

Prison overcrowding and ill-treatment: sentence reduction as a reparation measure. A view from Latin America and Europe

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Abstract

The article addresses the issue of prison overcrowding and how it can be tantamount to ill-treatment or torture under international law. Faced with such a broad phenomenon, the piece focuses on two elements that may help to assess this circumstance: the existence of a minimum standard with respect to living space, and the use of tools to establish the existence of harm caused by inhuman conditions of incarceration. The article will show novel jurisprudence of some Courts to secure reparation for victims (early release and reduction of sentence time as offsetting) and will address discussion on the scope and limitations of these decisions with the aim of proposing even more courageous measures to ensure group and generalised reparation measures to reduce the rates of structural institutional violence in prisons.

Keywords: prison overcrowding, ill-treatment, minimum standards, torturous environments, offsetting.

Introduction: the situation of overcrowding of prisons in Latin America and Europe.

A custodial sentence entails the restriction or limitation of certain rights. Firstly, the right to freedom of movement. In addition, other restrictions can be derived from the sentence, for example, by the type of offense. However, these limitations and the violent nature of the State's right to punish mean that the execution of the sentence must be endowed with a framework of principles (legality, proportionality, last resort) and guarantees so that there can be no excess in the application of this form of *legal* violence. Those of us who work in contact with prisons know that violations of prisoners' rights are a daily, systematic reality, to a greater or lesser degree depending on the country. The existence in practice of legal - and illegal - restrictions of rights means that it is not entirely accurate to speak of people "deprived of their liberty" but rather of "prisoners," as they are not only deprived of their right to freedom of movement, but also experience many more restrictions on their individual, family, and community development.

Within this framework of guarantees that should place strict limits on the possible harmful effects of deprivation of liberty, the absolute prohibition of torture or ill-treatment is of cardinal importance in international human rights systems. An *absolute* prohibition because, as the international instruments on

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the subject indicate, torture cannot be permitted under any circumstances, not even during war or situations of national emergency, in contrast to other rights, including the right to life.¹

Those of us who work in relation to prisons know that situations of torture and ill-treatment do not only arise from specific or determined acts of violence, but that many systems present material conditions which in themselves can be a cause of inhuman or degrading treatment. In this regard, overcrowding has become a central issue of concern which has been stated in the UN System Common Position on Imprisonment (April 2021). The position stated that overcrowding is the greatest cause of human rights violations in prisons globally. I will use the problem of overcrowding as a variable to assess the lack of a minimum physical living space that would be a possible condition for the production of ill-treatment or torture. I will provide an overview of the Latin American and European systems, which are the ones I know best and because the novel jurisprudence I want to explain here (regarding the reduction of sentence time as offsetting) seems to be the result of the definition of standards and how the nature and scope of reparation is understood by both systems of rights protection.

One of the effects of punitive populism has been to drive up incarceration rates globally, especially in the 21st century. However, the region with the most worrying data is Latin America and the Caribbean. Between 2000 and 2021, while the incarcerated population world-

wide had grown by 24% on average, in Central America it had increased by 77%, and in South America by a spectacular 200%.²

While the average incarceration rate worldwide, according to United Nations data, is 140 per 100,000 in the Americas it is of 376/100,000. Most of the countries in the world with the highest incarceration rates are in Central and South America: El Salvador (564, the fourth highest rate), Panama (436), Uruguay (383), Brazil (381), and Nicaragua (332). The figures for some Caribbean countries are even more alarming: Cuba (510), UK Virgin Islands (447), St. Kitts and Nevis (423), Grenada (413), or St. Vincent and the Grenadines (369).³

In respect to women, a worrying phenomenon emerges; their imprisonment has risen on all continents. Globally, while the total population of women is estimated to have increased by 21% in the 21st century, the number of women in prison has increased much more, by 53%. Worryingly, the number of women in prison in Central America and some South American countries has increased exponentially: in Colombia it has increased almost 3-fold, in Brazil 4.5-fold, in Guatemala 5-fold, and in El Salvador, the number of women prisoners has increased almost 10-fold (Foreo-Cuéllar, 2020, p. 212).

However, the incarceration rate alone does not provide data on prison conditions, as the density rate does. When the number of prisoners exceeds the number of available spaces (which normally is determined by prison authorities), we speak of overcrowding. The European Committee on Crime Problems has established that more than 120% of occupancy is considered critical overcrowding. If we con-

1 See: art 2.2 Convention against Torture (CAT); art 15 of the European Convention on Human Rights (ECHR), art 27 of the American Convention on Human Rights (ACHR), and art 5 of the Inter-American Convention to Prevent and Punish Torture (IACPPT).

2 See data in latest ICPR report, World Prison Population List (Fair & Walmsley 2021).

3 *ibidem*

Table 1. Occupancy level (Latin America and the Caribbean)

Country	Overcrowding rate (number of prisoners per available places)
Haiti	454.4%
Guatemala	357.1%
Bolivia	263.6%
Peru	212.2%
Honduras	195.9%
Grenada	184.3%
Nicaragua	177.6%
Paraguay	167.6%
Dominican Republic	165.1%
Bahamas	161.7%
Antigua and Barbuda	158.7%
Venezuela	157.5%
Brazil	143.8%
Panama	144.7%
El Salvador	135.7%

Source: own elaboration based on ICPR
World Prison Brief data.

tinue looking at data from the Latin American region, some countries are at the top of the world ranking of density, with Haiti as the highest overcrowding in the world (454.5%), and other countries with very high percentages; such as Guatemala (357.1%), Bolivia (263.6%), Peru (212.2%), and Honduras (195.9%)⁴. In many Latin American prisons, the situation of extreme overcrowding has been going on for decades. Therefore, it no longer makes sense to speak of “crisis” as a

definition of the situation of certain prison systems. Systematic non-compliance with the most basic human rights standards has become the rule.

For the purposes of this article, it is clear that the problem we are dealing with is not only *quantitative* but also *qualitative*. In addition to the extreme lack of space, there are serious material, health, food, and security shortages. Many of the region’s prisons are controlled by organised gangs who use extortion and where the law of the strongest rules. This situation is compounded by the under-representation of workers and guards. In practice, this translates into different levels of co-management in which prisoners are subjected to violence from different gangs and officials⁵.

When this “normality” breaks down and poor infrastructure or clashes between rival gangs provoke riots or fires, which are also often controlled with extreme violence by the state, we witness the news of massacres. In the 21st century, the examples are numerous: San Pedro Sula, Honduras, in 2004 (107 deaths), Santiago del Estero, Argentina, in 2007 (more than 30 deaths), San Miguel Prison in Chile, 2010 (81 deaths), Barranquilla, Colombia in 2014 (17 deaths), the fire in Comayagua, Honduras, in 2012 (375 deaths), Guanare, Venezuela, in 2020 (47 deaths), or in the prison of Tuluá-Valle del Cauca in Colombia, where more than 50 people died in 2022. To this must be added the events in Ecuador where between 2021 and 2022, through a dozen massacres, 419 people have died.

The data is staggering. It is estimated that in the region people are 25 times more likely to die in prison than while free in the communi-

4 World Prison Brief data (ICPR)

5 For more details see Sozzo (2022) and Miravalle (2021)

ty.⁶ It is in the face of this devastating situation that custodial sentences in the region are not only referred to as constituting inhuman or degrading treatment. It can be said directly that being imprisoned in the region is equivalent to being sentenced to an arbitrary death penalty (Zaffaroni, 2012, p. 3; Carranza, 2012, p. 46).

In the case of European prisons, although the levels of violence described above are generally not reached most countries in the centre and east have rates above the world average, with Eurasian countries exceeding 200 persons per 100,000 inhabitants.⁷ The latest report requested by the European Parliament on prison conditions in the European Union reveals overcrowding as a persistent problem with negative consequences on many aspects for the life of prisoners (Alonso, 2023). Even though in terms of density the continent does not present the alarming data we have seen above, there are 10 countries with overcrowding (the highest being Romania at 119%).⁸ Moreover, it should be borne in mind that the reality within each country differs greatly from one prison to another and, as the SPACE report also indicates, “there are roughly 1.5 inmates per cell. This suggests that some penal institutions who are theoretically not experiencing overcrowding may have in practice overcrowded cells” (Aebi et al, 2021, table 16). This reality means that most European prison systems struggle to provide decent conditions of detention and there is, among other things, an overload on health services, as the response to the Covid-19 pandemic highlighted.⁹ It is not surpris-

ing that during the first fifteen years of this century, the European Court of Human Rights has increasingly found violations of Article 3 of the ECHR on grounds of overcrowding, as we shall see below. And this is why it is interesting to analyze the two realities here, because although Europe does not have the levels of violence of Latin America, it has developed standards on minimum living space and has had some specific pronouncements on overcrowding (*Torreggiani et al. v. Italy*) that have served as inspiration for the decisions of the Inter-American system.

A final remark about the European system that should concern us: as a *qualitative* aggravating factor of prison sentences in Europe - and a distinctive feature in countries without overcrowding and with *good* quantitative data - we are confronted with the phenomenon of increasing rates of mentally-ill prisoners, self-harm, and suicide.¹⁰

These numbers and data provide a quantitative overview of the prison systems. However, for these data to be transformed into political and legal declarations of ill-treatment or torture, we need to construct indicators. In the following sections, I will refer to two tools that are currently being used, namely the concept of living conditions as an international minimum standard, and the verification of suffering through forensic reports to demonstrate that those conditions produce individual or collective harm.

6 Unpublished data from the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) (see Gusic & Espina, 2020).

7 See Space I. Council of Europe Annual Penal Statistics, 2021.

8 Ibidem.

9 See examples in different countries not only in

Europe but also in diverse countries in Antigone (2020).

10 Two examples of this can be seen in Italy where the number of suicides has broken records (84 in 2022) (Antigone, 2022), or in Catalonia where the last year has seen the highest number of suicides in the last 12 years (EFE, 2023), bearing in mind that since around 2010, the prison population has been reduced by 20%.

Living conditions as inhuman or degrading treatment.

The situation described above in Latin America has led many countries to declare (either by governmental or judicial decisions) that their prison systems are in a situation of *emergency* or *unconstitutional state of affairs*. In other words, the state officially assumes that its prisons *do not comply with the law*. This is what has happened in countries such as Colombia (since 1998 on three occasions¹¹), Peru, first with regard to people with mental illness and then the system in general,¹² Brazil,¹³ El Salvador,¹⁴ and Argentina with regard to the federal penitentiary system.¹⁵ However, Latin America is no exception. In Italy, the government decreed in 2010 a “state of emergency” in the prison system.¹⁶ There are other examples worldwide such as the ruling of the US Supreme Court in relation to the prison system in California,¹⁷ or the European Court of Human Rights in relation to Italy (which we will address below).¹⁸

What is important to note here is that in these decisions, the courts declared that the conditions of habitability do not respect constitutional and international law principles. Therefore, they oblige the public authorities to

take a series of measures to reduce overcrowding and improve these inhuman conditions. In addition, judgments often recognise certain reparation measures. This article addresses what seems to be a novelty: in recent years, some jurisprudence is declaring freedom or reduction of the sentence time as a form of *offsetting* for having been a victim of torture or ill-treatment. This form of reparation would broaden the scope in which the 5 forms of reparation (compensation, satisfaction, restitution, rehabilitation and non-repetition) are usually understood. But this discussion will come later. First, we must ask ourselves: how have these rulings *measured* non-compliance with the rules governing deprivation of liberty? This is where two key elements come into play: 1) the construction of minimum standards of prison habitability, and 2) the finding of suffering as tantamount to torture or ill-treatment.

The Construction of Minimum Standards for Prison Habitability

Although there is no universal rule on this issue, various reports, declarations, documents of principles, and rules at the international level have developed a series of standards. These texts are not binding until they are introduced by international or constitutional courts and become binding law, which has been happening at the international level in recent years.

This article will not address in detail the numerous standards that exist at the international level in all the protection systems. We will, however, highlight some key points regarding the European and Inter-American protection systems. What is relevant is that different instruments have been detailing minimum standards in two ways. On the one hand, a *quantitative* one, e.g., how much minimum space a prisoner should have at his or her disposal. On the other hand, a *qual-*

11 Rulings T-153/1898, T-388/2013 and T-762/2015 of the Constitutional Court.

12 Rulings of the Constitutional Court (Case No. 03426-2008- PHC/TC, and No. 05436-2014- PHC/TC, of 2020).

13 Supremo Tribunal Federal (Ação Direta de Descumprimento de Preceito Fundamental 347, 2015)

14 Constitutional Chamber of the Supreme Court of Justice (119-2014ac, 2016)

15 Resolution No. 184/2019 of the Ministry of Justice and Human Rights.

16 Decree of the President of the Committee of Ministers of 13 January 2010.

17 *Brown vs. Plata* (2011)

18 *Torreggiani and Others v. Italy*, (2013)

itative one, e.g., the conditions of this space (hygiene, ventilation, lighting). To this is added a broader understanding of “habitability,” looking beyond the space of the cell to look at the time available to prisoners outside the cell, and the quality of this time. That is to say, the amount of time and the possibility of accessing other spaces where work, study, leisure activities, sport, health care, religion, or ordinary, family and intimate communication can take place. These spaces must also be governed by standards of sufficient space and conditions of use that respect the inmate’s dignity. Below is a review of the minimum living space as an international standard. I use this standard not because it is the most important indicator we can use, but because it is a crucial starting point for declaring that there are human rights violations. The issue of attempting to define a minimum living space has been key in both European and Latin American jurisprudence and serves in this work to define strong presumptions of the existence of ill-treatment. In any case, as will be seen later in the discussion, this standard remains problematic and some literature advocates using (also) other minimum standards as a reference.

If we explore this issue at the European level, we must refer to the standards set by it two key authorities: the Committee for the Prevention of Torture (CPT) and the European Court of Human Rights (ECtHR). The basis for the construction of these standards is the absolute prohibition of torture which, as mentioned above, is laid down in Article 3 of the ECHR.

As the ECtHR itself explains (2022, p. 8), the starting point and foundation in the construction of the European standards is the strong link between the concepts of “degrading treatment” and respect for “dignity” (*Bouyid v. Belgium* [GC], 2015, § 90). It adds

that “where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and fall within the prohibition of Article 3” (*Muršić v. Croatia* [GC] 2016, § 98; *Ananyev and Others v. Russia*, 2012, § 140) (*Ibidem*).

The CPT’s work in this regard has been key. The reports, based on prison monitoring, establish a series of standards that not only serve as recommendations for States but also as guidance for the ECtHR’s work. Since 1989, the Committee has been specifying standards on various elements concerning living conditions. As the issue of minimum living space has become so important in recent years, in 2015 the CPT set out a clear position in a document compiling its standards (*Living space per prisoner in prison establishments: CPT standards*).¹⁹

It is important to note that the CPT has never stated an absolute minimum. The personal space available is a crucial criterion and a starting point for evaluating the adequacy of material conditions and their overall assessment. However, situations must be analyzed on a case-by-case basis. According to these 2015 standards, the CPT states that the minimum standard for personal living space in prison establishments is 6m² of living space for a single-occupancy cell and 4m² of living space per prisoner in a multiple-occupancy cell (in both cases with separate sanitary fa-

¹⁹ Other standards guiding the ECtHR and governments are to be found in the European Prison Rules, revised in 2020, and some recommendations of the Committee of Ministers, for example R(99)22 concerning Prison Overcrowding and Prison Population Inflation.

cility), at least 2m between the walls of the cell, and at least 2.5m between the floor and the ceiling of the cell (CPT, 2015, p. 1). These standards have served as a guide for the European Court to decide on complaints alleging violation of Article 3 regarding insufficient personal space and conditions of habitability, especially when it comes to group cells. However, the Court has made clear on many occasions that, under Article 3, it cannot determine, once and for all, a specific number of square metres that should be allocated to a detainee in order to comply with the Convention (2022, p. 12). The ECtHR needs to examine other circumstances such as 1) the duration of detention, 2) the possibility of outdoor exercise, 3) the physical and mental state of the detainee, 4) the light or natural air, 5) the availability of ventilation, 6) the adequacy of the ambient temperature, 7) the possibility of using the toilet in private and 8) the fulfilment of basic sanitary and hygienic requirements. However, there are occasions where the space available has been considered, in and of itself, as a relevant determinant for establishing whether conditions of detention were degrading within the meaning of Article 3 of the Convention (*Orchowski v. Poland*, 2009, § 122; *Ananyev and Others v. Russia*, 2012, § 143) (ECtHR, 2022, p. 13).

For the ECtHR, it is also relevant how long the person is subjected to these conditions of detention,²⁰ as well as whether they are persons with special needs (older adults, young adults, women, persons with disabilities, or persons with particular medical conditions).

The pilot sentences

The European Court had condemned States on numerous occasions for violating Article 3 (*Peers v. Greece*, 2001; *Kalashnikov v. Russia*, 2002; or *Sulejmanovic v. Italy* of 2009, among others) but as the 21st century progressed, the number of claims against states for violating Article 3 due to overcrowding continued to increase exponentially. The persistence of this phenomenon seemed indicative of a structural deficiency, which prompted a change in methodology. By virtue of Article 61 of its Rules of Procedure, the ECtHR resorted to the so-called “pilot-judgment procedure.”

Under this procedure, the Court, starting with one application, groups together other applications that follow the same pattern - and that demonstrate that the problem is structural- with the aim of resolving the issue in a global manner and, in the event of a conviction, obliging the state to design a Plan of Action to address the issue. This is what has been happening with the phenomenon of overcrowding in judgments against states such as Bulgaria (*Neshkov and Others v. Bulgaria*, 2015); Hungary (*Varga and Others v. Hungary*, 2015); Italy (*Torreggiani and Others v. Italy*, 2013); Poland (*Orchowski v. Poland*, 2009; *Norbert Sikorski v. Poland*, 2009); Romania (*Rezmiveş and Others v. Romania*, 2017); Russia (*Ananyev and Others v. Russia*, 2012); and Ukraine (*Sukachov v. Ukraine*, 2020) (ECHR, 2020, p. 9). Here we will briefly explore three cases: *Ananyev and Others v. Russia*, 2012, *Torreggiani and Others v. Italy*, and *Muršić v. Croatia*, 2016. All three decisions have been emblematic and have helped to define European standards of minimum living space. Moreover, in the *Torreggiani case*, the judgment has served as a reference for decisions of the Inter-American Court.

In the case *Ananyev and Others v. Russia* (2012), the ECtHR laid down what can be

²⁰ For example, 60 days of detention in a 7m space² for two people with poor ventilation and light (*Peers v. Greece*, 2001).

called the “Ananyev test.” In this case, the Court wanted to establish criteria to assess more broadly the lack of physical space: “In deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements: (1) each detainee must have an individual sleeping place in the cell; (2) each detainee must dispose of at least 3 sq. m of floor space; and (3) the overall surface of the cell must be such as to allow detainees to move freely between furniture items.” The conclusion of this was that... “The absence of any of these elements created a strong presumption that the conditions of an applicant’s detention were inadequate” (§ 148). As we shall see below, these criteria were decisive for the development of the *Muršić* case.

In the *Torreggiani* case, the complainants pointed to the limited physical space available to them in shared cells. The cells were 9m², which resulted in only 3m² per person. They also reported a lack of access to hot water and little sunlight. The rate of overcrowding in Italian prisons at the time was 151%. In its pilot judgment, the ECtHR acknowledged that the poor conditions of detention proved in the case were not an isolated situation, “but were due to a systemic problem resulting from the chronic malfunctioning of the Italian prison system” (§ 88). The Court also used as sources from CPT reports and the precedent of the Italian decision in the *Sulejmanovic* case (in which the ECtHR found that Italy had violated Article 3 of the Convention on grounds of overcrowding). From that judgment onwards, it was clear that the problem was structural and the number of complaints began to multiply, reaching around 4,000 (Antigone & CILD, 2017, p. 4).

One of the most important things in *Torreggiani* concerns the measures taken by the government as a form of reparation. The

Court orders the State to adopt a series of measures with preventive and compensatory effects to ensure an effective remedy against violations of the Convention arising from overcrowding (§ 99). The Italian government, in a novel measure that is important for the core of this article, established by Decree-Law 26 June 2014, n. 92, that the judge of penal execution, as a compensatory measure, should remove one day of sentence for every 10 days served in conditions considered degrading. In other words, it is ordered to reduce the time of the pending sentence as offsetting for degrading conditions. This is a very important measure which, as we shall see, is developing more strongly in the inter-American sphere.

As noted above, following the line of the *Ananyev* test and other minimum space criteria, the ECtHR provides clearer definitions of available space and its relation to the possible existence of ill-treatment. This is the case of the Grand Chamber’s important decision, *Muršić v. Croatia* (2016). Here the ECtHR establishes a differentiated assessment criterion depending on the square metres available in light of Article 3:

- “When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises” (§ 137).
- “In cases where a prison cell - measuring in the range of 3 to 4 sq. m of personal space per inmate - is at issue the space factor remains a weighty factor in the Court’s assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention” (§ 139).

- “in cases where a detainee disposed of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention [...] remain relevant for the Court’s assessment of adequacy of an applicant’s conditions of detention of an applicant under Article 3” (§ 140).

Furthermore, it states that in cases of less than 3m², “The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met: (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor; (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention” (§ 140).

If we now look at the Inter-American system, its Court has also been profuse in determining, through different decisions, solid standards on prison conditions which, when overlooked, can constitute cruel, inhuman, and degrading treatment.

As in the European system, the basis for addressing this issue lies in the obligation of States to respect (and guarantee) human dignity (art 5.1 ACHR. The same article that prohibits torture and cruel, inhuman or degrading treatment or punishment), for example in *Neira Alegria et al. v. Peru*, 1995 (§ 60). The Court has condemned different States for overcrowding as a violation of the Convention. For example, in the case of “*Instituto de Reeduación del Menor*” v. *Paraguay*, 2004, the Court noted that the pris-

oners “were in a situation of permanent overcrowding. They were held in unsanitary cells, with few hygienic facilities and many of these inmates had no beds, blankets and/or mattresses, which forced them to sleep on the floor, take turns with their fellow inmates, or share the few beds and mattresses” (§ 165). Similarly, in the case of *López Álvarez v. Honduras*, 2006, stated that “the alleged victim was in a situation of permanent overcrowding; he was in a small cell, inhabited by numerous inmates; he had to sleep on the floor for a long period of time; he did not have adequate food or drinking water, nor did he have access to indispensable hygienic conditions” (§ 108).²¹ In the broad understanding of the qualitative aspect of overcrowding mentioned above, overcrowding may also affect persons in individual cells, as “[s]uch conditions may result in a reduction of out-of-cell activities, overburden health services, and cause hygienic problems and reduced accessibility to washing and toilet facilities, among others” (*Boyce and others v. Barbados*, 2007, § 93)

In a relevant decision on the issue, the 2006 case *Montero Aranguren and others (Retén de Catia) v. Venezuela*, the Court adopts standards established by the European system of protection of rights, such as the 1992 CPT report which established 7m² as a minimum standard, and decisions of the ECtHR which considered that a space of about 2m² for one inmate is a level of overcrowding which in itself was questionable in light of Article 3 of the ECHR (*Kalashnikov v. Russia*, 2002, *Ostrovvar v. Moldova*, 2005), that a cell of 7m² for two inmates was a relevant aspect in establishing a violation of the same article (*Peers v. Greece*, 2001) and that a cell of 16.65m²

²¹ See in the same sense *Tibi v. Ecuador*, 2004 (§ 150) and *Fleury et al. v. Haiti*, 2011 (§ 85).

Table 2. European standards on minimum living space per prisoners		
Body	Decision / report	Criteria / relevant circumstances
ECTHR	The <i>Ananyev</i> “test” (<i>Ananyev and Others v. Russia</i> (2012), § 148)	<p>“In deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements:</p> <ol style="list-style-type: none"> 1. each detainee must have an individual sleeping place in the cell; 2. each detainee must dispose of at least 3 sq. m of floor space; and 3. the overall surface of the cell must be such as to allow detainees to move freely between furniture items. <p>The absence of any of these elements created a strong presumption that the conditions of an applicant’s detention were inadequate.”</p>
CPT	<i>Living space per prisoner in prison establishments: CPT standards</i> (2015)	<p>Minimum standard for personal living space in prison establishments is:</p> <ol style="list-style-type: none"> 1. 6m² of living space for a single-occupancy cell + sanitary facility 2. 4m² of living space per prisoner in a multiple-occupancy cell + fully-partitioned sanitary facility 3. at least 2m between the walls of the cell 4. at least 2.5m between the floor and the ceiling of the cell
ECTHR	Summary of relevant principles and standards for the assessment of prison overcrowding: (<i>Muršić v. Croatia</i> , 2016, §§ 136-141)	<p>Available personal space in multi-occupancy accommodation in regard to Article 3:</p> <ol style="list-style-type: none"> 1. less than 3 sq. m = strong presumption of violation. 2. between 3 and 4 sq. m = weighty factor to which must be added the assessment of other factors. 3. More than 4 sp. m = general conditions must be studied.

Source: own elaboration.

housing 10 inmates constituted an extreme lack of space (*Karalevicius v. Lithuania*, 2005) (§ 90). In *Montero Aranguen*, the IACtHR established that, “In the present case, the space of approximately 30 square centimetres per inmate is clearly unacceptable and constitutes in itself cruel, inhuman and degrading treatment, contrary to the inherent dignity of the human being and, therefore, in violation of Article 5(2) of the American Convention” (§ 91, emphasis added).

The same year, in the decision on the case of *Miguel Castro Castro v. Peru*, the Court stated that “[...] injury, suffering, damage to health or harm suffered by a person while deprived of liberty may constitute a form of cruel punishment when, due to the conditions of confinement, there is a deterioration of physical, mental and moral integrity” (§ 314). It continues to say that “The judicial authorities must take these circumstances into consideration when applying or assessing the penalties established” (*ibidem*).

Pacheco Teruel et al. v. Honduras, 2012, summarises the main standards that the Court has been compiling in its jurisprudence on prison conditions (separation into categories of detainees, food, medical care, education, work, etc.). Among them it states that overcrowding constitutes in itself a violation of personal integrity (§ 67).

The Court indicates something that is very relevant for the purpose of this text. For the Court, inhuman conditions of detention affect the mental health of detainees, with adverse repercussions on the psychological development of their life and personal integrity (case of “*Instituto de Reeducación del Menor*” *v. Paraguay*, 2004, § 168). In the same case, based on the information provided by the *habeas corpus* that had been filed, it stipulated that the assumptions of physical, psychological or moral violence that aggravates the conditions of de-

tention of persons deprived of their liberty had been established (§ 170).

This idea is important because it connects us to the other tool that I want to highlight as useful to support the Court in its assessment of the existence of ill-treatment or torture. That is, a forensic report demonstrating the suffering of the person under certain conditions of detention, as we will see below.

The finding of suffering as tantamount to torture or ill-treatment.

As explored before, the existence of standards on minimum living space and dignified conditions of imprisonment has been used to guide judicial decisions on allegations of human rights violations. As we have just analyzed in the previous section, there are cases in which the courts indicate that, in addition to the square footage, other elements must be assessed in order to decide whether there is degrading treatment. Some of them can be relatively easy to verify, such as the existence of sufficient ventilation or the possibility of using the toilet in private. However, one of them is a challenge to verify, as it requires a medical or forensic report: the physical and mental state of the detainee. A forensic report can determine not only the mental state of the detainee, but also how certain conditions of detention have affected his/her health and caused suffering. Thus, when individual suffering is involved or when courts require more evidence to find a situation of ill-treatment or torture, it is necessary to adduce some form of evidence of suffering or harm. This is where tools come into play to help measure or document that a person or a group of persons have suffered torture or ill-treatment.

One possible useful tool is a forensic or professional report on the degree of suffering that a person has experienced. The UN’s Is-

tambul Protocol is one of the most important guides to determine whether there has been physical or psychological torture. However, as we are seeing, we are faced with situations that often do not correspond to concrete and individual acts of violence. In many cases the environment in which inmates live can itself produce degradation. This is why, for some years now, medical and psychological professionals have also been working on the concept of “torturing environments.”

A torturing environment is defined as an “environment that creates conditions that can be qualified as torture, composed of a set of contextual elements, conditions and practices that bypass the will and control of the victim and compromise the self” (Pérez-Sales, 2017, p. 435). These situations, due to the accumulation of a series of factors, would produce physical or psychological harm in a person that does not correspond, for example, to legal deprivation of liberty. Based on this definition, work has been carried out on the definition of assessment instruments, in the style of questionnaires such as those of the Istanbul Protocol, and which have been configured around the so-called “Torture Environment Scale” (TES). This scale “measures, at the individual level, the likelihood that a person has suffered torture and, at the collective level, whether a given environment can be considered as an environment of torture” (Pérez-Sales, 2017, p. 535).

This tool is being used in specific cases in Latin American countries for expert opinions before the IACtHR,²² and has also been key in

the current resolution of a case in Spain, where it was used to demonstrate that two people detained for jihadism had suffered psychological harm due to the conditions of isolation to which they were subjected. In the latter case, the court recognised that the imprisonment had been unjustified and ordered compensation for the victims. But what is most interesting is that the court not only ordered compensation for having been unlawfully deprived of their liberty, but also for having suffered physical and psychological harm as a result of *the conditions of their imprisonment*.²³ This is a novelty in domestic jurisprudence because it awarded (economic) compensation for the psychological harm caused by the (legal) conditions in which they were deprived of liberty. To demonstrate that these conditions generated suffering, the TES tool was key. In addition to this, an adaptation of the TES in conjunction with the Istanbul Protocol has been used by the Basque Institute of Criminology for its report on torture in the Basque Country between 1960 and 2014 (Etxebarria, Beristain and Pego, 2017).

The concept has been included in the 2020 report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment with regard to psychological torture. In the report, it is noted that one of its objectives is to “Illustrate how various combinations of methods, techniques and circumstances - not all of which may amount to torture if taken in isolation and out of context - can form ‘torturous environments’ violating the prohibition of torture” (§ 15). The Report

22 See the actions of the Community Action Group and Sir[a] for example in the case of indigenous and Afro-descendant communities denouncing the Nicaraguan State who “intentionally set up a torturing environment on the lands of the affected indigenous and Afro-descendant com-

munities, with the aim of breaking the resistance against the Grand Interoceanic Canal project” (see <https://www.psicosocial.net/sira/canal-nicaragua-entornos-torturantes/>).

23 See García (2023)

conceives them as “accumulation of stressors” (§§ 68-70)²⁴ and concludes the following:

*“In practice, torture victims are almost always exposed to a combination of techniques and circumstances inflicting both mental and physical pain or suffering, the severity of which depends on factors such as duration, accumulation and personal vulnerability. Victims tend to experience and respond to torture holistically, and not as a series of isolated techniques and circumstances, each of which may or may not amount to torture. Accordingly, psychological torture may be committed in one single act or omission or can result from a combination or accumulation of several factors which, taken individually and out of context, may seem harmless. The intentionality, purposefulness and severity of the inflicted pain or suffering must always be assessed as a whole and in the light of the circumstances prevailing in the given environment” (§ 86).*²⁵

In the context of this article, the TES could be used to measure the intensity of situations such as overcrowding, the manipulation of environmental conditions (temperature, lighting, food), and how the person experiences the deprivation of liberty: disorientation, fear for their life or their physical or psychological integrity, lack of privacy, or humiliation (also of visiting family members).

This is a very useful approach because it shifts the focus from the perpetrator (intent,

methods) to the victim (suffering, humiliation) in order to decree that the state has violated international (and national) law and that it has a duty to make reparation and guarantee non-repetition. This is a relevant point, which has gradually been opened to understand the phenomenon of torture and ill-treatment beyond intention, wilfulness and the limits set by the definition of article 1 of the United Nations Convention against Torture.

This is also the starting point for understanding the State’s obligation to provide reparation is broader. The States’ position of guarantor in relation to the right of individuals not to be tortured or ill-treated means that it is objectively and directly responsible for the harm caused to a person in its custody. The State is responsible regardless of the individual culpability of the perpetrators (in specific cases) or the reasons for which there is, for example, overcrowding. In the context of this article’s analysis, the existence of prison overcrowding and torturous environments means that the analysis of the authorship is relegated by the certification of the situation and/or individual suffering.

Reparation measures: towards sentencing reduction as offsetting.²⁶

As explored before, the position of guarantor implies that the State not only has a negative obligation (not to torture), but also a positive obligation to prevent situations (or environments) of torture from occurring. States are therefore obliged to take all necessary measures to ensure that situations of torture and ill-treatment do not occur. If they do occur,

²⁴ Something similar can be found at the European level when the ECtHR emphasises that, when reviewing conditions, special attention should be paid to the cumulative effect of relevant factors, as in *Ostrovar v. Moldova*, 2005.

²⁵ The concept is also used in the recent *detailed Conclusions of the UN Human Rights Council’s Human Rights Expert Group on Nicaragua*.

²⁶ In Spanish, the term used by academics and some case law is “*compensación*.” Given that in English the term “compensation” is understood, above all, in an economic sense, we have preferred to use here the term “offsetting.”

they must make comprehensive reparations to the victims and ensure non-repetition.

The international obligation to reparation is fully described in the UN's Basic Principles of 2005 for *Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Paragraphs 18-23 describe the 5 ways in which reparation is understood: compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition, all of them which should be envisaged as complementary looking for a holistic reparation. *Restitution* should restore the victim to the original situation before human rights violations occurred. Restitution could include, for example, the restoration of liberty. *Compensation* refers to economically compensate the (physical, mental, economic or moral) harm of the victim. *Satisfaction* can refer to measures aimed at restoring the victim's dignity, to verify and acknowledge truth, or, for example, aimed at the cessation of continuing violations. *Rehabilitation* should include psychological and medical care as well as legal and social services. *Guarantees of non-repetition* is orientated towards prevention and can include law reforms and improvement of policies and practices of the criminal justice system agencies.

When talking about torture and ill-treatment, historically, the most common form of reparation has consisted of compensation, practically of a pecuniary nature, something that has been the subject of recurrent criticism, for example, in the European system. It is important to notice that in 2012, the Committee against Torture published a General comment (No. 3) on the implementation of article 14 of the Convention by States parties (victims' right to redress, fair and adequate compensation, including the means for as full rehabilitation as possible). In the Comment, the Committee transposes the UN's 2005 international principles of reparation (for victims of gross viola-

tions of International Human Rights Law and serious violations of International Humanitarian Law) to victims of torture with the aim of achieving *full reparation*. The document explains that "The Committee considers that the term 'redress' in article 14 encompasses the concepts of 'effective remedy' and 'reparation'. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention" (§ 2). These relevant observations also establishes something significant for the issue we are dealing with: that it is not necessary for there to be a conviction or identification of the guilty party in order for someone to be considered a victim (§ 3).

From then on, we find that the condemnations of States imply taking measures that go beyond individual pecuniary compensation, pointing to the need to take concrete decisions, for example, for the reduction of the prison population and to achieve the structural and legal reforms to deal with overcrowding of inhuman conditions of detention. This is what declarations of emergency or state of unconstitutionality that we have seen in Latin American countries, as well as the pilot judgments of the ECtHR, have attempted to achieve, despite their limited impact.

However, the IACtHR has recently further developed the understanding of reparations. In Provisional Measures in respect of two prisons in Brazil, the Court stipulated that the amount of sentence remaining to be served by persons who have been subjected to living in overcrowded conditions should be reduced proportionally to the rate of overcrowding. Before detailing this decision of the Inter-American Court, it is worth looking at how it has come to this point.

The origin of this jurisprudence is to be found in the doctrinal position of *unlawful punishment*, which was first expressed by Zaffaroni in 1994. The idea was developed by Vacani in a Phd thesis in 2013, which he later turned into a book (2015). Since then, it has been given a significant boost, especially by these two authors and, as will be seen, by certain jurisprudence. As Zaffaroni (2020) has pointed out, punishment is an exercise of power, which includes not only what the legislative has classified as punishment, but also by other expressions of punitive power exercised outside the law. The execution of a sentence, therefore, may contain both legal and illegal elements. Illegal elements such as torture, poor nutrition, risk of disease, or subjection to violent groups are also part of the sentence. From this point of view, punishment must be understood in both its qualitative and quantitative dimensions. Constitutions and international law establish regulations on the length and conditions of a prison sentence, which must respect basic principles of legality and proportionality. When we face scenarios such as those described above, situations and environments in which sentences are served clearly indicate *over-punishment*. This added suffering must be declared unlawful. As Zaffaroni says for Latin America, “a total deformation of legal punishment, of such an entity, ceases to be a mere deprivation of liberty and becomes a corporal punishment with possible irreversible consequences or even a death sentence by chance” (2020, p. 13).

Todarello and Destéfano, following Zaffaroni and Vacani’s theory, point out that, if one knows the prison reality, it is easier to understand that “prison time is not merely chronological, quantitative or linear, but an essentially qualitative, existential instance” (2020, p. 21). That is, *time* is understood in two dimensions: the chronological or linear running of time, and the existential, e.g., how

that time is lived and experienced. This was also the thesis of Messuti (2001), who theorised on the different dimensions that time takes within the deprivation of liberty and with respect to free society. Her theory also provided a basis for the theory of unlawful punishments. Is in this context, then, offsetting comes into play on two levels with regard to the sentence: its quantitative content and its qualitative content. In this sense, if the qualitative content of the sentence involves the violation of fundamental rights such as the right to life or to physical or psychological integrity, it seems reasonable to offset this excess by re-evaluating its quantitative content.

This theory has been implemented by different courts in Argentina, in cases such as Brian Nuñez,²⁷ Reyna,²⁸ or Orona.²⁹ These cases have been with regard to specific acts of torture (not for overcrowding), and generally provided reparation measures such as the reduction of sentence duration or the way in which is served (open regime, home detention), and have contributed to the jurisprudential construction of offsetting.³⁰

The leap to international justice and the offsetting of time as a form of reparation.

As mentioned, there are some decisions by the Inter-American Court that have taken a step forward in the understanding of the concept of reparation in situations of ill-treatment or torture. These are the Resolutions on Pro-

27 National Chamber of Cassation in Criminal and Correctional Matters - Chamber 3 56449/2013 Reg. No. 451 /2015.

28 Court of Criminal Cassation of the Province of Buenos Aires, Chamber I, Case 75.213 (2016).

29 Court of Criminal Cassation of the Province of Buenos Aires, Chamber I, Case No. 75.213 (2016).

30 For offsetting in Argentina see for example Toderallo and Destéfano (2020, p. 35-40).

visional Measures for Brazil in the cases of Plácido de Sá Carvalho Penal Institute (of 22 November 2018) and the Curado Prison Complex (of 28 November 2018). The Court adopted these resolutions after finding that its previous mandates and recommendations to reduce overcrowding, prevent deaths in custody, and protect the personal integrity of persons deprived of liberty had not been implemented. As Gaio indicates “both centres presented savage material conditions of detention, such as infrastructure incompatible for a place of detention, inadequate lighting and ventilation, insufficient and unhealthy food, appalling hygiene conditions, insufficient or non-existent medical care, exorbitant number of deaths, among others” (2020, p. 173). The situation in the prisons of the State of Rio de Janeiro was so critical that the Federal Supreme Court had established, through a *Binding Summary* (No. 56 of 2016), for all State powers, the mandatory reduction of the prison population, ordering the release of those who were closest to the end of their sentences.

In the case of Plácido de Sá Carvalho (IPPSC), when the Court revisited the situation to see what progress had been made, it found that the situation was still unsustainable:

“a population density of approximately 200% when international criteria - such as that of the Council of Europe - indicate that exceeding 120% implies critical overcrowding; the existence of only nine people in charge of the security of the establishment, which housed more than 3,800 people; numerous deaths of inmates without, in many cases, their causes being established; lack of separation between elderly and LGBTI people; lack of mattresses, clothing, footwear, bedding and towels for all detainees; insufficient sunlight and cross ventilation in the cells; and lack of hot water

available in the prison unit; unstable electrical network and the risk of fire due to exposed wiring; absence of a fire prevention and fire fighting plan; lack of decent spaces for night rest, with overcrowding in dormitories; negligible medical care [...] personal and physical insecurity resulting from the disproportion of staff in relation to the number of prisoners (as there were groups of forces that exercised power within the prison)” (Todarello and Destéfano 2020, p. 30).

The Court’s decision is interesting because it cites and details as jurisprudential precedents the cases of *Brown v. Plata* and *Torregiani et al. v. Italy*, and the decisions of the Constitutional Court of Colombia, which have been previously mentioned. The Court affirmed that the situation of detention implied the violation of art. 5.2 of the ACHR, as well as art. 5.6 (right to reform and social readaptation) which is impossible in these circumstances (Todarello and Destéfano, 2020, p. 30).

The Court, echoing the doctrine of unlawful punishment, stated that “When the conditions of the establishment deteriorate to the point of giving rise to a degrading punishment as a consequence of overcrowding and its effects as mentioned above, the afflictive content of the punishment or of the preventive deprivation of liberty is increased to an extent which becomes unlawful or illegal” (§ 92). When it is established that the prisoners were experiencing a punishment with unlawful suffering greater than that inherent to the deprivation of liberty, “it is equitable to reduce the time of imprisonment, for which a reasonable calculation must be made. On the other hand, this reduction implies offsetting in some way for the punishment suffered up to now in the unlawful part of its execution. [...]” (§ 120). Thus, the Court concludes that

“Since it is beyond any doubt that the ongoing degradation is due to the overcrowding of the IPPSC, whose density is 200%, that is, double its capacity, it would follow that it also doubles the unlawful infliction of pain in excess of the sentence being executed. This requires that the time of unlawful punishment or preventive measure actually suffered be computed at the rate of two days of lawful punishment for each day of actual deprivation of liberty in degrading conditions” (§ 121). Ultimately, the Court’s decision causes the entire population to have their sentences reduced by half, freeing those who have already served their sentences under the new calculation, and reducing the time pending for the rest.

What scope and limits can we observe in this decision?

While this decision is largely novel and offers opportunities to expand the understanding of reparation, it also offers some limitations.

In the first place, as Vacani points out, this decision could aim higher. When analysing the Court’s ruling, this author states that, although the level of density as an objective indicator to measure the illegal part of the sentence is interesting, other indicators could also be of interest, such as

“the minimum number of workers available for the custody of prisoners or the deaths caused in that prison during the period of detention, as these objective data are also collected by the Court with some particularity. In this sense, the reasonable calculation does not necessarily have to correspond to a mathematical or automatic operation. In terms of a qualitative measure of the length of unlawful imprisonment, this value should correspond to the measurement of objective circumstances related to the conditions of confinement (for which the Court adopts the value of over-

crowding as an accurate measure), and also subjective ones, related to the significance of these on the prisoner’s personal circumstances” (2020, p. 202).

This reflection coincides with the two elements that we have been analyzing in this article: to the verification of the violation of minimum standards, it could be useful to apply other tools that can measure subjective suffering such as the Istanbul Protocol or the TES.

If we continue to focus on this decision of the Inter-American Court, deciding to halve the sentence remaining to be served has the effect of early release of some people and reducing the sentence of others. This, on the one hand, can have an impact on overcrowding and, on the other hand, broadens the catalogue of reparation measures. Such a measure could perhaps serve several purposes such as restitution and a guarantee of non-repetition. But what happens to those who continue detained in conditions declared illegal? The Court indicates that “the application of this calculation does not exempt the State from the obligation to redouble its efforts to achieve decent conditions of penal execution for the population that does not attain liberty” (§ 125). There must also be the design and implementation of a Contingency and Structural Reform Plan³¹ which “must be implemented as a priority, without the State being able to allege financial difficulties to justify non-compliance with its international obligations”.³² However, as we know, these structural reform plans are never implemented, and detainees continue

³¹ see details in § 134.

³² Recall that the Court has already indicated the impossibility of excusing economic or structural impediments to reform in *Fleury et al. v. Haiti*, 2011 (§ 83), or in *Pacheco Teruel et al. v. Honduras*, 2012 (§ 67), among others.

in the same situation for years. In some cases, those Plans refer to building new prisons or improving the conditions of the existing ones as part of the solution. But, we know, this is not feasible. First, due to the very dimension of the problem, which would imply a material, personal and budgetary effort that most of the countries (especially in Latin America) cannot assume. Only in Colombia, before the new sentence of the Constitutional Court of 2013, it was said that in order to eliminate overcrowding it was necessary to build 42 new prisons with a capacity for one thousand people each, and to continue building between 13 and 16 of these new prisons annually to assume annual growth (Bernal 2013). Secondly, the problem is not the capacity of the prison system, but rather legislation and a punitive culture. Prisons must manage the results of very harsh laws, a lot of pretrial detention, long sentences and obstacles in accessing semi-liberty regimens.

If the purpose is to stop the degradation of the dignity to which prisoners are subjected, more courageous and direct measures must be taken regarding restitution, reducing prison population. The General comment of the CAT mentioned above is clear when it speaks of restitution:

“Restitution is a form of redress designed to re-establish the victim’s situation before the violation of the Convention was committed, taking into consideration the specificities of each case. The preventive obligations under the Convention require States parties to ensure that a victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment”; adding that “[f]or restitution to be effective, efforts should be made to address any structural causes of the violation” (§ 8).

In these cases, when there are structural causes for deprivation of liberty being declared to amount to ill-treatment or torture, it is evident that early release of a large number of detainees should be ordered.

But the offsetting decision could present other problems. For example, the possibility of unintended consequences, such as, that the legislator in the Penal Code or the judges in their decisions increase prison sentences to *offset* (but in the opposite direction) possible future reductions. We can’t ignore, given the punitive culture of some countries, that this could happen. Neither, that much of the daily basis violations of human rights in prisons is the responsibility of judges. That is why authors like Zaffaroni qualify judges as “mediate perpetrators of torture” (2020, p. 17). Given this, there is no other solution than to continue making radical and comprehensive decisions for the decarceration of large parts of the population, but the risk of countermeasures will always be present.

Conclusions

In the analysis of *conditions of habitability as inhuman or degrading treatment or torture*, we have seen how two elements have come into play in a relevant way: the existence of minimum standards on habitability, and the tools to accredit the suffering experienced (Istanbul Protocol, TES). Both elements should be complementary. For example, as stated above, the accreditation of suffering can be an element to be assessed by the courts to declare a situation or environment as ill-treatment, such as overcrowding. On the other hand, the existence of minimum standards could help to complement and update the assessment tools by establishing a strong presumption of ill-treatment or torture where there is a breach or departure from minimum standards as, without the

need to subjectively prove suffering or harm through interviews.

The development of these elements is of vital importance in the fight against torture, and reinforces the path to take more courageous measures towards redress, in line with the very objectives of the Committee against Torture established in its 2012 General Comment on art. 14 of the CAT. The result of declaring the objective violation of the minimum standards, together with that of subjective suffering, could help to better measure the different expressions of individual impact caused by the structural situation or the torturing environment. In this way, different forms of reparation could be specified in more detail, making it more holistic.

This seems to be the path that has been opened up, albeit in a limited and timid manner, by rulings such as that of the ECtHR in the *Torreggiani* case or the more recent ones of the IACtHR on Brazil.

Following the argument I have been making in the article, the Inter-American Court's decision is key, because it clarifies that it is not necessary for the harm to be intentional or for those responsible to be identified, but what is relevant is that a violation of rights due to the conditions or living environments has occurred.³³ In cases such as that of the IPPSC, the torturing environment would be the centre as a whole, we would be dealing with a "torturing system," which would not be caused by a specific policy but precisely by the total absence of such a policy.

Although the Court's ruling has the limitations described above, and has not been implemented in a decisive manner by the authorities of the State of Rio de Janeiro, it is relevant

for its content and its novel interpretation of reparation. Moreover, as the Court's jurisprudence, it is applicable to and guides all the countries of the Inter-American system and, through the control of conventionality, applied in domestic law (Gaio, 2020, p. 174).

But, as I have also pointed out, these measures do not tackle the underlying problem: punitive legislation and judges prone to subjecting people to preventive detention and long sentences with difficult access to semi-open regimes. For this reason, although these measures are useful, they should not be interpreted beyond a practical or pragmatic approach, seeking immediate results for some people, but which do not address the core problem. If the State cannot solve the material situation within a reasonable time, then we must promote alternatives that involve mass decarceration. First, of the people with the highest rates of vulnerability, the elderly, the sick, women with children, the mentally ill, or those convicted for non-violent crimes. The Covid-19 pandemic demonstrated, with all its particularities and limitations, depending on the country, that it is possible to take these series of measures. It is true that the adoption of these measures is often responded to by the mainstream media by generating alarm about the release of "dangerous criminals," "murderers" and "rapists." This media violence ends up influencing judges who take an even more reticent or conservative attitude when it comes to adopting measures to reduce prison overcrowding. On this point, it is relevant to remember again Zaffaroni qualifying judges as mediate perpetrators of torture.

Decisions such as *Torreggiani* or the IPPSC are important steps on the road to reducing institutional violence, but it is clear that they are not enough, as radical criminal and procedural reforms are needed (beyond prison reforms). Faced with the passivity of certain govern-

³³ We can recall here the European case law in the case *Peers v. Greece*, 2001

ments, it must be the collectives of lawyers, public defenders, psychologists and psychiatrists who, together with independent monitoring bodies, continue to provide information on the reality of prisons and put into practice the standards and tools for assessing harm, in order to continue to demand that States are accountable for the systematic violation of human rights in prisons.

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