



*Garante Nazionale  
dei diritti delle persone private della libertà personale*

**THEMATIC REPORT ON THE SPECIAL PRISON REGIME PURSUANT TO ARTICLE 41-BIS OF THE  
PENITENTIARY ACT  
(2016 - 2018)**

In compliance with the mandate referred to in Article 7 of the decree-law 146 of 23 December 2013, converted into law 10 of 21 February 2014, modified by art. 1 (317) of law 208 of 28 December 2015, and also in compliance with the provisions set out in Articles 17 to 23 of the UN Optional Protocol to the Convention against Torture (Opcat), ratified by Italy on 3 April 2013 under Law 195 of 9 November 2012, the Board of the National Guarantor for the rights of persons detained or deprived of liberty (hereinafter, National Guarantor) has visited all the detention units where the special detention regime pursuant to article 41-bis of the Penitentiary Act is executed.

In different time frames, thematic visits were conducted to:

Viterbo remand prison, 9 June 2016

Tolmezzo remand prison (Udine), as part of the visit to the Triveneto region, June-July 2016 and 13 July 2018

L'Aquila remand prison, 5 and 24 May 2017

Novara remand prison, 10 June and 6 October 2018

Milan prison (Opera), 15 April 2017 and 1 October 2017

Sassari remand prison, 3-4 November 2017

Parma remand prison, 22 December 2017

Terni remand prison, 11 January 2018

Ascoli Piceno remand prison, 12-13 January 2018

Spoletto prison, 14 January 2018

Rome remand prison (Rebibbia NC), 13 February 2018

Cuneo remand prison, 28-29 June 2018

At the time the Report is drafted, prisoners under said prison regime are 748 (including 10 women); internees detained in the "penal labour colony" (*casa di lavoro*) under the same prison regime are 5. Of the total number of prisoners detained under said special prison regime, only 363 are sentenced prisoners while the remaining are detained on remand or are mixed remand-sentenced prisoners. There are only 4 sentenced women.

Within the total number of prisoners considered, 18 are detained in some special units for detainees who are in need of an intensive health care service (*Servizio di assistenza intensiva - Sai*).

The distribution of prisoners under said regime in dedicated prison units is the following:

Ascoli Piceno prison: 0 (at the time of the visit, the unit was still operable and, therefore, some observations have already been sent to the Administration concerned and are included in the set of recommendations that was aiming to the complete renovation of the detention section).

Cuneo remand prison: 44

L'Aquila remand prison: 163 (of which 10 were women)  
Novara remand prison: 67  
Milan remand prison (Opera): 97 (9 were accommodated in the *Sai*)  
Parma remand prison: 77 (of which 9 in the *Sai* and 3 in detention units for disabled)  
Rome remand prison (Rebibbia NC): 42  
Sassari remand prison: 87  
Spoleto prison: 83  
Terni remand prison: 27  
Tolmezzo remand prison: 12 and 5 internees  
Viterbo remand prison: 49

Within this total number, 51 people are held in the 14 so-called “reserved areas” (*area riservata*), established in accordance with article 32 of the Presidential Decree 230 of 30 June 2000.

60 inmates or internees subjected to this regime are employed within the prison establishment (article 20 of the Penitentiary Act): 6 in Cuneo, 27 in L'Aquila, 4 in Parma, 15 in Spoleto, 2 in Terni, 6 in Tolmezzo (including the 5 internees). Not any other 41-bis prisoner was working in the remaining prisons.

The 41-bis prison units are placed under the custodial supervision of a dedicated special corps of the Italian penitentiary police, called *Gruppo operativo mobile* (Gom), introduced in 1997, but officially operational after a Decree of 19 February 1999, whose duties were more fully established on 4 June 2007 with another ministerial Decree. The *Gruppo operativo mobile* is divided into *Reparti operativi mobili periferici* (Rom – local sub-units of the same special corps of the penitentiary police) serving on a rotational basis in the different prison establishments having the 41-bis detention units.

2

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The suspension of plan (“*trattamento*”), or its possible extension, provided for by article 41-bis of the Penitentiary Act, is established by a justified decree, which is adopted by the Minister of Justice. The provision can be appealed before the Supervisory Court of Rome. The first enforcement of the decree refers to a period of four years, while any subsequent extensions are two-yearly. Complaints on the enforcement of the measures provided for by the decree can be lodged to the Supervisory Court, which is competent in the District.

## A. GENERAL CONSIDERATIONS

### A.1. The special regime and its pivotal principle

Following the first introduction (in 1992) of the restrictions that over the years have shaped the special regime pursuant to article 41-bis of the Penitentiary Act, the Constitutional Court, previously addressed by the Court of Florence and of Naples, had set forth a pivotal principle for such a restrictive regime. That principle was determined as being meaningful and capable to become the cornerstone for further judgements (*Italics in the quotations that follow have been inserted by the National Guarantor*).

The Court, in its ruling no. 376 of 1997, was asked about the principle that “when strong reasons of order or of public security are founded, also at the request of the Minister of the Interior, the Minister of Justice has the faculty to suspend, in whole or in part, the enforcement of the provisions foreseen in the Penitentiary Act relevant to prison treatment, because they can jeopardise the order and security requirements formerly stated” – principle which is limited to all those cases in which an individual has committed the crimes referred to

in paragraph 1 Article 4-bis of the prison law (that is to say, substantially, of crimes related to the organised crime). In its ruling no.376 the Court, referring to its previous pronouncements of 1993 and 1994 (respectively, Nos. 349 and 410 for 1993 and no.332 for 1994), explained that the measures adopted “cannot consist in further restrictions of the individual's personal liberty in addition to those already pertaining to their detention, which, therefore, are not relevant to the Penitentiary administration's competence on the execution of sentences”. Furthermore, it established that “the special regime cannot consist in measures that are different from those relevant and proportioned to the order and security requirements at the heart of the ministerial provision; [...] the measures provided cannot anyway violate the prohibition of treatments contrary to the sense of humanity nor cannot they thwart the rehabilitative aim of the sentence”.

Moreover, the enforcement of those measures «shall be addressed to face the specific needs of order and security, basically relevant to the necessity of preventing any connections among detainees belonging to criminal organisations, and their connections with all others in the free world who may belong to said organisations: said connections that could be established - as experience shows - through contacts with the outside world, which are possible, and are also nurtured, for those restricted in the ordinary prison regimes (as when it is favoured the prisoners' rehabilitation “also through the contacts with the world outside”)».

They are, therefore, provisions, which shall be "concretely justified in relation to the predicted needs of order and security". Since - argued the Court - «from one side, the differentiated regime is founded not abstractly on the title of crime object of the conviction or indictment, but on the effective danger of the permanence of ties with the outside world, of which the crimes indeed notified are a logical precondition; on the other side, the restrictions enforced, if compared to the ordinary prison regime, cannot be freely determined and can be considered only those congruous with respect to the above specific objectives of order and security – always within the limits of the prohibition of their having an impact on the quality and length of the punishment and of their being conducive to treatments that cannot be contrary to the sense of humanity [...] There is not, therefore, a category of prisoners, identified a priori according to the crime perpetrated, that is subjected to a differentiated regime: but only individual detainees, convicted or accused for crimes related to criminal organisations that the Penitentiary administration deems, justifiably and under the control of the Supervisory Courts, still capable to have a role, through their internal and external connections, in the criminal organisations and in their activities and for this reason it imposes only those restrictions - always motivated and under the control of the judges - that are effectively appropriate to prevent such a danger, through the preclusion or reduction of the opportunities that are possible for those serving their sentence under an ordinary prison regime".

3

As known, the legislator, again in 2002 (with law 279 of 23 December 2002), has established new regulations on this prison regime, always deeply remodeling the discipline within the limits previously outlined by the Constitutional Court in the aforementioned judgements and also in a number of interpretative declarations of rejection, rendered in the first ten years of application. It was then the legislative intervention in 2009 (law 94 of 15 July 2009) to give the current framework, which extended the length of the individual decree applying the regime, modifying

some important modalities in the provision execution and intervening on some aspects of the judicial protection system against the provision.<sup>1</sup>

The National Guarantor has examined the situation of application of the regime pursuant to article 41-bis of the Penitentiary Act in the light of the framework the Court outlined, as well as of the interventions that were subsequently adopted by the Court, when asked about some specific aspect of the factual implementation of this regime. In particular, it is worth remembering the judgements relating to the interviews with the legal advisor<sup>2</sup> or that concerning the possibility of cooking food in the pads.<sup>3</sup>

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Therefore, the Report presented here does not enter into the question itself of a normative provision, but focuses on the assessment of how its application is in line with the parameters of lawfulness indicated by the Constitutional Court and also how its reiteration, often for a large

<sup>1</sup> The CPT visited Italy from 14 to 26 September 2008, and in its Report it was written:

*«84. As the CPT has already stated, the current “41-bis” regime is already highly detrimental to the fundamental rights of the prisoners concerned. Furthermore, it is not without an effect on the state of both the somatic and the mental health of some prisoners (cf. paragraphs 71 and 78). It is by no means the CPT's intention to cast doubt on either the legitimacy or the necessity of the Italian authorities' fight against all forms of organised crime; quite the contrary. However, the possible entry into force of the aforementioned legislative amendments would inevitably cause irreversible damage to the fragile balance which should be maintained between the interests of society and respect for fundamental human rights. The introduction of the reversal of the burden of proof, the removal of “41-bis” prisoners to prisons located on islands (which is de facto equivalent to banishment), the drastic reduction in the amount of time spent outside the cell and of visits and telephone calls, and the restrictions imposed on contacts with lawyers are all measures which, cumulatively, contain within them the seeds of what could easily amount to inhuman and degrading treatment. The CPT urges the Italian authorities to reconsider the aforementioned draft legislative amendments».*

*The Italian Government, from its side, answered on this point (in §§ 139 – 144):*

*«139. The security and public order legislation, as passed on July 2, 2009, significantly amends the special penitentiary regime under Article 41-bis of the Penitentiary Order.*

*140. Along the lines of the reform (Act No. 279) undertaken by the third Berlusconi Government, dated December 23, 2002, the high security regime has been further aggravated and made more effective.*

*141. The most relevant novelties are as follows: The Minister of Interior may request the Minister of Justice the release of a 41-bis decree, whose term has been extended up to 4 years; the extension will be decided every two years; the extension criteria are clearly defined, including the maintenance of the contacts between the prisoner and his/her terrorism or organised crime organisation.*

*142. To this end, the Legislative Decree stipulates that the justice shall consider the role of the prisoner within his/her organisation, the maintenance of the relationship, the new charges not previously judged, the result of the penitentiary treatment and, lastly, the living conditions of the person under reference's family.*

*143. The time expiration is not sufficient to set aside the risk of the existence of such a link; the responsibility to decide on complaints against the ministerial decree setting the 41-bis regime has been given to the Supervisory Court in Rome, in order to avoid conflicting verdicts on this issue by the territorial Supervisory Courts being in the past entrusted to decide, depending on the territorial penitentiary at which the prisoner under 41-bis had been placed; the term to lodge a complaint has been extended from ten to twenty days, though such complaint does not suspend the execution of the relevant measure.*

*144. It has been introduced a new crime into the penal code under article 391-bis, whereby it is punished from one to a four-year detention penalty, whoever facilitates the communication and contact between who is under 41-bis regime and the outside. If such behaviour is perpetrated by a public official, the detention penalty is raised up to five years».*

<sup>2</sup> Judgement 20 June 2013 no. 143, constitutional illegitimacy of the restrictions on interviews with the legal advisors.

<sup>3</sup> Judgement 26 September 2018 no. 186, constitutional illegitimacy of the provision in §2-quater(f) in which it is established the prohibition of cooking food.

number of years, at the expense of the individual, may risk to affect the indispensable principle of the protection of the individual's human rights, regardless of their status of liberty or detention, as well as of their fundamental rights which, even within the objective limits imposed by the privative situation of freedom and in a particular regime, do not cease to be protected by our Constitution.

For this reason, in the context of the linguistic education purpose that should characterise each Institution, even in times when this objective seems forgotten, the National Guarantor recommends never to define this regime as a "carcere duro" (a "harsh prison regime") because this concept implies the possibility that something else can be added to the deprivation of liberty - which is itself the content of the prison sentence – to make it more punitive or deterrent or implicitly encouraging forms of collaboration with the judicial authorities. Said objectives would certainly place the 41-*bis* regime outside the constitutional framework. This is due to the absolute positive evaluation that the Guarantor gives to the role that effective cooperation with the judicial authorities has had and may have, and for the need that it shall be free from any external perception of improper negotiation.

## A.2. The reserved areas

In its 2018 annual report, the National Guarantor informed the Parliament about its visits to the so-called "reserved areas" (*area riservata*) within the special units referred to in article 41- *bis* of the Penitentiary Act. These areas are separated from the other units, which accommodate people subjected to this regime and are targeting the leaders of the criminal organisations. As already reported, there are 14 "areas", distributed in 7 establishments, in which at the time of this Report (January 3, 2019) 51 people were restricted (out of which, only 30 were convicted).

5

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There is no doubt that those individuals' criminal profile requires particular attention and conditions of maximum security. However, it could be argued that this request falls into the same definition of the scope of the special regime, with no need of further special requirements to be adopted.

The direct and overall monitoring has given objective feedback on the critical detention conditions in many of such "areas". The outcomes were already reported in the National Guarantor's first Annual Report to Parliament (March 2017): these are areas in which, by applying - according to the Guarantor in an improper manner – what is established in article 32 of the Regulations containing provisions on the Penitentiary Act and on measures entailing restrictions on, and deprivations, of personal liberty (decree of the President of the Republic of 30 June 2000, no.230), an even more restrictive regime is executed – if compared to the restrictions provided for by article 41-*bis* for the Penitentiary Act. The application of these rules is sometimes leading to an almost substantial isolation of the detained person (in 4 cases, at L'Aquila, Novara, Parma and Opera prisons).

In order to avoid the formal breaching of the provisions ruling the use of solitary confinement, another prisoner is often also placed in the "reserved area", always under the same special regime, who would not be entitled to stay there. He/she is used to make "company" when prisoners can benefit of the "binary socialisation activity" and during yard time: a solution that determines the application of a totally unjustified special regime to a second person and to the one for whom the specific restriction is requested.

However, in the opinion of the Guarantor, accommodating two people in the same "reserved area" is not acceptable because, in the case of a possible disciplinary measure of solitary

confinement on one of the two, the isolation of the other is inevitably determined. The result is unfounded in terms of the rights of the person: a punitive situation is experienced *de facto* also by a subject who has not committed an infringement of disciplinary rules and, as such, was not sanctioned. The National Guarantor believes that this situation does not have a legitimate basis and therefore requires a revision. In fact, he reminded that the *de facto* imposition of solitary confinement on a prisoner that did not commit any infringement, being implemented as a consequence of organisational procedures, is prohibited because it is in contrast with the principle of personal responsibility, as well as with the one expressed in rule 60.1 of *the European Prison Rules*.<sup>4</sup>

The Guarantor is available to start debating with the responsible Authorities on this aspect, which was not tackled in the most recent circular on the special regime of 2 October 2017.<sup>5</sup> The clear objective of the discussion shall be the overcoming of said specialty mechanism within a special prison regime; a mechanism which, as already mentioned, besides not having legitimate justifying foundations, exposes the country to the risk of being censored by the supranational monitoring bodies.

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With regard to the "restricted areas", the European Court of Prevention of Torture (CtPT), as is acknowledged, has already raised questions in 2004<sup>6</sup> and in 2008.<sup>7</sup> On these occasions, the Italian Government, in its response<sup>8</sup>, indicated as the legal basis of such areas in Article 32 of Presidential Decree 230/2000.<sup>9</sup> On this point, the Guarantor can only reiterate the strong perplexity that this article legitimises the situation that actually occurs in the "reserved areas": reduced possibility of social relations with other prisoners, already very restricted in the 41-bis regime, allocation with only another prisoner when not roughly a form of solitary confinement.

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<sup>4</sup> Rec(2006)2: «60.1. Any punishment imposed after conviction of a disciplinary offence shall be in accordance with national law».

<sup>5</sup> The Penitentiary Administration Department circular note no.3676/6126 "*Management of the special prison regime pursuant to article 41-bis of the Penitentiary Act*".

<sup>6</sup> CPT/Inf(2010)12, § 86.

<sup>7</sup> CPT/Inf(2017) 23, § 51.

<sup>8</sup> Response of the Italian Government to the CPT Report published in CPT del 2004 (CPT/Inf(2006)17 page 36: «*With reference to the remark formulated by the CPT, it has to be pointed out that the prisoner who during the visit was in the so-called "reserved area" of Parma prison, on 20.01.2005 was transferred to Viterbo remand prison. The legal basis of the so-called "reserved area" is provided, in general, for by art.32, Presidential Decree No.230/2000, according to which the Penitentiary Administration orders the assignment of prisoners who request particular care to specific prisons or wings, where the protection of their safety is easier, also in order to protect other prisoners from possible aggressions or clashes; the assignment to said wings does however imply neither a deprivation of human contacts with penitentiary workers, nor with the other prisoners having the same problems; treatment and support activities provided for by the Penitentiary Act, including recreational activities to be carried out by groups not exceeding three persons, continue to be guaranteed (para.84)*».

<sup>9</sup> Article 32 of the Presidential Decree 230/2000 rules the assignment and association of prisoners for precautionary reasons. In paragraph 3, it establishes: «*Moreover, special care shall be devoted to the assignment of those prisoners and internees liable to be aggressed or abused by other prisoners. To such end special wings shall be arranged, although the individuals' assignment to those wings shall be frequently checked in order to verify the continuance of reasons for their separation from community*».

- 1. The National Guarantor therefore recommends that steps be taken to dismiss the "reserved areas" within those prison establishments that have special regime units pursuant to article 41-bis of the Penitentiary Act.<sup>10</sup>**

Being moreover indisputable that a person cannot be detained for months or even years under total isolation, without the risk of breaching article 3 of the European Convention on Human Rights (ECHR), even if the confinement may be the outcome of several restrictive and/or disciplinary measures, each of which is legally carried out, the National Guarantor

- 2. recommends that the Penitentiary Administration Department urgently review all those situations in which a prisoner is serving his sentence under the special regime pursuant to article 41-bis in a de facto situation of continued isolation and provides for a different placement and organisation of his everyday life.**

### **A.3. The improper “binary socialisation activity”**

The current numbers of persons detained under the special prison regime pursuant to article 41-bis and the region of origin of the relevant criminal organisations to which they belong are determining a growing difficulty in the constitution of the groups of four inmates so to avoid any possible communication among members of similar and/or neighbouring criminal organisations. For this reason, in some units the Guarantor has observed groups of prisoners made of three or even two people.

7

The situation of women is particularly worrying. They are held in the only special unit for women placed in L'Aquila prison. Their small number, combined with the region of origin and in one case the unavailability to be part of such groups, determines that the composition of almost all groups is limited to two people and at least in one case there is one only inmate, with no socialisation activity possible.<sup>11 12</sup>

Considering that the constitution of groups of “socialisation” made of two prisoners has always effects of highlighted de-socialisation of the person, as well as of consequences in the implementation of disciplinary sanctions – as evidenced in the case of the “reserved areas,

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<sup>10</sup> Particularly difficult appeared to be the conditions of P.C. who is refusing to share his room with others and to establish any form of community with facts other than his (radio, television, foodies even if packed). A situation clearly due to his psychiatric disorders. His condition is undoubtedly different from the standard possible situation of a person who is living alone due to the lack of another cellmate or from the situation of those who are put in solitary confinement for the overlap of multiple disciplinary orders (see further). Nevertheless, from the standpoint of the respect of the individual's dignity and human rights, which also comprehend the need to pay full attention to their health conditions and the imposition on the authorities concerned to balance its right to safeguard it, the assignment of P.C. in a “reserved area” of the special unit is deemed inappropriate because he is thus prevented from any form of communication and psychiatric support. The National Guarantor is at the Penitentiary Administration's disposal for exploring together any feasible solution.

<sup>11</sup> After her will or for logistic reasons, N.D.L. is *de facto* detained in complete solitary confinement since many years. Not considering her motivations, which are at the root of her *de facto* isolation, the current situation, in fact, is not furthermore bearable notwithstanding the difficulties in understanding what could be the still operational criminal organisation she should be prevented from maintaining contacts.

<sup>12</sup> Similar situation is experienced by the two women detained in L'Aquila prison who have been assigned to the “High security 2” prison regime, after being transferred from Nuoro (also in consideration of what had been observed by the Garante at the time of their detention in Nuoro, which is an establishment only for men).

the National Guarantor believes that there should be found solutions to prevent it happening. To this end, the National Guarantor

**3. recommends that sections or groups of "socialisation" consisting of less than three prisoner be abolished.**

**A.4. The enforcement of a security measure on an internee within the 41-bis unit**

Not surprisingly, the National Guarantor acknowledged that the regime pursuant to article 41-bis has also effectively applied to persons who have fully served their sentence. The security measure provided for them is that of the "penal labour colony". In the first meeting with this reality in the prison of L'Aquila, the mystification of the lexicon was clear: the people were restricted in a regime identical to that of the persons there detained and, in the worst material conditions, in cramped detention facilities, without any offer of working activities to justify the denomination of the applied measure.

The National Guarantor then observed that the section was characterised by insufficient natural and artificial light. The windows, in fact, were obscured with 'jealousies' and networks that prevented light and air from entering properly. In the so-called "penal labour colony" the five prisoners worked only for three or four hours a month, divided into shifts of a quarter of an hour or half an hour a day.<sup>13</sup> It is therefore difficult to define it as a "work house". In fact, the internees in L'Aquila prison were subject to a regime that was almost identical to the special 41-bis regime.

The National Guarantor immediately highlighted this situation to the Penitentiary Administration Department after the visit, asking for the rapid transfer of the five inmates detained in L'Aquila prison to another suitable establishment (identified in the Tolmezzo prison). With communication GDAP 207832 of 22 June 2017, the Head of the Department informed the National Guarantor of their transfer.

On the occasion of the second visit to the Tolmezzo establishment (13 July 2018), the Guarantor was able to observe their new assignment and their inclusion in the management of a greenhouse. The National Guarantor emphasizes with satisfaction the Administration's response to the formulated recommendation.

However, it noted during the visit that the work activity is summarised in three hours every other day: very little to justify the specific quality of the security measure. The National Guarantor also noted that the security measure, when reduced to a mere linguistic expression, without any real offer of activities or work that may be addressing the future reintegration of the subject, it consists of an atypical continuation of the individual's detention. Moreover, their inactivity does not offer elements that can be evaluated in order to establish whether the social danger risk at the basis of the application of the security measure is still certain.

On the issue of the individual's internment under the special regime in article 41-bis, the National Guarantor observes that what is indicated in paragraph 2-quater that establishes the prisoners' assignment in the establishments, refers, unlike other paragraphs, only to prisoners and not to internees. Consequently, the Guarantor requires that suitable and appropriate accommodations be identified and assigned to internees, while subjected to such regime. Said accommodation shall be suitable to the measure applied and not simply be obtained from other

<sup>13</sup> For example, in February 2017, an internee worked for a total of 11 hours a month, distributed in 22 days, that is half an hour per day. Another worked for 7 days for a total of 3 hours and a half, that is 6.5 minutes a day.

parts of the structure which is destined to accommodate those who are subject to that special regime.

During the visits to the various sections of 41-bis, the Guarantor has become aware of cases where the security measure is not indicated in the sentence relevant to the type of crimes for which the special regime is provided but is subsequently decided by virtue of a statement of habitual criminal behavior occurred in the context of other proceedings.

As already reported in the Report to the Parliament in 2018, the security measures - which in the case of the application of the special regime under article 41-bis assume very special characteristics - have been the subject of considerations and judgments of the Court of Strasbourg with some guidelines that shall be kept in mind, especially those related to some German cases.<sup>14</sup> In a famous judgement in 2009, in the case of *M. v. Germany*<sup>15</sup>, the Court considered the detention security measure as a real punishment and, as such, covered by the principle of non-retroactivity, referring to Article 7.1. of the Convention. It also reiterated the fundamental principle that the application of a detention security measure is legitimate provided that *there is a causal link* between the fact that is the object of the conviction and the deprivation of personal liberty, and not a mere chronological sequence between the first and the second (in this, it refers to article 5.1(a) of the Convention), nor that the generic risk of committing a new crime is sufficient for its application (article 5.1(c)). Consequently, the Court has ruled the violation of Article 5.1. and Article 7.1. of the Convention in the present case, as the duration of the detention security measure had been indefinitely prolonged during the period of execution of the applicant's sentence and this extension had been applied to him at the end of such execution. The element which is relevant in this as in other coeval cases - and which was also taken up again later by the Court's jurisprudence - is the impossibility of applying a security measure in a disconnected manner from the conviction and adopted during the course of the execution of a sentence.

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This legal orientation of the European Court of Human Rights affirms a principle that in our system meets profiles of possible incompatibility for the effects of the combined provision of Articles 205(2-3) and 109(2)2 of the Criminal Code that allows the application of the security measures also with a provision following the sentence and on the basis of statements of a qualified danger risk pronounced at any time, even after the sentence has been enforced. The same risk also occurs in the case of an extension of a custodial security measure; even in this second case, in fact, according to the jurisprudence of the ECtHR, the link with the sentence is absent, while it is essential for the legitimacy of the deprivation of liberty.

Both these aspects of doubtful consistency with the jurisprudence of the Court of Strasbourg are found - in the opinion of the National Guarantor - in the verified cases concerning some internees placed under the prison regime pursuant to article 41-bis of the Penitentiary Act. In particular, the

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<sup>14</sup> In particular the cases *M. v. Germany* (2009), *Kallweit v. Germany* (2011), *Mautes v. Germany* (2011), *Schummer v. Germany* (2011).

<sup>15</sup> Judgement *M. v. Germany* (19359/04) of 17 December 2009. The claimant was sentenced to five years in custody and the subsequent application of a detention security measure, which at the time of the conviction could last no more than ten years. Later on, the limit of ten years was established overcome by further provisions, and the security measure became thus undetermined. For this reason, the claimant had his security measure extended beyond ten years, based on the evaluation of the risk of dangerousness. Following the judgement on violation of articles 5.1. and 7.1. of the European Convention on Human Rights and similar judgements in other cases (2011) the Constitutional Federal Tribunal has declared constitutionally illegitimate the discipline on the undetermined security measure.

qualified danger risk pronounced during the execution of a sentence in such a prison regime has had a direct impact on the prolongation of the same regime without that neither the measure nor the terms of its sentence execution could be linked to the crime that had determined the sentence and its special enforcement. Furthermore, the repeated extensions of the security measure illogically lengthen a certain regime that in fact steps back from returning the individual to the community in conditions of security.

This last aspect is observed in the context of the application of the security measure at the end of a provisional sentence served under this regime. The National Guarantor expresses its firm opposition to provisional sentences being served under this regime until they are completely fulfilled. The opposition is based primarily on the greater accountability of a penal sentence that is differently enforced during detention thus allowing the understanding of how a prisoner can be positively integrated into the external context, once the sentence has been executed, as well as the acquisition of information to redefine a sort of 'care process' towards their release. Furthermore, the rigorous detention regime been applied until the day of discharge - a person who until the previous day cannot communicate with anyone, talks to visitors through the glass, and the next day is on the street in full communication with anyone - does not provide the person with any possibility of building pathways to resume a journey that will keep them away from the criminal environment in their place of origin.

In addition to this doubt, there is the necessity to improperly bridge the gap between the absolute lack of communication with the epiphany of freedom, through the instrument of the security measure - even in cases, as already mentioned, in which *ab origine* there was no link to the sentence - which in fact prolongs the special regime in conditions almost unchanged compared to those of detention. Moreover, it is obvious that the application of a custodial security measure cannot be justified only by reasons of its preventive function, if in fact its execution does not differ from that of punishment.

The prolonged reiteration of the safety measure under special conditions has even been the case of those who after having served a long sentence, with obvious diseases that have repeatedly led to their hospitalisation in a *Sai* and that present serious profiles of behavioral disorders that do not allow even a continuous conversation, are still subjected to said measure for periods that are singularly short and continually repeated, in a time that seems indefinite.<sup>16</sup>

**4. The National Guarantor, while hoping for a full compliance in the application of prison security measures with the European Court for Human Rights jurisprudence, recommends the Authorities concerned to go through a staid revaluation of the possibility to foresee at different levels the enforcement of the security measures under the special regime pursuant to article 41-bis of the Penitentiary Act at the end of the sentence execution.**

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<sup>16</sup> It is the case of V.S. that the National Guarantor has met in two different occasions: the first meeting was in April 2017 the *Service for intensive care* in Milano-Opera, which is reserved to prisoners detained under the 41-bis special regime; the second, in July 2018 in the "penal labour colony" in Tolmezzo. During the first meeting, the National Guarantor could observe the severe somatic conditions, as V.S. was gone through a tracheostomy operation, was still undergoing chemotherapy cycles for a cancer to the larynx and was unable to speak. Nevertheless, he was trustful on the reassessment of the security measure. In the second meeting, the somatic condition was unchanged while his psychic-behavioural inability was evident. He could not take part in the conversation in a meaningful way. This was also confirmed by the prison officers belonging to the Rom squads, which had in charge the restricted well-being of the prisoner. Nonetheless, the security measure has been recently reconfirmed.

## A.5. The reiteration of the measure

The question of the duration of the application of the suspension of plan ('trattamento') and of the restrictions provided in the Penitentiary Act relevant to article 41-bis op is mainly connected to the system of extensions of the original application decree.

As it is known, Law 94 of 15 July 2009 modified the original provisions of the law and provided an extension of the period of placement in the 41-bis regime to four years, renewable for a period of two years until the conditions that motivated the first application of the provision are presumably still valuable.

The element that determines the permanence of the application exists, therefore, according to what is established in the current regulatory formula, "when it turns out that the ability to maintain links with the criminal, terrorist or subversive association has not occurred". This formulation prevents the verification of the conditions that legitimise the special regime and determines, substantially, a reiterative mechanism of the application decree that is likely to be automated. In fact, it limits the motivation of the extension of the special regime to the proof of a negative circumstance (a sort of *probatio diabolica*), which is the exclusion of the only ability to maintain all links with the association to which the prisoner belongs and not of their permanence.

Therefore, the actual operation of the extension decrees is exposed to the risk of disregarding the provisions of the Constitutional Court which, starting from 1993 and constantly in subsequent rulings, established the need for adequate motivation for each applicative provision and for each decree of extension. It established, as known, that "any provision of extension of the measures shall be based on an independent adequate motivation regarding the current permanence of dangers for the order and security that the same measures are aimed to prevent. Simple unjustified extensions of the special regime, nor apparent or stereotyped motivations, unfit to justify the decided measure in terms of the situation analysed, are not allowed".<sup>17</sup>

During the visits, the National Guarantor has found numerous cases of persons subjected to the 41-bis regime for over 20 years and has verified, in effect, the recurrence in the provisions of extension of motivations that substantiate the foundation of the reiteration in the «absence of any element in the opposite direction» to maintaining links with the criminal organisation operating outside.<sup>18</sup> In the extension decree the frequent references are the 'initial' offense for which the person has been convicted and the persistent existence in the region of the criminal organisation within which the crime has been committed. Two central elements, in the opinion of the Guarantor, which, however, do not constitute an absolute demand for the actualisation of the particular custodial needs expressed in the judgments of the Constitutional Court. Two elements that risk self-replication beyond the responsibility of the individual and the bodies in charge of the decision.

To this end, the National Guarantor also observes the fact that often the reiterations, as already noted, do not consider the provisional aspect of the sentence and in many cases the fact that the renewal of the regime will go beyond the end of the sentence execution. For example, of the 24 cases of convicts detained in a prison establishment – selected with a random procedure<sup>19</sup>, 12 had a provisional sentence and among them 4 were finishing serving their sentence in the forthcoming

<sup>17</sup> Constitutional Court, judgment no.376/97 of 26 November 1997.

<sup>18</sup> It is the case of V.S. (see above), decree of extension of 21 November 2017.

<sup>19</sup> Terni prison, 11 January 2018.

two years; in another prison, with a high presence of prisoners subjected to the special regime<sup>20</sup>, 40% of them is still serving a provisional sentence.

The considerations made in the previous paragraph about the extension of the special regime until the end of the execution of a temporary sentence and the strong opposition to this hypothesis – that the Guarantor has actually verified in some cases – lead to the need to formulate a specific recommendation on this topic.

5. **The national Guarantor recommends that the special regime pursuant to article 41- bis of the Penitentiary Act be not extended after the execution of a provisional sentence. On the contrary, if the period envisaged for a possible renewal is including the term of the penal execution, the reiteration be avoided thus giving the Penitentiary Administration the possibility to plan pathways that will gradually accompany the discharge and are useful for the positive social reintegration and more effective for the safeguard of external security.**

#### A.6. The unifying utopia

In 2016, the Penitentiary Administration Department has felt the need to define at central level the procedures for implementing the special prison regime pursuant to article 41-*bis* of the Penitentiary Act, in order to make its application more consistent and to avoid incongruous and diversified decisions at local level. This is a requirement that the National Guarantor had pointed out both during the visits, and following complaints from prisoners subjected to this regime, pursuant to Article 35 of the Penitentiary Act. The same rules, in fact, apply differently in different establishments, sometimes with the risk of going beyond the limit imposed by the very purpose of this special regime and opening to incongruous restrictions carried out on fundamental rights.

The work of preparing the text lasted about a year. It has also involved the National Guarantor, which has repeatedly expressed to the Prison Administration its opinion articulated on the provisional drafts (notes of 18 October and 27 November 2016). Some of the observations were accepted, but in the final text (the aforementioned circular number 3676/612 of 2 October 2017) according to the Guarantor, several critical issues remained. They risk to make complex the application of the circular note, if not to nullify its objective, namely the consistent implementation at national level of this special regime. These critical issues were amplified during the events that followed its administration to all establishments.

In fact, the National Guarantor noted that some interpretative elements – provided subsequently by the Head of a prison and made them available to other establishments, albeit in an informal non-institutional communication – have ended up determining more restrictive applications than those proposed in the complex and long debate that accompanied its drafting.

It turned out that, following a request for clarification on a full 14 points from the Sassari prison management, two months after the entry into force of the circular note<sup>21</sup>, the DG Prisoners and prison treatment of the Penitentiary Administration Department responded within three days<sup>22</sup> with consistent restrictive indications. It raised serious doubts the fact that the reply addressed to the prison management of the requesting establishment was unofficially distributed to all prisons hosting inmates subjected to the 41- *bis*

<sup>20</sup> L'Aquila prison, 24 May 2018.

<sup>21</sup> Letter no.19672/41 of 12 December 2017 to the DG Prisoners and prison treatment of the Penitentiary Administration Department, to the Head of the Department “*Gruppo operativo mobile*” of the Penitentiary Administration Department and to the Regional prison DG of the Sardinia region.

<sup>22</sup> Letter of 15 December 2017.

"regime" so that the implementation practice of administrative provisions could be consistent in all establishments" and with the final indication to work in this direction, standardising all practices to the replies given to Sassari.

A letter of reply addressed to a single prison manager was therefore considered as a regulatory and standardising element. The fact is even more puzzling if it is considered that the set of questions sent to the central prison administration were also asking for "the authorisation to act differently from the recently issued directives" for structural and organisational issues. In this, potentially undermining the objective of consistency that the circular intended to achieve.

In a letter to the Head of the Minister's Cabinet Head of the Cabinet and to the Head of the Penitentiary Administration, the National Guarantor reported that, during the visit of the special regime units in Parma prison, had found that such a response was widespread as an element of official interpretation of the circular.<sup>23</sup> The subsequent visits to the same units in Terni, Ascoli Piceno and Spoleto have confirmed this incongruous circulation. For this reason, the National Guarantor has formally expressed its strong opposition<sup>24</sup> to the modalities carried out in the attempt to reduce a debate that had been long, complex and with different stakeholders and in fact excluding the consultation with the National Guarantor that should have been asked for 'interpretations' on provisions in the circular that changed the overall framework.

Moreover, some answers appear very curious, both in the question and in the answer, as the provision, in response to a specific request, according to which prisoners are allowed a photo a year "performed with a single click". An affirmation that makes you smile when the technological aspect is considered.

13

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As for the indications contained in the aforementioned circular, it is worth highlighting some observations, which are also causing critical issues in the daily life of the prison establishments and the adoption of internal orders or regulations - in the rare cases in which it was possible, which interpret at the minimum standard the scope of intervention that the circular meant to broaden:

- a. The first fundamental observation regards the overly detailed definition of regulatory norms of daily life, such as the maximum diameter of pots and pans (respectively 25 and 22 cm), the number of watercolor pencils or colors that can be held in the painting room (no more than 12 ), the number of books that can be kept in the room (4), the size of the photographs (of a size not exceeding 20×30 cms and not more than 30 pics). Such details are perplexing and their implication is doubtful in respect to the purpose of the prison regime. How, for example, holding 15 pencils instead of 12 in the painting room can be a risk in terms of severing the internal and external links and communications with the criminal organisations?

The excess of details aimed at avoiding differences in the application of the provisions at local level can sometimes lead to its opposite: it is the case of the so-called "model 72" with a detailed list of foodies that can be purchased at the canteen that does not take into account the actual availability of products in the different regions. In these cases, the desired consistency is reflected in a downward differentiation based on the local availability of items, with no possibility for the prison establishment to integrate otherwise the list of products.

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<sup>23</sup> Letter of 28 December 2017.

<sup>24</sup> Letter to the Head of the Minister's Cabinet and to the Head of the Penitentiary Administration of 26 January 2018.

According to the Guarantor, more general principles to be monitored during the application phase would be sufficient. Such a detailed and strict ruling from one side can be detriment to the decision-making responsibility of those who professionally work at local levels; and on the other hand, it ends up by defining such a rigid organisation that is not suitable to the identification of the penitentiary interventions that remains as an informing criterion of our penal execution system, which is of outmost importance even for a special regime such as the one here considered.

- b. A second problem concerns the application of some specific rules of the special regime applied to *prisoners* and *internees*. The circular uniformly applies also to internees and inmates, not highlighting those aspects that even a structurally homogeneous provision in its restrictive intention leaves at least relative to the placement in establishments and prison units (the mentioned paragraph 2-quater of article 41-bis of the Penitentiary Act).
- c. A third critical aspect in the circular concerns some of its interpretations. In particular, the one applied to the hours spent outdoors: in fact, the hour to be spent in the socialisation room is subtracted from the two hours of yard time.<sup>25</sup> The clear disagreement of the National Guarantor to this interpretation, which has also found comfort in the judgments of the Court of Cassation - judgment 2630/2018 and 2631/2018 of the Penal First Section - will be articulated in the following pages.

14

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The National Guarantor's standpoint is intended to underpin the legitimacy of the regime pursuant to article 41- bis of the Penitentiary Act within the scope traced by the purpose assigned to it and to consider incongruous all the measures that fall outside said scope and which could be seen as useless and disproportionate persecutory measures. Only within the assigned perimeter can the special regime be defended and be functional to the necessary dissolution of the criminal networks to which prisoners subjected to that prison regime belong. In fact, in several occasions the Guarantor, in ascertaining the current necessity of this normative provision, has turned its analysis to the single measures imposed to assess whether they are functional to severe internal and external links and communications with the criminal organisations or if they risk to be considered as additional affliction not provided for by the Prison Act. An approach similar to the one that emerges from the CPT Reports and the ECtHR jurisprudence that, in assessing the existence or otherwise of violation of article 3 of the Convention, considers any specific rule or restriction in the light of the overall purpose for which the regime is applied.

Indeed, in this perspective, the National Guarantor expresses its doubts, for example, with regard to the provision in the circular note which provides that "the use of the television is allowed only at fixed times, starting at 07.00 and switched off at 24.00".<sup>26</sup> The effect is the sudden interruption of programmes before their scheduled end.<sup>27</sup> If such a prediction may appear at first sight irrelevant, it is necessary to ask whether that requirement is consistent with the purpose of

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<sup>25</sup> «Article 11 – Activities in the common room. In each units of the special regime, common rooms are available for cultural, recreational and sport activities. Prisoners/internees subjected to the 41-bis regime can stay outdoors for no more than two hours a day to be spent outdoors in the open air or in recreational/sport activities, in dedicated spaces such as the library, the gym court and the hobby room».

<sup>26</sup> Article 14. Tv and radio sets or other ITC device.

<sup>27</sup> The selection of channels is already very limited. It is stunning that some TV channels addressing an adult audience are not available, while are at the prisoners' disposal Rai Gulp and Rai YoYo been essentially delivered to a child public.

the special detention regime. Taking into account that, in all the units, the radio is incorporated in the television set, the result is, therefore, a limitation of the right to information at the time the television set is switched off, which is absolutely unjustified and disproportionate. This assessment was recently supported by ruling no. 4164/2018 of 27 September 2018 of the Supervisory Court in Rome, which ordered the circular to be disregarded in relation to this aspect.

The National Guarantor agrees with this ruling and reiterating what has already been written to the Head of the Department of the Prison Administration<sup>28</sup>,

**6. recommends that article 14(2) of the circular note no. 3676/6126 of the Penitentiary Administration Department be revised, ensuring access to information and, therefore, the use of television channels, without the time limit set forth therein.**

More generally, the Guarantor wishes, also in the light of recent norms and rulings, that the need to bring the application of the special regime in the different institutes to homogeneity is fully in accordance with the purpose of the special regime as well as defined in the judgment of Constitutional Court no. 376 of 1997, reducing the restrictions which do not descend "from the need to prevent and severe links". Apart from the failure in the unifying utopia pursued by the circular, its resolution in small restrictive prescriptions, locally adopted, has often puzzled the National Guarantor. However, the lack of consistency persists and it is sometimes also evident in some positive aspects, such as the efforts to enhance all the possibilities that can give meaning to a pathway aimed at the prisoner's re-education found in some establishments or the availability expressed by the Director of the "*Gruppo operativo mobile*" or by some special regime unit staff discuss with the National Guarantor what can be the practical modalities that least represent affliction and more protect the dignity of the restricted people.

15

On the contrary, some provisions are striking and difficult to understand. For example, a sign hanging in the socialisation room in Cuneo prison<sup>29</sup> announced the possibility of buying two ice creams at a time, but that it was "absolutely forbidden to deposit the ice creams in the refrigerator to be consumed later"; if you buy them, you should eat both immediately. In Novara, the Guarantor was told that you could not go to the shower with a bathrobe and towel together: either one or the other; at the visits, family members could not wear t-shirts with any writing even that of the manufacturer: they were forced to take it off and wear it backwards.<sup>30</sup> Or in L'Aquila, even in the summer and for women, open shoes were forbidden outside the room, according to the then Management, for reasons of decorum. Also in this prison, compensation was claimed for the damage inflicted on the reinforced door (*blindò*) for having beaten it in protest with a plastic bottle filled with water.<sup>31</sup> These examples are not isolated, though concentrated mainly in some establishments, which have been selected among many others and reported to make it clear how difficult it is to combine purpose and minimum daily life standards in a context such as that of the special regime that does not cease to have a hyper-punitive aftertaste.

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<sup>28</sup> Letter of 18 July 2018 of the National Guarantor and relevant negative reply, of August 1 from the Head of the Penitentiary Administration Department.

<sup>29</sup> Dated 6 June 2018.

<sup>30</sup> Following the internal provision of 28 March 2017 and interpreting the circular note of the DG Prisoners and prison treatment on the possible communication of illegal messages, of 5 April 2017, in an extensive way.

<sup>31</sup> Moreover, in this case, the documentation was also transmitted to the Public Prosecutor's Office, not only with reference to the public nuisance charge, but also to the damage to the Administration's assets.

## A.7. The external monitoring

There is no doubt that a very peculiar regime, such as that constituted by the special regime pursuant article 41- *bis* of the Penitentiary Act, requires particular attention from the supervisory bodies. This is not because of a negative evaluation of the professionalism of those who work there, but because it is inherent in the concept of specialty the need for multiple points of observation.

The external control is primarily assigned to the Supervisory Authority, which, in addition to its intervention in accepting or not complaints made by the prisoners and, as regards the district of Rome, to the examination of appeals against the assignment or the extension of the 41-*bis* regime, has also the task of supervising the overall conditions of detention and approve internal regulations.

The presence of the supervisory justice within the prison institutions in order to exercise this supervisory power varies from one establishment to the other: many positive experiences, others strongly lacking. It is striking, for example, that after the collective transfer to another prison (15 March 2018) of all the persons previously restricted in units that had been closed elsewhere<sup>32</sup>, the supervisory judge of the new headquarters had not paid any visit to the unit before the Guarantor's monitoring (28 June 2018).

At the same time, it was precisely certain orders of the supervisory judges and their subsequent development, which at times reached the Constitutional Court, that maintained the rules, daily life and methods of implementation of the regime in the perspective of the protection of the rights of persons, their dignity and within the scope of its purpose.

However, it is regrettable to note that the local authorities have not always complied with and are complying with the orders of the Supervisory Authority, at least until a judgment of compliance has been produced. The National Guarantor trusts that this situation will not result from general indications given to the local branches of the Administrations.

### **7. The National Guarantor recommends that the Prison Administration give indications to consolidate the practice of complying without any delay to the orders of the Supervisory Justice.**

An important contribution is made by the network of guarantors. As is well known, the National Guarantor has the possibility, as a "National Preventive Mechanism"(NPM) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>33</sup>, of unannounced access to any place and documentation and of conducting private interviews with the restricted persons.<sup>34</sup> This function of prevention certainly has a cooperative profile, of which this report also bears witness, aimed at highlighting those aspects which can and must be modified in order to maintain the regime within the scope of its constitutional legitimacy.

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<sup>32</sup> Following the closure of the 41-bis units at Ascoli Piceno prison, after the CPT visit and the following visit by the National Guarantor, the prisoners were transferred to Cuneo and assigned to the unit which was closed for the structural inadequacy of the facility. On the material conditions of said re-opened unit, some observations will be developed in the following parts of this Report.

<sup>33</sup> Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), ratified by Italy with law 195 of 9 November 2012, articles 3, 4 and 17-23. In addition, the *note verbale* of designation of the National Guarantor as the Italian Npm.

<sup>34</sup> Powers, which the prison Administration has given to its local subsidiaries through circular letter 3671/6121 of 18 May 2016. Similar circulars were giving the same communication to the other Administrations involved in the monitoring activities, control and prevention of the National Guarantor.

The National Guarantor believes that this function, confirmed also in the judgments of the Court of Cassation no. 2944/2018 of 26 June 2018 and no. 3167/2018 of 11 July 2018, is of fundamental importance. At the same time, these rulings did not fully extend this preventive function to the local guarantors.

The National Guarantor, while reaffirming its commitment to the construction of a network that could broaden the "National Preventive Mechanism", according to strict adherence to the parameters indicated in the aforementioned Optional Protocol and the operating procedures that characterise the United Nations, believes that the function of the local Guarantors must be enhanced by providing that their interviews with prisoners, although conducted within the limits defined by the prison system, are not counted in the overall number of interviews the detainee is entitled to conduct with visitors. It would be really unacceptable the juxtaposition of two inalienable rights: that of maintaining emotional relations and that of effective and full exercise of the possibility of making a complaint by addressing, as the law provides, to the "appointed" Guarantors and to make the reasons for their grievances explicit in the interview. The recent amendment of article 18 of the Penitentiary Act, with the introduction of a new second paragraph, is to be read in this direction.

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## B. IMPLEMENTATION OF THE REGIME

### B.1. The material conditions

The article 41- *bis* regime unit shall respond, also in terms of spatial organisation, to the needs of the exclusive purpose of this regime: to prevent forms of communication between members of criminal organisations within the establishment and members of those criminal organisations who find themselves in the free society and, as such, must have a preventive rather than punitive objective (judgment of the Constitutional Court no. 376/1997, with reference to judgments 351/1996 and 349 / 1993)<sup>35</sup>.

In this perspective, all those elements that increase the suffering inherent in the deprivation of liberty, whatever the need to implement a special prison regime, cannot be introduced. This principle is *inter alia* established by article 3 of the "Standard Minimum Rules for the Treatment of Prisoners" (the so-called *Nelson Mandela Rules*)<sup>36</sup>, approved by the UN General Assembly on 17 December 2015.

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<sup>35</sup> The Court has in fact stated that the 41-*bis* regime is based «not abstractly on the title of crime subject to conviction or indictment, but on the real danger of the permanence of connections, of which the crime concretely contested constitute a logical premise; on the other hand, the restrictions applied, differently from the ordinary prison regime, cannot be freely determined, but - always within the limits of the prohibition of the impact on the quality and quantity of the sentence and of treatments contrary to the sense of humanity - can only be those that are appropriate to the aforementioned specific aims of order and security; and even this adequacy is guaranteed *ex post* by the judicial control that can be activated on ministerial measures. It is prohibited to adopt restrictive measures which constitute treatment contrary to the sense of humanity, or such as to completely frustrate the re-educational purpose of the sentence».

<sup>36</sup> Standard Minimum Rules for the Treatment of Prisoners - *Nelson Mandela Rules*

«Rule 3: *Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation*».

Therefore, even the places of deprivation of liberty must be configured in such a way as not to affect the psycho-physical abilities, otherwise the prison sentence would risk assuming the connotation of "corporal punishment", obviously expunged from all democratic systems.

However, during its visits, the National Guarantor has found situations that do not agree with these principles.

Particularly striking is the 41-*bis* unit at Sassari prison (district of Bancali) which opened in June 2015. It is the only one so far designed specifically to accommodate prisoners in special detention regime under article 41-*bis* of the Penitentiary Act. It is built in an area obtained in the basement of the establishment. The five sections progressively descend, with a gradual decrease in the access of air and natural light, coming from small windows placed high on the wall, corresponding to the base of the prison boundary wall. For this reason, both people in their rooms and staff in their premises must continuously keep the electric light turned on to compensate for the lack of natural light. Furthermore, it was reported to the delegation that often during the intense rains this last part of the ward is flooded with obvious inconveniences for everyone.

The National Guarantor considers that this design does not find justification for the specific purpose of the 41-*bis* special regime and it risks generating a negative impact on the psycho-physical conditions of staff working there and the persons therein imprisoned.

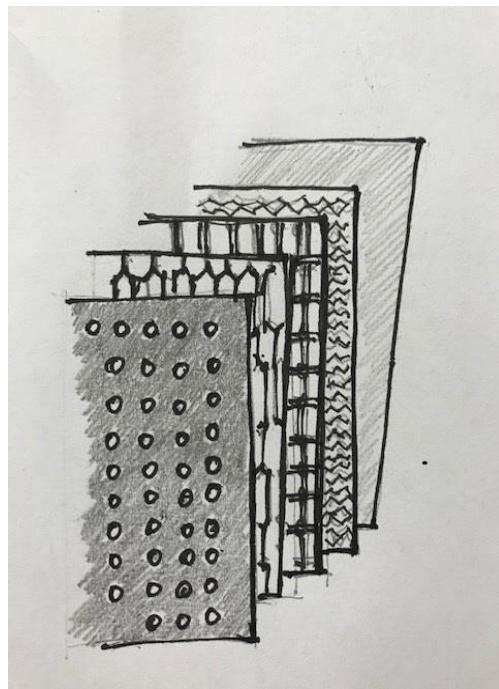
The structural conditions of the 41- *bis* unit at Cuneo prison are severe. The unit reopened in March 2018 following the closure of the unit at Ascoli Piceno prison with the transfer of all the prisoners coming from that establishment. The previous general situation of deterioration of the premises, which had led to the closure of the unit two years earlier, in May 2016, for necessary restructuring in order to make it adequate to the internationally established standards, did not find an acceptable solution in the works carried out to allow the reopening.

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Worth of consideration, are the windows of the cell room, with as many as four layers of shielding: an opaque plastic sheet, the size of the window; a metallic link net; a metal hexagon soft bar grating; a second hard bar grating; in some rooms a fifth shielding was added consisting of a piece of the bed net (a metal plate with small circular holes) welded to the bars. This last shield - it was explained to the Guarantor - has been realised to prevent the passage of objects through the windows placed between two different rooms.

Five layers of cover that significantly reduce the passage of light and ventilation and that do not find any reasonable justification:



8. The National Guarantor recommends that these layers on windows be eliminated, in accordance with Rule 18.2 of the European Prison Rules (Rec (2006) 2), which states that "windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system".

19

On the general conditions of the environments, the visit at Cuneo prison has confirmed the many critical issues reported to the National Guarantor in dozens of complaints under article 35 of the Penitentiary Act : window frames that do not close, with great heat dispersion in winter, in a city with a rigid climate like in Cuneo; bathrooms without hot water and without door and equipped with a peephole on the corridor of about 15 ×40 cm with inevitable lack of *privacy*; very small washbasins (25 × 40 cm) to be used also for washing clothes; common showers in reduced numbers (one per unit) with time limits (7 minutes for each shower); insufficient hot water compared to the needs; light switches in the cell rooms outside the room; mattresses with expiration date in 2015. To this is added the poor quality of the material used to paint the walls which "pulverizes" and determines a persistent dust that is breathed by staff and prisoners.

The situation is also well known to the Regional Penitentiary Directorate which in a letter to the National Guarantor<sup>37</sup> has confirmed to the seriousness of the material conditions and the need for renovation works to: completely replace all the windows; the construction of a new water network to supply hot water to overnight accommodation; the placement of showers in the cell bathroom and the replacement of the sanitary ware, defined as "old concept"; the replacement of the electrical installation of the ground floor currently out of standard; the ordinary maintenance works of the exercise yards. Moreover, during the visit, some technical officials specifically sent by the Regional Penitentiary Director assured the successful planning of the renovation of the interview room. The National Guarantor asks to be kept up to date on the implementation of all these interventions.

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<sup>37</sup> Letter of 11 May 2018.

Also the special regime unit at Viterbo prison presents screens on the windows, which appear completely useless since these windows overlook the surrounding wall surrounding the unit, located inside the establishment. It is really difficult to understand what they should shield. The reduced contribution of natural light to the environments, if it does not meet any real security need, is purely afflictive and is a violation of national and supranational norms<sup>38</sup>, as well as a failure to comply with the European recommendations.<sup>39</sup>

The detention rooms reserved to women are all in severe conditions. The bed is fixed to the floor and placed in such a way - detached from the wall - to allow full visibility through the 'peephole' placed on the door: such accommodation – which was frequent in the past in psychiatric hospitals and even today in some rooms used for solitary confinement - is, in the opinion of the National Guarantor, intrinsically disrespectful of the individuality of the restricted person and his ability to recognise himself in his own environment, although limited and placed within a segregating institution. It must therefore be rethought.

On the other hand, the conditions of the unit at Tolmezzo prison were positive: the windows are not screened and face the mountain, allowing the extension of the gaze, a particularly important element in the case of prisoners subjected to the 41- bis regime who spend most of their days inside the detention room.

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With regard to the organisation of the detention facilities, the National Guarantor cannot avoid topoint out the inadequacy of the "linear" departments, in which the cells look symmetrically on the two sides of the corridor, compared to the "modular" ones in groups of four rooms. The linear organisation of space certainly does not appear to be consistent with the purpose of severing communication links between the prisoners, also in consideration of the fact that cells belonging to different of groups of "socialisation" of four are adjacent. Moreover, in recent months the groups of "socialisation" in some establishments are composed of three people and not four for reasons of territorial incompatibility or criminal belonging: the Guarantor found situations in which prisoners belonging to different of groups of "socialisation" had cells facing each other. This is the case in L'Aquila, Novara, Tolmezzo and Cuneo. A double perplexity: on the one hand, it is

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<sup>38</sup> See article 6(2) of the Presidential Decree no. 230/2000 which allows to shield the windows of the rooms where prisoners may stay «[...] only in exceptional cases and for proven security reasons [...]. See also the European Prison Rules 2006, article 18(2)(a): «the windows shall be large enough to enable the prisoners to read and work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system».

<sup>39</sup> CPT/Inf (2001)16, paragraph 30: «*The CPT frequently encounters devices, such as metal shutters, slats, or plates fitted to cell windows, which deprive prisoners of access to natural light and prevent fresh air from entering the accommodation. They are a particularly common feature of establishments holding pre-trial prisoners. The CPT fully accepts that specific security measures designed to prevent the risk of collusion and/or criminal activities may well be required in respect of certain prisoners. However, the imposition of measures of this kind should be the exception rather than the rule. This implies that the relevant authorities must examine the case of each prisoner in order to ascertain whether specific security measures are really justified in his/her case. Further, even when such measures are required, they should never involve depriving the prisoners concerned of natural light and fresh air. The latter are basic elements of life which every prisoner is entitled to enjoy; moreover, the absence of these elements generates conditions favourable to the spread of diseases and in particular tuberculosis. The CPT recognises that the delivery of decent living conditions in penitentiary establishments can be very costly and improvements are hampered in many countries by lack of funds. However, removing devices blocking the windows of prisoner accommodation (and fitting, in those exceptional cases where this is necessary, alternative security devices of an appropriate design) should not involve considerable investment and, at the same time, would be of great benefit for all concerned».*

almost impossible to inhibit communication, on the other it is equally impossible to avoid the psychological frustration caused by not being able to greet a person constantly in front of you.

The situation is different at Sassari prison, designed to keep groups of "socialisation" separate, thus avoiding the risk of communication between members of different groups. In this regard, the Guarantor expresses concern with respect to the 41- bis unit under construction in Cagliari, at the "Uta" prison, whose works are resumed after a long period of interruption. In fact, despite being built according to a "modular" model, the prisoners to reach the courtyard of the walk must necessarily pass through the same corridor, making the organisation of shifts inevitable to prevent unauthorised meetings.<sup>40</sup>

A separate observation is to be referred to the exercise yards; walking areas for inmates sometimes obtained in such small spaces that they do not in fact allow any real physical activity, often closed on top with a network. Those conditions are inadequate, especially even more so in the context of the special regime, where people spend no more than 21 hours a day in the overnight room.

Particularly degraded and unacceptable are the exercise yards in the so-called "reserved areas", to the extent that prisoners often give up their yard time.

**9. The National Guarantor recommends that special attention be paid to the general building planning so that in the 41- bis regime units, while taking into account the particular needs determined by that imprisonment regime and its purpose:**

- no detention units be created in the prison basement and, where they are realised they shall not be used as detention units;
- all environments be such as to allow the passage of fresh air and natural light sufficient to allow reading and activities during the day without recourse to artificial light;
- window screens be removed where they are not justified by their opening up to transit areas of other inmates or external persons;
- the walking areas allow an extension of the gaze that does not affect the overall visual ability;
- the walking areas allow a visual stimulation to colors and, therefore, are not mere containers in gray cement, but give the possibility to see natural landscape elements;
- the walking areas are not covered by tight networks;
- walking areas have sizes and structure that allow the actual performance of physical activities.

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**The National Guarantor also recommends the existing units be progressively adapted in compliance with these parameters, constituting minimum standards of liveability, and that new units or those that the Administration has planned to reopen are only operationalised in compliance with the parameters indicated above.**

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<sup>40</sup> A side consideration is necessary relevant to the waste of public resources in building the Cagliari 41-bis unit. The building project was abandoned for about three years – also in consideration of the many building companies which were bankrupt during the construction with the consequent decay of materials left abandoned and no more recoverable. An example for all, reported in the National Guarantor's regional report on the visits conducted in Sardinia (3-10 November 2017) and, in particular, in paragraph 2.1.1, relevant to the fully equipped kitchens left abandoned for years.

## B.2. The relationship with the outside world

The visit rooms deserve a separate mention: at Cuneo prison, contrary to what was provided by the aforementioned circular<sup>41</sup>, there are visit booths of 1x1,5 mts, fully partitioned, with a 50 cms glass that forces people who are at the visit to stay bent to see each other, even beyond the glass. The dividing walls of the booths do not isolate from the noise, letting the voices pass: to the overall confusion there is also the risk of communication, which is the very danger that the special regime aims to deal with. The Guarantor has been informed that renovations are planned.<sup>42</sup>

The National Guarantor cannot avoid pointing out the lack in some prisons of a system of passage of minors under the age of twelve, who are authorised to carry out the interview beyond the glass in direct contact with the detainee. At L'Aquila and Tolmezzo prisons children have to pass through a window to go to the other side and talk to the prisoner: a practice which all in all disrespectful of all the people involved (minors, prison workers, visiting relatives, the prisoners).

### **10. The National Guarantor recommends that rooms dedicated to visit prisoners subjected to the 41-bis regime be adequate to allow minors under the age of 12, who are authorised to pay visit without the separating glass, be passing through a practical passage respectful of their dignity.**

22

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With regard to visits with family members, their extension to persons living together, ultimately being married to a person of the same sex, on the basis of law 76 of 20 May 2016<sup>43</sup>, appears to be positive: the adaptation was provided for in the aforementioned circular.<sup>44</sup> However, there is still the limitation of interviews beyond the glass only to children and children of children, therefore grandchildren in direct line, excluding children of both parents. This situation seems reductive, as it does not allow the possibility of direct contact with their minor family members in many cases, and it would be more appropriate to evaluate it on a case-by-case basis.

As is well known, for telephone calls, family members can receive the call at the prison establishment closest to their place of residence, decided by the prison management where the person concerned is restricted.<sup>45</sup> This is a measure to avoid possible direct contact with unauthorised persons. However, given also the advanced age of many persons detained under the 41-bis regime, there are several cases of elderly parents who are not able to reach the prison to conduct the visit in a controlled location. This situation leads to the interruption of family ties. Although the National Guarantor understands the security requirements of the identified

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<sup>41</sup> The Prison Administration circular no. 3676/6126 of 2 October 2017, article 16(4).

<sup>42</sup> During the first visit to L'Aquila prison (May 5, 2017) the Guarantor observed that the wall behind the family members, fully visible to the detainee, were engraved or written various messages of greeting or other. This is surprising considering that at the prison even cookies are removed from their single package in the event that the package itself has any inscription from the production factory, and are put back into anonymous containers. So much specific attention could have been more usefully devoted to preventing people from communicating during interviews simply by writing on walls. Having noted the absolute absence of any report on the matter (relating to writings that had already been in existence for two years), the Guarantor confidentially brought the matter to the attention of the Prison Administration Department and, indeed, found that the wall had subsequently been repainted. However, it would be useful to report the episode here because it is indicative of how meticulous attention to detail can sometimes lead to inattention to problems of a more general nature.

<sup>43</sup> "Regulation of civil unions between persons of the same sex and ruling on cohabitations".

<sup>44</sup> *Ibidem*, Article 16.

<sup>45</sup> *Ibidem*, Article 16.2(4).

procedure, he hopes that, in a completely extraordinary way and in cases of proven necessity, alternative procedures can be found which allow the detained persons not to lose that thread with their parents or relatives.

Still on the subject of interviews with family members, it is not uncommon for prisoners to complain that they have been refused permission to receive visits without justification. The National Guarantor points out that any judicial act of refusal must be motivated specifically and not generically and that this justification must be made known to the applicant.

With regard to the interview rooms for lawyers, the National Guarantor noted that the confidentiality of the interview itself is not always guaranteed: at Novara prison, for example, the glass does not isolate the sound that is therefore audible from the outside, while in that of Spoleto it was reported that, in the absence of a dedicated room, talks with the legal advisor take place in the same premises in which they conduct those with family members, that is, with the separation glass and in rooms equipped for video recording and listening. Since it is obviously not possible to listen to the talks with the lawyer, the Guarantor considers it urgent that other premises be identified and made operational, in full respect of the right of defence.

It should be noted as a positive element that people detained under the special regime have, unlike in many other countries for similar regimes of very high security, access to study at university level. Of course, this activity is subject - like all the others - to the limitations of the regime itself, but there are several people who over the years have continued or completed their studies until they obtained their degree.

In light of the widespread use of information technology for justice purposes, such as video conferences, the Guarantor invites to expand this use to encourage study and reading, overcoming the distrust towards prisoners that seems to permeate the prison administration. The use of electronic book readers - in a clearly off-line mode that is easily and scrupulously 'closed' - would allow to meet requests for greater access to books without entailing a relapse on staff to check that messages are not hidden within the texts. It is a matter of making that change of mentality that is essential to better manage the opportunities offered by technological innovation, such as, for example, the use of video calls requested by the Head of the Department of Prison Administration in the circular on the *Guidelines* of December 5, 2018.

23

### B. 3. Outside the rooms

It has been reiterated several times in this Report that any executive modality must "be understood in the sense that it is forbidden to adopt restrictive measures concretely involving treatment contrary to the sense of humanity, or such as to completely frustrate the re-educational purpose of the sentence"<sup>46</sup>; and that the special regime "does not and cannot involve the suppression or suspension of the activities of observation and individualised treatment provided for in article 13 of the Penitentiary Act, nor the preclusion of the prisoner's participation in cultural, recreational, sporting and other activities, aimed at the realisation of the personality, provided for by article 27 of said Act, which, if anything, must be organised, for prisoners subject to this regime, with appropriate procedures to prevent those contacts and those links whose risks the ministerial measure tends to avoid. The application of the 41-bis regime cannot therefore be

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<sup>46</sup> Judgment of the Constitutional Court no.376 of 26 November 1997, which refers to judgments nos. 351 of 1996 and 349 of 1993.

equivalent to recognising a category of prisoners who escape, in fact, any attempt at rehabilitation.<sup>47</sup>

It is not easy to make these indications effective. This is also in consideration of the scarce presence of educators: a presence which, if lacking in general in all the Italian prison establishments due to the scarce investment that in recent years seems to have been made on this fundamental figure also in terms of staffing forecasts, often becomes completely uncertain in the context of the special regime units. Almost everywhere, it has been observed that operators in this area were unable to access the sections, that interviews were rare and that they were completely out of any treatment plan addressing re-integration issues, even for those serving a provisional sentence. The sections often appear as ‘territories’ that are ‘free’ from the programmatic logic that must guide the project that each establishment should prepare; ‘territories’ that are daily managed only by the “*Gruppi operativi mobili*”, not always in tune with their prison police colleagues. If the “*Gruppi operativi mobili*” are to be recognised the effective knowledge of the single situations and, as already observed, the will to construct an interlocutor with the National Guarantor on the task entrusted to them, it is certainly to be underlined that an approach which sees *de facto* a ‘prison within prison’ is not acceptable and poses serious problems regarding the unity which, however, our constitutional system provides for the penal execution.

A particularly critical point is the access to the exercise yard. This access is often interpreted - and even the often cited circular lends itself, in the linguistic ambiguity that it has adopted in several places, to this misinterpretation - as opposed to the possibility of having access to the place for the socialisation common activities. Sometimes, as opposed to the study or even - as we will see - access to their judicial documents when these are produced on digital media, which can only be consulted in the common rooms.

24

The National Guarantor believes that this aspect, which is also the subject of several ruling issued by the Supervisory Judiciary, also confirmed by the Supreme Court, must be finally clarified.

As already written in its Report to Parliament 2018, the National Guarantor firmly believes that the term ‘outdoor’, which normally equals two hours a day, cannot be considered as just the cell opening, but also the access to the ‘open air’<sup>48</sup>, that is in spaces designed for this purpose to spend what are commonly referred to as ‘yard times’. It recalls, in fact, that article 10 of the Penitentiary Act makes explicit reference to the ‘open’ and that article 16 of Presidential Decree 230/2000 limits this possibility “to exceptional reasons” and states that such limitation “must be ordered by a motivated provision by the governor of the establishment, and shall be communicated to the regional Director and to the supervisory justice”.<sup>49</sup> Article 41-bis of the Penitentiary Act, in

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<sup>47</sup> *Ibidem*.

<sup>48</sup> Article 10(1) of the Penitentiary Act: «offenders who do not work outside shall be allowed a *daily exercise* of at least two ours. Only for *exceptional reasons* such a period may be reduced to not less than one hour a day». (*Italics in the quotations that follow have been inserted by the National Guarantor*).

<sup>49</sup> Article 16(3) of the Presidential Decree 230/2000: «The reduction of outdoor activities to at least one hour a day in exceptional circumstances must be limited to short periods, ordered by a motivated provision by the governor of the establishment, and shall be communicated to the regional Director and to the supervisory justice».

speaking of the limitation of the “outdoor stay” can therefore only refer to what is provided for by said article of the law and by the relative article of the Regulation.<sup>50</sup>

This interpretation, moreover, is in line with the amendment of the individual ministerial decree of application of 41-*bis* regime, which replaced, after the issue of the circular, the wording of point g), which changed in the prohibition of “outdoor permanence for periods longer than two hours a day, one of which to be spent in the library rooms, in the gym court, etc.. and in groups of more than four people”, as it was in the text of the previous decrees, to the new wording of the prohibition of “staying outdoors for periods longer than two hours a day and in groups of more than four”<sup>51</sup>, thus removing from the total number of hours the period spent in the place of socialisation. To further support this interpretation are, *inter alia*, the two provisions of the Supervisory Court of Sassari of 18 April 2017 and of Spoleto of 27 March 2018, which have accepted the complaints of persons detained highlighting the mismatch between “outside the cell” and the word “outdoor”.<sup>52</sup>

The First Penal Section of the Court of Cassation recently intervened (8 June 2018) on the subject, and rejected the appeal against the decision of the Court of Sassari - which had confirmed the provisions of the Supervisory Judge - while affirming that “the overlapping of the permanence in the open air and of socialisation constitutes an incorrect operation, since it unreasonably unites two different hypotheses, whose only common connotation (and that is, being outside the prison room) shows the aspects of irrelevance for the purposes that interest us”.<sup>53</sup> Moreover, “the stay in the open air expressly responds to the purpose of containing the negative effects of deprivation of personal liberty, so much so that the evaluations of the health and psychological services are provided for and so much so that it must last at least two hours a day and that the reduction of it to only one hour a day is made possible only in compliance with the strict condition of the existence of exceptional reasons underlying a motivated measure”.<sup>54</sup>

**11. The National Guarantor recommends that in all sections of the special regime pursuant to article 41- bis of the Penitentiary Act a two hours yard time be guaranteed to each prisoner, except in the cases provided for by article 16(3) of the Presidential Decree 230/2000 and in the procedural modalities provided for by article 10(1) of the Penitentiary Act for each person detained in respect of which such exceptional and temporally limited reduction must be adopted; further recommends that any reduction should never be set against the possibility of accessing the planned socialisation hour or other legally permitted activity.**

#### B.4. The critical issues in the execution

The analysis of the critical issues that are determined in an establishment is an important indicator to understand what the quality of life in detention is. The comparison between the data, referring

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<sup>50</sup> Article 41-*bis*, paragraph 2*quater* letter f) of the Penitentiary Act: «The limitation of daily outdoor stay, in groups composed of no more than four persons, up to two hours a day, without prejudice of the lowest limit provided by art.10».

<sup>51</sup> Minister of Justice, decree of 5 October 2017.

<sup>52</sup> Provision of the Supervisory Court in Sassari of 21 April 2017 paragraph 6: «Letter f) under examination, in fact, does not say “out of the cell”, but “outdoor”, and recalls the minimum limit provided in article 10, which unequivocally refers to as “outdoor”».

Provision of the Supervisory Court in Spoleto of 27 March 2018: «[...] the time to be spent in socialisation activities shall be granted without affecting the time dedicated to the outdoor activities».

<sup>53</sup> Court of Cassation, First penal section, ruling no.40761/2018.

<sup>54</sup> *Ibidem*.

to the same categories of critical issues, in different prison institutions allows then to understand in which they develop major problems and start an analysis of motivations and possible solutions.

It should be noted that the specific critical issues are minor in these units if they are compared with what happens in prison establishment where ordinary prison regimes are enforced. In particular, there are no attacks, and there are few cases of extreme self-harm or attempted suicide: in the period examined specifically - which runs from 1 January 2018 to 2 January 2019 - there were no suicides and there were fifteen attempted suicides, nine of which in the same institution.<sup>55</sup> However, there have been more than two hundred and fifty individual demonstrations of protest, more than half of which at L'Aquila prison, and more than four hundred collective demonstrations, two thirds of which always in this same institution. In this prison, disciplinary isolation has been used - which, given the objective situation of absolute restriction and already extremely limited contacts, is scarcely used in special regime sections - for a number of times equal to 74% of the total use of it in the 11 institutions that host special regime sections in the country. If we observe that 22.5% of the cases happened at Novara prison, we can understand how marginal is the recourse to isolation in the other 9 institutions that all together collect the remaining 3.5% of cases.

Such differences, not being able to be referred to the randomness of the single restricted persons, raise some questions on the effective homogeneity of application of the 41-bis regime and on the capacity of interlocution that is established in the single situations to attenuate the critical issues intrinsic to such a restricted regime and, at the same time, to maintain security and order in an ordered way.

Among the critical issues, the use of physical force having a restraining function should be underlined. Although it is present in not a insignificant number of events, in 98% of cases it was always addressed to a single person in prison, who was met several times by the National Guarantor, who presents a specific form of acute crisis of psychomotor agitation that requires, even at his request, a number of operators up to the moment of relaxation. In order to protect the person and the prison officers who have to intervene in such cases, the Guarantor asks if the Supervisory Judiciary and the Prison Administration are willing to continue to deal with the issue in the current modalities or if it is not necessary a less contingent reflection of a problem that presents profiles of doubtful ordinary acceptability.

For a more detailed analysis of the issue related to the concentration of critical events in two institutions, as well as for some peculiarities that may also involve others, the National Guarantor has followed during the year the different course of events and can, therefore, bring to the attention of the Prison Administration the following summary table:

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<sup>55</sup> At Milano-Opera prison.

Period: 1 January 2018 - 2 January 2019							
Institution	Self-injury	attempted suicide	Suicides	Protest	Collective protest	Coercive measures applied	Disciplinary isolation
Cuneo	8	0	0	11	32	20	0
L'Aquila	1	3	0	143	358	0	211
Novara	0	0	0	11	3	0	64
Parma	35	0	0	14	0	0	2
Rome Rebibbia N.C.	1	0	0	13	5	0	0
Sassari	1	1	0	12	0	0	0
Spoleto	0	0	0	20	1	6	5
Tolmezzo	1	0	0	5	0	0	0
Viterbo	0	1	0	5	0	0	0
Terni	0	1	0	10	21	13	3
Milano-Opera	6	9	0	33	0	0	0
<b>Total</b>	<b>53</b>	<b>15</b>	<b>0</b>	<b>277</b>	<b>420</b>	<b>39</b>	<b>285</b> <small>27</small>

The 39 applied coercive measures concerned F.V. in 38 cases, previously held at Terni prison and subsequently at Cuneo prison. The summary of the data indicates that the situation at L'Aquila prison is particularly problematic; the number of collective protests at Cuneo prison is growing.

The aspect of critical issues opens, however, to the more general question of the limit is applied to the punitive power in any democratic system, or at least in the liberal ones, by the overall consideration of the person regardless of the crime committed and his criminal potential. The National Guarantor calls for the urgent opening of a debate on the continuation or non-application of a special regime to persons who, for serious illnesses, no longer present the danger of connection with criminal organisations after which the special regime was imposed. The National Guarantor's fears, in fact, refer to the possibility that sometimes there might be a risk that the symbolic value that the permanence of the special regime takes on, even in extreme cases, will prevail - for example, as it has happened, when the person is no longer able to understand and interact.

The National Guarantor remembers that the principle of consensus or external dissent or the perception of the public opinion must never be considered when it is a matter of ensuring the individual's fundamental rights and when there is a risk of attributing a pure symbolic value to the permanence of particular conditions. Also because, as Cesare Beccaria taught more than two hundred and fifty years ago, "there is no freedom whenever laws allow that, in some cases, an individual ceases to be a *person* and becomes a *thing*: you will then see the industriousness of the powerful all addressed to bring out from the crowd some civil combinations which the law is

favourably giving to him".<sup>56</sup> If the freedom of a person, even if stained with serious crimes, becomes a *symbol* or *message* addressed to the community and not the punishment for his crimes, to the point that he no longer considers his actual conditions of understanding, the risk of having reduced it to a *thing* is not very far<sup>57</sup>.

### B.5. The discipline

As already reported, in 2018 the cases of disciplinary confinement of persons detained under special regime pursuant to article 41- bis of the Penitentiary Act were significant in number, although concentrated in only two prison establishments.<sup>58</sup> This is a relevant issue if we consider that the "exclusion from common activities for no more than fifteen days" is the most serious disciplinary sanction provided for by article 39 of the Penitentiary Act<sup>59</sup> and that the European Prison Rules recommend its adoption only in exceptional cases.<sup>60</sup> Furthermore, the fact that the persons subject to the special regime are already in fact 'isolated' for most of the day cannot be disregarded.

However, this measure is widely adopted in some establishments. The Guarantor noted, for example, that at L'Aquila prison indications concerning the prohibition of communication between persons detained in the special regime not belonging to the same group of "socialisation" are interpreted in an extremely rigid and extensive way: calling a person with his Christian name after having greeted him was considered, at the time of the visit to the prison, a violation of the prohibition of communication and therefore it was sanctioned with solitary confinement. On 6 November 2016, the same prison management had issued a notice to all the prisoners under the 41- bis regime, stating that: «As provided for by paragraph *quater*, letter *f*, article 41- bis of the Penitentiary Act 354/1975<sup>61</sup>, it is reminded to the detained population the

<sup>56</sup> Cesare Beccaria, *Dei delitti e delle pene*, chapter XX.

<sup>57</sup> These principles are at the basis of the recent judgment of the Court of Strasbourg of 25 September 2018 versus Italy (case *Provenzano v. Italia*) for breaching article 3 of the Convention, for not having considered the claimant's degraded mental conditions when the application of the 41-bis regime was to be reconfirmed for the last time on 23 March 2016, just four months before his passing away, on 13 July 2016.

<sup>58</sup> A total of 285 cases, of which 211 at L'Aquila prison and 64 at Novara prison. The data relevant to L'Aquila are particularly disproportionate: 211 disciplinary sanctions in 129 days, around 1 and ½ each day; fewer less than 1 solitary confinement every two days and 1 every three days the general protest occurred.

<sup>59</sup> «Art. 39. Disciplinary sanctions

Disciplinary infringements may only lead to the following sanctions:

- 1) warning by the prison governor;
- 2) admonition, by the governor, in the presence of members of staff and of a group of prisoners or internees;
- 3) exclusion from recreational and sports activities for not more than ten days;
- 4) isolation during the time spent out of doors for not more than ten days;
- 5) exclusion from common activities for not more than fifteen days.

<sup>60</sup> European Prison Rules (Rec(2006)2) Rule 56.1. «Disciplinary procedures shall be mechanisms of last resort» and Rule 60.5. «Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible».

<sup>61</sup> «The suspension of the rules governing treatment and of the provisions under para 2 provides for: [...] the limitation of daily outdoor stay, in groups composed of no more than four persons, up to two hours a day, without prejudice to the lowest limit provided by art. 10, para 1. Moreover, all the measures for security shall be adopted, even through logistics arrangements in the detention premises, necessary to

prohibition to communicate with members of other groups of “socialisation” also in the form of SIMPLE GREETING [*capital letters are in the notice*]. It should also be noted that failure to comply with this prohibition involves disciplinary responsibility in the case of violation». The Guarantor has however been able to observe that the prohibition of greeting with the name is not applied in all the prisons in a homogeneous manner and that only at L’Aquila prison it entailed a high number of disciplinary sanctions. Always at this institution some restricted women in the female section have reported that also other simple words spoken during the distribution of food and referring to the mere request for more food was sufficient to incur in a disciplinary sanction.<sup>62</sup>

In reaffirming its support to the purpose of the special regime pursuant to article 41- *bis* of the Penitentiary Act, as outlined by the law and the Constitutional Court, the National Guarantor shall assess whether the specific measures adopted in the daily life of the various sections are coherent and proportionate to those purposes. For this reason, it underlines the need to rigorously maintain the clear difference between the prohibition of possible communication and the prohibition of speech: the observed sanction system applied to those who greet - by name - a person not belonging to their group of “socialisation”, seems to get closer to this second hypothesis than to the necessary control over the first.

**12. The National Guarantor recommends that the practice established in some prisons to sanction, even with the suspension from the common activities, the detained person who is simply greeting another person restricted even if it happens by calling him/her by his/her name, be dismissed, unless there are founded and specific elements that lead to attribute to this gesture a different meaning from the mere greeting.**

**13. It also recommends that disciplinary procedures are always used as mechanisms of last resort and solitary confinement be used only in exceptional cases, as stated in the European Prison Rules.**

In a situation of such a restrictive regime it was stunning to find a cell in which even more severe conditions are applied and even a so-called “box”. Instead, on the ground floor of the women's section, the National Guarantor's delegation observed the presence, alongside the spaces for the common activities and the exercise yard, of an empty room with windows obscured by cartons. A room whose use recalls the so-called “box” that are not allowed if not in a healthcare environment. The National Guarantor has remarked to the prison management that an empty room devoid of any element of furniture, passages for the circulation of air and heating system, with insufficient natural light, cannot in any way be used to accommodate people even for very short times, and is potentially in violation of Article 3 of the European Convention on Human Rights. It was also reported to the National Guarantor and subsequently confirmed by the same prison governor that the section on the ground floor, once used as nursery and now abandoned, was used precisely for disciplinary isolation.

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ensure the total impossibility to communicate among prisoners belonging to different groups, to exchange objects and to cook food ». Art. 41bis-*quater* letter f) of the Penitentiary Act.

<sup>62</sup> According to what was reported to the Guarantor, and was not denied by the prison manager at the time of the visit, beyond the simple greeting it was sufficient that the person in charge of the food distribution may have pronounced the words “would you like some more?” or “Is it enough?” to incur in the disciplinary sanction. On the same restrictive and punitive type of reaction, some other incidents caused disciplinary sanctions for trivial reasons, as it was the case of a woman who was sanctioned for not having withdrawn a very expensive face cream, because she did not have enough money to buy it.

Searches on people under the special regime are clearly different and more frequent than those applied on the common prison population detained in other prison units: each time they enter or leave the cell they are searched with *metal detectors*. In some prisons, the Guarantor has observed that people must also lift their feet to allow the control of the shoe soles - a practice that is considered by some to be particularly humiliating, as it refers to the procedures for horse shoeing. This procedure is also the subject of a conflict between some prisoners who refuse to have their shoe soles checked, with consequent continuous disciplinary measures and solitary confinement sanctions. The Guarantor renews the request to verify the unavoidability of this method during searches in and out of the room; indispensability that appears challenged by the fact that in some prisons have been identified different effective methods, which were perceived as more respectful.

The National Guarantor, recalling the need to reduce possible internal conflicts, hopes that forms will be identified that ensure the control of the shoe soles without it becoming a behavior perceived as humiliating by the people subjected to it.

Especially serious appears to be the practice observed in two prison institutions where searches were carried out with the person fully undressed and in some cases, they were also asked to squat, not based on a specific situation or following a motivated provision, but almost as a routine.<sup>63</sup>

The Constitutional Court, on the subject of strip searches involving the full removal of clothes, stated<sup>64</sup> that they should be considered as a last resort (even if they do not entail squats), both in terms of frequency and of the existence of alternative control instruments, and called for a progressive reduction of such searches, until they are completely replaced. In addition, the judgement of 23 April 2014 of the Court of Cassation<sup>65</sup> found illegitimate strip searches involving the systematic full removal of clothes imposed on a person detained under special regime pursuant to Article 41-bis of the Penitentiary Act. Finally, the National Guarantor notes that Rule 54(6) and (7) of the European Prison Rules prohibit prison staff from carrying out any physical examination, specifying that during searches, the cavity searched may only be entrusted to medical staff.

30

**14. The National Guarantor recommends to carry out searches with full removal of clothes only and exclusively in exceptional cases when there is a "well-founded suspicion" about the possession of objects that are not permitted or dangerous for the order and safety of the prison institution and not detectable otherwise. Said searches shall not be carried out in a systematic way and shall always guarantee the right to privacy and discretion, avoiding exposing the person involved to the looks of prison officers who are not required to be present in full compliance with rule 54.4 of the European Prison Rules (Rec (2006) 2). They shall never be routinely implemented.**

## C. FURTHER RIGHTS

The space of the effective exercise of the fundamental rights of the person is extended up to the limits established by the security requirements that are at the base of the special detention regime, as we have remembered in the previous paragraphs of this Report, and according to the

<sup>63</sup> Some women detained at L'Aquila prison declared that the strip search was taking place in a room on the ground floor of the section, close to the dress storage and before many women prison police officers.

<sup>64</sup> Constitutional Court, ruling of 15 November 2000 no. 256.

<sup>65</sup> Court of Cassation, First penal section, judgement no. 20355/2014 of 23 April 2014.

precise indications dictated from the jurisprudence of the Constitutional Court which are substantiated in the statement that the measures adopted "cannot consist in restrictions of the personal freedom further than those already inherent in the detention" and "different from those attributable to the purpose of order and security of the ministerial provision with a relationship of congruity".<sup>66</sup>

In this context, some restrictions found by the National Guarantor in various prison establishments proved to be even more rigorous than the rules dictated by the circulars of the Prison Administration Department and, in particular, the last of 2 October 2017, no. 3676/6126. They appear to be unjustified and, in some cases, of a particularly afflictive tenor because they affect the exercise of some fundamental rights such as the right to defense, to information, to health, to privacy in situations and personal facts.

### C.1. The documentation of their judicial documents

The full exercise of the inalienable right of defense cannot ignore the direct access by the detained person to the judicial documents and their complete knowledge.

As is well known, the judicial events affecting the persons subjected to the regime referred to in Article 41 - *bis* of the Penitentiary Act, naturally concerning facts of organised crime, are accompanied by a compendium of acts of particular extent. Moreover, the direct reading of the acts constitutes an essential and indispensable element of the exercise of the right of defense for every person involved in a trial; but it is particularly so for those who are subject to the possibility of participation in the audiences only by videoconference and to the objective difficulty of dialogue with the defenders due to their general distance from the places of detention, typical of the special detention regime.

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The large size of the procedural acts involves, in most cases, the fact that they are reproduced on computer-readable devices, rather than in paper: the availability of such digital media, reading tools and, finally, time for consultation that is not removed from those intended for the enjoyment of other fundamental rights - such as those of socialisation or permanence in the open air - they necessarily integrate the exercise of the right of defense in its overall complexity.

On the contrary, the National Guarantor found, in the practices of some prison institutions, limitations that were challenging the enjoyment of this right. In some cases, the lack of availability of reading devices, clearly with no internet connection, envisaged, in accordance with the aforementioned circular of 2 October 2017, for cases in which it is necessary to view the documents for a longer time than that available for the use of a desk computer outside the detention room<sup>67</sup>; in others the calculation of time dedicated to the consultation of documents on the desk computer placed in a special room to be reduced from the time dedicated to socialisation activities or to yard time.<sup>68</sup>

With respect to these practices, the National Guarantor can only express its disagreement and, consequently,

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<sup>66</sup> Constitutional Court, ruling no.376/97 and recalls to previous judgements nos.349/1993, 410/1993, 332/1994.

<sup>67</sup> Article 14.1(5)(6)

<sup>68</sup> This practice has been implemented, for example, at Sassari prison and the National Guarantor has recorded during its visit conducted in November 3-4, 2017.

**15. recommends all practices that restrict the consultation of procedural documents be interrupted and the possibility of consultation be ensured to persons detained under special regimes by providing them with technological reading devices in accordance with Article 14.1 paragraphs 5 and 6 of the Prison Administration circular note no. 3676/6126 of 2 October 2017 and in any case excluding any overlap between the time dedicated to the reading from a desk computer with the time reserved for other activities taking place outside the detention room.**

### **C.2. The right to information and the preclusions imposed**

Within the wide scope that refers to the exercise of the right to information, there are situations that are connected with the right of defense, as they include the trial proceedings of the prisoner.

The National Guarantor, although aware of the restrictions on the purchase of the local newspapers, established in article 19 of said circular, cannot avoid but to point out that some practices established by the circular note are strongly questionable, through the broad implementation of prohibitions and censorships which even overcome those there provided.

It has been reported, in fact, that in some prisons<sup>69</sup> persons who are in special regime are not provided with press articles or publications that are not directly dealing with the prisoner or their case, but which have an overall reference to the fight against organised crime or the cultural and social context in which it develops: this also determines the elimination of essayistic contributions, pages of the daily and weekly newspapers that somehow configure the set of elements that the constitutional right to information is safeguarding.

**16. The National Guarantor recommends that preclusions in purchasing and having availability of the press and of publications be not extended in such a way as to affect the effective access to information.**

32

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### **C.3. The right to health**

The primary quality of health protection is such that it does not allow exceptions of any kind, even remembering that the Constitution, in its clear and complex lexicon, uses the adjective "fundamental" only to imply this right in its article 32. The question, however, invests not only the guarantee of adequate health care but also the implementation of general conditions of health in detention.

With regard to this second aspect, the remarks and recommendations already proposed in the paragraph of this Report relevant to the material conditions of the units accommodating prisoners subjected to the 41- bis regime<sup>70</sup> and the fact that structural problems, such as obstacles to views or insufficient access to air and light in the detention rooms and spaces, have a greater impact on the overall structure must be kept in strict consideration of the individual's health the more he has to deal with very long sentences, as is the case of the prisoners we are dealing with.

With regard to the first aspect and, therefore, to the need for the sections assigned to the special regime to be provided with a health care service adapted to the general and particular needs of the detainees, it should be noted that the general principles and criteria dictated by article 11 of the Penitentiary Act, even in its new and recent formulation, are naturally extended to the entire prison population whatever its specific classification and applied regime: after all, the same circular of the Prison Administration Department includes and confirms the guarantee of

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<sup>69</sup> For example, at Tolmezzo prison, according to what has been recorded during the visit conducted on 13 July 2018.

<sup>70</sup> See above Recommendation no.9.

essential and indispensable health care units, while adapting their realisation to the particular security needs.<sup>71</sup>

In this framework of principles, it is totally discordant the practice, found in some prison institutions, not to give rise to the translation of the person detained in external places of care, or to delay it, due to the unavailability of personnel to be applied to the custodial service.

This critical aspect is manifested in more serious terms in the territories lacking of *Intensive Care Services* (*Sai*) for persons detained under special conditions: this is the case in Sardinia, where there is no *Sai* to be used to protect their health<sup>72</sup>, since that at Sassari prison - originally structured for this detained population - has recently been transformed into a psychiatric observation center and the only other *Sai* in the Region, which is located at Cagliari-Uta prison is reserved for the medium security prison population. Here, therefore, the two combined shortages, that of dedicated staff for the surveillance in external healthcare places and that of a *Sai* for the particular detention regime, determine the substantial absence of an adequate health care service for people subjected to the 41- *bis* regime. The National Guarantor, therefore

**17. recommends that *Intensive Care Services* (*Sai*) be immediately activated in the prison institutions and local areas where they are still missing. They shall be organised to respond to the needs of health protection of people held under the 41- *bis* regime, through the sign of necessary protocols with local health authorities. It also recommends that the implementation of transfers to external places of care for people in need of diagnostic examinations or treatments that cannot be carried out in prison be strictly observed.**

33

#### **C.4. The right to privacy**

The particular demands of security and surveillance dictated by the 41- *bis* regime must find compatibility lines with the protection of personal privacy, particularly when they deal with situations involving the individual's privacy. First of all, it shall refer to the need to preserve some parts of the cell from the direct sight of others: this need has not been observed where cameras are placed in the sanitary services of cells as observed in the "reserved area" at Rome Rebibbia prison.

Furthermore, the person's right to privacy must be a guiding criterion in the execution of body searches, as dictated by the European Prison Rules<sup>73</sup> (Rec (2006) 2).

In this context, the National Guarantor, feels completely incompatible with the right to privacy and, at the same time, the full exercise of the right to health protection, the presence of prison police officers during medical visits as a standard practice and not as a consequence of a specific request from the doctor in an equally specific and detailed case. This practice, found in several visited establishments<sup>74</sup>, is carried out either with the direct presence in the room in which the visit takes place or with the presence on the door of the room so as to allow anyway to hear the conversation between the patient and the doctor. Remembering that visual control is allowed and auditory control is forbidden, except in specific exceptional cases and at the request of health personnel, the National Guarantor requests that this practice be dismissed urgently,

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<sup>71</sup> Articles 23, 23.1, 24.

<sup>72</sup> Report to the regional visit in Sardinia, 3-10 November 2017.

<sup>73</sup> Rule 54.4: Persons being searched shall not be humiliated by the searching process.

<sup>74</sup> At Cuneo prison, at Parma prison and its *Sai*, at Rome Rebibbia prison, at L'Aquila prison, at Sassari prison.

both to protect the privacy of the person and to protect the State compared to possible international sanctions on this point.

The serious damage to the relationship of trust between doctor and patient, consequent to this practice, constitutes a further reason for making the described methods of surveillance absolutely unacceptable.

The Guarantor reiterates that the measures must necessarily protect all the actors involved: the doctor, the custodial staff, the other operators, the detained persons. With even more disappointment, he was able to see that this practice was implemented in some prison institutions also during psychiatric visits. In this regard, he recalled that serious situations that had occurred a few years ago in a prison, which were clearly censured by the President of the local Supervisory Court, had led Italy to the risk of condemnation by the Court of Strasbourg.<sup>75</sup>

With regard to the different aspects that affect the protection of the right to privacy, therefore:

**18. the National Guarantor recommends that:**

- **the cameras located in the bathrooms of the detention rooms are deactivated or at least screened in order to guarantee the confidentiality in the performance of their physiological functions ;**
- **medical examinations are carried out in compliance with the principles of confidentiality and protection of the relationship between doctor and patient, excluding the presence or proximity of prison staff unless in circumstantial cases and following a specific and equally detailed request by the health care professional providing for external and exclusively visual control methods, as it can be achieved by providing the doors of the doctor's room with a window.**

34

In addition to providing descriptive elements that may be useful to the Department of Prison Administration responsible for the structures visited, this Report aims to provide elements of analysis for the improvement of the conditions of implementation of deprivation of personal liberty and the conditions of those who work in this delicate sector. The Report therefore contains analyzes and recommendations, pursuant to Article 7, letter f, of Decree Law 146/2013, converted into Law 10/2014.

The National Guarantor asks that these recommendations be answered, indicating the actions taken, those envisaged or arguing those not initiated, within thirty days of receipt of the Report. It will be the responsibility of the Central Administration to transmit to the Local Authorities the Report, highlighting the parts that indicate actions of local competence.

On the specific subject of this Report, the National Guarantor renews its willingness to continue with the "Working Table" long since started with the Penitentiary Administration.

**In presenting the Report, the National Guarantor recalls that every visit and every intervention represents an element of collaboration with the Institutions and takes the opportunity to underline once again the profitable collaboration of the Office with the Administrations involved. The Report will be made public on the website of the National Guarantor without any**

<sup>75</sup> Reference is made to the Supervisory Court in L'Aquila in 2014.

**indication of names not earlier than thirty days from the sending to the Administrations responsible. Any comments and responses received will also be made public, together with the Report.**

Rome, 7 January 2019

Mauro Palma