

COMBATING ILL-TREATMENT IN PRISON



Jim Murdoch
Vaclav Jiricka

A handbook for prison staff
with focus on the prevention
of ill-treatment in prison

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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The authors:

Jim Murdoch, Professor of Public Law, University of Glasgow, School of Law, United Kingdom

Václav Jiříčka, Head Psychologist, Prison Service, Czech Republic

List of Abbreviations

- ▶ **CM/Rec** Recommendation of the Committee of Ministers
- ▶ **CPT** European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- ▶ **CPT Convention** European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- ▶ **DSM** Diagnostic and Statistical Manual of Mental Disorders
- ▶ **ECHR** European Convention on Human Rights
- ▶ **EPA** European Psychiatric Association
- ▶ **FMI** “Five Minute Intervention”
- ▶ **ICCPR** International Covenant on Civil and Political Rights
- ▶ **ICD** International Classification of Diseases
- ▶ **NPM** National Preventive Mechanism
- ▶ **RNR** Risk-Needs-Responsivity model
- ▶ **SPT** United Nations Subcommittee on Prevention of Torture
- ▶ **WHO** World Health Organization

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Introduction

The focus on the prevention of ill-treatment in prison

The responsibilities placed upon prison services are considerable. Charged with securing the safety of society by incarcerating those deemed most dangerous, expected to help reform and rehabilitate those who have offended against the criminal law, and required to hold ever-increasing numbers of detainees in a prison estate that may often be in need of urgent repair, prison staff and managers are called upon to do the near-impossible: to ensure that detention conditions and prison arrangements respect the dignity of each and every prisoner.

Public expectations of what prison services will achieve are often contradictory: prison as punishment, or imprisonment in order to rehabilitate and to reform? Other considerations exist: pre-trial detainees deserve the protection of the presumption of innocence; and instead of reforming the prisoner, it is now accepted that loss of liberty inevitably carries with it negative consequences for physical and mental health as well as for employment and community ties. Prison regimes, detention facilities and health services are now expected to try to help address these consequences.

In Europe, the old adage that individuals are sent to prison *as* punishment rather than *for* punishment has now been supplemented by a further maxim: that prisoners retain all civil rights other than those that are incompatible with the very fact of loss of liberty. Prisoners retain their human rights, and the scope of these rights is increasing. For example, a plethora of decisions and judgments of the European Court of Human Rights has helped spell out the content of rights relating to communication with the outside world and

exercise of the franchise. In Europe at least, prisons are changing in how the legal system engages with the treatment of prisoners.

This text examines one particular aspect of this protection: the prohibition of ill-treatment in prison. It focuses upon what this prohibition entails, and the emergence of positive obligations and new expectations in respect of the responsibilities of prison services towards those entrusted to its care. It also examines the development of new obligations in respect of combating the impunity of those who use ill-treatment in places of detention. It seeks to provide a basic awareness of European standards, both in terms of legal obligations under the European Convention on Human Rights (ECHR) and in respect of standard-setting by allied bodies (in particular, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), but also by the Committee of Ministers of the Council of Europe). It also highlights examples of good practice in domestic systems that may be worthy of emulation elsewhere.

Working in prisons is not without significant challenge. The intention is that this text will help those concerned with this area of public provision achieve a more humane and open service. In this regard, it seeks to help realisation of Rule 81(4) of the Committee of Ministers Recommendation Rec. R(2006)2 on the European Prison Rules. This provides that “The training of all staff shall include instruction in the international and regional human rights instruments and standards, especially by ECHR and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Convention), as well as in the application of the European Prison Rules.”

This text is designed for practitioners. It provides a guide to these legal instruments and standards in an accessible way. It follows upon a multilateral meeting held in Strasbourg in spring 2015 which helped bring together management and leadership from prison services from across Europe to address issues of common concern. It was clear from the discussions during the two days of the meeting that not only do many countries face the same set of problems, but also that “good practice” does exist across Europe, and that discussion not only of these challenges but also of possible solutions can be of real assistance. Following the meeting, representatives were asked to highlight further instances of “good practice” in their countries that could be of use elsewhere across Europe. Many good ideas were highlighted. In the space available, only a handful of these could be included.

Chapter 1

European standard-setting

1.1 Introduction

European prisons are changing. Most prisons are under increasing strain from growing prison populations, exacerbated in many cases by increasing numbers of foreign prisoners. However, European prison systems are also changing, and for the better. Improved arrangements for the domestic monitoring of prisons is one clear trend. This is taking place alongside a growing awareness of the challenges (and often inadequacies) of traditional judicial approaches to the imposition of incarceration. There is also increasing domestic discussion of what prisons are for, and how they can better meet societal expectations.

At a European level, prisons are also changing in response to increasing awareness of the rights of prisoners. Protecting prisoners from ill-treatment has now become a significant aspect of human rights protection. European standard-setting is without doubt now world-leading. Two European institutions in particular can claim credit for this real progress. First, the European Court of Human Rights has given steady and now increasing protection of prisoners through its creative and progressive interpretation of the ECHR. The European Court of Human Rights is essentially a *reactive* body: it deals with complaints after the factual basis for the complaint has occurred. Second, the CPT has helped prompt this development of legal standards. In contrast, the CPT is *proactive* and preventive. The first judgment of the European Court of Human Rights was issued more than half a century ago; in contrast, the

CPT has been in existence only for some 25 years. Over time, however, the European Court of Human Rights has begun to rely upon CPT reports both as to its findings in places of detention and also its standards (in helping interpret the responsibilities assumed by States when ratifying the ECHR). The gradual fusion of CPT recommendations into legally-binding standards helps explain why European standards and expectations in prisons have moved from the basic prohibition of ill-treatment to a series of requirements covering many aspects of daily prison life. It puts the protection of the prisoner upon a new level. In doing so, however, it also can help professionalise those who work in the prison service. In particular, there is growing stress placed upon concepts such as “dynamic security” and the elevation of the work of those involved in prison healthcare.

The starting-point in all of this is the fundamental and basic principle that ill-treatment is prohibited. Key international treaties such as the International Covenant on Civil and Political Rights (ICCPR) stress that the right not to be subjected to torture or inhuman or degrading treatment or punishment is absolute. This approach is reflected at European level. According to the European Court of Human Rights, Article 3 of the ECHR “enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.¹ The text of Article 3 is succinct. The formulation of the prohibition of torture or inhuman or degrading treatment or punishment excludes any exception. As well as the essentially negative obligation – to refrain from the use of torture or ill-treatment – states undertake a number of positive obligations. In the context of prison, for example, there is an obligation to protect prisoners from the risks posed by other prisoners.

This fusion of positive and negative obligations under international law, a process influenced by the work of the CPT, has had a significant impact upon the development of standards at a European level. Further impetus has come in the form of non-binding standard-setting by the Committee of Ministers of the Council of Europe. In particular, the European Prison Rules are designed to inform and instruct those working in the field, whether as policy-makers, prison managers or prison staff.

Yet while European expectations are world-leading, it cannot yet be said that these standards have been fully realised at a domestic level. Both CPT reports and judgments of the European Court of Human Rights counteract any suggestion that it is mere occasional lapse that preclude full satisfaction; rather, the picture painted is often one of significant under-achievement on account of lack of material resources, adequate training, and political and

1. *Soering v United Kingdom* (1989) A 161, at para 88.

managerial leadership. Some shortcomings are more important than others. If anything, statistical data from the European Court of Human Rights seems to suggest that the number of cases leading to adverse judgments against states is increasing.

This is particularly so in relation to failures to investigate possible ill-treatment. The European Court of Human Rights has also interpreted Article 3 of the ECHR as imposing the obligation to ensure the provision of an effective legal framework that leads to the effective investigation of ill-treatment with a view to bringing those responsible to justice. The development of this “procedural aspect” of the guarantee against torture and ill-treatment is justified by the need to render the provision practical and effective: state officials will be less likely to resort to prohibited means if the consequences of doing so are considerable.

Before discussing these expectations and standards, however, it is helpful to outline in greater detail the three principal strands of standard-setting at a European level: the jurisprudence of the European Court of Human Rights when interpreting the ECHR; those arising from the work of the CPT; and the recommendations made by the Committee of Ministers of the Council of Europe. A final point worth noting is that other agencies are also now active in this field and playing an increasingly important role in the protection of prisoners.

1.2 The European system for the protection of persons deprived of their liberty

1.2.1 Legal obligations under the European Convention on Human Rights

In Europe, the European Court of Human Rights is the ultimate protector of human right norms, but the European human rights system proceeds upon the basis that member States are expected to provide the first line of defence. In particular, the expectation is that domestic courts should reflect the ECHR case-law in their daily determinations. This suggests a constructive interplay between domestic legal systems and the jurisprudence of the European Court of Human Rights. But the emphasis is clearly and firmly upon *domestic* implementation of human rights guarantees. Certainly, when domestic arrangements are found wanting, exercise of the right of individual application to the European Court of Human Rights may be necessary. However, when the European Court of Human Rights establishes a violation of a provision of the ECHR, the principle of subsidiarity again arises, for after it decides, the case remains very much open until the steps necessary to meet the concerns of the European Court of Human Rights have been taken by the domestic

authorities to the satisfaction of the Committee of Ministers of the Council of Europe. Thus the action to be taken is a matter for the State in conjunction with the Committee of Ministers, for the European Court of Human Rights cannot dictate to a State the specific measures it should take.

The primary level of protection for human rights is domestic. National courts are expected to ensure that European standards are reflected and applied in the decisions of national courts.

Interfering with a prisoner's right of complaint

The right of victims of violations of ECHR guarantees to make use of their rights is also protected by the European Court of Human Rights under Article 34 of the ECHR. This provides that states "undertake not to hinder in any way the effective exercise of this right". The control the state exercises over persons deprived of their liberty may allow officials the means to interfere with the right of petition, for example, through interference with a detainee's correspondence or the bringing of pressure to withdraw a complaint through the threat of imposition of sanction. Recognition by the European Court of Human Rights of the vulnerability of prisoners is evident from cases such as Coteț v Romania. Here, a violation of Article 34 was established in light of the intimidation of the prisoner, the failure of the prison authorities to provide necessary writing materials for his correspondence with the European Court of Human Rights, and both the delay in forwarding and the systematic opening of the prisoner's mail. All of this "constituted a form of illegal and unacceptable pressure which infringed the applicant's right of individual application"; a conclusion "all the more imperative having regard to the particular vulnerability of the applicant who had few contacts with his close relatives or with the outside world while in custody".²

1.2.2 Standard-setting by the CPT

A European system which relies primarily upon individual complaint to secure effective compliance with human rights has inherent limitations on account of practical difficulties such as low levels of awareness amongst individuals and over-lengthy and costly procedural machinery. The CPT Convention reflects the recognition that protection of persons deprived of their liberty is often more effectively and efficiently protected by directing attention to the fundamental causes of ill-treatment rather than through the provision of a remedy for its infliction at some later stage. The body set up by an international treaty – the CPT – achieves its goal of enhancing protection for individuals through on-the-spot monitoring and the encouragement

2. Coteț v Romania (3 June 2003), para 71.

of dialogue and discussion with state officials. Following visits to places of detention, the CPT reports its recommendations. States, in turn, are expected to respond to its observations and suggestions.

Information gathered and reports to states are confidential, but this is subject to three exceptions: first, a state may request publication of the report and any comments it may have on the report; second, if a state refuses to co-operate or to improve matters in light of CPT recommendations, a public statement may be issued by the CPT; and third, the CPT's annual ("general") reports made to the Committee of Ministers of the Council of Europe provide sufficient detail to provide some impressions of the situation of detainees in particular states. Country visit reports are now (almost) invariably published. Although CPT reports are essentially advisory, the principle of mutual co-operation found in Article 3 of the CPT Convention implies, if not necessarily a legal obligation, then a presumption that the authorities concerned will take measures to implement recommendations (a presumption reinforced by the power available to the CPT to make a public statement where there has been a refusal to do so).

While the CPT is not a judicial body, it has nevertheless developed a set of standards which it employs during visits to help assess existing practices and to encourage states to meet its criteria of acceptable arrangements and conditions. Standard-setting is designed to assist in the prevention of ill-treatment by providing a set of "measuring rods" to states which they (and the CPT during a visit) may use when assessing whether existing conditions or domestic procedures effectively achieve this goal. The justification for the development of this "corpus of standards" (as the CPT puts it) was the CPT's perception that existing European and international instruments often lacked clear guidance.³ In spite of it being a non-judicial body the CPT calls the set of its standards "jurisprudence". Such standards are promulgated in its annual ("general") reports which contain codified statements reflecting both the "case law" style accumulation of precedent found in country reports and the development of agenda concerns in the CPT's work. Subsequent refinement of earlier statements may also take place.

The CPT has now carried out more than 400 visits to places of detention. These visits may be either "periodic" (ie, as part of a regular programme of visits to places of detention) or "ad hoc" (ie, to examine a particular institution or issue that has come to the attention of the CPT). The CPT operates on the basis of cooperation with States. It has the right of unimpeded access to any place of deprivation of liberty and to interview detained persons in private. Of particular concern to the CPT is the situation where persons deprived of their liberty face intimidation or retaliatory action by

3. 1st General Report, CPT/Inf (91) 3, paragraphs 95-96.

the authorities, either in advance of or after a visit. The CPT has recently published a statement on this phenomenon, strongly condemning any such attempt to interfere with its work in this way. It has also stressed the importance of protecting officials who have acted as “whistle-blowers” in bringing matters to its attention.⁴

The importance of standard-setting by the CPT through its process of generating “soft law” is thus significant. This should not come as a surprise on account of the influence of the CPT’s authority to make recommendations and to monitor their implementation, and its reports that cover visits on a regular basis to all member States of the Council of Europe. The impact of the CPT’s “jurisprudence” upon the jurisprudence of the European Court of Human Rights in interpreting Article 3 of the ECHR has been considerable. This trend of referring to the CPT’s texts in the proceedings before the European Court of Human Rights is indeed accelerating on account of the evidential value of visit reports as well as the source of commonly accepted requirements. Invariably, in consequence, almost every recent judgement of the European Court of Human Rights relating to prison conditions refers to CPT standards or reports.⁵

The work of the CPT is having a significant impact upon the development of the cases of the European Court of Human Rights in relation to the treatment of prisoners. All of those who work in the prison service need to be aware of the CPT’s work, its mandate and its recommendations.

1.2.3 The work of the Committee of Ministers of the Council of Europe

The Committee of Ministers of the Council of Europe plays a significant role in the protection of human rights. It comprises the Ministers of Foreign Affairs of all member states or their permanent diplomatic representatives, and monitors member states’ compliance with their undertakings. It has a key part to play in the enforcement mechanism established under the ECHR in supervising the action taken by a State consequent upon a finding by the European Court of Human Rights that a State has breached its legal responsibilities. It also has a wider role in helping express agreed approaches to problems confronting

4. 24th General Report, CPT/Inf (2015) 1, paras 41-46.

5. See E Svanidze “The European Convention For The Prevention Of Torture” in G. Alfredsson, J. Grimheden, B.G. Ramcharan and A. De Zayas (eds) International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller, 2nd Revised edition. Martinus Nijhoff Publishers, 2009, p 493-502.

Europe, and to this end, the Committee of Ministers may make recommendations to member states on matters where it has agreed “a common policy”.⁶ While recommendations are not binding on member states, the Committee of Ministers may ask member governments “to inform it of the action taken by them”.⁷ The key point is that a recommendation will be an expression of a high level of common commitment achieved between governments.

One recommendation of the Committee of Ministers of particular importance in respect of those deprived of their liberty is that which makes provision for the European Prison Rules. The initial inspiration for the European Prison Rules is to be found in the 1957 Resolution of the United Nations concerning Standard Minimum Rules for the Treatment of Prisoners.⁸ The Rules have been revised in 1987 and in 2006. The 2006 Rules reflect the work of the CPT, and as discussed, this work has also influenced the jurisprudence of the European Court of Human Rights.

The European Prison Rules apply to anyone held in a prison, irrespective of the legal basis for the deprivation of liberty, and are to be applied “impartially, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (Rules 11-13).

These basic principles have significant relevance in protecting prisoners against ill-treatment. They open with a statement of basic principles:

1. *All persons deprived of their liberty shall be treated with respect for their human rights.*
2. *Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.*
3. *Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.*
4. *Prison conditions that infringe prisoners' human rights are not justified by lack of resources.*
5. *Life in prison shall approximate as closely as possible the positive aspects of life in the community.*
6. *All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.*
7. *Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged.*

6. Statute of the Council of Europe, ETS No. 1, Article 15.b.

7. Ibid., Article 15.b.

8. Standard Minimum Rules for the Treatment of Prisoners: United Nations (1957). International standards are now to be found in the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners (the “Mandela Rules”), adopted in December 2015.

8. *Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.*
9. *All prisons shall be subject to regular government inspection and independent monitoring.*

1.2.4 Other standard-setting and monitoring bodies

Several other actors play an important role in standard-setting and in monitoring prisons. The Committee of Ministers of the Council of Europe works closely with the Parliamentary Assembly which is comprised of representatives from legislatures of each member state. The Assembly can adopt its own recommendations and resolutions. Both bodies have played an active part in the development of new initiatives of relevance in the field of the protection of persons deprived of their liberty.

Since 1999, too, the Council of Europe Commissioner for Human Rights has exercised a general mandate to promote effective respect for human rights standards through activities concentrating upon awareness-raising and the issuing of reports, opinions and recommendations, several of which refer to the protection of persons deprived of their liberty.

At an international level, the United Nations Subcommittee on Prevention of Torture (the “SPT”) now has a mandate similar to that of the CPT; at domestic level, National Preventive Mechanisms (“NPMs”) established under the Optional Protocol to the United Nations Convention against Torture (OPCAT) help monitor and report upon prisons.

Conclusion

The tendency is now to talk of a Council of Europe *acquis* of standard-setting in relation to prisons. There is a continuous and constructive debate on human rights standards and their implementation, in turn leading to the emergence over time of new and enhanced expectations. As stressed, the European Court of Human Rights itself has been influenced by these complementary mechanisms and recommendations, particularly by the work of the CPT. It is now possible in the chapters that follow to discuss the implications for domestic prison systems in respect of the prevention of ill-treatment.

Chapter 2

Protecting Prisoners - Basic responsibilities: protecting prisoners from physical and psychological harm

2.1 Introduction

Prisoners by the very fact of their incarceration are under the care of state authorities. The imposition of loss of liberty does not deprive an individual of the enjoyment of rights under the ECHR; indeed, in some important respects, the responsibilities owed by state authorities to individuals are enhanced by the very fact of loss of liberty. This is particularly so in respect of protection against ill-treatment.

This chapter will outline the key legal obligations that prison staff must be aware of in respect of the protection of prisoners from physical or psychological harm. These responsibilities arise in particular under Articles 2, 3 and (to a lesser extent) 8 of the ECHR. Article 2 protects the right to life; Article 3 prohibits torture and inhuman or degrading treatment or punishment; and Article 8 calls for protection for respect for private life. These obligations essentially concern the protection of the prisoner from physical or psychological harm. The case law has been influenced by the standard-setting of the CPT; in turn, much of this is also now reflected in the European Prison Rules.

Each of these provisions thus concerns aspects of physical and psychological well-being. There is a close relationship between Articles 2 and 3 insofar as the principles of interpretation adopted by the European Court of Human Rights are similar. Most obviously, loss of life will fall to be considered under Article 2, but even where death has not occurred, if the force complained of could potentially have led to loss of life, then Article 2 (rather than Article 3) will be engaged. Articles 3 and 8 can often in practice cover the same range of issues (since Article 8 may come into play where the harm complained of is not sufficiently serious to fall within the scope of “inhuman or degrading” treatment).

This chapter and the one that follows are concerned with physical or psychological harm arising in two distinct areas: first, the ill-treatment of a prisoner at the hands of state authorities; and second, the failure to protect prisoners against violence or intimidation directed at them by other prisoners. This chapter covers the basic principles of the obligations of prison staff in preventing such harm; the next discusses the specific issue of segregation or solitary confinement.

2.2 Key guarantees of the European Convention on Human Rights

2.2.1 Operational activities in prisons and the right to life

Article 2 concerns the most basic right of all: the right to life. It opens with the statement that “everyone’s right to life shall be protected by law”. The most obvious aspect of this guarantee is to prohibit state officials from the taking of life. Thus the use of force by state agents such as prison officers which results in the intentional loss of life, or where death has occurred as an unintended outcome, or where there has been recklessness during the deployment of potentially lethal force even when death has not resulted, will engage legal responsibility under the ECHR. In consequence, where lethal force is used in a place of detention, the authorities must provide a plausible explanation.⁹

However, it is important to note that the right to life is not absolute (as is the right not to be subject to torture or ill-treatment), and the text of Article 2 specifically provides that there is no violation of the guarantee where death has occurred in one of four narrowly-prescribed circumstances, that is, in situations in which the state may use force which results in the deprivation of life. These are specified

9. Eg *Peker v Turkey (no 2)* (12 April 2011), paras 51-60 concerning the lack of a plausible explanation for a gunshot wound sustained by prisoner during operation to re-establish internal security).

as the following four purposes: to protect against violence, to effect an arrest, to prevent escape of a prisoner, or to quell rioting or insurrection.

These circumstances may have a potential relevance in prisons. However, the text of Article 2 heavily qualifies the applicability of the recognised exemptions. First, as the text makes clear, the use of force must be in accordance with domestic law: that is, there must be a basis for the use of force in domestic law. Second, and crucially, the use of force must have been “absolutely necessary” in the particular circumstances. In other words, the provision “does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life”.¹⁰

While this obligation to refrain from using force to take life is essentially *negative* in character, it is itself prescribed by a wide range of *positive* obligations. These will have a particular significance for prison management and leadership, for “absolutely necessary” is tested against expectations that an operation has been properly organised, staff have been properly trained, and the use of force is adequately regulated by regulations. In other words, in order to ascertain whether the lethal (or potentially lethal) force used was strictly proportionate, consideration is required not only of the immediate circumstances surrounding the moment when loss of life occurred but also of the planning and operational control of the prison operation, the prior training of officers, and the regulatory framework surrounding the use of force.

While most of the case-law of the European Court of Human Rights involves scrutiny of police operations, the principles are similar in respect of the use of lethal or potentially-lethal force in prisons. Three particular issues should be borne in mind if a serious situation such as a riot occurs. First, in planning an operation, steps to minimise the risk of incidental loss of life to others caught up in an operation is necessary. “All feasible precautions in the choice of means and methods” must be taken to avoid the risk of death including ensuring that others are not placed at substantial risk.¹¹ Second, it is also expected that officials have received appropriate training and instructions (such as the use of basic restraint techniques).¹²

10. *McCann and Others v United Kingdom* (1995) A 324, at para 148

11. *Ergi v Turkey* 1998-IV, paras 79–81 at para 79.

12. See for a case involving police officers, *Saoud v France*, 2007-XI, paras 88–104: an individual had been asphyxiated after being subjected to the use of a face-down immobilisation technique for 35 minutes. The officers had been attempting to arrest the man who was suffering from schizophrenia. The European Court of Human Rights held that while the police intervention had been justified and proportionate for the protection of others’ physical safety, in these circumstances there had been a violation of the right to life, noting that no precise instructions had been issued as regards the immobilisation technique. This case would also be of relevance in prison settings.

Both the right to life and the prohibition against ill-treatment involve important positive obligations to protect prisoners – from the risks posed by staff, by other prisoners and by themselves.

Third, it is important that those who are involved in the operation can be called to account thereafter. This is to help combat the impunity of state officials through the holding of an effective investigation (a matter examined in chapter 8). Operational control must thus not deliberately seek to prevent the identification of the officers directly involved in operations:

*In Ataykaya v Turkey, the Court held that there had been a deliberate creation of a situation of impunity since the identification of security force officers involved in an operation had been impossible through the failure to require the officers concerned to wear identification marks. In consequence, it was not subsequently possible for the state authorities to show satisfactorily that the use of lethal force had been “absolutely necessary” and proportionate.*¹³

2.2.2 The prohibition against torture and ill-treatment

Closely related to Article 2’s protection of the right to life is Article 3’s prohibition of torture or inhuman or degrading treatment or punishment. In contrast with Article 2, the guarantee is absolute: no justification exists for its use by state officials. The application of Article 3 essentially involves two questions: first, consideration of whether the physical or mental treatment has achieved a minimum level of severity to fall within the scope of Article 3; and second, where this threshold test has been satisfied, whether the circumstances amount to torture, or to inhuman or degrading treatment or punishment.

The threshold question – whether the specific treatment complained of meets a minimum level of severity inevitably involves a degree of subjective judgment. However, “treatment” or punishment not considered sufficiently serious to so qualify may nevertheless fall within the ambit of Article 8’s guarantee of respect for private life.

The issue of whether Article 3 applies is considered by reference to all the circumstances of the “treatment” in question, including its cumulative effects, duration, and its physical and mental characteristics, as well as the sex, age and health of the victim. Calculation of the intensity of pain or suffering, or of the mental consequences of ill-treatment, involves a judicial assessment of

13. *Ataykaya v Turkey* (22 July 2014), paras 45-59.

the physical and psychological effects of these factors from the point of view of “present day” expectations. If it is considered that the suffering involved is excessive in the light of prevailing general standards, then this threshold test will be satisfied. The lack of any evidence of a positive intention to humiliate or to debase an individual is not in itself conclusive as the absence of any such purpose does not rule out a finding of a violation of Article 3. Nor need the “treatment” be deliberate, for ill-conceived or thoughtless action on the part of state authorities can also give rise to a violation of the guarantee.

The distinctions between “torture” and “inhuman” and “degrading” treatment or punishment were initially taken to reflect differences in the intensity of suffering as judged by contemporary standards and assessment of state purpose. As the Court put it, the use of the term “torture” attaches a “special stigma to deliberate inhuman treatment causing very serious and cruel suffering”. Inhuman treatment or punishment involved the infliction of intense physical and mental suffering, while degrading treatment or punishment was defined in this judgment as treatment “designed to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”.¹⁴ However, in cases not involving a finding of “torture” the European Court of Human Rights may simply refer to a conclusion that “inhuman or degrading” treatment or punishment has occurred or simply to a finding of a violation of Article 3.

An assessment of the impact of the treatment upon the particular victim is thus required, but may be simply assumed by the European Court of Human Rights in certain cases:

*In Keenan v United Kingdom in seeking to quantify the level of suffering a prisoner who had been suffering from a chronic mental disorder had endured before his death, the Court observed that the “treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects”.*¹⁵

Recourse to physical force by state officials which has not been rendered strictly necessary by a prisoner’s own conduct may well give rise to issues under Article 3. It will be for the state authorities to demonstrate convincingly that the use of force was not excessive, particularly if injuries are significant. As with Article 2, the expectation is that any operation to secure internal order in a prison is properly planned and executed in such a way as to ensure that the means employed were strictly necessary in order to attain the operation’s

14. *Ireland v United Kingdom* (1978) A 25, at para 167.

15. *Keenan v United Kingdom* 2001-III, at para 113.

ultimate objectives. Furthermore, it will generally be the case that the onus is upon state authorities to show that the force used was necessary and proportionate, rather than upon the prisoner to show that the force was excessive.

It will be for the state authorities to demonstrate convincingly that the use of force was not excessive, particularly if injuries are significant.

In other words, the use of force upon a prisoner carries with it the risk that it will be seen as disproportionate and thus unlawful. This is now recognised in many prison services. For example, in United Kingdom [England and Wales], increased levels of violence in the prison system led to the introduction of a violence reduction initiative. This includes new reward based regimes encouraging positive behaviour, new de-escalation techniques piloted with juvenile offenders, and the introduction of body-worn video cameras for staff and other personal protective equipment.

The European Prison Rules spell out in some detail what is expected:

Use of force

64.1 Prison staff shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order and always as a last resort.

64.2 The amount of force used shall be the minimum necessary and shall be imposed for the shortest necessary time.

65. There shall be detailed procedures about the use of force including stipulations about:

- a) the various types of force that may be used;*
- b) the circumstances in which each type of force may be used;*
- c) the members of staff who are entitled to use different types of force;*
- d) the level of authority required before any force is used; and*
- e) the reports that must be completed once force has been used.*

66. Staff who deal directly with prisoners shall be trained in techniques that enable the minimal use of force in the restraint of prisoners who are aggressive.

67.1 Staff of other law enforcement agencies shall only be involved in dealing with prisoners inside prisons in exceptional circumstances.

67.2 *There shall be a formal agreement between the prison authorities and any such other law enforcement agencies unless the relationship is already regulated by domestic law.*

67.3 *Such agreement shall stipulate:*

- a) the circumstances in which members of other law enforcement agencies may enter a prison to deal with any conflict;*
- b) the extent of the authority which such other law enforcement agencies shall have while they are in the prison and their relationship with the director of the prison;*
- c) the various types of force that members of such agencies may use;*
- d) the circumstances in which each type of force may be used;*
- e) the level of authority required before any force is used; and*
- f) the reports that must be completed once force has been used.*

Weapons

69.1 *Except in an operational emergency, prison staff shall not carry lethal weapons within the prison perimeter.*

69.2 *The open carrying of other weapons, including batons, by persons in contact with prisoners shall be prohibited within the prison perimeter unless they are required for safety and security in order to deal with a particular incident.*

69.3 *Staff shall not be provided with weapons unless they have been trained in their use.*

At the heart of the CPT's mandate is the prevention of ill-treatment. In consequence, the CPT has also developed a statement of its expectations:

53. Prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards.

A prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary, treated by a medical doctor. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff, and the results of the examination (including any relevant statements by the prisoner and the doctor's conclusions) should be formally recorded and made available to the prisoner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Further, instruments of restraint should be removed at the earliest

*possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners.*¹⁶

2.2.3 Material conditions of detention

Constantly developing jurisprudence in respect of the treatment of prisoners is directly attributable to the impact of the CPT. In particular, the European Court of Human Rights has now acknowledged that the effects of prolonged exposure to poor material conditions of detention may be such in themselves to amount to ill-treatment, or alternatively, may exacerbate other forms of treatment or punishment such as to give rise to an issue under Article 3. This latter point is important in any discussion of the protection of prisoners from ill-treatment. The CPT's standard-setting, driven by concerns not only to prevent ill-treatment but also to counteract the psychological effects of incarceration, has directly led the European Court of Human Rights to adopt a more robust approach to conditions of detention. There is now a general expectation that state authorities will ensure that a detainee is held in conditions which are:

“compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.”¹⁷

The CPT's expectation is that each prisoner will have at least 4 m² of space in relation to multiple-occupancy cellular accommodation. This is the *minimum* standard.¹⁸ The size of cellular accommodation may indeed also be of relevance in judicial assessments of detention conditions (and thus the European Court of Human Rights now insists upon a minimum of 3 m² per prisoner in order to satisfy Article 3).¹⁹ The point is that a combination of factors may be sufficient to give rise to a violation of the guarantee, and that deliberate ill-treatment may combine with poor detention conditions to lead to such a conclusion; but such a violation may occur simply on account of the conditions themselves.

In Peers v Greece, a foreign prisoner had been held in a segregation wing where, for at least two months, he had been largely confined to a cell lacking ventilation and windows and which in consequence would at times become unbearably hot. The applicant also had been forced to use the cell's toilet in the presence of another inmate

16. 2nd General Report, CPT/Inf (92) 3. For discussion of electrical discharge weapons (of particular relevance in policing), see 20th General Report CPT/Inf (2010) 28.

17. *Kudła v Poland* 2000-XI, paras 90–100, at para 94.

18. Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015) 44.

19. *Florea v Romania* (14 September 2010), para 51.

(and similarly be present when his cellmate was using the toilet). These factors were sufficient for the Court to conclude that the applicant's human dignity had been diminished such as to amount to a violation of Article 3: the conditions had given rise to feelings of anguish and inferiority capable of humiliating and debasing the applicant and possibly breaking his physical or moral resistance. The failure of the authorities to take steps to improve the applicant's conditions of detention were thus considered to have amounted to degrading treatment.²⁰

In *Mamedova v Russia*, the Court found a violation of Article 3 in light of the two-year detention of a pre-trial detainee confined to cells with less than 2 sq m of space per prisoner for 23 hours per day in circumstances where the prisoner was required to use a toilet in the presence of other prisoners).²¹

In *Yakovenko v Ukraine*, a number of factors combined together to give rise to a breach of the provision: poor material conditions of detention involving severe overcrowding and personal space of 1.5 square metres; the lack of access to appropriate medical care in respect of HIV and tuberculosis; and the repeated transportation between detention centres in cramped and unventilated transportation with individual compartments of 0.3 square metres.²²

This also has some relevance in respect of arrangements for the transportation of prisoners to and from court.²³

2.2.4 Inter-prisoner violence

As well as the essentially negative obligation not to inflict ill-treatment or deprive an individual of life, the ECHR imposes significant positive obligations upon state authorities. These have a particular relevance to prison staff. The basic premise is that prisoners are in a vulnerable position by the very fact that they are in prison, and thus state authorities must counteract this vulnerability through taking effective steps to ensure their protection. This is of particular importance in respect of inter-prisoner violence. Prison staff must provide adequate protection against other prisoners known to pose a threat to fellow detainees.

The basic premise is that prisoners are in a vulnerable position by the very fact that they are in prison: thus state authorities must counteract this vulnerability.

20. *Peers v Greece* 2001-III, paras 68–75

21. *Mamedova v Russia* (1 June 2006) paras 61–67

22. *Yakovenko v Ukraine* (25 October 2007), paras 81–102

23. *Moiseyev v Russia* (9 October 2008), paras 131–136 (50 cm² space per prisoner, and inadequate ventilation and heating).

The care of prisoners features as a key aspect in CPT reports on visits. The CPT has also issued its own statement of expectations. This is as follows:

The duty of care which is owed by custodial staff to those in their charge includes the responsibility to protect them from other inmates who wish to cause them harm. In fact, violent incidents among prisoners are a regular occurrence in almost all prison systems; they involve a wide range of phenomena, from subtle forms of harassment to unconcealed intimidation and serious physical attacks.

Tackling the phenomenon of inter-prisoner violence requires that prison staff be placed in a position, including in terms of staffing levels, to exercise their authority and their supervisory tasks in an appropriate manner. Prison staff must be alert to signs of trouble and be both resolved and properly trained to intervene when necessary. The existence of positive relations between staff and prisoners, based on the notions of secure custody and care, is a decisive factor in this context; this will depend in large measure on staff possessing appropriate interpersonal communication skills. Further, management must be prepared fully to support staff in the exercise of their authority. Specific security measures adapted to the particular characteristics of the situation encountered (including effective search procedures) may well be required; however, such measures can never be more than an adjunct to the above-mentioned basic imperatives. In addition, the prison system needs to address the issue of the appropriate classification and distribution of prisoners.²⁴

The European Court of Human Rights also has had the opportunity to consider a number of cases, involving both Articles 2 and 3, in which the failure to protect prisoners from inter-prisoner violence has led to judgments against the respondent State. The most obvious first step involves the screening of prisoners upon reception, both in terms of identifying those who are particularly vulnerable, and also in respect of those prisoners likely to pose a risk to others.

In Paul and Audrey Edwards v United Kingdom, the applicants' son had been killed in a cell by another detainee who was suffering from paranoid schizophrenia. A violation of Article 2 was established as information had been available to the authorities which should have alerted them that the other prisoner posed an extreme danger on account of his mental illness. Here, though, there had been shortcomings in the transmission of this information, and this had not been addressed during a brief and cursory nature of the screening examination carried out by the health worker. For the Court, it was "self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision."²⁵

24. 11th General Report CPT/Inf (2001) 16

25. *Paul and Audrey Edwards v United Kingdom* 2002-II, paras 57–64 at para 6. See also (in respect of police detention) *Keller v Russia* (17 October 2013), paras 84–91 (failure of police to provide sufficient and reasonable protection required to safeguard life of drug addict who jumped to his death in an escape attempt: violation).

There is also positive obligation upon prison officials to prevent inter-prisoner violence under Article 3. A failure to take measures within the scope of authorities' powers which, judged reasonably, might have been expected to avoid a real and immediate risk of ill-treatment by an identified individual from the criminal acts of a third party in circumstances where the authorities had knowledge of the risk (or ought to have had such knowledge) may thus give rise to a violation of the guarantee.

*In Pantea v Romania a prisoner claimed he had been beaten by other prisoners at the instigation of prison staff and then had been made to lie underneath his bed while immobilised with handcuffs for nearly 48 hours. Thereafter, he had been held in a railway wagon crammed with other prisoners for several days while suffering from multiple fractures. No medical treatment, food or water had been provided. While not all his allegations were deemed to have been established, medical reports had attested to the number and severity of blows suffered. These had been sufficiently serious to constitute inhuman and degrading treatment. This ill-treatment had been aggravated both by the handcuffing of the applicant while he continued to share a cell with his assailants and also by the failure to provide him with necessary medical treatment. The authorities could reasonably have been expected to foresee that the applicant's psychological condition had made him vulnerable, and further that his detention had been capable of exacerbating his feelings of distress and his irascibility towards his fellow-prisoners. This had rendered it necessary to keep him under closer surveillance.*²⁶

2.2.5 Prisoners and the right to life – protection against self-harm and suicide

An extension of this duty involves protection against self-inflicted harm. Taking steps to prevent the circulation of drugs in prisons is one such example of this obligation: this, though, is more an obligation of means rather than of result as it cannot be guaranteed with absolute certainty that drugs will not circulate in prison.²⁷

Placing a prisoner known to be at risk of self-harm on suicide watch is obviously, too, an obligation upon prison authorities. Indeed, "the risk of suicide should be constantly assessed both by medical and custodial staff".²⁸ However,

26. *Pantea v Romania* 2003-VI, paras 177–196. See also *Rodić and Others v Bosnia and Herzegovina* 2008, paras 68–73 (integration of prisoners convicted of war crimes into general prison population not in itself inhuman or degrading but clearly entailed a serious risk to physical well-being, and inadequacy of measure had involved violation of Art 3); and *DF v Latvia* (29 October 2013), paras 81–95 (failure to address protracted fear and anguish of the imminent risk of ill-treatment of prisoner on account of his cooperation with the police: violation of Art 3).

27. *Marro and Others v Italy* (dec) (8 April 2014)

28. Appendix to the Recommendation (93) 6 of the Committee of Ministers concerning prison and criminological aspects of the control of transmissible diseases including aids and related health problems in prison, para 58.

this obligation only arises where it is clear that such a risk occurs: prison authorities must have actual or imputed knowledge that a real and immediate suicide risk exists. Prison staff are not expected to start from the supposition that all prisoners are potential suicide risks as such a stance would place a disproportionate burden on the authorities as well as unduly restrict the liberty of the individual.²⁹

The risk of suicide should be constantly assessed both by medical and custodial staff.

In Renolde v France, the suicide in disciplinary cell of mentally disturbed prisoner who had previously self-harmed was deemed to have involved violations both of Arts 2 and 3³⁰, while in Jasińska v Poland, the failure of prison authorities to have given thought to the risk of suicide by drugs overdose when renewing drug prescriptions was such as to give rise to a breach of Article 2 since the prison authorities had been aware of deterioration in the prisoner's mental state.³¹

In Keenan v United Kingdom, a prisoner had been suffering from a chronic mental disorder involving psychotic episodes and feelings of paranoia. He had also been diagnosed as suffering from a personality disorder. While in prison, and after his return from the hospital wing to normal prison accommodation, he had displayed disturbed behaviour involving the demonstration of suicidal tendencies, possible paranoid-type fears, and aggressive and violent outbursts. After being subjected to segregation and disciplinary punishment, he had killed himself. The lack of medical notes suggested "an inadequate concern to maintain full and detailed records of his mental state [which undermined] the effectiveness of any monitoring or supervision process". On top of this, there had been no reference to a psychiatrist for advice on future treatment or fitness for adjudication and punishment. In short, "significant defects in the medical care provided to a mentally ill person known to be a suicide risk" together with "the belated imposition on him in those circumstances of a serious disciplinary punishment – seven days" segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days before his expected date of release had constituted inhuman treatment.³²

The question of force-feeding a prisoner who is on hunger strike to protect his life is not entirely clear. If it can be shown that the measures were strictly

29. *Younger v United Kingdom* (dec) 2003-I.

30. *Renolde v France* 2008, paras 85–110 and 119–130.

31. *Jasińska v Poland* (1 June 2010), paras 63–79. See also *De Donder and De Clippel v Belgium* (6 December 2011), paras 72–84; cf *Keenan v United Kingdom* 2001-III, paras 88–101 (not possible to conclude that the applicant's son had been at immediate risk of suicide, and the prison authorities had done all that could have been reasonably expected of them: no violation of Art 2; but a violation of Art 3 because of defects in health care).

32. *Keenan v United Kingdom* 2001-III, paras 109–116, at para 116

necessary in medical terms, and that there are adequate safeguards in place, this may not be objectionable:

*In Nevmerzhitsky v Ukraine, the Court considered that measures such as force-feeding where these can be shown to be medically necessary in order to save life could not in principle be regarded as inhuman and degrading providing that they are accompanied by procedural guarantees protecting against arbitrariness and that the measures do not go beyond a minimum level of severity. However, in this case the Court considered that the force-feeding of the applicant had constituted torture within the meaning of Article 3 in light of the lack of any proof of medical justification and the restraints and equipment used.*³³

2.3 Preventing ill-treatment: health services in prison

Healthcare arrangements must be adequate for each prisoner, and a failure to safeguard the physical integrity of a detainee by providing appropriate medical care may give rise to a violation of Article 3. This topic is explored further in an allied Council of Europe publication.³⁴

The key point is that inadequate health care can rapidly lead to situations falling within the scope of Article 3's prohibition of "inhuman or degrading" treatment. A sharp deterioration in a prisoner's health inevitably gives rise to questions concerning the adequacy of healthcare, and state authorities will be under an obligation to account for their treatment of detainees. There is thus a need to ensure that a prisoner's health is monitored not only at the time of admission but periodically thereafter. Prisons inevitably contain higher percentages of individuals with health problems (particularly in relation to mental health) than is the case in the population in general; further, the very fact of imprisonment is likely to lead to a deterioration in a prisoner's physical and mental health unless positive steps are taken to provide an adequate regime of activities. In many prison systems, too, there are high levels of prevalence of communicable diseases, while many prisoners may also be suffering from problems associated with drug abuse:

In McGlinchey and Others v United Kingdom, the death of heroin addict a week after being imprisoned was considered to have amounted to a violation of Art 3, for while there had been regular monitoring of her condition for the first six days and steps had been taken to respond to her symptoms, the serious weight loss and dehydration she had experienced as a result of a week of largely uncontrolled vomiting and inability

33. *Nevmerzhitsky v Ukraine* 2005-II, paras 93–99. See also *Giorap v Moldova* (dec) (19 June 2007) (force feeding of prisoner involving severe pain and not shown to have been for medical necessity and without procedural safeguards: violation of Art 3). See also Appendix to the Recommendation (98) 7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison, paras 60–63 (responsibilities of health service in the case of refusal of treatment and hunger strike).

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*to eat or hold down liquids had caused her distress and suffering and had posed very serious risks to her health but although her condition was still deteriorating, she had not been examined on either of the following two days as the medical officer did not work at weekends.*³⁵

As well as addressing effectively the risks posed by prisoners with communicable diseases, prison authorities may also be expected to take reasonable steps to address the risks posed by passive smoking.

*In Ostrovar v Moldova, poor material conditions of detention were exacerbated by exposure to passive smoking although the applicant was known to suffer from asthma. Here, the Court considered that there had been a violation of Art 3.*³⁶

*In Florea v Romania, the prisoner had been first held in a cell shared with up to 120 other prisoners, the vast majority of whom smoked. Exposure to passive smoking had continued after he had been transferred to a prison hospital despite medical advice that this should be avoided. This was deemed to have amounted to a violation of Article 3.*³⁷

A sharp deterioration in a prisoner's health inevitably gives rise to questions concerning the adequacy of healthcare.

2.3.1 Responding to the healthcare needs of individual prisoners who are particularly vulnerable

The principle that healthcare arrangements must meet the needs of individual prisoners is of particular relevance in relation to individuals who are particularly vulnerable. Thus in the case of mentally-ill persons, an assessment of detention conditions must take into consideration their vulnerability and

35. *McGlinchey and Others v United Kingdom* 2003-V, paras 47–58 See also *Aleksanyan v Russia* (22 December 2008), paras 145–158 (failings in medical care – but not in availability of drugs – had entailed particularly acute hardship to a pre-trial prisoner). See also *Tarariyeva v Russia* 2006-XV, paras 79–89 (inadequate medical care of prisoner with acute ulcer resulting in his death: violation of Arts 2 and 3); *Kaprykowski v Poland* (3 February 2009), paras 70–77 (prisoner suffering from severe epilepsy and forced to rely for assistance and emergency medical care on his cellmates); *Ghavitadze v Georgia* (3 March 2009), para 96 (detainees cannot be hospitalised only when symptoms peak and before being cured sent back to prison where no treatment would be given); *Yoh-Ekale Mwanje v Belgium* (20 December 2011), paras 91-99 (delays in securing appropriate health treatment for detainee at advanced stage of HIV infection: violation); and *G v France* (23 February 2012), paras 38-49 (continued detention for 4 years with repeated transfers to psychiatric hospital making it more difficult to provide required mental health treatment: violation).

36. *Ostrovar v Moldova* (13 September 2005), paras 76–90.

37. *Florea v Romania* (14 September 2010), paras 51–64. See also *Elefteriadis v Romania* (25 January 2011), paras 46–55, the exposure of prisoner over 6 year period to passive smoking in shared cells had led to chronic obstructive bronchopneumopathy. The Court again considered that there had been a violation of Article 3.

their inability, and in particular “(a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of [the prisoner]”³⁸

Certain other classes of vulnerable prisoners stand out. Old age in itself does not render the detention of an elderly prisoner incompatible with ECHR guarantees, but significant deterioration in a prisoner’s health may make the continuing detention of an individual intolerable.

In relation to persons with physical disabilities, particular attention is required:

*In Price v United Kingdom, a four-limb-deficient thalidomide victim suffering from kidney problems had been committed to prison for seven days for failure to answer questions during civil proceedings for debt recovery without steps having been taken by the judge before imposing the penalty to ascertain whether adequate detention facilities were available to cope with the applicant’s severe level of disability. The first night she had been held in a police cell which had been too cold for her medical condition, and since she could not use the bed in the cell, she had been forced to sleep in her wheelchair. The remainder of her sentence had been served in a prison hospital where the lack of female medical staff had meant it had been necessary for male prison officers to assist her with toileting. For the Court, the detention of “a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty” constituted degrading treatment within the meaning of Article 3.*³⁹

This is also likely to involve the need to ensure that detainees are provided with any specialised aids to help them cope with imprisonment.⁴⁰

However, it is not only the failure to provide appropriate medical care but also the very fact of inappropriate treatment that may give rise to a finding

38. *Babar Ahmad and Others v United Kingdom* (10 April 2012), at para 215.

39. *Price v United Kingdom* 2001-VII, paras 25–30 at para 30. See also *Flaminzeanu v Romania* (12 April 2011), paras 82–100 (failure to adapt detention conditions to detainee’s disabilities: violation); *Arutyunyan v Russia* (10 January 2012), para 74, the detention for almost 17 months in a regular prison facility of a wheelchair-bound person who had numerous health problems including a failing renal transplant, extremely poor eyesight, severe obesity and a serious form of insular diabetes was also deemed incompatible with Article 3; and *Grimailovs v Latvia* (25 June 2013), paras 154–162 (lack of organised assistance for paraplegic prisoner: violation). Cf *Zarzycki v Poland* (12 March 2013), paras 105–125 (4-year detention of prisoner with amputated arms: no violation as prison authorities had successfully provided an appropriate solution without undue delay).

40. See also *VD v Romania* (16 February 2010), paras 92–99 (medical diagnoses indicated a prisoner’s need for dentures, but none had been provided who was unable to pay for them himself and despite legislation making these available free of charge: degrading treatment); *Slyusarev v Russia* 2010, paras 34–44 (detainee suffering from medium-severity myopia not able to use glasses for several months causing considerable distress and giving rise to feelings of insecurity and helplessness: violation); and *Vladimir Vasilyev v Russia* (10 January 2012), paras 60–70 (no provision of special orthopaedic footwear to prisoner resulted in distress and hardship exceeding this unavoidable level: violation).

of a violation of Article 3. Cases such as *Nevmerzhitsky v Ukraine* concerning forced-feeding (and discussed above) indicate that treatment not meeting European standards may even constitute torture. Nevertheless, “as a general rule, a measure which is a therapeutic necessity (in terms of established principles of medicine) cannot be regarded as inhuman or degrading”.⁴¹ On the other hand, in the case of mentally ill persons, “the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment” on account of the “feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder”.⁴²

Conclusion

A range of factors are relevant in the context of prisons. The prevention of physical or psychological harm is of critical importance in the jurisprudence of the European Court of Human Rights in relation to Articles 2 and 3, and is at the very heart of the mandate of the CPT. Numerous issues can give rise to breaches of Article 3 (and in cases involving death or the threat of death, Article 2): the use of force in security operations or in relation to action to ensure good order, poor detention conditions, the failure to protect a prisoner from the threat posed by other prisoners or against self-harm or suicide, inadequate healthcare, and healthcare-treatment without sufficient safeguards. Combating ill-treatment starts with these fundamental aspects of prison care.

One specific aspect of prison regimes - the use of solitary confinement or segregation – will be covered in chapter 6. This discussion will bring into sharper focus the obligations discussed in this chapter, for segregation may be imposed to *protect* vulnerable prisoners, but in doing so, it may lead to ill-treatment in another form.

41. *Herczegfalvy v Austria* (1992) A 244, at paras 82–83.

42. *Sławomir Musiał v Poland* (20 January 2009), para 87.

Chapter 3

Risk assessment

3.1 Introduction

Ill-treatment of prisoners is usually associated with deliberate action taken by one or more individuals, or alternatively as a result of implicit or systemic failures in provision such as poor material conditions, inefficient complaints procedures, and so on. Often, however, ill-treatment finds fertile ground where specific characteristics associated with individual prisoners are not taken into account, or where such characteristics (or “risk factors”) are not reflected in prison security and management arrangements or in the determination of prisoners’ individual welfare and rehabilitation needs.

The management of offenders should be based on an assessment of the security risk prisoners present and their risk of re-offending, and further be tailored to address individual characteristics and needs. Solid knowledge of risk factors related to an individual can and should fundamentally affect subsequent treatment and any other measures implemented. Conversely, neglect of individualised risk assessment at the outset of incarceration or thereafter during imprisonment may lead to incorrect or absent conclusions and thus to the imposition of disproportionate security measures or disciplinary punishments, non-equivalent medical care, a lack of activities within the sentence plan, and other factors that may constitute ill-treatment.

Offender management should be based on security risk assessment and the assessment of the risk of re-offending. Neglecting risk assessment that is tailored to address individual needs may play an important factor later in leading to ill-treatment.

Risk management is the process of selecting and applying a range of intervention measures in custodial and community settings and in the post-release period or in the context of preventive supervision. The primary risk to be managed is public safety. This not only means protection of the public during the time when the offender is serving the sentence of imprisonment, but also after the offender is released. Developed prison and probation systems are increasingly concerned with this post-release stage. They are aware of their share of responsibility for potential re-offending of released offenders, and they aim to mitigate the risk of re-offending at the same time as assisting the released offender in reintegration into the community. Only well-adjusted and well-conducted risk assessment procedures can protect both public safety and safeguard the rights of offenders.

“Public safety” means to protect the public during the period that the offender serves the prison sentence and after the offender is released.

Risk assessments are essentially predictions of future behaviour. The result of a risk assessment has serious implications for both the individual subject to the assessment and also for society: for the individual offender, the assessment will decide his or her freedom; for society, it may determine whether a potentially dangerous person will be released back into the community.⁴³

All offenders should be subject to assessment at the time they enter a prison facility. Risk assessment influences an offender’s security classification, the programming they will receive while incarcerated, their eligibility for temporary release, and their release date. Risk assessments should be performed by justice professionals on a regular and reoccurring basis: pre-trial, before sentencing, when determining security level in custody, prior to release, and after the occurrence of any breaches or critical incidents.⁴⁴

In order to work with offenders it is thus necessary to have enough information about their attitudes towards themselves and others, what threats they pose to people that work with them, and what chances there are for rehabilitation. For this reason *any* intervention with the offender must be necessarily preceded by an assessment. This should involve mapping their personal features

43. Howard, J. “Offender Risk Assessment.” John Howard Society of Alberta, 2000.

44. Hare, R. D. “Without Conscience: The Disturbing World of Psychopaths Among Us”. New York: Pocket Books, 1993.

with consideration of the situations in which the outputs will be used. These outputs may differ during imprisonment and after early release.

- ▶ Thus for a *prison guard* it will be important to know to what degree the offender is dangerous and whether the prisoner will present any risk of harm during imprisonment either towards other people or to himself or herself.
- ▶ A *therapist* needs to assess any progress the offender has made in their own perception and any changes they have made in their attitudes. An early release board and the relevant judge will be interested in knowing the likelihood of re-offending after release and of law-abiding integration into the community.
- ▶ A *probation officer* will plan and organise the scheme of suitable intervention and make sure that the rehabilitation and reintegration of the released person is successful.

Therefore a clear distinction should be made between the offender's risks to the outside community, and while inside prison. These two risks – the security risk and the risk of re-offending - should be evaluated separately.⁴⁵

3.2 Assessing an individual's security risk

Security risks are factors which may have an impact on the security within the prison potentially leading to the prisoner's escape, violence, suicide, substance abuse etc. When determining a security rating, the risk the prisoner presents to prison security, to the community, to themselves, or to any other person should be considered. This assessment should have regard to a number of features: the nature of the offence; the risk of the prisoner escaping, or attempting to escape; the risk of the prisoner committing a further offence and impact on the community; any risk the prisoner poses to prison management, security and good order; any risk the prisoner poses to the welfare of himself or herself and any other person; the length of the prisoner's sentence or the maximum sentence applicable to the offences in respect of which the prisoner has been charged; and any other matter considered relevant to prison management, security and good order and the safe custody and welfare of the prisoner.

Adaptation skills following regime rules, personality (history of violence, suicide attempts, substance abuse, cognitive skills, personality disorders, etc), social contacts and behavioural signs should all be subjects of particular interest. The length of the sentence or the offender's general recidivism cannot constitute the only criterion for defining an offender as dangerous in this sense.⁴⁶

45. Recommendation CM/Rec(2014)3 of the Committee of Ministers concerning dangerous offenders, § 33.

46. Recommendation CM/Rec(2014)3 of the Committee of Ministers concerning dangerous offenders, § 5.

The length of the sentence cannot constitute the only criterion for defining an offender as dangerous.

It is important that the initial assessment is carried out as soon as possible after admission. This is particularly important for detainees in remand prisons since it is known that the first 48 hours after imprisonment are critical in terms of suicidal behaviour, poor adaptation or other safety risks. This concerns in particular prisoners who are members of vulnerable groups such as juveniles and young prisoners, elderly prisoners, mentally ill prisoners or drug abusers.

The security measures applied to individual prisoners should be the minimum necessary to achieve their secure custody.⁴⁷ Prisoners should be managed in the least restrictive way based on an objective assessment of their security risks. They should then be held in security conditions appropriate to these levels of risk. The level of security necessary should be reviewed at regular intervals throughout a person's imprisonment.⁴⁸

Sometimes, the security risk is the only risk assessed during the period of imprisonment. It should be noted that the security risk assessment is necessary, but not sufficient assessment for each prisoner. Misinterpretation of outputs or their misleading use – such as mixing security risks and the risk of re-offending in institutional classification committees – may lead to inappropriate decisions, measures or even ultimately ill-treatment.

It is advisable to carry out the security risk assessment within 48 hours of the start of incarceration. This applies in particular to detainees in remand prisons and selected vulnerable groups of prisoners.

3.2.1 Risk of re-offending

The assessment of risk of re-offending is a more complex process which deserves more attention.

47. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 51.1; and Recommendation CM/Rec(2014)3 of the Committee of Ministers concerning dangerous offenders, § 41.

48. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 51.4-5.

By studying the characteristics and attributes of individuals who commit crimes with those who do not, it is possible to reduce the risk of criminal incidents in future behaviour. Those who pose a “high” risk in re-offending and are therefore very likely to commit new crimes should be assigned to the more restrictive and most treatment-based forms of intervention. Supervision and treatment is more effective when it is applied to those who pose a middle to high risk of recidivism. Conversely, those that pose the least level of risk should experience the least restrictive (and expensive) forms of intervention. This not only helps to save financial resources, but also protects low-risk offenders from deteriorating behaviour as several studies have shown that exposing low risk offenders to treatment actually increases their recidivism rates.⁴⁹ The key assumption is that high-risk offenders can be identified and that by responding to that risk, public safety is enhanced, so that high-risk offenders will not be released before it is appropriate to do so.

In this sense, the objective of risk assessment is primarily to predict the likelihood of an offender’s reoffending and to adjust further intervention to the offender based on this prediction. Risk assessment is a process in which the offender is assessed on selected variables which increase the likelihood of “failure” if shown to exist.

3.2.2 Static and dynamic risk factors

These variables or “risk factors” are further subdivided into static and dynamic factors. Both categories are causally linked to the offending behaviour. The **static factors** are based on the history and they are fixed and cannot be changed. The **dynamic factors** are currently present and they can be influenced. The examples of static factors include history of previous sentences, sex, type of offence, family criminality, or motivation for committing previous offences. The age at which the offender committed the first offence is a very good predictor of future behaviour, and it is a risk factor that cannot be changed: if an offender was first arrested at age of twelve, this fact will always exist. Typical dynamic factors include financial situation, employment, attitudes encouraging the likelihood of criminal conduct, addictions, family relations, criminal friends and acquaintances, or leisure time activities. In some literature sources these dynamic factors are also called “criminogenic needs”, ie crime-producing factors that are strongly-correlated with risk.

49. Andrews, D. A. & Bonta, J. “The Psychology of Criminal Conduct”. Cincinnati, OH: Anderson Publ., 3rd ed., 2003, p. 260.

Targeting criminogenic risk factors

The term “criminogenic” takes into account that “offenders have many needs deserving treatment but not all of these needs are associated with their criminal behaviour.”⁵⁰ There are other factors that come into play which may prove to be associated with committing crime (eg, low self-confidence, depression, anxiety, and fear), yet these are not causally-linked.

It is important to know that the non-criminogenic factors will not have much effect on recidivism rates. Studies have shown that programmes that target four to six more criminogenic risk factors than non-criminogenic risk factors can have a thirty per cent or more effect on recidivism. Programmes that target more non-criminogenic risk factors have small to slightly negative effects.

Criminogenic risk factors which are causally associated with criminal behaviour should be assessed first of all in any risk assessment.

Most offenders are high-risk for recidivism because they have multiple risk-and need-factors. Effective treatment programmes should assess and target needs that are highly correlated with criminal conduct such as anti-social attitudes, anti-social peer associations, substance abuse, a lack of empathy, or self-control skills.

An analogy constructed by scholars Latessa and Lowenkamp⁵¹ uses an example of a variety of risk factors associated with having a heart attack. Age, sex, family history of heart disease, weight, physical exercise, blood pressure, stress, level of cholesterol, and smoking habits are the strongest predictors of having a heart attack. In order to *understand* the level of risk of having a heart attack, the totality of all of these (static and dynamic) factors determining the likelihood of having a heart attack would be important. To *affect and lower* the risk of having a heart attack, the dynamic factors (such as physical exercise or smoking) should be changed. Similarly, in the criminal context, criminogenic risk factors are those that can and should be targeted through an appropriate treatment.



50. Andrews, D. A., & Bonta, J. (2007) The Risk-Need-Responsivity model of assessment and human service in prevention and corrections: Crime-prevention jurisprudence. *The Canadian Journal of Criminology and Criminal Justice*. 49, p. 439-464.

51. Edward J. L. & Lowenkamp, C. "What Are Criminogenic Needs and Why Are They Important?" For the Record 4th Quarter 2005, p. 15-16.

3.3 Principles of effective interventions

Criminogenic needs play a key role in a concept known as the Risk-Needs-Responsivity (RNR) model⁵², which provides a means to assess and treat offenders in order to reduce recidivism. The RNR model consists of the following core principles: the risk principle, the needs principle, and the responsivity principle.

- ▶ The **risk principle** considers that “supervision and treatment levels should match the offender’s level of risk”. It contends that high risk offenders should receive a greater “dosage” of treatment, and low risk offenders should receive less services. Ironically, the opposite is often true: many prison professionals tend to require low-risk offenders to submit to an array of intervention programmes in an attempt to prevent and “save” them from “prisonisation”. “Unproblematic” prisoners are also less challenging to treat. However, there are studies that show that focusing excessive resources on low-risk offenders can actually lead to higher recidivism rates.
- ▶ The **need principle** states that treatment should target offenders’ criminogenic needs. These are needs that when changed alter the probability of recidivism through the delivery of services.
- ▶ Finally, the **responsivity principle** proposes that treatment is more likely to be effective if it is a cognitive-behavioural treatment programme (modelling, graduated practice, role-playing, and high levels of reinforcement for pro-social behaviours) and if there is *matching* of the style of service delivery with offenders’ learning style. These two processes are described as general and specific responsivity, respectively. In other words, offenders must receive services that take into account the “strengths, learning style, personality, motivation, and bio-social (e.g., gender, race) characteristics of the individual.”

The Risk-Needs-Responsivity (RNR) model is one of the current most recognised and effective treatment approaches in terms of re-offending reduction. In order to implement this model, the first step is to assess an offender’s criminogenic needs.

No effective treatment is possible without a proper risk and need assessment. In creating a link between risk and need assessment and treatment, it is helpful and effective to follow these risk, needs and responsivity principles.

52. Andrews, D. A., & Bonta, J. (2007) The Risk-Need-Responsivity model of assessment and human service in prevention and corrections: Crime-prevention jurisprudence. *The Canadian Journal of Criminology and Criminal Justice*. 49, pp. 439-464.

3.4 Risk assessment instruments

“Risk assessment” is a term more obvious in common parlance than in actual implementation in prison and correctional services. Risk assessment can be conducted through several (more or less) structured means. These can be divided into four categories (or “generations”). The first generation of assessment tools involved clinical judgments. These were unstructured and were based mainly on experience of the assessor. This very common approach proved to be the least accurate and reliable risk assessment method leaving little space for consideration of other circumstances of offending. These judgments on the very same offender often varied from expert to expert.

For this reason, in the 1980s a second generation of tools was developed using actuarial methods. These started to emphasise the so-called static factors as described above: age, sex, start of the offending career, number of convictions and other features typical of offending behaviour. These methods remain common classification tools in correctional settings even today. While this model shows higher predictive validity, nevertheless it fails to match criminogenic factors with intervention leading to the rehabilitation of offenders.

The 1990s saw the use of tools combining static and dynamic factors which built upon the premise that in order to be able to determine the risk of re-offending and to choose a suitable intervention, it is necessary to know both the offender’s static risks and criminogenic needs and dynamic risks. While some of these third generation tools proceed on an arithmetical calculation to arrive at numeric risk scores, other approaches incorporate evidence-based information about risk factors and expert interpretation of the seriousness, frequency and duration of these risk factors. Although third generation tools do not present higher predictive validity than actuarial tools, they concentrate upon influencing the offender. Since the introduction of third generation tools it has not been sufficient to ask just whether and to what extent the offender is dangerous, but also why it is so and what can be done in order to change that.

By the turn of the millennium, a fourth generation of tools appeared that take into account the length and intensity of the proposed intervention according to the seriousness of risks and needs. In short, intervention and offenders must correspond, and must be responsive. This enables the tailoring of interventions to individual offenders, and at the same time it is possible to predict future behaviour if certain conditions are met. Therefore, case management is considered by some authors as an integral part of the fourth generation tools.

At present, all four generations of tools are in use at the same time. Regardless what generation and which specific instruments are deployed, it is important that before a prison or criminal justice system decides to adopt a risk

assessment system, it needs to conduct the following steps to ensure risk assessment instruments will work as designed⁵³:

- ▶ Risk assessment instruments should be tested on the specific correctional population;
- ▶ An independent and objective research body should conduct inter-reliability and validity tests;
- ▶ The instruments should allow for dynamic and static factors that have been well accepted and tested in a number of jurisdictions on the local correctional population;
- ▶ The instruments should be compatible with the staff's skill level;
- ▶ The risk assessment should be credible with all of the parties who are directly involved: prison staff, offenders and policy makers.

Some rather simple and universal risk-assessment instruments can be purchased on the open market. These also include staff training. For some of these instruments, staff will need little academic or specific training to conduct accurate assessments. Other instruments are unlikely to achieve minimal levels of reliability and validity unless staff are highly skilled. Unless the agency has such staff, the use of these instruments is not recommended. It is perfectly acceptable if an agency decides to rely upon more "basic" (but standardised) risk instruments. Such tools are far easier to implement, are less expensive to use, and often have the same predictive validity as the more developed (and complicated) instruments.

Less can be more

When introducing a new risk assessment policy, it may be more advantageous to start with simple risk assessment tools that can be understood and accepted by all staff and decision-makers rather than with comprehensive, sophisticated instruments but without a supportive environment and sufficient theoretical background.

3.5 Some formal aspects of risk assessment implementation

In order to ensure that risk assessment serves the goals discussed above and to avoid misleading use of outputs, the following recommendations and examples of good practice should be taken into account.

53. Austin, J. "The proper and improper use of risk assessment in corrections." Federal Sentencing Reporter, Vol. 16, No. 3, 2004.

Regardless of the type of risk assessment instruments, risk assessment should be conducted in an evidence-based and structured manner, and incorporating appropriate validated tools and professional decision-making. Those persons undertaking risk assessments should be aware of (and understand clearly) the limitations of assessing the risk of re-offending and of predicting future behaviour, particularly in the long term. Such risk assessment instruments should be used to develop the most constructive and least-restrictive interpretation of a measure or sanction, as well as to lead to an individualised implementation of the sentence. They are not designed to determine the sentence, although their findings may be used constructively to indicate the need for interventions.⁵⁴

Assessments undertaken during the implementation of a sentence should be seen as progressive, and be periodically reviewed to allow for a re-assessment of the offender's risk. Risk assessments should be repeated on a regular basis by appropriately trained staff to ensure the requirements of sentence planning are met, or when otherwise necessary and thus allowing for a revision of the circumstances that change during the execution of the sentence. Assessment practices should be responsive to the fact that the risk posed by an individual's offending will change over time: such change may be gradual or sudden. They should be coupled with opportunities for offenders to address their specific risk-related needs and to change their attitudes and behaviour. The depth of assessment should be determined by the level of risk and be proportionate to the gravity of the potential outcome.

It seems to be beneficial for both the institution and offenders if offenders themselves are involved in their assessment, and have information about the process and access to the conclusions of the assessment.

The more developed a prison system is, the more attention should be paid to criminogenic risks and needs and to their specific assessment.

Interventions for the prevention of reoffending should be clearly linked to the ongoing risk assessment of the individual offender. It should be planned for both the custodial and community settings, ensuring continuity between these two contexts. Sentence plans should be realistic and have achievable objectives and should be structured in such a way as to allow offenders to understand clearly the purposes of interventions and the expectations placed upon them. These processes should be subject to regular review, with the capacity to respond to changes in risk assessment.

54. Recommendation CM/Rec(2014)3 of the Committee of Ministers concerning dangerous offenders, § 28 - 32.

Chapter 4

Dynamic security

4.1 Introduction

For prison managers, security is a core business. “Security” can be divided into three basic categories: **physical security** involving infrastructure, buildings, perimeters and supporting technologies including electronic devices; **procedural security** including targeted and structured actions conducted by prison staff such as security checks, controls and various routines; and **dynamic security covering** actions that contribute to the development of professional and positive relationships between prison staff and prisoners as a specific approach to security that is based on knowledge of the prison population and an understanding of the relationships between prisoners and between prisoners and prison staff.⁵⁵

Dynamic security thus seeks to create respectful and responsible relationships between prison staff and prisoners. It is effective in ensuring that the power staff members have over prisoners is not perceived as provocation or punishment and allows staff to better anticipate problems and security risks within a prison. The European Prison Rules⁵⁶ provide that the “security which is provided by physical barriers and other technical means shall be complemented by the dynamic security provided by an alert staff who know the prisoners who are under their control.” This involves **security risk assessment** to be carried out as soon as possible after admission to determine the risk that prisoners would present to the community if they were to escape, and indeed the risk that they will try to escape either on their own or with external assistance.⁵⁷ The level of security necessary should be reviewed at regular intervals throughout a person’s imprisonment.

55. United Nations “Prison Incident Management Handbook”, 2013

56. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 51.2

57. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 51.3-5

4.2 The principles of “dynamic security”

The basic condition for the most crucial aspect of dynamic security is the permanent observation of and active contact with offenders. The more this is a two-way (rather than one-sided) relationship, the better. This is why it should be possible for prisoners to make contact with staff at all times, including during the night.

The European Prison Rules emphasise the important role played by staff in other ways. Staff should display an attitude consistent with a clear sense of the purpose of the prison system. Management should provide leadership in such a manner as to help realise this purpose. Particular attention should be paid to the management of the relationship between front-line prison staff and the prisoners under their care.

One of the most difficult tasks of prison staff is the responsibility they have in preserving the dignity of prisoners and in ensuring a humane prison environment. This places considerable demands on them. Expectations are high as the European Prison Rules suggest: thus prison staff “shall at all times conduct themselves and perform their duties in such a manner as to influence the prisoners by good example and to command their respect”.⁵⁸

A good example of putting this expectation into practice can be found in the Corrections Management Policy of the Australian Capital Territory Corrective Services. This reflects the key point that dynamic security occurs when prison officers interact and engage with prisoners during the course of their work, for example by:

- ▶ regularly walking through the area in which they are posted;
- ▶ talking to prisoners, gaining their trust, and building rapport;
- ▶ checking prisoners’ physical welfare during musters and head checks;
- ▶ maintaining a consistent approach to inappropriate behaviour;
- ▶ encouraging positive behaviour and addressing negative behaviour;
- ▶ engaging in case management process;
- ▶ following up on requests in a timely manner; and
- ▶ remaining calm during incidents.⁵⁹

Dynamic security is aided further by effective communication between prison officers, and between prison officers and other staff members. Effective information-sharing facilitated by procedural arrangements integrating electronic systems with personal contacts will ensure that senior prison staff are aware

58. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 75.

59. Corrections Management Policy of the Australian Capital Territory Corrective Services, 2011

of relevant issues, and also that comprehensive handovers are conducted between shifts and teams.

Dynamic security is aided further by effective communication among prison officers and between prison officers and other staff members.

When implemented effectively, dynamic security allows prisoners to feel comfortable when approaching prison staff. This in turn will help prevent problems escalating. Experience shows that if some prisoners wish to be disruptive, others will report this and decline to participate on account of the desire to preserve a fair and humane prison regime. *In United Kingdom [England and Wales], recent initiatives have focused on ensuring staff understand that their relationships with prisoners are as important as the physical means of restraint. The “Five Minute Intervention” (FMI) teaches staff that in a brief five minute conversation they can engage prisoners in such a way that they will feel cared for and that the member of staff is interested in them. This means that a sense of hope is fostered in the prisoners that they can change their lives but also that a better relationship will yield more information and hence improve dynamic security. Prison officers’ training has now been extended to ten weeks and emphasises improving relationships with prisoners.*

Achieving excellence in dynamic security thus rests on prison leadership promoting a positive culture based on three pillars: supportive environment; competent and committed staff; and individual assessment of prisoners and risk management. The latter factor was discussed in the preceding chapter. The other two aspects can be summarised briefly:

- ▶ **A supportive framework** involves physical and procedural security. These are pre-conditions to create a safe environment, that is, one in which staff and prisoners may feel at ease and relax. Management based on Council of Europe standards should be able to create a just, humane and safe environment where prisoners’ needs are met and their welfare is cared for.
- ▶ **Competent, skilled and committed staff** is not possible without a sufficient level of staffing. Further, the selection of candidates, their knowledge, life skills and training are vital for their proficiency and professionalism. Staff need to feel at ease in their job and when having contact with prisoners. Staff need to feel secure, need to be coherent and credible in the overall approach, and need to retain control over the prison in all circumstances. If staff feel too weak, this will inhibit pro-active

interaction with prisoners. Staff will be better committed to justice, order and discipline if supported by the system through transparent security policy and corporate identity, thus in turn allowing the staff to encourage positive behaviour while consistently addressing negative behaviour. In a good environment, this does not necessarily mean harsh punishment: whenever conflicts can be negotiated, mediation should have priority. It is the role of a management valuing honesty, openness and integrity to take responsibility to ensure that staff are in a strong position – thus aggressive exhibition of power will no longer be necessary.

It is also worth in closing to highlight the CPT's general standard and often-repeated recommendation to abstain from weapons in ordinary daily service. If weapons are deemed necessary in particular situations, these should not be carried visibly when in direct contact with prisoners. Such practice is seen as directly opposed to the concept of dynamic security.

Wearing weapons visibly in direct contact with prisoners can disrupt the concept of dynamic security.

Chapter 5

Dealing with vulnerable groups of prisoners

5.1 Introduction

All prisoners may be vulnerable to a certain degree (for example, on account of overcrowding, poor physical conditions, isolation or inappropriate activities). However, some groups of prisoners run a greater risk of ill-treatment than others. Physical weakness, mental insufficiency, membership of a minority group, different appearance or salient behaviour are just some of the factors which may lead to prejudice, discrimination, exclusion or indeed direct ill-treatment.

Prisoners from ethnic, religious and racial minorities, foreign nationals, sexual minorities, and especially people with disabilities such as handicapped, sick, mentally-ill and mentally-retarded prisoners are at a much higher risk of discrimination and ill-treatment. Additionally, juveniles, women and elderly prisoners may be vulnerable to abuse from both prison staff and other prisoners. There are also special groups of white collars criminals, police informers, former public officials and police or prison officers who may be at real risk of humiliation or physical and psychological abuse and violence.

Vulnerable prisoners should be treated – as with all prisoners - in accordance with the requirements of international human rights standards. This also implies that their special needs should be considered in relation to their prospects of social reintegration.

Vulnerable prisoners should be considered as prisoners with special needs. That is why they are in need of additional care and protection.

Contrary to general perception, such vulnerable groups do not just constitute a small part of the prison population, for their proportion in domestic prison systems has been growing rapidly in recent years. Foreign prisoners, for example, make up over 20 per cent of the prison population in European Union countries. Other categories of vulnerable prisoners may be even more prevalent. According to studies undertaken in a number of countries, between 50 to 80 per cent of prisoners have some form of mental disability (and the numbers of prisoners with diagnosed mental disorders has been continually increasing). Further, racial and ethnic minorities represent over 50 per cent of the prison population in some jurisdictions.⁶⁰

Vulnerable groups may represent a substantial proportion of the prison population.

It is also important to note that, in many cases, prisoners may belong to more than one vulnerable group. This implies that their special needs may be multiple. Such prisoners may suffer both on account of their existing special needs (exacerbated by the fact of imprisonment) but also on account of the additional risks they confront stemming from their particular status.

“Vulnerable” does not refer to “less dangerous” as it is not related to the degree of dangerousness, risk of reoffending, violence etc. However, it implies that failing to meet the needs of vulnerable prisoners may in certain cases amount to ill-treatment.

The high proportion of vulnerable prisoners means that their special needs cannot be considered as a marginalised component of prison management policies. Comprehensive management strategies, including risk and need assessment, tailored sentence plans, special care, and supervision and protection of prisoners with special needs, implies that policies and practices need to be developed, and then implemented. It is particularly important that the protection of the human rights of vulnerable prisoners is seen as an integral part of management responsibilities to ensure the creation of a safe and fair environment (a matter discussed within the context of discussion of “dynamic security”, above).

60. Handbook on Prisoners with special needs. United Nations Office on Drugs and Crime, United Nations, New York, 2009, p. 4-5.

This is not without challenge, but it is vital that this is achieved. Equality and fairness go hand in hand in the criminal justice system. It is important to ensure that policies preventing discriminatory practices are implemented in prisons. Discrimination on the basis of the birth, nationality, ethnicity, race, descent, sex, sexual orientation, gender, identity, age, disability, health condition, sentence or other status may be precluded; but this does not prevent in turn recognition of the special needs of certain groups of prisoners.

5.2 Juveniles⁶¹

Violence in institutions for juvenile offenders may be prevalent in a number of countries. It takes different forms, involves different perpetrators, and arises in different contexts and at different stages in the criminal justice system. The phenomenon is a complex one. Identifying its features and causes may help address its prevention. Violence occurs in different ways. It is inflicted by other juvenile detainees, by adult inmates incarcerated with juveniles, by staff, and by the juveniles themselves (including self-harm and suicide). The most common forms of violence by other juveniles involve aggression and bullying; in addition, sexual abuse, extortion and racist abuse may also occur.

Staff may pose a risk to juvenile detainees through the abuse of official authority. This may include the excessive use of force, the use of restraints, and arbitrary application of disciplinary measures such as solitary confinement and search. Staff members may deliberately bully and threaten juveniles, and as a consequence juveniles may even be afraid of being on their own in their cells. Staff may also condone attacks by other juveniles by failing to respond appropriately.

Juveniles are thus a particularly vulnerable category of detainees. This section seeks to highlight international standards, to identify particular risks, and to suggest strategies to minimise such risk.

Juveniles constitute a particularly vulnerable category of detainees. However, the risks they face can be reduced significantly through the taking of certain measures.

- ▶ An institution's environment can heavily influence the ability of a juvenile to adapt to life in the institution. The level of social interaction

61. This section is drawn heavily from the Report on Violence in Institutions for Juvenile Offenders prepared by Prof. Dr T. Liefwaard, Dr J. Reef and M. Hazelzet, LL.M and approved by the Council for Penological Co-operation (PC-CP) of the European Committee on Crime Problems (CDPC) of the Council of Europe, (PC-CP (2014)13 rev 2), presented at the multilateral meeting by Prof Dr T. Liefwaard.

between juveniles and staff and staff attitudes towards juveniles will heavily determine their feeling of safety, fair treatment and trust in staff to resolve concerns or address complaints. All of this will also help the juveniles to handle emotional stress and thus help prevent anger and fear: a repressive climate in an institution results in distrust between juveniles and staff and also among juveniles, in turn resulting in the risk that violence is used as a means of control with the obvious consequence that juveniles themselves will become more aggressive.

- ▶ Staff selection is vital. The CPT recommends that staff “should be carefully selected for their personal maturity and ability to cope with the challenges of working with – and safeguarding the welfare of – this age group. More particularly, they should be committed to working with young people, and be capable of guiding and motivating the juveniles in their charge. All such staff should receive professional training, both during induction and on an on-going basis, and benefit from appropriate external support and supervision in the exercise of their duties”.⁶²
- ▶ Treating juveniles in a fair and just manner, for example through the application of child-specific information and legal safeguards, is important. In turn, fair treatment helps establish a sense of trust in institutional arrangements and results in more ready acceptance of institutional rules and (where necessary) sanctions. In particular, Recommendation CM/Rec(2008)11 on European Rules for juvenile offenders subject to sanctions or measures provide detailed rules regarding complaints procedures, inspection and monitoring. These rules have been supplemented by the 2010 Guidelines for child friendly justice which call for mechanisms that are “accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to private and family life and to integrity and dignity”.⁶³ Trust between staff and juveniles so as to allow the latter to feel free to lodge complaints against staff without repercussions is vital. Juveniles should also have access to independent complaints mechanisms outside the institution.

Staff must be aware that there are inherent risks to the use of physical restraints; at the same time, however, the failure to restrain a juvenile where there is a

62. *24th General Report CPT/Inf (2015)*, para 119. Examples of such practices have been observed by the CPT in Ireland (Ireland – CPT/Inf (2011) 3, paragraph 40; Moreover, gender mixed staff and a multi-disciplinary team approaches are present in, for example, Austria and Turkey (Austria – CPT/Inf (2010) 5, paragraph 74; Turkey – CPT/Inf (2005) 18, paragraph 73; Council of Europe, 2012, p. 25).

63. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010), section II. Definitions

serious risk of harm could result in a failure in the duty of care. The European Rules for juvenile offenders subject to sanctions or measures provide that the use of force against juveniles should only be used as a last resort in self-defence, in cases of attempted escape, physical resistance to a lawful order, direct risk of self-harm, harm to others, and serious damage of property. These Rules also call for proper domestic regulation: the use of instruments of restraints must be specified in national law and must not be applied longer than strictly necessary. Some forms of restraints must be prohibited such as the use of chains and irons.⁶⁴

The use of force against juveniles should only be used as a last resort in self-defence, in cases of attempted escape, physical resistance to a lawful order, direct risk of self-harm, harm to others, and serious damage of property.

Ireland's Best Practice Guidelines in the Use of Physical Restraint provides a useful assessment of whether restraints are used as a measure of last resort by posing a series of questions before employing physical restraint:

- ▶ *Is there an alternative strategy that carries fewer risks than physical restraint, such as, supervision of the young person from a safe distance or distraction or diversion?*
- ▶ *Are there medical, psychological or other safety warnings to avoid the use of physical restraint with the child in question?*
- ▶ *Is this intervention appropriate to the developmental stage of the young person?*
- ▶ *What has been learned from previous experience, if any, of physically restraining this young person?*⁶⁵

Similar concerns arise in respect to the use of disciplinary measures. Here, the risk is that these are used as instruments of repression and deterrence in circumstances when it would be more appropriate to adopt an educational or pedagogical approach to address the grounds for their imposition. The line between lawful and unlawful or arbitrary punishment can be a fine one. The European Rules for juvenile offenders subject to sanctions or measures provide that disciplinary procedures should be used as a last resort and that only "conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence". Member States are again expected

64. Recommendation CM/Rec(2008)11 of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures, Rules 90-91.

65. Irish Youth Justice Service, The Best Practice Guidelines in the Use of Physical Restraint, 2006.

to ensure disciplinary procedures have a clear legal basis in national law (ie, the grounds for application of disciplinary rules and the procedures to be followed before these may be employed must be specified).⁶⁶

Disciplinary punishments should preferably be selected for their educational impact and be proportionate to the seriousness of the offence. The European Rules on juvenile offenders subject to sanctions or measures also specifically reject the use of collective punishment, corporal punishment, punishment by placing an individual in a dark cell, and all other forms of inhuman and degrading punishment. In particular, “solitary confinement in a punishment cell shall not be imposed on juveniles”.⁶⁷

Education may address the adverse impacts of the often low socio-economic background of juvenile detainees and assist their eventual reintegration into society. This may involve educational support to try to understand and thus to tolerate cultural and religious differences and differences in sexual orientation. More specifically within the context of reducing the risk of violence, teaching young people better social problem-solving skills by general coping interventions (for example, in relation to bullying and victimisation) will help individuals learn more appropriate ways of responding rather than aggression).

Teaching young people better social problem-solving skills will help individuals learn more appropriate ways of responding to situations.

Examples of good practice are found in the Council of Europe Report on Violence in Institutions for Juvenile Offenders⁶⁸:

In Malta, perpetrator-victim mediation has produced some positive results. This approach encourages responsibility on the part of the perpetrator and understanding and possibly forgiveness on the part of the victim, but most importantly [it] teaches inmates to resolve conflict in a mature way making it a learning experience for both parties.

France has tried “educative mediation”. This allows sufficiently-strong educative tries to be established with professionals before the particular act giving rise to the conviction is discussed. This educative mediation thus permits issues that pertain to the offence to be discussed in an indirect way and in a manner that is

66. Recommendation CM/Rec(2008)11 of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures, Rule 94.

67. Recommendation CM/Rec(2008)11 of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures, Rule 95.

68. Report on Violence in Institutions for Juvenile Offenders (PC-CP (2014)13 rev 2).

more likely to allow the offender to acknowledge the offence. Devices such as writing courses, prevention or sensibilisation modules (on citizenship, on healthcare, etc.), role playing or cultural activities can be used in order to indirectly help the teenager to speak out and to contribute to a restorative practice.

In Ireland, a bespoke Behaviour Management Policy and Procedures backed up with training equips staff to deal with all behavioural issues from verbal escalation to physical restraint and subsequent debriefing of all incidents. 'With the development of the bespoke behaviour management programme there is a consistency on how staff work with the young people especially in relation to potential incidents. With the emphasis of the training on principals that create a facility where care, welfare, safety and security of the young people and the staff is of paramount importance, every effort is made to intervene in situations early in order to prevent them becoming physical. The focus of the training is on identifying the point of an escalating incident and training staff to intervene in the most appropriate level taking into consideration their knowledge of the particular individual(s) involved. The role of the "Keyworker" is vital here as well as the development of the "Individual Care Management Plans". These are developed for each young person based on the information gleaned from assessments, studies and staff meetings. The actual number of physical restraints and major incidents has dropped considerably over the past seven years and is due in part to staff developing more experience in the work and the on-going training in behaviour management and other areas.'

5.3 Prisoners with mental disabilities

Recent developments in psychiatry across Europe have resulted in a decrease in the number of patients held in mental health institutions, but this has been at the price of an increase in prisoners with some form of mental health illness. Punitive sentencing policies have in part been responsible for this situation. This has posed a particular problem for prison services that are not readily able to cope with such prisoners.

While assessments of major mental disorders such as depression or schizophrenia and mental retardation are rarely controversial, the assessments of both extreme emotional states of relatively short duration and of personality disorders have been debated at length during the past several decades.

The stronger the connection between mental disorder and the offence, the lower the responsibility. A prison sentence is imposed in part on the basis that the offender can be held personally responsible.

Laws and criminal codes dealing with offenders with mental illness inevitably provide that hospitalisation should be imposed before or instead of a prison sentence.

Mental disabilities include a wide range of profoundly-different conditions. These are distinct in their causes and effects, especially with regard to how a prisoner's right to health should be interpreted and implemented. These differences have a crucial bearing on how such a prisoner should be treated, including the implementation of any security measures.

Wherever possible, a distinction should be made between prisoners with:

- ▶ intellectual disabilities (including mentally retarded);
- ▶ mental illnesses (such as affective, psychotic or neurotic disorders);
- ▶ mental and behavioural disorders due to psychoactive substance use;
- ▶ personality disorders.

The treatment of prisoners with **intellectual disabilities** should focus on providing a safe and secure environment, preferably with separation from other prisoners as mentally-retarded individuals are at greater risk of exploitation and physical or sexual abuse. Adaptive behaviour is always impaired, but in protected social environments where support is available this impairment may not be at all obvious in subjects with mild mental retardation.

For prisoners with **mental disorders** such as anxiety, depression, psychotic, neurotic and other disorders, good access to health care services and psychiatric treatment in particular should be provided. The 2004 WHO report "Prevention of Mental Disorders" states that "Prevention of these disorders is obviously one of the most effective ways to reduce the [disease] burden."⁶⁹ Similarly, the 2011 European Psychiatric Association guidance on prevention of mental disorders states that "there is considerable evidence that various psychiatric conditions can be prevented through the implementation of effective evidence-based interventions."⁷⁰ Unfortunately, the terms "mental disorder" and "mental illness" carry a relatively vague interpretation, with the result that the question whether personality disorders are mental illnesses of the same quality, or not, remains unresolved.⁷¹

69. World Health Organization. (2004). Prevention of mental disorders : effective interventions and policy options : summary report / a report of the World Health Organization Dept. of Mental Health and Substance Abuse. Geneva: World Health Organization, p 1.

70. Campion, J.; Bhui, K.; Bhugra, D. "European Psychiatric Association (EPA) guidance on prevention of mental disorders". *European Psychiatry*, 2012, 27 (2): p. 68–80.

71. Kendell, R. E. "The distinction between personality disorder and mental illness." In *The British Journal of Psychiatry*, Feb 2002, 180 (2) 110-115.

Prisoners with mental and behavioural disorders due to psychoactive **substance use** are more vulnerable to a wide range of other mental illnesses. They often suffer from a mental condition which refers to a dual-diagnosis. The best treatment programmes are those that offer an integrated approach. The programmes should not use a one-size-fits-all approach whereby all prisoners receive the same sentence plan or treatment. *The Italian prison service is leading a EU-funded project focusing upon the number of prisoners suffering from a mental health problem, with a view to developing and piloting new approaches to dealing with mental health issues affecting prisoners.*

Prisoners with **personality disorders** form a special category. Although personality disorders - and antisocial or dissocial personality disorders in particular - are included in the commonly used lists of mental disorders (DSM⁷² and ICD⁷³), not every personality disorder substantially diminishes legal responsibility.⁷⁴ There is still no consensus however, among either forensic psychiatrists, psychologists, or jurists on how to judge the legal responsibility of these offenders. Persons who manifest primarily personality disorders in regard to criminal conduct are, at least for heuristic reasons, usually held accountable for their behaviour. This is reflected by the fact that up to 60 percent of prisoners are individuals with a personality disorder. With the exception of serious personality disorders, labelling prisoners as vulnerable only on the basis of a diagnosed personality disorder does not seem to be appropriate. On the contrary, it may lead to false indications of special care.

Prisoners with personality disorders who represent a large portion of the prison population, are not automatically indicated as vulnerable, unless their special needs and indications are identified in detail.

Owing to the range of different conditions the term 'mental disability' encompasses the different treatment approaches which should be adopted in response. The terms 'mental health care' and 'treatment' are used here to cover a range of treatment options, including psychosocial support, counselling,

72. American Psychiatric Association, & American Psychiatric Association. (2011). *Diagnostic and statistical manual of mental disorders: DSM-IV-TR*. Washington, DC: American Psychiatric Association.

73. World Health Organization. (1992). *The ICD-10 classification of mental and behavioural disorders: Clinical descriptions and diagnostic guidelines*. Geneva: World Health Organization.

74. Krober, H. L. & Lau, S. "Bad or mad?— disorders and legal responsibility: the German situation." In *Behavioral Sciences & the Law*, 18, 679–90, 2000.

speech and occupational therapy, physiotherapy, behavioural therapy, and psychiatric and medical treatment as well as other appropriate specialised health care services.

It is also important to develop strategies to prevent suicide and self-harm. For that reason, appropriate psychological and psychiatric treatment procedures should be provided to those at risk. A comprehensive mental health care strategy should be introduced in every prison and staff should be trained in assessing the risk of self-harming behaviour.

The process of health screening undertaken on entry to prison (the period of the first 24 hours after admission is the one carrying the most risk) and subsequent assessments at regular intervals are key components of self-harm and suicide-prevention strategies. Staff training on mental health covering assessment of the risk level and the prevention of such acts is essential. In short, the promotion of mental health in prisons should be a key element of prison management and health care policies.

5.4 Older prisoners and prisoners with physical disabilities

Most prisons are designed for younger and physically-healthy offenders. Such prisoners comprise the majority of the prison population. Prisoner programmes are normally also developed with the needs of younger prisoners in mind. The quite different physical capabilities and programme needs of older prisoners are rarely taken into account. Older (that is, elderly) prisoners and persons with physical disabilities (and those with long-term disabilities in particular) may encounter various barriers that hinder their full and effective participation in prison life or on an equal basis with others.

The principle that prison sentences should only be imposed as a last resort should be fundamental in deciding whether to imprison offenders with disabilities, taking into account the level of care they are likely to receive in prisons. It is also important to ensure that legislation and procedures are in place to ensure that persons charged with or convicted of a criminal offence are not discriminated against on account of their physical disabilities. Such physical disabilities are magnified in prisons, given the nature of the closed and restricted environment in place.

Older prisoners have a variety of health care needs which most prison systems are unable to provide for to the fullest possible extent, and which also place a significant burden on the resources of prison health care services. Several factors may exacerbate existing physical disabilities. Prison overcrowding is one obvious factor. Prison layout and architecture may also render it difficult

for prisoners with mobility impairments to access dining areas, libraries, sanitary facilities, work, recreation and visiting rooms. Prisoners with visual disabilities will not be able to read their own mail or prison rules and regulations unless they are assisted or the material is provided in Braille, and they will be unable to use the library, unless taped materials or books in Braille are available. Prisoners with a hearing or speaking disability may be denied interpreters, making it impossible for them to participate in various prison activities, including counselling programmes, as well as in their own parole and disciplinary hearings.⁷⁵

In short, in order to ensure the equal treatment of prisoners with disabilities and the protection of their human rights, prison authorities should have special policies and strategies which address the needs of this vulnerable group. Such policies should address as a priority issues such as staff training, classification, accommodation, health care, access to programmes and services, safety and preparation for release or early conditional release.

5.5 Ethnic, racial and religious minorities

Minority groups are distinct from other prisoners on account of their ethnicity, race and descent. This distinctiveness will be reflected in different ethnic, religious and cultural practices and languages. A minority group is not necessarily a numerical minority, as it can involve any group disadvantaged by the dominant group in terms of social status, education, wealth or political power. It is especially important to realise that some ethnic, race or religious groups of prisoners or indigenous people may be in some prisons overrepresented in comparison to the situation in general population of the relevant state or region.

A minority group is not necessarily a numerical minority.

Overrepresentation occurs when the proportion of a certain group of people within a prison or criminal justice system is greater than the proportion of that group within the general population. Equitable treatment calls for the elimination of all forms of discrimination and also affirmative action to ensure that the special needs of minorities are met.

Discrimination in prison can be reflected in a number of ways, most obviously by physical abuse (eg, beating) and verbal abuse (eg, hate speech or

75. Russell, M. and Stewart, J., Disablement, Prison and Historical Segregation, Monthly Review, July 15, 2002.

harassment) by prison staff or other prisoners. Members of overrepresented groups may be systematically:

- ▶ *overclassified* and placed in higher security institutions than necessary,
- ▶ discriminated in the quality of *accommodation*,
- ▶ imposed to more frequent *disciplinary punishment*,
- ▶ imposed to more frequent *searching procedures* or other security measures,
- ▶ affected in access to *health care and treatment programmes*,
- ▶ affected in access to education and work, and
- ▶ affected in access to extramural activities, temporary release, home leave and parole decisions.

Most obviously, linguistic requirements of minority groups may be neglected. This can include, eg, failure to provide copies of prison rules and regulations in a language that they understand, a lack of reading materials, or the absence of translation and interpretation during disciplinary hearings or rehabilitation programmes.

A successful strategy to overcome these problems requires implementation of appropriate policy procedures. The first step for prison services is to make clear their commitment to racial and ethnic equality and to transform that commitment into practice. Here, it is clearly advisable to consult with community representatives of the minority groups when developing specific measures.

5.6 Foreign national prisoners

The term “foreign national prisoners” refers to “prisoners who do not carry the passport of the country in which they are imprisoned” and covers “prisoners who have lived for extended periods in the country of imprisonment, but who have not been naturalised, as well as those who have recently arrived”.⁷⁶ Irregular migrants and those seeking asylum are *not* prisoners, and should never be held in prison establishments. Over the last few decades, prison populations in European countries have grown and their profiles have changed. In 2015, there were almost 115,000 foreign prisoners in European countries. Their numbers vary greatly per country, from less than 1% in Romania and Poland to an absolute majority in almost ten countries, including Austria (50.9%), Liechtenstein (55.6%), Greece (60.4%), Luxembourg (72.3%) and Switzerland (73%). Indeed, the average percentage of foreigners in the total European

76. Handbook on Prisoners with special needs. United Nations Office on Drugs and Crime, United Nations, New York, 2009.

prison population is over 20%.⁷⁷ Recent events with increased migration to Europe suggest that a further increase is to be expected.

Foreign national prisoners who do not have a legal permit to reside in the country of arrest or those who lose their legal permit to reside as a result of the offence face two penalties: imprisonment and deportation to their country of origin, often against their will⁷⁸. Sometimes the home country will not want to take the prisoner back, which will lead to the prolonged detention of the person concerned in an uncertain state. Some prisoners apply for asylum while in prison. Many face indefinite detention pending a decision by the immigration authorities after the sentence has been served.

Prisoners who are both foreign and of a racial or ethnic minority group may be subjected to a higher level of discriminatory attitudes and practices. The risks of being ill-treated multiplies if other risk factors such as mental disorder and post-traumatic stress disorder are present.

Taking into account the growing numbers of foreign national prisoner in many prison systems, there are urgent ethical and practical reasons to establish strategies that address the special needs of this group of prisoners to ameliorate the harmful effects of imprisonment in a foreign country.

Foreign national prisoners, especially those who are imprisoned as immigration detainees, often come from countries affected by war, political conflict or disaster. Some prisoners may exhibit symptoms of post-traumatic stress disorder. This is a natural emotional reaction to intense experiences that involve actual or threatened serious harm to oneself or to others. These types of experiences are called “traumatic.” Examples of traumatic events are bombings, rape, torture, death or disappearance of family members or friends, being forced out of one’s home, or seeing another person harmed or killed.

Discriminatory treatment may be reflected in actual physical or verbal abuse, but may often be less visible and more subtle, for example, reflected in the security level to which foreign nationals are allocated, the accommodation they are given, the number of disciplinary punishments they receive in comparison to others, and the search procedures or methods to which they are subjected.

77. World Prison Brief and Institute for Criminal Policy Research. (2015, December 1). Retrieved from: <http://www.prisonstudies.org>.

78. Handbook on Prisoners with special needs. United Nations Office on Drugs and Crime, United Nations, New York, 2009, pp. 83-84.

The European Prison Rules recommend that specific information about legal assistance should be provided to prisoners who are foreign nationals, and that such prisoners should be informed, without delay, of their right to request contact and be allowed reasonable facilities to communicate with the diplomatic or consular representative of their state.⁷⁹

The recommendation of the Committee of Ministers to member States of the Council of Europe 2012(12) concerning foreign prisoners⁸⁰ lists in detail measures to reduce isolation and promote social resettlement:

- ▶ *prison rules and information should be made clear,*
- ▶ *translation and interpretation services should be provided, as well as language training courses,*
- ▶ *communication with other person of same nationality should be facilitated,*
- ▶ *access to reading material in prison libraries or via consular services should be provided,*
- ▶ *where foreign prisoners are to remain in the State in which they were held after release, they shall be provided with support and care by prison, probation or other agencies which specialise in assisting prisoners,*
- ▶ *foreign national prisoners should have same access to suitable work and vocational training, including programmes outside prison,*
- ▶ *visits and other contacts with outside world should be facilitated.*

5.7 Sexual minorities

A sexual minority is a group whose sexual identity, orientation or practices differ from those of the majority of society. The term is primarily used to refer to lesbian and gay individuals, but it can also refer to intersex, transgender or third gender individuals.⁸¹

Sexual minorities are a particularly vulnerable group in prisons on account of discrimination. Prisoners will suffer humiliation, violence and sexual abuse. The main and most obvious need of such prisoners is protection from sexual abuse and rape, assaults generally perpetrated by other prisoners.

Prisoners from sexual minorities are much more likely to be victims of sexual assault and rape than they are to be perpetrators of such acts.⁸²

79. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, 37.1-37.5.

80. Recommendation CM/Rec(2012)12 of the Committee of Ministers concerning foreign prisoners

81. More recently, the catch-all terms GSM ("Gender and Sexual Minorities") have been proposed.

82. Human Rights Watch, No Escape: Male Rape in United States Prisons, 2001, p. 70.

As the UN's *Handbook on Prisoners with Special Needs*⁸³ notes, since prisoner-on-prisoner rape in such cases involves persons of the same sex, its perpetrators are unthinkingly labelled as homosexuals. In fact, the majority of prison rapists see themselves as heterosexual and the victim as a substitute for a woman. A typical route open to gay or lesbian prisoners is to receive the protection of a prisoner "husband"; that is, a prisoner powerful enough in the hierarchy to keep other prisoners at bay, in return for meeting any sexual requests of the other prisoner. In time, though, the victim may be 'hired out' to other prisoners, thereby exacerbating the suffering of the victim as a forced prostitute.

A number of steps to protect such prisoners will help address the risks of ill-treatment:

- ▶ Prison management should develop policies and strategies that ensure the maximum possible protection of prisoners from sexual minorities by prohibiting discrimination on the basis of sexual orientation or gender identity. In particular, there should be no discrimination in the quality of accommodation provided for prisoners from sexual minorities.
- ▶ Staff training should include awareness-raising of principles of equality and non-discrimination, including awareness of sexual orientation and gender identity and the special needs and protection of sexual minorities.
- ▶ Prison classification systems should recognise the special protection needs of prisoners from sexual minorities. Such prisoners should not be placed in dormitories or cells together with prisoners who may pose a risk to their safety. (It may be helpful to take into account the wishes and concerns of prisoners themselves during the stage of allocation to cellular accommodation).

It is not always advisable to accommodate transgender prisoners according to their birth sex. Instead, prison management should take into account the different accommodation needs of those who have not undertaken sex reassignment surgery and those who have, and whether such prisoners are male to female or female to male transgender persons, or whether they are in a process of transition.

83. *Handbook on Prisoners with special needs*. United Nations Office on Drugs and Crime, United Nations, New York, 2009, p. 105-106.

As with all prisoners, prisoners from sexual minorities should undergo a full health screening on entry to prison. An effective, accessible and confidential complaints mechanism will also assist in identifying any particular concerns of such prisoners.

5.8 Other vulnerable groups of adult prisoners

Other groups of vulnerable prisoners exist. Long-term and lifelong prisoners, prisoners with terminal illnesses, or (where this exists) inmates placed in forensic hospitals or secure preventive detention facilities may each represent additional vulnerable groups within the criminal justice system. Individuals in each of those groups have particular specific needs and may face specific risks of ill-treatment. Although such groups are highly heterogeneous in terms of life prospects and social reintegration, each is at risk of suffering caused by separation and isolation from their families.

Appropriate policies and strategies should be devised (and periodically reviewed) to ensure that the needs of prisoners threatened by long-term isolation or by minimal life chances are addressed in a manner that respects their human rights, while at the same time taking into account security needs and the safety of the community at the same time. Such policies and strategies should also include the medical care.

Chapter 6

Security measures, instruments of restraint and solitary confinement

6.1 Introduction

As discussed, prison staff have an important responsibility for protecting prisoners from others. Staff must be alert to identify and trained to deal with “subtle forms of harassment to unconcealed intimidation and serious physical attacks”.⁸⁴ As also noted above, positive relations between staff and prisoners through interpersonal communication skills will lead to a situation of ‘dynamic security’ reducing the need for more intrusive forms of physical control of prisoners. According to the United Nations⁸⁵, key factors in ensuring safety and order in custody involve the configuration and infrastructure of the prison facility, adequate numbers of staff and who are well-trained and have the relevant skills and competencies, an effective system for classification of detainees, and the separation of different categories of detainees. These work against the necessity of using measures of restraint. On the contrary, poor prison management resulting in dysfunctional forms of control emerges as a major cause of interpersonal violence when measures of restraints are more often misused.

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84. *11th General Report (CPT/Inf (2001) 16*, para 27. For an example of CPT discussion, see CPT/Inf (99) 9 (Finland), paragraph 59 (awareness of the problem of inter-prisoner violence and recognition of the duty of care which is owed to prisoners in such cases: but “the time is ripe to move beyond monitoring the phenomenon and to establish a coherent strategy in order to tackle it. More needs to be done to minimise the opportunity for strong and robust prisoners to prey upon the weak”).
85. United Nations, *Prison Incident Management Handbook*, 2013, p26.

A “dynamic security” approach which combines positive staff-prisoner relationships with fair treatment and purposeful activities, and techniques of mediation and de-escalation, are more effective means to ensure order in custody as all of this allows for the anticipation of problems and security risks.

Nevertheless, while proper classification and distribution of prisoners may reduce the threat of intimidation of prisoners by others, application of security measures (such as searches, the use of restraints and the placing of prisoners in solitary confinement) may on occasion be necessary to provide security and order in a custodial setting, to protect persons deprived of their liberty from inter-prisoner violence, for self-defence, to prevent self-harm and suicide, and to prevent escape.

The European Court of Human Rights is mindful of the inherent difficulties in maintaining security and good order in prisons. Detention in a high security prison is not in itself incompatible with the ECHR, but the imposition of routine but stringent security measures in the absence of convincing security needs may give rise to a violation of the prohibition of ill-treatment under Article 3, particularly if there is any indication of an intention to humiliate a prisoner. Nevertheless, as discussed above, material conditions must be compatible with respect for human dignity and not create distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in imprisonment.

In much of this case law, the principle is that application of security measures or restraints must satisfy two fundamental requirements: first, of proportionality (that is, there must be a reasonable relationship between the means selected and the end sought to be achieved), and second, of protection against arbitrary decision-making (that is, that procedural safeguards ought to be adequate to protect the prisoner from unwarranted action).

Safeguards are thus necessary to counteract the possibility of ill-treatment in instances when force or the use of instruments of physical restraint becomes necessary. Use of restraints that are “inherently degrading or painful” is not permissible under any circumstances. This should be read in the light of the commentary to Article 5 of the UN Code of Conduct for Law Enforcement Officials, which states that the term “cruel, inhuman or degrading treatment or punishment” should be “interpreted so as to extend the widest possible protection against abuses, whether physical or mental”. Further, according to the European Prison Rules, instruments of restraint shall never be applied as a punishment. *In Portugal, staff are required to report to the director of the prison immediately whenever they become aware of any instance where coercive force*

has been used; in turn the director must report the matter to the Prison Service General-Director for further examination by the Inspection and Audit Service, a unit headed by the Prison Service General Director and coordinated by a judge or public prosecutor. Further, any prisoner requiring to be restrained by handcuffs for more than an hour clinical services are contacted for evaluation and adoption of the measures deemed appropriate to their medical condition. In United Kingdom [England and Wales], all prisons are required to analyse their use of force figures for trends, including disproportionate use affecting ethnic minority prisoners. Further, a corruption prevention and professional standards system which allows staff to confidentially report allegations of ill-treatment and wrongdoing by other members of staff has been introduced.

This chapter will examine a range of security measures, including the use of solitary confinement or segregation. In this regard, it will address how best to achieve the requirements of rule 51 of the European Prison Rules which states that: "The security measures applied to individual prisoners shall be the minimum necessary to achieve their secure custody".

6.2 Strip-searching of prisoners

An obvious measure of security is the strip-searching of prisoners. Clearly, though, such a measure carries inherent risks, most obviously, that a prisoner may feel humiliated. Application of this form of security measure⁸⁶ may give rise to issues of compatibility with the ECHR. It is clear that the authorities must be able to show a justification for the measure, for its use for inappropriate purposes or as merely routine practice will be suspect. Searches requiring a detainee to undress will be carried out only by staff of the same gender and out of the sight of custodial staff of the opposite gender.⁸⁷

Strip-searching imposed as a routine practice is inherently risky. Staff must be able to show a justification for the measure, and that the search is a proportionate response.

86. See Recommendation (98) 7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison, paragraph 72: "Body searches are a matter for the administrative authorities and prison doctors should not become involved in such procedures. However, an intimate medical examination should be conducted by a doctor when there is an objective medical reason requiring her/his involvement."

87. *10th General Report, CPT/Inf (2000) 13*, paragraph 23. See also *Wiktorko v Poland* (31 March 2009), paras 46–57 (stripping naked of a female in a sobering-up centre by male staff members and immobilisation with belts for ten hours constituted degrading treatment).

In Iwańczuk v Poland, a prisoner had been ordered to undergo a body search before he could exercise his right to vote. He had not been a disruptive prisoner, and there had been no grounds for fearing that he would behave violently. As he was undressing, he had been subjected to abusive remarks from the guards, and in light of this humiliation, had refused to remove any further clothing. In consequence, he had been denied the right to vote. This constituted degrading treatment within the meaning of Article 3.⁸⁸

In Van der Ven v Netherlands, the combination of routine strip-searching in a maximum security prison with the imposition of other stringent security measures had amounted to inhuman or degrading treatment. One of the features which had been hardest for the applicant to endure had been the weekly routine of a strip search for some three and a half years, a measure applied in the absence of convincing security needs and in addition to all the other strict security measures imposed.⁸⁹

In Frérot v France, full body searches had not been shown to have been based upon convincing security needs but rather than upon a presumption of concealment. This led to a finding of a violation.⁹⁰

In El Shennawy v France, repeated full body searches of high risk prisoner by officials wearing balaclavas on up to eight occasions a day over a short period of time and which had initially been recorded on video were judged to have violated Article 3 of the European Convention on Human Rights: full body searches had not only to be necessary but conducted in an appropriate manner, and this case had involved a degree of humiliation going beyond the level which the strip-searching of prisoners inevitably entailed.⁹¹

6.3 Security monitoring arrangements in prisons

Strip-searching of prisoners is not the only aspect of internal security measures that may give rise to issues under the ECHR: drugs testing⁹² and other forms of forcible medical examination of a prisoner will constitute interferences with respect for private life but will be deemed justified where a state can show this is for good order or a step taken in the prisoner's own interests.⁹³ However, in every instance it will be necessary that there is an adequate legal basis for the practice to prevent arbitrary application of the measure:

In Van der Graaf v the Netherlands, the prisoner had been subjected to permanent video observation for a period of about four and a half months in a remand centre. The surveillance had been deemed appropriate given the reaction of society to the

88. *Iwańczuk v Poland* (15 November 2001), paras 50–60.

89. *Van der Ven v Netherlands* ECHR 2003-II, paras 46–63. See also *Lorsé and Others v Netherlands* (4 February 2003), paras 58–74.

90. *Frérot v France* 2007-VII, paras 35–48

91. *El Shennawy v France* (20 January 2011), paras 39–46

92. Application No. 21132/93, *Peters v Netherlands*, Commission decision of 6 April 1994, DR 77, p. 75; and Application No. 20872/92, *A.B. v Switzerland*, Commission decision of 22 February 1995, DR 80, p. 66 (compulsory medical intervention in the form of urine tests undergone by prisoners constitutes an interference with respect for private life, but is justified as necessary for the prevention of crime and disorder).

93. *Matter v Slovakia* (5 July 1999), paras 64–72 (forcible examination of mental health detainee justified on the grounds of his own interests).

charges the applicant was facing (that is, suspicion of having shot and killed a well-known politician) and to minimise any risk of suicide by or other harm to the prisoner. In declaring the application inadmissible, the Court considered that while the lack of privacy may have caused distress, it had not been sufficiently established that such a measure had in fact subjected him to mental suffering of a level of severity such as to constitute inhuman or degrading treatment within the meaning of Article 3. Nor was the application well founded in terms of Article 8 given the public unrest caused by his alleged offence and the importance of bringing him to trial. In other words, the interference with respect for private life in these circumstances could be regarded as necessary in a democratic society in the interests of public safety and the prevention of disorder and crime.⁹⁴

In *Lindström and Mässeli v Finland*, the imposition of requirement on prisoners to wear 'sealed' overalls for short periods following suspicion of attempted drug-smuggling had resulted in occasions when they had defecated in their overalls. Here, the Court concluded that there was no violation of Article 3 as strong security reasons had existed for the practice of closed overalls for prisoners in isolation and there had been no intention to humiliate the prisoners, but a violation of Article 8 was established on account of an insufficient legal basis for the practice⁹⁵.

6.4 Use of forcible restraints

The risk is that the use of forcible restraints themselves amount to a form of ill-treatment, or at least undermine the establishment of harmonious relations between staff and prisoners. Instruments of restraint are defined as external mechanical devices designed to restrict or immobilise the movement of a person's body, in whole or in part. Instruments of restraint pose a high risk of torture or other ill-treatment owing to their highly intrusive nature and the risk of causing injury, pain and humiliation. Some devices have been prohibited or condemned in themselves as degrading or painful. Standards developed on medical ethics prohibit healthcare personnel from participating in any procedure for restraining a prisoner or detainee. There is no therapeutic justification for the prolonged use of restraints; indeed, such use may constitute ill-treatment.

There is a risk, too, that instruments of restraint may be directly and purposefully misused as a tool for deliberate ill-treatment, or to immobilise detainees who are then beaten or otherwise abused. Beyond the deliberate use for torture, the use of handcuffs and other means of restraint during interrogation is problematic if used to 'soften up' a detainee, to intimidate or 'break' them in order to obtain a confession or statement. Therefore instruments of restraint should only be used for the shortest possible period of time, and should

94. *Van der Graaf v Netherlands* (dec), (1 June 2004).

95. *Lindström and Mässeli v Finland* (14 January 2014), paras 37-50, and 58-66

never be applied as a punishment. For the CPT, too, the use of instruments of physical restraint should be seen as exceptional, discontinued at the earliest possible opportunity, never applied (or their application prolonged) by way of punishment, and always accompanied by “constant and adequate supervision” of the prisoner and by the provision of medical treatment.⁹⁶

A prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary, treated by a medical doctor. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff, and the results of the examination (including any relevant statements by the prisoner and the doctor’s conclusions) should be formally recorded and made available to the prisoner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Further, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners.⁹⁷

There is no therapeutic justification for the prolonged use of physical restraints. Their use must be lawful, necessary and proportionate.

Recourse to physical force which has not been rendered strictly necessary by a detainee’s own conduct in principle will give rise to the question whether this constitutes ill-treatment within the meaning of Article 3 of the ECHR.⁹⁸ The European Prison Rules also make clear that the use of force or forcible restraints can only be justified in strictly-defined cases (such as self-defence, in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations) and must not involve more force than is strictly necessary. Staff should also be given appropriate training to enable them to restrain aggressive prisoners.⁹⁹

96. *2nd General Report*, op. cit., para 53. See *11th General Report*, op. cit., para 26: ‘The cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job. Building positive relations with prisoners should be recognised as a key feature of that vocation.’ For discussion in country reports, see CPT/Inf (2009) 25 [Bosnia and Herzegovina], at para 77: ‘restraining inmates at risk of self-harm by handcuffing them to a bed is not acceptable. Alternative means exist of mechanically restraining a prisoner, which are more appropriate and cause fewer injuries’.

97. *2nd General Report*, CPT/Inf (92) 3, para 53.

98. *Ribitsch v Austria*, (1995), A336, para 38; and *Tekin v Turkey* 1998-IV, para 53.

99. Recommendation Rec(2006)2 of the Committee of Ministers on the European Prison Rules, Rules 64-68.

The principle also applies to the use of handcuffs. Prisoners should not be handcuffed in custody without a valid grave security reason and the use of physical restraints is legitimate only if **lawful, necessary and proportionate**.¹⁰⁰

In Tarariyeva v Russia, the unnecessary handcuffing of prisoner to a bed while he was seriously ill was deemed a violation of Article 3.¹⁰¹ A similar violation was established in Filiz Uyan v Turkey on account of a refusal to remove handcuffs from a female prisoner who was serving lengthy prison sentence and who had been taken taken for a gynaecological examination which had occurred in the presence of male guards.¹⁰²

In Kashavelov v Bulgaria, the systematic handcuffing of prisoner each time he was taken out of his cell, a practice that had applied for 13 years despite the absence of any indicators of risk, was found to have violated Article 3, the Court noting CPT standards that systematic handcuffing constituted degrading treatment.¹⁰³ In contrast, no violation was established in Portmann v Switzerland in which a particularly dangerous suspect had been hooded and handcuffs and leg shackles had been used to restrain him for two hours).¹⁰⁴

In short, restraints should not be applied other than in exceptional circumstances, when no other options are available, in order to prevent the prisoner from inflicting injuries to others or themselves, or to prevent escape during a transfer. Where the use of restraints is legitimate in principle, the manner in which they are applied must not be degrading or painful (for example, handcuffing a person tighter than necessary). In order to allow for proper scrutiny of whether the use of restraints was appropriate, proper recording of the use of restraints should be mandatory. In short, the method chosen must be proportionate to the situation, and automatic resort to restraints is not called for when a brief period of manual control combined with de-escalation skills would suffice. Furthermore, restraints must never be used on a discriminatory basis, and vulnerabilities need to be taken into account regardless of the existence of explicit procedures, for example in the case of sick or injured detainees, elderly prisoners or persons with disabilities.¹⁰⁵

6.5 Imposition of solitary confinement

Solitary confinement or isolation carries the risk of ill-treatment. The CPT defines solitary confinement as “whenever a prisoner is ordered to be held separately

100. Report on the 2008 visit of the Subcommittee on Prevention of Torture (SPT) to Benin, 15 March 2011, CAT/OP/BEN/1, para 107.

101. *Tarariyeva v Russia* 2006-XV, paras 108–111.

102. *Filiz Uyan v Turkey* (8 January 2009), paras 32–35.

103. *Kashavelov v Bulgaria* (20 January 2011), paras 38–40.

104. *Portmann v Switzerland*, (11 October 2011), paras 66–72.

105. See case law discussed above at p. 20–26.

from other prisoners or was held together with one or two other prisoners”.¹⁰⁶ It is liable to be imposed for a number of disparate reasons: either as a disciplinary sanction, or as a response to a prisoner’s perceived “dangerousness” or his “troublesome” behaviour, or in the interests of a criminal investigation, or at the prisoner’s own request, or to protect the prisoner from the risk of violence of other prisoners.¹⁰⁷ For the CPT, solitary confinement must always be justified, and meet certain principles summarised in the mnemonic “PLANN”: that is, solitary confinement must be *Proportionate* (ie, linked to actual or potential harm to be addressed, with the stronger the reason for confinement the longer it continues); *Lawful* (ie, clearly and adequately regulated in domestic law); *Accountable* (ie, fully recorded so as to indicate decision-making and subsequent reviews); *Necessary* (that is, only restrictions necessary for the particular end to be achieved should be applied); and *non-discriminatory* (to ensure that irrelevant considerations are not taken into account when imposing it).¹⁰⁸

When solitary confinement is used as a punishment:

*Given the potentially very damaging effects of solitary confinement, the CPT considers that the principle of proportionality requires that it be used as a disciplinary punishment only in exceptional cases and as a last resort, and for the shortest possible period of time. The CPT considers that the maximum period should be no higher than 14 days for a given offence, and preferably lower. In the case of juveniles, the CPT insists that any use of solitary confinement as a disciplinary sanction must only be imposed as a last resort and if so, only for a very short period.*¹⁰⁹ Further, there should be a prohibition of sequen-

106. See 21st General Report CPT/Inf(28), paras 53-64 (detailed statement on solitary confinement). The Istanbul statement on solitary confinement (2007) definition involves “the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day” and where “meaningful contact with other people is typically reduced to a minimum” with “the reduction in stimuli is not only quantitative but also qualitative ... [t]he available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic”. See further Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, rule 53: “Special high security or safety measures shall only be applied in exceptional circumstances. There shall be clear procedures to be followed when such measures are to be applied to any prisoner. The nature of any such measures, their duration and the grounds on which they may be applied shall be determined by national law. ... Such measures shall be applied to individuals and not to groups of prisoners.” For international standards, see the Istanbul statement on the use and effects of solitary confinement (2007); and Report of UN Special Rapporteur on Torture, doc A/66/268 (2011). See also UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2010), rule 22 (prohibition of solitary confinement on pregnant women, women with infants and breastfeeding mothers).

107. 21st General Report, CPT/Inf (2011) 28, para 53. The Istanbul statement on solitary confinement (2007) also notes that “broadly four circumstances in various criminal justice systems around the world; as either a disciplinary punishment for sentenced prisoners; for the isolation of individuals during an ongoing criminal investigation; increasingly as an administrative tool for managing specific groups of prisoners; and as a judicial sentencing. In many jurisdictions solitary confinement is also used as a substitute for proper medical or psychiatric care for mentally disordered individuals [and additionally, solitary confinement is increasingly used as a part of coercive interrogation, and is often an integral part of enforced disappearance or incommunicado detention”.

108. 21st General Report, CPT/Inf (2011) 28, paras 55.

109. 24th General Report, CPT/Inf (2015) 1, para 128.

tial disciplinary sentences resulting in an uninterrupted period of solitary confinement in excess of the maximum period. Any offences committed by a prisoner which it is felt call for more severe sanctions should be dealt with through the criminal justice system. The reason for the imposition of solitary confinement as a punishment, and the length of time for which it is imposed, should be fully documented in the record of the disciplinary hearing. Such records should be available to senior managers and oversight bodies. There should also be an effective appeal process which can re-examine the finding of guilt and/or the sentence in time to make a difference to them in practice. A necessary concomitant of this is the ready availability of legal advice for prisoners in this situation. Prisoners undergoing this punishment should be visited on a daily basis by the prison director or another member of senior management, and the order given to terminate solitary confinement when this step is called for on account of the prisoner's condition or behaviour. Records should be kept of such visits and of related decisions.¹¹⁰

As regards the effects of isolation on the prisoner's personality, the Court reiterates that all forms of solitary confinement without appropriate mental and physical stimulation are likely to have damaging effects in the long term, resulting in deterioration of mental faculties and social abilities. Also, the automatic segregation of life prisoners from the rest of the prison population and from each other, in particular where no comprehensive out-of-cell activities or in-cell stimulus are available, may in itself raise an issue under Article 3 of the ECHR and the isolation should be justified by particular security reasons, with further references to soft-law instruments.

Whether this gives rise to an issue falling within the scope of Article 3 will depend upon the particular facts of each case including the conditions in which this was imposed, the stringency of the measure, its duration, the objective pursued, and its effects on the prisoner. The imposition of solitary confinement for an indefinite time or when involving complete sensory and social isolation will not be compatible with the guarantee,¹¹¹ but other forms of solitary confinement may also be deemed to violate Article 3 where there is a failure to provide appropriate mental and physical stimulation or when accompanied by poor material conditions or where a prisoner's health has not been taken into account.¹¹² *In Romania, national guidelines attempt to restrict the use of solitary confinement. For example, the principle that segregation is to be imposed only until a viable alternative is identified implies that if the cause of the*

110. 21st General Report, CPT/Inf (2011) 28, at paras 56 and 57.

111. *Van der Ven v Netherlands* 2003-II, para 51; and cf *Ramirez Sanchez v France* [GC], 2006-IX, para 138; and paras 125–150 (prolonged solitary confinement of terrorist: no violation of Art 3, taking into account the number of visits from his legal representatives).

112. See eg *Iorgov v Bulgaria* (11 March 2004), para 83 (likelihood of deterioration of mental faculties and social abilities in the long term); *Csüllög v Hungary* (7 June 2011), para 34 (lengthy solitary confinement in inadequate detention conditions); *Hellig v Germany* (7 July 2011) (week-long confinement in security cell without clothes); and *Plathey v France* (10 November 2011), paras 39-57 (month-long detention in foul smelling disciplinary cell for 23 hours a day: violation).

segregation is linked with one particular prison, the prisoner should be transferred so that the need for segregation is removed. A prisoner who is segregated has the right to contact his or her legal representative, and continues to have appropriate means to stay in contact with family unless valid security concerns dictate, and must be offered the chance to participate in activities (where possible together with other prisoners) in order to prevent sensory deprivation. In United Kingdom [England and Wales], prisoners held in segregation are subject to strict controls and receive daily visits by the Governor, Chaplain, an independent monitoring board, and healthcare services. Prisoners at risk of self-harm in segregation unit are subject to a safety algorithm which determines whether the prisoner can cope with a period of segregation, and audits take place to ensure systems are in place to safely manage prisoners held in segregation.

The use of solitary confinement must also be lawful, necessary and proportionate. Indefinite solitary confinement, or where there is insufficient mental stimulus, is incompatible with the European Convention on Human Rights.

More particularly, the imposition of such measures may only take place when these are in accordance with domestic law and when accompanied by procedural safeguards.

In consequence, the imposition of solitary confinement in instances where the risk posed by a prisoner is insufficient to warrant this measure or where the restrictions imposed are not reasonably related to the stated objectives for solitary confinement will give rise to a violation of Article 3.¹¹³

6.6 Disciplinary procedures

Domestic prison rules will invariably contain regulations seeking to secure good order within prisons, and breach of these regulations will be liable to give rise to the application of sanctions. The European Prison Rules recognises that the maintenance of discipline and order is necessary to ensure the good safety and security of the prison. Domestic regulations should thus specify conduct constituting a disciplinary offence, the types and duration of punishment which may be imposed upon finding of a breach, the authority competent

113. *Xv Turkey* (9 October 2012), paras 31-45 (holding of homosexual prisoner in total isolation for more than eight months to protect him from fellow prisoners: violation); cf *Rohde v Denmark* (21 July 2005), para 93 (pre-trial prisoner held solitary confinement for almost a year: no violation).

to impose such punishment, and a prisoner's access to (and the authority of) the appellate authority.¹¹⁴

For the CPT, too, clear statements of expected behaviour and disciplinary procedures that are formally established and applied in practice are necessary to prevent the development of unofficial and uncontrolled systems of control. This avoids the application of unofficial regimes existing in parallel to formal procedures.¹¹⁵ Institutional practices which proceed on the basis of "a minimum of paper, a maximum of efficiency" are thus suspect. Prisoners should enjoy the rights to be heard and to appeal against any sanctions imposed, and any punishment must reflect the offence and not be disproportionate. Safeguards should also accompany the imposition of particular forms of punitive detention such as solitary confinement or "special restraint" measures, and where other procedures also exist allowing the imposition upon a prisoner of involuntary separation from other inmates on discipline-related or security grounds, these procedures should also provide the effective safeguards of notification in writing of the reasons for the measure, the opportunity to present his views and the ability "to contest the measure before an appropriate authority".¹¹⁶ The CPT is clear that incidents of self-harm should not be treated as disciplinary matters.¹¹⁷

That fully-fledged procedural safeguards of the same level that would apply in the context of the determination of a criminal charge are not necessarily appropriate in all such cases is perhaps obvious. However, the decision to label prison offences in domestic law as "disciplinary" or as "administrative" rather than as "criminal" will not necessarily exclude the application of guarantees in terms of Article 6 of the ECHR. In other words, domestic classification of the offence in prison regulations as merely "disciplinary" will not be conclusive. The more "appreciably detrimental" the potential sanction, the greater the likelihood that the offence will be considered as criminal, especially if the penalty could involve not inconsiderable loss of liberty.¹¹⁸

114. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, Rules 55-63.

115. For further discussion, see Morgan, R. and Evans, M., *Combating Torture in Europe*, Council of Europe Publishing, Strasbourg, 2002, pp. 117-121.

116. *2nd General Report*, CPT/Inf (92) 3, paragraph 55 (although the reasons given "might not include details which security requirements justify withholding from the prisoner").

117. See for example CPT/Inf (2005) 13 (Austria), paragraph 105: "The CPT wishes to stress that acts of self-harm and suicide attempts frequently reflect problems and conditions of a psychological or psychiatric nature, and should be approached from a therapeutic rather than punitive standpoint".

118. *Engel and Others v the Netherlands*, (1976) A. 22, paras 80-85, at para 82 (the imposition of two days' strict arrest upon a soldier for breach of military discipline was deemed insufficient to bring the matter within the category of "criminal"); see also Application No. 7341/76, *Eggs v Switzerland*, 11 December 1976, DR 15, p. 35 (loss of liberty through imposition of five days' strict arrest for breach of military discipline considered insufficient to establish a "criminal" offence).

*In Campbell and Fell v United Kingdom, disciplinary offences covered not only matters of internal discipline but also behaviour which was criminal according to domestic law and punishable by loss of remission of almost three years. Taking into account the particularly grave character of the offences charged and the substantial additional days' custody awarded (that is, loss of remission) of some five hundred and seventy days, the Court readily determined that Article 6 was applicable to the prison disciplinary proceedings and thus that fair hearing guarantees ought to have been accorded.*¹¹⁹

*In Ezeh and Connors v United Kingdom, two prisoners had been charged with prison offences of some seriousness: threatening to kill a probation officer and assault of a prison officer respectively. Each had been denied their requests for legal representation before the prison adjudication hearings. Both had been found guilty and awarded loss of remission. The Court held that the refusal to allow the applicants to be legally represented had constituted a violation of the requirements of Article 6. The imposition of awards of additional days' detention constituted fresh deprivations of liberty imposed for punitive reasons.*¹²⁰

119. *Campbell and Fell v United Kingdom* (1984) A 80, paras 69-73.

120. *Ezeh and Connors v United Kingdom*, [GC] 2003-X, paras 90-130.

Chapter 7

Staffing issues

7.1 Introduction

Staff selection and training are key to the effective implementation of non-discrimination policies. Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.

Even the best-equipped prisons with outstanding material conditions of detention will be wanting if prison staff are not up to the job. As the CPT has frequently pointed out, constructive relations between prisoners and staff are of considerable significance in lowering tension and thereby reducing the likelihood of violence in an institution. As has been stressed earlier, maintaining effective control and security in a prison by means of 'dynamic security' is a vital approach to the prevention of ill-treatment. Prison staff and prison management are a necessary component in the prevention of ill-treatment.

Constructive relations between prisoners and staff are of considerable significance in lowering tension and thereby reducing the likelihood of violence in an institution.

7.2 Staff selection, training and conditions of employment

The calibre of prison staff is thus of crucial importance in helping prevent ill-treatment. This self-evident fact is acknowledged in a number of Council of Europe standards including Resolutions and Recommendations of the

Committee of Ministers to member states. These reiterate the central importance of the recruitment, selection and training of staff.¹²¹

In particular, the European Prison Rules stress the public nature of the prison service and its all-important role in upholding the dignity of each prisoner:

72.1 Prisons shall be managed within an ethical context which recognises the obligation to treat all prisoners with humanity and with respect for the inherent dignity of the human person.

72.2 Staff shall manifest a clear sense of purpose of the prison system. Management shall provide leadership on how the purpose shall best be achieved.

72.3 The duties of staff go beyond those required of mere guards and shall take account of the need to facilitate the reintegration of prisoners into society after their sentence has been completed through a programme of positive care and assistance.

72.4 Staff shall operate to high professional and personal standards.

73. Prison authorities shall give high priority to observance of the rules concerning staff.

74. Particular attention shall be paid to the management of the relationship between first line prison staff and the prisoners under their care.

75. Staff shall at all times conduct themselves and perform their duties in such a manner as to influence the prisoners by good example and to command their respect.

Staff recruitment, especially of prison officers, should be based on careful selection of personnel. Taking account of factors such as personality traits, attitudes, motivation and interpersonal skills, aptitude for good working relationships, displaying a firm but fair approach to situations and the ability to stay calm and make quick decisions is vital. In short, when selecting new staff, management “shall place great emphasis on the need for integrity, humanity, professional capacity and personal suitability for the complex work that they will be required to do”. Staff should be “carefully selected, properly trained, both at the outset and on a continuing basis, paid as professional workers and have a status that civil society can respect” (Rule 76) and “normally be appointed on a permanent basis and have public service status with security of employment, subject only to good conduct, efficiency, good physical and mental health and an adequate standard of education” with salaries adequate to attract and retain suitable staff and with benefits and conditions of employment that reflect “the exacting nature of the work as part of a law enforcement agency”.¹²²

Staff training may vary from country to country as well as from facility to facility depending on specific factors. However, the same conditions and standards for training and further education should apply throughout the one system. Initial and continuing training (and specialised training in relation to

121. See Committee of Ministers Resolution (66) 26 on the status, recruitment and training of prison staff; Committee of Ministers Resolution (68) 24 on the status, selection and training of governing grades of staff of penal establishments; and Appendix I to Recommendation (97) 12 of the Committee of Ministers on staff concerned with the implementation of sanctions and measures.

122. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, Rules 76-79.

vulnerable groups of prisoners) followed by the passing of a test of competency before taking up responsibilities are necessary prerequisites. Training should include not only the theoretical (such as criminal and correction law, professional standards, etc.) and technical skills (such as use of force and restraints, self-defence or first aid) but also soft skills, in particular, interpersonal communication.

Training should also include instruction on relevant international and regional human rights instruments and standards, in particular, the European Convention on Human Rights, the standards of the CPT, and the application of the European Prison Rules.

Staff who deal directly with prisoners should also be trained in techniques that enable the minimal use of force in the restraint of prisoners who are aggressive. Staff who are to work with specific groups of prisoners, such as foreign nationals, women, juveniles or mentally ill prisoners, etc., should be given specific training for their specialised work.¹²³

Management should also ensure that, throughout their career, all staff maintain and improve their knowledge and professional capacity through attendance on courses of in-service training and development organised at suitable intervals.

Staff who are to work with specific groups of prisoners should be given specific training for this specialised work.

In short, all staff, including relevant authorities, agencies, professionals and associations involved in the assessment and treatment of dangerous offenders, should be selected on the basis of defined skills and competences and professionally supervised.¹²⁴ They should have sufficient resources and training in assessing and dealing with the specific needs, risk factors and conditions of this group. Particular competencies are needed when dealing with offenders who suffer from a mental disorder. Training in multi-agency co-operation between staff inside and outside prisons should be arranged.

123. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, Rule 81.

124. Working under supervision means that a professional or group of professionals such as psychologists, psychotherapists or treatment team members use the services of another counsellor or psychotherapist to review their work with clients, their professional development, and often their personal development as well. Supervision is important for two reasons: 1) to protect clients, and 2) to improve the ability of professionals to provide value to their clients. Supervision protects clients by involving an impartial third party in the work of a professional and client, helping to reduce the risk of serious oversight and helping the professional concerned to reflect on their approach with the client.

These themes are replicated in CPT reports which recognise that well-developed communication skills will help lower tension in prisons and help prison staff deal with situations without recourse to physical force.¹²⁵ Dynamic security is stressed: prison staff should seek to ensure that the ethos in a prison is a positive one for “the promotion of constructive as opposed to confrontational relations between prisoners and staff will serve to lower the tension inherent in any prison environment and by the same token significantly reduce the likelihood of violent incidents and associated ill-treatment”;¹²⁶ the ultimate aim is to ensure that “a spirit of communication and care accompany measures of control and containment”.¹²⁷ But dynamic security will not be achieved without adequately-trained staff: staff should thus be recruited on the basis of their interpersonal communication skills, and such skills should be encouraged and developed through training.

All of this can be summarised in one simple maxim:

*“the cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job”.*¹²⁸

7.3 Adequate staffing levels

However, if “there is arguably no better guarantee against the ill-treatment of a person deprived of his liberty than a properly trained ... prison officer”,¹²⁹ there must also be an adequate level of staffing:

Ensuring positive staff-inmate relations will also depend greatly on having an adequate number of staff present at any given time in detention areas and in facilities used by prisoners for activities. ... An overall low staff complement and/or specific staff attendance systems which diminish the possibilities of direct contact with prisoners will certainly impede the development of positive relations; more generally, they will generate an insecure environment for both staff and prisoners. ... [W]here staff complements are inadequate, significant amounts of overtime can prove necessary in order to maintain a basic level of security and regime delivery in the establishment. This state of affairs can easily result in high levels of stress in staff and their premature burnout, a situation which is likely to exacerbate the tension inherent in any prison environment.¹³⁰

125. *2nd General Report, CPT/Inf (92) 3*, paragraphs 59-60.

126. *2nd General Report, CPT/Inf (92) 3*, paragraph 45; and *11th General Report, CPT/Inf (2001) 16*, paragraph 26.

127. *Ibid.*, paragraph 45.

128. *11th General Report, CPT/Inf (2001) 16*, paragraph 26.

129. *Ibid.*, paragraph 59.

130. *11th General Report, CPT/Inf (2001) 16*, paragraph 26.

A further aspect of adequate staffing levels concerns the importance of having adequate staff available to deal with the special needs of particular groups of prisoners. In particular, mixed-gender staffing should be encouraged as this can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention. This also helps prevent ill-treatment as well as allowing for appropriate staff deployment when carrying out gender-sensitive tasks such as body searches.¹³¹ Much of this CPT standard-setting is now replicated in the revised European Prison Rules of 2006.¹³²

7.4 Statements of ethics

The notion of professionalism amongst staff can also be enhanced by the adoption of statements of ethical standards on such matters as the abstention of any form of discrimination, provocative behaviour, or physical or mental ill-treatment. In particular, prison staff should recognise that they have an ethical responsibility to handle information about prisoners and their families appropriately, and that they “must not under any circumstances accept bribes or engage in corrupt activities with suspected or sentenced offenders or their families and must do all in their power to ensure that such acts are not engaged in by other members of staff”.¹³³

131. *Ibid.*, paragraph 32.

132. See Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, Rules 25 and 34.

133. See Appendix I to Recommendation (97) 12 of the Committee of Ministers on staff concerned with the implementation of sanctions and measures; and Appendix II, paragraphs 13-19.

Chapter 8

Complaints, inspections and the duty to investigate

8.1 Introduction

A professional prison service grounded in a firm commitment to ethical behaviour and with a trained staff inculcated with a sense of purpose in its mission will have nothing to fear from openness and scrutiny (and indeed, everything to gain insofar as any shortcomings will be identified allowing for action to be taken to address any matters). A continuing process of “quality assurance” can achieve real and lasting change in a prison.

On the other hand, the closed world of prisons may make it difficult for prisoners (and even for staff) to raise concerns without threat of informal sanction. Where such a situation exists, the risk of ill-treatment is high. Accordingly, European standards place much expectation upon effective internal procedures, the rights of prisoners to raise concerns, and the obligations of staff and managers (and other actors in the criminal justice system). These expectations are essentially three in nature: the operation of an effective complaints system within the prison, the establishment of an effective monitoring system involving both internal and external elements, and the effective investigation of any indications that ill-treatment may have occurred.

8.2 Complaints and inspection mechanisms

Expectations that domestic prison services have effective means for prisoners to raise complaints, and that there are effective monitoring mechanisms to

identify concerns even in the absence of actual complaints by prisoners, seek to ensure that issues are rapidly identified.

The basic expectation can be stated succinctly: there should be effective grievance and inspection procedures involving internal and external complaints mechanisms with some element of confidential access and backed up by a system of regular visits by an independent body (such as a board of visitors or by a supervisory judge) which is able to inspect the prison and hear and follow up complaints from prisoners, will provide crucial safeguards against ill-treatment.¹³⁴ Several countries have arrangements permitting prisoners to complain additionally to the authority responsible for the promotion of human rights (eg in Armenia, to the Office of the Human Rights Defender). Some countries have a system of confidential access complaints to enable prisoners to write directly to the prison director without interference from staff (for example, Cyprus and Portugal have a system of sealed boxes available in prisons).

For the CPT, the importance of effective grievance and inspection procedures in helping prevent ill-treatment in prisons is a recurrent theme. Not only should prisoners have available complaints mechanisms both internal and external (including confidential access to an appropriate authority), but there should also be an independent visiting body (such as a board of visitors or supervisory judge) which has the power to hear to take action upon complaints from prisoners and to inspect the establishment's premises.¹³⁵ Prison monitoring and inspection mechanisms have a particular role to play. Monitoring arrangements should be able to identify and to act upon possible ill-treatment as well as poor material conditions of detention posing a risk to the well-being of the prisoner.

There should be effective grievance and inspection procedures involving internal and external complaints mechanisms with some element of confidential access and backed up by a system of regular visits by an independent body (such as a board of visitors or by a supervisory judge) which is able to inspect the prison and hear and follow up complaints from prisoners. This will provide crucial safeguards against ill-treatment.

134. *2nd General Report, CPT/Inf (92) 3, paragraph 54.*

135. *2nd General Report, CPT/Inf (92) 3, paragraph 54.* For further discussion, see Evans, M., "Inspecting Prisons: the View from Strasbourg", in King, R. and Maguire, M. (eds.), *Prisons in Context*, Clarendon Press, Oxford, 1994, pp. 141-159; and Morris, P., "The Prisons Ombudsman: A Critical Review", *European Public Law*, 4, 1998, pp. 345-378.

As far as prisoners' complaints are concerned, both the European Prison Rules and the CPT consider an effective system of prisoner complaints to be of importance in ensuring the protection of detainees. The European Prison Rules thus specify that prisoners should have the opportunity each day to make requests or complaints to the prison director or to the designated manager, and additionally have an opportunity outside the presence of staff to talk to (and to make requests or complaints to) an inspector of prisons or other authority enjoying the right to visit the prison. Prisoners should also have the right to make confidential requests or complaints to the central prison administration or judicial or other designated authority, the only proviso being that appeals against any formal decisions may be restricted to authorised procedures. Every request or complaint addressed or referred to a prison authority should be promptly dealt with and replied to without undue delay.¹³⁶

Such rights are meaningless without knowledge of their existence. Thus prisoners at the time of admission should be provided with written information about the regulations governing the treatment of prisoners, disciplinary requirements, authorised methods of seeking information and making complaints, and any other information necessary to allow prisoners to understand their rights and obligations and to adapt to the life of the institution.¹³⁷

8.3 The duty to investigate

International law requires a range of substantive and procedural measures in domestic law to ensure the prohibition of torture is effective in practice.¹³⁸ The most obvious starting-point is the existence of domestic legislation criminalising the infliction of ill-treatment. However, the mere enactment of

136. Recommendation (2006) 2 of the Committee of Ministers on the European Prison Rules, Rules 70 and 92-93.

137. Recommendation Rec(2006)2 of the Committee of Ministers on the European Prison Rules, Rule 30(1): "At admission, and as often as necessary afterwards all prisoners shall be informed in writing and orally in a language they understand of the regulations governing prison discipline and of their rights and duties in prison".

138. Eg, obligations assumed by state parties in terms of the UN Convention against Torture: in addition to the duty to investigate allegations of ill-treatment (found in Article 12 of this treaty), the elements incorporated in the CAT includes a reference to the taking of necessary 'legislative, administrative, judicial or other measures' (Article 2); the criminalisation of acts of torture in domestic law (Article 4); the introduction of universal jurisdiction or making torture an extraditable offence, and the responsibility to assist other States in criminal proceedings brought in respect of torture (Articles 5, 7 and 8); the taking those implicated in torture into custody or the application of other legal measures to ensure their presence before a tribunal (Article 6); the training of law enforcement and other relevant personnel (Article 10); the systematic review of rules, instructions, methods and practices, and law enforcement arrangements (Article 11); the operation of an adequate complaint systems (Article 13); the availability of fair and adequate compensation in the event of torture (article 14); and ensuring that any statement that is established to have been made as a result of torture shall not be invoked as evidence against its victims (Article 15).

provisions in domestic law prohibiting torture and the infliction of inhuman or degrading treatment or punishment is unlikely in itself to provide sufficient protection for the individual.

In these circumstances, the duty to initiate an investigation in terms of Article 3 of the ECHR will arise when circumstances come to the attention of the relevant authorities suggesting that ill-treatment of sufficient severity has occurred. For the European Court of Human Rights, this obligation is triggered when the existence of 'sufficiently clear indications that torture or ill-treatment has been used' becomes known to the authorities¹³⁹ or where an "arguable claim" giving rise to "a reasonable suspicion" of the infliction of ill-treatment has arisen.¹⁴⁰ The focus is thus upon investigating the *deliberate* use of ill-treatment.

The requirement of effective investigation is an application of an obligation placed upon States by ratification of the European Convention on Human Rights. It is also based upon the important principle that it is for the state authorities initially to explain the presence of injury upon a prisoner, rather than for the individual to establish its cause. The *purpose* of the requirement is to hold officials to account.

The obligation covers a range of components starting from the securing of avenues of initiation of investigation, and ending where applicable with the imposition of an appropriate punishment. Discharge of the responsibility is thus best considered as a shared responsibility, and one in which policy-makers, independent investigators, prosecutorial authorities and judges each have a part to play. The following are some recent examples of good practice in this regard:

- ▶ In the United Kingdom [England and Wales], an independent Prison and Probation Ombudsman can investigate allegations of ill-treatment; in addition, an independent monitoring board reporting directly to the Minister has a statutory obligation to carry out routine visits to establishments on a weekly basis, and the Chief Inspector of Prisons visits each establishment on a rolling cycle and checks for ill-treatment;
- ▶ In Cyprus, a complaint concerning ill-treatment by a prison officer will normally lead to the suspension from duty of the officer until an

139. *Bati and Others v Turkey* 2004-IV, at para 133 (reference to the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Istanbul Protocol').

140. Eg *Gharibashvili v Georgia* (29 July 2008), at para 64: "the applicant's allegations made before the domestic authorities contained enough specific information – the date, place and nature of the ill-treatment, the identity of the alleged perpetrators, the causality between the alleged beatings and the asserted health problems, etc., to constitute an arguable claim in respect of which those authorities were under an obligation to conduct an effective investigation".

investigation is concluded. If this is not possible, the officer will be reassigned to other duties not bringing the officer in contact with the prisoner;

- ▶ In Italy, “supervisory judges” (whose role is solely confined to this task) are responsible for monitoring compliance with prisoners’ rights. Domestic law now makes provision for preventative and compensatory remedies for any ill-treatment caused by inappropriate detention conditions. Further, institutional monitoring is complemented by a range of organisations (including community-based groups);
- ▶ In “the former Yugoslav Republic of Macedonia”, a national strategy for the development of the prison system with specific provisions relating to the effective combating ill-treatment has been introduced;
- ▶ In Cyprus, an attempt has been made to ensure that concerns raised by prisoners’ relations can also be addressed. This relies in turn upon enhanced visiting rights for prisoners and the use of ‘Skype’ where an inmate is not able to receive visits from family or friends.

More specifically, the domestic investigation must meet the key criteria of effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny). The procedures must also be coordinated. The investigation must also be subject to checks (in cases of discontinuation or termination of proceedings or refusal to prosecute, the obligation extends to consideration of the judicial review of the legality of such decisions, or the possibility of triggering judicial proceedings by means of lodging a criminal complaint where this is provided for by domestic legislation); and be motivated by a determination to root out ill-treatment.¹⁴¹

Domestic investigation must satisfy the key criteria of effectiveness (independence and impartiality; adequacy; promptness; sufficient victim involvement; and openness via public scrutiny); be coordinated; be subject to checks; and above all driven by a determination to punish any wrongdoing.

At the heart of this is the determination to act with a sense of purpose. Thus “authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, a detailed statement

141. See further Svanidze *Guidelines on International Standards on the Effective Investigation of Ill-treatment* (2010).

concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical certificates apt to provide a full and accurate record of the injuries and an objective analysis of the medical findings, in particular as regards the cause of the injuries”, as “[a]ny deficiency in the investigation which undermines its ability to establish the cause of injury or the person responsible will risk falling foul of this standard”.¹⁴²

There are thus important consequences for prison staff and prison management. The most crucial has been spelt out by the CPT: that all prison staff see themselves as part of the strategy of preventing the infliction of ill-treatment:

*“Positive action is required, through training and by example, to **promote a culture** where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.*

*...no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be “zero tolerance” of torture and other forms of ill-treatment.”¹⁴³*

A comprehensive statement on investigating allegations of ill-treatment and on combating such instances of “impunity” is found in the CPT’s *14th General Report*. Public officials such as prison directors should be formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment of a detainee, and further, the discretionary authority enjoyed by prosecutors in deciding whether to open an investigation should be narrowed so as to place prosecutors under a specific legal obligation to undertake an investigation whenever they receive credible information of possible ill-treatment of detainees from any source, including evidence of ill-treatment by public officials which emerges during civil proceedings. To this end, care needs to be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint by operation of the civil law of defamation. Further, as the law will not be of itself sufficient to guarantee that such investigative action will be taken, attention must be given to sensitising the relevant authorities to these obligations placed upon them. In short, these authorities must accept that they have a responsibility in such instances to take “resolute action”.¹⁴⁴

142. *Bati and Others v Turkey* (3 June 2004), para. 134.

143. *14th General Report*, CPT/Inf (2004) 28, at paras 26 and 42.

144. *14th General Report*, CPT/Inf (2004) 28, paras 25-42.

Conclusion

Complaints mechanisms and prison monitoring and inspection arrangements can be properly seen as an essential aspect of the European system for the protection of prisoners from the threat of ill-treatment. Both feed into managerial decision-making by allowing channels of information to identify areas of concern. Both also may trigger an investigation into allegations or indications of possible deliberate ill-treatment. The requirement of an effective investigation also serves a linked purpose, that of *preventing* future instances of ill-treatment. This is explicitly acknowledged in the Istanbul Principles.¹⁴⁵ The discharge of the obligation to examine a particular case thus important consequences for each institution involved in the investigation, for the 'mainstreaming' of the role of effective investigation is likely to enhance subsequent investigation techniques as well as discourage further ill-treatment both by indicating the likely outcomes for officers who have a tendency towards deviancy but also by identifying strategies or steps likely to enhance the protection of individuals. In other words, investigative authorities should be well-placed not only to identify wrongdoers but also measures needed to prevent the recurrence of ill-treatment.

145. Principle 1.b of the Istanbul Principles.

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The handbook is designed for practitioners working in prisons. It examines one particular aspect of the protection of prisoners' human rights: the prohibition of ill-treatment in prison. It is conceived as a policy guide and a management tool for professionals and it focuses upon what this prohibition entails and the responsibilities of prison services towards those entrusted to its care. The text highlights the relevant standards of the Committee of Ministers of the Council of Europe Recommendations and of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and the case law of the European Court of Human Rights. The handbook is a result of a multilateral meeting on combating ill-treatment in prison, held in Strasbourg in April 2015, as part of the Council of Europe co-operation activities in the penitentiary field implemented by the Criminal Law Co-operation Unit. The text is also online at:
<http://www.coe.int/t/DGI/CRIMINALLAWCOOP/>

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