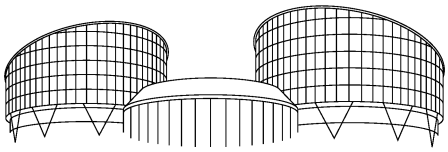

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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THE EUROPEAN COURT OF HUMAN RIGHTS' CASE-LAW AND ITS CONSEQUENCES

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A. INTRODUCTION

- **Objective of the Recommendation (CM/Rec(2014)3)** of the Committee of Ministers to member States concerning dangerous offenders of 19 February 2014 ("the Recommendation"): strike the right balance between the protection of **public safety** and the **fundamental rights of offenders**

- In the past years, the European Court of Human Rights in Strasbourg (hereafter: the **Court** / the ECtHR) had to deal with a number of cases concerning **dangerous offenders** and measures taken by the Contracting States to the European Convention on Human Rights (hereafter: the **Convention** / ECHR) in their respect

- The cases before the Court concerned a large **variety of situations** and different fundamental rights protected by the Convention. However, **in essence**, the Court always had to decide on the same question: whether the States, in the case before it, had struck the right **balance** between the protection of **public safety** and the **fundamental rights** as protected by the Convention of the dangerous offenders concerned. By respecting the rules laid down in the Recommendation, States are in a position to **strike that balance in a fair manner** and may avoid being found in breach of the Convention.

- The Court's case-law lays down the **minimum standard of protection** of human rights which all States which are parties to the Convention must respect. That case-law appears to have **inspired** some parts of the **Recommendation**. Likewise, the Recommendation may be drawn upon by the Court in the **future** in order to support the Court's reasoning. (Until now, the

relatively new Recommendation does not yet appear to have been cited in the Court's case-law). As a legal instrument, the Recommendation enumerates **more conclusively** the applicable principles on detained dangerous offenders than the case-law of the Court, which decides on specific aspects on a **case-by-case basis**.

- Against that background, it appears useful, in the context of the application in practice of the Recommendation, to bear in mind the **minimum standards** set by the Convention **in various fields covered by the Recommendation**. I shall therefore present to you a number of **key principles** developed in several more recent judgments of the **ECtHR** concerning **dangerous offenders** which may be of interest in that context.

I shall **structure** my **presentation** as follows:

1. Dangerous offenders and Convention standards in general: States' **positive obligation to protect** society against dangerous offenders and dangerous **offenders' Convention rights**

2. Convention standards concerning **preventive detention**

3. Convention standards on **risk assessment and risk management**

4. Convention standards concerning **conditions of imprisonment**

5. Conclusion

B. DANGEROUS OFFENDERS AND CONVENTION STANDARDS IN GENERAL: STATES' POSITIVE OBLIGATION TO PROTECT SOCIETY AGAINST DANGEROUS OFFENDERS AND DANGEROUS OFFENDERS' CONVENTION RIGHTS

- Question of **law-making policy** arising in all 47 State parties to the Convention: How should society be protected from convicted offenders who are **highly likely to reoffend** and must therefore be considered as **particularly dangerous**?

- How can measures for the protection of society be made **compatible with** the **offenders' fundamental rights under the Convention**, in particular the prohibition of inhuman or degrading treatment (Article **3** ECHR), their right to liberty (Article **5** ECHR), the prohibition on retrospective punishment(Article **7** ECHR) and the right to respect for private and family life (Article **8** ECHR)?

- States have to comply with standards set by the Convention in **two respects** when dealing with dangerous offenders: One the one hand, they have to comply with their **positive obligation** under the Convention **to protect society** from criminal acts committed by dangerous offenders; on the other hand, they have to **respect** the **fundamental rights** laid down in the Convention **of the dangerous offenders** concerned

-> a **balance** has to be struck between these conflicting rights

I. The States' positive obligation to protect society from dangerous offenders

1. What is a positive obligation under the Convention?

- **Positive obligations relevant** for dealing with dangerous offenders mainly arise in the context of **Article 2** of the Convention, which protects the right to life, and **Article 3** of the Convention, which lays down the prohibition of torture and of inhuman or degrading treatment

- **"Negative" obligation:** States may **not**, by acts carried out by their **officials**, **interfere** with and violate the right to life or the prohibition of torture;

- **"Positive" obligation: obligation to protect** the **life** (Article **2** ECHR) and the **physical integrity** of individuals (Article **3** ECHR) under their jurisdiction and thus guarantee security;
More precisely, the States must protect individuals against **acts** committed **by other private individuals** who – by criminal offences against life or serious violent or sexual offences – affect the right to life or the prohibition of torture of the victims (*Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII)

2. The ambit of States' positive obligations with regard to dangerous offenders

- States must take **"appropriate steps"** to safeguard the life and physical integrity of those within its jurisdiction (*Osman*, cited above, § 115; *Mastromatteo v. Italy* [GC], no. 37703/97, § 67, ECHR 2002-VIII; and *Opuz v. Turkey*, no. 33401/02, § 159, ECHR 2009-...)

- comprises also obligation to afford **general protection to society / not yet identified members of the public** against the potential acts of one or of several persons serving a prison sentence for a violent crime (*Mastromatteo*, cited above, §§ 69, 74)

- The **scope** of this obligation has been described, in particular, in the case of ***Maiorano and Others v. Italy*** (no. 28634/06, § …, 15 December 2009) (*which was referred to in the programme to this seminar*):

- **Facts:** In 1976 one Mr I. was sentenced to **life imprisonment** for the abduction, rape and brutal abuse of two young women and the **murder** of one of them. Despite his involvement in numerous incidents in prison, which led to further convictions, including an escape attempt with hostage-taking and an escape following prison leave, in November 2004 the sentence-execution court granted him **day release**. That decision was taken on the basis of an expert **psychiatrist's report** and probation officers' reports that were favourable to him. While on day release, the authorities were informed that Mr. I. had engaged another person to kill a judge and proposed to others to participate in **criminal**

activities, but failed to react. Mr I. then **murdered** the wife and daughter of one of his former fellow prisoners.

- **Court: Breach** of the State's positive obligation under **Article 2 ECHR** to protect life, in the **particular** circumstances of the case, by the State's decision to **grant** Mr I. **day release**, combined with **failure to inform the sentence execution courts** of his failure to respect the conditions imposed for the day release

  -> Scope of the States' **positive obligation** *(see PP slide)*: it must be established that the authorities knew or **ought to have known** at the time of the existence of a **real and immediate risk** to the life of other persons from the criminal acts of a third party and that they **failed** to take measures within the scope of their powers which, judged **reasonably**, might have been expected to avoid that risk (*Osman*, cited above, § 116; *Maiorano and Others*, cited above, § 109)

  -> Court stressed that in principle, even though prison sentences serve to protect society from dangerous offenders, their gradual **reintegration into society** by, for instance, **prison leave is a legitimate aim** pursued by States (see *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 72-73, ECHR 2002-VIII; *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, ECHR 2012)

-> State's duty to **thoroughly examine the dangerousness** of the detainees concerned (see *Maiorano*, cited above, § 115), which is also stressed in **Part III** of the **Recommendation**

- The *Maiorano* case is an **exceptional** case in which a State was found in breach of the Convention for having granted a dangerous offender too many liberties and thus not having sufficiently protected the society; in the **large majority** of cases concerning dangerous offenders in which the Court has

found breaches of the Convention, it found those breaches because the States had **restricted the rights of dangerous offenders** in a way **incompatible** with the offenders' **Convention** rights

II. Limit on States' measures concerning dangerous offenders: Dangerous offenders' Convention rights

- The scope of the States' positive obligation under Article 2 and 3 ECHR to protect society from dangerous offenders by repressive or preventive measures is **delimited by the Convention rights of the offender** concerned

- The Court stressed that under the Convention, State authorities had a positive obligation to take reasonable steps within the scope of their powers to prevent threats to the life or ill-treatment of other persons of which they had or ought to have had knowledge. However, the **Convention does not permit a State to protect** individuals or the society from criminal acts of a dangerous offender **by measures which are in breach of that offender's Convention rights** (see, *mutatis mutandis*, *Osman*, cited above, § 116; *Opuz*, cited above, § 129; and *Jendrowiak v. Germany*, no. 30060/04, § 37, 14 April 2011).

-> States therefore **cannot invoke their positive obligation** to protect potential victims from offences in order **to justify**, for instance, a deprivation of liberty which does not comply with any of the grounds for justification under **Article 5** ECHR

C. CONVENTION STANDARDS CONCERNING PREVENTIVE DETENTION

- The **Recommendation**, in its **Part II (§§ 16-22)**, contains specific provisions on **secure preventive detention**, that is, as defined in the Recommendation, detention imposed by the judicial authority on a person not merely because of an offence committed in the past, but also on the basis of an assessment revealing that he or she **may commit other very serious offences in the future**. That detention is to be served during or after the fixed term of imprisonment.

- A number of (Western-European) States[1] traditionally have such a system of preventive detention and some States have **recently introduced** it or are **considering the introduction** of such a system

-> Regard **Convention standards** in that field

- Series of applications against Germany concerning preventive detention; in particular leading case of ***M. v. Germany*** (no. 19359/04, judgment of 17 December 2009) (*equally mentioned in the programme to this conference*)

[1] December 2009: Germany, Austria, Switzerland, Liechtenstein, Denmark, Italy, San Marino and Slovakia.

I. Leading case on preventive detention: *M. v. Germany*, no. 19359/04, judgment of 17 December 2009

- Case raised the question of the compatibility of the applicant's preventive detention with **Article 5 § 1 ECHR** (right to liberty) and **Article 7 § 1 ECHR** (prohibition of retrospective punishment)

- Facts: The applicant was convicted of attempted murder and robbery in 1986. He was sentenced to **five years' imprisonment** and his **preventive detention** was ordered. At the time the applicant committed his **offences,** the statutory maximum length of enforcement of a (first) preventive detention order was **ten years**. That maximum duration was subsequently abolished with retrospective effect; preventive detention from then on had no longer a maximum duration. The German courts responsible for the execution of sentences then ordered the continuation of the applicant's detention also beyond the former ten-year time-limit as they considered that the applicant was **still dangerous** to the public.

- Complaint: Retrospective extension of the applicant's preventive detention **beyond the ten-year period**, which had been the maximum for such detention under the legal provisions applicable at the time of his offence, violated his **right to liberty** (Article 5 § 1 ECHR) and the **prohibition of retrospective punishment** (Article 7 § 1 ECHR)

- Court: Violation of both **Article 5 § 1 and Article 7 § 1** ECHR

• **<u>Article 5 § 1</u>:**

- **sub-paragraph (a)** allows the *„lawful detention of a person **after** conviction by a competent court"*

- The Court found that the applicant's preventive detention **up to the ten-year point** was justified as lawful detention after conviction within the meaning of Article 5 § 1 (a).

However, **beyond the ten-year point**, the applicant's preventive detention was in breach of Article 5 § 1 (a). The order of preventive detention in 1986, under the clear legal provisions then in force, meant that preventive detention against the applicant **could not be executed for more than ten years**, irrespective of whether he was still dangerous to the public.

-> detention no longer **"after conviction" after ten-year period, that is,** the necessary **sufficient causal connection** between criminal conviction in 1986 and preventive detention beyond the ten-year point no longer existed

- Applicant's preventive detention could also **not** be **justified** under any of the **other sub-paragraphs of Article 5 § 1**

• **<u>Article 7 § 1</u>:**

- prohibits (in its second sentence) that a "***heavier penalty** be imposed than the one that was applicable at the time the criminal offence was committed"*

- The measure imposed on the applicant was “heavier” in that his detention was **prolonged with retrospective effect** by the order for his continued detention beyond the former statutory maximum duration of ten years

- Preventive detention was to be classified as a **“penalty”** to which the prohibition on retrospective punishment applied, even though under German law, preventive detention was considered as a merely preventive measure and not as a penalty: It is a **sanction following conviction** of a criminal offence, ordered and prolonged by the **criminal courts,** a **severe measure** in that the detention is of indefinite duration and in practice (at the relevant time) it was executed simply in separate departments of **prisons**

- Court criticized in that context that there were **no special measures aimed at keeping the duration** of preventive detention **at a minimum**. It considered that the “*achievement of the objective of crime prevention would require, [as stated convincingly by the (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment) CPT …,] ‘a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option’”* (*M. v. Germany*, cited above, § 129)

-> This case-law is reflected in **§§ 20 and 21 of the Recommendation**, under which persons “held for preventive reasons should be entitled to a **written plan** which provides opportunities for him or her **to address the specific risk factors** and other characteristics that contribute to their current classification as a dangerous offender” (§ 20). Furthermore, “[t]he **aim** of

the relevant authorities should be the reduction of the restriction and **release** from secure preventive detention in a manner consistent with public protection from the risk posed by the offender" (§ 21).

-> **Consequence of the Court's case-law:** In order to comply with the right to liberty and the prohibition on retrospective punishment, **preventive detention may not be introduced (or prolonged) with retrospective effect**. It may only be applied to offenders who committed their offence after the introduction / prolongation of preventive detention.

II. The implementation of the *M. v. Germany* judgment and the Court's judgment in the case of *Bergmann v. Germany*

- German **Federal Constitutional Court**, in a **leading judgment of 4 May 2011** (file nos. 2 BvR 2365/09 and others), reversed its previous case-law in the light of the Court's findings in *M*. It found that **all provisions** of the Criminal Code on the **imposition of preventive detention** were **incompatible** with the fundamental **right to liberty** of persons in preventive detention as those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment.

- The **legislator** thereupon profoundly **revised the provisions on preventive detention (by the Preventive Detention (Distinction) Act)**. Since June 2013 most persons in preventive detention are being detained in newly constructed

centres for persons in preventive detention. The material conditions now substantially differ from the conditions of detention in ordinary prisons. Detainees are placed in **individual apartment units** and, in particular, **extensive possibilities for psychiatric, psychotherapeutic or socio-therapeutic treatment** aimed at reducing the risk the detainees pose to the public are being provided.

- The Court had to rule for the first time on the compatibility with the Convention of a convicted offender's preventive detention for therapeutic treatment purposes under the new legal framework governing preventive detention in Germany in its recent judgment of 7 January 2016 in the case of ***Bergmann v. Germany***, no. 23279/14.

- Just as the case of *M. v. Germany*, the case of *Bergmann* concerned the retrospective prolongation of Mr Bergmann's preventive detention **beyond** the maximum period of **ten years** permissible at the time of his offences.

- The Court **welcomed** the extensive **measures** which have been taken in the defendant State on judicial, legislative and executive levels with a view to adapting preventive detention to the requirements, in particular, of the fundamental right to liberty (*Bergmann*, cited above, § 123).

- The Court found that preventive detention under the new legislative framework in Germany, **as a rule**, **still** constituted a **"penalty"**, which may not, therefore, be imposed or prolonged retrospectively (*ibid.*, § 181). However, in the specific circumstances of the ***Bergmann*** case, where the measure was extended because of and with a view to the need to treat his **mental disorder**,

his detention was no longer to be classified as a “penalty” and thus compatible with Article 7 § 1 ECHR; it was further justified as detention of a person “of unsound mind” under Article 5 § 1 (e) (*ibid.*, §§ 151-183 and 103-134).

D. CONVENTION STANDARDS ON RISK ASSESSMENT AND RISK MANAGEMENT

- The Recommendation contains a number of rules on **risk assessment and risk management** in relation to dangerous offenders in its Parts III and IV (§§ 26-39)

- **Court** equally developed a number of **principles** relating to risk assessment and management in its case-law

I. Necessity under the Convention to carry out risk assessment and risk management

- Dangerous offenders, as defined in Part I (§ 1 (a)) of the Recommendation, have been convicted of **very serious sexual or very serious violent crime**. The domestic courts will therefore regularly have sentenced them to long terms of imprisonment, including **life sentences**, which serve, amongst others, the legitimate aim to protect the public from these offenders (see *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 108, ECHR 2013 (extracts); *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 195, 18 March 2014)

- However, even a life sentence cannot make the **risk assessment** as described in the Recommendation unnecessary. The necessity to carry out risk assessment and management notably cannot be circumvented by simply

imposing **whole life sentences** on dangerous offenders without any possibility to be released

- The Court has repeatedly found that a life sentence may breach Article 3 of the Convention (prohibition on torture and inhuman or degrading punishment) if there is no **possibility *de facto* or *de jure* to be released**. The Court considered that the loss of any hope to be released from prison one day created mental suffering in breach of that provision (*Kafkaris v. Cyprus* [GC], no. 21906/04, § 98, ECHR 2008; *Vinter and Others*, cited above, §§ 108, 113; and *Öcalan*, cited above, § 197).

- Therefore, **Article 3 ECHR** must be interpreted as requiring **reducibility of the life sentence**. There must be a **review** of the sentence which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that **continued detention can no longer be justified on legitimate penological grounds**, including their dangerousness (*Vinter and Others*, cited above, § 119; and *Öcalan*, cited above, § 198)

- The Court found that the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than **twenty-five years** after the imposition of a life sentence, with further periodic reviews thereafter (*Vinter and Others*, cited above, § 120; *Öcalan*, cited above, § 198)

- Moreover, the Court may consider the continuation of (preventive) detention of dangerous offenders to be in breach of their right to liberty under Article 5 § 1 ECHR if those detainees, in view of their **advanced age and/or state of**

health, could no longer **reasonably be considered as dangerous** to the public. It is necessary, in such circumstances, for the domestic authorities to **show**, with the help of **advice of external medical experts**, that the applicant was still dangerous (see *Schönbrod v. Germany*, no. 48038/06, §§ 94-97, 24 November 2011; *Bergmann*, cited above, §§ 130-132).

II. Convention requirements concerning risk assessment and risk management

- Recommendation notably requires that risk assessment should be conducted in an evidence-based, structured manner, incorporating appropriate **validated tools** and **professional decision making** (§ 28). Furthermore, assessments undertaken during the implementation of a sentence should be **periodically reviewed** to allow for a dynamic re-assessment of the offender's risk by **appropriately trained staff** (§ 30). Assessments should be coupled with **opportunities** for offenders to **address their special risk-related needs** and change their attitudes and behaviour (§ 31).

- **Court** had the occasion to rule on some of these aspects of risk assessment:

1. Necessity to obtain sufficient expert advice

- Under the Court's case-law, the domestic courts must base their decision to prolong the detention of a dangerous offender on **sufficient and up-to-date medical evidence**.

- In the case of ***H.W. v. Germany*** (no. 17167/11, §§ 103-116, 19 September 2013) the Court found, for instance, that the domestic court's order to prolong the preventive detention of the applicant, who had been convicted of serious sexual offences, had violated the applicant's **right to liberty** under **Article 5 § 1 ECHR**. The Court noted that more than **12 years** had passed since the German courts had last assessed the applicant's dangerousness with the help of medical expert advice. It had been necessary to obtain a **new report of an external psychiatric expert** in order to determine whether the applicant remained dangerous.

- see also ***Ruiz Rivera v. Switzerland***, no. 8300/06, §§ 61-66, 18 February 2014: no sufficiently recent report of independent medical expert to decide on the continuing detention of a person considered as being of unsound mind in prison

2. Obligation to provide for sufficient treatment

- In the case of ***H.W. v. Germany*** (no. 17167/11, § 112, 19 September 2013) the Court further recalled that a decision not to release a detainee as he still posed a threat to the public could become inconsistent with the objectives of an order for preventive detention and thus breach **Article 5 § 1 ECHR** if the

person concerned was deprived of the means, such as **suitable therapy**, to demonstrate that he was no longer dangerous (see also *Ostermünchner v. Germany*, no. 36035/04, § 74, 22 March 2012).

3. Obligation to comply with time-limits for judicial review

- The Court, in the said case of ***H.W. v. Germany*** (no. 17167/11, §§ 74-91, 19 September 2013) further stressed that it was vital to comply with **the statutory (then two-year) time-limit for judicial review** of the question whether the applicant's preventive detention was still necessary because of his dangerousness. It found that the order for the continuation of the applicant's preventive detention was made **27 days** after the expiry of the statutory time-limit for review. The applicant's detention had therefore not been lawful for the purposes of the Convention and had breached the applicant's **right to liberty** under Article 5 § 1 ECHR in the intervening period.

E. CONVENTION STANDARDS CONCERNING CONDITIONS OF IMPRISONMENT

- **Recommendation**, in its **Part V**, addresses **treatment and conditions of imprisonment** of dangerous offenders. It stresses that the conditions of imprisonment shall be guided by the principles contained in Recommendation Rec(2006)2 on the **European Prison Rules** (§ 40). Moreover, **security measures** should be set to the **minimum** necessary, and the level of security should be revised regularly (§ 41).

- *Does not appear to be the focus of the Recommendation; therefore only covered shortly*

- Court had to deal repeatedly with the Convention compliancy of **security measures within prison** to prevent further offences. The following issues, in particular, were dealt with:

• Question of **solitary confinement** of dangerous offenders:

Solitary confinement even of a dangerous prisoner may constitute inhuman or degrading treatment (or even torture in certain instances) in breach of **Article 3 ECHR**. **Complete sensory isolation, coupled with total social isolation** can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. However, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment **-> entire conditions of detention decisive** (see *Öcalan*, cited above, § 107; and *Ramirez Sanchez v. France* [GC], no. 59450/00, § 123, ECHR 2006-IX

– concerning the solitary confinement for eight years of a terrorist, "Carlos", considered as one of the most dangerous in the world at the time);

- **Substantive reasons must be given** when a protracted period of solitary confinement is further extended. The decision should thus make it possible to **establish** that the authorities have **carried out a reassessment** that takes into account any changes in the prisoner's circumstances, situation or behaviour. (see *Öcalan*, cited above, § 105).

- Article 13 of the Convention, which lays down the right to an effective remedy, requires, however, that there must be a **remedy** available in domestic law to allow the offender **to contest** the decision to prolong his detention in **solitary confinement** (see *Ramirez Sanchez*, cited above, §§ 160-166)

• Further security measures in prison

- for example restrictions on **visits, telephone communications and correspondence** with family members must comply with the convicted offenders' right to respect for his **family life under Article 8 § 1 ECHR**; the restrictions must be proportionate for the protection of public safety and the prevention of disorder and crime (within the meaning of Article 8 § 2 of the Convention) (see, for instance, *Öcalan*, cited above, §§ 154-164, where in view of the Turkish Government's legitimate fear that the applicant might use communications with the outside world to contact members of the PKK, the restrictions on his right to respect for private and family life had **not breached Article 8 ECHR**)

F. CONCLUSION

- The Convention does not forbid, but even obliges States in certain circumstances to **protect society** from dangerous offenders

- However, protective measures **must respect the dangerous offenders' Convention rights**, in particular their rights under Articles 3, 5, 7 and 8 of the Convention, which constitute the limit to the scope of possible State measures concerning dangerous offenders

- States' **compliance with the Recommendation** (CM/Rec(2014)3) will help them to **avoid Convention violations** in the context of measures concerning dangerous offenders