing hashish to a friend. On the following day, the fast track trial confirmed the arrest and denied remand to a therapeutic community. As of that day and until his death, on 22 October, Stefano Cucchi went through a number of institutional places: two *Carabinieri* barracks, a security prison cell, the courtroom and the clinic of the Court of Rome, the infirmary and a cell in the prison of Regina Coeli, the Emergency Room of the Fatebenefratelli hospital, and the detention unit of the Sandro Pertini hospital. It was a painful process, which made Cucchi's story paradigmatic. On 5 June 2013 the Court of First Instance delivered its judgment, following a long trial based on experts' reports. The investigation on the death of Stefano Cucchi led to an initial charge of manslaughter for three doctors of Pertini hospital, and involuntary manslaughter for the three police agents who were with him in the cells of the Court of Rome before the hearing for the confirmation of the arrest. The investigation was concluded in April 2010, with a radical change of the charges, which became aiding and abetting, neglect of incapable persons, abuse of official powers, and untrue attestations for the physicians and the nurses, and assault and misuse of power for the Penitentiary police officers.

The Public Prosecutors never deemed it necessary to investigate the responsibilities of the *Carabinieri* of the barracks, and the Prosecution held that clearly they were absolutely not liable. As we will see, the judgment questioned this first - and, perhaps, hasty - evaluation. Since the beginning, the trial was characterized by a strong discrepancy between the technical reports presented by the Prosecution and those presented by the parties claiming damages.

Their views were in conflict: on the one hand, the Prosecution claimed that, in establishing the cause of Stefano Cucchi's death, the lesions on his body were negligible. On the other hand, the experts

for the parties claiming damages stated what might have sounded obvious: if the lesions had not been there, Stefano Cucchi would not have died. The trial revolves on causality: while the Prosecution was trying, in any possible way, to minimize the lesions on Cucchi's body, his family's lawyers were trying to prove that, from the start, everything that happened was connected and, therefore, nothing could be left out. On 5 June 2013, in the *Aula bunker* (a high-security courtroom) of the prison of Rebibbia in Rome, the Court of First Instance delivered its judgment. The Prison officers were acquitted because of the lack of conclusive evidence: in fact, the evidence relating to their guilt was insufficient or controversial (Section 530(2) of the Italian Code of Criminal Procedure). The six medical doctors were found guilty of manslaughter, while the nurses were acquitted for not having committed the crime. The grounds of the judgment were published at the beginning of September and depicted the following scenario: the main accuser of the prison officers, Samura Yaya, is deemed unreliable, as he had only heard - and not seen - the facts reported, and also because "it must be taken into account that there might be a chance that he was influenced, although in an imponderable way and unconsciously, by the intention of becoming part of an event that had gone beyond the boundaries of the prison and overflowed into the media." By acquitting the policemen and deeming Samura Yaya unreliable, the judges admitted that it was difficult to assess what the conditions of Stefano Cucchi were when he was being held in the two barracks.

However, they emphasized something else: "the more one leaves behind the statements of the *Carabinieri* of the Roma-Appia barrack, the more precise the descriptions on Cucchi's conditions become ."

The statements of the *Carabinieri*, moreover, substantially differ from one another, so much so that the judges write: "it is legitimate to suspect that Cucchi, who, at the time of his arrest, presented with bruised eyes […] and was complaining of pain, had already been beaten up by the *Carabinieri*.

Of course, it is not up to the Court to identify which one of the many *Carabinieri* Cucchi entered into contact with had beaten him up.

However, the statements of the *Carabinieri* themselves do not exclude the possibility that the reconstruction of the events might be different from that of Samura Yaya." As regards the position of the medical doctors, one should first consider which one of the experts' reports was deemed valid by the judges when taking their decision. The Court chose to share the conclusions of the panel of experts drafting the so-called "Super report", in particular because the cause of death therein indicated "namely the 'starving syndrome', is the only one capable of accounting for the most striking and peculiar element of the case in question: Cucchi's astounding weight loss during his hospitalization." Even though the technical experts had pointed out the lesions to the sacrum and to the head, they did not relate them to Cucchi's death, therefore excluding any "causation of a biological nature." In other words, Stefano Cucchi was starved to death, and the hospital unit director, Aldo Ferro, along with the medical doctors Silvia Di Carlo, Flaminia Bruno, Stefania Corbi, Luigi De Marchis Preite, were all convicted of manslaughter. The director was sentenced to 2 years' imprisonment, whereas the doctors were sentenced to 1 year and 4 months. Rosita Caponnetti was convicted of untrue attestations and sentenced to 8 months' imprisonment. All defendants were acquitted in relation to the charges of abuse of official powers, aiding and abetting, and omission of medical reports. All nurses were acquitted. Aside from having underlined the shortcomings and superficiality of the investigation carried out by the Prosecution, the judgment found that the starving syndrome was a credible cause of death - which is hard to accept. The Prosecuting Office of Rome, Stefano Cucchi's relatives and even the General Prosecuting Office appealed against this judgment, which would appear to be still a long way from the truth.

CIEs and the acquittal of three migrants for self-defence

Between 9-15 October 2012, a group of aliens not holding the required stay permits and, therefore, detained at the Sant'Anna CIE (*Centro di Identificazione ed Espulsione* - Identification and Deportation Centre) of Isola Capo Rizzuto organized a demonstration against the difficult living conditions in the centre. On 9 October, at 3 p.m., the men climbed onto the roof of the "B2 module" housing facility, removed gratings, window frames, railings, taps and fillings, lamps and ceiling lights, and used them as blunt objects, throwing them at the personnel of the CIE and at the policemen present. The demonstration originated from a "reclaiming" operation (a "quasi-search", as defined by the Director of the centre) carried out by the Police a couple of hours earlier in the rooms of the centre. One of the detainees had recently been denied the permit to go visit his mother, who was seriously ill and had entered into a coma. After spending six days guarding the roof of the building in turns, and on hunger strike, the demonstrators gave in and surrendered to the police, who arrested them in the act. The three men were committed to trial, with charges of criminal damage, violence or threat against a public official, and personal injury. The Public Prosecutor requested a sentence of imprisonment for 1 year and 8 months, whereas the defence counsel requested the acquittal of the three men because of the existence of a state of necessity. Moreover, an inspection was carried out in the places where the events had happened.

At the time of the revolt, Aarrassi Hamza had been detained for about a month, after having been arrested in Gioia Tauro, where he worked as an artisan and lived with his family, for not holding the required permit. Ababsa Abdelghani had been detained for a month and had been arrested for the same reason in Viareggio, where he worked as a waiter. Dhifalli Ali had been detained for a week and had been arrested near Cosenza, where he lived with his three-month-pregnant partner, for not holding the required permit. The

three men described the living conditions in the Centre in these terms: precarious sanitary conditions, shortage of food and outdoors spaces, lack of a canteen with tables or of an area where to eat, filthy sheets and towels which had never been changed during their one-month stay. During the questioning, all of them declared that they would have preferred to be remanded in custody rather than be restrained in the CIE. When deciding, the judge firstly verified whether the detention in the CIE and the living conditions were justified and subsequently whether the accused had acted to protect their fundamental rights. Immigration – in particular the stay and removal of aliens illegally staying in a country - is regulated by EU Law. Directive 2008/115 provides that: "(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient."

Moreover, detention is to be ordered in writing, and reasons in fact and in law must be given. Having examined the detention order of the three accused, the judge found that there was no indication of the concrete and specific reasons for not ordering a less coercive measure than the CIE and, therefore, deemed said orders unlawful, since no specific reasons were given. As regards domestic legislation, the judgment quotes Article 2 of the Italian Constitution, which "recognises and guarantees the inviolable rights of the person", and section 14(2) of the consolidated text on immigration, providing that "aliens are detained in CIEs in such a way as to ensure the necessary assistance and full respect for their dignity." On the basis of the results of the inspection of the Sant'Anna CIE in Isola Capo Rizzuto, the judge established that its conditions were "barely decent" - that is, not "suitable for its purpose: hosting human beings." According to the judge, the indecency of the place is demonstrated by a number of facts: the manner in which the accused were forced to rest, on filthy mattresses without any sheets and with extremely dirty blankets; the

conditions under which they were forced to care for their personal hygiene - filthy towels and dirty washbasins and squat toilets; and the conditions under which they were forced to eat - no chairs or tables and food of poor quality. These conditions, according to the judge, are doubtlessly in breach of human dignity, especially "when taking into account that these people were not being deprived of their personal liberty because they had committed a crime; and that they were forced to leave their countries of origin to improve their condition." At this point, it was to be assessed whether the three men's behaviour could be justified by the unjust violation of their fundamental rights: the right to their human dignity and the right to their personal liberty. According to the judge drafting the judgment, the answer was "yes." The prerequisites for self-defence include an unjust assault and a legitimate reaction: in this case, the former was proven to exist by having regard to the detention in breach of the relevant legislation; the latter was also proven by the topicality and inevitability of the danger (the facts were committed within the CIE, and during a detention that should have guaranteed the three men's rights), and by the proportionality between the protection of the right and the offense caused - since the value of the interest being breached (the life or safety of a person) is "enormously higher" than that of the interest to be defended, i.e. the tangible assets owned by the State.

Finally, could the defendants have resorted to different tools, other than the one they used, to protect their rights? Had they acted in a less detrimental way, would they have managed to reach their objective - that is, being released? According to the judge, their behaviour was only aimed at protesting against a detention deemed unfair because of the conditions they were exposed to; their protest "was implemented in the only possible way that could have been effective under those circumstances: blocking the regular operational activities of the Centre." The other forms of protest previously implemented by the accused - such as writing to competent authorities - did not produce any effect. They were like water in the sand, to quote a passage in

the judgment relating to one of the three inmates.

The three men were acquitted on grounds of self-defence, because there was no case to answer.

Discrimination And Violence

8 January - Italy is condemned by the European Court of Human Rights for the conditions of its prisons.

7 February - The Antigone Association, lead manager of the European Prison Observatory, publishes the first data on the Italian anomaly: poor application of alternative measures, ten times less than in Spain or France; and misuse of pre-trial detention (more than 40% of detainees).

16 February - In 2012, prison psychologists and criminologists only managed to dedicate an average of 28 minutes to each inmate. The professionals of this sector wrote a letter to President Napolitano, asking for an adequate amount of hours, a new stable contract, and the structuring of a Psychology and Criminology Service within prisons.

19 February - The Court of Review of Padua asked the judges of the Constitutional Court to consider whether setting a threshold for the number of prison inmates might be “the only instrument to bring the execution of the sentence back into line with Constitutional principles.”

12 April - According to the data published during the Meeting of Young Psychiatrists, one third of detainees is at high risk of mental disorders. Each year, on a total of about 70,000 people detained in Italian prisons, 20,000 cases (a number rounded down) of disorders such as psychosis, depression and bipolar disorder are reported.

4 May - The mother of Marcello Lonzi, a detainee who died in 2003 in his cell in Le Sughere prison in Leghorn, brings an action against two physicians of the prison and the forensic medicine expert who had conducted the autopsy, accusing them of not having "adequately performed their duty" and asking for the investigation on the youth's death to be re-opened.

9 May - The Sant'Anna school of Pisa publishes a research on CIEs: they cost Italy 55 million Euro per year, and they violate "Article 13 of the Italian Constitution, because detention in CIEs, which is similar to that in prisons, is not regulated by law."

9 May - A cardiologist had been arrested for having drafted a false medical report in order to prevent an offender from being detained: but it was thanks to his diagnosis that the man was cured and thus escaped death. The cardiologist was then acquitted.

13 June - With its judgment No. 135 of 2013, the Italian Constitutional Court establishes the obligation for Prison administrations to implement the measures ordered by the *Magistrato di sorveglianza* to protect detainees' rights.

14 June - The Court of Appeal of Milan confirms the acquittal of Carlo Fraticelli, one of the doctors of the hospital of Varese that

had treated Giuseppe Uva, the man who died on 14 June 2008 after spending the night in the *Carabinieri* barrack of Varese. According to his relatives, Uva was the victim of the violence perpetrated in the barrack by the *Carabinieri* and the policemen.

20 June - With its judgment No. 143 of 2013, the Italian Constitutional Court holds Article 41-bis of the Prison Administration Act illegitimate, in particular where it limits talks between prison inmates and their counsel.

21 June - The Permanent Observatory on Deaths in Prisons publishes the first data relating to 2013: 26 people committed suicide, 57 died, and investigations were opened on 13 cases.

5 July - Six Prison officers are committed to trial with charges of manslaughter and abuse of authority, after a 28-year-old man hung himself in the Santa Maria Maggiore prison in Venice. According to the Prosecution, the man killed himself after having been kept in solitary confinement without water, lighting or heating, and without a bed, a chair or a mattress.

2 August - The CIE of Modena, which had been the focus of much controversy and harshly criticised because of poor living conditions and management, is closed down for renovation. After the closure of the CIE of Bologna, Emilia Romagna is left with no more centres for the detention of undocumented aliens.

28 September - After 7 years of activity, the National Committee for Bioethics held its last plenary meeting , adopting an opinion on the issue of health in prison. In the document, the Committee

recommends - among other things - to use group homes for the custody of detainees with children under six years of age.

29 November - A "rigorous internal administrative investigation" on the death of Federico Perna is ordered by the Minister of Justice - Annamaria Cancellieri - through the head of the Prison Administration Department - Giovanni Tamburino. Perna had died on 8 November in the prison of Poggioreale (Naples).

2 December - The Guarantor for Detainees of Campania, Adriana Tocco, mentions cases of battery reported by the detainees of Poggioreale prison: "Often, these are oral reports, because detainees are too scared to put their signature on an actual report. But we do receive many oral reports." In July, the Guarantor for detainees had filed a report with the Public Prosecutor's Office, signed by 50 detainees: "They reported mistreatments, as well as the presence of rats and dirt."

19 December - Antigone Association reports that, in 2013, 99 detainees had died in prison, the latest of which on 13 December in Bergamo for a heart attack. 47 detainees committed suicide (23 of which were aliens), while the cause of death of 28 people was still to be established.

11 March 2014 - The Judge for Pre-Trial Investigations of Varese was to rule on a request to dismiss the case of the two *Carabinieri* and the six policemen that detained Giuseppe Uva on the night of 14 June 2008: the Judge issued charges against the eight men on counts of illegal arrest, abuse of authority on arrested persons, neglect of incapable persons, and manslaughter.

Legislation and policies

Interventions to reduce prison overcrowding.

A special commissioner and the declaration of the state of emergency for prisons.

Before addressing the current situation, and before understanding how our country is doing and acting in the light of the judgment of the European Court of Human Rights for the Torreggiani case, it is necessary to take a few steps back.

Law No. 241 on the granting of pardon was adopted on 31 July 2006. At the end of 2005, there were 59,523 inmates in Italian prisons, whereas at the end of the following year - after the clemency provision was adopted - the number went down to 39,005[1]. At the end of 2013, there were 62,536 people detained in Italian prisons [2]. According to the Ministry of Justice, in Italian prisons there are 47,649 available places, but Antigone Association, in its 2013 Report, states that this number is overestimated as the available places are alleged to be around 37,000. Going back to the situation after the 2006 pardon, it can be said that the relief of pressure on prisons did not last long, so much so that in 2008 the Minister of Justice, Angelino Alfano, launched the so-called "Prison plan". By means of Legislative Decree No. 207 of 2008[3] the then-chief of the Prison Administration Department, Franco Ionta, was appointed Special Commissioner, with the task of drafting a plan of measures to build new prisons

1 Inmates in Italian prisons. Report by Istat and Ministry of Justice, year 2011. Available at http://www.istat.it/it/files/2012/12/I-Detenuti-nelle-carceri-Italiane-anno2011.pdf

2 One of the main reasons behind this substantial increase lies in the introduction of certain provisions in the Italian legal system. Of these, the most "imprisonment-generating" one is certainly the so-called "Fini-Giovanardi Law" on drugs: as of 31 December 2012, 38.46% of prison inmates were being detained for having violated Section 73 of Presidential Decree No. 309 of 1990 (4th White Paper on the Fini-Giovanardi Law, dossier by Fuoriluogo.it - 2013). On 12 February 2014 the Fini-Giovanardi Law was held unconstitutional because of a procedural flaw.

3 Enacted, with amendments, by Law No. 14 of 2009.

and increase the capacity of the existing ones. The Prison Plan was meant to create 18,000 new places by 2012: to this purpose, it was also decided to resort to the *Cassa delle ammende* (a public body with a special fund whose money comes from payment of fees relating to judgments) whose funds had been previously allocated to reintegration and assistance programmes for detainees and their families[4]. The Government adopted the Prison Plan on 13 December 2010, and simultaneously confirmed the extraordinary powers attributed to the chief of the Prison Administration Department and declared the state of emergency for prisons[5].

It was decided to set four main levels of action for the Prison Plan: the first two related to prison facilities, intended both as the building of new structures, and the building of new wings within existing prisons; the third pillar aimed at modifying the relevant legislation; finally, the last point envisaged the hiring of 2,000 prison police agents. Given a reduction of the funds and a considerable delay in the working timeline, this is the current implementing status of the Prison Plan at 31 December 2013, as reported by Prefect Sinesio: "With 468 million Euro allocated to the Prison Plan, facilities are being created, or the relevant calls for tenders are being finalised, to accommodate 12,024 inmates. They are divided as follows: 413 new prisons, for a total of 3,100 places; 1,314 new wings, for a total 3,000 places; 1,615 completions of new wards, already started by the Police Administration Department, for a total of 3,347 places; 916 interventions to recover already-existing prisons, for a total of 1,212

4 Section 7 of Law No. 14 of 2009 amended Section 4(2) of Law of 6 May 1932 establishing the *Cassa delle ammende*, as follows: "The *Cassa delle ammende* funds reintegration programmes for detainees and internees, assistance programmes for them and for their families, as well as prison building projects aimed at improving custodial establishments."

5 Prime Minister's Decree of 13 January 2010, "Declaration of the state of emergency consequent to the overcrowding of the prisons present on the National territory." The state of emergency was meant to last until 31 December 2010, but it was extended twice, up to 31 December 2013. As of 2011, the *Dipartimento della Protezione Civile* (the Civil Protection) has been in charge of managing the prison emergency and, by means of the Order of the Prime Minister of 13 January 2012, Prefect Angelo Sinesio was appointed Delegated Commissioner for the prison emergency and empowered to derogate from several pieces of legislation. Thanks to Presidential Decree of 3 December 2012, as of 1 January 2013 Prefect Sinesio became Special Commissioner for the prison emergency, although he was no longer empowered to issue orders by derogating from the relevant legislative requirements.

places; 317 interventions on new prisons, for a total of 1,665 places, already started by the Ministry of Infrastructures."

The so-called "laws for emptying out prisons"

Together with the interventions relating to prison buildings, actions were undertaken to reduce prison overcrowding by means of legislative instruments. The first law to be adopted was Law No. 199 of 2010, which entered into force on 16 December 2010, envisaging the possibility to serve the last 12 months of the sentence at one's domicile[6]. This was amended by Legislative Decree No. 211 of 2011, which brought to 18 months the remaining period to be served before having access to home detention. Both laws, however, were temporary in nature, as they were closely connected to the prison emergency and their application could not be extended beyond 31 December 2013. Moreover, none of them provided for an automatic mechanism regarding home detention: the prison inmates wishing to benefit from this norm had to apply for home detention, and their application had to be evaluated by the competent *Magistrato di sorveglianza*. According to the data of the Ministry of Justice, as of 31 December 2013, 13,044 inmates had left prison thanks to this law[7].

On 23 December 2013, Decree-Law No. 146 "containing urgent measures for the protection of the fundamental rights of prison inmates and the controlled reduction of prison population[8]" was enacted. This Decree was strongly supported by then-Minister of Justice, Anna Maria Cancellieri, and envisaged two lines of intervention: measures aimed at fighting prison overcrowding, and interventions to protect inmates' rights. As regards the former

6 This norm did not apply to perpetrators of certain especially serious crimes; moreover, it envisaged an increase in the terms of imprisonment in case of escape, as well as some amendments to Prison Police laws.

7 http://www.giustizia.it/giustizia/it/mg_1_14_1.wp?previsiousPage=mg_1_14&contentId=SST977633

8 http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0014900.pdf

interventions, the Decree is organized as follows:

1. Amendments were made to the Consolidated Text on drugs (Presidential Decree No. 309 of 1990). Section 73(5) - Unlawful production, trafficking and possession of narcotic drugs or psychotropic substances - was amended, so as to provide for a specific type of offence and a sanctions system independent of the cases contemplated in the four preceding paragraphs of this section: therefore, minor offences will carry lighter punishments (e.g., the illegal trading of small amounts of drugs). Moreover, the section forbidding more than two referrals to welfare services for treatment purposes was repealed.

2. Amendments were made to the prison system (Law No. 354 of 26 July 1975) and indirect measures were taken to strengthen the supervision of sentenced persons who have been granted home detention. The judge was empowered to order persons placed under house arrest or detention to wear an "electronic bracelet"; the remaining period to be served before being placed on probation was raised from 3 to 4 years, and the *Magistrato di sorveglianza* was given greater powers.

   A special early release was introduced[9], by raising the number of days that may be deducted from the period remaining to be served, as already envisaged for any sentenced person that can prove to have profited from re-educational initiatives, from 45 to 75 per semester (for the period between 1 January 2010 and 24 December 2015).

3. Changes were introduced regarding the possibility to serve time at one's domicile by virtue of Law No. 199 of 26 November 2010 (section 5). The provision that allows serving sentences

9 Special early release does not apply to the periods when the sentenced person is on probation and in home detention; to sentenced persons who had been allowed to serve time at home or that were placed under house arrest pursuant to Section 656(10) of the Italian Code of Criminal Procedure; to those convicted of crimes causing particular social concern as listed in section 4-bis of the Law on Prison Administration.

of no more than 18 months at one's domicile - even if this is the residual time to be served for a longer sentence - was made permanent by lifting the deadline of 31 December 2013.

4. Amendments were made to the Consolidated Text on Immigration, pursuant to Legislative Decree No. 286 of 1998, on the expulsion of foreign nationals as an alternative measure to imprisonment (section 6).

As regards the measures for protecting inmates, the following was envisaged:

1. The wording of Section 35 on the so-called "generic" complaint was amended (see Section 3(1a)). The list of the entities prison inmates may file a complaint with was extended, and a terminological adjustment was made.

2. Judicial complaint procedure - Section 3(1b). Stronger safeguards were introduced for prison inmates in the Complaints procedure, including a proceeding to ensure that the Prison administration complies with judicial orders.

3. Creation of a National Authority for the rights of persons imprisoned or deprived of liberty. This will not entail any additional cost for the State, and the Authority will be in charge of monitoring the conditions of prisons by virtue of powers of inspection, making requests to the prison administration and addressing recommendations. The Authority will also have to submit a yearly report to the Italian Parliament.

4. Measures for streamlining the management of specific questions falling within the competence of the *Magistrato di sorveglianza*.

5. Postponement of the deadline for adopting regulations on the specific benefits relating to taxation and social contributions afforded to companies and social cooperatives hiring prison inmates.

Protection of parenting in prison

With Law No. 62 of 21 April 2011, Parliament adopted new measures regarding mothers with underage children serving time in prison. This new law includes provisions regulating the application of remand in custody and imprisonment. As regards remand in custody, the Law raised the child's age threshold (from 3 to 6 years) below which no remand in custody order may be issued or validated in respect of the mother, except where major precautionary requirements have to be met. In any case, mothers with children under 6 have to be remanded to an ICAM (*Istituto a custodia attenuata per madri,* a special custodial facility for mothers) or, when existing, to a protected group home[10]. The deadline for the implementation of the provisions on "mitigated custodial measures" is 1 January 2014, unless it is possible to use places already available - under the current legislation - in existing ICAMs. As regards serving a custodial sentence, home detention - including in a protected group home - may be granted to pregnant women or to women with children under 10 living with them, provided they have to serve a sentence of no more than 4 years' imprisonment and even if this is the residual time to be served for a longer sentence.

Currently, there are two ICAMs in Italy, one in Milan and one in Venice, and a third one will be opened in Sassari. Finally, Law No. 62 provides for the right of mothers to visit their underage children when sick - even if they do not live with them - and to assist children that visit a specialist for a serious health problem. The latter provisions may also be applied to the child's father , when the same conditions obtain and the mother cannot assist her child or has passed away.

As of 31 December 2013, there were 40 children under 3 detained

10 Section 4 of Law No. 62 delegated the Ministry of Justice - together with the State's, Cities' and Local Authorities' Conference – to set out, by way of a decree, the features of protected group homes (which are provided for in Section 284 of the Italian Code of Criminal Procedure, and Sections 47-*ter* and 47-*quinquies* of Law No. 345 of 1975). As there is no specific funding for protected group homes, Regional *Provveditorati* (Superintendencies) and Local bodies have to identify the most suitable structures, as well as the necessary funds.

with their mothers in Italian prisons.

The crime of torture

As of 31 December 2013, the crime of torture is not part of the Italian legal order[11]. Both the Universal Declaration of Human Rights of 1948 and the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950refer to torture or to cruel, inhuman and degrading treatment and punishment. However, the first internationally acknowledged definition of Torture is to be found in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1984[12].

The Convention, among other things, requires States to adopt domestic laws to acknowledge and sanction any act of torture. Parliament has repeatedly tried to introduce this type of offence, but the debate has ever come to a standstill because of the conflict between two opposite views: should the crime of torture be intended as a *reato proprio* (that is to say, a crime ascribable to a specific class of offenders, in this case those who apply coercive measures legitimately), or as a *reato comune* (that is to say, ascribable to any citizen)?

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11 On 5 March 2014, the Italian Senate adopted a bill on the introduction of the crime of torture. This is the link of the adopted text that is to be discussed by the Chamber of Deputies: http://goo.gl/lSwRcE

12 Article 1(1) of the UN Convention reads: "For the purposes of this Convention, the term 'Torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

The definition of torture in the UN Convention leaves no room for doubts, as it explicitly quotes "public official or other person acting in an official capacity." The only step forward was the ratification of the Optional Protocol to the Convention against Torture (OPCAT), which was adopted on 13 April 2013 and entered into force on 3 May of that year.

The Protocol was adopted by the UN General Assembly on 18 December 2002, and entered into force on 22 June 2006. Italy signed it on 20 August 2003. The Protocol has a two-fold purpose: on the one hand, it establishes the UN Subcommittee on Prevention of Torture, at International level; on the other hand, it obliges Acceding states to provide for the establishment of an inspection and monitoring system for prisons, the so-called "National Mechanism of Prevention", aimed at preventing torture and other cruel, inhuman or degrading treatment. With the entry into force of Legislative Decree No. 146 of 2013 (the so-called "Cancellieri Decree"), creating the National authority for the rights of persons imprisoned or deprived of liberty, Italy finally introduced this important preventative instrument. OPCAT lists the criteria for National Mechanisms of Prevention to be defined as such[13], and, as regards the newly-established Italian authority, doubts arise in relation to at least one of the points listed in the Protocol, namely the one on the availability of resources for its funding[14].

The CIE[15] of Bari is brought to Court

13 In particular, see Articles No. 17-23. http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx

14 Article 18(3) of OPCAT reads: "The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms."

15 Identification and Expulsion Centres were established by Law No. 40 of 6 March 1998, and provided for in the Consolidated text on immigration (Legislative Decree No. 286 of 25 July 1998). CIEs are facilities for detaining aliens staying unlawfully in Italy prior to their deportation. Section 14 of Legislative Decree No. 286, as amended by Law No. 189 of 30 July 2002 (the so-called "Bossi-Fini Law") provides that "if it is not possible to immediately proceed with the removal by means of deportation", the Chief of Police "provides for the foreign nationals to be detained for as long as is strictly necessary " at the CIE. The maximum period of stay in said Centres went from 60 days to 18 months in total. According to Police data, 6,016 migrants (5,431 men and 585 women) were detained in Italian CIEs in 2013, and less than half of them (2,749) were actually repatriated. The total

In May 2010, Luigi Paccione and Alessio Carlucci, attorneys-at-law, "replaced" the Municipality and the Province of Bari and initiated proceedings against the Prime Minister's Office, the Ministry of the Interior and the local Prefecture, petitioning the Court to immediately close down the CIE of Bari for violation of universal human rights[16]. The petition was granted and a technical inspection was ordered: it confirmed the reported conditions of the "guests" of the CIE, as well as the structural and medical shortcomings of the Centre. After this verdict, the CIE of Bari was renovated and the Court ordered another technical assessment on the conditions of the new Centre and its compliance with legal requirements. The Class Action Procedimentale association together with the abovementioned lawyers has been following this case for years and scored an important result: the Court of Bari ordered the Ministry of the Interior and the local Prefecture to carry out the necessary adjustments to the structure, so as to prevent it from being shut down. A significant part of the procedure was aimed at assessing whether its "guests" were being detained or not. In the judgment, justice Francesco Caso says: "On the other hand, using a specific terminology, which is not, so to say, "prison-oriented", is not decisive;

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amount of migrants repatriated through CIEs in 2013 is 0.9% of the total migrants allegedly staying unlawfully on the Italian territory (294,000, according to the data of ISMU - the Institute for the Study of Multi-ethnicity, as of 1 January 2013). Currently, there are 11 CIEs in Italy (in Bari, Bologna, Brindisi, Caltanissetta, Crotone, Gorizia, Milan, Rome, Turin, Trapani, and Trapani Milo), but only 5 of them are operating (namely, those of Bari, Caltanissetta, Rome, Turin, and Trapani). The CIE of Trapani (Serraino Vulpitta) and that of Brindisi have been closed for more than a year, while the Centre of Lamezia was closed down in November 2012. The CIEs of Emilia-Romagna were closed down in February (Bologna) and August (Modena) for renovation: in fact, in the light of the living conditions of the inmates and the disastrous outcomes of the management, the Prefecture revoked the contracts relating to the CIE, which had been awarded to the relevant company after a race to the bottom type of tendering. The CIE of Crotone was shut down in August, following the death of a young migrant and the subsequent revolt of the other inmates. The CIE of Gradisca d'Isonzo was emptied at the beginning of November, after months of protests and revolts of the migrants against the inhuman treatment they were subject to. The CIE of Milan is closed for renovation. As things stand, all these closures should be temporary, even though the date of reopening is unknown. Most of the CIEs are working at a reduced scale because of security reasons or because many parts of the buildings are unfit for use or damaged. According to the data of the Ministry of the Interior, as of 4 February 2014, on a total capacity of 1,791 places, the available places were actually 842. As of 13 February 2014, there were 460 inmates in CIEs, which means that CIEs operate well below 50% of their capacity.

16 All documents and information can be found at www.classactionprocedimentale.it

in fact, it may sound hypocritical to the extent what is not referred to as a "prison" or "imprisonment" is actually even more mortifying than what is correctly termed in this manner because of the way it is regulated." The individuals held in CIEs are deprived of their liberty but, indeed, they are not as protected as those who are in prison, which is spelled out by the judge in another passage of his judgment: "It would not be hasty to conclude that, if the aliens held in CIEs while waiting to be deported had been subjected to the current discipline of prisons, their condition would have been better and, in any case, they would be much more 'protected', at least from a formal point of view." Both the lawyers of Class Action Procedimentale, and the Ministry of the Interior appealed against this decision. The former noticed some inconsistencies in the judgment, as the judge pointed out the unlawfulness of the detention in the CIE but did not order its immediate closure, which he should have done according to the appellants. Conversely, the Ministry of the Interior claimed that it should not be obliged to carry out the works listed in the judgment. The parties will meet at the hearing of 8 April 2014.

In any case, this judgment - the first of its kind in Europe - strongly underlines the inconsistencies of Italy's approach to the detention of undocumented aliens.

Recommendations

1. Countering the overcrowding of prisons by reducing the number of inmates to the accommodation capacity envisaged by the regulations applicable to the individual correctional institutions, also by way of amnesty and pardon measures whether of a general nature or limited to certain types of crime (e.g. holding of drugs). Introducing a "grandfather's clause" (*numerus clausus* for prisons) to prevent overcrowding by way of a waiting list that should include non-socially dangerous

individuals sentenced to custodial penalties.

2. Passing a law to introduce the crime of torture into the legal system pursuant to the obligations undertaken internationally as well as to fulfil the consolidated obligation to afford protection against crime that is enshrined in our Constitution (Article 13, paragraph 4).

3. Significantly reducing the scope of special prison regimes, particularly the ”tough prison regime” under section 41-bis of the Criminal Procedure Code, by strengthening the judicial guarantees for the parties concerned, limiting the duration of the measures and of the individual extensions that may be ordered, and reducing the scope of prisoners' rights liable to be affected on account of such measures. Thus, application of a special regime must be traced back to its rationale, which consists in its being a temporary measure aimed at breaking whatever links between the prison inmate and the relevant criminal organization.

4. Ensuring financial, management and organisational autonomy of the (newly established) national Guarantor of the rights of persons subject to measures restricting personal freedom, with cognisance also being extended to identification and expulsion centres as well as to persons subject to mandatory hospital treatment.

5. Overcoming the framework of limitations on access to measures mitigating the prison regime as based on the relevant statutory offence and developing tools and programmes that can foster the application of such measures – especially with regard to prison inmates that are drug addicts.

6. Promoting the offer of cultural, educational and vocational

training activities in prisons so as to meet the Constitutional requirement of enabling the best possible social reintegration of a convict that has served his or her time.

7. Ensuring effectiveness of the right to health, and the presence of Regional Health Authorities in each prison and in CIEs.

8. Ensuring application of the guidelines on dynamic surveillance whereby cells should be opened and job training and socialization activities carried out during most of the day.

9. Ensuring prison inmates can keep up their relationships with family members and relatives, also via the effective implementation of the principle of territoriality of punishment.