Section:	**Supranational rights and Criminal Procedure** – The Defendant's Guarantees
Title:	*European Court of Human Rights and Prison Overcrowding: the case of* Torreggiani and others v. Italy
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1. A pilot judgment: what does it signify?

In recent years, there have been many changes concerning the operations of the European Court of Human Rights. Amongst these, a significant role can be assigned to what are known as "pilot judgments", due to their resulting consequences. The judgment hereunder analyzed is a significant example thereof.

It is generally known that, in some cases, the Strasbourg Court has relinquished the characteristic of the "individual case" judge - in respect of which it restricts itself to assessing the violation of one of the fundamental rights set forth in the European Convention- increasingly acquiring a more specific and effective modus operandi. In this way the Court, in its judgment, not only considers the "mere" violation reported but also identifies those national legislative and structural deficiencies to the responsible state on the basis of its non compliance.

The purpose of such holdings has been to help the responsible state to identify suitable measures to solve internal structural problems. It was intended to both guarantee further realisation of the rights laid down in the European Convention, and avoid the recurrence of violations and, consequently, repetitive cases raising the same issue.

The different modus operandi of the European Court of Human Rights follows the Committee of Ministers Recommendation Rec(2004)6 adopted on 12 May 2004, urging for the necessity to guarantee internal remedies by member states to redress violations ascertained by the European Court. Besides, it underlines the ever-increasing number of applications before the Strasbourg Court, identified as a factor in the slow down the examination of the Court and, consequently, of prejudice for the effectiveness of the system. In this respect, the Recommendation Rec(2004)5 adopted on 12 May 2004 is also particularly significant, because, in order to prevent possible

violations of the rights laid down in the Convention, recommends that member states set up mechanisms for the verification of compatibility with the system of protection rights established in the Convention of draft laws, existing legislation and administrative practice.
Within this "new" framework, the member state responsible for the violation, in order to comply with what is stated in Article 46 of the ECHR, may not confine itself to pay financial damages as just satisfaction, but it has to find *individual measures* to redress the violation ascertained by the European Court. In addition, it has to adopt suitable *general measures* to prevent a new violation similar to that alleged[1].
A first example of this new procedure in the Court's rulings ("pilot judgments") is the case of *Broniowski v. Poland* [GC], no. 31443/96, 22 June 2004. The pilot judgment procedure has further been applied to cases concerning Italy with regard to criminal trials conducted in absentia. In this respect the Strasbourg Court highlighted the internal deficiencies to be remedied in order to avoid the recurrence of violations (*Sejdovic v. Italy*, no. 56581/00, 10 November 2004).

2. *The case* of Torreggiani v. Italy*: a pilot judgment*

On 8 January 2013, the ECtHR found Italy responsible for violation of Article 3 of the ECHR for the overcrowding experienced by the applicants inside the prison facilities where they were held. In particular, the Strasbourg Court, after considering the large number of pending applications based on the same violation, delivered a "pilot judgment" requiring Italy to take internal "preventive" and "compensatory" remedies. Such measures, to be adopted within one year of the judgment become final, shall be suitable to grant just satisfaction in cases of prison overcrowding. Pending the adoption of these measures, the cases before the Court concerning similar issues will be adjourned. The judgment in the case of *Torreggiani v. Italy* shall be final if, within three months of its issue, none of the parties concerned makes request that the case be referred to the Grand Chamber (Arts. 43 and 44 ECHR).
Before the judgment concerning Italy, on 10 January 2012, the ECtHR had already ruled- specifically with regard to Russia- (*Ananyev and others v. Russia*) again with the "pilot judgment" method. In that case the Russian authorities were required to adopt a series of binding commitments within six months, in order to take preventive and compensatory measures compatible with Article 3 of the ECHR. The Court drew this conclusion after considering that the violation of the aforementioned provision by Russia had been alleged in more than 80 judgments since 2002 and more than 250 cases on the same issue were still pending before the Court.

3. *The circumstances of the case*

The case originated in an application lodged by seven persons detained in Busto Arsizio and Piacenza detention facilities.
The applicants complained about the conditions experienced inside the prison: a 9 square metre cell shared by three inmates and, therefore, a space of only 3 square metres each. In addition,

[1] In this perspective see Recommendation Rec(2000)2 adopted on 19 January 2000, concerning the necessity that member states ensure a *restitutio in integrum* in the internal legislation for the subject whose fundamental rights set forth in ECHR have been violated as ascertained by a Strasbourg Court judgment.

restrictions were imposed on the use of the shower for the occasional lack of hot water, as well as insufficient and inadequate lighting.
It should be noted that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its annual general reports, has pointed out several times that overcrowding is an issue of direct relevance to its mandate. More specifically, with regard to the size for a police cell intended for each detainee, the CPT, while highlighting the complexity of the question, felt the need for rough guidelines in this area. According to the CPT assessment, a police cell (or any other type of detainee/prisoner accommodation) should be in the order of 7 square metres, 2 metres or more between walls, and 2.5 metres between floor and ceiling [CPT, 2nd General Report, [CPT/Inf (92) 3]. This criterion is deemed to be a desirable level rather than a minimum standard by the CPT itself.
The ECtHR, with regard to the living space to be given to each detainee, observed that such a space cannot be easily assessed in the light of the rights set forth in the Convention, also taking into account the variety of factors that may affect such an assessment. However, in some cases - the Court argues - "the blatant lack of personal space for detainees represents, per se, a treatment that contravenes Art. 3. In such cases, as a rule, the applicants had less than 3 square metres of living space each" (see *Sulejmanovic v. Italy*, no. 22635/03, § 1, 16 July 2009; *Aleksandr Makarov v. Russia*, no. 15217/07, § 93, 12 March 2009; see also *Lind v. Russia*, no. 25664/05, § 59, 6 December 2007; *Kantyrev v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Andreï Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Labzov v. Russia*, no. 62208/00, §§ 44, 16 June 2005; *Mayzit v. Russia*, no. 63378/00, § 40, 20 January 2005).
In this light, the lack of space inside the detention facilities may be fundamental in affirming or excluding the violation of Art. 3 of the ECHR, especially if the situation continues for a long time (*Torreggiani v. Italy*, § 78, 8 January 2013).

4. The case concerning Italy

The ECtHR, in condemning Italy, observes that the problem of overcrowded prisons is an objective fact also highlighted by the statements of the main national authorities.
The judgment under consideration follows another ruling of the ECtHR (*Sulejmanovic v. Italy*, cited above), which found Italy responsible for violation of Art. 3 of the ECHR for the conditions of detention suffered by the applicant during the period when he was obliged to live in a personal space amounting to 2.70 square metres, which is to say, in a space smaller than that deemed desirable by the CPT (*Sulejmanovic v. Italy*, cited above, § 43).
Given such premises, the ECtHR, in the judgment under consideration, recalling its precedent case, points out that the deprivation of liberty in execution of a lawful order of the judicial authority "does not deprive the detainee of the rights guaranteed by the Convention". On the contrary: "the inmate may need more protection precisely because of the vulnerability of his condition and his being completely under state responsibility" (*Torreggiani v. Italy*, cited above, § 65).

5. Principle of subsidiarity and domestic remedies

In the case of *Torreggiani v. Italy*, there is a relevant part which analyzes the compliance of what is known as the principle of subsidiarity. According to this rule the application to the Court is admissible only if it complies the requirement of the exhaustion of domestic remedies.
On this point, the Italian Government raised a specific objection, because of the opportunity for each detainee to lodge a complaint before the judge having jurisdiction, i.e. the magistrato di sorveglianza, pursuant the Arts. 35 and 69 of Law no. 354 of 1975. The magistrato di sorveglianza is entrusted to carry out functions of supervision of the organization of detention facilities by Art. 69 Law no. 354 of 1975. In the particular case, the magistrato di sorveglianza of Reggio Emilia, urged by some applicants about the problem of overcrowding and conditions of detention, upheld the complaints. Indeed, the Court argued that the limited space given to detainees constituted an inhuman and degrading treatment and also gave place to unequal treatment, considering that other detainees could be allowed to live in wider spaces. However, despite the Court's holding being brought to the attention of Italian Ministry of Justice and to prison administration, there has been no "concrete" outcome.
This point was carefully analyzed by the ECtHR in the judgment under consideration to determine whether the principle of subsidiarity was actually observed before applying to the supranational judge. In this respect, the Strasbourg Court stressed that it is not important to assess the administrative or judicial nature of the complaint under Art. 35 of the law above cited, but rather the effectiveness of that remedy must be examined (§ 51 and 52). The Court gave negative answer to this question considering that, in the specific case, some detainees had recourse to that instrument without any concrete result (§ 52). The negative evaluation on the effectiveness of the complaint by the ECtHR, moreover, took into consideration the general condition of prison overcrowding which excluded - the Court stressed – the effectiveness of the remedy. The Court pointed out, indeed, that such a remedy was not a suitable instrument "to avoid the continuing violation alleged and ensure an improvement of the material conditions of detention for the applicants. The latter were not, therefore, obliged to exhaust it before applying to the Court" (§ 55).

6. Possible solutions

Some possible solutions to the problem of prison overcrowding were, in the past, also suggested by CPT which, in 7th General Report [CPT/Inf (97) 10] stressed that the main solution to the problem of overcrowding is not to increase the number of prison places. In the CPT's view, building new prisons does not constitutes a "lasting solution". On the contrary, its only result is that "the prison populations rise in tandem with the increased capacity acquired by their prison estates". By contrast, "the existence of policies to limit or modulate the number of persons being sent to prison has in certain states made an important contribution to maintaining the prison population at a manageable level". Therefore, attention should be drawn to a new legislative criminal policy, providing a reduced recourse to the execution of imprisonment and strengthening alternative instruments both in terms of numbers and effectiveness. Another aspect to review concerns the necessity to reduce the use of pre-trial detention. As reported in the judgment under consideration (§ 29) 42% of detainees are waiting to be judged.
The fact remains that, after the ECtHR judgment in the case *Torreggiani v. Italy*, progress has been made in order to find internal remedies to offer preventive or compensatory solutions for detainees, owing to the objective situation of prison overcrowding.

As regards possible "compensatory" remedies for those who have suffered a violation of their fundamental rights in detention, and are subject, because of overcrowding, to inhuman and degrading treatment, the Corte di Cassazione ruled with the judgment of 15 January 2013, no. 4722, in the case of *Vizzari*. The Italian Supreme Court argued that the magistrato di sorveglianza is not empowered to decide on non-pecuniary losses incurred by detainees, but, at the same time, took the emergencies pointed out by ECtHR in the case *Torreggiani v. Italy* upon itself and the commitments that stem from it for Italy.

Besides, just after the judgment in the case of *Sulejmanovic v. Italy*, the issue on granting damages to detainees because of overcrowding had been raised. More specifically, in the wake of the aforementioned judgment, the Lecce Magistrato di Sorveglianza, with a decision of 9 June 2011, upheld the complaint of a detainee alleging a series of conditions (cell space, bed, lack of recreational spaces) experienced during the execution of imprisonment. In that case, it was deemed that the conditions alleged constituted an infringement of both internal law and fundamental rights set forth in ECHR and compensation was granted to the claimant by the prison administration.

It was the first time that such a decision was rendered in the Italian legal system. The case remained unique, because other magistrati di sorveglianza deemed that granting such compensation was not included in their competences (Magistrato di Sorveglianza of Vercelli, ordinanza of 18 April 2012).

As regards the seeking of "preventive" internal remedies – in the current state of legislation – to prevent the occurrence of fundamental rights violations, the Tribunale di Sorveglianza of Venezia, on 13 February 2013, raised the objection of unconstitutionality with regard to Art. 147 of the Italian criminal code in so far as it does not provide, apart from the cases spelled out, the option of a stay of execution of imprisonment when it has to be carried out in conditions contrary to human dignity, for violating Arts. 27, paragraph 3, and 117, paragraphs 1, 2 and 3 of the Italian Constitution. It is the first attempted breakthrough – always by means of jurisprudence – in the legal system on the issue, which might not be postponed, involved in the case *Torreggiani v. Italy*. We will see what the Italian Constitutional Court will hold. It is possible to imagine, in the wake of what already occurred in other fields of the criminal process, an ongoing dialogue among Courts, characterized by the availability and sensibility of constitutional judges in accepting the "solicitations" from the Strasbourg Court, in a framework of multi-level protection of the fundamental rights increasingly intended to their enforcement (on this point see also M. Montagna, *Dialogo tra Corti ed effettività dei diritti fondamemntali nel processo penale*, in *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo*, edited by L. Cassetti, Napoli, 2012, pp. 399 ff.; EAD., *Processo contumaciale e pubblicità dell'udienza nella prospettiva di un dialogo tra Corti*, *Arch. pen.*, 2012, pp. 127 ff.).

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