Procedural obligations laid down by the European Court of Human Rights regarding physical conditions of detention and prison over crowding

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Initially taken into account through what was referred to as "indirect" protection\(^1\)—as early as 1962 the European Commission of Human Rights affirmed that article 3 can be applied in the matter\(^2\)—since 2000\(^3\), conditions of detention fall directly under the scope of protection of the Convention\(^4\). Thus, as noted by B. Pastre-Belda, the protection of the physical and moral well-being of a detainee has, over half a century, made a "major qualitative leap": European judges are no longer obliged "to consider if the alleged violation infringes a right guaranteed by the Convention, the right to decent conditions of detention now expressly [being included] in article 3, through the dynamic interpretation of the European Court"\(^5\). In this regard, the right to humane physical conditions of detention is the clearest manifestation of the category based protection laid down by the Court, on the grounds of respect for dignity. F. Sudre thereby demonstrated that "whilst article 3 applies to any man, as perceived as a unity and its entirety (...) European case law has favoured the emergence of category based protection, which, prior to an analytical approach, induces the division of men and takes into account particular categories of individuals. Based on the mechanism of indirect protection, category based protection, through a gradual transition, becomes a specific protection"\(^6\).

In the same time frame, the Court organised the procedural guarantee of the physical right consecrated thereby. The Court did so almost exclusively in the scope of article 13 of the Convention, very marginally of that of article 6, and never under the procedural angle of article 3. The procedural requirements of the Convention also figure in the considerations cited in the context of considering if the applicants had complied with the rule of exhausting all means of seeking redress at a domestic level, provided for in article 35 § 3 b). Indeed, the logic behind this rule is based, according to the Court, "on the hypothesis, reflected in article 13, that the domestic legal system shall provide an effective remedy against breaches of the rights defined by the Convention. This is an important aspect of the subsidiary nature of the mechanism established by the Convention". The requirements of an effective remedy regarding physical conditions of detention form part of the more general framework laid down by the Court under article 13, it being specified that, according to case law, as this duty to guarantee is related to specific rights, it may be accomplished in different manners according

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1 A technique that consists of extending the applicability of the ECHR to areas that are not expressly included in the text of the Convention. The Convention, as opposed to other instruments protecting human rights (such as article 10 of the United Nations’ International Covenant on Civil and Political Rights 1966 for example), does not refer expressly to detainees and a fortiori conditions of detention. Article 3 of the ECHR thus stipulates that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".


3 From the judgment of Kudla v. Poland [GC], 26 October 2000, No. 30210/96.

4 On the matter of the direct nature of this protection v. B. Ecochard, "L’émergence d’un droit à des conditions de détention décentes garanti par l’article 3 de la Convention EDH", RFDA, 2003, pp. 99-108

5 B. Belda, Les droits de l’homme des personnes privées de liberté, Contribution à l’étude du pouvoir normatif de la Cour européenne des droits de l’homme, Bruylant/LGDJ, 2010

to the right that the State must guarantee and the specific situation in question\(^7\), the national authorities having considerable room for manoeuvre in the area.

The Court was nevertheless led to specify how the protection regarding conditions of detention should operate. It can already be indicated that the requirements in the area are structured in two parts, according to the aim of the remedy: what is known as "preventive" remedies, intended to lead to an improvement in physical conditions of detention, and compensatory remedies, seeking remedy for damages suffered due thereto\(^8\). Despite the Court's use of a not entirely aggressive formulation\(^9\), by which it attributes the "highest value" \([to] the remedy "capable of bringing an end to the continued violation of article 3"\), which is truly the characteristic imperatively required by case law with regard to a domestic mechanism that must be available to people still suffering from the incriminated treatment\(^10\). Once the interested party has left the establishment in question, they must have access to a mechanism to offer reparation for this violation and logically a compensatory remedy would suffice\(^11\).

With regard to the effort made by the Court to find an interpretation in its case law to allow for the fulfilment of the right to respect for human dignity—which is an essential principle of the protection accorded by article 3 of the Convention—an analysis of the procedural resources applied by the case law\(^12\) to ensure the practical implementation of the requirements of the Convention regarding the accommodation of detainees is a particularly appropriate indicator of the place and the function of the right to an effective remedy in the construction of European prison law. Beyond questions regarding the internal rationale of the case law of the European Court of Human Rights with regard to incarceration, systemic considerations, regarding the methods applied by the Court to resolve the structural problem of the deplorable conditions of detention across the whole continent\(^13\), which puts its authority directly at stake, and more prosaically, to confront the flood of requests, campaigning for a serious examination of the procedural obligations conceived by the Court.

The articulation of prison policy requirements with procedural law and the general case law policy followed by the Court to refer the burden of proceedings regarding the prison system back to the national authorities are analysed in sections dedicated, on the one hand, to the taking into account of reductionist objectives in the context of article 5 of the Convention, to the pilot judgments. For their part, the developments that follow—and just meet the

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\(^7\) See for example \textit{Boudaïeva and others v. Russia}, 20 March 2003, No. 15339/02


\(^9\) See \textit{Ananyev and others v. Russia}, 10 January 2012, No. 42525/07; 60800/08

\(^10\) See \textit{Canali v. France}, 25 April 2013, No. 40119/09;

\(^11\) See \textit{Lienhardt v. France (dec.)}, 13 September 2011, No. 12139/10

\(^12\) Which we shall see are almost exclusively sought within the scope of article 13.

\(^13\) Overcrowding constitutes, in the eye of the Court, an endemic or structural problem in many European countries, such as Russia (\textit{Ananyev v. Russia}), Romania (\textit{Florea v. Romania}, no. 37186/03, 14 September 2010), Moldova (\textit{Ciorap v. Moldova}, no. 12066/02, 19 June 2007), Ukraine (\textit{Malenko v. Ukraine}, no. 18660/03, 19 February 2009), \textit{Visloguzov v. Ukraine}, no. 32362/02, 20 May 2010), Bulgaria (\textit{Neshkov v. Bulgaria}), Italy (\textit{Torreggiani v. Italy}), Hungary, Belgium (\textit{Vasilescu v. Belgium}); Poland (\textit{Orchowski v. Poland no. 17885/04, 22 October 2009})
procedural requirements contained in the judgments—seek to take into account the manner in which the Court intends to create mechanisms for national remedies and to grasp the relationship between procedural obligations and substantive law regarding the right to decent conditions of detention. In order to understand the content and the extent of the procedural obligations in question, it is first necessary to recall the conditions of the emergence of the right to decent conditions of detention, and to outline them (1°). The European procedural requirements will then be examined by reviewing the different workings of the domestic mechanisms intended to ensure the right guaranteed under article 3 (2°).

1. Extent of the right to decent conditions of detention, subject to procedural safeguards

1.1. Genesis of the right to conditions of detention that respect human dignity

The Court has moved from "the stage of ignorance of the general conditions of detention to that of recognising the right of any detainee to conditions that respect human dignity"\(^{14}\). Building on this development, the decade from 2000-2010 has, in this respect, seen a genuine increase in the number of proceedings in Strasbourg related to prison life. The European Commission of Human Rights has certainly admitted that physical conditions of detention can be found to be inhuman or degrading treatment. In the "Greek case" it came to this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world\(^{15}\). F. Sudre however recalls that the Commission only penalised conditions of detention when two conditions were met: an objectively degrading environment and the intention to humiliate the detainee\(^{16}\). Ultimately, "the refusal, by the Commission, to take into account in its consideration the minimal European rules in the area left it the duty to set this threshold according to the specific data in question", which was placed at a very high level\(^{17}\).

The right to humane conditions of detention has truly be established in favour of a judgment regarding the right to health in prison. As noted by F. Tulkens\(^{18}\), these two rights, the right to protect health and the right to decent conditions, find their "common matrix" in the judgment on *Kudła v. Poland* of 26 October 2000 (cited above), where the Grand Chamber summarised the obligations of the State in these terms: "Article 3 requires that the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that


\(^{15}\) Claims nos 3321/67 and others, Commission's report of 5 November 1969, Year book 12

\(^{16}\) SUDRE F., "L'article 3bis de la Convention européenne des droits de l'Homme : le droit à des conditions de détention conformes au respect de la dignité humaine", Prev. art., p. 1508. To support this assertion the author refers to the European Commission on Human Right's decision, 15 May 1980, MCFEELEY and others v. United Kingdom, app. no. 8317/78, p. 54

\(^{17}\) B. Ecochard, L'émancipation d'un droit à des conditions de détention décentes garanti par l'article 3 de la Convention européenne des droits de l'homme, RFDA 2003. 99

\(^{18}\) F. Tulkens, Les prisons en Europe. Les développements récents de la jurisprudence de la Cour européenne des droits de l'homme, Déviance et Société 2014/4 (Vol. 38)
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”.

In rapid succession, two judgments in 2001, handed down regarding physical conditions endorsed that they should be taken into account in and of themselves. Thus abandoning the intentional element as a condition required in order for the treatment to be considered as contrary to article 3. In the Peers v. Greece case of 19 April 2001, the Court unanimously found there had been a violation of article 3 of the Convention due to the physical conditions of detention of the applicant. At fault was a detention in a poorly lit cell with a single closed window in the ceiling, with no ventilation and without a partitioned toilet, when the cell was occupied by two detainees. In the case Douguz v. Greece, the conditions of detention were qualified as degrading treatment by the European Court (a violation of article 3), in particular due to the major overcrowding and the lack of bedding, combined with an excessive duration of detention in such conditions (around 17 months in all).

Beyond abandoning the intentional element as a prerequisite for the prohibited treatment is the practical interpretation of the lowering of the threshold of the seriousness triggering the protection of article 3.

1.2. Basis and legal severity of the obligation to ensure decent conditions of detention

The development thus described is part of the origin of a broader and more general changing approach that tends to appreciate breaches of fundamental rights in a stricter manner. B. Belda has demonstrated in this context that the lowering of the threshold of seriousness also leads to a redefinition of the concepts contained in article 3 through the notion of human dignity. The principle of respecting human dignity is a fundamental objective pursued by the European Court when it applies, and therefore interprets, the European Convention on Human Rights for persons deprived of their liberty. She explains that European judges adopt a specific approach to interpretation when they apply rights under the Convention to detainees, aiming to grant a privileged protection of their rights, due to the complexity of their status. In ruling under the scope of article 3, which makes no exception to prohibiting inhuman or degrading treatment, the Court grants a basic right to decent conditions of detention. As a consequence, the Court affirms that the respondent Government must “organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties”.

This approach to interpretation—by which the Court has updated the possibilities of the text to construct a category based protection for detainees—was accompanied by an incorporation of the doctrine by other bodies of the Council of Europe, and particularly "soft case law" from

19 Thesis cited above
20 See for example, Varga and others. v. Hungary, 10 March 2015 no. 14097/12
the activity of the CPT. This approach is part of a more general tendency to take into account external sources in European case law. As revealed by B. Belda, a common European detention law is being progressively built, under the leadership of European judges and for which the "basic tools" used, then assimilated into law under the Convention, are a range of instruments with normative constraints.

This is particularly the case for requirements regarding the surface area that detainees must have available in collective cells. In its decision on Kalachnikov v. Russia in 2002, in order to judge if the size of the applicant's cell, which measured 17 m² and was occupied by between 18 and 24 detainees, raised problems covered by the scope of article 3 of the Convention, the Court "recalled that the CPT has set the approximate minimum desirable surface area per person for a detention cell at 7 m² (see the CPT's 2nd general report – [CPT/Inf] (92) 3, §43), i.e. 56 m² for eight detainees" (§97). The Court, after specifying that "serious overcrowding was constantly the rule in the cell", therefore concluded that this was "a state of affairs which in itself raised an issue under Article 3" (§97).

1.3. Scope of the right to decent conditions

In its judgment on Dougoz v. Greece, cited above, after recalling "that conditions of detention may sometimes amount to inhuman or degrading treatment", the European Court specified the elements taken into account to assess the minimum level of severity. It specifies the two factors determining the applicability of article 3, i.e. "When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant" (§46). In this case the Court concluded there had been "degrading treatment" due to the unacceptable physical conditions of detention (overcrowding and a lack of beds or bedding) "combined with the inordinate length of the period during which he was detained in such conditions" (§48).

Nevertheless, as it has often been able to recall wherein the overcrowding in an establishment is such that it leads to depriving the detainees of a sufficient personal living space, this may constitute, as such, treatment contrary to article 3: "The Court finds that when it has been confronted with blatant cases of overcrowding, it has deemed that this element alone could suffice to find a violation of article 3 of the Convention". In this regard, the European Committee for the Prevention of Torture (CPT) was very quick to establish that poor treatment "may not be deliberate but rather the result of organisational failings or inadequate

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21 As opposed to the "methodological tools" represented by methods of interpretation.
24 In the same sense see European Court of Human Rights, 4 May 2006, Kadikis v. Latvia (no. 2), §49.
25 20 October 2011, Mandić and Jović v. Slovenia, App. no 5774/10 and 5985/10, § 77; European Court of Human Rights, 21 June 2007, Kantyrev v. Russia, App. no 37213/02, § 50-51; European Court of Human Rights, 29 March 2007, Andrey Frolov v. Russia, App. no 205/02, § 47-49
resources”. The Court now cites to an ever greater extent the reports of the CPT that consider that any detainee must have a living space of at least 4 m² when they are incarcerated in a collective cell and 7 m² when they are incarcerated in a private cell, it being specified that the sanitary facilities must not be included in the calculation. For its part, the Court has been led to conclude that inhuman and degrading treatment as provided for by article 3 of the Convention exists when “the personal space granted to the applicant was less than 3 m²”. It must also be specified that, where appropriate, the Court takes into account that the “space in the cells was reduced by the amount of furniture”.

In all as the Court summarises in its judgments, it “has to have regard to the following three elements:

(a) each detainee must have an individual sleeping place in the cell;

(b) each detainee must have at his or her disposal at least three square metres of floor space; and

(c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.”

Furthermore, “the period for which an individual was detained under the offending conditions are an important factor to be taken into consideration”. Indeed, the Court considers if the poor conditions are compensated by the acknowledged possibility for the interested parties to leave the cell during the day. Hence, in the Valasinas judgment, it was the fact that detainees could circulate freely in the detention wing from 6:30 am until 10 pm and the existence of toilets and showers outside the sleeping area that led to the dismissal of a claim for a violation of article 3 (§§103-107). On the other hand, in Mandić and Jović v. Slovenia of 20 October 2011 (nos 5774/10 and 5985/10), regarding holding two detainees in cells in which they had only 3 m², the Court noted the fact that the interested parties were kept in a cell 21 1/2 hours

26 2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991.
27 See Larralde J-M,
28 v. amongst others CPT/Inf (2012) [Moldavia], § 57; CPT/Inf (2009) 22 [Lithuania], § 35; CPT/Inf (2009) 1 [Serbia], § 49
29 Mandic and Jovic v. Slovenia, cited above, § 77; Kantyrev v. Russia, cited above, § 50-51 ; Andrey Frolov v. Russia, cited above, § 47-49; 15 July 2012, Kalashnikov v. Russia, no 47095/00, § 97
30 Torreggiani and others v. Italy, cited above, § 75
31 European Court of Human Rights, 10 January 2012, Ananyev v. Russia, no 42525/07, § 146 to 148
33 Valasinas v. Lithuania, 24 July 2001, no 44558/98, §107; Nurmagomedov v. Russia, 16 September 2004, app. no 30 138/02, decision on admissibility
34 Cited above
per day prior to conviction, notwithstanding the fact that the establishment was appropriate on a sanitary level and that the cell had a separate and closed toilet (§§79-80).

Beyond this spatial issue, the Court regularly recalls that "wherein overcrowding was not to such an extent as to pose a problem under article 3 (...) other aspects of the conditions of detention [are] to be taken into account in considering this provision." In this way it pays particular attention to physical and sanitary conditions in considering "factors such as the possibility for the applicant to benefit from access to toilets under conditions that respected his privacy, the ventilation, access to natural light, the condition of the heating appliances and the compliance with hygiene standards." 

Thus, even in the event that the applicant had a cell with personal living space of more than 3 m², the Court nevertheless concluded there had been a violation of article 3 taking into account the cramped nature of the cell combined with a lack of ventilation and light, characterised in particular by a need to turn artificial lights on at any time of day, and that may be increased by metal bars on the window, by limited access to an outdoor walking area or a total lack of privacy in cells due to the absence of partitioning around the sanitation area and its proximity to the living area. The Court also takes into account the insalubrity of the rooms or the infestation of the cells with parasites that, as already stressed, imposes the authorities to implement measures to disinfect and regularly inspect the cells. It also deems it unacceptable that anybody might be detained in conditions involving a lack of adequate protection against precipitations and extreme temperatures.

From 2005, the Court was regularly led to examine the transport conditions of prisoners during transfers. As this was a new issue, it was based on the conclusions of the CPT regarding the size of compartments suitable for transport. The issue was mostly raised in cases concerning Russia and the Ukraine. The Court has found a violation in several of these cases, due to transport conditions where the subject was bound, the number and frequency of

35 Torreggiani and others v. Italy, cited above, § 69
37 9 October 2008, Moisseiev v. Russia, no 62936/00, § 125; 18 October 2007, Babouchkine v. Russia, no 67253/01, § 44; 19 July 2007, Trepakhkine v. Russia, no 36898/03, § 94 Peers v. Greece, cited above, §§ 70-72
38 10 August 2007, Modarca v. Moldavia, no 14437/05
40 1 March 2007, Belevitskiy v. Russia, no 72967/01, §§ 73-79; 2 June 2005, Novoselov v. Russia, no 66460/01, §§ 32 and 40-43; Peers v. Greece, cited above, §73 Ananyev and others versus Russia, cited above, §165; Moiseyev v. Russia, cited above, §124.
41 20 January 2011, Payet v. France, no 19606/08, §§80-84; 25 April 2013, Canali v. France, no 40119/09, §52
42 Kalachnikov v. Russia, cited above, §98; Modarca v. Moldavia, cited above
43 Ananyev and others versus Russia, cited above, §159
44 Mathew v. Netherlands: dilapidated cell, in which the occupant was exposed to the heat of the sun.
transfers under such conditions\textsuperscript{45} and the use of a standard panel van to transport a patient between one hospital and another immediately after an operation\textsuperscript{46}.

2. Field and content of the procedural obligations: the general conditions for the effectiveness of remedy

According to the Court, assessing the effectiveness of a system of legal channels involves taking into account, in a realistic manner, not only the remedy available in theory in a domestic legal system, but also the general legal and political context in which it operates\textsuperscript{47}. The Court was required to specify the required features for domestic bodies called to recognise issues related to overcrowding in prisons and other physical conditions of detention. In particular, it did so in a highly instructive manner in the developments that it established, based on article 46, for the measures expected from States following a pilot or quasi pilot judgment.

2.1. Nature of the complaints body.

In a constant manner, under article 13, the Court judges that the "national body" to which this provision refers does not necessarily need to be a judicial institution. If it is not, its powers and the guarantees that it offers shall be taken into account in assessing the effectiveness of the redress available before it\textsuperscript{48}. Taking into account the traditionally acknowledged place, in national law, of remedies within the penitentiary authorities, the main question from this point of view is to know if such a system meets the requirements of article 13. In this regard, the acceptance, for the purposes of article 13, of non-legal mechanisms, sometimes leads to ambiguous formulations regarding physical conditions of detention, which implies that recourse to a higher level of the penitentiary authority may be regarded as sufficient. Even so, the Court has, in a judgment of 1988, deemed a claim addressed to a prison governor regarding the violation of rules governing the inspection of the detainees’ correspondence constituted a remedy that met with the requirements of article 13\textsuperscript{49}.

Closer to home, in the quasi-pilot judgments Orchowski and Norbert Sirkowski v. Poland, the Court declared that it "wished rather to encourage the State to implement an efficient system of recourse to the penitentiary authorities and the authorities responsible for monitoring the performance of penalties, in particular the penitentiary judge, who are better placed than the

\textsuperscript{45} see Khudoyorov v Russia, no 6847/02, 8 November 2005, ECHR 2005-X; Yakovenko v Ukraine, no 15825/06, 25 October 2007; Vlasov v Russia, no 78146/01, 12 June 2008; Starokadomskiy v Russia, no 42239/02 31 July 2008; Moiseyev v Russia, no. 62936/00, 9 October 2008
\textsuperscript{46} Tararieva v. Russia, no. 4353/03, 14 December 2006
\textsuperscript{47} Akdivar and others v. Turkey, [GC], 16 September 1996, 21893/93, §§68-69; A.B. v. Netherlands, 29 January 2002, no 37328/97, §73
\textsuperscript{48} See Kudła v. Poland, op. cit., paragraph 157.
\textsuperscript{49} Boyle and Rice v. United Kingdom, 27 April 1988, no 9659/82 and 9658/82.
courts to quickly take the appropriate measures, in particular by ordering the transfer of a detainee, to allow for them to be moved in the long term to a cell that meets the standards provided for by the Convention." (Sikorski, §41). In the pilot judgment for Neshkov and others v. Bulgaria, The Court declared that a solution of recourse before an administrative authority may be accepted, but then immediately recalled that the powers and procedural guarantees that the authority possesses are elements to be taken into account to determine if the remedy in question is effective (§182). In reality, the motivation of the Neshkov judgment appears to be a rather expeditious response to the solution for Polish quasi pilot judgments, which, for their part, highlighted a two tier system, claim to the administration and recourse before the penitentiary judge, in order to facilitate a rapid intervention to bring an end to the offending treatment. Also, the reference in the Neshkov judgment to only the administrative authority, without mentioning the judge, seems disputable and does not seem to accurately reflect the state of the law.

Ultimately, analysing the content of the obligations listed in the case law, particularly in terms of independence, leaves little room for doubt regarding the inadequacy, for the purposes of article 13, of a complaints system within the penitentiary authority. The jurisprudence of the Court holds that recourse through hierarchical channels leaving the requested authority the option of involving the respondent authority in the proceedings and not organising an adversarial discussion of the arguments does not represent an effective channel of recourse. In the Slawomir Musiał v. Poland judgment of 20 January 2009, the Court recalls with regard to the exhausting of all channels of recourse that "a detainee who wishes to file a complaint regarding their conditions of detention may (...) be required to put his complaints about his situation in prison before a penitentiary judge". In the Radkov v. Bulgaria case (no 2), the respondent State that highlighted the possibility available to the detainee to file a complaint with the prison authorities—which in this case the applicant had done—the Court answered that, beyond the fact that the claim filed in this case had been without affect, "The Government did not refer to any specific possibilities for the applicant to initiate procedures and obtain, in so far as his complaints might be well-founded, any practical improvement of the conditions of detention" (§55).

More fundamentally, beyond the fact that the requirements for independence and impartiality resulting from article 6§1 may be brought into play, the procedural obligation resulting from articles 3 and 13 implies that the persons called upon to hear the allegations of poor treatment must be independent from those involved in the incriminated facts, which supposes a total absence of any hierarchical or institutional relationship and a practical independence. The same applies to physical conditions of detention. Thus, the pilot judgment in Ananyev and others v. Russia, declares categorically that "the Court does not consider that the prison

Norbert Sikorski v. Poland and Orchowski v. Poland
Horvat v. Croatia, no 51585/99, § 47
28300/06
Radkov v. Bulgaria (no 2), 18382/05, 10 February 2011.
See also the section regarding article 6
See amongst many others Kelly and others v. United Kingdom, 4 May 2001, no 30054/96, § 114.
Ananyev and others v. Russia, 10 January 2012, No. 42525/07; 60800/08
authorities [prison governor, and hierarchical regional authorities] would have a sufficiently independent standpoint to satisfy the requirements of Article 13[...] in deciding on a complaint concerning conditions of detention for which they are responsible, they would in reality be judges in their own cause" (§101).

As for the possibility to establish a mandatory recourse with the authority before seizing any external complaints body, such a system may lead to a violation of article 13 if the consequence is to prevent a rapid intervention in good time of a decision by the body that complies with the provisions of the Convention57. Beyond this dimension of time, such a system seems problematic in itself. In the decision on the admissibility of the case Valasinas v. Lithuania58, the Court rejected the mechanism of mandatory prior recourse before the authorities, considering that any complaint on the conditions of detention to the penitentiary authorities or any governmental authority would have been considered based on more general economic and political considerations, and that no claim to the authority would therefore have been able to correctly remedy the personal claims of the applicant in this regard. Ultimately, in spite of the ambiguities resulting from the drafting of certain judgments, the requirements of the Convention clearly exclude recourse to the penitentiary authorities as an effective remedy.

Although the States are free to choose the nature of the configuration of the recourse to be implemented this has not prevented the Court from promoting very specific models. Thus, in the case of Ananyev v. Russia, the Court promotes before the constitution ex nihilo of a mechanism potentially involving external people, who may not necessarily be legal professionals, citing the examples of the Dutch complaint commissions and British Boards of Visitors59. This position is repeated in the Bulgarian pilot judgment (§282).

The Court therefore appears to be circumspect regarding the aptitude of ordinary jurisdictions to adequately handle claims from detainees, without explaining the considerations that lead to this conclusion. Whereas, this does not really seem to instruct the systems that is promotes. Thus, in the Ananyev judgment reference is made to Boards of Visitors whereas they changed their name nearly ten years before and, above all, are not doted with the powers required by the judgment itself, casting doubt on the informed nature of this assessment, which was nevertheless repeated in the Bulgarian pilot judgment. In the same manner, the preference shown for the penitentiary judge, over jurisdictions with more general competency, arises for the first time in the Polish quasi pilot judgments60, whilst the European Court simultaneously observes the ineffectiveness of internal channels of recourse. Regarding the reference to the Italian system, it arises although the Court has not yet been able to examine the effectiveness

57 See for example Payet v. France, Plathey v. France, no 48337/09 , 10 November 2011, see also Ananyev, §101.
59 The latter reference is the result of an error to the extent that this mechanism, which was already no longer in force, did not meet the requirements pronounced by the Court itself.
60 Orchowski v. Poland - 17885/04 Norbert Sikorski v. Poland, no 17599/05, 22 October 2009
of the reforms made by the authorities following Torreggiani. The more prudent Hungarian pilot judgment does not refer the State to any particular system.

Furthermore, the Court may also itself impose the intervention of another legal body. Thus, in the case of the detainees placed in disciplinary accommodation, which was unfit for habitation, the Court expressly provided, with regard to the importance of the repercussions of detention in a disciplinary cell, the necessity for a "legal body", which must examine both the form and the content of such a measure. Such a solution may however be regarded as extending the requirement for the intervention of a judge, dedicated to the neighbouring field of isolation as a security measure (that may last for several years).

More generally, the prerogatives that it requires from the body (see below), in particular in terms of the mandatory force of decisions, are clearly of a nature that is usually associated with the power of the courts.

2.2 Characteristics of the procedure

2.2.1 Accessibility of the complaints body.

Although the Court has abstained from providing a model for the system of recourse that is best able to meet the requirements of article 3, its clear preference for independent authorities or a specialist judge takes into account a specific concern of the responsiveness of the mechanism and its knowledge of the penitentiary environment, but also its accessibility for detainees. Various aspects are taken into account, to varying degrees, in this regard: the cost of the proceedings, the complexity of the rules and the procedures, protection against reprisals, etc.

In the Ananyev judgment, the Court is satisfied that the procedure for preventive remedy provided for by domestic law is implemented at no cost to the applicant (§109). For the compensatory remedy to be established in performance of the judgment, it asserts that it must not include a regime with legal costs that place an excessive burden on an applicant who’s action is with good cause (§228). On the grounds of article 6, in a general manner case law considers that the capacity for an applicant to pay legal costs, and the stage of the proceedings where these fees are required are also elements to be taken into account to know if access to the judge may be hindered. Restrictions of a purely financial nature, with no relation to the outlook for the success of the claim, may be subject to a particularly thorough examination.

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61 Varga and others v. Hungary, cited above
62 In the Payet case, the cells in the disciplinary wing had no windows but an opaque dome in the ceiling. The air vents were infested with birds and the walking areas were frequently flooded with rainwater. The applicant remained there for 45 days. In a second judgment, the applicant was placed in a cell that had been burnt out where there was a suffocating odour.
63
The Court has proven to be rather severe with regard mechanisms including fees for seizing the judge regarding conditions of detention\textsuperscript{64}.

As for access to legal aid, case law appears to be rather sparse. From the perspective of a fair trial, it takes into account the absence of legal aid but declares in its conclusions, not on the grounds of right to access to a judge, which is usually the grounds on which it considers the issue of free legal aid, but regarding a failure to be personally heard before a judicial body\textsuperscript{65}. It should however be noted that, in its judgment in Aden Ahmat v. Malta of 23 July 2013\textsuperscript{66}, regarding issues associated with the physical conditions for the retention of illegal immigrants, and for which the findings may be transposed to disputes regarding the prison system, the Court expressly asserted that the absence of a structured system of legal aid posed in itself a problem in terms of access to recourse, regardless of the merits thereof (§66).

However, it does not seem that such a position has been taken at this time in a penitentiary dispute, whereas a country such as Russia, which has been subject to a pilot judgment, does not offer free access to a lawyer in this area. In reality, the Court insists rather on the seizing of competent organs by the detainees themselves, emphasising the simplicity of the procedures\textsuperscript{67} or requiring the adaptation of rules governing establishing the facts (see below).

Specific diligences are imposed on authorities wherein the incriminated situation concerns people with mental health issues, obliging them to act under their own initiative to have the situation in question inspected. Thus, in the ruling on Slawomir Musial v. Poland, the Court considered that, as the applicant suffered from a psychiatric disorder that had lowered their mental faculties, "it should not be required or expected that he use with the greatest attention all the remedies available under the code for the application of sentences." (§73). To reject the exception raised by the respondent government regarding the failure to exhaust all domestic remedies it held that the prison authorities were the cause of this situation, which was evoked in his requests for liberation and the claims to the Mediator (§74). Thus, in the specific case of detainees that are unable to act for themselves, taking into account their psychological condition, the positive procedural obligation thereby imposed—to assess the grounds for the complaints, notwithstanding the absence of any lawfully introduced body—obliges the administrative and legal authorities to great vigilance, in order to be in a situation to disregard the procedural rules in force when the condition of the applicant so requires\textsuperscript{68}. Some cases regarding detainees with no such issues include indications in favour of a requirement for an action \textit{proprio motu}\textsuperscript{69}, but such an obligation does not appear to be systematic in case law as it is in the preceding hypothesis.

\textsuperscript{64} article 70.4 of the European Prison Rules of 2006
\textsuperscript{65} Vasilyev v. Russia, 10 January 2012, no 28370/05; Beresnev v. Russia, 24 December 2013 no 37975/02. See the report on article 6 in this regard.
\textsuperscript{66} no. 55352/12
\textsuperscript{67} Neshkov, cited above, §191; mutatis mutandis, Marin Kostov v. Bulgaria, no.13801/07, § § 47-48, 24 July 2012)
\textsuperscript{68} Such an instruction may also be applied to suicidal people taken to the disciplinary wing (see Keenan v. UK).
\textsuperscript{69} See for example, Kalashnikov v. Russia (dec.), 18 September 2001, no 47095/99
The major obstacle to exercising means to rights in prison that is constituted by fear of reprisals now seems to be taken into account by the Court. In the judgment *Neshkov and others v. Bulgaria*, the Court therefore went to the trouble of specifying that the detainees must be able to pursue channels of recourse with no fear of punishment or prejudicial consequences due thereto (§191), thanks to the support of the European Prison Rules. The Court bases itself *mutatis mutandis* on the solution given in a case where the applicant was placed in isolation due to their complaints to the prosecutor. This innovation has not at this stage resulted in an "operational" instruction, which may require a specific protection mechanism for a person making a complaint.

2.2.2 A regulated process, ensuring the participation of the applicant

To satisfy the requirements of article 13, the consideration of claims by detainees must follow a procedure which is defined by legislation and that ensures the participation of the interested parties. This means both allowing the facts to be established independently and avoiding the claims of detainees being ignored. On the one hand, the interested parties must be able to comment on the observations made by the authority in its defence, in order that their allegations may not be swept away by contradictory statements made by the penitentiary services. On the other hand, the body must be obliged by procedural rules to rule effectively on the claims for which it was seized.

In this respect, authorities such as the Prosecutor, responsible in some central and eastern European States for checking the legitimacy of the acts of the authority, were considered to be inadequate for the purposes of article 13, as they did not allow the detainee to follow the progress of the proceedings and to dispute the statements of the authority. Thus, the Court has analysed the system in force in Russia, in which the public prosecutors departments may make surprise inspections of detention, investigate and trigger proceedings for an offence in the case of failings, to which the penitentiary authorities are legally bound to respond within one month, in the form of a report stating the measures taken to remedy them. In spite of the coercive nature of the proceedings, the Court considered that this system may not be considered as effective recourse, as the prosecutor is not obliged to hear from the applicant and that the latter has no right to information on how the monitoring body has treated the claim, as the proceedings occur between the prosecutor and the inspected body. The same assessment was given of the Bulgarian system. It should be noted that the same considerations, further to those regarding the absence of an enforceable powers, led the Court to refuse to see Ombudsman institutions and the like as effective recourse under the terms of article 13.


71 Pavlenko, no 42371/02 , §§ 88-89, 1 April 2010; Aleksandr Makarov, no 15217/07 §86, and Ananyev, cited above, §99.

72 Neshkov and others v. Bulgaria, cited above, §212.

73 See for example Ananyev and others, cited above, §§105-106.
It should be noted that the inspection undertaken under article 6-1 by the Court in compensation disputes regarding conditions of detention are mostly embodied by the issue of the participation of the applicants in hearings, regarding situations in which their witness statement is deemed to be crucial to settle the dispute.\(^75\)

### 2.2.3 Speed of action by the judge

The requirement for a rapid response established by case law refers to "preventive remedies", the function of which is to rapidly bring an end to treatment in violation of article 3 (see for example Varga and others v. Hungary\(^76\), §49). According to the principle generally declared by the Court, indeed, "the effectiveness of the remedies required by article 13 supposes that they can prevent the performance of measures that violate the Convention and of which the consequences are potentially irreversible (...)"\(^77\). Although States may enjoy a certain leeway in this area\(^78\), the procedure in question must make it possible to have a decision taken by the complaint body in a short lead-time. This requirement for rapid reaction also covers the execution phase of the measure ordered by the judge, as recalled by the decision in Stella v. Italy\(^79\). In other words, the Court checks that the authority is obliged, by the domestic mechanism, to rapidly implement the measures ordered by the judge. Case law does not provide specifications regarding exact times, the degree of rapidity required for proceedings depends in principle on the nature of the alleged violation and the circumstances\(^80\). However, some judgments, such as that handed down in the case Ananyev and others v. Russia (cited above), give an indication of what the Court expects. Having recalled that the mechanism must allow for a "prompt and diligent" handling of complaints (§214), the judgment considers the lead-time of ten days for a domestic judge to rule to be satisfactory (§109).

The time condition is better specified when the offending treatment includes a period defined by statute, as there the general principle according to which a remedy that cannot be applied in good time is neither sufficient nor effective. Thus in the case of Kadikis v. Latvia (no 2)\(^81\), the Court condemned the respondent State due to the impossibility faced by the applicant to seek a remedy for their conditions of detention during the time of their incarceration, which was 15 days. The dispute regarding disciplinary measures endured under deplorable physical conditions is another illustration thereof. The Court has had the opportunity to judge that a remedy that does not offer a chance of success before the end of a penalty suffered in an insalubrious disciplinary wing failed to meet the requirements of article 13. Thus, the Court decided in two cases against France regarding penalties in a disciplinary wing of more than 45 days. In the case Payet v. France, the detainee was placed in a dark, cramped cell with no ventilation. In the case v. France, the applicant was placed in a burnt-out cell with a

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\(^{75}\) See the chapter on article 6.

\(^{76}\) 10 March 2015, No 14097/12, 45135/12, 73712/12

\(^{77}\) See for example., Payet v. France, no 19606/08, cited above, §127

\(^{78}\) Ibid.

\(^{79}\) Stella and others v. Italy, dec. 16 September 2014, no 49169/09, 54908/09, 55156/09, §48.

\(^{80}\) Čuprakovs v. Latvia, 18 December 2012, no 8543/04 §50

\(^{81}\) No 62393/00, 4 May 2006,
suffocating atmosphere. In both cases, the Court found fault with the fact that the judge could not be accessed before the end of the penalty, due to the system, provided for by domestic law, to mandatorily seek prior remedy from the authority. It stated that, “taking into account the importance of the repercussions of detention in a disciplinary cell, an effective remedy that allows the detainee to dispute both the form and the substance, and therefore the grounds, of such a measure before a legal body is essential.” (Payet, §133). Although in its judgments the Court refers to case law regarding removal measures for foreign nationals, which in certain situations require remedy of a suspensive nature, it does not specify if such a nature is required for a disciplinary penalty.

Finally, compensation procedures, for so-called compensatory remedies, must also be "rapid" (Stella cited above, §61), although we can understand that the stakes are lower if it does not involve bringing an end to the treatment in hand. The requirement here is rather the reasonable lead-time provided for by article 6-1, as referred to in the matter in the Ananyev judgments (§228).

2.3 The methods applied by the judge

2.3.1 Administration of evidence

According to the European judges, "for a domestic remedy in respect of conditions of detention to be effective, the authority or court in charge of the case must deal with it in accordance with the relevant principles laid down in the Court’s case-law". This requirement concerns primarily understanding the facts and, as a result, the administration of proof that must be equivalent to that in force in Strasbourg. In this matter, with no directive in the Convention or the Rules of the Court, case law has established a general criteria which is, very strictly, that of proof "beyond any reasonable doubt". As noted by Béatrice Pastre Belda, "this means, therefore, a principal standard that is at least rigorous and that, first and foremost, places the burden of proof exclusively on the person claiming violation of the Convention."

However, to ensure that the regime of proof does not weaken the protection afforded by the Convention, the Court has greatly softened the strictness of this principle, stressing that the procedures followed before it do not always presuppose the principle by which the person claiming something must prove the truth of its allegations. This easing is particularly clear with regard to imprisonment. Indeed, as found by Pastre Belda, "as establishing the truth of

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82 Conka v. Belgium, no 51564/99
84 Ireland v. United Kingdom, that also specifies that the system is that of the free assessment of the evidence: "the Court, being master of its own procedure and of its own rules (...) has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it" (§617).
86 Principle of affirmanti incubit probatio
87 Also see the section regarding violence between detainees and by penitentiary staff, as well as that on protection of privacy.
the alleged facts is a condition for the applicability of the immaterial provisions of the Convention, it is therefore fundamental for the applicant who is deprived of their liberty of movement, that the burden of proof is not exclusively placed on them, all the more so for serious allegations"\(^88\). The Court takes into account the context for the interpretation of the requirements of the Convention, i.e. the fact that the applicant depends entirely on the authority, making it impossible to demonstrate the alleged facts under normal conditions. Almost all of the evidence that may prove the truth of the allegations is held by the respondent authority, which controls access to the rooms in question and concretely holds the defendant in a situation of subjection. Therefore the Court asserts that "it falls upon the national authorities to gather the data that may demonstrate that a situation that is subject to a claim by an applicant to Strasbourg complies with the Convention"\(^89\).

The same applies regarding disputes concerning conditions of detention. The Court always asserts that the procedure provided for by the Convention does not lend itself to a strict application of the *affirmantici incumbit probatio* principle as, "inevitably, the respondent government is sometimes the only one to have access to all the information that may confirm or refute the assertions of the applicant"; "the mere fact that the Government's version contradicts that of the applicant shall not, if no relevant document or explanation is provided by the Government, lead the Court to reject the allegations of the interested part as unproven"\(^90\).

By virtue of the equivalence expected between the protection offered by a domestic judge and a common law judge from the ECHR, the Court requires that they implement similar, or identical, rules of evidence. Thus the pilot judgment in *Ananyev and others v. Russia* recalls in a very explicit manner (§228) that, the requirement for the applicants in the mechanism for remedy required by the Russian authorities should be satisfied by a simple initial proof of poor treatment. It should merely be required that the interested party produce elements that are easily accessible to them, such as detailed descriptions of their conditions of detention, declarations be witnesses or answers from inspection bodies (ombudsman, monitoring commission, etc.); it would then be down to the authorities to refute these allegations by producing documents demonstrating that the conditions of detention do not go contrary to article 3 of the Convention.

This system of protection meets the intention to make mechanisms for remedies work in spite of the obstacles to exercising these rights in detention, which arises due to the radical structural imbalance that characterises the situation of the two parties to the process. It works in two phases. A first phase is marked by an adaptation of the purpose and means of evidence, which is in such a way that the applicant is not held to a procedure with a "burden of proof", or the obligation to demonstrate its complaints to give them sufficient grounds, which allows the opening of the second phase of consideration. This is embodied by the implementation of

\(^{88}\) Thesis, p.
\(^{89}\) *Wegera v. Poland*, 19 January 2010, no 141/07, §69, regarding denying detainee's visitation rights.
\(^{90}\) Brândușe v. Romania, no 6586/03, § 48, 7 April 2009; Ananyev and others v. Russia, cited above, § 123; Torreggiani v. Italy, cited above, §72
a mechanism of negative proof, which places the burden on the authority to refute the assertions of its opponent by producing elements to disprove them.

Thus, the Court has worked to simplify the procedural mechanisms, in order to bring the protection afforded by article 13 within the reach of detainees. This rationale makes it possible to handle the most common issues in European penitentiary systems: promiscuity related to overcrowding, insalubrity, constructions that are unfit for human habitation, etc. In other words, the data for the dispute lends itself to descriptions and discussions on evidence in fairly simple terms. Case law does not appear to have really considered the issue of investigatory measures, in particular expertise, which require a professional to inform the judges of their field with regard to technical questions\(^91\). It is not given that the system resulting from current case law may allow appropriate treatment of the disputes involving complex issues. There is an increasing tendency for these to present themselves, given the vast programmes of modernisation and construction across the whole continent, and regarding the proliferation of elaborate passive security provisions in prison architecture.

2.3.2 Conditions for implementing legal qualifications

Under the angle of article 13, the Court requires that national jurisdictions adopt the same methods for understanding treatment contrary to article 3 as those developed by its case law, as described above.

Firstly, the prohibition of such treatments should not be affected by the application of qualifications of domestic law. And thereby a system in which the implementation of protection (in this case compensation) due to poor conditions of detention is conditional upon the demonstration of the personal fault of the prison managers is judged contrary to article 13\(^92\). The same applies wherein national bodies seek solely a formal violation of domestic standards, or abstain from taking into account the cumulative effects of different aspects of poor conditions of detention\(^93\). Thus, in the case of Neshkov and others v. Bulgaria, the Court held that if domestic law on the tortious liability of the State makes it possible to obtain reparations in the event of inhuman or degrading treatment, any person who wishes to benefit from this right must establish the "illegality", under Bulgarian law, of the measures taken by the penal authorities, rather than seeking to demonstrate that they have been subject to such treatment. When faced with claims regarding poor conditions of detention, the Court finds that on most occasions, the Bulgarian jurisdictions only take into account the domestic legislative and regulatory provisions, and not the general prohibition of inhuman and degrading treatment laid down by the Convention. The right to an injunction ordering the transfer of detainees to another establishment as a preventive measure is also hindered by the fact that the administrative jurisdictions only decide on such a measure if the strict conditions of "illegality" are met.

\(^91\) For an example requiring an expertise to establish the facts, in another dispute (medical fault) under the protection provided by article 8, see S.B. v. Romania (no 24453/04)

\(^92\) See Aleksandr Makarov, cited above, §§ 77 and 87-89; Benediktov, §§ 29 and 30.

\(^93\) Aleksandr Makarov v. Russia, cited above, §§ 98-100; Iacov Stanciu v. Romania
On the other hand, a legal status of the detainee given in terms too vague to allow a judge to perform a verification of the legality constitutes an aspect that may be taken into account to find fault with the effectiveness of the remedy.\(^\text{94}\)

The Court has furthermore been led to specify that, for compensatory claims requiring establishing a prejudice, the person must not be subject to complex demonstrations of the non-pecuniary damage suffered due to the inhuman or degrading treatment resulting from the conditions of detention.\(^\text{95}\) Domestic law must enshrine a great legal presumption in the matter.\(^\text{96}\)

### 3 The powers of the judge

As has been stated, the procedural section protecting detainees against poor physical conditions of detention is divided into two branches. On the one hand, the guarantees intended to protect the interested parties from the occurrence or continuation of treatment contrary to article 3 (so-called "preventive" remedy); on the other hand those intended as reparation for the damages that have already been committed and have ceased. The Court specifies that the two mechanisms of remedy must coexist. In other words, the detainee who complains about their current conditions of detention must be able to seek reparation of the prejudice suffered.

#### 3.1 Preventive remedies with the power to bring an end to the incriminated treatment

The decisive issue is knowing if the interested party may obtain a direct and appropriate remedy from the domestic jurisdictions, and not merely indirect protection of their rights guaranteed by article 3 of the Convention.\(^\text{97}\) Thus, an exclusively compensatory remedy will not be deemed sufficient, to the extent that it does not have a "preventive" effect in that it will not prevent the continuation of the alleged violation or allow other detainees to obtain an improvement in their physical conditions of detention.\(^\text{98}\) The aptitude that the mechanism must have to make changes in the living conditions of the interested parties includes various legal and factual implications.

#### 3.1.1 Mandatory and sufficiently determined measures.

In order that the remedy be deemed to be an effective preventive remedy, the decisions taken by the competent body must be "binding and enforceable" (Ananyev, §216), that is to say having in and of themselves a mandatory effect on the respondent authority. The latter must be legally bound to take measures or adopt a certain behaviour due to the latter. This aspect is particularly important wherein, in a number of European States, the status and the scope of the

\(^{94}\) Yaroshonen v. Turkey (72710/11)

\(^{95}\) Neshkov and others v. Bulgaria, 27 January 2015, §128

\(^{96}\) Ananyev v. Russia, §228.

\(^{97}\) see, amongst others, Mandić and Jović v. Slovenia, nos 5774/10 and 5985/10, § 107, 20 October 2011

\(^{98}\) Amongst many others, Cenbauer v. Croatia (dec.), no 73786/01, 5 February 2004 ; Norbert Sikorski v. Poland, no 17599/05, § 116, 22 October 2009 ; Mandić and Jović v. Slovenia, cited above § 116; Parascineti v. Romania, no 32060/05, § 38, 13 March 2012.
decisions taken by the institution of the penitentiary judge, which is intended to be a review body, are unclear.

Determining the enforceability of the decisions in question may be unclear in domestic law, in which case the Court is led to seek out the implications for the facts. In the Torreggiani and others v. Italy pilot judgment, the question was raised if a remedy sought before the penitentiary judge constituted a prior requisite for seizing the European jurisdiction, as claimed by the government. The law provided in particular that the magistrate had the "power to prescribe provisions to eliminate any violations of rights" of the interested parties, by means of an order. In this regard, the disputed nature of the legal or administrative decision taken by the penitentiary judge, is "not detrimental" in the eyes of the European judges. However, the exception established by the State is hindered by the uncertainty regarding the scope of the orders of the penitentiary judge, the Court noted that a failure to implement a decision given in favour or the applicants weakens the governmental argument that decisions are enforceable on the authority (§54). In any event, the effective requirement preventing the "detainee from obtaining a favourable decision multiplies the remedies in order to obtain acknowledgement of the fundamental rights at the level of the penitentiary authority".

The decision in Stella v. Italy, which concluded the pilot judgment against this State, the Court noted "with interest that the new channel for seeking remedy now specifies the enforceability of the decisions (...). Such decisions are taken pursuant to the principle of confrontation between the parties and are enforceable on the competent administrative authorities. The latter must perform them within a lead-time set by the judge, which in principle satisfies the criteria for rapidity of the procedures, failing which forced performance may begin" (§49).

The absence of any effect of the remedy may result from the authority's indifference to the decisions taken in the context of a mechanism judged to be ineffective. This vigilance appeared very early. Thus, in its decision on the admissibility of the case A.B. v. Netherlands of 5 September 2000\(^9\), the Court found that the civil remedy that had not been exhausted by the applicant was in itself of great value. However, "in examining this remedy in light of the findings of the CPT (...) the Court doubts that an injunction procedure would have been able to remedy the violations cited by the applicant. Furthermore, in the brief observations on the procedures, the Government has not in any way demonstrated that the remedy would have proven an effective remedy in this case". In its decision on the merits\(^10\), the Court in rejecting the inadmissibility and concluding on a violation of article 13, said it was struck "by the considerations of the court (...), from which it can be seen that the authorities (...) remained totally passive for more than a year in complying with the six injunctions to remedy the serious structural failings in terms of elementary hygiene and of a humanitarian nature" (§73).

The Court saw in the imprecision of the prerogatives of the judge a concrete obstacle to the authority of the decisions taken by them. It also considered that they must have access to a

\(^9\) No 37328/97
\(^10\) 29 January 2002
large range of legal means that may eradicate the observed violation (Ananyev, §214). One aspect of the Court's requirements in this area is the capacity of the system to control the use of measures intended to temporarily address an overcrowding situation, in such a manner that they do not reach a severity threshold for treatment contrary to article 3 (Ananyev, §208). The judges of the Human Rights Building seem to be won over by the system implemented by the Polish authorities following the decision of the Constitutional court of 26 May 2008, which deemed that due to its serious and chronic nature, the phenomenon of prison overcrowding in the country was, in itself, susceptible to be qualified as inhuman and degrading treatment and that, as such, the legislative provisions allowing the authorities to take measures in order to reduce the surface area for each detainee to less than 3 m² were unconstitutional (see Norbert Sikorski, §§75-88). The right arising from the legislative reform provides that the jurisdiction may rule on the performance of the sentence, for a duration that may be up to six months, when the number of detainees on a national level exceeds the global capacity of the prison service. Furthermore, the law now provides that, excluding exceptional circumstances, the head of the establishment may only place a detainee in a cell offering a surface area of less than 3 m², but greater than 2 m² for a period of less than 14 days. The measure may only be extended with the authorisation of the judge and for a total duration of 28 days. It may only be repeated with regard to the interested party after a period of 180 days.

In its decision Latak v. Poland\textsuperscript{101}, closing the pilot judgments Norbert Sikoski and Orchowski, whilst declaring that it did not want to prejudge its position in relation to the effectiveness of the remedy created by the reform, the Court stressed that the law "not only specifies the circumstances in which the statutory minimum space requirement can be reduced and sets time-limits for the application of that measure, but also provides a detainee with a new legal means enabling him to contest a decision of the prison administration to reduce his cell space" (§87). In the same manner, Poland is clearly an example in the Ananyev judgment (see in part §§61-65, and §207).

3.1.2 Measures taking into account, where appropriate, the underlying structural problem of overcrowding

The Court's case law and in particular the pilot and quasi pilot judgments regarding prison overcrowding assert that to be effective, the preventive remedy must allow the judge to act on all the situations giving rise to the violation. Thus, in the Ananyev judgment, the Court asserted in the area of article 46 (performance of the judgment) that "Taking into account the pervasive and structural nature of the problem of overcrowding, consideration should be given to equipping the Russian courts with appropriate legal tools allowing them to consider the problem underlying an individual complaint and effectively deal with situations of massive and concurrent violations of prisoners’ rights resulting from inadequate detention conditions in a given remand facility." (§219, see also in this sense, Norbert Sikorski, §160). This reasoning, under the terms of which "the dysfunction of "preventive" remedies in situations f overcrowding is largely dependent on the structural nature of the phenomenon", led the Court

\textsuperscript{101} (dec.) no 52070/08, 12 October 2010
in the pilot judgment *Torreggiani v. Italy*, to judge that the claims mechanism before a judge was not effective in practice. Indeed, the Court declared it could "easily conceive that the Italian penitentiary authorities are not able to perform the decisions of the penitentiary judge and to guarantee the detainees conditions of detention compliant with the Convention" (§54). These considerations had previously been taken into account in the pilot judgments handed down against Poland, the Court considered that "a civil jurisdiction decision is unlikely to provide a global solution to the problem of inadequate conditions of detention taking into account the fact that it cannot act on the underlying circumstances" (Norbert Sikorski v. Poland, cited above, § 160).

The *Ananyev v. Russia* judgment reveals the underlying concern for this requirement, that is to say that the measure that is ordered by the complaints body to remedy a failing observed in this type of case must not result in a worsening of the outcome for other detainees and as result cause other violations of the Convention (*Ananyev*, §§ 111-112). This means, implicitly but necessarily, that the sole power given to the judge to order that the applicant change cells, which would have the effect of accentuating the effects of overcrowding for other detainees of the establishment is insufficient.

More specifically, the Court rejects, under the requirement for effectiveness, complaints systems in which the competent body cannot remedy the observed failing without aggravating the outcome for other detainees in the same establishment as the applicant (*Ananyev*, §§111-112). Under these conditions, the only power at the judge’s disposal to order that the applicant change cells is insufficient. Thus, the complaints bodies must have a capacity to act on the flows of detainees into the establishments in question. In the ruling on *Strucl and others v. Slovenia*102, the Court encouraged the authorities to implement a system that allowed applicants to obtain "a speedy reaction to complaints", consisting, where appropriate, of a transfer to an establishment that is not overcrowded (§141), the *Orchowski v. Poland* judgment stressed that ceaseless transfers may undermine the requirements of the Convention, which sounds like a warning against the temptation to manage overcrowding though the continual movement of excess detainees.

Regarding what are often endemic problems, affecting all or part of the territory of States, the injunction to transfer the detainee may prove to be insufficient, wherein all of the system is overcrowded. Thus, the body responsible for the remedy may find itself in the same situation as the penitentiary services, being unable to provide a legitimate individual solution that will not be detrimental to the other detainees, who are also faced by overcrowding103. In spite of the unrelenting nature of the problem across the continent and the seriousness of the stakes for the Court itself104, it has abstained from following the reasoning to its conclusion, and explicitly requiring that the complaints body have the power to prevent imprisonment in these establishments or order a release.

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102 20 October 2011, No 5903/10, 6003/10, 6544/10
103 See for example, Kalashnikov v. Russia (dec.), 18 September 2001, no 47095/99;
104 see the section on pilot judgments.
The Ananyev and others v. Russia ruling however proved to favour systems of this type, but without formally associating them with the right to effective remedy. Indeed, in the context of the measures proposed to address the problem of overcrowding in remand prisons (distinct part of the judgment from that concerning the system of recourse to be put in place), the judgment takes a position in favour of standards of maximum capacity and operational capacity (§205), allowing governors not to accept new detainees (§206) and mechanisms governing measures to manage overcrowding (§207).

The decision in Stella v. Italy (which closes the Italian pilot judgment) does not examine the newly applied tools available to the judge for preventive remedies, but takes into account the prison policy measures generally adopted and the considerable improvement of the prison statistics, to conclude that "the current situation in the Italian penitentiary system appears to offer the competent administrative authorities a more favourable context for implementing legal decisions. According to the Court, this is a crucial aspect that needs to be taken into account in assessing the practical effectiveness of the remedy in question" (§50). And this whilst the penitentiary system remains saturated, casting doubt on the capacity of the judge to remove the interested parties from the situation about which they are complaining. Thus, the Court openly grants an encouraging bonus to the Italian government for the direction given to its prison policy and the rapid reform applied to the system for remedies, at the cost of reducing procedural requirements. To the benefit thereof, control of the prerogatives of the judge appear to be withheld in particular.105

3.2 So called "compensatory" remedies

The Court considers that once the detainee has left the establishment in which he or she endured the inadequate conditions, he or she must have an enforceable right to compensation for the violation that has already occurred. This is a compensatory remedy as referred to above. The reparation may take two forms: compensation or a reduction in the time to be served, according to the prejudice suffered. In this regard, the Court considers that a favourable decision or measure for an applicant only suffices in principle to withdraw the status of "victim" if the national authorities have acknowledged explicitly or in substance and remedied the violation of the Convention.107

3.2.1 Pecuniary remedy

The Court considers that the amount of reparation granted does not only constitute only a matter of assessing the prejudice, which would only address a factual issue: it also represents part of the effective remedy under the terms of article 13 of the Convention and, as such, any insufficiency may also, in itself, constitute a violation of the rule of law provided for by this provision.108

105 The Court specifies that .

106 see Sergey Babushkin, cited above, § 40

107 Torreggiani, §38

108 Rhazali and others v. France, (dec.), no 37568/09
In this regard, the level of compensation granted for the non-pecuniary damages must not be unreasonable in relation to the decisions handed down by the Court in similar cases; the right not to be subject to inhuman or degrading treatment is "so fundamental and central to the system of the protection of human rights that the domestic authority or court dealing with the matter will have to provide exceptionally compelling and serious reasons to justify their decision to award lower or no compensation in respect of non-pecuniary damage"\(^{109}\)

In the case of *Shilbergs v. Russia*, the Court recalled the requirements on the jurisdictions in the matter in a particularly exemplary manner. It implicated the payment of compensation of €50 for a detention suffered, notably, in a cold and wet cell without adequate lighting. It furthermore declared that is was concerned by the reasoning of the Russian courts, which assessed the amount of compensation by reference in particular to the "the responsibility of the unit management for the suffering caused to the applicant and the insufficiency of funds". The Court allowed that in applying the principle of reparation, the domestic jurisdictions could take account of the behaviour of the interested parties and the circumstances.

However, it recalled that the financial or logistical difficulties, and the absence of a genuine intention to humiliate or belittle the applicant, could not be cited by the national authorities to exonerate themselves of their obligation to organise the prison system in such a manner as to respect the dignity of the detainees\(^{110}\). The Court deemed it to be abnormal that the domestic courts reduce the amount of compensation to be paid to the applicant for a fault committed by the State referring to the latter's lack of funds. It deemed that the low budget that the State had at its disposal should not be held as grounds for mitigating its fault, and was therefore irrelevant in assessing damages under the compensatory criterion. Furthermore, the Court stressed that, as guardians of personal rights and freedoms, the domestic jurisdictions have a duty to demonstrate their disapproval of the illegal behaviour of the State, by awarding an adequate amount in damages and interest taking into account the fundamental importance of the right of which it had observed the violation, even if it deemed it to have been accidental. This would have sent a message that the State may not set individual rights and freedoms at nought or circumvent them with impunity (*Shilbergs*, cited above, § 71-79).

The solemnity with which the Court recalls the function of compensatory remedy\(^{111}\), rings oddly with the solution adopted in the case of *Stella v. Italy* (which closes the pilot judgment), consisting in some manner of a financial bonus granted to the State that rapidly complies with the requirements of the pilot judgment. In other words, to take into account in the system of assessing damages suffered parameters that are totally alien to the circumstances of the dispute. The Court was required to rule in particular on a scale providing compensation of €8 for each day spent in conditions deemed to be contrary to the Convention. To give its blessing to such low levels of compensation, it asserts that "wherein the State has made a significant step by introducing a compensatory remedy in reparation of the violation of the Convention, it must be granted a larger margin of assessment so that it can organise the domestic remedy in a manner that is coherent with its own legal system and its traditions, pursuant to the

\(^{109}\) Ananyev, cited above §230

\(^{110}\) Mamedova v. Russia no. 7064/05, § 63, 1 June 2006.

\(^{111}\) Position reiterated in the Ananyev pilot judgment, cited above
standard of living in the country (see, amongst others, Cocchiarella [GC], cited above § 80). Thus, the Court may perfectly accept that a State that has equipped itself with different remedies and of which the decisions comply with the legal tradition and the standard of living of the country are fast, reasoned and performed quickly, allow amounts that, whilst being lower than those set by the Court, are not unreasonable (ditto, § 96)."

3.2.2 Remedy in the form of a reduced sentence

In the Ananyev v. Russia judgment, the Court asserted, with regard to the remedy system based on awarding a reduction in sentence, that the courts must acknowledge the violation of article 3 in a sufficiently clear manner and grant reparation by reducing the sentence in an express and measurable manner. Without giving a specific explanation of the decisions of the domestic jurisdictions regarding the measure in which the observing and the acknowledgement of the violation of article 3 led to a reduction in the sentence, the Court considered that a reduction in the sentence would not, in itself, deprive the individual of their status of victim of the violation. This requirement that the reduction be measurable presupposes the legal possibility of an individualised assessment of the impact of the violation of the rights of the Convention and the specific reparation that must be granted to the aggrieved person. An automatic reduction operating by means of coefficients of standard reductions would not easily be compatible with this requirement for individualised assessment. Furthermore, the Court is of the opinion that an automatic reduction in sentence for condemned criminals due to their previous stay in insalubrious establishments may damage the public interest of a criminal punishment.\footnote{The Court refers to the judgment in Dimitrov and Hamanov v. Bulgaria, no 48059/06 and 2708/09 , § 129, 10 May 2011}

In the case of Stella v. Italy, cited above, the Court was once again called upon to rule on a system of remedies, under the terms of which the detainees still waiting to finish their sentence may be granted a reduction of their legal sentence by one day for each period of ten days that was incompatible with the Convention. The Court asserted that on this occasion a reduction in the sentence, under certain conditions, may constitute a satisfactory remedy for violations of the Convention in criminal matters, wherein the national authorities have, explicitly and in substance, acknowledged and remedied the violation of the Convention (§59). Asserting that it had not been required to rule on such a system in the context of article 3, it recalled that it had already deemed satisfactory the granting of a reduction in sentence in an express and measurable manner in the event of non-compliance with the "reasonable lead-time" requirement provided for by article 6 § 1 of the Convention, or in the event that the national authorities have not treated a case of a person placed in remand with the diligence required by article 5 § 3 of the Convention. In the specific case, it approved the mechanism to the extent that, on the one hand, the reduction is explicitly granted to remedy the violation of article 3 of the Convention and that, on the other hand, its impact on the amount of the sentence of the interested party is measurable. Furthermore, it considered that "this form of..."
remedy presents the undeniable advantage of contributing to solving the problem of overcrowding by accelerating the release of detainees”.

3.3 Right to effective remedy and changes to penal law

The large scale disregard for the right to decent conditions is described as a situation justifying limiting the power of the State to define its prison policy at its discretion. To quote the terms of the pilot judgment in Varga and others v. Hungary, "when a State is not able to guarantee each detainee conditions of detention consistent with Article 3 of the Convention, it has been the constant position of the Court and all Council of Europe bodies that the most appropriate solution for the problem of overcrowding would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures (see Norbert Sikorski, cited above, § 158) and minimising the recourse to pre-trial detention (see Ananyev and Others, cited above, § 197)." (§104).

However, this position is not seen by the Court as a mandate that allows it to intervene freely in the area of prison policy, as some constitutional courts do. As an international jurisdiction, it considers that it is not its role to work directly on these policies. However, in the principle of subsidiarity it sees an authorisation to act in the area of domestic channels for seeking remedy.

The judgment in Ananyev and others v. Russia clearly states this position. In it the Court explains, with regard to the actions to be taken to resolve the problem of overcrowding that "It is not the Court’s task to advise the respondent Government about such a complex reform process, let alone recommend a particular way of organising its penal and penitentiary system. (...) The Committee of Ministers is better placed and equipped to monitor the measures that need to be adopted by Russia to ensure adequate conditions of pre-trial detention in accordance with the Convention" (§194). Such restraint is however not applied regarding the domestic system for remedies, such that "The situation is, however, not the same as regards the violation of Article 13 (...) In accordance with Article 46 of the Convention, the Court’s findings under this provision require clear and specific changes in the domestic legal system.(…)" (§212).

Under these conditions, the Court seeks to make effective remedy before domestic jurisdictions a lever to act indirectly on prison policies and practices. The pilot judgments that, according to the Rules, give rise to identifying a structural problem and designating the measures to be taken to resolve it\textsuperscript{113}, clearly manifest the logical break between observing the violation and the remedial measures announced. Having described and analysed the systemic problem resulting from the prison policies and practices, these judgments then branch off to give the transformations to be applied in the mechanisms for remedies. This being the case, the Court may be more or less forceful regarding the reorientation of the prison policy of the respondent State. Some judgments are specific in indicating the expected reforms. This is

\textsuperscript{113} Article 61.3 of the Rules of Court declares that "The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment."
particularly the case for the Ananyev judgment, which, as has been previously indicated, did not hesitate to suggest specific actions and mechanisms to limit the prison population, such as numérus clausus. Others are satisfied with very general observations. Thus, the gentle reminder, made by the pilot judgment in Torreggiani v. Italy\textsuperscript{114}, of the reductionist doctrine of the Council of Europe, barely masks the distance taken from the proactive method applied in the Ananyev judgment.

Case law is therefore marked by a strong tension between, on the one hand, the imperative to guarantee the effectiveness of the right to conditions of detention that comply with the right to respect of dignity, all the more so as this right is intangible, and, on the other hand, the concern of allowing for the principle of subsidiarity and putting the domestic jurisdictions at the forefront of treating this mass dispute. From this point of view, the final decision by the Court to place the burden of starting proceedings that may, ultimately sway the public decision makers and the judges on the prison population may seem dubious, as there are so many concrete obstacles to exercising these rights in prison and in view of how versatile the prison policies followed on the continent are. In this context, the decision in Stella and others v. Italy manifests an understandable enthusiasm with the results of the pilot judgment from Torreggiani that it closes: "the Court can only congratulate the commitment of the respondent State. It appreciates the significant results obtained up to the present time thanks to the considerable efforts made by the Italian authorities at many levels, and notes that the problem of prison overcrowding in Italy, although still ongoing, now has less dramatic proportions" (§54). Although it is marked with a seal of realism regarding the relationship between the Court and the States, such a jurisprudence strategy seems to be ill equipped to counter the instrumental process of prison policy, which operates in so many domestic contests and that deactivates the legal guarantees of ever larger categories of individuals, thereby sapping the very foundations of the protection of the "irreducible human attribute" progressively established by the bodies of the Convention.

\textsuperscript{114} the Court "wishes to recall in this context the recommendations (...) suggesting that States incite prosecutors and judges to resort, to the greatest extent possible to alternative measures to imprisonment and to steer their prison policy to the lowest recourse to incarceration with the aim, amongst other things, of resolving the increasing problem of the growing prison population (see, in particular, the recommendations of the Committee of Ministers of the Council of Europe Rec(99)22 and Rec(2006)13))"