UNIVERSAL PANACEA FOR ILL-TREATMENT OR MUCH ADO ABOUT NOTHING

Assessment of National Mechanisms for the Prevention of Torture Established Under the Optional Protocol to the UN Convention against Torture

Dissertation
Zur Erlangung der Doktorwürde an der
Fakultät für Rechtswissenschaft
der Universität Hamburg

vorgelegt von
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Hamburg, 2019

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Datum der Disputation: 24. Oktober 2018

ACKNOWLEDGMENTS

This thesis would not have been possible without the financial support of the German Academic Exchange Service (DAAD) and the Open Society Foundations (OSF). For this, I owe them my deepest gratitude.

First and foremost, I would like to thank my supervisor Prof. Dr. Markus Kotzur who provided me with valuable insights and comments throughout the period I spent working on my dissertation. His constructive feedbacks to my work formed, improved and challenged my research. Prof. Dr. Stefan Oeter and Prof. Dr. Florian Jeßberger, in addition to making valuable suggestions as regards my research, sent the reference letters on my behalf necessary for extension of my stipend. For this I am grateful. Furthermore, Mr. Andreas Knobelsdorf from the Central Library of the Law Faculty deserves special mention since he kept me abreast of new literature, was always friendly and ready to help.

I am deeply grateful to my family and friends for their encouragement and support during different phases of working on my dissertation. Special thanks goes to my significant other Juliane Mertsching who supported me during every step of the way. The second person who marked my life in the last years provided moral support only. Namely, my daughter Frida was born during the course of my studies thus enriching our lives and providing me with an additional impetus to carry on.

Finally, the city of Hamburg also deserves a mention. Let's say that its reputation of having the worst weather in Germany is not justified. Quite the opposite.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples Rights
ACtHPR	African Court on Human and Peoples' Rights
APT	Association for the Prevention of Torture
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Basic Principles and Guidelines	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
Basic Principles	Basic Principles for the Treatment of Prisoners
Body of Principles	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIDT	Cruel, inhuman or degrading treatment or punishment
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
Commentary to EPR	Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organization
CtAT	Committee Against Torture
CtESCR	Committee on Economic, Social and Cultural Rights
CtRPD	Committee on the Rights of Persons with Disabilities
DEPS	Directorate for the Enforcement of Penal Sanctions
ECHR	European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights

EPR	European Prison Rules
HRC-	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights
ICC	International Coordinating Committee for National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICTR	The International Criminal Tribunal for Rwanda
ICTY	The International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
Istanbul Protocol	Istanbul Protocol for the Effective Investigation and Documentation of Torture
Maastricht Guidelines	Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
NA	National Agency for the Prevention of Torture
NGO	Non-Governmental Organization
NHRI	National Human Rights Institution
NPM	National Preventive Mechanism
OAS	Organization of American States
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Paris Principles	Principles relating to the Status of National Institutions
PBP in the Americas	Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas
SMR	Standard Minimum Rules for the Treatment of Prisoners
SRT	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

UN Mental Illness Principles	UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care
UN Working Group	UN Working Group on Arbitrary Detention
UPR	Universal Periodic Review

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PART I

INTRODUCTION

1 Chapter: Introduction and literature review

1.1 Introduction

Personal integrity and dignity, namely, freedom from physical and psychological violence as well as from degradation or humiliation, have always been of primary concern to humans. Proper observance of these rights and freedoms by the state enables citizens to live and act freely by making most of their other rights, since barely anyone would dare to practice his[1] religion, run for office, speak his mind or act upon it when fearing for his and his family's safety. And yet again, human body and soul have been routinely invaded through centuries in order to coerce, punish and intimidate and, thus, bring about desired behavior.[2]

It is no wonder then, that since the formulation of the first documents limiting the absolute power of the monarch and articulating inalienable rights of man up to enacting modern constitutions and international treaties, addressing this concern, by stipulating guarantees of personal integrity and dignity, has been accorded paramount importance.[3] This has led to the abolishment of a range of practices and punishments which, although once considered legitimate, with the passage of time came to be seen as unacceptable (judicial torture, corporal punishment etc.)

Today, prohibition of torture and inhuman or degrading treatment or punishment (ill-treatment)[4] stands at the core of international human rights law, since—in contrast to most human rights—it is absolute or unqualified. Hence, resort to ill-treatment cannot be justified under any circumstances,

[1] For the sake of brevity, the masculine form is used throughout this dissertation but should be taken to refer to persons of all genders.

[2] There are a number of books and articles dealing with torture and other forms of ill-treatment from historical and/or comparative perspective. See for example M. Foucault, *Discipline and punish: The birth of the prison*, 2nd Vintage Books ed. (New York: Vintage Books, 1995); D. M. Rejali, *Torture and democracy* (Princeton, Oxford: Princeton University Press, 2007); J. H. Langbein, 'The Legal History of Torture', in S. Levinson (ed.), *Torture: A collection* (Oxford: Oxford University Press, 2004), pp. 93–103; C. J. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis', *Sociological Theory* 25 (2007), 101–21; M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), pp. 1–26.

[3] Although not explicitly prohibiting torture, Clause 39 of the 1215 Magna Carta set forth guarantees against arbitrary detention which came to be considered as a bedrock upon which the modern principles of due process and habeas corpus are erected. English Bill of Rights of 1689 and, thereafter, 8th amendment to the US Constitution from 1791 prohibited cruel and unusual punishment. In addition, the 1789 Declaration of the Rights of Man and of the Citizen envisaged guarantees against arbitrary detention and limited the discretion of the state in imposing penalties in articles 7 and 8. In the context of humanitarian law the 1863 Lieber Code (Instructions for the Government of Armies of the United States in the Field) prohibited members of the US army to resort to torture to extort confessions. Lastly, the first modern formulation of the prohibition of ill-treatment was specified in Article 5 of the UDHR. See V. R. Johnson, 'The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015', *St. Mary's Law Journal* 47 (2015), 1–62, at 16–7; N. Jayawickrama, *The judicial application of human rights law: National, regional and international jurisprudence / Nihal Jayawickrama* (Cambridge: Cambridge University Press, 2002), pp. 299–300; J. Murdoch, *The treatment of prisoners: European standards* (Council of Europe, 2006), p. 16; D. Kretzmer, 'Prohibition of Torture', in R. Wolfrum (ed.), *MPIL: (online ed.)* .

[4] In what follows the notion "*ill-treatment*" will be used as a generic term to denote both torture and cruel, inhuman or degrading treatment or punishment. In addition, terms "*other forms of ill-treatment*", "*other ill-treatment*", "*ill-treatment other than torture*" or "*CIDT*" will be used to refer only to cruel, inhuman or degrading treatment or punishment. Of course, "*torture*" is meant to refer to torture only not encompassing other ill-treatment, while "*inhuman*", "*inhuman and degrading*" and "*degrading*" treatment or punishment stand for these notions alone. Term "*deliberate ill-treatment*" will be used to denote acts of torture but also other ill-treatment where individual deprived of liberty has been personally targeted by law enforcement officials. Finally, words like *abuse*, *mistreatment* or *neglect* are to be understood semantically, that is to say, they are to denote only acts of violence or pressure upon individuals or withholding care due in case of neglect.

notwithstanding how compelling, legitimate or weighty the reasons for its utilization might be.[5] Moreover, as this prohibition cannot be suspended either, it is to be understood as setting a minimum standard of basic decency on how public officials should treat people that must be ensured at all times. For this reason every general human rights treaty has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[6] States have also adopted international instruments dedicated solely to that end.[7] Various international bodies produced substantial practice in the course of the previous 50 years, clarifying—and to a large extent shaping— the prohibition of torture and other forms of ill-treatment.[8] Similarly, a number of legally non-binding instruments were brought into existence with the aim of setting minimal standards for the treatment of persons deprived of their liberty and, thus, preventing their ill-treatment.[9]

Given that this consensus on the total rejection of ill-treatment in any form and under any circumstances has been continually reaffirmed by states, it stands beyond doubt that torture, and most probably other forms of ill-treatment, acquired a status of peremptory norm of international law.[10]

In sum, prohibition of ill-treatment is an imperative tenet that allows no exceptions, material or temporal, and binds all states regardless of whether they formally acceded to or ratified any international instruments proscribing ill-treatment.

That being said, it comes as a surprise that ill-treatment remains widespread in many and occasionally practiced in most countries in the world.[11] It follows that formal pledges of states are at odds with their actual performance in complying with prohibition of ill-treatment. What is more, this gap has not been adequately addressed by conventional methods of ensuring observance of human rights, either on national or international level.

As will be explained later in more detail, states are the primary bearers of a duty to secure rights to those under their jurisdiction. This is reflected in the notion of subsidiarity. By relying on its officials, a state is expected to respect rights, prevent their violation and—when violations have nonetheless occurred—investigate, punish the perpetrators and redress the victims. However, public officials did not prove very effective in preventing and sanctioning state induced violence, especially that taking

[5] Refer to chapter 4 Character of the prohibition of ill-treatment in international law.
[6] European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force September 3,1953, article 3; International Covenant on Civil and Political Rights, entered into force March 23, 1976, article 7; American Convention on Human Rights, entered into force July 18,1978, article 5; African Charter on Human and Peoples' Rights, entered into force October 21, 1986, article 5.
[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987; Inter-American Convention to Prevent and Punish Torture, entered into force February 28, 1987; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, entered into force February 1, 1989.
[8] This practice includes case law, general comments, concluding observations, reports etc.
[9] Standard Minimum Rules for the Treatment of Prisoners, (1955); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (1988); Basic Principles for the Treatment of Prisoners, (1990); European Prison Rules, Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe (1987); Recommendations on prison overcrowding and prison population inflation, Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe (1999).
[10] Refer to chapter 4 Character of the prohibition of ill-treatment in international law.
[11] For example, Amnesty international states that in 2011 people were tortured or exposed to other forms of ill-treatment in at least 101 countries, see http://files.amnesty.org/air12/fnf_air_2012_en.pdf (last visited on 15 October 2012).

place in prisons and other closed institutions. It is precisely this anomaly that needed to be checked through international supervision of states' compliance with human rights obligations. The main mechanisms for such supervision are still traditional and, for the most part, utilize state reporting and individual complaints procedures. These procedures exhibit shortcomings such as addressing a particular problem and/or situation *post facto*, that is, after the violations have already occurred, reliance on the second hand information and inability to devote adequate attention to each and every state.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) adopted by the United Nations General Assembly in 2002 and entered into force in 2006, was designed to address these inconsistencies.

The OPCAT is the first international instrument which seeks to prevent torture and other forms of ill-treatment through the system of regular visits to places of detention carried out both by international (Subcommittee for the prevention of torture - SPT) and national (National Preventive Mechanisms - NPMs) bodies. This instrument introduced a new approach to ensuring compliance with obligations arising from human rights by drawing on two well-established concepts: the notion of subsidiarity and international oversight. In addition, rather than setting new standards, it obliged states to establish mechanisms that are to prevent existing standards from being violated. The OPCAT seeks to protect persons deprived of their liberty and prevent their ill-treatment by putting in place a system of preventive monitoring performed chiefly by NPMs. The novelty of the OPCAT is not only that it mandates states to establish NPMs, but also that it sets out main powers and formal arrangements that are to be accorded to such bodies. NPMs ought to carry out regular visits to closed institutions, examine the treatment and material conditions under which persons deprived of their liberty reside and, where necessary, make recommendations, including those that address more general issues and require change of legislation. NPMs are expected to engage in dialogue with relevant authorities with the aim of getting the recommendations implemented. This new approach, first envisaged in the OPCAT, was utilized in the UN Convention on the Rights of Persons with Disabilities (CRPD) as well.

On a more general note, it seems that there is a move towards a novel method of implementing rights set out in international human rights treaties centered around prevention rather than sanction. In addition, it has been recognized that strengthening actors at the national level assist states meet their international obligations and, thus, enhance observance of human rights.[12] This makes particular sense as regards direct monitoring of whether prohibition of ill-treatment was observed, since most of the violations occur behind closed doors, and thus remain undetected. Therefore, opening up closed institutions to independent scrutiny by designating mechanisms that are to visit them on a regular basis, and so contribute to the eradication of practices tantamount or conducive to ill-treatment, seems to be a logical response. This is to be done by joint endeavors of both the SPT and NPMs. Of course, given

[12] O. A. Hathaway and H. H. Koh, *Foundations of international law and politics*, Foundations of law series (New York, N.Y: Foundation Press; Thomson.West, 2005), p. 206; C. Tomuschat, *Human rights: Between idealism and realism / Christian Tomuschat*, The collected courses of the Academy of European Law, Third edition p. 180.

that the SPT is an international body, the bulk of visiting activities needs to be carried out by NPMs, since they, being on the spot, are better placed to conduct regular visits to places of detention.

To comply with this duty, states parties to the OPCAT, in addition to designating such bodies, must guarantee their independence, provide sufficient resources, enable them to visit places of detention without hindrances and finally make the most of their recommendations. Therefore, it seems that the success of the entire endeavor is closely related to NPMs. However, due to its relatively recent creation, no serious and coherent assessment of this novel mechanism's effectiveness has been carried out. The main emphasis was put on sharing good practices and providing guidelines that are to facilitate the designation and enhance the capacity of the newly established NPMs to carry out their mandate.

Although this innovative approach to combating ill-treatment is still in relatively early phase,[13] it is possible to assess its effectiveness, since a number of states have ratified the OPCAT, designated NPMs and published reports on its work. More precisely, until the commencement of the work on this study at the end of 2013, 70 states have ratified while 21 have signed the OPCAT. Out of these, 51 states have designated NPMs.[14] Similarly, the SPT, given that it became operational in 2007, conducted a number of country missions and published respective reports.

Therefore, the aim of this thesis is to determine whether the new approach to preventing ill-treatment in closed institutions based on regular visiting carried out by NPMs and followed by publishing reports and recommendations, has been successful or not. Moreover, it will try to establish if certain characteristics favor or disfavor NPM's effectiveness. This is to be done by conducting a comparative analysis of formation and performance of NPMs in several jurisdictions that display different scores on features that might have had bearing on NPMs effectiveness. This will, analytically pave the way for some more general conclusions on NPMs effectiveness of wider relevance.

1.2 Literature review

Most of the academic contributions to date which addressed issues directly related to NPMs focused on innovative nature of both OPCAT and NPMs and their potential to contribute to prevention of ill-treatment. For instance, Murray, Evans and others provided an overview of developments which led to adoption of the OPCAT and positioned this instrument within the current maze of international efforts aimed at enforcement of prohibition of ill-treatment. In addition, these authors clarified the OPCAT's scope, role of both SPT and NPMs and expectations a functional NPM would have to meet in order to

[13] Although the OPCAT was adopted in 2002 and entered into force in 2006, designation of NPMs did not immediately ensued. Namely, majority of States Parties to the OPCAT overstepped the requirement set out in Article 17 to designate an NPM within one year upon ratification or accession. Moreover, a number of states have not designated NPM at all. Lastly, if we consider that NPMs were established at different time junctures it is to be concluded that the entire system of prevention established by the OPCAT is, in relatively, early phase. For exact date of ratification and designation of NPMs see APT, *OPCAT Database*. http://www.apt.ch/en/opcat-database/ (15 July 2016).

[14] United Nations Treaty Collection, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en (03 December 2013).

be effective.[15] Nowak and McArthur in their seminal commentary on the CAT provided explanations and interpretation of OPCAT articles in line with contemporary developments in the field of torture prevention.[16] In addition, there are a number of articles dealing with development of OPCAT and its innovative character,[17] NPMs independence[18] and its relation with NHRIs[19] as well as other issues pertaining to the OPCAT in general, and NPMs in particular.[20]

Focus of non-academic texts was mainly placed on sharing best practices and experience to enhance efficiency of prospective or newly established NPMs. One of the leading international NGOs dealing with prevention of ill-treatment, Geneva based Association for the Prevention of Torture (APT), has been continuously publishing various brochures such as manuals, briefs, compilation of jurisprudence etc. containing information considered instrumental for NPMs' effective functioning.[21] Furthermore, the APT made available the most comprehensive database of designated NPMs in different jurisdictions around the globe.[22] In addition, Human Rights Implementations Centre at the Law School of the University of Bristol also established and maintains database on NPMs.[23] Similarly, under the auspices of the CoE a project named "European NPM Newsletter" was established to facilitate exchange of information and best practices among NPMs on the topics within their remit.[24] Finally, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre published a study

[15] R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011).
[16] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008).
[17] See for example: M. D. Evans and C. Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture', *Human Rights Law Review* 4 (2004), 19–55; P. V. Kessing, 'New Optional Protocol to the UN Torture Convention', *Nordic Journal of International Law* 72 (2003), 571–92; F. Ledwidge, 'The Optional Protocol to the Convention Against Torture (OPCAT): A major step forward in the global prevention of torture', *Helsinki Monitor* 17 (2006), 69–82; A. Olivier and M. Narvaez, 'OPCAT Challenges and the Way Forwards: The ratification and implementation of the Optional Protocol to the UN Convention against Torture', *Essex Human Rights Review* 6 (2009), 39–53.
[18] E. Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention', *Human Rights Law Review* 14 (2014), 1–29.
[19] R. Murray and E. Steinerte, 'Same but Different?: National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture', *Essex Human Rights Review* 6 (2009), 77–101.
[20] R. Murray, 'National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All', *Netherlands Quarterly of Human Rights,* 26 (2008), 485–516; G. de Beco, 'The Optional Protocol to the Convention Against Torture, Inhuman or Degrading Treatment or Punishment (the OPCAT) in Europe: Duplication of Reinforcement?', *Maastricht Journal of European and Comparative Law* 18 (2011), 257–74; A. Edwards, 'The Optional Protocol to the Convention Against Torture and the Detention of Refugees', *International and Comparative Law Quarterly* 57 (2008), 789–825; A. H. de Wolf and J. Watson, 'Navigating the Boundaries of Prevention: The Role of OPCAT in Deportations with Diplomatic Assurances', *Netherlands Quarterly of Human Rights,* 27 (2009), 525–66
[21] See for example APT, *Monitoring places of detention: A practical guide* (Geneva: APT, 2004); *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006); *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010); *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008).
[22] APT, *OPCAT Database*. http://www.apt.ch/en/opcat-database/ (15 July 2016).
[23] Human Rights Implementation Centre of the University of Bristol Law School, *NPM Directory*. http://www.bristol.ac.uk/law/research/centres-themes/hric/publications-and-resources/resources/npmdirectory/#d.en.278328 (22 January 2017).
[24] Directorate General of Human Rights and Legal Affairs of the Council of Europe, *European NPM Newsletter*. http://www.coe.int/t/democracy/migration/ressources/npm_newsletter_en.asp (08 June 2016).

addressing follow up of NPM recommendations in the EU.[25] As most of other contributions, this one too intended to facilitate enhancement of NPMs' capacity to effectively follow up on their recommendations by sharing good practices and proposing an adequate framework for follow up strategies. Only a few non-academic texts tried to provide a critical assessment of set-up and/or performance of several NPMs. These writings took the form of policy papers and short NGO reports on the one hand, and on the other sections in treaty bodies´ reports or concluding observations in which, albeit briefly, performance of NPMs in specific countries was evaluated. Examples of the former include synthesis report on torture preventive mechanisms in nine post-Soviet states (Russia, Ukraine, Belarus, Georgia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan) published by Prison Reform International.[26] German Institute for Human Rights published a policy paper assessing set up, activities and methodology of German NPM and proposing avenues for improvement.[27] As to the latter, the CPT in most of its reports provides a brief assessment (usually taking few paragraphs only) of NPMs. Similar practice has been employed by the CtAT and other treaty bodies under their reporting procedure. The SPT, on the other hand, in addition to briefly tackling NPM related issues in regular missions, deals at length with particular NPMs during missions specially devoted to that end. Outcome of such visits are two reports, addressed to the state and NPM respectively, in which in depth analysis of NPM's strong and weak points are provided together with relevant recommendations for improvements. In addition, the SPT produced Analytical self-assessment tool for NPMs aimed at facilitating NPMs' efforts to optimize their performance and thus tackle issues of ill-treatment in places where persons deprived of liberty reside more effectively. Extent to which this instrument was utilized is beyond the scope of this study.

It follows that most of academic focus was put on analysing potentials and implications of a novel approach to preventing ill-treatment introduced by the OPCAT. Non-academic literature focused on providing know-how on preventive oversight and sharing best practices in implementing the OPCAT and establishing NPMs. In other words, efforts were made to improve prospects of NPM effectiveness rather than assess whether NPMs were in fact effective. Hence, it is safe to conclude that, to the best of our knowledge, no comprehensive academic study was carried out with the principal aim to evaluate the effectiveness of several NPMs. More precisely, there are no studies seeking to determine either NPMs impact on actual level of ill-treatment[28] or its performance.[29] Likewise, it appears that there is a

[25] M. Birk, G. Zach, D. Long, R. Murray and W. Suntinger, *Enhancing Impact of National Preventive Mechanisms: Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward* (Ludwig Boltzmann Institute of Human Rights, 2015).
[26] K. Koroteev, *Mechanisms for the prevention of torture in nine CIS states: Synthesis report* (London: Penal Reform International, 2012)
[27] P. Follmar-Otto, *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!: Zur völkerrechtskonformen Ausgestaltung und Ausstattung*, Policy paper / Deutsches Institut für Menschenrechte (Berlin: Dt. Inst. für Menschenrechte, 2013), vol. 20.
[28] Impact assessment seeks to determine whether NPMs did or did not manage to reduce prevalence of ill-treatment in places where persons deprived of liberty are held, refer to chapter 3 Research methodology, section 3.2.1. Impact assessment.
[29] Performance assessment examines whether NPMs met all relevant requirements, employed methodology and implemented activities considered necessary for successful prevention of ill-treatment, refer to chapter 3 Research methodology, section 3.3.2. Performance assessment.

lack of comparative studies seeking to discover more general inferences on whether specific factors favour or hinder effectiveness of NPMs.

Empirical research in the field of determining extent of human rights observance in general, and personal integrity rights in particular, was carried out by using qualitative and quantitative research methods.

As to the quantitative studies, focus was put on capturing certain regularities at macro level by making use of statistical methods. More precisely, by utilizing quantitative or statistical method, researches tried to explain variance in incidences of ill-treatment over time, established through coding annual human rights reports, by contrasting it with presumably causal variables such as state of democracy, economic development, ratification of international treaties, creation of NHRIs etc. Special mention in this respect deserves 1994 Poe and Tate study tracking down violations of personal integrity rights between 1980 and 1994, by making use of the existing dataset: Political terror scale,[30] to unearth correlations with independent variables such as democracy, economic development, armed conflict, British cultural influence and population size.[31] At the beginning of the twenty-first century, Hathaway explored whether ratification of international treaties, including the CAT, led to better observance of the right not to be subjected to torture. Again, instances of torture were identified by analysing information made available by the U.S. Department of State human rights reporting during the course of 14 years (from 1985 to 1998) and contrasted with ratification of the CAT but taking account of additional variables such as previous human rights practices, level of democracy etc.[32] Somewhat unexpected results, pointing towards a conclusion that—contrary to conventional wisdom—ratification of the CAT by autocratic states was followed by increase rather than decrease of extent of torture, stimulated additional research. For example, level of violation of personal integrity rights was determined by applying content analysis on the U.S. State Department annual human rights reports on 153 states in the course of 23 years and contrasted with ratification of the CAT.[33] Similar methods were applied to examine whether an introduction of NHRIs prompted decrease in violations of personal integrity rights. To that end prevalence of personal integrity rights violations (torture, extra judicial killings, political imprisonment and disappearances) were examined in the course of 25 years in 143 countries by making use of data extracted from the U.S. State Department and Amnesty International reports. This dependent variable was contrasted to passage of time as an independent, that is causal

[30] Political Terror Scale measures level of political violence annually on a five-point scale by coding information procured by U.S. State Department, Amnesty International and Human Rights Watch human rights reports. See M. Gibney, L. Cornett, R. Wood, P. Haschke and D. Arnon, *The Polit-ic-al Ter-ror Scale: 1976-2015*. http://www.politicalterrorscale.org/ (22 September 2016).

[31] S. Poe and N. Tate, 'Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis', *The American Political Science Review* 88 (1994), 853–72.

[32] O. A. Hathaway, 'Do Human Rights Treaties Make a Difference?', *The Yale Law Journal* 111 (2002), 1935–2042.

[33] E. M. Hafner-Burton and K. Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology* 110, 1373–411; see also W. M. Cole, 'Human Rights as Myth and Ceremony?: Reevaluating the Effectiveness of Human Rights Treaties, 1981–2007', *American Journal of Sociology* 117 (2012), 1131–71; E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', *Journal of Conflict Resolution* 49 (2005), 925–53.

variable.[34] Similarly, incidence of torture in the 25-year time span in 153 states were looked at in light of the CAT ratification and existence of NHRIs.[35] Along the same methodological lines is a recent major study, commissioned by the APT and carried out by Richard Carver and his team, on effectiveness of measures seeking to prevent torture. Namely, this study sought to determine effectiveness of measures deemed to prevent torture (independent variables) by contrasting them with instances of torture identified in 16 countries over the 30-year time span (dependent variable). In addition, quantitative research was complemented by in depth qualitative outline of examined states.[36]

With regard to qualitative research, numerous studies addressed phenomena of torture from different perspectives. For example, one dealt with historical development of the notion, its abolition and re-emergence in the 20th century.[37] Rejali wrote a comprehensive study demonstrating transformation of practices amounting to torture in democracies from, infliction of pain via "classical" methods leaving visible body marks or even causing mutilation (beatings, whipping etc.) to the so called "clean techniques" leaving little or no marks on the victim's body.[38] More to the point, in one qualitative study relationship between international human rights regime and variance of resorting to torture and other violations of personal integrity rights in Latin America was explored.[39] Again, publications and pieces on NHRIs constitute a fair share of qualitative research in the field. Some authors assessed NHRIs in Central and Eastern Europe;[40] others, in regions such as Latin America[41] or Africa.[42] There is also a piece assessing effectiveness of Northern Ireland NHRI in comparison with that established in South Africa.[43] However, in addition to tackling prevention of ill-treatment and specific role of NPMs only in passing, these studies differ considerably with respect to focus and methodology used. Some attempts to evaluate effectiveness of treaty bodies such as the CtAT were made. For instance, in one study several jurisdictions in Europe (Norway, the Netherlands, Portugal, Sweden, Denmark, the Czech Republic, Iceland, and Luxembourg) were examined in order to determine whether and to what extent

[34] W. M. Cole and R. O. Francisco, 'Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004', *American Sociological Review* 78 (2013), 702–25.
[35] R. M. Welch, 'National Human Rights Institutions: Domestic implementation of international human rights law', *Journal of Human Rights*.
[36] Carver R. and Handley L. (eds.), *Yes, torture prevention works: Insights from a global research study on 30 years of torture prevention*, September 2016 (Geneva: APT, 2016).
[37] C. J. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis', *Sociological Theory* 25 (2007), 101–21.
[38] D. M. Rejali, *Torture and democracy* (Princeton, Oxford: Princeton University Press, 2007).
[39] E. L. Lutz and K. Sikkink, 'International Human Rights Law and Practice in Latin America', *International Organization* 54 (2000), 633–59.
[40] R. Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law', in R. Goodman and T. I. Pegram (eds.), *Human rights, state compliance, and social change: Assessing national human rights institutions* (Cambridge, New York: Cambridge University Press, 2012), pp. 181–209.
[41] T. Pegram, 'National Human Rights Institutions in Latin America: Politics and Institutionalization', in R. Goodman and T. I. Pegram (eds.), *Human rights, state compliance, and social change: Assessing national human rights institutions* (Cambridge, New York: Cambridge University Press, 2012), pp. 210–39.
[42] O. C. Okafor, 'National Human Rights Institutions in Anglophone Africa: Legalism, Popular Agency, and the "Voices of Suffering"', in R. Goodman and T. I. Pegram (eds.), *Human rights, state compliance, and social change: Assessing national human rights institutions* (Cambridge, New York: Cambridge University Press, 2012), pp. 124–49.
[43] S. Livingstone and R. Murray, *Evaluating the effectiveness of national human rights institutions: the Northern Ireland Human Rights Commission : with comparisons from South Africa* (2005).

they complied with recommendations set out in the CtAT concluding observations.[44] One further study examined the CtAT's mandate, set up, methodology and practice. The conclusion that followed from this analysis was rather unfavourable, for the CtAT was labelled a weak institution which calls upon universal principles and yet fails to treat all states equally.[45]

In conclusion, it appears clear that there is a gap in the literature in respect of studies purporting to estimate effectiveness of efforts undertaken to prevent forms of ill-treatment other than torture as well as abuses taking place in psychiatric hospitals or social institutions.

There is an abundance of literature addressing legal aspect of ill-treatment under international law and obligations stemming from it. In what follows, review of the principal literature, mostly books, frequently consulted in piecing together different parts of this thesis, will be provided.

For a comprehensive overview of various specificities surrounding incarceration under rules of criminal law, Rodley and Pollard's classic, *The Treatment of Prisoners Under International Law*, was relied upon. The authors managed to draw on a variety of legal fields and topics and yet stay firmly centred on deprivation of liberty setting and address its many facets. All in all, as this book synthesized different case law, state practice and academic opinions to provide a coherent global account of the latest developments in the field, it proved to be more than helpful and was, thus, frequently resorted to.[46]

In tracking down developments taking place within the framework created by the CAT, basic reference is made to Nowak and MacArthur's CAT Commentary.[47] In addition, for conditions accompanying the CAT's creation and initial understanding of problems that it was designed to address Burgers and Danelius CAT Handbook was consulted.[48] Further two books on CAT deserve mentioning: Ingelse's analysis of the CtAT jurisprudence[49] and Boulesbaa's understanding of certain provisions of the CAT and obligations arising from them.[50]

Developments under the ICCPR were explored by making use of Nowak's ICCPR commentary[51] and that authored by Joseph and Castan.[52] Understanding of prohibition of ill-treatment under the law of the ECHR was clarified by guidance provided by authorities in the field such as Harris, O'Boyle &

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[44] R. McQuigg, 'How Effective is the United Nations Committee Against Torture?', *European Journal of International Law* 22 (2011), 813–28.
[45] T. Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty', *Human Rights Quarterly* 31 (2009), 777–800.
[46] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009).
[47] Nowak, McArthur and Buchinger, *Nowak et al. 2008*.
[48] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9.
[49] C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001).
[50] A. Boulesbaa, *The U.N. Convention on Torture and the prospects for enforcement*, International studies in human rights (The Hague, Boston, Sold and distributed in North, Central, and South America by Kluwer Law International: M. Nijhoff Publishers; Cambridge, Mass., 1999), v. 51.
[51] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005).
[52] S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, materials, and commentary*, Third edition

Warbrick[53] and Jacobs, White and Ovey.[54] Broader picture on contemporary standards pertaining to prisoners and detainees in Europe was acquired by looking at Murdoch's study of treatment of prisoners in Europe.[55] For an account of prohibition of ill-treatment under Inter-American Human Rights System, commentary of the IACtHR jurisprudence and exhaustive report on persons deprived of liberty published by the IACmHR were consulted.[56]

In exploring predicaments disproportionally afflicting persons with psychosocial and/or intellectual disabilities deprived of their liberty (arbitrary detention, involuntary treatment etc.) and state obligations, made clear in CRPD, that are to prevent them, Kanter's comprehensive overview of this problematics was utilized[57] along with several other texts.[58]

In locating relevant jurisprudence resort was made to several compendiums outlining jurisprudence on prohibition of ill-treatment emerging before universal and regional judicial or quasi–judicial bodies.[59] Similarly, a number of specialized handbooks on different issues related to deprivation of liberty were consulted to further illuminate the content of state obligations formulated in general manner. These include: WHO handbook on role and basic tasks performed by health care professionals in prisons,[60] UN handbooks dealing with alternatives to imprisonment[61] and with properly maintaining prisoner files,[62] manual on the effective investigation and documentation of ill-treatment (Istanbul Protocol)[63] etc.

It goes without saying that, in order to demonstrate which measures are considered crucial for prevention of ill-treatment in closed institutions, an extensive overview of texts, falling under the broad

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[53] D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009).

[54] B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, Sixth edition ; Occasional resort was made to C. Grabenwarter, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1. Aufl (München: Beck, 2011).

[55] J. Murdoch, *The treatment of prisoners: European standards* (Council of Europe, 2006).

[56] L. Burgorgue-Larsen, Úbeda de Torres, Amaya and R. Greenstein, *The Inter-American Court of Human Rights: Case-law and commentary* (Oxford, New York: Oxford University Press, 2011); R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II.

[57] A. Kanter, *International Human Rights Recognition of People With Disabilities: From Charity to Human Rights* (Routledge, 2012).

[58] See, for example P. Bartlett, O. Lewis and O. Thorold, *Mental disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2007); J. E. Lord, 'Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities', *Loyola of Los Angeles International and Comparative Law Review* 33 (2010), 27–81.

[59] S. Joseph, *Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies*, OMCT handbook series (Geneva, 2006); D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006); F. Viljoen and C. Odinkalu, *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland: World Organisation Against Torture, 2006), v. 3; U. Erdal and H. Bakirci, *Article 3 of the European Convention on Human Rights: A practitioner's handbook ; with a preface by Sir Nigel Rodley*, OMCT handbook series (Geneva: World Organization Against Torture (OMCT), 2006), v. 1; *2008*.

[60] Enggist S. (ed.), *Prisons and health* (Copenhagen: WHO Regional Office for Europe, 2014).

[61] D. van Zyl Smit, *Handbook of basic principles and promising practices on alternatives to imprisonment*, Criminal justice handbook series (New York: United Nations, 2007).

[62] *Handbook on prisoner file management*, Criminal justice handbook series (New York: United Nations, 2008).

[63] *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1.

notion often termed as "soft law", was undertaken. These documents include ICRC and CPT standards, concluding observations and general comments of treaty bodies, reports and other contributions made by the SRT.

On mechanisms and procedures of human rights implementation in general, Tomuschat's book *Human rights: Between idealism and realism* proved to be of great value.[64] It is written in clear language and gives an overview of advantages and weaknesses of specific implementation methods. In addition, resort was made to edited book *International Human Rights Law* containing useful contributions on state obligations and methods of their implementation under universal and regional human rights regimes.[65] Though somewhat outdated, Evans and Morgan's thorough analysis of the CPT's methodology and practice, was nevertheless made use of to shed light on different aspects of preventive monitoring and identify good practices that can be further applied.[66] Last but not least, resort was made to a number of contributions made available in *Max Planck Encyclopaedia of Public International Law* (MPEPIL) as they provide condensed and relevant overview of the latest development in a number of rather specific fields related to the main topic of this thesis.[67]

[64] C. Tomuschat, *Human rights: Between idealism and realism*, The collected courses of the Academy of European Law (Oxford, New York: Oxford University Press, 2003), v. 13/1.
[65] Moeckli D., Shah S., Sivakumaran S. and Harris D. J. (eds.), *International human rights law*, Second edition
[66] Evans and Morgan, *Evans et al. 1998*.
[67] For example see T. van Boven, 'Victims' Rights', in R. Wolfrum (ed.), *MPIL: (online ed.)*

2 Chapter: Research design

To study human rights as a predominately legal concept in the real world, one needs to go beyond the boundary of legal scholarship and make use of the methodology devised by social sciences. In doing this, the lawyer ought to change his perspective from arguing for something by advancing arguments that can best support his view to putting his thesis under harsh scrutiny governed by the rules of empirical inquiry.[68] It seems that this is often not the case and that human rights scholarship in empirical research suffers from serious methodological drawbacks.[69]

At the beginning of this study it should be made clear that although this thesis endeavors to assess the effectiveness of NPMs established under the OPCAT only in selected jurisdictions, it will point towards some trends that have broader relevance, complement research[70] in this field and thus, contribute to the larger academic debate. It should also be noted that there is a scholarly debate on most suitable methods for measuring human rights violations and in turn, the achievement of human rights agreements and mechanisms.[71] Empirical researchers in this field have used qualitative and quantitative research methods as well as their combination.[72] Measuring the impact of one particular instrument and making inferences about its effectiveness is a complicated endeavor with an uncertain outcome. This is related to the universal problem of dealing with society and human behavior which is so unpredictable that no firm rules can be determined, and the link between cause and effect is hard to establish. As opposed to natural, social sciences can try to emulate the scientific method in order to capture some kind of regularity. Research in social sciences is *per definitionem* imperfect and as such forced to make choices which are always related to the so-called trade-off paradigm: conflicts between different goals of the research itself as well as goals and the most suitable instruments to achieve them.[73] In other words, one choice regarding the research design will inevitably affect other aspects of the research or distort goals that the researcher aims to achieve. Some of the most relevant trade-offs are those between

[68] L. Epstein and G. King, 'The Rules of Inference', *The University of Chicago Law Review* 69 (2002), at 9.
[69] F. Coomans, F. Grünfeld and M. T. Kamminga, 'Methods of Human Rights Research: A Primer', *Human Rights Quarterly* 32 (2010), 180–7.
[70] A major study—looking at 16 countries in a time period of 30 years—on measures and mechanisms which contribute to prevention of torture commissioned by the APT and led by Prof. Richard Carver has been made public in 2016, Carver R. and Handley L. (eds.), *Yes, torture prevention works: Insights from a global research study on 30 years of torture prevention*, September 2016 (Geneva: APT, 2016).
[71] Cingranelli D. L. (ed.), *Human rights: Theory and measurement*, Policy Studies Organization series (New York: St. Martin's Press in association with the Policy Studies Organization, 1988); Coomans, Grünfeld and Kamminga, 'Coomans et al. 2010'; R. J. Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses', *Human Rights Quarterly* 8 (1986), 607–27; O. A. Hathaway, 'The New Empiricism in Human Rights: Insights and Implications', *American Society of International Law Proceedings* (2004); T. Landman, 'Social Science Methods and Human Rights', in C. Foomans, F. Grünfeld and M. T. Kaaminga (eds.), *Methods of Human Rights Research* [10], pp. 19–41; T. Landman, 'Comparative Politics and Human Rights', *Human Rights Quarterly* 24 (2002), 890–923; T. Landman, 'Measuring Human Rights: Principle, Practice and Policy', *Human Rights Quarterly* 26 (2004), 906–31; T. Landman, *Studying human rights* (London, New York: Routledge, 2006); T. Landman and E. Carvalho, *Measuring human rights* (Milton Park, Abingdon, Oxon, New York, N.Y: Routledge, 2010); E. M. Hafner-Burton and J. Ron, 'Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes', *World Politics* 61 (2009), 360–401; Foomans C., Grünfeld F. and Kaaminga M. T. (eds.), *Methods of Human Rights Research*
[72] Refer to chapter 1 Introduction and literature review, section 1.1. Literature review.
[73] Brady H. E. and Collier D. (eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (2010), p. 153.

"*accuracy, generality, parsimony and causality*"[74] or between seeking to take account of all relevant causal variables and keeping them at a manageable level in order to make valid inferences.[75] In short, a choice concerning methods inevitably produces side effect negatively affecting some other feature of the research.

This said, it is upon the researcher to study these phenomena, select methods that can best capture what is to be measured while trading off less relevant aspects.

2.1 Framing the problem: research question

Is the approach to preventing ill-treatment based on regular visits to closed institutions by NPMs which are to monitor and enhance state compliance with the CAT and the other relevant legal standards pertaining to the prohibition of torture and other forms of ill-treatment actually effective in preventing it? Are the selected factors affecting, and if yes, to what extent, the overall success of NPMs? In order to answer the basic research questions further questions can be discerned

- Are NPMs established in compliance with the OPCAT requirements and best practices in the field?
- Did NPMs manage to generate the so-called deterrent effect?
- Did NPMs manage to open up places of detention by conducting regular visits and making public their findings?
- Did NPMs formulate adequate recommendations?
- To what extent have these recommendations been implemented?

2.2 Framing the answers: research hypothesis

The success of NPMs in preventing ill-treatment in closed institutions is contingent upon conditions and circumstances (level of democracy, rule of law, strength and independence of institutions, general observance of human rights, economic development and level of corruption) shaping the political and legal setting of the states in which it operates. To facilitate this research, three model states displaying different scores on the above specified factors are to be considered:

- developed democratic state with strong institutions, rule of law and low level of corruption (established democracy)
- former autocratic states which undertook a move towards democracy but where abovementioned features still did not manage to take hold (semi-democracy)
- state where democratic rule and other features are either non-existent or feature only formally (autocracy)

[74] Ibid., p. 21.
[75] Ibid., p. 157.

In order to facilitate greater differentiation among prospective results three sub hypotheses on NPM effectiveness were developed.

1. NPM proved to be most effective in established democracy, less so in semi-democracy and least effective in autocracy. The extent of NPMs efficiency depends on factors such as strength and stability of institutions, general respect for human rights and the rule or law, wealth of a state, democratic tradition etc. It therefore follows, that NPMs practical effect is the greatest in established democracies with strong institutions, rule of law and high level of human rights protection, intermidiate in semi-democracies and least or negligible in autocratic states. This should follow from the fact that established democracies have the greatest interest in upholding the rule of law and human rights as torture and other ill-treatment tend to distort the integrity of the judicial process and negate the principle of the rule of law by causing miscarriage of justice. In addition, respect for human rights in general and personal integrity and dignity of the individual have worth in their own right and are considered pillars on which these states rest. These pillars are then buttressed by vigorous civil society, advocating for transparency, public control, accountability and responsibility of public officials. Consequently, in accordance with this hypothesis, in semi-democracies the NPM should be less effective while in autocratic states its´ effect, if any, would be minimal.
2. NPM proved to be most effective in semi-democracy, less so in established democracy and least effective in autocracy. This hypothesis is grounded in presumption that effectiveness of NPMs does not closely follow the pattern described in first hypothesis. Namely, although democratic states are officially committed to the rule of law and human rights in general, and prohibition of ill-treatment in particular, practical observance of the latter is not without flaws. While it is true that these states abstain from oppression of political opponents, guarantee civil liberties and promote human rights as part of their foreign policy, the less visible layer of violence and degradation manifested through sporadically resorting to excessive force and oppressive practices in places of deprivation of liberty remains. This thesis can be additionally supported with the following argumentation. On the one hand, democratic, economically advanced states in international fora, above all the UN, initiate, sponsor and accept new human rights instruments in order to "lead by example", namely convince other states to do the same. On the other hand, they assume that the implementation of obligations arising from them (such as creation of national bodies) is not problematic, since they already give full respect to rights observance of which these bodies are meant to improve. This, in turn, leads to relatively formal implementation efforts. In other words, their performance might fall somewhat short of their reputation. Semi-democracy demonstrated the best performance, followed by established democracies while autocracy is again placed last. The reason for the relative success of semi-democracies in this regard lies in the fact that states in democratic transition have strong incentives to be recognized as democratic and human rights observant entities and eligible

partners in international fora. As these states gave up the policy of systematic oppression of, above all, political opponents, there are no structural obstacles standing in the way of practical implementation. This, coupled with stronger international pressure, leads to increased efforts and more vigilant national bodies for the prevention of ill-treatment. In contrast, even though autocracies also have an interest to present themselves as legitimate and observant of rights, their oppressive character prevents the realization of commitments endorsed on the international stage.

3. Effectiveness of NPMs is not related to any of the outlined factors pertaining to established democracies, semi-democracies and autocracies as NPMs, in all three states selected, performed equally ineffective or effective or their performance ranking renders impact of outlined factors moot (for example, autocracy has the best performance, state in transition second best, and democratic state the worst). This hypothesis should not be interpreted as an attempt at equating these states, but rather as implying that the performance of NPMs is not necessarily dependent on the factors outlined above.

3 Chapter: Research methodology

As already indicated, this thesis is seeking to determine whether the approach to preventing ill-treatment of persons deprived of liberty based on regular visits to closed institutions carried out by independent national bodies and publishing reports containing recommendations for improvement is actually effective in preventing ill-treatment. This is to be done by conducting a comparative analysis of several jurisdictions where such national bodies are designated and operational and then making further inferences of wider relevance addressing the effectiveness of NPMs as such.

To that end, two methodological issues need to be addressed. The first concerns the method through which it is to be ascertained whether national bodies designed to prevent ill-treatment were actually effective in preventing it. The second relates to the choice of jurisdictions that are to be examined. In what follows, developments pertaining to both components will be discussed.

3.1 Overview of research methodologies

Questions such as whether certain normative concepts, including human rights, are being respected in the real world are answered by conducting an empirical study, which can either employ a qualitative or a quantitative approach.[76] These two methods have been largely debated and contrasted in social sciences.[77] Quantitative method is based on numerical measurement, uses large number of cases contrasted with variables in order to produce general explanations and strong causal inferences.[78] Here, the selection of cases does not pose a significant problem, since the recommendable modus is random selection. In contrast, qualitative research, sometimes referred to as “thick”, is non-numerical. It generates qualitative data by assembling a wide array of information by means of documents, interviews or observation, on a small number of cases and utilizes a comprehensive and deep analysis in order to provide a holistic understanding of the problem.[79] As regards qualitative research, the selection of cases is one of the major difficulties, since an incorrect selection can lead to the so-called selection bias and thus, weaken the entire research. This major methodological difference mirrors the features of the research strategies employed, the so called variable oriented and case oriented strategies.[80] However, even if these methods are substantively different, it is argued that both are grounded on the logic of inference, which is a "*process of using facts we know to learn something about facts we do not know*".[81]

[76] Hathaway, ‘Hathaway 2004’, 207.
[77] It has been argued that basic distinction between two methods lies in the level of measurement, number of cases, use of statistics and whether analysis is thick or thin. For this see D. Collier, J. Seawright and H. E. Brady, ‘Qualitative versus Quantitative: What Might This Distinction Mean?’, *Newsletter of the American Political Science Association* 1 (2003), 4–9, at 5.
[78] G. King, R. O. Keohane and S. Verba, *Designing social inquiry: Scientific inference in qualitative research / Gary King, Robert O. Keohane, Sidney Verba* (Princeton, N.J., Chichester: Princeton University Press, 1994), p. 3.
[79] Ibid., p. 4 C. C. Ragin, *The comparative method: Moving beyond qualitative and quantitative strategies* (Berkeley: University of California Press, 1987).
[80] Ibid.
[81] King, Keohane and Verba, *King et al. 1994*, p. 119.

Similarly, qualitative research as well can be expressed by using variables.[82] It seems that a major advantage of the quantitative approach is its sound variable oriented methodology and ability to grasp trends in a large number of cases. It is also more suitable for making causal inferences. On the other hand, exactly this, inability to capture a bigger picture and make strong causal inferences despite rigorous rules aimed at keeping the variables constant, is a weakness of a qualitative study. However, qualitative research can unearth and compare much larger amounts of data and, therefore, create an insight into processes that quantitative studies cannot detect.

3.2 Two approaches to measuring effectiveness

After the two methods, most appropriate for application have been analyzed, the main research question should be examined in order to determine which method is the most suitable. In the present case, we aim to discover something we do not know: effectiveness of the new preventive mechanism introduced by the OPCAT by using empirical evidence. One might wonder what *effective* actually means. One answer that immediately comes to mind is that NPMs decreased the level of ill-treatment[83] in one country whilst the other is not directly concerned with whether ill-treatment was actually decreased, but with whether an NPM performed as it should. The first approach has been referred to as impact whereas the second as performance assessment.[84]

3.2.1 Impact assessment

As to the first option, the entire endeavor revolves around the question: how can one determine whether a system established under the OPCAT decreased ill-treatment? To answer this question, empirical analysis needs to be utilized to determine whether the change in the independent or causal variable under observation (designation of NPM) is connected with the variation of ill-treatment. In legal scholarship, this is usually done by "*observing what occurs before and after a change in the causal variable*".[85]

[82] B. G. Peters, *Comparative politics: Theory and methods / B. Guy Peters*, Comparative government and politics (Basingstoke: Macmillan, 1998), p. 8.
[83] One remark is in order here. Most of the empirical human rights researches to date were dealing explicitly with torture or with bodily integrity rights. According to international law torture is not equal to ill-treatment and therefore cannot be measured in the same way. Ill-treatment is a generic term that includes torture, inhuman or degrading treatment or punishment. For the purpose of this paragraph suffice it so say that torture represents the gravest form of ill-treatment where state agents inflicted pain or suffering deliberately and with a specific purpose. Other forms of ill-treatment do not require this precondition. Therefore, it is plausible to assume that large number of people are treated inhumanely or are being degraded out of pure negligence. This is an important distinction, since it reflects on the methodology and measures that need to be utilized.
[84] These approaches have been recognized by Carver who, in his contribution to methodology of assessing effectiveness of NHRIs, distinguished performance and impact assessment see R. Carver, *Assessing the effectiveness of national human rights institutions* (Geneva: International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, 2005), p. 10
[85] Epstein and King, 'Epstein et al. 2002', 35.

Within this dilemma two basic questions can be further distinguished. How to measure ill-treatment and how to establish a causal connection between the established variation of ill-treatment and the introduction of NPM, since occurrences of ill-treatment are usually driven by a number of factors.

As to the first problem, it relates to the more general issue of human rights measurement. Landman divides the concept of human rights, for the purpose of its measuring, into three distinct levels or dimensions which in turn answer different questions: rights in principle (are rights guaranteed by legislation), rights in practice (are rights observed in reality) and rights as policy (effect of government policies in addressing human rights issues).[86] He then puts forward 4 techniques of measuring the respect for human rights: event based, standard based, policy based and by making use of official statistics. An event-based technique is simply tracking down instances of human rights violations over a certain time period; the standard based technique ranks human rights observance on a certain scale and the survey based technique targets the perception of human rights observance. Finally, statistics provide aggregate information that can point toward or serve as proxy for practical observance of individual human rights.[87] The next step, and maybe the most important one, is related to sources one draws upon to apply the aforementioned technique of human rights measurement. The choice of the method also reflects on the choice of sources. Since quantitative methods draw on a large number of cases, they usually take one source and code it in accordance with specific criteria. Event based or standard based measures have been employed in most of the quantitative studies to date. This approach has major weaknesses. First, how to measure something (torture) that is always done secretively and, if exposed, vehemently denied.[88] Second, it is even more difficult to measure forms of ill-treatment other than torture because they do not necessitate intent on the part of the public official, can be caused by negligence and are usually a consequence of a range of factors which, if observed independently, do not necessarily amount to ill-treatment. It seems clear that any attempt to examine the effectiveness of efforts to prevent ill-treatment would certainly lead nowhere if one grounds its work only on official reports of the state. For this reason, most of researchers seeking to measure ill-treatment by quantitative methods as a source of empirical data, use annual reports of Amnesty International and/or US Department of State.[89] These sources are problematic in their own right in a twofold manner. The first one is general and relates to the clandestine nature of ill-treatment and the inability of any report to grasp the real picture in every country of the world.[90] The second relates to the agenda of these

[86] Landman and Carvalho, *Landman et al. 2010*, p. 17.
[87] Ibid., pp. 36–40.
[88] Goldstein, 'Goldstein 1986', 617.
[89] Three most notable endeavors are: *The Political Teror Scale*. http://www.politicalterrorscale.org/ (04 May 2014); *The Cingranelli-Richards Human Rights Dataset*. http://www.humanrightsdata.com/ (15 November 2016) and research on compliance of states with human rights treaties done by prof. Hathaway see Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, Yale Law Journal, (2002).
[90] Landman, 'Landman 2004', 923.

organizations which, notwithstanding the proficiency and impartiality they aspire to, necessarily influences their work.[91]

Establishing a clear causal connection between the identified level of ill-treatment and NPMs is difficult, especially because the actual performance of an NPM is not taken into consideration, which brings us to the second problem in implementing the first approach to examining NPMs effectiveness. Attributing change in the dependent variable (level of ill-treatment), to independent variable considered causal (designation of NPMs) disregards other potentially relevant variables (factors such as strong, efficient and independent institutions, especially judiciary, level of democracy and overall respect for human rights, economic development etc.) that may also have contributed to change in the level of ill-treatment. The recommended solution, keeping all other independent variables that might had an effect on dependent variable stable in all states examined (equally strong or weak institutions, state of democracy etc.) during the period of observation, is difficult to implement.

3.2.2 Performance assessment

The second approach focuses on the NPMs potential, namely it attempts to clarify whether NPMs performance has met the expectations set forth directly in the OPCAT and those formulated by other actors (organizations and individuals, including academic commentators) dealing with the prevention of ill-treatment. If the answer is in the affirmative NPM is effective and *vice versa*.

The problem with this approach is that, essentially, it does not make clear whether the introduction of national preventive bodies achieved its main objective: decreasing the level of ill-treatment by preventing it. However, as the rationale of NPMs is that they, in addition to being an important safeguard themselves, can decisively contribute to establishing and/or strengthening other safeguards, which together make up a framework of procedures and measures conducive to preventing ill-treatment; it can be assumed that they inevitably reduce ill-treatment by averting its materialization in places of detention. Namely, the basic premise is that despite the fact that ill-treatment can occur anywhere as an isolated incident, it is prevalent in countries where safeguards buttressing the preventive framework against ill-treatment do not exist, are weak or ineffective. Moreover, the entire construction of efforts taken to strengthen the observance of the prohibition of ill-treatment in reality rests on the presumption that setting up certain safeguards in the deprivation of liberty context, forestalls or at least makes resort to ill-treatment more difficult.

This approach is along the lines of what King, Kohen and Verba termed as "*retaining the same unit of observation but changing the dependent variable…. involves looking for many effects of the same*

[91] A. D. McNitt, 'Some Thoughts on the Systematic Measurement of the Abuse of Human Rights', in D. L. Cingranelli (ed.), *Human rights: Theory and measurement*, Policy Studies Organization series (New York: St. Martin's Press in association with the Policy Studies Organization, 1988), at p. 94.

cause" and suggest asking oneself "*what else would we expect our explanatory variables to influence aside from the current dependent variable*?"[92]

Therefore, it is plausible to posit that the efficiency of NPMs in setting up and strengthening the framework of safeguards conducive to reducing ill-treatment, necessarily translates into a decline of the actual incidence of ill-treatment. Even if by no means a miracle cure against ill-treatment, NPMs do possess a great potential to contribute to prevention more than any other international and most national bodies. Thus, assuming that a high performance NPM prevents ill-treatment altogether or reduces it considerably, is not implausible.

3.3 Overview of case selection criteria

The other crucial choice the researcher needs to make is that of a convincing case selection i.e. what kind of cases he wants to compare. The main question that needs to be answered in this context is how to avoid bias in selection of cases which, in consequence, may distort the results of the research.[93]

Quantitative studies have no such problems, since random sampling is strongly recommended. Random sampling in a qualitative study composed of a small number of cases (small-N study) is most likely going to lead to some form of selection bias. In the literature, it is suggested that case selection in qualitative comparative study can follow either most similar or most different system design.[94] Through the most similar system design one examines if a set of independent variables lead to a supposed outcome. In this system, cases examined should be as similar as possible (except in respect of the variables under observation that should vary across the cases) in order to rule out other external factors (variables that are not being taken into consideration) that could influence the dependent variable.[95] By employing the most different system design one aims to discover if a certain outcome, that is constant in a number of different cases, is caused by a set of causal factors.[96]

An argument has been made that the discussion regarding the most similar or different case design is misleading as the researcher ought to develop a design able to "*produce data that are relevant to answering the questions raised by the researcher*".[97] Similarly, it has been argued that a strategy to select cases in small-n research should not rely on the dependent variable and, to the extent possible,

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[92] G. King, R. O. Keohane and S. Verba, *Designing social inquiry: Scientific inference in qualitative research / Gary King, Robert O. Keohane, Sidney Verba* (Princeton, N.J., Chichester: Princeton University Press, 1994), p. 223.

[93] On selection bias in general see G. King, R. O. Keohane and S. Verba, *Designing social inquiry: Scientific inference in qualitative research / Gary King, Robert O. Keohane, Sidney Verba* (Princeton, N.J., Chichester: Princeton University Press, 1994), pp. 128–38.

[94] Peters, *Peters 1998*, pp. 37–40 See also G. Sartori, 'Compare Why and How: Comparing, Miscomparing and the Comparative method', in M. Dogan and A. Kazancigil (eds.), *Comparing nations: Concepts, strategies, substance* (Oxford [u.a.]: Blackwell, 1994), pp. 14–35, at p. 22.

[95] For example, if economic underdevelopment, widespread corruption and a lack of respect for human rights lead to large scale famines is to be examined in states that are similar regarding other factors that could lead to famine such as history of armed conflict, land fertility etc.

[96] Here, one would try to find out what are the factors that led to large scale famines in different states where they actually occurred. See Peters, *Peters 1998*, pp. 37–40.

[97] King, Keohane and Verba, *King et al. 1994*, p. 205.

guard against selection bias.[98] It seems that there is no consensus on the topic whether a researcher should select the countries to be examined by bearing in mind the dependent variable he wants to measure.[99] In other words, it is unclear whether a proper research should be designed by anticipating what the presumable outcome of this endeavor is supposed to be? In any case, anticipation up until a certain degree during the selection cannot be avoided. This is not to suggest that this research will be engineered in a sense that the author has explicit knowledge on the final outcomes of success or failure of NPM in certain jurisdictions.

It seems that the use of the most different system design is not advisable, since when a research looks at units of observations on a systemic level (i.e. countries are units of observations), the dependent variable, in this case the level of ill-treatment or NPM performance, should always be constant in all of the cases under observation.[100] This would entail that only states, as different as possible, where torture has been significantly decreased or where NPMs exhibited outstanding performance, are compared in order to find out which factors led to this outcome.

Political science scholarship does not suggest an ideal solution of the problem, but instead advises that a researcher should develop a coherent selection criteria, which will prevent, to the extent possible, the selection bias.

In accordance with the most similar system design, causal variables should, at least to some extent, differ while control variables should be held constant. According to Gering, when a researcher wants to test a hypothesis he „*strives to identify cases that exhibit different outcomes, different scores on the factor of interest, and similar scores on all other possible causal factors*".[101] Similarly, Varone, Rihoux and Marx recommend two basic rules: "*maximize the variation on the outcome and conditions (explanatory variables) under investigation […] homogenize as much as possible on other possible explanatory conditions*".[102]

3.4 Decision on research methodology

In sum, the impact assessment approach focuses on detecting instances of ill-treatment before and after the introduction of NPMs and thus, attempts to establish a causal connection between the two. The performance approach focuses on the performance of NPMs themselves and assumes that a high performance reduces the level of ill-treatment. These two approaches are somewhat opposite in the sense that the first tries to measure variations in the observance of a specific human right and then

[98] Epstein and King, 'Epstein et al. 2002', 113.
[99] Peters, *Peters 1998*, pp. 54–5.
[100] C. Anckar, 'On the Applicability of the Most Similar Systems Design and the Most Different Systems Design in Comparative Research', *International Journal of Social Research Methodology* 11 (2008), 389–401.
[101] J. M. Box-Steffensmeier, H. E. Brady and D. Collier, *The Oxford handbook of political methodology*, The Oxford handbooks of political science (Oxford, New York: Oxford University Press, 2008), p. 668.
[102] F. Varone, B. Rihoux and A. Marx, 'A New Method for Policy Evaluation?: Longstanding Challanges and Possibilities of Qualitative Comparative Analysis (QCA)', in B. Rihoux and H. Grimm (eds.), *Innovative Comparative Methods for Policy Analysis: Beyond the Quantitative-Qualitative Divide* (Boston, MA: Springer Science+Business Media, Inc., 2006), at p. 228.

establishes a causal connection between the result determined and a special preventive mechanism introduced. The other is doing the reverse; it focuses on the performance of the mechanism itself and assumes that it had an impact on the level of ill-treatment and then proceeds to establish causal connection with the factors presumed to be causal.

Considering that it is more feasible to determine the performance of NPMs rather than the level of ill-treatment due to reasons outlined above, the performance assessment is more promising and will thus be utilized. In addition, the performance assessment will be perfected by crosschecking, where possible, NPMs performance with findings of international fact finding bodies concerning ill-treatment in the country under observation. This will serve as a corrective and final check to the reliability of the results acquired by means of the performance assessment method.

When it comes to the division between quantitative and qualitative method, it seems that the latter is more adequate, since in depth qualitative methods are suitable to provide insights into "*problems within the legal system, best practice insights and the effect of policy shifts*."[103] In addition, it has been recognized that the impact of a specific visiting mechanism on the occurrence of torture in places of detention, is usually examined by means of qualitative method.[104]

Therefore, the assessment of NPMs effectiveness will be based on an in-depth performance assessment of a small number of NPMs in accordance with predetermined criteria. NPMs and the states in which they operate will be selected with the intention of increasing causal leverage, that is, ability of making inferences of wider relevance. In addition, outcomes and findings of NPMs will be, where possible, crosschecked with findings of international bodies made during visits to selected states after commencement of NPM activities. This will serve as a corrective to findings based on performance evaluation only and shed additional light on NPMs real effectiveness.

3.5 Sources of information

3.5.1 General sources

This thesis will, whenever possible, draw on first-hand information obtained directly from NPMs or other actors such as NGOs or independent institutions having a direct insight into the phenomena under consideration. Information more removed from the direct observer (the second or third hand information) will be referred to only exceptionally. This will apply to cases when more direct information are either not available or do not exist at all. In other words, in the empirical part of this thesis, opinions or judgments concerning certain aspects of NPMs layout, methodology and output made by third actors will be, as far as possible, avoided. In addition to reports of the NPMs, the required

[103] Qualitative Approaches to Empirical Legal Research, Webley, Lisa, 947.
[104] It has been advanced that qualitative approach is suitable for assessing the impact of one preventive mechanism on the occurrence of torture. See R. Carver, 'Does Torture Prevention Work?', at 4–5.

information will be collected by conducting interviews with NPM members, secretariat staff, NGOs participating in or acquainted with NPM activities or otherwise engaged in prevention of ill-treatment.

On another level, this thesis consists of two main components: theoretical background and empirical research. The theoretical background encompasses main concepts that are to be examined, i.e. torture, inhuman and degrading treatment under international law as well as state obligations stemming from the body of rules addressing this issue. Furthermore, it deals with mechanisms and procedures designed for the implementation of human rights treaties: reporting, petition and inspection procedures. It places special emphasis on the inspection procedure that is, on site visits by the specially designated bodies to places of deprivation of liberty. It follows that the theoretical part will mostly draw on jurisprudence of international bodies in charge for protection of human rights and work of academicians in this field of research. Empirical research consists of applying indicators that are developed and extracted from the theoretical part on the countries selected. In order to obtain information, various documents will be used, above all NPM reports (annual, visit, thematic) and qualitative interviews conducted with relevant interlocutors. In addition to this, other documents, such as national legislation (constitution, laws, bylaws), reports of international bodies etc., will be resorted to as well.

3.5.2 Interviews

A special focus was put on examining different interview techniques with the aim of identifying the most adequate one. In the end, the so-called semi structured approach towards conducting interviews was selected as it is considered "*key technique in 'real-world' research*".[105] In this kind of interviews, the interviewer sets up a general structure by deciding in advance on the ground to be covered and the main questions to be asked, whereas the "*answers are entirely up to the interviewee*".[106] Therefore, interlocutors are encouraged to provide information and offer impressions related to the subject of research by, if necessary, going out of the strict confines set by the predetermined questions. Interviews were conducted in line with identified good practices aiming at maximizing the quality and objectivity of the information obtained. A basic questionnaire and questioning guidelines were developed. Special efforts were made to avoid using the so called leading questions i.e. questions framed in such a way to suggest or indicate a certain answer.[107] Interviews were conducted exclusively in person and were tape-recorded. At the end of every interview, a postscript was made while the material was transcribed as soon as possible.

Interviewees were specially selected out of those possessing inside or special knowledge on the topic of prohibition of ill-treatment in general, and work of the NPM in states under consideration in particular. Interviews were carried out with 10 interlocutors coming from state authorities, independent

[105] B. Gillham, *The research interview*, Real world research (London: Continuum, 2000), p. 21.
[106] B. Gillham, *The research interview*, Real world research (London: Continuum, 2000), p. 41.
[107] I. Seidman, *Interviewing as qualitative research: A guide for researchers in education and the social sciences*, 3rd ed. (New York: Teachers College Press, 2006), p. 84.

institutions and NGOs in Germany and Serbia. More precisely, interviews were conducted with one research associate and one member of the National Agency for the Prevention of Torture in Germany and Head of Department of Human Rights Policies (Germany/ Europe) at the German Institute for Human Rights. In Serbia, interviews were conducted with the Deputy Ombudsman in charge for the protection of persons deprived of their liberty in Serbia and representatives of the following non-governmental organizations: Belgrade Centre for Human Rights, Lawyers' Committee for Human Rights-YUCOM, and Mental Disability Rights Initiative of Serbia (MDRI-Serbia). Unfortunately, despite repeated attempts, no interlocutors could be identified in the case of Azerbaijan. The Azeri ombudsman refused to be interviewed, designate a staff member or even reply to questions in writing and did only direct to their annual reports. Similarly, no relevant interlocutor could be identified from the NGO sector. For this reason, in the case of Azerbaijan, larger resort was made to information derived from reports and observations of international bodies dealing with ill-treatment above all CtAT, CPT and UN Working Group on Arbitrary Detention. In addition to these, the research drew on reports published by international NGOs.

Interviews with staff or members of NPMs have been based on the following topics/questions:

- Designation of NPM (whether consultations with different societal actors preceded the actual designation, NPM model adopted, legal act by means of which NPM is established);
- Independence of NPM (whether it is separated from the government and/or institutions within which it operates, guarantees of independence accorded to the head of NPM and its members and staff);
- Are resources allocated to NPM in terms of annual budget, staff and access to expertise adequate for proper discharge of its mandate;
- Does NPM possess powers and prerogatives envisaged by the OPCAT and good practices of international visiting bodices (right of unlimited unannounced access to all places where persons deprived of liberty are or might be held, access to documentation and right to conduct private interviews with persons deprived of liberty);
- What standards is NPM making use of in assessing positions of persons deprived of their liberty (police stations, prisons, hospitals, social care centers etc.);
- Which kind of institutions is NPM considering to fall under its mandate;
- How frequent are these institutions being visited;
- Number of unannounced visits, if any, conducted annually;
- Visiting methodology, number of members, staff and experts in visiting teams, duration of visits;
- Criteria for selection of persons deprived of liberty for interviews, number of such interviews and their methodology;

- Measures taken to prevent reprisals against inmates which agreed to meet with visiting teams, share information and voice complaints;
- Methodology of dealing with complaints received from persons deprived of their liberty with or without visible injuries;
- Whether NPM took a position on whether treatment and or exposure to several shortcomings pertaining to material conditions and detention regime amounted to certain forms of ill-treatment;
- How does NPM deal with complaints on ill-treatment not corroborated with physical or other evidence;
- Whether NPM conducts, and if yes under which circumstances, forensic examination of inmates with physical injuries by an independent expert, possibly member of NPM team;
- What is the outcome of complaints, are certain cases followed up on, are criminal charges submitted to competent state organs;
- Please describe NPMs activities in the field of reviewing legislative acts with the aim of bringing them in line with the requirements stemming from prohibition of ill-treatment;
- How NPM visiting team is determining whether safeguards against ill-treatment envisaged in national and international documents are observed in practice (three fundamental rights upon deprivation of liberty, custodial safeguards, health care, regime, material conditions etc.);
- Whether, in addition to annual, visit reports are being made public, and in what time span after a visit is concluded;
- What is the rate of formal (based only on information communicated by the authorities) and real (based on follow up visit) compliance with recommendations issued;

Interviews with representatives of NGOs or other independent actors have been based on the following topics/questions:

- Has the designation of NPM and its head been done via transparent and inclusive process?
- Are those appointed to serve as NPM members professionally and personally acceptable for carrying out such a function?
- Is the NPM perceived as independent from the state by the NGO sector? If no, please specify how can this lack of trust be explained?
- Is the NPM considered independent, based on your experience, by the persons deprived of their liberty?
- Are there any indications that members of NPM are in a conflict of interest?
- Is the head of NPM a person disentangled from daily politics and in possession of sufficient expertise for the job?
- Does the NPM have sufficient number of staff, members, and experts to implement his mandate? If no, please specify how many staff members and which expertise is lacking.

- Do NPM members and/or staff have relevant expertise (legal, medical, psychological etc.) in order to satisfactorily implement its mandate?
- Does NPM have sufficient resources on its disposal to implement his mandate?
- Are NGOs conducting visits to places where persons are deprived of their liberty independent from NPM?
- Did designation of NPM negatively or positively affected NGOs ability to access places of detention? Please explain in what sense?
- How would you describe cooperation, if any, between the NGO sector and NPM? (Are NGOs conducting visits together with NPM, are NGOs consulted on certain issues etc.)
- Did NGOs provide information of relevance for NPM activities (places of detention where persons deprived of freedom are in an increased risk of ill-treatment) etc.? If yes, please specify did NPM made use of these information by, inter alia, paying particular attention to visiting them?
- Is the NPM a useful partner to NGOs in advocating for expanding national standards or their better observance in practice? Are there any joint initiatives, press conferences etc?
- Is the NPM conducting sufficient number of visits to places of detention?
- Does the NPM conduct satisfactory number of unannounced visits, if any? Are unannounced visits, according to your knowledge, really unannounced?
- Does the NPM conduct visits out of working hours, at night, weekends or holidays?
- Did the NPM qualify certain conditions of detention or combination of material conditions, regime, use of force, solitary confinement etc. it observed during visits as specific form of ill-treatment?
- Are you aware if any prisoner suffered reprisals due to addressing and/or cooperating with the NPM team?
- Is a qualified physician always part of NPMs visiting team? Are you aware that he conducted examinations of persons deprived of liberty with visible injuries?
- Did the NPM make an assessment whether allegations of detainees regarding ill-treatment are consistent and based on that expressed risk of ill-treatment in institutions visited?
- Are you aware of any disciplinary proceeding, investigation, court proceeding or sentencing of law enforcement official or health professional investigation based on allegations or indications of ill-treatment discovered by an NPM? If yes, please specify how many.
- Did activities of the NPM made places of detention that is material conditions, regime, practical utility of safeguards etc. more transparent?
- Did the NPM neglected certain type of institutions or persons deprived of liberty (prisons, police stations, psychiatric hospitals or social care homes)? If yes, please specify which?

- Is the methodology of NPMs work adequate in the sense that it strives to verify allegations of ill-treatment and existence and effectiveness of certain safeguards by cross checking information coming from different sources (personnel, direct observation, records and persons deprived of liberty)?
- Does the NPM continually publishes visit reports in a timely manner providing a truthful account of the situation in place of detention visited followed by pertinent recommendations? If no, please specify the main weaknesses.
- Are NPMs annual reports providing an accurate overview of situation in places of detention and relevant recommendations?
- Did the NPM publish any thematic report? If yes, please specify topic in focus and indicate usefulness and quality of such a report.
- Do you consider that standards NPM used during inspections are in line with those at the international level?
- Are the NPM reports comprehensive and provide good overview of material conditions, regime, treatment, health care, safeguards etc. in diverse places of detention (police stations, prisons, psychiatric and social care institutions)?
- Do the NPM recommendations adequately address the identified problems?
- Did NPM activities attract attention of the public through media?
- Are you aware of any improvements in safeguards against ill-treatment in places of detention and/or of material conditions of detention, regime, health care etc. that can be accredited to NPM or to which he contributed? If yes, please specify which.
- Are you aware of any proposal for change of legislation or other regulations, change of policy, introduction of new safeguards opening of public debate, addressing root causes of ill-treatment such as overcrowding initiated by an NPM? If the answer is yes, please specify the outcome of these initiatives.
- Did the NPM recommended for certain objects, rooms or facilities to be put out of use as they are not adequate for accommodating persons deprived of their liberty? If yes, please specify did authorities complied.

3.6 Four level model of measurement

For the purpose of this research, a specific structure, developed by Adcock and Collier[108] and suggested by Landman for empirical research in the field of human rights,[109] applicable to both qualitative and

[108] R. Adcock and D. Collier, 'Measurement Validity: A Shared Standard for Qualitative and Quantitative Research' (2001) 95, Am. Pol. Sci. Assoc., 529–46 at 530.
[109] T. Landman and E. Carvalho, *Measuring human rights* (Milton Park, Abingdon, Oxon, New York, N.Y: Routledge, 2010), pp. 31–4.

quantitative research, will be made use of. This structure serves to facilitate the prospective measurement by embedding it in a four-step frame. The first step consists of producing the background concept which is a broad collection of ideas and meanings associated with or providing context to a particular concept that one wants to study. The next step (systematized concept) is to concretize and define the background concept so that it, as much as possible, corresponds to the phenomena that is to be examined. In the third phase a range of indicators corresponding to and reflecting observance of rights identified in systematized concept ought to be identified. Finally, the fourth step is related to scores produced by applying the specific indicators, which can be either quantitative or qualitative. The idea behind the entire endeavor is to ensure measurement validity. This means that the selected indicators accurately measure the systematized concept. All steps in the process should be revisited in the course of research. For example, further insight could make the author redefine the background concept or add or remove something related to the systematized concept. What is being emphasized is that one should approach these concepts with flexibility and not hesitate to amend or revise them if necessary.

Having followed the four-level model, the results will be subjected to a comparative analysis in order to provide valid conclusions on what characteristics can explain the final results of effectiveness of NPMs in selected jurisdictions.

3.6.1 Background concept

In outlining the background concept, the notion of prohibition of ill-treatment under international law will be dealt with in its entirety. It will start by clarifying the unqualified nature of this right and move on to explain what amounts to torture, inhuman and/or degrading treatment or punishment. In addition, an overview of developments as to certain treatments and punishments, suspect of ill-treatment but regularly resorted to in a deprivation of liberty context, will be provided. The same will be done regarding the basic structure of state obligations stemming from human rights in general, and the right not to be subjected to ill-treatment in particular. Special emphasis will be put on the nature and extent of the obligation to prevent ill-treatment. Finally, this chapter will end with an overview of basic international mechanisms designed to ensure compliance with human rights set forth in the respective treaties.

3.6.2 Systematized concept

The systematized concept will provide an overview of human rights obligations stemming from the background concept but addressing only persons deprived of their liberty as deprivation of liberty is the context in which the OPCAT operates. Lastly, an overview of the standards on designation, set-up and running of NPMs extracted from the practice of similar bodies and suggested by relevant scholars and experts with a view of maximizing NPMs preventive potential will be provided.

3.6.3 Indicators

A set of indicators will be developed based on the systematized concept in order to determine whether NPMs were set up and equipped with powers, means and guarantees necessary for the successful implementation of their mandate, whether they managed to produce deterrent effect, make institutions where persons deprived of liberty are kept more transparent and improve, in law and practice, the legal framework conducive to reducing ill-treatment.

3.6.4 Evaluating effectiveness

Finally, the performance of each NPM selected will be evaluated. More precisely, indicators will be applied in order to determine whether benchmarks and finally the four main objectives of NPM have been met. Lastly, final results the NPMs have reached will be looked at from the perspectives provided by three main hypotheses postulating different scenarios on efficiency of NPMs stemming from different states. This will ideally help to draw some conclusions of wider relevance.

3.7 The width of the research

By virtue of Article 4 of the OPCAT NPMs are authorized to visit any place "*where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence*". This definition is fairly broad and can encompass many institutions. For the purpose of this thesis, activities of the NPM in relation to persons in prisons, under police custody, and establishments where persons with psychosocial and/or intellectual disabilities[110] are held (psychiatric hospitals and social care institutions) will be examined. This choice mirrors the institutions regularly visited by the CPT and SPT and is, considering that both bodies share the emphasis on prevention in combating ill-treatment, also relevant for NPMs. Other institutions where persons might be, in fact, held without their consent, such as care homes for elderly persons or immigration detention will be taken into consideration but will not be placed in the center of the research.

3.8 Decision concerning case selection

The OPCAT is a universal instrument open to all states. At the point of the commencement of this study, 70 countries have ratified the OPCAT out of which 51 have designated NPMs. This paper will narrow down its choice of states to those that are members of the CoE (47). The reason for doing so is mainly of practical nature. Namely, all CoE's members are state parties to the ECPT, which came into force in 1989 and thus, agreed to periodical visits of the CPT, a body established under this Convention.

[110] The term "*persons with psychosocial and/or intellectual disabilities*" was intentionally chosen to satisfy two ends: avoid stigmatizing language such as mental disease or retardation and cover a range of disabilities of intellectual, cognitive, developmental or mental origin. The term "*persons with disabilities*" will be used to cover people with disabilities in general including psychosocial, intellectual and physical.

Considering the specificity of methodology employed in this research, periodic reports furnished by the CPT are of crucial importance since they focus on the preventive approach and provide benchmarks in relation to which progress of each country can be assessed. On the other hand, narrowing down the countries to those that are members of the CoE, amounts to the utilization of most similar system design. Members of CoE share, or should share, the same values underpinning CoE membership - human rights, rule of law and democracy.[111] Conversely, one could argue that the most similar system design in its pure form could hardly be applied, since CoE member states are quite different. I maintain that this is the utilization of the most similar system design at least as regards the following: the countries in question are, at least nominally, democracies, none of them belongs to extremely underdeveloped states, they are officially committed to respect for human rights and are monitored by the CoE bodies: the ECtHR, Parliamentary assembly of the COE, the CPT, Commissioner for Human Rights and the Committee of Ministers. In addition to this, they have criminalized torture and are also, at least publicly, renouncing torture and other forms of ill-treatment. The differences between them, as broad as they might be, for the purpose of this research are considered causal and are therefore allowed to fluctuate.

3.8.1 Causal variables

- Democratic capacity
- Economic development
- Strong and independent institutions
- Observance of human rights in general
- Corruption

3.8.2 Control variables

- Members of the CoE, (ECtHR, European Parliament, CPT)
- Torture is criminalized
- The government is relatively open in that it does not reject the concept of human rights monitoring by international bodies such as CPT, SPT etc.
- It is nominally a democracy

3.8.3 Tentative list of countries to be examined.

There are currently 31 member states of the CoE that have ratified the OPCAT and designated NPMs. These countries are: Albania, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus,Czech Republic,

[111] According to article 3 of the Statute of the Council of Europe every member state "*must accept the principles of the rule of law and of the enjoinment by all persons within its jurisdiction of human rights and fundamental freedoms*". For the critic of argument that all membership in CoE necessarily leads to the good human rights record see P. A. Jordan, 'Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms', *Human Rights Quarterly* 25 (2003), 660–88.

Denmark, Estonia, France Georgia, Germany, Hungary, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine and United Kingdom. When we eliminate states that do not have a functional NPM since the beginning of 2012 at the latest (Austria, Bulgaria,Croatia, Hungary, Netherlands, Norway, Portugal and Ukraine) we have 23 states left (Albania, Armenia, Azerbaijan, Cyprus,Czech Republic, Denmark, Estonia, France Georgia, Germany, Liechtenstein, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Poland, Serbia, Slovenia, Spain, Sweden, Switzerland and United Kingdom). From these countries 5 case studies are to be preselected which vary on the outlined criteria. There are two main criteria: the selected states should differ on causal variables and strive to be representative of the members of the COE; it is also advisable that causal variables should vary considerably.

The next step is to identify countries within these preselected states that vary in respect of causal variables. To this end, several databases, which by means of social science based indicators, measure variables of interest and produce cross-country rankings, were consulted. For the state of democracy "*Democracy Index*" was consulted.[112] For corruption "*Corruption perception index*" was consulted.[113] For strength of institutions "*World Governance Indicators project – Rule of law*" was consulted.[114] For economic development World Bank data on GDP per capita was consulted.[115] For general state of human rights "*Freedom in the World reports*" were consulted.[116] For state of affairs as regards ratification of the OPCAT and designation of NPMs, the OPCAT database run by the Geneva based NGO Association for the prevention of torture (APT) was consulted.[117]

- Serbia ratified the OPCAT on September 26, 2006 while the NPM became operational in 2011. The Protector of Citizens (Serbian ombudsman) was designated to implement NPMs mandate in cooperation with the Ombudspersons of the autonomous provinces and human rights associations. On the 2013 democracy index Serbia is categorized as flawed democracy (with the score of 6,67 it ranks 57 out of 167 states). On the 2013 corruption perceptions index it ranks 72nd with a score of 42 points. GDP per capita for the year 2013 was 6353 US dollars.

[112] Democracy Index estimates state of democracy in 165 states based on five indicators: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture and divides states into the following types of regimes: full democracies, flawed democracies, hybrid regimes and autocratic regimes. See The Economist Intelligence Unit, *Index of Democracy*. http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2013_WEB-2.pdf&mode=wp&campaignid=Democracy0814 (22 December 2015).

[113] Corruption perception index measures the perceived levels of public sector corruption. See Transparency International, *Corruption Perception Index*. https://www.transparency.org/cpi2013/results (22 December 2015).

[114] World Governance Indicators project – Rule of law reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. See World Bank, *Worldwide Governance Indicators*. http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators (22 December 2015).

[115] GDP per capita is gross domestic product divided by midyear population. See World Bank, *GDP per capita.* http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2013&start=1960 (22 December 2015).

[116] Freedom in the World reports are published annually by Freedom House and assess the state of civil liberties and political rights annually around the globe on a scale from 1 to 7 where one stands for best while 7 for worse performance. See Freedom House, *Freedom in the World*. https://freedomhouse.org/sites/default/files/Freedom%20in%20the%20World%202014%20Booklet.pdf (22 December 2015)

[117] APT, *OPCAT Database*. http://www.apt.ch/en/opcat-database/ (15 July 2016).

On the rule of law index its estimate of governance (ranges from approximately -2,5 (weak) to 2,5 (strong) governance performance) for the year 2013 was -0.3. Freedom in the world report for 2013 categorized Serbia as free with the second-best score 2.

- Slovenia ratified the OPCAT on January 23, 2007 whereas NPM became operational in 2007. The Ombudsman's institution was entrusted with implementing NPMs mandate in cooperation with NGOs. On the 2013 democracy index Slovenia too falls within those states labeled as flawed democracies (ranks 30 out of 167 states with the score 7,88). On the the 2013 corruption perceptions index it ranks 43 with a score of 57 points. GDP per capita for the year 2013 was 23150 US dollars. On the rule of law index its estimate of governance (ranges from approximately -2,5 (weak) to 2,5 (strong) governance performance) for the year 2013 is 1.00. In the Freedom in the world report for 2013 Slovenia has been labeled as free with the best score 1.
- Germany ratified the OPCAT on December 4, 2008 and designated a new specialized institution: The National Agency for the Prevention of Torture, consisting of two distinct bodies on federal and state level (Federal Agency for the Prevention of Torture and Joint Commission of the Länder respectively), to implement NPM mandate. On the 2013 democracy index Germany is categorized as full democracy (ranks 15 out of 167 states with the overall score of 8,31). On the the 2013 corruption perceptions index it ranks 12 with a score of 78 points. GDP per capita for the year 2013 was 45688 US dollars. On the rule of law index its estimate of governance (ranges from approximately - 2,5 (weak) to 2,5 (strong) governance performance) for the year 2013 is 1.6. Freedom in the world report for 2013 labeled Germany as free with the best score 1
- UK ratified the OPCAT on December 10, 2003 and in 2009 designated 18 existing monitoring bodies (as 2013 two more were added, UK's NPM is, thus, made of 20 oversight bodies) to collectively execute the NPM mandate. Her Majesty's Inspectorate of Prisons coordinates their activities. On the 2013 democracy index UK is designated as full democracy (ranks 14 out of 167 states with the overall score of 8,31). On the 2013 corruption perceptions index it ranks 14 with the score of 76 points. GDP per capita for the year 2012 was 42407 US dollars. On the rule of law index its estimate of governance (ranges from approximately - 2,5 (weak) to 2,5 (strong) governance performance) for the year 2013 is 1.7. Freedom in the world report for 2013 also labeled United Kingdom as free with the best score 1
- Azerbaijan ratified the OPCAT on January 28, 2009 and during the same year designated Commissioner for Human Rights (Ombudsman) to act as an NPM. The 2013 democracy index categorized Azerbaijan as authoritarian regime (ranks 140 out of 167 states with the score of 3,06). On the 2013 corruption perceptions index it ranks 127 with a score of 28 points. GDP per capita for the year 2013 was 7811 US dollars. On the rule of law index its estimate of

governance (ranges from approximately - 2, 5 (weak) to 2,5 (strong) governance performance) for the year 2013 is -0.7. Freedom in the world report for 2013 considered Azerbaijan not free and assigned nearly the worst score 6

3.8.4 Final decision on the states selected

From these five cases, Germany, Serbia and Azerbaijan have been selected. These countries are a valid choice because they exhibit different scores on the main independent variable of interest. If we imagine a continuum where one pole reflects economically developed democracies having strong independent institutions, which, in turn, respect human rights in their day to day operation and exhibit a low level of corruption and the other echoes precisely the reverse traits, we can place Germany and Azerbaijan along the opposite poles. Serbia, then, would be positioned somewhere in the middle as a state undertaking reform processes and having clear prospects of EU accession.

3.9 Interpreting the outcomes

As this thesis discards the approach based on direct measurement of ill-treatment and rests on the assumption that properly established and functional NPMs are effective and thus reduce ill-treatment, it will look at different states to discern what can account for different levels of effectiveness determined. More precisely, in making sense of the assessment results, factors shaping the environment and circumstances in which NPMs operate need to be considered as they may augment or diminish its effectiveness. The main premise underlying this research is that a breakthrough in preventing ill-treatment cannot be attained only by introducing certain mechanisms, notwithstanding their advanced design and far–reaching potential, without taking note of the wider settings in which they are to function. It follows that the political and institutional environment determines the efficiency of a national preventive body such as NPM. States need to possess certain traits in order to provide minimum conditions enabling national preventive bodies to leave a mark. Differently put, NPMs cannot produce a desired effect in states with structural deficiencies as regards democracy, human rights and rule of law. On the other hand, the opposite premise is not necessarily correct, as the presence of these characteristics is by no means a guarantee of NPMs maximal efficiency.

Consequently, effectiveness of a particular NPM will be considered a dependent variable to be interpreted in view of the following independent causal variables: level of democracy, institutional strength and rule of law, observance of human rights, economic strength and level of corruption.

This hypothesis will be tested in three jurisdictions where NPMs operate. The first one will be a fully developed democracy with the tradition of the rule of law, strong institutions, low corruption and respect for human rights. The second one will be its opposite, an autocratic or semi autocratic state where the outlined qualities do not exist or are at best a mere window dressing. Finally, the third jurisdiction will stand somewhere between the previous two, a state not possessing the traits of the first

case (rule of law, strong institutions, respect for human rights) but nevertheless being in the process of acquiring them, or at least being perceived as such.

Finally, to state the obvious, success of NPMs in countries under observation will not be automatically equated with general state of affairs as regards ill-treatment taken in absolute terms. Different states have different starting points and different structural problems. It may well be that a NPM operating in a country where ill-treatment is prevalent achieved better results in preventing it than the one functioning in a country where instances of ill-treatment are rarely, if ever, documented even though the former, in respect of general compliance with prohibition of ill-treatment, still significantly lags behind the latter.

3.10 Potential flaw of the research design

The approach towards preventing ill-treatment based on the assumption that envisaging procedural safeguards in law and observing them in practice will result in decrease of ill-treatment was exposed to criticism.[118]

Although these criticisms should not be discarded lightly, they do injustice to efforts made by international human rights law in combating ill-treatment. As regards Morgan's critique, it needs to be remembered that the occurrences of ill-treatment are driven by a range of factors (psychological, cultural, passivity of the judiciary to end impunity of perpetrators of ill-treatment etc.) which are extremely difficult to influence. It follows that the inability to establish a clear correlation between a set of safeguards and the absence of ill-treatment can be explained by the fact that these procedural rules are meant to prevent ill-treatment and thus cannot provide any guarantee against it.

However, these limitations should not serve as an excuse to reject the entire concept of prevention, especially in absence of a more promising alternative. In addition, the CPT's findings are limited as they are based on visits of few closed institutions only in the course of several years and thus, can offer only partial verification. In other words, the fact that ill-treatment was or was not identified in

[118] Two lines of criticism were identified. The first critique, suggested by Morgan, draws on the argument that effectiveness of the CPT's approach to preventing ill-treatment by pressing for observance of certain set of safeguards remains, all things considered, unconfirmed. Moreover, insistence on detailed procedural safeguards tends to blur the main idea which is that the true goal is not to set up safeguards but to prevent ill-treatment and that it must always be kept in mind that former is but a means to achieve the latter. To corroborate his argument this author points out that in some states where a preventive framework was lacking instances of torture were not identified, whereas in others where such framework was largely in place cases of torture were encountered. He goes on to say that insisting on implementation of the same set of safeguards in all states across the board notwithstanding their particularities might be counterproductive as it fosters superficial implementation and suggest that recommendations should be tailored to specific needs of states under observation. Put differently, according to this author, there is no reason to insist on implementation of a comprehensive set of safeguards as some countries are simply in no need of them. See R. Morgan, 'The CPT Model: An Examination', in L.-A. Sicilianos and C. Bourloyannis-Vrailas (eds.), *The prevention of human rights violations: Contribution on the occasion of the twentieth anniversary of the Marangopoulos Foundation for Human Rights (MFHR)* (Athens, 2001), pp. 3–37, at pp. 33–6; The second critique is proposed by Kelly who challenged the CtAT's approach to combating ill-treatment by arguing that it favours "*liberal institutions and values*", technical requirements and institutional arrangements and thus tends to disregard violence generated within these liberal states which include phenomena such as mass incarceration or death penalty. See T. Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty', *Human Rights Quarterly* 31 (2009), 777–800, at 798–800.

institutions visited does not necessarily imply that it does or does not take place in other places of detention in the same country. Finally, there is nothing inherently problematic in the CPTs insistence that a set of safeguards[119] ought to be applied across the board, since they do not seem unreasonable or place a disproportionate burden on states. Similarly, as even states with a remarkable track record concerning respect of physical integrity and dignity of persons deprived of liberty are not immune to ill-treating, setting up these procedural safeguards can ensure that ill-treatment does not occur even as an isolated incident. In addition, the preventive approach developed by international inspecting bodies such as ICRC, CPT and others, proved reasonably successful in preventing ill-treatment. Involving national bodies that are able to further this approach by increasing frequency of visits, conducting truly unannounced visits and at the same time are authorized to make the information gathered public and collaborate with authorities and other national and international actors on the implementation of recommendations, can only enhance the effectiveness of the original design.

As to the critique espoused by Kelly, it ignores the fact that international law is to a large extent "state made" and that it cannot cross red lines they draw. There are compromises to be made between the principle of sovereignty and human rights in a sense that the absolute prohibition of certain acts, in principle, still needs to be agreed upon among states. For instance, the death penalty is outlawed by means of protocols to human rights treaties such as the ECHR and the ICCPR.[120] Excessive resort to incarceration as a result of "tough on crime" policy is also exposed to criticism.[121] As to the ill-treatment employed by liberal states during fight against terrorism, one can see a range of critical reports, and even judgements of international courts that are criticizing, condemning and pressuring these states to change certain practices, introduce novelties or moderate their approach and methods used in discovering and ultimately preventing potential terrorist threats.[122]

All things considered, the approach based on a set of safeguards, though by no means perfect, created the most sophisticated system of prevention that international human rights law could come up with, which is at the same time feasible and thus, able to be systematically implemented in practice.

Imperfect as it is, it made great strides in protecting the individual from the state. The fact that it did not succeed sufficiently or that it did not manage to more forcefully address specific forms of violence is regrettable but it can hardly be a good enough reason to justify its abolition especially in absence of any viable alternative.

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[119] For instance, three basic guarantees following an arrest, presence of a lawyer during interrogation, obligation that physician are trained to properly document injuries indicating torture, functional complaint system and effective investigation, exclusionary rule etc.

[120] Refer to chapter 6 Impact of the prohibition of ill-treatment - a dynamic process, section 6.1. Capital punishment.

[121] Refer to chapter 12 Review of state obligations stemming from obligation to prevent ill-treatment, section 12.2.8. Overcrowding - an aggravating factor.

[122] See, for example, *Concluding Observations on the United States of America* (CtAT, 25 July 2006); *Concluding observations on the United States of America* (CtAT, 19 December 2014); *Report on Lithuania* (CPT, 19 May 2011), §§ 64–74; *El-Masri v. the Former Yugoslav Republic of Macedonia* (ECtHR, 13 December 2012); *Husayn (Abu Zubaydah) v. Poland* (ECtHR, 24 July 2014); *Al Nashiri v. Poland* (ECtHR, 24 July 2014); *Mohammed Alzery v. Sweden* (HRC, 25 October 2006).

PART II

BACKGROUND CONCEPT OF THE RESEARCH

4 Chapter: Character of the prohibition of ill-treatment in international law

Absolute rights are those rights whose enjoyment cannot be balanced against important general interests or rights of others envisaged by the so-called limitation clauses or suspended in times of emergency.[123] This latter restriction is often referred to as derogation. Although there is a clear difference between the absence of a limitation clause applicable under normal circumstances (unqualified rights) and the impossibility of suspension in times of emergencies (non-derogability), in what follows absolute prohibition of ill-treatment will be referred to as encompassing both notions since together they convey the quality that the enjoyment of the right cannot be limited under any circumstances.[124] There are only a few core rights which bear this characteristic such as the prohibition of slavery or the prohibition of ill-treatment. Even the right to life is not absolute in this sense since, though non-derogable, it can be limited under strictly defined circumstances.[125]

The prohibition of slavery and forced or compulsory labour, as framed in international treaties,[126] is absolute only in respect of slavery and servitude, since the right not to be subjected to forced and compulsory labour is qualified by stipulation what is not to be considered forced or compulsory labour. Therefore, for the purposes of this prohibition, forced or compulsory labour does not include work in the course of detention, military obligation or civil service, times of emergencies and performing obligations considered part of general civil obligations. This is different from the prohibition of ill-

[123] However, the reach and practical implications of one right's absoluteness is not altogether clear. Gewirth defines absolute rights as those that can never be overridden and justifiably infringed and must, therefore, be fulfilled without exceptions. See A. Gewirth, 'Are There Any Absolute Rights?', *The Philosophical Quarterly* 31 (1981), at 2; Barak asserts that absolute rights are those whose scope is equivalent to the extent of protection afforded, see A. Barak, *Proportionality: Constitutional rights and their limitations*, Cambridge studies in constitutional law (Cambridge, U.K, New York: Cambridge University Press, 2012), p. 27; Greer prefers the term formally unqualified to absolute rights and makes a distinction between absolute negatively phrased principles and rights stemming from the them which, unlike these principles, can be limited by defining what falls within their scope, see S. C. Greer, *The European Convention on Human Rights: Achievements, problems and prospects*, Cambridge studies in European law and policy (Cambridge, UK, New York: Cambridge University Press, 2006), pp. 232–3 and S. Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gafgen Case', *Human Rights Law Review* 11 (2011), 67–89, at 68; By contrast, Alexy differentiates between principles and rules within prima facie absolute constitutional norms where the former, even if considered embodiment of greatest values such as human dignity, can be weighed against other principles, whereas the latter are the final result of such balancing and thus absolute, see R. Alexy, *A theory of constitutional rights* (Oxford: Oxford University Press, 2002), pp. 62–4.

[124] In this sense, according to Megret, freedom from torture is absolute since "*no social goal or emergency can ever limit the categorical prohibition of torture.*", see F. Megret, 'Nature of Obligations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 97–118, at p. 110. On general explanation of notions of limitation and derogation under human rights law see Ibid., pp. 110–4.

[125] Despite the fact that different international treaties frame the limitations on the right to life somewhat differently (ICCPR, IACHR and ACHPR proscribe arbitrary deprivation of liberty while ECHR intentional deprivation of liberty), they all cover cases of warranted use of force by law enforcement officials and lawfully imposed death penalty See ICCPR Article 6, ECHR Article 2, IACHR Article 4, ACHPR Article 4, see also M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 127–36.

[126] See ICCPR article 8, ECHR article 4 and ACHR article 6.

treatment where texts of core international human rights conventions envisage exceptions neither for torture nor for cruel, inhuman and degrading treatment or punishment.[127]

Finally, it is beyond dispute that the prohibition of torture and, arguably, other forms of ill-treatment acquired *jus cogens* status i.e., grew to be peremptory or imperative norms of international law. This has been recognized both by practice of international bodies such as the ICTY, IACtHR, ECtHR, HRC, CtAT, SRT[128] and legal writings.[129] One of the main consequences of this development is that the obligation not to ill-treat cannot be evaded by opting not to ratify human rights treaties or even with the emergence of a new norm of customary international law but only the norm of equal, *jus cogens*, status.[130] From a practical perspective, this means that the absolute prohibition of ill-treatment is virtually impossible to revoke, relativize or diminish as this would entail the emergence of a new international consensus that using torture and/or other ill-treatment is under specific circumstances allowed. This would, in consequence, give rise to a new peremptory norm replacing the existing one. This course of events is highly improbable to say the least. [131]

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[127] For comparison of prohibition of slavery and ill-treatment in text of international human rights treaties see M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment', *Netherlands Quarterly of Human Rights,* 23 (2005), 674–88, at 676–7.

[128] Jus cogens status of the prohibition of torture has been recognized by a number of authorities, see, for example *Prosecutor v. Furundzija* (ICTY, 10 December 1998), § 153–153; D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), p. 27; *Al-Adsani v. the United Kingdom* (ECtHR, 21 November 2001), § 61–61; *General comment No. 4: Article 3: UN Doc CCPR/C/21/Rev.1/Add.6* (1994), 8,10; *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 1–1; SRT, *Thematic Report: Distinction between torture and Cruel, Inhuman or Degrading Treatment or Punishment: UN Doc E/CN.4/2006/6* (2005), § 17–17

[129] J. Crawford, *The International Law Commission's articles on state responsibility: Introduction, text and commentaries*, 1. ed. (Cambridge: Cambridge University Press, 2002), p. 188; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 65–6; N. S. Rodley, 'Integrity of the Person', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 174–94, at pp. 176–7; M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment', *Netherlands Quarterly of Human Rights,* 23 (2005), 674–88, at 674; D. Shelton, 'International law and 'Relative Normativity'', in M. Evans (ed.), *International Law* pp. 145–73, at pp. 155–6

[130] This clearly follows from the Article 53 of the Vienna Convention on the Law of Treaties and has been confirmed by numerous authorities. See, for instance *Vienna Convention on the Law of Treaties: VCLT* (1969), § 53–53; *Prosecutor v. Furundzija* (ICTY, 10 December 1998), § 153–153; D. Shelton, 'International law and 'Relative Normativity'', in M. Evans (ed.), *International Law* pp. 145–73, at pp. 155–6; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 65–6.

[131] Arguments have been made, mostly in the political arena, suggesting that certain forms of ill-treatment should be allowed under strictly defined circumstances such as that where information obtained through torture would save lives by preventing terrorist attacks (the so called ticking bomb scenario). However, these statements have no bearing upon absolute character of the prohibition as they represent neither State practice nor Opinion juris, main components affecting emergence or disappearance of international customary law norms. See, United Nations, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: UN Doc A/67/279* (2012), § 65–65; Therefore, it is very uncommon for states to legislate or otherwise legally tamper with the absolute nature of the prohibition. Rare cases when this was the case cannot alter the outlined absolute character of the prohibition. For instance, a legal document produced by the Bush administration in the USA (which later came to be known as Bybee or Torture memorandum) interpreted level of pain and suffering required for torture unusually high thus placing acts, which according to customary international law are to be considered torture, below the requisite pain and suffering threshold. Although it did not take long for this this dubious document to be retracted, it has been put forward before the ICTY as a proof of change of international customary law as regards level of pain and suffering necessary for torture. The ICTY firmly rejected such a reasoning and remarked that change of the customary international law cannot be based on a shortly valid document issued by only one—even if world's most influential—state, see *Prosecutor v. Brdjanin* (ICTY, 03 April 2007), §§ 244–52.

4.1 Scope of the absolute prohibition of ill-treatment

However, the absolute nature of prohibition against ill-treatment should not be taken at face value and deserves more detailed consideration. To begin with, it needs to be underlined that what enjoys absolute protection is not personal and physical integrity as such; rather, it is a certain set of circumstances where an individual experienced pain of certain intensity elicited by acts of public officials, and in case of torture deliberately undertaken with a prohibited purpose in mind. Rejali refers to torture as to a "*normative judgement*" or "*inherently normative concept*" that "*cannot serve as an empirical referent in the real world*".[132] Therefore, the absolute nature of the prohibition of ill-treatment (torture or CIDT) holds true insofar as a particular set of circumstances qualifies as a particular form of ill-treatment.

It is this understanding of absolute protection that is expressed explicitly, in specific[133] or implicitly (by not envisaging that prohibition of ill-treatment can be limited or derogated) in general human rights treaties and has continually been reaffirmed by a number of authorities.[134] Although the non-derogability clause in CAT article 2 (2) refers only to torture, which could imply that other forms of ill-treatment prohibited in CAT article 16 can be suspended, general human rights conventions do not make any distinction whereas human rights bodies hold that absoluteness of prohibition of CIDT is equal to that of torture. It is therefore generally accepted that the absolute character applies both to torture and other forms of ill-treatment.[135] Moreover, no conceivable ground, no matter how plausible it might appear (nature of the offence allegedly committed by the victim, fight against crime or terrorism, protection of rights of others, obedience to an order issued by a superior authority), can be invoked to justify resort to ill-treatment.[136] The prohibition of ill-treatment buttresses the principle of

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[132] D. M. Rejali, *Torture and democracy* (Princeton, Oxford: Princeton University Press, 2007), pp. 559–60; see also reference in footnote 169 below.

[133] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: CAT* (1984), 2 (2); *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), § 5–5.

[134] *Lori Berenson-Mejía v. Peru* (IACtHR, 25 November 2004), § 100–100; *Gäfgen v. Germany* (ECtHR, 01 June 2010), 87,107; *General Comment no. 20* (HRC, 1992), § 3–3; *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), §§ 5–6; *Report of the Special Rapporteur Theo van Boven: UN Doc A/59/324* (2004), p. 14; for the confirmation that absolute prohibition of ill-treatment is a part of customary international law see E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge, UK, New York: Cambridge University Press, 2003), pp. 87–177, at pp. 151–5; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 118; for the position that absolute nature of prohibition holds under IHL see C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 517.

[135] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), §§ 5–6; D. Kretzmer, 'Prohibition of Torture', in R. Wolfrum (ed.), *MPIL: (online ed.)* at 19,24; K. Ambos, 'May a State Torture Suspects to Save the Life of Innocents?', *Journal of International Criminal Justice* 6 (2008), 261–87, at 266–7; I. Cherneva, 'The Drafting History of Article 2 of the Convention Against Torture', *Essex Human Rights Review* 9 (2012), 1–14, at 11; On the other hand, some authors find that the absolute nature of prohibition of inhuman treatment is not clear under international law see M. Gur-Arye and F. Jessberger, 'The Protection of Human Dignity in Interrogations: May Interrogative Torture Ever be Tolerated? Reflections in Light of Recent German and Israeli Experiences', *Israel Law Review* 44 (2011), 229–62, at footnote 62; Common Article 3 of the Geneva conventions also absolutely prohibits ill-treatment, see C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 517.

[136] This provisions are relevant for criminal prosecution of those accused to have committed ill-treatment and it aims at preventing impunity of individual perpetrators. While the HRC speaks of ill-treatment in general, *General Comment no. 20:*

non-refoulement in that it extends its scope to prevent transfer of a foreigner to a country where he might face ill-treatment.[137] Even if the person in question is considered to pose a security risk for the host state, the absolute prohibition still holds and prevents balancing of important interests such as national security with the probability of exposure to or harshness of ill-treatment in the state of destination.[138]

On the other hand, this prohibition, understood as a certain level of pain or suffering reached, which, in case of torture must be accompanied by a prohibited purpose, seems not so watertight as it *prima facie* appears. Namely, pain, suffering or humiliation arising only from proper application of legitimate sanctions such as imprisonment or some other measures commonly used in custodial settings and correct use of force by law enforcement officers, are in principle considered incapable of amounting to ill-treatment.[139] The situation is additionally perplexed considering that these sanctions or measures may nevertheless amount to ill-treatment if unnecessarily or inappropriately applied.[140] Therefore, it would be more precise to state that, strictly speaking, these exceptions should be viewed not as excusing ill-treatment under strictly defined circumstances, but instead as excusing pain and suffering leading to a specific form of ill-treatment.

Although the absolute nature of the prohibition is, by and large, equally valid both for torture as well as for other forms of ill-treatment, there are substantial differences.

Article 7: UN Doc HRI/GEN/1/Rev.9 (1992), § 3–3 CAT in art 2 (3); IACPPT article 4 and CAT article 2 para. 3 prohibit defence based on superior order only regarding torture. It seems, that the failure to mention CIDT in prohibition of superior order defence set out in the created a loophole in the absolute nature of the prohibition of ill-treatment. See M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 121–2.

[137] Although texts of general human rights treaties usually do not contain non refoulment principle, position that an individual must not be transferred to a state where, in addition to torture, he might face other forms of ill-treatment has been prevalent in IHRL. For the practice of the ECtHR see *Babar Ahmad and Others v. the United Kingdom* (ECtHR, 10 April 2012), § 176–176; for the HRC see *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 9–9; In addition, the IACPPT explicitly envisages both torture and other forms of ill-treatment as a ground precluding extradition see *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), 13.4.; see also M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 573; By contrast, CAT does contain explicit prohibition but coupled with torture only. Practice of the CtAT has followed this limitation and held that article 3 prevents transfer only where one is in danger of being tortured in the country of destination, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 574–5; Some even claim that the question whether ill-treatment other than torture falls under the scope of non-refoulment is not, as of yet, finally settled despite clear positions taken by the ECtHR, the HRC and legal commentators, see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 172; As regards IHL, in absence of relevant practice, the most plausible way to approach non refoulment within prohibition of ill-treatment contained in Common Article 3 should be interpreted in line with approach of IHRL see E. C. Gillard, 'There's no place like home: states' obligations in relation to transfers of persons', *International Review of the Red Cross* 90 (2008), at 711; C. Droege, 'Transfers of detainees: legal framework, non-refoulement and contemporary challenges', *International Review of the Red Cross* 90 (2008), 669–701, at 675.

[138] This position was established by the ECtHR in Chalal and reaffirmed in Saadi, see: *Chahal v. the United Kingdom* (ECtHR, 15 November 1996), §§ 80–1 and *Saadi v. Italy* (ECtHR, 28 February 2008), § 127–127. This position was followed by the HRC and the CtAT see *Maksudov v Kyrgyzstan* (HRC, 31 July 2008), 12.4 and *Tapia Paez v. Sweden* (CtAT, 28 April 1997), 14.5. For literature confirming this see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 171.

[139] D. Long, 'Aspects of the Definition of Torture In the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda', in *The definition of torture: Proceedings of an Expert Seminar, Geneva, 10-11 November 2001* (Geneva: APT, op. 2001), pp. 51–78, at p. 72.

[140] Refer to chapter 6 Impact of the prohibition of ill treatment - a dynamic process.

4.2 Absolute nature of the prohibition of torture

When elements comprising torture[141] are met (severe pain intentionally inflicted by public official with prohibited purpose), the absoluteness of prohibition is more compelling since latitude for justification on grounds of legitimate sanctions or measures is narrower. This is so because legitimate objectives that can implicitly serve as limitations to the right to physical integrity, are mainly incompatible with prohibited purposes outlined in CAT article 1. Differently put, in case of torture infliction of severe pain is hardly ever motivated by an objective that might be considered legitimate (such as law enforcement, protection of the right to life, thus placing the impugned act beyond the scope of torture), but instead with prohibited purpose such as extraction of confession, intimidation or discrimination. The only exception is the prohibited purpose of infliction of punishment, explicitly envisaged in CAT article 1, which coincides with the power of the state to dispense justice and inflict punishment on offenders and thus protect public interest. While imprisonment as a punishment for criminal offence committed and pronounced by a court can hardly amount to severe pain and suffering,[142] this is conceivable as regards life sentence and even more so for capital punishment. The mere knowledge that one, as a punishment, must spend the rest of his life in prison or that he will be executed—the co-called death row phenomenon—could amount to psychological suffering meeting the threshold of CIDT and even torture. [143] The lawful sanction clause[144] was meant to remedy this oversight and exclude pain arising solely from the administration of lawful sanctions from the scope of torture, by making clear that torture can never be caused by application of measures considered lawful and legitimate sanctions. The model for this provision was the definition of torture in the Declaration against Torture,[145] which referred to acts not in accordance with the Standard Minimum Rules for the Treatment of Prisoners (SMR). During the drafting process, reference to the SMR came to be considered inadequate and was eventually dismissed in favour of a more general formulation which reads *"It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"*. From a broader perspective, insertion

[141] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.1. Deconstructing the definition of torture.

[142] Nowak and McArthur note that treatment consistent with the SMR such as solitary confinement and imprisonment can hardly amount to torture as defined in CAT. See M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 83.

[143] For finding that life sentence may amount to ill-treatment see footnote 421 below. As to the death row phenomena, international bodies and courts do not agree whether placing a person on death row as such amounts to ill treatment or some additional aggravating factors need to be met, see U. Deutsch, 'Soering Case', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 15–15.

[144] This exception has for the first time been formulated in obligatory international convention in art 1 of the CAT followed by the IACPPT shortly after but using slightly different language and latter and almost verbatim in Rome statute for torture as a crime against humanity. See respectively *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: CAT* (1984), § 1–1; *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), § 2–2; *Rome Statute of the International Criminal Court: Rome Statute-ICC* (1998), § 7–7.

[145] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration Against Torture) is a non-binding predecessor of the CAT adopted by the UN General Assembly in 1975. For developments leading to adoption of Declaration against Torture and thereafter CAT see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 35–42.

of the lawful sanction clause in the text of CAT article 1 actually took place in an effort to make CAT acceptable to a larger number of states.[146]

This compromise backfired as it opened the door to interpretation effectively removing extremely cruel punishments, such as the amputation of limbs, flogging or stoning to death, applied in accordance with national law, from the scope of torture.[147] The problem is that, although similar to exceptions envisaged by international bodies as regards ill-treatment in general, its wide formulation created ground for some states to argue that even these extremely cruel sanctions do not amount to torture, provided that they are regulated by national law. However, the prevailing position is that national law cannot be the only yardstick through which the legality of a punishment is to be assessed and that compliance with rules of international law is decisive.[148] Therefore, if a particular sanction envisaged by national law is not consistent with international standards, it cannot be considered lawful for the purpose of being exempted from the scope of torture. For example, if the lawful sanction clause is invoked to exclude sanctions such as amputation or flogging from the scope of torture, these nevertheless fall under the scope of CIDT, which, in turn, makes them illegal under international law, rendering thus the lawful sanction clause inapplicable. This situation prompted certain authors to consider the lawful sanction clause as producing no practical implications since it neither adds anything to nor does it exempt certain sanctions from the review of general international law.[149] On the other hand, given that the lawful sanctions clause, in addition to clearly preventing the qualification of lawful but controversial sanctions such as capital punishment as torture, stands in the way of a momentum being gathered for recognition that these sanctions are inhuman and degrading *per se*, it appears to be not entirely useless.

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[146] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 121–2.

[147] Some authors are of the opinion that cruel punishments under Sharia law are, by means of lawful sanctions clause, explicitly excluded from the definition of torture A. A. An –Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhumanr, or Degrading Treatment or Punishment', in M. Goodale (ed.), *Human rights: An anthropological reader* (Chichester, U.K.: Wiley-Blackwell, 2009), pp. 68–85, at pp. 77–8; Although critical towards loophole created by lawful sanctions clause Boulesbaa admits that it could be used to violate the Convention without being in breach of it A. Boulesbaa, *The U.N. Convention on Torture and the prospects for enforcement*, International studies in human rights (The Hague, Boston, Sold and distributed in North, Central, and South America by Kluwer Law International: M. Nijhoff Publishers; Cambridge, Mass., 1999), v. 51, pp. 29–30.

[148] Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B: E/CN.4/1997/7 (1997), § 8–8, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: UN Doc A/60/316* (2005), § 27–27, United Nations, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: UN Doc A/67/279* (2012), § 28–28; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 85–6; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), 445-446, 448; This position is upheld in international criminal law as well see G. Werle and F. Jessberger, *Principles of international criminal law*, Third edition p. 365.

[149] Nowak, McArthur and Buchinger, *Nowak et al. 2008*, p. 84; M. Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', in A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict*, Oxford handbook, First edition pp. 387–409, at p. 394; C. E. F. Coracini, 'The Lawful Sanction Clause in the State Reporting Procedure Before the Committee Against Torture', *Netherlands Quarterly of Human Rights,* 24 (2006), 305–18, at 317–8.

4.3 Absolute nature of the prohibition of inhuman and/or degrading treatment or punishment

Other forms of ill-treatment, that is inhuman or degrading treatment and punishment, also bear the quality of being absolute. Although, due to absence of the definition, the scope of CIDT is much more difficult to determine, one could, based on the practice of human rights bodies, plausibly assert that pain or suffering of certain intensity as well as humiliation in case of degrading treatment, are central to the notion of inhuman or degrading treatment. It follows that due to such a broad scope, this understanding of CIDT is subject to a much wider range of exceptions than torture. Firstly, certain treatments or punishments causing pain or suffering below the entry threshold are not proscribed. It is also acknowledged that suffering and or humiliation arising only from carrying out legitimate sanctions such as imprisonment, never meet this threshold as well. [150] In other words, the mere fact that one is, for example, deprived of his liberty in accordance with the law, cannot, taken alone, amount to ill-treatment.[151] In view of the fact that all forms of punishment inevitably contain an element of degradation, Nowak suggests that for a punishment to amount to ill-treatment an additional "*element of reprehensibleness*" is necessary.[152] Another side of the coin is the principle that "*offenders are sent to prison as a punishment, not to receive punishment*".[153] This maxim should be understood in the sense that imprisonment imposed by a court should not be additionally aggravated by specifying that a prisoner should undergo his sentence under extraordinarily strenuous conditions, for example under the regime of solitary confinement or performing hard physical labour.

Nowak recognizes the inconsistency between the proclaimed absolute character of prohibition of ill-treatment and resorting to the proportionality test to determine whether the use of force by law enforcement officials caused pain of gravity sufficient for inhuman treatment. He solves this problem by allowing the application of proportionality only in the law enforcement setting and only in determining the scope of ill-treatment. This comes as no surprise since it follows from the dictum of human rights bodies.[154] It also follows that, in addition to deprivation of liberty itself, some of the measures that state authorities resort to in detention (solitary confinement, bodily searches, handcuffing and other means of restraint, force feeding) cannot, in principle, amount to ill-treatment. However, under specific circumstances (if applied for a prolonged period, arbitrarily, unnecessarily etc.) these, otherwise legitimate measures, were held to amount to CIDT or even torture.

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[150] *Stanev v. Bulgaria* (ECtHR, 17 January 2012), § 204–204; D. J. Harris, Harris, O'Boyle &Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), p. 92., N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 127.; Vuolanne v. Finnland (Human Rights Committee, 07 April 1989.), paras. 9.2.

[151] *Hummatov v. Azerbaijan* (ECtHR, 29 November 2007), § 106–106.

[152] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), p. 166

[153] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), 56a, J. E. Mendez, 'The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Tratment or Punishment', *Human Rights Brief* 20 (2012), 2–6, at 2–6.

[154] Refer to section 5.3.2.1. Test for evaluating use of force in the law enforcement setting.

At any rate, it cannot be denied that these exemptions to the absolute nature of prohibition of CIDT are prompted by the need to protect certain legitimate objectives. If this is so, it should follow that these objectives are balanced against the limitation of rights of those affected in order to determine whether a particular act amounted to ill-treatment; however, this is not how this issue was approached. Quite the contrary, it was insisted on the absolute nature of prohibition of CIDT and the emphasis was put on the level of pain and suffering experienced.[155] The ECtHR consistently speaks of a certain minimum level of severity that needs to be reached in order for an act to come under the scope of the prohibition. Understanding the prohibition of CIDT primarily through the perspective of the level of pain and suffering or humiliation which tends to be perceived as increasing together with the intrusiveness and duration of certain acts or measures, might be misleading. Context matters. What confuses is that sometimes acts that may be deemed as considerably intrusive, were found not to have met the imaginary threshold while those less intrusive exceeded it. For example, the threat of torture to which a suspect was subjected at the hands of the police for not more than 5 minutes to reveal the whereabouts of the boy he kidnapped, amounted to inhuman treatment.[156] On the other hand, solitary confinement may last for years without being found to violate the prohibition.[157] Moreover, same acts, which should cause the identical level of suffering, under one set of circumstances are considered ill-treatment while under other circumstances are not.

Here one should, again, recall that what enjoys absolute protection is neither bodily integrity, nor causing certain level of pain and suffering absolutely prohibited, but a certain set of circumstances qualified as ill-treatment.[158] Harris et all speak of acknowledged exceptions to the unqualified nature of the ECHR article 3,[159] while Mavronicola argues that instead of recognizing exceptions to absolute nature of article 3, the delineation of boundaries between acts that can or cannot be considered ill-treatment by relying upon the minimal threshold of severity, more correctly reflects the ECtHR approach.[160] Grabenwater asserts that interference with the prohibition of ill-treatment under the ECHR presupposes weighing different interests in order to determine whether the threshold of severity was met.[161] Byrnes cites Rodley in asserting that the justifiability of disputable acts comes into play in the process of classifying certain conduct as a particular form of ill-treatment.[162]

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[155] Refer to section 5.4.7. Limited relevance of the minimal threshold.
[156] *Gäfgen v. Germany* (ECtHR, 01 June 2010).
[157] *Ramirez Sanchez v. France* (ECtHR, 04 July 2006).
[158] N. Mavronicola, 'Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force', Modern Law Review 76 (2013), 370–82, at 375.
[159] D. J. Harris, Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), pp. 69–70.
[160] N. Mavronicola, 'Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force', Modern Law Review 76 (2013), 370–82, at 376.
[161] C. Grabenwarter, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1. Aufl (München: Beck, 2011), pp. 39–40.
[162] A. Byrnes, 'Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person', in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and procedural aspects of international criminal law: The experience of international and national courts* (The Hague, Boston: Kluwer Law International, 2000), pp. 197–246, at pp. 219–20.

To conclude, the most common way of approaching this type of inconsistencies: subjecting prohibition of ill-treatment, as most other rights, to certain limitations and applying a proportionality and necessity test, proved to be inoperative due to its unqualified nature which has been anchored in texts of all international instruments.[163] Instead, a similar test has been applied explicitly[164] and implicitly[165]in considering whether certain acts fall within the scope of the prohibition.[166] Here, pain and suffering generated by the use of certain measures (physical force, solitary confinement, handcuffing and other means of restraints, force feeding, forced medical intervention and even deprivation of liberty) is offset by certain objectives or other rights if the level of limitations are proportionate to the aim pursued.

4.4 Conclusion

Prohibition of ill-treatment is envisaged as a restraint on state's oppressive power while its absoluteness reflects the significance accorded to physical integrity and personal dignity of the individual within the framework of international law. In a sense, it is intended to serve as counterbalance to the state's vast capacity to coerce the individual. However, the point to be made here is that inconsistencies on whether certain measures amount to ill-treatment and ultimately the reach of absolute prohibition are unavoidable since they arise from the necessity of resorting to repressive measures even in the most benevolent states. The outlined relativity of the absolute prohibition introduced by way of classifying certain acts as ill-treatment, reflects the inevitability of subjecting individuals to acts causing pain and suffering in strictly limited circumstances.

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[163] Nowak observes that framing right to personal integrity and dignity negatively and in absolute terms was perhaps a mistake. This author notes that inserting a limitation clause to the right to personal integrity sanctioning use of force in law enforcement context, similar to prohibition of slavery and forced labour, would have been more adequate. M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment', *Netherlands Quarterly of Human Rights,* 23 (2005), 674–88, at 676–7.

[164] For use of force outside situation of effective control see section 5.3.2.1. Test for evaluating use of force in the law enforcement setting.

[165] In situations, such as detention, solitary confinement, body searches, handcuffing and other means of restraint, force feeding or non-voluntary medical interventions.

[166] Nowak makes this explicit regarding use of force outside detention, see M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), pp. 566–8, for his position in the role of SRT, see Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (2010), §§ 189–94; Battjes notes that qualification of certain acts under the ECHR as inhuman and degrading or even torture involves proportionality test ,see H. BATTJES, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed', Leiden Journal of International Law 22 (2009), 583, at 614–5, McBride notes that proportionality plays a role in what seems to be absolute right such as ECHR article 3, see J. McBride, 'Proportionality and the European Convention on Human Rights', in E. Ellis (ed.), The principle of proportionality in the laws of Europe (Oxford, Portland, Or.: Hart Pub., 1999), pp. 23–35, at p. 28; Smet notes that the ECtHR uses the language identical to that of proportionality while reviewing the cases related to use of solitary confinement, force feeding as well as means of restraint and placing a defendant in a metal cage, see S. Smet, 'The absolute prohibition of torture and inhhuman or degrading treatmant in Article 3 ECHR: truly a question of scope only?', in E. Brems and J. H. Gerards (eds.), Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights pp. 273–93, at pp. 280–1. On the other hand, Palmer rejects the opinion that the ECtHR resorts to proportionality in article 3 cases, but engages in exercise of relativity by taking the particular circumstances of each case in account see S. Palmer, 'A Wrong Turning: Article 3 and Proportionality', Cambridge Law Journal 65 (2006), 438–52, at 439.

In general, prohibition of both torture and CIDT, although proclaimed absolute, are subject to certain exceptions. With regard to torture, due to high level of pain and suffering on the one hand and, on the other, specific prohibited purposes that are required to exist behind an act or punishment hardly any exceptions to its absolute nature are allowed. In contrast, albeit CIDT is also considered absolutely prohibited, this absoluteness is, due to its broad scope, much less compelling. A number of punishments or acts are carved out from CIDT since they serve a legitimate purpose. These encompass punishments such as judicially imposed imprisonment, death sentence, different types of isolation in detention, use of means of restraint, use of force in law enforcement context, body searches and forced medical interventions such as forced feeding. The key to understanding the paradoxical practice of international bodies consistently stressing the absolute nature of the prohibition on the one hand, and exempting acts causing pain and suffering of substantial gravity on the other, is to acknowledge that, unlike the prohibition itself, what falls within its scope is subject to the balancing test. Thus, the challenge to the absolute nature of the prohibition revolves not around whether exceptions to what has undisputedly been recognized as ill-treatment should be allowed, but around the question of scope, i.e. whether a certain set of circumstances can be qualified as a certain form of ill-treatment in the first place.[167]

Therefore, if one wants to be precise, what is absolutely prohibited is the unwarranted direct use of force in defiance of the will of a powerless individual capable of making rational judgments.[168] As regards the law enforcement context, the use of force is allowed provided that it is necessary, proportionate and commensurate. Causing suffering by measures other than direct use of force is strictly limited, but allowed if part of sanctions considered lawful under national and international law or certain measures in detention allowed by soft law instruments. Conditions of detention need to reach a certain level of inadequacy to be qualified as ill-treatment. Exceptionally, state actions outside the detention context may reach the level of severity and thus meet the lower threshold of ill-treatment.

[167] Because of this, instead of openly justifying torture by calling upon national security or protection of lives states rather claim that acts to which prisoners were subjected to in order to extract information did not amount to torture.
[168] Even this attempt to filter the absolute core of the prohibition is incomplete, since force feeding of individual, as thing stand, if formal conditions are met, does not amount to ill-treatment.

5 Chapter: Mapping the content of ill-treatment under international law

This chapter will review the meaning of different forms of ill-treatment in international law, that is, its sources such as conventional and customary rules, jurisprudence of international bodies and writings of scholars. It will seek to provide a holistic understanding of ill-treatment from the standpoint of IHRL, IHL, ICL but also take into consideration new developments within IHRL where a new reading of established rules—from the standpoint of disability rights movement—challenges well established views on what constitutes ill-treatment.

Similarly, it will take account of the practice of both judicial and monitoring bodies. It should also be repeated that torture and other forms of ill-treatment are legal qualifications of certain objective (conduct or punishment and status of the perpetrator) and subjective (intent and purpose behind the conduct) elements. Similarly, the absolute nature of the prohibition of torture, inhuman and degrading treatment or punishment does not imply that the use of force is also absolutely prohibited under any circumstances. Therefore, there is no torture, inhuman or degrading treatment or punishment *per se,* but only constellations of certain elements that were held to amount to one of these prohibited acts.[169] It follows, that these qualifications are not casted in stone but prone to change with time and development of society as a whole. In this case, we speak of evolutionary development of these notions.[170] In what follows, when refereeing to inhuman or degrading "treatment or punishment" the term punishment will be omitted as it is considered to fall within the broader notion of treatment which is to be understood as any activity of the state.[171]

5.1 Deconstructing the definition of torture

For the sake of clarity, a tripartite classification of the crime of torture under general international law, where torture can be a discrete crime, war crime or crime against humanity will be used in this paper. International human rights law governs torture (as discrete crime) while the other two are governed by international criminal law.[172] One should not, however, understand this classification as forming three entirely distinct notions of torture. Quite the opposite, most of the main elements of torture are common

[169] In addition to authority cited in footnote 132 above, see United Nations Voluntary Fund for Victims of Torture, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* (2009), p. 2.
[170] *Selmouni v. France* (ECtHR, 28 July 1999), § 101–101; *Cantoral-Benavides v. Peru* (IACtHR, 18 August 2000), § 99–99.
[171] N. Jayawickrama, *The judicial application of human rights law: National, regional and international jurisprudence / Nihal Jayawickrama* (Cambridge: Cambridge University Press, 2002), p. 303; S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, materials, and commentary*, Third edition p. 216.
[172] A. Cassese, *International criminal law: Cases and commentary* (Oxford, New York: Oxford University Press, 2011), p. 258; C. Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment', *Journal of International Criminal Justice* 6 (2008), 159–82, at 161; P. Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture?', *Journal of International Criminal Justice* 6 (2008), 183–93, at 186.

to all three[173] and the variances reflect the differences between international human rights law (IHRL) and international humanitarian law (IHL).[174] These two branches of international law have exerted mutual influence especially as regards torture; more precisely, IHRL has been used to define and clarify torture under ICL. In what follows, if not explicitly stated otherwise, the notion of torture under IHRL (discrete crime) will be discussed and only where necessary, specificities of the understanding of torture under ICL (torture as a war or crime against humanity) will be indicated.

When intending to give an overview of the definition of torture under international law one ought to start by examining art. 1 of the Convention Against Torture (CAT). This definition is central since it simultaneously serves as a point of convergence of different developments in international law regarding the prohibition of torture up until the adoption of CAT and a point of departure for making sense of the contemporary understanding of torture. It reads

> *"the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".*

Four distinctive features of this definition can be identified and will be further discussed:

- Level of pain or suffering,
- Intention,
- Purpose and
- Requirement that the perpetrator can only be public official.

Even if not explicitly mentioned in this definition, it is implied that the distinctive feature of torture is that it can only be committed against a person under *de facto* control of another, namely a person that is, for all intents and purposes, powerless.

It should be noted that although torture is understood as the most heinous violation of the prohibition of ill-treatment, inhuman or degrading treatment are also absolutely prohibited. This, however, invites the following question: why bother with qualifications of certain incidents as torture when they can be characterized as other forms of ill-treatment with the same effect? One possible

[173] Basically, the only difference between these IHRL and IHL understanding of torture comes down to absence of state involvement in commission of torture under the latter, see *Prosecutor v. Kunarac et al.* (ICTY, 22 February 2001), para. 482., Ibid., para. 483., Ibid., para. 497.; *Prosecutor v. Kunarac* et al. (ICTY, 12 June 2002), paras. 146–147., *Prosecutor v. Brdjanin* (ICTY, 03 April 2007), para. 246.; C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 518.

[174] One of the main difference being that IHRL is binding upon states, while IHL binds both states and private individuals. See C. Droege, 'Elective affinities? Human rights and humanitarian law', *International Review of the Red Cross* 90 (2008), 501–48, at 521.

answer is that the strength of the word torture lies in its symbolic value and, similar to the term genocide, puts a special stigma on the state designated as torturer. In addition, findings of torture would also lead to harsher sanctions and stronger measures aimed at redressing the victims.[175] On the other hand, the HRC, in line with its General Comment of article 7,[176] does not insist on designating each and every violation of article 7 as torture, inhuman or degrading but is satisfied with simply finding a violation.[177]

5.1.1 Level of pain and suffering

As to the question of differentiating between torture and other forms of ill-treatment on grounds of severity of pain and suffering, the situation is somewhat blurred. One may wonder whether notions such as pain and suffering are even susceptible of being classified in a hierarchical manner, and if yes, who is best placed to do so and by applying what methods? In any case, international courts and treaty bodies while acting upon individual cases brought before them made a final assessment of the level of pain and suffering applicants were exposed to.

CAT explicitly stipulates that severe pain and suffering, as an element of torture, need not only be physical but that mental pain and suffering as well can rise to the level requisite for torture. This is a settled question and was confirmed in practice.[178]

One of the main points of controversy in international legal discourse regarding torture is what level of pain and suffering suffices for an act to be considered torture. Rodley and Polard identified three approaches used by international human rights bodies in differentiating torture from other forms of ill-treatment based on the level of pain and suffering experienced.[179] For the sake of clarity and simplicity in what follows, a summary of their findings will be provided.

The first, so-called ´severe-plus`, approach is developed by the European Commission of Human Rights (ECmHR) in the prominent Greek case in 1969,[180] reshaped in Ireland v. UK[181] and later applied by the ECtHR in a number of cases. It stands for a vertical or ladder scheme where degrading treatment, as the least form of ill-treatment, is followed by more grave ill-treatment; inhuman treatment. The latter is always instigated by the infliction of severe mental or physical suffering. Torture, on the other hand, represents the gravest form of ill-treatment and is depicted as an aggravated form of inhuman treatment. It follows then, that the level of pain and suffering required for torture must be higher than severe, hence the term ´severe-plus` approach. It also transpires that inhuman treatment is at the same time degrading

[175] Harris, *Harris 2009*, p. 71.
[176] General Comment no. 20: Torture or cruel, inhuman or degrading treatment or punishment (1992), para. 4.
[177] C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law' (2007) 89, International Review of the Red Cross, 515–41 at 528., N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 93.
[178] C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 530; W. A. Schabas, 'The Crime of Torture and the International Criminal Tribunals', *Case Western Reserve Journal of International Law* 37 (2006), 349–64, at 362.
[179] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), pp. 98–9.
[180] *The Greek case* (ECmHR, 1968).
[181] *Ireland v. the United Kingdom* 1–246 (ECtHR, 18 January 1978).

while torture always subsumes inhuman and degrading treatment. The problem with this understanding is that it has set an unreasonably high threshold of pain and suffering for torture surpassing already severe pain and suffering required for inhuman treatment. According to the second or the ´severe-minus` approach, in order to amount to torture pain and suffering need "only" be severe while pain of considerable intensity but not crossing the severity threshold falls within the ambit of inhuman treatment. This approach, also vertical in nature, based on the CAT replaced the 'severe plus' approach in the ECtHR reasoning. Finally, authors suggest and favor the third, so-called ´purpose only`, approach, that differentiates between torture and inhuman treatment only by the presence or the absence of a specific purpose. As per this approach, pain and suffering of certain intensity, when inflicted intentionally with a prohibited purpose in mind amounts to torture and in the absence of such purpose to inhuman treatment. Therefore, so the argument goes, these two forms of ill-treatment are to be differentiated not on the grounds of intensity of pain and suffering,[182] but rather in accordance to whether a specific purpose behind the impugned acts is present. Even though the ´purpose only` approach towards the designation of torture and inhuman treatment has the largest support in the literature,[183] it appears that international human rights bodies continue to adhere to the difference in the level of severity of pain and suffering to distinguish torture from inhuman treatment. To be sure, they do mention the purpose requirement but still place the main emphasis on the level of severity. This is so because establishing a purpose element as a prerequisite for torture, is usually straightforward. For instance, pressure exerted on a criminal suspect during initial hours after his arrest clearly point out towards a prohibited purpose. As the level of pain and suffering is prone to be gradated, categorizing a certain incident as torture ultimately hinges on the estimate of the adjudicating body on whether severity of pain and suffering required for torture has been met.

In its reasoning in individual communications it seems that the CtAT distinguishes among severe pain reserved for torture and the lesser level of pain for inhuman treatment which amounts to the afore outlined `severe-minus` approach.[184] The ECtHR consistently applied the "ladder approach", while it lowered the criteria on the severity of pain and suffering required for torture.[185] Although the Inter-American Convention to Prevent and Punish Torture (IACPPT)—as opposed to the CAT—does not specify that pain and suffering inflicted need be severe to amount to torture, Inter-American human

[182] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), pp. 98–9.
[183] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 123.; M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), p. 69; Nowak supported this position in his role as SRT as well, see Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (2010), para. 32.; M. D. Evans, 'Getting to Grips with Torture' (2002) 51, ICLQ at 382.
[184] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 113.
[185] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), pp. 105–11., C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law' (2007) 89, International Review of the Red Cross, 515–41 at 528.

rights bodies interpreted this provision in line with the CtAT, thus requiring the severity of pain and suffering experienced.[186] The African Commission on Human and People`s Rights (ACmHPR) adopted the view on torture espoused in the CAT[187] and applied the severity criteria to distinguish torture from other forms of ill-treatment.[188] The International Criminal Tribunal for the former Yugoslavia (ICTY) consistently applied the approach of gradation of pain and suffering in distinguishing between torture and other forms of ill-treatment.[189] On the other hand, although the HRC in its general comment of article 7 noted that, to differentiate among various forms of ill-treatment, it takes into consideration the "*nature purpose and severity of the treatment applied*",[190] in dealing with individual communications it generally avoided to qualify violations of the ICCPR as specific forms of ill-treatment.[191] When it had nevertheless done so, although the circumstances of individual communications where torture was established as a rule reveal most brutal abuses,[192]it avoided explicitly referring to the severity of pain requirement.[193] Finally, it appears that in its recent jurisprudence, by specifying the purpose as a critical distinction between torture and other ill-treatment and referring to omitting the "*aggravation criteria*" as distinction between torture and inhuman treatment in the CAT definition of torture, the HRC moved towards the purpose only approach.

Although certain methods of pain infliction are recognized by international bodies to always meet the severity threshold necessary for torture,[194] in most cases an appraisal of a concrete situation is carried out with the purpose of establishing whether the requisite level has been reached. To that end in determining the severity of pain and suffering and whether it reached a certain level (torture, inhuman treatment or entry threshold), modern jurisprudence had indicated specific criteria such as duration and physical and mental effects of pain infliction, sex, age and the state of health of victim.[195] It should be noted that permanent or serious bodily injuries can serve as proof of the pain endured but are not a necessary precondition since serious pain and suffering can be inflicted without leaving any

[186] D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), p. 106; C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law' (2007) 89, International Review of the Red Cross, 515–41 at 528. For different opinion see N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 115.
[187] *Abdel Hadi et al. v. Republic of Sudan* (ACmHPR, 05 November 2013), para. 70.
[188] Ibid., para. 73.
[189] *Prosecutor v. Kvocka and others* (ICTY, 02 November 2001), para. 142.; *Prosecutor v. Brdjanin* (ICTY, 01 September 2004), para. 483., *Prosecutor v. Martic* (ICTY, 12 June 2007), para. 75.
[190] General Comment no. 20: Torture or cruel, inhuman or degrading treatment or punishment (1992), para. 4.
[191] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 93.
[192] M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR commentary, 2nd rev. ed (Kehl, Germany, Arlington, Va., USA: N.P. Engel, 2005), p. 162.
[193] M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), p. 73.
[194] These methods include suffocation by water (the so-called waterboarding), hanging by the hands (Palestinian hanging), beating on the soles of the feet (falaka) and rape, see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 95–7.
[195] *Vuolanne v. Finland* (HRC, 07 April 1989.), paras. 9.2., *Selmouni v. France* (ECtHR, 28 July 1999), para. 100., *Prosecutor v. Brdjanin* (ICTY, 01 September 2004), para. 484.

(waterboarding) or minor bodily injury (electricity).[196] The mere threat of physical torture may amount to mental torture provided that a requisite degree of pressure and intensity of mental suffering is met.[197]

Therefore, the practice of international human rights bodies, regardless of some developments in the HRC indicating possible reconsideration, confirms that the main criteria distinguishing torture from inhuman treatment remains to be the severity of pain and suffering. In deciding whether the severity threshold was reached, particular circumstances of each case are assessed by using criteria such as duration and effects of treatment, sex, age and state of health of the victim.

5.1.2 Intent

The infliction of pain and suffering must be intentional. Therefore, notwithstanding the severity of pain and suffering that may reach the level required for torture, if inflicted out of negligence it cannot be qualified as such.[198] For example, non-administration of insulin to a prisoner suffering from diabetes, even if led to permanent bodily impairment, if committed out of negligence, for example prison guards were not aware of detainee's medical condition, cannot constitute torture. In order to establish whether pain was inflicted with intent, international bodies were not conducting thorough analysis of the mental state of the suspected perpetrator but rather inferred it from the circumstances of the case under consideration.[199] However, intent alone is not enough, as pain needs to be inflicted with a specific purpose in mind. It follows that, to meet the subjective element of torture, an act must be carried out intentionally and with prohibited purpose in mind. It may well be that an act is done intentionally but the illicit purpose is lacking.[200] On the other hand, an act carried out with a prohibited purpose is always intentional.

5.1.3 Purpose requirement

The requirement that, for torture to exist, pain ought to be inflicted with a specific purpose in mind transmits the idea that pain is not an end in itself but is instrumental to realizing some calculated aim. This idea that public officials deliberately induce suffering for a distinct purpose most likely comes from a century long institutionalized use of judicial torture to secure criminal convictions. Despite being outlawed in international and national law, this was and still is, the classical and most often utilized purpose of torture. It follows that torture does not arise from a random action or act perpetrated in

[196] Ibid., para. 484.
[197] *Gäfgen v. Germany* (ECtHR, 01 June 2010), 91,108.
[198] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 118.
[199] O. A. Hathaway, A. Nowlan and J. Spiegel, 'The Intent to Torture Under International and Domestic Law', *Virginia Journal of International Law Association* 52 (2012), at 836.
[200] For example, infliction of pain by a medical doctor in order to save the life of a patient cannot be qualified as torture as prohibited purpose is lacking see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 34–34.

circumstances of heightened tensions but a deliberate attack on one's physical and mental integrity to attain prohibited ends. Precisely this necessity of premeditation makes torture especially repugnant.

There is a consensus that a prohibited purpose, apart from the definition of torture as a crime against humanity under ICC Rome statute, is an essential feature of crime of torture in international law.[201]

The definition of torture set forth in the CAT explicitly stipulates the following purposes: obtaining confessions or information, punishing, intimidating or coercing and any reason based on discrimination. Despite the fact that procurement of confessions is a classical purpose of torture and that other purposes are formulated in a broad way so as to encompass a wide range of situations, they do not form a closed list. Other purposes that have something in common with those explicitly enumerated may be added. Burgers and Danelius described this common ground shared among the listed purposes which other purposes should also share as "*some-even remote-connection with the interests of policies of the State and its organs*".[202] In this sense, even if other elements are present, when a perpetrator does not harbor a prohibited purpose, his acts cannot be considered torture. For example, intentional infliction of severe pain by a public official only with the purpose of satisfying his sadistic desires will not amount to torture.

Purpose is considered an indispensable component of torture under the ECHR law from the first case dealing with allegations of torture when the ECmHR noted that torture has a purpose of, for instance, "*the obtaining of information or confessions, or the infliction of punishment.*"[203] Later on, the ECtHR started referring explicitly to the CAT and the element of purpose contained therein.[204] The definition of torture under the IACPPT, in addition to stipulating certain purposes as an indispensable element of torture, adds the words "*for any other purpose*". This open-ended formulation would then imply that, contrary to the CAT, under the Inter-American system any purpose would suffice. In practice, however, purposes used by and large coincide with those listed in the CAT.[205] As far back as 1958, in the framework of the IHL, it was noted that a legal definition of torture must envisage obtaining confessions and information as a specific purpose behind the pain infliction.[206] The ICTY, after some inconsistencies on the matter whether humiliation can be considered as additional purpose, adopted a

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[201] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 117. For the analysis of possible explanations for exclusion of element of purpose from definition of torture as a crime against humanity under ICC Rome statute see Ibid., p. 117.

[202] J. H. Burgers and H. Danelius, The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, International studies in human rights (M. Nijhoff, 1988), vol. 9, pp. 118–9.

[203] *The Greek case* (ECmHR, 5 November 1969).

[204] *Gäfgen v. Germany* (ECtHR, 01 June 2010), § 90–90.

[205] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 119.

[206] Pictet in 1958 Commentary on the IV GC accentuates purpose of obtaining confessions and information as a main distinction between torture and other crimes Pictet J. (ed.), *Commentary on the Geneva Conventions of 12 August 1949. Volume IV: Geneva Convention relative to the Protection of Civilian Persons in Time of War : commentary* (Geneva: ICRC, 1958), p. 598; Nowak takes note of Pictet observation on torture and use it to reinforce its argument that purpose is central element of torture under both IHRL and IHLM. Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', in A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict*, Oxford handbook, First edition pp. 387–409, at pp. 402–3.

list of purposes explicitly contained in the CAT definition. It also held that prohibited purpose is not required to be the sole purpose of the conduct but can be a part of motivation behind it.[207] From this it follows that, due to their broad formulation (to punish, intimidate, coerce or discriminate), these purposes can almost always be read into the motivation behind the conduct.

Although the HRC generally refrained from differentiating between different forms of ill-treatment, and when it had done so it did not rely on purpose as a distinguishing criterion,[208] it seems that it recently moved towards the purpose requirement as main distinction between torture and other ill-treatment.[209]

In conclusion, practice of human rights bodies and courts corroborates the view that purpose is indispensable for the crime of torture to exist. Purposes listed in CAT article 1 are largely accepted but consensus has been forged that other purposes, resembling those explicitly listed, can be added.

5.1.4 Public official

The requirement that both torture and inhuman and/or degrading treatment need to be either directly committed or in a substantial way sanctioned by a public official, fits well within the notion of human rights guaranteed at international level and formulated primarily as a barrier against state power. Although it is not contested that a state, as potentially posing the greatest challenge to personal integrity of the individual, is a principal duty bearer of the right not to be subjected to ill-treatment, it is less clear whether non-state actors can violate this right as well. More precisely, it is contested whether private violence should be dealt with on an international level and through language, procedures and by bodies in charge for human rights protection. In the context of the ban on ill-treatment, there is a large debate regarding this issue and about whether the abuse of private persons by other individuals should be considered a human rights violation. As that this topic was addressed elsewhere in this thesis,[210] the focus of the following text will be on whether public official involvement remains an indispensable requirement for ill-treatment.

The CAT explicitly requires some kind of official sanction for a conduct to be designated as either torture or other form of ill-treatment. This sanction starts with a straightforward state of affairs where a public official itself is a direct perpetrator, encompasses that where it instigated a third person to commit torture and ends with a situation where it condoned or acquiesced to acts of non-state actors. One author labeled this as "*a sliding scale of the required official involvement*".[211] In order for less formal modes of state involvement to be covered, in addition to *public official* CAT article 1 specifies that a perpetrator

[207] P*rosecutor v. Delalic et al.* (ICTY, 16 November 1998), para. 471.; *Prosecutor v. Brdjanin* (ICTY, 01 September 2004), paras. 486–487.; C. Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment' (2008) 6, Journal of International Criminal Justice, 159–82 at 170–1.
[208] Ibid., p. 118.
[209] *Giri v. Nepal* (HRC, 24 March 2011), paras. 7.5-7.6.; S. Joseph and M. Castan, The International Covenant on Civil and Political Rights: Cases, materials, and commentary, Third edition , pp. 219–20.
[210] Refer to chapter 8 Public private dichotomy in international human rights law.
[211] S. Joseph and M. Castan, The International Covenant on Civil and Political Rights: Cases, materials, and commentary, Third edition , p. 220.

can also be any *other person acting in official capacity*. This wording was meant to cover situations where state involvement was less plain, such as privately run social institutions or homes for the elderly. Moreover, under this formulation even paramilitary formations wielding power akin to that of a state can be covered. Namely, in Elmi case, the CtAT reasoned that in a state without a central government, members of rivalry armed groups are considered persons acting in official capacity thus bringing the potential victims of these groups under protection of CAT article 3.[212] However, the same body later took the view that when armed groups are in control of certain areas of the country where central government exists, violations committed by members of these armed groups fall out of the ambit of the CAT.[213] One should however bear in mind that this jurisprudence relates to CAT article 3 where a state party should refrain from returning a person to a state where he might be in danger of being tortured. In order to answer this task, the CtAT and other human rights bodies do not examine whether a particular state is responsible for a specific act of torture, but instead assesses the likelihood of such occurrence in third states.[214]

Although, besides the CAT, public official involvement was explicitly stipulated only in the IACPPT,[215] the necessity of such involvement in order for a specific treatment to be clearly labeled as torture, inhuman or degrading treatment seems to flow from the general design of human rights treaties and practice of its bodies.[216] Namely, in the great majority of cases adjudicated by international instances to date, a connection with state officials was evident, the state was held directly responsible and a violation was qualified either as torture or as inhuman or degrading treatment. A notable exception to this rule being HRC, which explicitly endorsed the view that all acts prohibited by article 7 could be perpetrated by persons acting in their private capacity.[217]

As to the mentioned sliding scale of public official's involvement, in most of the above-referred case law, state involvement was generally undisputed as public officials were direct perpetrators of ill-

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[212] R. McCorquodale and R. La Forgia, 'Taking of the Blindfolds: Torture by non-state Actors', *Human Rights Law Review* 1 (2001), 189–218, at 196–8.

[213] The following conclusion then accurately captures the CtAT's position towards this matter: "*it seems that it is only in the absence of any de jure government control that the Committee will recognise persons holding de facto power as public officials. Where de facto control of a region is held by a faction that does not enjoy government support, acts by members of the faction will not fall within the definition of torture in Article 1 of the Convention.*", see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 14.

[214] M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), pp. 164–5.

[215] *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), § 3–3.

[216] As regards the ECtHR see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 63; D. Long, 'Aspects of the Definition of Torture In the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda', in *The definition of torture: Proceedings of an Expert Seminar, Geneva, 10-11 November 2001* (Geneva: APT, op. 2001), pp. 51–78, at p. 61; regarding the IACmHR and the IACtHR practice on public sanction see D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), p. 106; D. Long, 'Aspects of the Definition of Torture In the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda', in *The definition of torture: Proceedings of an Expert Seminar, Geneva, 10-11 November 2001* (Geneva: APT, op. 2001), pp. 51–78, at p. 57; For critique of this position see L. Burgorgue-Larsen, Úbeda de Torres, Amaya and R. Greenstein, *The Inter-American Court of Human Rights: Case-law and commentary* (Oxford, New York: Oxford University Press, 2011), 377/8; for the ACmHPR see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), pp. 129–31.

[217] General Comment no. 20: Torture or cruel, inhuman or degrading treatment or punishment (1992), para. 2.

treatment. However, concerning acts stemming from non-state actors the situation is more complicated. While there is no denying that in many cases involving violence among non-state actors international bodies found a breach of specific provisions guaranteeing prohibition of ill-treatment, any further conclusions are more difficult to come to.

In order to accommodate acts of privately induced violence within the public official narrative set out in the CAT, it was suggested that the notion of acquiescence should be used as an opening through which such violence is to be attributed to the state and thus drawn under the scope of ill-treatment. The notion of due diligence should serve as a test for such attribution. To be more specific, state failure to conduct itself with due diligence by enacting and effectively implementing laws against, say, domestic violence or child abuse, would suffice for acquiescence to misdeeds of a violent husband or a child molester and therefore incite direct state responsibility. This interpretation would then, in fact if not theory, significantly relax the public official requirement. The CtAT in its General comment No. 2 has held that direct responsibility can be attributed to the state for acts of non-state actors if a state acquiesced or consented to the act by failing to prevent harm it knew of or had reasonable grounds to believe that it will take place, investigate the impugned acts, prosecute and punish the perpetrators and redress the victims.[218] Commentators support the expansion of the protection under the CAT through a broader interpretation of the notion of acquiescence as well. Nowak and McArthur in their influential Commentary on the CAT advocate for a wide interpretation of acquiescence not just in article 1(torture) but also in article 16 (other forms of ill-treatment) so as to "*cover a wide range of actions committed by private persons if the State in some way or another permits such activities to continue.*"[219] Nowak has voiced his support for this approach in his capacity as the SRT as well.[220] In a similar vein, Ingelse noted that the wording of the CAT and especially acquiescence could be interpreted to cover a range of acts committed by private persons "*if the state in some way or other permits such activities to continue".*[221] The problem with this approach is that it was not confirmed in practice of human rights bodies. Namely, the concept of due diligence was utilized not to broaden the understanding of acquiescence and thus attribute the responsibility for wrongful act to a state as if the perpetrator was a state agent but to establish whether a distinct obligation to prevent ill-treatment was met.[222] Moreover, international bodies in these type of cases (i.e. those dealing with abuse committed by non-state actors) refrained from explicitly qualifying impugned acts as torture, inhuman or degrading treatment but were content with referring to the relevant article or simply using the general term ill-treatment.

International instances, in dealing with individual applications, were simply not willing to find states directly responsible for acts of non-state actors via extensive interpretation of acquiescence. To

[218] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 18–18.
[219] Nowak, McArthur and Buchinger, *Nowak et al. 2008*, p. 78.
[220] Strengthening the Protection of Women From Torture (2008), para. 68; Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (2010), para. 196.
[221] Ingelse, *Ingelse 2001*, p. 210.
[222] Refer to chapter 8 Public private dichotomy in international human rights law.

be precise, while international instances did, on occasion, make use of acquiescence while adjudicating individual communications, they interpreted it rather narrowly without hinting that it could, through the due diligence test, serve as a door through which direct responsibility of the state for private acts is to be engaged. In what follows, a brief overview of relevant cases in the area of interest will be provided. The CtAT in *Hajrizi Dzemajl et al. v. Yugoslavia* held that police presence during the annihilation of the Roma settlement by private persons constituted acquiescence to acts amounting to CIDT.[223] Similarly, the HRC found that the presence of Swedish law enforcement officials during the ill-treatment committed by US agents on Swedish soil made this acts, in addition to the USA, imputable to Sweden and therefore led to state responsibility.[224] More light was shed on this problem in a line of the ECtHR cases dealing with the so-called "*CIA extraordinary rendition and secret detention program*". In *El-Masri v. Macedonia* it was established that Macedonia was "*directly responsible*" for torture committed by the US agents on Macedonian territory and in presence of its officials on the ground of its acquiescence or connivance. The ECtHR reasoned that Macedonian officials *"actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring."*[225] In two further cases, based on the identical factual and legal pattern, the ECtHR went a step further and found Poland responsible for torture committed on its territory by CIA agents despite the fact that, opposite to previous cases, Polish officials were neither present during the interrogations nor even had precise knowledge on what was actually taking place inside the so-called "black sites". The ECtHR nevertheless came to the conclusion that Poland was responsible, due to its acquiescence and connivance, since—despite being aware of the general nature and purpose of the CIA activities in Poland—it failed to ensure that no one is ill-treated under its jurisdiction and moreover "*facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring*."[226]

Therefore, the practice demonstrates that acts of foreign agents as well as private individuals can be attributed to the state when state officials are either physically present but remain passive in the face of ill-treatment taking place or when, as in Polish cases, state agents are not present but there are strong indicia to assume that persons handed over to direct perpetrators are going to be ill-treated. This is a rather strong connection and it probably cannot hold for domestic violence or other vulnerable groups, where a failure to live up to diligence due leads to violation of separate State obligation.

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[223] "*Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party*" Hajrizi Dzemajl et al. v. Yugoslavia (Committee Against Torture, 21 November 2002), paras. 9.2. The CtAT applied similar reasoning in Osmani case "*the State party's authorities who witnessed the events and failed to intervene to prevent the abuse have, at the very least "consented or acquiesced" to it*" *Besim Osmani v Serbia* (CtAT, 08 May 2009), § 10–10.

[224] *Mohammed Alzery v. Sweden* (HRC, 25 October 2006), paras. 11.6.

[225] *El-Masri v. the Former Yugoslav Republic of Macedonia* (ECtHR, 13 December 2012), 206 211.

[226] *Al Nashiri v. Poland* (ECtHR, 24 July 2014), § 517–517; *Husayn (Abu Zubaydah) v. Poland* (ECtHR, 24 July 2014), § 512–512.

It has been argued that the persistence on interpreting acquiescence more broadly under the CAT lies in the explicitly stipulated requirement of state involvement both for torture and other forms of ill-treatment in articles 1 and 16.[227] However, such appeals remained futile as even the CtAT, which in its general comment advocated for a broader interpretation of acquiescence, in individual complaint procedure adhered to its more conventional understanding by requiring that a public official was physically present during private violence and did nothing to prevent or stop it.[228]As such requirements were not specified in other human rights instruments, there was no need for using acquiescence to address non-state induced violence.[229] Therefore, taking everything into account, it would be more appropriate to say that provisions proscribing ill-treatment in international instruments, were used to tackle privately induced violence rather than argue that the public official requirement was loosened or abolished for ill-treatment to encompass acts committed by private persons.

The ICTY in its early judgments, under influence of the CAT definition and human rights bodies torture jurisprudence, reasoned that the involvement of state official for the crime of torture is mandatory[230] but in subsequent cases changed its position[231] and thereafter firmly held that gist of torture as a war or crime against humanity is not in the status of the perpetrator but in "*the nature of the act committed*".[232] It further clarified that state involvement required under IHRL"*is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law*".[233] Cassese asserted that the understanding of torture under IHL departs from the public official requirement under IHRL because of the specific and extraordinary circumstances in which the former operates and where individuals find themselves in particularly precarious position due to armed conflict or systematic attacks.[234] Rodley notes that even if this departure from IHRL state official requirement is justified on the grounds that nature of the parties to non-international armed conflicts may be blurred, the presence of other elements (prohibited purpose for war crimes, systematic nature of attack and explicit mention of deprivation of liberty for torture as a crime against humanity) ensures that entirely private acts of violence are not dealt with under these

[227] S. Joseph and M. Castan, The International Covenant on Civil and Political Rights: Cases, materials, and commentary, Third edition , p. 226.
[228] In addition to the CtAT cases cited above see A. Edwards, 'The 'Feminizing' of Torture under International Human Rights Law', *Leiden Journal of International Law* 19 (2006), 349, at 374 and J. Barrett, 'The Prohibition of Torture under International Law, Part 2: The Normative Content', *The International Journal of Human Rights* 5 (2001), 1–29, at 20.
[229] Nowak explains the fact that the HRC in addition to public also deals with private ill-treatment by noting that ICCPR, opposite to CAT, does not contain definition of torture and is thus more amenable to be interpreted in light of modern day circumstances. See M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR commentary, 2nd rev. ed (Kehl, Germany, Arlington, Va., USA: N.P. Engel, 2005), p. 182.
[230] *Prosecutor v. Furundzija* (ICTY, 10 December 1998), para. 162.
[231] *Prosecutor v. Kunarac et al.* (ICTY, 22 February 2001), para. 496.
[232] *Prosecutor v. Kunarac et al.* (ICTY, 22 February 2001), para. 495.
[233] *Prosecutor v. Kvocka and others* (ICTY, 02 November 2001), paras. 138–139. See also J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, Customary international humanitarian law (Cambridge, New York: Cambridge University Press, 2005), pp. 317–8.
[234] A. Cassese, International criminal law: Cases and commentary (Oxford, New York: Oxford University Press, 2011), p. 265.

provisions.[235] Therefore, as things stand, torture as a war or crime against humanity needs not be perpetrated by a person acting in an official capacity.[236]

To recapitulate, official involvement is still considered an elementary precondition for torture as well as other forms of ill-treatment under human rights law. Provisions prohibiting ill-treatment in conjunction with general articles requiring from states to ensure human rights to everyone within their jurisdictions were used to, under specific circumstances, engage state responsibility in relation to failure to prevent private violence. Human rights bodies proved to be more restrictive in finding a state responsible on account of acts of private persons when applying the individual petition procedure than when reviewing State reports or publishing general comments on specific issues. IHL does not envisage state involvement as a precondition for torture either as war crime or crime against humanity to exist as it deals with both state and individual responsibility.

5.1.5 Position of powerlessness

For certain act to be qualified as torture, the victim ought to be for all intents and purposes "powerless", that is to say under the *de facto* control of the state official.[237] This requirement is not explicitly specified in any binding instrument and yet, squarely fits within the general concept of torture under international law. The term powerlessness, used by Nowak and McArthur,[238] can be misleading since it may imply that a person being exposed to severe pain and suffering with the purpose of eliciting information is not completely powerless given that it holds information vital for the torturers which gives him some leverage over them.[239] Therefore, the position of powerlessness as a requirement for torture should not be interpreted broadly. It suffices that a state official can inflict pain or otherwise cause suffering of the victim without hindrance as the latter is unable to resist.

The term deprivation of liberty can also cause some misunderstandings since it may imply that torture can take place only in context of lawful deprivation of liberty. Despite the fact that places of detention still provide the stage where ill treatment most commonly occurs, torture does not necessitate any officially effected deprivation of liberty, but rather a situation where one person is held under the

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[235] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), pp. 89–91.

[236] In addition to the above authorities see also P. Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture?', *Journal of International Criminal Justice* 6 (2008), 183–93, at 185–6; W. A. Schabas, 'The Crime of Torture and the International Criminal Tribunals', *Case Western Reserve Journal of International Law* 37 (2006), 349–64, at 361; J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary international humanitarian law* (Cambridge, New York: Cambridge University Press, 2005), pp. 317–8.

[237] Burgers and Danelius in their authoritative Commentary on the CAT underscored that history of both Declaration and Convention Against Torture make plain that victims of torture and other forms of ill-treatment "*must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person infliction the pain or suffering*.", see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 120–1; Ingelse concurs with this position and adds that, according to wording and background of CAT non-inclusion of this requirement in the final text of the CAT was an omission C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001), p. 211.

[238] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 75–7.

[239] This critique was voiced by Rodley and Pollard, see Rodley and Pollard, *Rodley et al. 2009*, p. 119.

thumb of another. Differently put, the perpetrator should have complete control over his victim due to, for instance, fear or physical restraint. It has been suggested that the deprivation of legal capacity may also lead to such control, exercised by the victim's legal guardian.[240] On the other hand, even if legally deprived of liberty, one needs not always be powerless. If a prisoner attacks a security guard he is not powerless in the indicated sense in spite of being legally deprived of his liberty. Therefore, use of force in these situations can never amount to torture and if proportionate and necessary, neither to other forms of ill-treatment. So, it would be most accurate to say that, for torture to occur, the victim needs to be under the effective control of the authorities or private individuals acting with their consent or acquiescence as a matter of fact. Although this requirement follows from the practice of international bodies, it was actually never explicitly articulated. However, it has been speculated that the CtAT in the Dzemajli case qualified the pogrom against inhabitants of the Roma settlement committed by private persons with acquiescence of the state authorities "only" as inhuman treatment precisely because the element of powerlessness was missing.[241] Namely, the inhabitants could and did flee from the attacked settlement to save their lives.

In sum, according to international law as it stands and the practice of international bodies, powerlessness is a necessary precondition for torture, but not for other forms of ill-treatment. It seems that an understanding of powerlessness is being extended so as to include situations outside the classical perception of this notion, such as the relation between persons with psychosocial and/or intellectual disabilities and their legal guardians.

5.2 Cruel inhuman and degrading treatment or punishment

Unlike for torture, there is no authoritative definition of other forms of ill-treatment. Moreover, no international body even tried to provide a definition, but instead illuminated some of its aspects. Drafters of the CAT, for example, considered it impossible to provide a definition of other ill-treatment precisely due to its vague nature.[242] Defining what is covered under inhuman and degrading treatment under ECHR article 3, also posed a great problem.[243] The CtAT, according to one commentator, refrained from defining other ill-treatment but adopted the "*I know it when I see it' approach*".[244]

[240] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 50–50; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 31–31.
[241] Nowak, McArthur and Buchinger, *Nowak et al. 2008*, p. 70.
[242] Burgers and Danelius, Burgers et al. 1988, vol. 9, p. 149.
[243] A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in Macdonald, Ronald St. J., F. Matscher and H. Petzold (eds.), The European system for the protection of human rights (Dordrecht, Boston: M. Nijhoff, 1993), p. 225.
[244] C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001), p. 274.

5.2.1 Width of the application

In practice, however, international bodies used CIDT as a catch-all clause through which treatments not meeting the legal requirements for torture but nevertheless considered unacceptable, were to be outlawed. This outlook sits well with the position set forth of the UN Body of Principles suggesting that CIDT "*should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental*".[245]

There is a difference in opinion regarding whether the deprivation of liberty is a necessary requirement for CIDT to occur. While Burgers and Danelius are of the view that deprivation of liberty is a precondition both for torture and other forms of ill-treatment,[246] Nowak and McArthur indicate that such conclusion can be drawn for torture only.[247] Whatever the case may be, bearing in mind that the practice of international bodies consistently found that CIDT occurred outside the custodial setting, mainly but not exclusively in excessive use of force cases, this debate became obsolete.

Therefore, concepts of cruel, inhuman and/or degrading treatment were used to cover a wide range of situations, within and outside the deprivation of liberty context, flanked by torture as the upper limit and situations not amounting to ill-treatment due to a variety of reasons (low intensity of pain and suffering, proposition that suffering stems from lawful sanctions, acts aimed at suppressing crime or interrogation techniques) at the lower end. It is well established that CIDT cannot be limited to acts causing physical injuries only, but rather encompass a range of contexts where an individual is treated inhumanely.[248] It is not surprising, then, that situations very different in intensity of pain and suffering, nature, duration and effect of violation were qualified either as inhuman or degrading treatment or both. This diversity of situations and the incoherent approach to pain and suffering considered necessary[249] can, at least to some extent, be explained by the fact that with the passage of time and advancement of human rights law the entry as well as threshold of pain and suffering between the different forms of ill-treatment is getting lower.[250] Therefore, views on whether certain acts fall within the scope of the prohibition or constitute a specific form of ill-treatment can be reconsidered or reclassified with the passage of time and change of societal attitudes.

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[245] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: UN Doc A/43/49* (1988), § 6–6.
[246] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 149–50.
[247] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 566–8.
[248] Pictet J. (ed.), *Commentary on the Geneva Conventions of 12 August 1949. Volume IV: Geneva Convention relative to the Protection of Civilian Persons in Time of War : commentary* (Geneva: ICRC, 1958), p. 598.
[249] Refer to section 5.4.7. Limited relevance of the minimal threshold.
[250] *Selmouni v. France* (ECtHR, 28 July 1999), § 101–101; *Cantoral-Benavides v. Peru* (IACtHR, 18 August 2000), § 99–99; C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 519.

5.3 Inhuman treatment or punishment

In what follows, the word cruel used in UDHR and ICCPR alongside the word inhuman will be omitted since it is well established that, for the purposes of discussing the international prohibition of ill-treatment, their meaning by and large coincides.[251] The general approach of human rights bodies is to consider the particular circumstances of every case and determine inhuman treatment against the elements that constitute torture. When some of the well-established elements comprising torture were absent, the treatment was characterized as inhuman. In this vein, Nowak and McArthur defined cruel and inhuman treatment as:

> *"the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such conduct can be both intentional or negligent, with or without a particular purpose. It does not require the specific situation of detention or direct control of the victim by the perpetrator, which is characteristic only for torture."*[252]

5.3.1 Scope of application

Therefore, the notion of inhuman treatment is used to proscribe acts causing suffering which does not meet elements necessary to be qualified as torture[253] and covers three broad fields.

Firstly, it includes the classical context of torture when deliberate pressure, mental or physical, is applied to elicit information or confession, punish, intimidate, coerce or discriminate a powerless individual but the level of pain or suffering did not reach the severity limit required for torture. Conversely, one can speak of inhuman treatment in situations where the requisite level of pain and suffering was met, the victim is powerless, but an element of intent or specific purpose is lacking. Finally, as noted above, it can occur that both purpose and severity of pain and suffering components were met but the victim was not powerless.

Secondly, inhuman and/or degrading treatment came to be used to sanction the unsatisfactory material conditions or regime, lack of adequate medical assistance or combination of these factors in places of detention. Having in mind that persons deprived of their liberty are entirely dependent on the authorities for satisfying their basic needs and subjected to security measures inherent to deprivation of liberty, ill-treatment can stem from a variety of issues such as those mentioned but also use of means of restraint, solitary confinement, body searches, forced medical interventions etc. In practice of

[251] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 558; This also holds for usage of these words under IHL see C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 520.
[252] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 558.
[253] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), p. 163.

international bodies for the protection of human rights, ill-treatment stemming from material conditions of detention and underlying regime is usually labeled as degrading and/or inhuman treatment.[254]

Thirdly, inhuman treatment came to be used by international bodies to sanction unnecessary and disproportionate or excessive use of force by state officials. This modality of inhuman treatment will hereinafter be considered in more detail.

5.3.2 Use of force

While state officials, in principle, cannot use force against persons under their effective control i.e. powerless,[255] this is permitted and, for the most part, unavoidable in the course of law enforcement in and outside custodial settings. International human rights bodies and courts sanctioned excessive or unnecessary use of force by law enforcement officials by finding violation of prohibition of ill-treatment.[256] However, use of force up until the moment of establishing direct and effective control can never amount to torture since, as already noted, for torture to exist the victim needs to be powerless. When a victim is able to resist, and does so, the question whether use of force will amount to inhuman and/or degrading treatment depends on the alignment of the State agent's acts with the notions of necessity and proportionality.[257] More precisely, in the context of international human rights law, noncompliance with these rules, depending on the circumstances, usually lead to situations that can be qualified as either a violation of the right to life or inhuman and/or degrading treatment, depending on whether use of force was lethal or not.[258]

5.3.2.1 Test for evaluating use of force in the law enforcement setting

In both right to life and ill-treatment cases, use of force is being assessed through a specific variation of the proportionality test. This test is applicable in and outside the context of formal detention where

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[254] For the sake of convenience this will be further explained in section 5.4.5.2.1. Material conditions and regime of detention

[255] This is not entirely correct as state officials can make use of a range of practices and methods which, to all intent and purposes, equals use of force under law enforcement paradigm. These include force feeding prisoners on hunger strike, taking bodily fluids from suspects for the purpose of criminal investigation and apply measures of restraint Refer to chapter 6 Impact of the prohibition of ill treatment - a dynamic process, section 6.3. Non-consensual medical intervention and 6.4. Use of means of restraint, solitary confinement and body searches; refer also to chapter 4 Character of the prohibition of ill-treatment in international law, section 4.3. Absolute nature of the prohibition of inhuman and/or degrading treatment or punishment. Also see N. Mavronicola, 'Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force', *Modern Law Review* 76 (2013), 370–82, at 373.

[256] See, for instance, the following cases: *Rehbock v. Slovenia* (ECtHR, 28 November 2000), §§ 76–8; *Loayza-Tamayo v. Peru* (IACtHR, Judgment of 17 September 1997), § 57–57; *Gamarra v. Paraguay* (HRC, 02 March 2012), § 7–7; *Keremedchiev v. Bulgaria* (CtAT, 11 November 2008), § 9–9; On the other hand the HRC in at least one occasion instead of prohibition of ill-treatment found a violation of the right to security of person guaranteed in ICCPR Article 9 (1), see A. Conte and R. Burchill, *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee*, 2nd ed (Farnham, Surrey, UK: Ashgate, 2009), pp. 116–7.

[257] *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: Basic Principles on the Use of Force* (1990), § 5–5; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), §§ 189–94; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 134–5.

[258] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 134–5. This, however, seems not to be a firm rule since the ECtHR can examine disproportionate use of force in relation to violation of right to life even when death did not occur, if the amount and type of force used and the intent of the perpetrator indicate that life of the victim was at stake, see *Makaratzis v. Greece* (ECtHR, 20 December 2004), § 51–51.

use of force is made necessary by the behavior of the affected person. It can be argued that the test is stricter in the context of formal detention due to the specific situation where a detainee is under the more stringent control of the state. Notwithstanding this, the test applied is, by and large, similar.

According to Nowak, the proportionality test in the law enforcement context consists of three prongs: use of force must be in accordance with domestic law, pursue a legitimate objective and be moderate and necessary to attain the objective pursued.[259] There is a slight confusion in the terminology since, in human rights law generally, the notion of proportionality refers to the balancing act between the importance of the objective pursued and the extent of encroachment upon a particular right but sometimes also to the requirement that force used must be commensurate to the resistance of the suspect (proportionate force).[260] This second meaning is also considered a distinct part of notion of necessity,[261] which postulates that force should be resorted to only when called for by the exigency of the situation at hand, as means of last resort and to the extent warranted by the perpetrators resistance. In order to avoid any confusion, in what follows only the first meaning will be designated as proportionality while the second, related to proportionate force, will be referred to as to commensurability. Necessity will remain necessity. Thus, in evaluating whether use of force amounted to ill-treatment, three elements are at play.

5.3.2.1.1 Proportionality

Firstly, force is used to achieve a legitimate aim and is proportionate to that aim (for example, a protester blocking a public road cannot be severely beaten in order to clear traffic congestion). It follows that a mere existence of such objective does not always suffices in the sense that even if the objective undoubtedly exists, say effecting an arrest, extreme force cannot be justified to apprehend a suspect for commission of trivial offence. Therefore, *"the law enforcement officers must strike a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected*."[262] The HRC, for example, found that beating up a prisoner because he disobeyed a direct order to leave his cell was disproportionate.[263]

5.3.2.1.2 Necessity

Secondly, use of force must be necessary and used as a means of last resort (in the above example force should not be used if a less violent alternative is available, for example, protester could be carried away

[259] M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment', *Netherlands Quarterly of Human Rights,* 23 (2005), 674–88, at 676–7.
[260] S. Smet, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in article 3 ECHR: truly a question of scope only?', in E. Brems and J. H. Gerards (eds.), *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights* pp. 273–93, at p. 275.
[261] For more detailed explanations of notions of necessity and proportionality and terminological complexities, see N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), pp. 256–7.
[262] See M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23, Netherlands Quarterly of Human Rights,, 674–88 at 677.
[263] For example, the HRC held that disproportionate use of physical force against prisoners that refused to leave the cell amounted to violation of both article 7 and 10., see *Robinson v. Jamaica* (HRC, 13 April 2000), paras. 10.3.

before resorting to force). As a general rule, it has been recognized that any unwarranted use of force by state agents is, in principle, a violation of the prohibition of ill-treatment amounting, at least, to degrading treatment. This principle was established in the context of custody[264] and subsequently broadened to cover law enforcement operations outside custodial settings.[265]

On the other hand, the above rule that any unwarranted use of force ought to be considered ill-treatment, invites the question: When is use of force warranted i.e. necessary? Commentary on the UN Code of Conduct for the Law Enforcement Officials authorizes law enforcement officials to use force only in situations of crime prevention and effecting an arrest.[266] Nowak lists, by way of example, the following objectives necessitating the use of force:

> "*effecting the lawful arrest of a person suspected of having committed an offense, preventing the escape of a person lawfully detained, defending a person from unlawful violence, self-defense, or an action lawfully taken for the purpose of dissolving a demonstration or quelling a riot or insurrection*".

The ECtHR continually reaffirmed that police may use force "*in defusing situations, maintaining order, preventing offences, catching alleged criminals and protecting themselves and other individuals*"[267] and added that in a prison setting this may be necessary to ensure security, maintain order or prevent crime.[268] Evans and Morgan, while discussing ECtHR and ECmHR jurisprudence, held that the phrase "*not been made strictly necessary by his own conduct*" was "*doubtless intended to cover cases such as forceable restraint in the face of violent behavior or to avoid self-inflicted injuries*".[269] The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[270] note that an exception to the prohibition of use of force against persons deprived of their freedom is a strict necessity related to "*the maintenance of security and order within the institution, or when personal safety is threatened*".[271]

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[264] It is well established that every use of force towards a person deprived of liberty not made necessary by behaviour of that very person diminishes human dignity and leads to the violation of the prohibition of ill-treatment, see *Assenov and Others v. Bulgaria* (ECtHR, 28 October 1998), p. 94; *Selmouni v. France* (ECtHR, 28 July 1999), § 99–99, *Barta v. Hungary* (ECtHR, 10 April 2007), § 62–62; *Loayza-Tamayo v. Peru* (IACtHR, Judgment of 17 September 1997), § 57–57; The ECtHR somewhat relativized this principle by finding that hitting a detained person over the hands with a truncheon causing slight bruising did not reach the entry level of severity required for ill-treatment, see *Stefan Iliev v. Bulgaria* (ECtHR, 10 May 2007), p. 44. However, in recent judgment the principle that any resort to force (in this case a mere slap) not made strictly necessary by the applicant violates his human dignity and therefore amounts to at least degrading treatment was reasserted, see *Bouyid v. Belgium* (ECtHR, 28 September 2015), §§ 91–113.

[265] In a non-custodial setting, the ECtHR adopted the strict necessity test, earlier formulated in cases of use of force against those deprived of liberty, by holding that every use of force not made strictly necessary by the conduct of the individual to whom the force is applied is in principle violation of article 3, see *Rachwalski and Ferenc v. Poland* (ECtHR, 28 July 2009), § 59–59; *Tahirova v. Azerbaijan* (ECtHR, 03 October 2013), § 43–43.

[266] *Code of conduct for law enforcement officials: A/RES/34/169* (1980), § 3–3.

[267] *Kuzmenko v. Russia* (ECtHR, 21 December 2010), § 41–41.

[268] *Vladimir Romanov v. Russia* (ECtHR, 24 July 2008), § 63–63.

[269] M. D. Evans and R. Morgan, Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Oxford, New York: Clarendon Press; Oxford University Press, 1998), pp. 100–1.

[270] The HRC and CAT referred to these principles on a numerous occasions in their concluding observations, see S. Joseph, Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies, OMCT handbook series (Geneva: World Organisation Against Torture (OMCT), 2006), v. 4, p. 167.

[271] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: Basic Principles on the Use of Force (1990), para. 15.

According to the UN Standard Minimum Rules, use of force against prisoners is allowed in cases of "*self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations*".[272] European Prison Rules state: "*self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order and always as a last resort.*"[273] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas as legitimate grounds to resort to force against detainees, identify the need to "*ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors*."[274] The CPT framed the exception as need for "*control* (of) *violent prisoners*" [275] Similarly, in the psychiatric hospital context it noted that"*on occasion the use of physical force against a patient may be unavoidable in order to ensure the safety of staff and patients alike*".[276]

Therefore, it seems safe to conclude that situations outside custodial settings justifying the resort to force encompass conducting a lawful arrest, interventions in context of demonstrations, defending others from violence or self-defense. Within the detention setting, physical attack on the members of the custodial staff or other prisoners, escape attempt, securing the safety of staff and other inmates, and a range of situations related to maintaining order in closed institution including refusal to follow orders, make use of force necessary.

5.3.2.1.3 Commensurability

Finally, supposing that use of force is necessary and proportionate to the legitimate objective pursued, it needs also be commensurate to the intensity of the resistance i.e. not excessive. As to what degree of force is commensurate depends on the circumstances of each case. In deliberating whether the force used was excessive, factors taken into consideration were the number and seriousness of injuries sustained, the level of resistance given, age, gender and physical constitution of the victim.[277] For example, while force causing concussion and multiple bruises inflicted in an effort of a police officer to overpower an older woman who violently entered the police station and kicked him was considered excessive,[278] that where six police officers used fists, truncheons and tear gas to restrain two practicing bodybuilders causing multiple injuries necessitating in-hospital treatment, was not.[279] Similarly, while the use of physical force, handcuffs and a telescopic baton to restrain a prisoner with record of violence was not considered excessive, using pepper spray in view of available alternatives such as helmets and

[272] Standard Minimum Rules for the Treatment of Prisoners: SMR (1955), paras. 54 (1).
[273] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 64–64.
[274] *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle XXIII (2).
[275] 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991 (1992), para. 53.
[276] 16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35 (2006), para. 37.
[277] *Ivan Vasilev v. Bulgaria* (ECtHR, 12 April 2007), § 64–64; see also *Keremedchiev v. Bulgaria* (CtAT, 11 November 2008), § 9–9.
[278] *Kuzmenko v. Russia* (ECtHR, 21 December 2010), §§ 42–3.
[279] *Berlinski v. Poland* (ECtHR, 20 June 2002), pp. 61–4.

shields was.[280] From this it follows that state agents that are to apply force need to consider age, gender and other specificities of the offender and apply force only to the extent necessary to secure that he is overpowered and effectively neutralized as a threat.

5.3.2.2 Conclusion on use of force in the law enforcement setting

Excessive or unnecessary use of force by law enforcement officials came to be sanctioned primarily through prohibition of ill-treatment or right to life. The test established to that end examines whether requirements of proportionality, necessity and commensurability have been met. More precisely, proportionality examines whether interference with personal integrity rights is proportionate to the overall objective pursued. Necessity requires that force be used only when warranted as a means of last resort while commensurability suggests that a response to force coming from the suspect should not be excessive but moderate.

5.3.2.3 Use of force in non-detention context under IHL

Under IHL, ill-treatment in principle does not arise from use of force against an enemy combatant in the non-deprivation of liberty context. This difference stems from the inherent differences between IHRL and IHL as regards rules regulating use of force. Namely, as we have seen, IHRL permits the use of force as a measure of last resort, i.e. only when it is strictly necessary, commensurate to the resistance and proportionate to the legitimate objective pursued. Conversely, under IHL notions of proportionality and necessity in the course of using deadly force against military objectives (including enemy personnel) are not, as a general rule, aimed at minimizing damage to life and limb of the targeted individual, but rather at preventing excessive civilian casualties and the destruction of their property.[281] The physical integrity of the targeted enemy combatant is, in principle, not taken into consideration although the use of weapons aimed at causing unnecessary suffering of superfluous injuries is prohibited.[282] Of course, as soon as enemy soldiers lay down their arms they benefit from protection of IHL.

This distinction between two bodies of international law was labeled as difference between law enforcement and hostilities paradigms.[283] The gist of the difference lies in the fact that whereas IHRL is conceived as a limit to state power and strives to protect liberty, life, personal integrity and other individual rights, IHL was meant to regulate armed conflict between states where the basic aim is to be

[280] In coming to this conclusion, the ECtHR accorded due weight to the position of the CPT that pepper spray should never be used indoors, see *Tali v. Estonia* (ECtHR, 13 February 2014), §§ 77–8.
[281] ICRC, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (2013), pp. 8–9; N. Lubell, 'Challenges in applying human rights law to armed conflict', *International Review of the Red Cross* 87 (2005), 737–54, at 745–6; C. Droege, 'Elective affinities? Human rights and humanitarian law', *International Review of the Red Cross* 90 (2008), 501–48, at 525–6.
[282] F. Hampson,, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts', *Revue de Droit Militaire et de Droit de la Guerre* 31 (1992), 119–42, at 128–30; K. Watkin, 'Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict', *American Journal of International Law* (98), 1–34, at 32–3.
[283] ICRC, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms* (2013), pp. 8–9.

victorious by destroying military capacities, including members of armed forces, of the opposite side. While standards of these two bodies of international law, by and large converge on the subject of treatment of prisoners, they diverge as regards the use of force on account of different contexts where they operate (peace and armed conflict). If taking a life of enemy combatants is not prohibited, neither is the level of pain and suffering equal to inhuman treatment under the law enforcement paradigm. Nevertheless, there are some indices that ill-treatment is applicable outside the deprivation of liberty context as well. Hamspon is of the opinion that in the situation of armed conflict outside the deprivation of liberty context "*Ill-treatment takes the form of injury brought about by the use of an unlawful weapon or by attacks causing disproportionate civilian injuries*".[284]

Therefore, within the body of rules governing the use of force under IHL, the notion of proportionality is principally utilized to minimize civilian casualties of war. Protection of combatants themselves is not of primary interest and at best they benefit from minimal protection only.

5.3.2.4 Conclusion on use of force under IHRL and IHL

The practice of international human rights bodies clearly demonstrates that the excessive use of force by law enforcement officials or members of the military (while conducting tasks similar to law enforcement) can lead to the violation of the prohibition of ill-treatment. In addition to the dispersal of riots or demonstrations, contexts in which the violations were considered are related to effecting an arrest, breaking the resistance of violent inmates as well as those refusing to obey lawful orders of prison officers or maintain order in places of detention. Under IHL and the so-called conduct of hostilities paradigm, use of force outside the context of detention against civilians and, arguably, combatants when weapons or methods of warfare that can cause unnecessary suffering and superfluous injuries are used, may amount to inhuman treatment.

5.4 Degrading treatment

As with inhuman, there is no binding or authoritative definition of degrading treatment. In practice of human rights bodies, degrading treatment was used to sanction both acts or omissions causing pain lesser than that usually required for torture or inhuman treatment as well as those wholly disentangled from physical pain or suffering.[285] On the one hand, it follows that, judging on the severity of pain and suffering, degrading treatment is the least serious form of ill-treatment, for it covers acts positioned at

[284] F. Hampson,, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts', *Revue de Droit Militaire et de Droit de la Guerre* 31 (1992), 119–42, at 132–3.

[285] What is more, in practice there is seldom a clear-cut division between inhuman and degrading treatment. One treatment can be at the same time both inhuman and degrading. Sometimes differentiation between inhuman and degrading treatment is based solely on presence or absence of a particularly degrading aspect of the challenged treatment or punishment. See D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), p. 92; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 129–30.

the lower end of the ill-treatment ladder of pain and suffering.[286] On the other hand, it forms a largely distinct offence, in that its gist is not in intensity of pain or suffering, but rather on humiliation to which the victim was exposed.[287]

Nowak and McArthur recognized this duality while portraying degrading treatment as:

> *"the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim. Even the infliction of pain or suffering which does not reach the threshold of severe must be considered as degrading treatment or punishment if it contains a particularly humiliating element.*"[288]

Vorhaus has commented the relation between notions of degradation and suffering by observing that degradation may not go together with great suffering and thus, could not be considered simply as a variation of inhuman treatment.

> "*Degradation is not synonymous with great suffering, though the two may often coincide. And treatment which tends to, but which may not, cause degradation and great suffering is different from treatment which almost certainly will have this effect. These points mark a clear distinction, and demonstrate that we cannot conceive degradation as merely a variant of inhuman treatment*."[289]

Under IHL, the explicit prohibition of the "*outrages upon personal dignity, in particular humiliating and degrading treatment;*" stipulated in Article 3 common to the 1949 Geneva Conventions (henceforth Common Article 3),[290] has the similar meaning and is largely comparable to degrading treatment under IHRL.[291] Terms degradation, humiliation and debasement are consistently used by international instances to describe the notion of degrading treatment and, though semantically not completely identical, share the same deeper meaning, which points to the notion of lowering.[292] In what follows, these terms will be considered synonymous[293] and thus used interchangeably.

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[286] S. Joseph, Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies, OMCT handbook series (Geneva: World OrganisationAgainst Torture (OMCT), 2006), v. 4, pp. 160–1; M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR commentary, 2nd rev. ed (Kehl, Germany, Arlington, Va., USA: N.P. Engel, 2005), p. 165; One author referred to prohibition of degrading treatment under the ECHR as "the least serious absolute right under Article 3" see Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR' (2003) 21, Netherlands Quarterly of Human Rights,, 385–421 at 387.

[287] D. J. Harris, Harris, O'Boyle &Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), p. 92.; C. Grabenwarter, European Convention for the Protection of Human Rights and Fundamental Freedoms: Rechtsstand: voraussichtlich Februar 2010, 1. Aufl (München: Beck, 2011), p. 36.

[288] Nowak, McArthur and Buchinger, Nowak et al. 2008, p. 558.

[289] J. Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31, Common Law World Review, 374–99 at 395.

[290] Article 3 common to all Geneva conventions contains the least common denominator of the law of war applicable to all armed conflicts and is considered to have acquired the status of customary the international law. See J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary international humanitarian law* (Cambridge, New York: Cambridge University Press, 2005), Introduction-l; *Prosecutor v. Kunarac et al.* (ICTY, 12 June 2002), § 68–68.

[291] M. Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', in A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict*, Oxford handbook, First edition pp. 387–409, at p. 400. Even though the ICTY held that outrages upon personal dignity are "*species* of inhuman treatment", it outlined the features reflecting degrading treatment under IHRL, see *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), §§ 54–6.

[292] E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), p. 128.

[293] C. Droege, '''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law', *International Review of the Red Cross* 89 (2007), 515–41, at 532.

5.4.1 Feeling humiliated and the state of humiliation

Opposite to torture and inhuman treatment, the element of humiliation assumes a prominent place in the violation of the right not to be exposed to degrading treatment. In this case, when violation of prohibition of ill-treatment is based solely or mostly on degradation, the main problem turns out to be how it is to be verified? Whether a feeling of humiliation is sufficient or there are some objective standards to be met? Relying solely on the subjective feeling of humiliation caused by an act of another is in many respects problematic. This feeling differs and while some, arguably more sensitive individuals, encounter it on a regular basis others do not.[294] In discussing early ECtHR jurisprudence, Duffy came to the conclusion that, finding degrading treatment is not entirely dependent on subjective standard.

> "*It thus seems that in deciding whether treatment degrades an applicant in his eyes, an entirely subjective test is not to be used. The position is probably that the views and reactions of the victim constitute an important consideration but that equally a State cannot be condemned for action which the victim finds degrading merely because of his own unreasonable attitudes or exceptionally sensitive nature.*"[295]

The bottom line is that one cannot rely on the feeling alone without opening the door to gross arbitrariness. So, it seems that, in addition to a subjective, there should be an objective element present as well: an act or omission of a third person, acting in an official capacity that gives the victim a reason or a cause for feeling humiliated.

This dichotomy has been described as a difference between "*feeling humiliated and being in a state of humiliation*".[296] Margalit termed this objective standard as having *sound reason* for feeling humiliated which is not necessarily coupled with a psychological feeling of humiliation. A person can feel humiliated by a trivial cause, which cannot be equated with a reason, let alone sound one, and vice versa, such a feeling may be absent altogether even if sound reason for it exists. For instance, there is a sound reason for one to be afraid of a runaway tiger while no such reason exists in the case of a housefly. In both cases, however, according to this author, some people do not feel (in case of tiger) or feel (housefly) fear.[297] Basically, this view also comes down to a specific situation where persons would have strong reasons to feel humiliated.

In deliberating whether certain acts constituted *outrages upon personal dignity,* the ICTY explicitly gave primacy to the objective standard that is acts that would give rise to humiliation in a reasonable person.[298] Moreover, under ICL a subjective feeling of degradation needs not to be present at all since

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[294] *Campbell and Cosans v. the United Kingdom* (ECtHR, 25 February 1982), § 30–30; This point has been recognized by the ICTY as well, see *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), § 56–56.
[295] P. J. Duffy, 'Article 3 of the European Convention on Human Rights', *International and Comparative Law Quarterly* 32 (1983), 316–46, at 319.
[296] E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), pp. 133–5Ibid., pp. 133–5.
[297] A. Margalit, The decent society (Cambridge, Mass: Harvard University Press, 1996), p. 9.
[298] *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), para. 56.

humiliation of the deceased or persons with psychosocial and/or intellectual disabilities, which may not be aware of humiliation falls within the crime of outrages upon personal dignity.[299]

The ECtHR, in spite of not spelling it out clearly as the ICTY, also adopts the objective standard in considering whether a particular treatment can be considered degrading.[300]

Along the same line, while describing the practice of the ECHR's organs as regards degrading treatment, Evans and Morgan pointed out that

> "*The purpose of the foregoing discussion has been to illustrate that what is taken to be degrading treatment depends not only on whether a particular act was in fact degrading, either in the eyes of the applicant or in the eyes of others, but often turns on whether a particular practice is deemed to be degrading, irrespective of the particular circumstances. This is very much a policy decision that lies in the hands of the Strasbourg organs.*"[301]

Similarly, Waldron notes that not the subjective feeling of being humiliated, but rather meeting an objective standard is indispensable for finding that a certain treatment constitutes degradation.[302]

On the other hand, Vorhaus perhaps goes too far in holding that the concept of degradation itself is completely detached from feelings such as suffering as it represents a "*loss of human dignity*". According to him it would be wrong to refer to degradation and humiliation as to feelings since they are not susceptible to be felt.[303] The critical test for establishing degradation, according to Vorhaus, entails asking whether dignity is reduced and, if yes, whether the extent of this reduction amounts to degradation.[304] Thus, this position also points towards an objective state of humiliation, which he calls *loss of dignity,* while feeling arising from this state is irrelevant.

Therefore, this overview indicates that putting an individual in a situation that is by a reasonable person considered humiliating carries more weight than personal emotion or a feeling arising from the state of being degraded or humiliated.[305] However, this is not to say that this personal feeling is irrelevant. Quite the opposite, the objective standard attempts to identify situations which are likely to bring about such feelings and in most cases the two coincide. It could be argued that it serves to mitigate

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[299] J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, Customary international humanitarian law (Cambridge, New York: Cambridge University Press, 2005), p. 319.

[300] Webster notes that in the ECtHR case law, state of humiliation takes precedence over the feeling of being humiliated: "*In determining whether a state of degradation has existed, the emotional experience claimed by the applicant is significant…..What is more significant, however, is the Court's own evaluation of whether the applicant has been placed in a state of degradation…It is the role of the Court to make its own assessment of whether an applicant has been subjected to degradation as a social fact, on the basis of how the Court understands degradation to be manifested*." E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), pp. 140,165-166.

[301] M. D. Evans and R. Morgan, Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Oxford, New York: Clarendon Press; Oxford University Press, 1998), p. 91.

[302] J. Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23, Canadian Journal of Law and Jurisprudence, 269–86 at 283–4.

[303] He supports this assumption by claiming that the same treatment, say an intimate body search, applied to two different persons could in one lead to humiliation and in the other one not, and yet in both cases one can speak of degrading treatment, see J. Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights', *Common Law World Review* 31 (2002), 374–99, at 380.

[304] J. Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31, Common Law World Review, 374–99 at 390.

[305] E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), p. 140.

the arbitrariness stemming from different sensitivities of people by outlying the standard of what would invoke degradation or humiliation of a reasonable person.

5.4.2 The role of cultural diversity in the objective standard

Notwithstanding that subjective emotion or feeling of being humiliated does not play a decisive role in assessing whether a certain treatment amounts to degradation, objective criteria of putting a person in a state of humiliation does not provide a universal yardstick capable of being routinely applied on every single situation. This is so because what is considered humiliating or degrading varies, to a degree, among cultures.[306] Similarly, one should be especially careful with vulnerable groups such as children, persons with psychosocial and/or intellectual disabilities etc. since an act, generally not amounting to degradation, can do so in case of members of these groups. On the one hand, it is reasonable to presume that many situations such as, for example, making a person in detention defecate in his clothes or perform subservient acts towards his captors. are considered degrading in all cultures. On the other hand, certain acts might invoke a feeling of humiliation only in (reasonable) members of specific group because they adversely affect, intentionally or not, their specific traits (religious convictions, disability etc.). For example, cutting detainee's hair may be grossly humiliating for a Sikx while not so for a Buddhist or a Catholic, forcing a Muslim prisoner to drink water during Ramadan fasting period to be able to conduct a urine narcotic test may be degrading, not providing adequate toilets to multiple disabled person etc.

ICC Elements of Crimes, in stipulating elements of the war crime of outrages upon personal dignity, stressed that in assessing humiliation, degradation and violation of dignity relevant aspects of the cultural background of the victim are to be taken into consideration.[307]

So, in order to determine whether a certain situation is objectively degrading, that is, capable of invoking a feeling of humiliation in a member of a certain group, special regard is to be held towards the specific traits of these groups such as not only the cultural or religious background, but also disability, sexual orientation, rites and customs, culture and tradition of a specific group.[308]

Despite of the inevitability of the described variations in what is considered degrading, Waldron tried to provide a constant depiction of degradation able to capture its culturally conditioned nuances by stating that it "*connotes (or includes) something like being forced to violate one's fundamental norms of chastity, modesty or piety*."[309] Likewise, Rodley and Pollard argue that the criterion for degrading

[306] In addition to references cited bellow, this has been continuously reaffirmed by a number of author. See for example J. Waldron, 'Inhuman and Degrading Treatment: The Words Themselves', *Canadian Journal of Law and Jurisprudence* 23 (2010), 269–86, at 285; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 128.

[307] *Elements of crimes* (The Hague: International Criminal Court, 2011), § 8–8.

[308] Y. Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR' (2003) 21, Netherlands Quarterly of Human Rights, 385–421 at 395; E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), pp. 165–6.

[309] J. Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23, Canadian Journal of Law and Jurisprudence, 269–86 at 285.

treatment remains constant although it is inevitable to be interpreted by taking into consideration different backgrounds of the victim.[310]

From the above follows that group specificities, tradition and social contexts in which individuals interact should be taken into account when discussing whether one was put in a state of humiliation i.e. had sound reasons to feel humiliated. One should, however, be careful with relativizing the notion of degradation from a cultural point of view since it can be used to argue that, as certain treatment is socially acceptable in a given cultural setting, it falls outside the ambit of degradation.[311]

5.4.3 Guidelines for identifying degrading treatment

International courts and monitoring bodies developed a number of principles or guidelines in order to facilitate the process of determining if a certain treatment can be considered degrading. In case of degrading treatment, as opposite to other forms of ill-treatment, the emphasis is not so much on the level of pain or suffering but on the experience of humiliation and degradation.[312] Regardless of the minimum level of suffering that needs to be reached and is usually verified by bodily injuries or mental/physical pain or suffering, degrading treatment can stem out of acts which degrade, humiliate and lower the dignity of a victim or stimulate strong feelings of fear, anguish and inferiority.[313] Degrading treatment has been described in human rights discourse as "*such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience*"[314] In establishing whether degrading treatment took place, the ECtHR seeks to determine whether consequences of the impugned treatment "*adversely affected his or her personality in a manner incompatible with Article 3*."[315] Exposing people to the public eye or taking deliberate action in order to humiliate them before others is, though taken into account, not an indispensable requirement for degrading treatment because degradation can take place in absence or even without knowledge of third persons.[316] The personal feeling of humiliation is also not necessary, for example

[310] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 128.
[311] N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 129.
[312] C. Grabenwarter, European Convention for the Protection of Human Rights and Fundamental Freedoms: Rechtsstand: voraussichtlich Februar 2010, 1. Aufl (München: Beck, 2011), p. 36.
[313] *Pretty v. The United Kingdom* (ECtHR, 29 April 2002), § 52–52; *Hummatov v. Azerbaijan* (ECtHR, 29 November 2007), § 105–105.
[314] *Gäfgen v. Germany* (ECtHR, 01 June 2010), § 89–89; *Stanev v. Bulgaria* (ECtHR, 17 January 2012), § 203–203; Almost identical language was used by the IACtHR, see *Case of Loayza-Tamayo v. Peru* (IACtHR, Judgment of 17 September 1997), para. 57.; And C. Droege, ''In truth the leitmotiv'': the prohibition of torture and other forms of ill-treatment in international humanitarian law' (2007) 89, International Review of the Red Cross, 515–41 at 531.; D. Rodríguez-Pinzón, C. Martin and C. Grossman, The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates, OMCT handbook series (Geneva, Switzerland: World Organisation Against Torture, 2006), v. 2, p. 108.
[315] *A. and Others v. the United Kingdom* (ECtHR, 19 February 2009), § 127–127; *Raninen v. Finland* (ECtHR, 16 December 1997), § 55–55.
[316] D. J. Harris, Harris, O'Boyle &Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), p. 92; N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 127; M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR commentary, 2nd rev. ed (Kehl, Germany, Arlington, Va., USA: N.P. Engel, 2005), p. 165.

ICC elements of crime envisage that the victim of humiliation and degradation can even be a dead person and that a victim needs not to be aware of humiliation. Finally, a specific purpose of the perpetrator to degrade another person is not a necessary element of degrading treatment.[317]

It follows that, although useful as indicators of existence of degradation, these notions cannot serve as firm criteria based on which the infinite variety of diverse situations could be resolved.[318]

5.4.4 Dignity

Language emphasizing human dignity permeates the entire body of human rights and humanitarian law.[319] In the period after the Second World War the notion of dignity has been inserted into preambles and substantive parts of major universal and regional human rights and humanitarian treaties as well as non-binding documents, with the notable exception of the the ECHR. Many of these references to human dignity were incorporated into articles guaranteeing freedom from ill-treatment and regulating the status of those deprived of their liberty. The UDHR contains a reference to dignity and human worth in its preamble while article 1 specifies: "*All human beings are born free and equal in dignity and rights"*. Article 10 of the ICCPR dealing with special protection of persons deprived of their liberty refers to "*inherent dignity of the human person*." The HRC held that the aim of ICCPR article 7 is to protect the dignity of the human person. The ACHR envisages in article 5 that human dignity entails respectful treatment of those deprived of their liberty. Article 5 of the ACHPR guarantees the basic right of every person to human dignity which can be infringed by various forms of exploitation and degradation, in particular slavery, slave trade, torture, inhuman or degrading treatment as well as torture as violations of the basic right to human dignity.

The concept of dignity as recognized in international human rights law is apparently grounded in the Kantian understanding of human dignity, which emphasizes that every person possesses a worth in itself, and should not be treated as means only.[320] The notion of human dignity was utilized by international human rights bodies on the one hand, to expand the protection of existing or derive new rights[321] and reject argumentation aimed at limiting rights, on the other.[322]

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[317] *Stanev v. Bulgaria* (ECtHR, 17 January 2012), § 203–203; D. J. Harris, Harris, O'Boyle &Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), p. 92; N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 127; "*Purpose may be an element of degradation, but so equally it may be absent, and the Commission's reference to contempt and a lack of respect for persons allows for both possibilities*." J. Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31, Common Law World Review, 374–99 at 389.

[318] For more detailed insight into the practice of the ECtHR as regards these points of reference see E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), pp. 39–42.

[319] *Prosecutor v. Furundzija* (ICTY, 10 December 1998), para. 183.

[320] For this point see E. Webster, 'Exploring the prohibition of degrading treatment within article 3 of the European Convention on Human Rights', PhD, The University of Edinburgh (2010), pp. 110–1.; N. Petersen, 'Human Dignity, International Protection', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 5–5.

[321] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19 (2008), 655–724, at 721–2.

[322] J.-P. Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in C. McCrudden (ed.), Understanding human dignity, Proceedings of the British Academy, First edition, vol. 192, p. 400.

In international law, human dignity has, at least, two different meanings. The first one represents a guiding principle or philosophical pillar of all human rights.[323] The second, narrower and more practical, meaning focuses on the dignity's antithesis by communicating the idea that humiliation is a violation of human dignity.[324] In this sense, it has been argued that "*non-humiliation is a commonsense surrogate for human dignity*",[325] that human dignity at present operates as "*a legal guarantee assuring the respect of every human being and protecting him or her against humiliation and degradation*"[326] or that "*degradation represents a loss of human dignity, a loss which, though often accompanied by feelings, will register more than simply levels of suffering*"[327]

The attempt of the International Committee of the Red Cross (ICRC)[328] to include a strong reference to human dignity in the preamble of the Geneva Conventions failed; nevertheless IHL draws on this second meaning of dignity, since substance of its standard formulation "*outrages upon personal dignity"* set forth in Common Article 3 almost exclusively conveys the notion of humiliation and degradation.[329] It follows that dignity guards against "outrages" such as illegal physical violence as well as humiliation, debasement, attacks on self-respect and mental well-being.[330] Furthermore, the ICTY held that the purpose of paragraph 1 of the Common Article 3, which prescribes humane[331] treatment, is to "*uphold and protect the inherent human dignity of the individual*".[332]

With regard to the prohibition of ill-treatment, this second, more modest meaning of human dignity is central and was utilized by international human rights bodies to strengthen the prohibition of ill-treatment under international law and further the protection accorded by it.

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[323] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19 (2008), 655–724, at 675; O. Schachter, 'Human Dignity as a Normative Concept', *American Journal of International Law* 77 (1983), 848–54, at 853, N. Petersen, 'Human Dignity, International Protection', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 37–37.

[324] A. Margalit, 'Human dignity between kitsch and deification', *The Hedgehog Review* 9 (2007), 7–19, at 18–9; S. Millns, 'Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom', *German Law Journal* 3 (2002), 1–31, at §10–10; N. Petersen, 'Human Dignity, International Protection', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 37–37, O. Schachter, 'Human Dignity as a Normative Concept', *American Journal of International Law* 77 (1983), 848–54, at 849.

[325] D. Luban, 'Human Rights Pragmatism and Human Dignity', in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* forthcoming, at p. 23. See also from the same author D. Luban, *Torture, power, and law* pp. 139–40.

[326] N. Petersen, 'Human Dignity, International Protection', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 37–37.

[327] J. Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31, Common Law World Review, 374–99 at 380.

[328] The ICRC is impartial, neutral and independent organization who, within the framework of the 1949 Geneva Conventions, their protocol and ICRC Statute, works to ensure humanitarian protection during armed conflict and other situations involving violence. It has the longest record in monitoring places of detention, see ICRC, *The ICRC's mandate and mission*. https://www.icrc.org/en/mandate-and-mission (22 April 2016).

[329] N. Petersen, 'Human Dignity, International Protection', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 31–31.

[330] *Prosecutor v. Furundzija* (ICTY, 10 December 1998), para. 183.

[331] The meaning of the word humane and its opposite inhumane is not identical to human and inhuman since it conveys somewhat different understanding. Treating someone humanely means with compassion, sympathy, while inhuman treatment is that which denies humanity to a person and as such indicates more severe violation of prohibition of ill-treatment. For note on this difference see J. Waldron, 'Inhuman and Degrading Treatment: The Words Themselves', *Canadian Journal of Law and Jurisprudence* 23 (2010), 269–86, at 278; According to Common Article 3, however, humane treatment outlaws a number of crimes ranging from torture, mutilation murder to degradation and even foresees procedural safeguards related to fair trial. It appears that humane treatment, as an all-embracing notion, encompasses a range of acts outlined in IHL and IHRL violating one's dignity and his personal integrity. Similar to the notion of ill-treatment, it tends to evolve through time J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary international humanitarian law* (Cambridge, New York: Cambridge University Press, 2005), pp. 306–8.

[332] *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), § 49–49.

International bodies were continuously calling upon human dignity in ill-treatment cases The ECtHR, in most of its cases where it found degrading treatment, called upon human dignity, thus suggesting that humiliation indicates violation of human dignity. As will be seen below, the notion of dignity is regularly invoked in contexts where persons deprived of their liberty are kept in inadequate conditions,[333] where acts of state officials towards detainees are especially degrading and outside of context of detention, where racial discrimination towards members of a group is of such intensity that it deprives them of their dignity and thus, amounts to degradation.[334]

The IACtHR in Castillo Paez held that placing a person in a trunk of an official police vehicle during an arrest, even if no other abuse took place, violates the dignity of a human person and thus contravenes the IACHR guarantee of humane treatment.[335] Although the ACmHPR seems not to distinguish between cruel, inhuman and degrading treatment and the violation of human dignity,[336] it held that labeling persons with psychosocial and/or intellectual disabilities as *lunatics* and *idiots* in an official statute, necessarily degrades them and thus constitutes a violation of article 5 of the ACHPR[337]

In discussing the approach of the CPT on differentiating between different forms of ill-treatment, Cassese, who served as the first president of the CPT, drew attention to a subtle difference between inhuman and degrading treatment on the one hand, and the unacceptability of certain conditions, on the other. This author further explained that even if the material conditions were not in accordance with the prescribed standards and thus *unacceptable* they could not be "*described as utterly repugnant to our sense of human dignity*".[338] From this it follows that the notion of human dignity assists in determining whether the level of inconformity of detention conditions with prescribed standards traversed the minimal threshold of suffering, hence, amounting to ill-treatment.

The importance of human dignity in the context of ill-treatment lies not in its legal, but rather in its symbolic strength; therefore, dignity was primarily used to buttress not ground finding of the violation by calling upon its symbolic power. Judge Costa disclosed that the ECtHR in cases in which it used the notion of dignity would have come to the same conclusion without referring to dignity. He added that calling upon dignity

> "*emphasizes the value of the human being, who is at the center of a system aimed at protection human persons against breaches of their fundamental rights. The Court is not merely adjudicating*

[333] It seems that the ECtHR uses the notion of dignity to demarcate minimum threshold of severity necessary for an act to fall under the ambit of article 3, see for example *A. and Others v. the United Kingdom* (ECtHR, 19 February 2009), § 128–128.
[334] U. Erdal and H. Bakirci, *Article 3 of the European Convention on Human Rights: A practitioner's handbook ; with a preface by Sir Nigel Rodley*, OMCT handbook series (Geneva: World Organization Against Torture (OMCT), 2006), v. 1, p. 133
[335] *Castillo-Páez v. Peru* (IACtHR, 03 November 1997), § 66–66.
[336] F. Viljoen and C. Odinkalu, *The prohibition of torture and ill-treatment in the African human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland: World Organisation Against Torture, 2006), v. 3, p. 37.
[337] *Purohit and Moore v. Gambia,* (ACmHPR, 2003), § 59–59.
[338] A. Cassese, Inhuman states: Imprisonment, detention and torture in Europe today (Cambridge, UK, Cambridge, MA, USA: Polity Press; Blackwell Publishers, 1996), pp. 48–9.

cases: it also has a pedagogical role, and by referring to dignity it thereby sends important signals to all respondent states."[339]

Finally, one should not understand dignity only in a vertical manner, namely as symbolizing the least serious form of ill-treatment. Violation of human dignity, understood as gross humiliation or debasement, treating a person without respect, as a mere object, is not persistently stressed in cases of torture,[340] and to some extent inhuman treatment because it is assumed that acts of inflicting severe pain to achieve prohibited ends negates the dignity of the human person. On the other hand, in cases where the purpose behind the act or physical pain caused by it is absent, the notion of human dignity, that is its negation: gross humiliation and disrespect, gains currency and human rights bodies make use of this language in order to justify their final assessment. This notion of dignity was explicitly laid out in article 2 of the Declaration Against Torture "*Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity* "[341] Similarly, the ACHPR in article 5 considers the entire prohibition of ill-treatment as forms of violation of the basic right to human dignity.

To recapitulate, the notion of human dignity has a prominent status in the field of prohibition of ill-treatment operating in and outside the context of detention. International jurisprudence kept calling attention to its direct opposite: degradation or humiliation of a person. This said, it needs to be noted that referring to human dignity by judicial bodies was utilized not to base but buttress the finding that ill-treatment took place. The CPT, as a non-judicial body, in the context of physical conditions of detention, called upon dignity to determine a borderline between the violation of ill-treatment and other irregularities that could not be characterized as such. The symbolic strength of the notion was brought into play to assert and extend the protection afforded under international human rights law. Therefore, human dignity, as applied in the context of ill-treatment, is most appropriately understood as a thread that runs through the entire prohibition and is particularly stressed in its most benign violation, degrading treatment, in order to underpin reasoning of the human rights bodies.

5.4.5 Fields of application of degrading treatment

From the practice of human rights bodies follows that the scope of degrading treatment is wide. Namely, in addition to situations arising within the custodial setting, the notion of degrading treatment may include those situations taking place outside the context of deprivation of liberty.

5.4.5.1 Degrading treatment in non-deprivation of liberty context

Outside detention, degrading treatment was usually found to occur when members of a specific group were being grossly discriminated. Immigration legislation, which denied British citizens of Asian ethnic

[339] J.-P. Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights', in C. McCrudden (ed.), Understanding human dignity, Proceedings of the British Academy, First edition , vol. 192, p. 402.; see also N. Petersen, Human Dignity, International Protection, para. 17.
[340] This may be due to the absence of reference to human dignity in the legal definition of torture contained in CAT article 1.
[341] *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: UN Doc A/10034 (1975)* (1975), § 2–2.

origin residing in Africa to relocate to the UK, was not only a blatant example of racial discrimination but also constituted degrading treatment.[342] The precarious conditions under which Greek Cypriots were forced to live in the territory under Turkish control were held to constitute degrading treatment.[343] Similarly, miserable living conditions of Romanian Roma after burning of their settlement, along with failure of the authorities to act upon their complaints for a period of ten years amounted to degrading treatment.[344] Degrading treatment on account of gross discrimination is not reserved to race or ethnicity only, but can relate to different treatment motivated by some other personal traits such as sexual orientation.[345]

Though not substantiated by case law, it was argued that degrading treatment can take place in the law enforcement context, if the force is used in a particularly humiliating manner.[346] One can speculate on other situations outside the context of detention, which could fall within the ambit of degrading treatment, such as denying family unification to migrant workers, virginity test for immigrants[347] to name a few. However, there appears to be no practice corroborating such assumptions.

To sum up, in specific circumstances gross discrimination can amount to degrading treatment. Excessive use of force can also, arguably, lead to degrading treatment as well as other measures encroaching upon the dignity of the individual.

5.4.5.2 Degrading treatment of persons deprived of their liberty

Most of the cases where degrading treatment was found took place in the custodial setting or under circumstances of direct physical control. This is because the deprivation of liberty makes people completely dependent on the authorities for the fulfillment of the entirety of their personal needs.[348] Another side of the state's power to deprive of liberty is reflected in an obligation not to expose detainees to conditions amounting to ill-treatment. This obligation is particularly evident as regards degradation since carrying out daily routines becomes impossible without at least a tacit approval of the custodial staff.[349] Failure to pay such attention, often referred to as a duty of care,[350] in literally all aspects of life, can lead to degrading treatment. In this sense, Waldron noted the extreme vulnerability of detainees and a corresponding state obligation to be particularly sensitive to their needs:

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[342] *East African Asians v United Kingdom* (ECmHR, 14 December 1973), 207–208.
[343] *Cyprus v. Turkey* (ECtHR, 10 May 2001), §§ 309–11.
[344] *Moldovan and others v. Romania No. 2* (ECtHR, 12 July 2005), §§ 110–3.
[345] *Smith and Grady v. the United Kingdom* (ECtHR, 27 September 1999), § 121–121.
[346] M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), p. 568.
[347] Y. Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in L. Henkin (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights (New York: Columbia University Press, 1981), p. 124.
[348] M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 109–10.
[349] For example, using toilet can become problematic if one does not possess sufficient amount of toilet paper, reading a book is strenuous without adequate light, writing a letter is impossible without paper and a pen, washing is impossible without soap and so one and so forth, the list is endless.
[350] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.7.1. Health care in prisons.

> "*In this regard, we should remember the context. These standards prohibiting inhuman and degrading treatment are supposed to operate in situations like detention, incarceration, and captivity: situations of more or less comprehensive vulnerability of a person; and total control by others of a person's living situation. Such provisions require those in total control of another's living situation to think about whether the conditions that are being imposed are minimally fit for a human, with characteristic human needs, vulnerabilities, life-rhythms, and so on.*"[351]

In what follows an overview of human rights bodies practice on degrading treatment within the detention setting will be provided. As the border-line between degrading and inhuman treatment is fluid, an emphasis will be put only on cases where international instances explicitly stated that a certain act constituted degrading treatment only. The overview will be divided in two clusters: degrading treatment arising from inadequate material conditions and the detention regime and other cases. The reason for this is that cases falling within the scope of degrading treatment, other than those stemming from conditions of detention, are particularly idiosyncratic and thus cannot be clustered in more general categories.

5.4.5.2.1 Material conditions and regime of detention

Binding international human rights treaties at best place a general obligation upon States to ensure humane treatment of persons deprived of their liberty. The ICCPR guarantees the right to personal integrity in articles 7 and 10. Whereas article 7 sets forth a general prohibition of ill-treatment, article 10 provides special guarantees of human treatment to persons deprived of their liberty. The HRC interpreted these two articles, so that inhuman treatment stemming from general deplorable conditions of detention is sanctioned under article 10 while some form of attack (be it physical or omission to provide medical care or deliberate placement in conditions worse than ones for general population) directed at the individual is covered under article 7.[352] Nowak held that article 10 "*primarily imposes on States parties a positive obligation to ensure human dignity*".[353] Despite the fact that the ECHR's text does not differentiate between general prohibition of ill-treatment and guarantee of human treatment of those deprived of freedom, its organs interpreted article 3 so as to include not just material conditions of detention[354]but also the regime to which persons deprived of liberty were exposed.[355] The ECtHR in early jurisprudence qualified a violation of article 3 stemming from detention conditions and

[351] J. Waldron, 'Inhuman and Degrading Treatment: The Words Themselves' (2010) 23, Canadian Journal of Law and Jurisprudence, 269–86 at 281.
[352] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 392–3; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 249–50; S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, materials, and commentary*, Third edition p. 328.
[353] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 249–50.
[354] The court held that article 3 guarantees "*the right of all prisoners to conditions of detention which are compatible with human dignity*", see *Mouisel v. France* (ECtHR, 14 November 2002), § 40–40.
[355] *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 77; Ibid., p. 78; *Stanev v. Bulgaria* (ECtHR, 17 January 2012), § 205–205.

regime as inhuman treatment but then started considering them degrading treatment.[356] ACHR, in addition to the negative wording similar to that of ECHR article 3, contains a positively formulated right to personal and mental integrity as well as the right to dignified treatment of persons deprived of their liberty.[357] The Inter-American human rights bodies held that States are responsible for detention facilities and for ensuring the well-being of persons under their absolute control.[358] The IACtHR found that substandard prison conditions amounted to cruel, inhuman and degrading treatment in violation of IACHR article 5 (2).[359] The obligation to ensure adequate living conditions and humane treatment of those deprived of liberty is not clearly envisaged in the CAT but was found to arise as a combined effect of several provisions.[360]

In the practice of international bodies unsatisfactory conditions of detention were characterized as either inhuman and/or degrading treatment or as violation of a distinct provisions of apposite human rights instruments guaranteeing humane treatment. Ill-treatment has in many cases been established on account of both inadequate material conditions and deliberate acts of state officials. However, in what follows only cases where shortcomings in material conditions and detention regime amounted to ill-treatment, will be reviewed. The objective is to depict what shortcomings related to material conditions and regime were found to constitute ill-treatment.

Due to the succinct wording of human rights treaties' provisions guaranteeing rights of those deprived of freedom, international bodies are mindful of standards elaborated in non-binding documents regulating various aspects of one's life in detention (accommodation, nutrition, hygiene etc.),[361] particularly the SMR,[362] EPR[363] and CPT standards.[364] To be precise, international bodies make use of these standards as benchmarks against which the adequacy of detention conditions is being assessed. On the other hand, these documents do not always provide easy to use yardsticks which can be simply applied to every situation and provide unequivocal answers. It should be strongly emphasized that

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[356] D. J. Harris, Harris, O'Boyle &Warbrick: Law of the European Convention on Human Rights, 2nd ed (Oxford, New York: Oxford University Press, 2009), p. 79.
[357] *American Convention on Human Rights: ACHR* (1969), § 5–5.
[358] D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), p. 109.
[359] *Raxcacó-Reyes v. Guatemala* (IACtHR, 15 September 2005), § 102–102.
[360] CAT articles 1,16 and 11, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 409.
[361] Refer to chapter 12 Review of state obligations stemming from obligation to prevent ill-treatment.
[362] General Comment No. 21 Article 10 (Humane treatment of persons deprived of their liberty) (1992), para. 5; S. Joseph and M. Castan, The International Covenant on Civil and Political Rights: Cases, materials, and commentary, Third edition , p. 317; Case of Raxcacó-Reyes v. Guatemala (Inter-American Court of Human Rights, 15 September 2005), para. 99; As regards the CtAT see M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), pp. 403, 412, 551.*Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 41; The SPT also referred to the SMR, see *Report on Mali* (SPT, 20 March 2014), § 38–38.
[363] *S v. Switzerland* (ECmHR, 12 July 1990), para. 93; *Nevmerzhitsky v. Ukraine* (ECtHR, 05 April 2005), 63, 97; *Vinter and Others v. the United Kingdom* (ECtHR, 09 July 2013), 77, 115-6.
[364] It should be noted that the CPT standards, in addition to deprivation of liberty governed by criminal law rules, addresses other situations such as detention of irregular migrants, asylum seekers, persons with psychosocial and/or intellectual disabilities. Interestingly, in addition to ECtHR, IACtHR cited CPT standards as well see *Montero-Aranguren and Others (Detention Centre of Catia) v Venezuela* (IACtHR, judgement of 05 July 2006), § 90–90.

failure to meet these standards does not necessarily result in ill-treatment.[365] On the other hand, some of these standards, such as the explicit prohibition of certain means of punishment (corporal, placing in a dark cell, shackling etc.), reflect legal obligations under general international law.[366] In case of Mukong, the HRC with reference to corresponding articles of the SMR articulated minimum conditions of detention (minimum floor space and cubic content of air, adequate sanitary facilities, clothes, bed and sufficient food), which "*must be observed regardless of a State party's level of development"*.[367] Therefore, it appears that severe disrespect at least of some standards can, taken alone, amount to ill-treatment. Besides the above-mentioned punishments, failure to provide food to persons deprived of freedom[368] and prolonged solitary confinement, overcrowding is, arguably, the most discussed standard whose disrespect can, on its own, amount to ill-treatment.[369]

However, minimum space per prisoner disrespect of which will always constitute ill-treatment has not been uniformly specified across the board. The ECtHR found that, although the desirable standard in pre-trial multi occupancy cells is 4 m² per person,[370] severe overcrowding such as that where prisoners were afforded between 0.9-1,9 square meters of floor space in itself "*raises an issue under Article 3*"[371] and added that less than 3 m² per prisoner creates a strong presumption of article 3 violation.[372] Furthermore, it held that such assumption arises if a prisoner does not have a sleeping place or cannot move about his cell freely due to furniture and other objects placed therein.[373] The IACtHR found that 0,3 m² represents *per se* cruel, inhuman and degrading treatment contrary to human dignity.[374] The SPT held that an overcrowding rate of 300% or 400% in itself represents CIDT.[375] On the other hand, practical significance of ill-treatment stemming solely from lack of space is, all things considered, limited. This is so because those kept in such conditions are, in addition to space, usually deprived of a

[365] In discussing whether failure to ensure minimal floor space per prisoner in itself amounts to violation of article 3, ECtHR held that while it "*may take into account general standards in this area developed by other international institutions, such as the CPT* (…) *these cannot constitute a decisive argument*", see *Trepashkin v. Russia* (ECtHR, 19 July 2007), § 92–92; Also see S. A. Rodriguez, 'The Impotence of Being Earnest:' Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States', *New England Journal on Criminal and Civil Confinement* 33 (2007), 61–122, at 118.

[366] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 383–4.

[367] The HRC referred to "*minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength*" *Mukong v. Cameroon* (HRC, 21 July 1994), § 9–9.

[368] *Report on Mexico* (SPT, 31 May 2010), § 112–112.

[369] Rodley and Pollard claim that overcrowding and prolonged solitary confinement can alone amount to ill-treatment, see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 425.

[370] While the ECtHR correctly noted that the CPT did not articulate minimum standards for multi-occupancy cells in its General comments, but rather indicated towards 4 m^2 per prisoner in its country reports, it does not hold that the CPT qualified 4 m^2 as a desirable standard. On the contrary, it persistently claimed that 4 m^2 for multi-occupancy cells represents a minimum. Bearing this in mind lowering this minimum for the entire square meter in order to be qualified as ill-treatment is at least questionable.

[371] *Kalashnikov v. Russia* (ECtHR, 15 July 2002), § 97–97.

[372] *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), § 148–148.

[373] *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), § 148–148.

[374] *Montero-Aranguren and Others (Detention Centre of Catia) v Venezuela* (IACtHR, judgement of 05 July 2006), § 91–91.

[375] *Report on Mali* (SPT, 20 March 2014), § 49–49.

range of other standards (bed, hygiene, outdoor activities, medical care, access to air and light…etc.).[376] These standards are specified in the co-called soft-law documents, and even though some acquired more persuasive character through incorporation in the case law or general comments of human rights bodies,[377] all things considered, lack binding force.

The ECtHR spelled out factors (access to outdoor exercise, adequate ventilation and accessibility of natural light, satisfactory sanitary and hygienic conditions, as well as heating and possibility to use toilet in private) which, notwithstanding that the previous 3 basic preconditions (3 m² of space, bunk and unhindered movement within the cell) are satisfied, may amount to degrading treatment. It seems that withholding these cannot separately constitute ill-treatment, whereas their combination, as well as the fact that personal space is between 3 and 4 m², can.[378] SPT held that crowding rate of 300% or 400% if coupled with lapse of time and poor material conditions, especially in case of pretrial detention, can even amount to torture,[379] whereas prolonged stay in a single cell measuring 6,4 m² and a shortage of access to suitable activities outside the cell, can amount to ill-treatment.[380]

In assessing whether the combination of material detention conditions and daily regime amounted to ill-treatment international bodies considered the following factors: occupancy rate/overcrowding, access to natural and/or artificial light and fresh air, period a prisoner spends outside his cell and in the open air and possibility to exercise, sanitary and hygienic conditions (including access to clean bed lining and personal hygiene items), possibility to use the toilet without being observed, adequate heating, regular and adequate rations of food and water, access to medical care, degree of sensory and social isolation (including regulation of family visits and correspondence), extended use of solitary confinement and unnecessary and/or inadequate use of means of restraint, availability of protection against inter-prisoner violence etc.[381] Although the above-mentioned factors relating to inadequacy of

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[376] Refer to chapter 12 Review of state obligations stemming from obligation to prevent ill-treatment, section 12.2.8. Overcrowding - an aggravating factor.

[377] The HRC invited state parties to indicate observance of relevant UN soft law instruments regulating status of prisoners, inter alia the SMR, in their state reports, see *General Comment No. 21: UN Doc HRI/GEN/1/Rev.9* (1992), § 5–5; This led some authors to claim that the SMR have, through references of the HRC, acquired the status of international treaty law, see Joseph und Castan, S. 317. The ECtHR extensively referred to standards contained in a range of soft law instruments such as the EPR and CPT standards, see S v. Switzerland (European Commission of Human Rights, 12 July 1990), para. 93; *Nevmerzhitsky v. Ukraine* (ECtHR, 05 April 2005), 63, 97; *Vinter and Others v. the United Kingdom* (ECtHR, 09 July 2013), 77, 115-6; *Babar Ahmad and Others v. the United Kingdom* (ECtHR, 10 April 2012), 115,212; *Harakchiev and Tolumov v. Bulgaria* (ECtHR, 08 July 2014), § 204–204.

[378] *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), §§ 148–59.

[379] *Report on Mali* (SPT, 20 March 2014), § 49–49.

[380] *Report on New Zealand* (SPT, 25 August 2014), § 82–82.

[381] C. Droege, ‘‘‘In truth the leitmotiv’’: the prohibition of torture and other forms of ill-treatment in international humanitarian law’ (2007) 89, International Review of the Red Cross, 515–41 at 537–8; N. S. Rodley and M. Pollard, The treatment of prisoners under international law, 3rd ed (Oxford, New York: Oxford University Press, 2009), p. 425.; for the CtAT see *Kirsanov v. Russian Federation* (CtAT, 14 May 2014), § 11–11 and for summary of earlier observations see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 40 and C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001), pp. 275–7; For summary of HRC’s findings of violations of article 7 and 10 on the ground of detention conditions see S. Joseph, *Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies*, OMCT handbook series (Geneva, 2006), p. 167; For summary of practice of Inter-American bodies see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 397 and D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), pp. 122–3; For material conditions of detention

detention conditions are equally valid for persons with psychosocial and/or intellectual disabilities residing either in hospitals and social care institutions or in prisons,[382] other aspects infringing upon their dignity may be of relevance. For example, lack of individualized clothing for the residents regularly emphasized by the CPT[383] contributed to the ECtHR's finding that material conditions a resident of social care institution was subjected to, amounted to degrading treatment as not returning clothing after washing probably made him feel inferior.[384] In addition, lack of reasonable accommodation can contribute towards or in itself constitute ill-treatment.[385] It follows that certain latitude of discretion is accorded to states in respect of whether conditions and detention regime, taken together, amount to ill-treatment. Put differently, although these bodies are taking into account standards pertaining to deprivation of liberty, they were usually not considering these separately but looked at whether their combined effect, namely disregard of several standards together with passage of time, rose to the level of violation of prohibition of ill-treatment. This has been referred to as a cumulative approach and is considered as predominant way of establishing ill-treatment on account of detention conditions.[386]

Finally, it appears that detrimental consequences of certain shortcomings regarding material conditions of detention, such as lack of space, could be, at least to some extent, mitigated with benefits arising from more favorable detention conditions (greater freedom of movement within the compound, more hours spent on the open air, recreational activities etc.) and, thus, kept under the severity threshold required for ill-treatment.[387] For instance, substandard amount of space accorded to prisoners did not in

under the ECHR see *Zakharkin v. Russia* (ECtHR, 10 June 2010), p. 122, for detention regime see *Dybeku v. Albania* (ECtHR, 18 December 2007), § 39–39; For overview of the ECtHR practice on this matter see C. Grabenwarter, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1. Aufl (München: Beck, 2011), p. 43; For African bodies see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 140; For the ICTY practice regarding detention conditions see *Prosecutor v. Simic, Tadic and Zaric* (ICTY, 17 October 2003), § 97–97; *Prosecutor v. Limaj, Bala and Musliu* (ICTY, 30 November 2005), p. 652; *Prosecutor v. Blagojevic and Jokic* (ICTY, 17 January 2005), § 609–609; For summary of ICTY and ICTR practice see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), pp. 171–2; For factors taken into consideration by the ICRC see A. Aeschlimann, 'Protection of detainees: ICRC action behind bars: IRRC March 2005 Vol. 87 No 857' (2005) 87, International Review of the Red Cross, 83–122 at 115.

[382] The CtRPD in its concluding observations expressed concern under article 15 regarding poor living conditions at psychiatric hospital where a person has been detained for more than 10 years without rehabilitative services, see *Concluding observations on the initial report of Peru* (CtRPD, 16 May 2012), § 30–30.

[383] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 34–34; For state reports see for example *Report on Latvia* (CPT, 27 August 2013), p. 118.

[384] *Stanev v. Bulgaria* (ECtHR, 17 January 2012), 209,212.

[385] *Price v. the United Kingdom* (ECtHR, 10 July 2001), § 30–30; *Z.H. v. Hungary* (ECtHR, 08 November 2012), § 29–29; *Grimailovs v. Latvia* (ECtHR, 25 June 2013), § 151–151. For the ECHR context see O. De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights', in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe. From Theory to Practice* (2005), pp. 35–63, at pp. 53–5; For the CRPD see *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 54–54.

[386] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 425; Droege, 'Droege 2007', 522; D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), p. 93.

[387] The ECtHR in Varga summarized factors, identified in its earlier case law, that can offset negative consequences of extreme lack of personal space: "*the brevity of the applicant's incarceration* (…), *freedom of movement afforded to inmates and unobstructed access to natural light and air* (….), *and relative lengthy daily periods for outdoor exercises and freedom of movement*", see *Varga and Others v. Hungary* (ECtHR, 10 March 2015), §§ 76–7; However, flagrant lack of space, structural problems in prisons and detention in completely inadequate premises cannot be balanced with other, more favourable, conditions see *Mursic v. Croatia* (ECtHR, 12 March 2015), § 56–56.

itself lead to violation of ECHR article 3, since they had access to the entire detention wing for up to 16 hours per day.[388]

To sum up, material conditions and the regime of detention are in the practice of international bodies recognized as main factors contributing towards inhuman and\or degrading treatment and can even amount to torture. The preferred approach of human rights bodies was looking into compatibility of detention conditions with international standards in assessing whether one or several shortcomings, eventually aggravated with the lapse of time, amounted to ill-treatment. Cumulative approach to various factors stemming solely from material conditions of detention can have, at least under ECHR case law, a negative and a positive effect upon an individual. More precisely, the cumulative approach can be used to either elevate suffering above the severity threshold by taking into account the collective effect of different shortcomings or compensate negative impact stemming from certain material inadequacies by considering positive aspects of detention and thus bringing it below the severity line. However, the described positive effect is rather limited. Namely, having in mind that two or more shortcomings generate a negative cumulative effect that can hardly be made good, it is to be assumed that only one shortcoming can be compensated with another more favorable condition.[389]

5.4.5.2.2 Miscellaneous situations

Degrading treatment was found in a range of different situations pertaining to the context of deprivation of liberty such as: non-voluntary gynecological examination of unaccompanied minor in police custody,[390]exposure of prisoner to cigarette smoke,[391]placing a person in a metal cage within a courtroom during his trial,[392] exhibiting a prisoner to the media in a cage,[393] shaving prisoners head as a part of punishment of solitary confinement,[394]taking away detainees eye glasses and not providing new ones in the course of almost 5 months, [395]inadequate medical treatment which did not cause prolonged severe pain and suffering necessary for inhuman treatment,[396]verbally abusing the prisoner and forcing him to strip naked in front of prison guards in order to be allowed to exercise his right to vote,[397]strip search in presence of a women and touching prisoners genitals and food with bare hands,[398] guards beating and pushing a detainee with a bayonet, emptying urine bucket on his head, throwing

[388] *Valasinas v. Lithuania* (ECtHR, 24 July 2001), § 103–103*2008*, p. 79. But in one case access to the segregation unit and small yard could not make up for lack of space, privacy and inadequate cooling arrangements in the prison cell, see *Peers v. Greece* (ECtHR, 19 April 2001), 71,75.
[389] For observation on limited effect of positive cumulative effect in case of cumulation of negative effects see Torture in international law: A guide to jurisprudence (Geneva: APT, 2008), p. 79.
[390] *Yazgul Yilmaz v. Turkey* (ECtHR, 01 February 2011), § 53–53.
[391] *Florea v. Romania* (ECtHR, 14 September 2010), § 65–65.
[392] *Svinarenko and Slyadnev v. Russia* (ECtHR, 17 July 2014), §§ 138–9; *Mikhail Pustovoi v. Ukraine* (HRC, 12 May 2014), paras. 9.3.
[393] *Polay Campos v. Peru* (HRC, 06 November 1997), paras. 8.5.
[394] *Yankov v. Bulgaria* (ECtHR, 11 December 2003), §§ 113–20.
[395] *Slyusarev v. Russia* (ECtHR, 20 April 2010), §§ 43–4.
[396] *Hummatov v. Azerbaijan* (ECtHR, 29 November 2007), § 121–121.
[397] *Iwanczuk v. Poland* (ECtHR, 15 November 2001), p. 59.
[398] *Valasinas v. Lithuania* (ECtHR, 24 July 2001), § 117–117

food and water on the floor and mattress out of the cell,[399]assault by prison guards and constant soaking of bedding,[400] forcing detainees to serve as human shields or trench diggers,[401] aiding and abetting mistreatment of detainees during bodily search which also included death threats and theft,[402] forcible performance of subservient acts, reliving bodily functions in clothing and constant fear of violence.[403] Rather peculiar cases of ill-treatment, to a large extent on grounds of detention conditions, were found in relation to Peru. Prisoners convicted for offences related to terrorism were sent to serve their sentence in a prison located on more than 4000 meters above the sea level, with extreme meteorological conditions (thin air, temperature of minus 15 degrees Celsius), poor material conditions of detention (cells without heating and windows), insufficient food rations and under strict incommunicado regime. These factors together were found to amount to cruel, inhuman and degrading treatment and thus violation of IACHR article 5.[404]

Often these two categories (inadequate detention conditions and deliberate abuse) are intertwined and in assessing whether certain conditions and treatment amounted to ill-treatment, the combined effect is decisive. For example, the IACtHR in Layza Tamayo found cruel, inhuman and degrading treatment due to the cumulative effect of a range of factors including physical conditions of detention but also deliberate acts such as infliction of blows and intimidation, being exhibited to the media in degrading clothing, subjection to regime tantamount to incommunicado detention and restrictive visiting schedule etc.[405] Notwithstanding the differences among these examples (some of them display considerable pain but this can be attributed to the different disposition of decision-making bodies and different points in time when the decision was made), what they have in common is the omnipresent element of undignified treatment of a person: his degradation without the element of pain being necessarily present.

5.4.6 Summary

Degrading treatment can take place in and outside contexts of detention. In the latter case, it is provoked by gross discrimination or when force was used in a particularly degrading manner. Concerning the former, the general picture is that, in addition to unsatisfactory conditions and the regime of detention surpassing the entry threshold of pain and suffering, degrading treatment is being found in situations where a person is subjected to treatment not necessarily related to pain or suffering, but instead capable of arousing feeling of humiliation or degradation in an average person.

[399] *Francis v. Jamaica* (HRC, 24 March 1993), paras. 12.4.
[400] *Byron Young v. Jamaica* (HRC, 04 November 1997), paras. 5.2.
[401] *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), para. 229.
[402] *Prosecutor v. Aleksovski* (ICTY, 25 June 1999), paras. 87, 185-6, 190, 226 and 228.
[403] *Prosecutor v. Kvocka and others* (ICTY, 02 November 2001), para. 173.
[404] *Lori Berenson-Mejía v. Peru* (IACtHR, 25 November 2004), § 88–88; *Castillo Petruzzi et al. v. Peru* (IACtHR, 30 May 1999), § 198–198.
[405] *Loayza-Tamayo v. Peru* (IACtHR, Judgment of 17 September 1997), § 58–58.

It follows that degrading treatment in the practice of human rights bodies has two aspects. The first aspect is related to the ladder of suffering. In this ranking, degrading treatment is delimited by inhuman treatment on the upper end and by violation of some other rights say, right to privacy or religion or not surpassing the threshold level of pain and suffering on the lower end of the scale. In this sense, and related to material conditions of detention, simple failure to meet one international standard, although causing distress, does not automatically lead to a violation of the prohibition of ill-treatment because the requisite level of pain and suffering was in most cases not met.

The second aspect is unrelated to the ladder of suffering and reviews whether the victim has been placed in a state of degradation (and related to this whether this degradation is so severe that it infringes his dignity) and whether he personally experienced humiliation where the former takes precedence. This aspect covers a range of different situations where a person's dignity or self-respect was in some fundamental sense infringed. It depends on the particular circumstances of each case under observation, such as a point in time when the case was examined, specific traits of the alleged victim (religion, cultural background, sexual orientation, disability etc.) and, last but not least, on the disposition of the adjudicating body.

5.4.7 Limited relevance of the minimal threshold

As already noted,[406] pain and suffering should surpass the lower threshold of suffering in order to fall within the ambit of the prohibition of ill-treatment. This threshold was intended to distinguish between pain and suffering stemming solely from the application of legitimate sanctions such as the deprivation of liberty or lawful measures within the context of detention such as handcuffing, solitary confinement etc.[407] and that coming from detention conditions or acts not representing a corollary of the legitimate sanctions and measures. This is, as with torture, assessed by taking into consideration certain factors such as duration of the treatment, its effects on the victim as well as victim's personal traits (gender, age, health).[408]

The question, however, whether a minimal threshold of pain and suffering was reached appears to be irrelevant in situations, in and outside the detention setting, where physical force was used. This is so because an assessment of whether use of force amounted to ill-treatment is governed by the notions of necessity, proportionality and commensurability.[409] More precisely, one should differentiate between persons whose behavior does and does not make use of force necessary. In the latter case, any use of

[406] Refer to chapter 4 Character of the prohibition of ill-treatment in international law, section 4.2. Scope of absolute prohibition of ill-treatment and 4.4. Absolute nature of prohibition inhuman and/or degrading treatment or punishment.
[407] Refer to chapter 6 Impact of the prohibition of ill treatment - a dynamic process.
[408] *El-Masri v. the Former Yugoslav Republic of Macedonia* (ECtHR, 13 December 2012), § 196–196; *Selmouni v. France* (ECtHR, 28 July 1999), § 100–100; *Vuolanne v. Finland* (HRC, 07 April 1989.), § 9–9; *Brough v. Australia* (HRC, 17 March 2006), p. 9; *Prosecutor v. Delalic et al.* (ICTY, 16 November 1998), § 536–536; *Prosecutor v. Vasiljevic* (ICTY, 29 November 2002), p. 235; *Prosecutor v. Simic, Tadic and Zaric* (ICTY, 17 October 2003), § 75–75.
[409] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.3.2.1. Test for evaluating use of force in the law enforcement setting.

force under any circumstances is prohibited and thus amounts to, at least, degrading treatment.[410] In the former case, which, by and large, coincides with the law enforcement paradigm, the focus shifts from the notion of necessity to that of proportionality and commensurability of the force used. It follows that in this case use of force would not lead to ill-treatment when it was necessary, commensurate and proportionate although it might have caused pain and suffering surpassing the minimum threshold or even reaching the threshold of severity required for torture. Either way, the minimal threshold of pain and suffering has no role to play in determining whether the use of force amounted to ill-treatment. Evans and Morgan back in 1998 commented that, in the detention context "*The only limitations upon the scope of Article 3 … no longer concerns the gravity of the injuries sustained but relates to their cause*."[411]

It has been argued that the proportionality test actually serves as an assessment tool for evaluating whether the lower threshold of ill-treatment has been reached.[412] If the answer is negative, the impugned act cannot be considered ill-treatment. The rationale of making the entry threshold of pain and suffering contingent upon proportionality and necessity, is a consequence of the absolute character of the prohibition of ill-treatment. Namely, classical proportionality test which weighs whether interference in the protected right was justified, simply cannot work with absolute rights as they necessitate that any interference is automatically a violation. Essentially, however, making the entry threshold for ill treatment contingent upon proportionality is a construct developed in order to accommodate the threshold criteria within the law enforcement setting. In fact, as with other rights, lawful, necessary, proportionate and commensurate force with is an exception to the right to personal integrity.[413] Even the use of extreme force causing severe pain and suffering, if applied in line with the mentioned requirements, will not amount to ill-treatment.

Therefore, when use of physical force was not warranted in any way by the victim's behavior, the entry threshold for ill-treatment has no role to play since any unwarranted use of force amounts to ill-treatment notwithstanding the actual level of pain and suffering experienced. Furthermore, if the force used was necessary, the crux of the issue is not determined by the threshold of pain but revolves around the question whether the force used was necessary, proportionate and commensurate which is being determined in light of circumstances of a case under consideration. Observance of the said principles

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[410] See jurisprudence cited above in footnotes 264 and 265.
[411] Evans and Morgan, *Evans et al. 1998*, pp. 100–1.
[412] M. Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23, Netherlands Quarterly of Human Rights,, 674–88 at 677; Smet also argues that entry threshold in law enforcement varies due to the context, for example same use of force, punching two times and handcuffing in case where peaceful demonstrator needed not to be arrested, a burglar caught in flagrante and resisted and a burglar caught in flagrante and did not resisted an arrest the actual threshold adjusts to these specific circumstances, see S. Smet, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in article 3 ECHR: truly a question of scope only?', in E. Brems and J. H. Gerards (eds.), *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights* pp. 273–93, at pp. 276–8.
[413] In the context of the ECtHR jurisprudence Smet noted that in both variations of the proportionality test "*the Court effectively rules that public interests or other (Convention) rights 'outweigh 'the interest of the applicant*.", S. Smet, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in article 3 ECHR: truly a question of scope only?', in E. Brems and J. H. Gerards (eds.), *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights* pp. 273–93, at p. 281.

brings the action of law enforcement officials within the realm of legitimate and lawful measures that, in principle, if correctly applied, cannot amount to ill-treatment. It follows that in use of force cases, establishing level of severity of pain and suffering serves only to enable characterizing the impugned situation as inhuman treatment or torture.

6 Chapter: Impact of the prohibition of ill-treatment - a dynamic process

This chapter consists of an overview of the current state of affairs regarding which means of treatment and punishment are either entirely outlawed or their use significantly curtailed by subjecting them to strong limitations and safeguards. It will be demonstrated that some sanctions and measures frequently used in the context of detention, even if permitted, can infringe upon the prohibition of ill-treatment. From a historical perspective, it would be most accurate to look at the consistency of means and methods of punishment with the prohibition of ill-treatment as a dynamic process where certain treatments and punishments, although earlier regularly applied and considered perfectly legal, are at present either prohibited or their use significantly restricted.[414] Consequently, contemporary methods of punishments and treatment of persons deprived of freedom are also under review and thus, could be found inconsistent with the prohibition of ill-treatment.

In what follows, acts or measures constituting exceptions to the absolute prohibition of ill-treatment understood as a certain level of suffering or humiliation will be considered in order to outline under which conditions they nevertheless might amount to ill-treatment.

6.1 Capital punishment

An example of the punishment, which, though still not universally outlawed, faces considerable restrictions through limitations and exceptions, is the capital punishment. Since capital punishment is one of the clearly stipulated exceptions to the absolute nature of the right to life and as such abolishable only by amending the respective treaties themselves, the jurisprudential efforts aimed at ending or restricting this practice actually revolved around the prohibition of ill-treatment.[415] Consequently, legislative efforts aimed at the abolition of capital punishment took the form of protocols to key universal and regional human rights treaties while the restriction of the circumstances under which capital punishment could be utilized was effected through practice of treaty bodies and human rights courts. Regarding the former, capital punishment is abolished completely among the CoE member states and partially in OAS as well as under the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. As to the latter, one should bear in mind that capital punishment *per se* cannot amount to torture due to the lawful sanctions clause contained in the definition of torture under

[414] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 166–7.
[415] *Promotion and Protection ofall Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/HRC/10/44* (2009), § 33–33.

the CAT.[416] However, the ECtHR in a recent decision held that capital punishment, effected either in times of war or peace, in itself violates the prohibition of ill-treatment since

> "*whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering*".[417]

In addition to this, international and national jurisprudence as well as various soft-law instruments make clear that the imposition of the death penalty following an unfair trial, not proportionate to the gravity of the crime, certain methods of execution (stoning or gas), treatment prior to execution (death row phenomenon) and execution of members of certain groups (pregnant women, nursing mothers, juveniles, elderly and persons with psychosocial and/or intellectual disabilities) violates the international prohibition of ill-treatment.[418]

Similarly, as pointed out above, some international instruments, in addition to peacetime, aim at abolishing capital punishment in times of war. As to, retentionist countries, IHL rules apply in times of war under which use of capital punishment is restricted. Namely, juveniles, pregnant women and mothers of infants cannot be executed. Moreover, under these circumstances procedural requirements related to fair trial in capital cases under IHL and rules facilitating the commutation of sentence and exchange of prisoners rather than execution apply.[419]

6.2 Deprivation of liberty

Having in mind that incarceration, either as a detention on remand or punishment, imposed under rules of criminal law and governed by penal law is at present still considered legitimate and thus not challenged *per se* under international law,[420] it is not surprising that imprisonment alone can neither

[416] Refer to chapter 4 Character of the prohibition of ill-treatment in international law, section 4.3. Absolute nature of prohibition of torture.
[417] *Al-Saadoon and Mufdhi v. the United Kingdom* (ECtHR, 02 March 2010), 115, 120.
[418] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 279–328; United Nations, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: UN Doc A/67/279* (2012), 58, 63, 77-8J. E. Mendez, 'The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Tratment or Punishment', *Human Rights Brief* 20 (2012), 2–6, at 3–4. For an extensive review on the question of abolition of capital punishment see W. Schabas, *The abolition of the death penalty in international law*, 3rd ed (Cambridge: Cambridge University Press, 2002).
[419] The IHL rules on capital punishment are regulated by the 1949 Geneva conventions and additional protocols. Under these instruments two groups are protected - combatants taken prisoner and civilians in occupied territories. Combatants taken prisoner can be sentenced to capital punishment under laws in force in the armed forces of the detaining power for acts not considered as a lawful act of war; however, capital punishment can be even then commuted. Combatants in non-international armed conflict have no particular protection *per se*, but rather fair trial guarantees in the proceedings for capital offences envisaged by Common Article 3 apply as well as suspension of the execution for a certain period after the conviction and prohibition of execution of juveniles. For civilians residing in occupied territories capital offenses are limited *ratione materiae*, restrictions on juveniles and mothers apply as well as the rule that capital punishment cannot be applied if abolished by the occupied state prior to hostilities, see W. Schabas, *The abolition of the death penalty in international law*, 3rd ed (Cambridge: Cambridge University Press, 2002), pp. 211–4.
[420] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 382.

constitute a violation of the right to liberty nor amount to ill-treatment. Even long prison sentences including life imprisonment are not intrinsically contrary to human rights law.[421]

This should not imply that the deprivation of liberty, especially when effected and or maintained without respecting adequate legal safeguards, could not constitute or significantly contribute to ill-treatment. Indefinite detention without charges, for example, in itself amounts to ill-treatment.[422] Confinement of persons without psychosocial and/or intellectual disabilities in psychiatric institution may amount to inhuman and degrading treatment.[423]

Therefore, the most appropriate way of putting it is that although the deprivation of liberty is not disputed as such, it is closely related to ill-treatment in that it provides a stage necessary for torture and conducive for inhuman and/or degrading treatment to occur.

6.2.1 Specificities relating to persons with psychosocial and/or intellectual disabilities

On the other hand, such a straightforward answer cannot be given in respect of involuntary commitment of persons with psychosocial and/or intellectual disabilities since they are being detained not because of the criminal offence committed but usually due to mental disorder from which they suffer. The ECHR can serve as an illustration of this point since in article 5 para. 1 (e) an exception to the right to liberty and security as regards "*the lawful detention of (...) persons of unsound mind*" is explicitly allowed. In a seminal Winterwerp case, the ECtHR clarified this provision by formulating criteria for depriving persons with psychosocial and/or intellectual disabilities of freedom: it must be reliably shown that one suffers from a genuine mental disorder, that this disorder warrants confinement (this is the case when his condition requires therapy or other medical treatment or where supervision is necessary to prevent that person from harming himself or others) and lasts throughout the confinement period.[424] This approach has been followed in a number of soft law documents such as the *UN Mental Illness Principles* and *CoE Recommendation 2004 (10) concerning the protection of the human rights and dignity of persons with mental disorder* and thus reflects an international standard regarding involuntary confinement of persons with psychosocial and/or intellectual disabilities. In addition to this, persons with such dispositions, although considered to reside in social institutions or psychiatric hospitals

[421] However, the so called irreducible life sentence, that is, life imprisonment without even the formal possibility of a review in the first 25 years following the conviction was relatively recently found to be inconsistent with ECHR article 3, see *Vinter and Others v. the United Kingdom* (ECtHR, 09 July 2013), pp. 119–22.
[422] *Concluding Observations on the United States of America* (CtAT, 25 July 2006), § 22–22; Concluding observations on the combined third to fifth periodic reports of the United States of America (Committee Against Torture, 19 December 2014), para. 14.
[423] *Report on Kyrgyzstan* (SPT, 28 February 2014), § 116–116.
[424] *Winterwerp v. the Netherlands* (ECtHR, 24 October 1979), § 39–39; *Shtukaturov v. Russia* (ECtHR, 27 March 2008), § 114–114; *D.D. v. Lithuania* (ECtHR, 14 February 2012), § 156–156; *Stanev v. Bulgaria* (ECtHR, 17 January 2012), §§ 145–6; For in depth analysis of this criteria in the ECtHR case law see P. Bartlett, O. Lewis and O. Thorold, *Mental disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2007), pp. 42–60.

voluntarily, are being deprived of liberty in fact, since consent for their placement has been provided not by them but by their legal guardians.[425]

This standard is being challenged at the universal level under the CRPD which in article 14 para 1 (b) rejects disability as a ground for deprivation of liberty by explicitly stating that "*the existence of a disability shall in no case justify a deprivation of liberty*".[426] Shortly after CRPD came into force, it was somewhat unclear whether the scope of art. 14 is restricted to prohibiting deprivation of liberty based exclusively on diagnosis of disability, psychosocial or intellectual, or whether it also rules out detention based on seemingly neutral criteria such as danger to oneself or others which, in most cases, accompany the diagnosed disability? The difference between these two interpretations of Article 14 is not only academic since the former would merely reflect whereas the latter challenge the current human rights standard regarding involuntary commitment of persons with psychosocial and/or intellectual disabilities.

While some authors entertained the narrower scope of art 14,[427] the UN High Commissioner for Human Rights held that this article requires states to revoke not just legal provisions envisaging psychosocial and/or intellectual disability as the only ground for detention, but also those where a diagnose of this sort of disability coupled with *prima facie* distinct criteria, such as danger to oneself or others, amounts in effect to the so called preventive detention.[428] CtRPD seems to follow the second view, given that it continually insisted (in a number of concluding observations[429] as well as a separate document[430]) on the complete abolishment of nonconsensual institutionalization based both on disability and perceived danger of persons with psychosocial and/or intellectual disabilities. The SPT, on its part, seems to have sided with the former as it accepted the deprivation of liberty on the basis of

[425] D. Karsay and O. Lewis, 'Disability, torture and ill-treatment: taking stock and ending abuses' (2012) 16, The International Journal of Human Rights, 816–30 at 819.

[426] This provision cannot be interpreted other than prohibiting any deprivation of liberty on grounds differing from those applicable to general population. On the other hand, detention based on disability neutral criteria that disproportionally affects those with psychosocial and/or intellectual disabilities would also not be in line with the CRPD, see A. Kanter, *International Human Rights Recognition of People With Disabilities: From Charity to Human Rights* (Routledge, 2012), pp. 151–2 and P. Bartlett, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention', *The International Journal of Human Rights* 16 (2012), 831–44, at 835.

[427] G. Quinn, 'A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law* 1 (2009), 89–114, at 109; A. Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?', *Syracuse Journal of International law and Commerce* 34 (2007), 563–619, at 612.

[428] *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities: A/HRC/10/48* (2009), §§ 48–9. See also P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law', *Modern Law Review* 75 (2012), 752–78, at 772–3; Kanter notes that CRPD article 14 prohibits, or is at least suspect of, all forced treatment or detention of persons with disabilities, see A. Kanter, *International Human Rights Recognition of People With Disabilities: From Charity to Human Rights* (Routledge, 2012), p. 135.

[429] See, for example, *Concluding observations on the initial report of Mexico* (CtRPD, 27 October 2014), 29,30; *Concluding observations on the initial report of Austria* (CtRPD, 30 September 2013), §§ 29–30; *Concluding observations on the initial report of Sweden* (CtRPD, 12 May 2014), §§ 35–6.

[430] CtRPD, in Guidelines on CRPD article 14, made it clear that deprivation of liberty based on actual or perceived impairment including seemingly neutral criteria such as danger to themselves or others or need to provide care or treatment is incompatible with article 14 and linked it with CRPD articles 12 (equal recognition before the law) and 19 (right to independent living), see *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities* (2015), § 6–6.

danger of harming oneself or others though subject to strong procedural safeguards.[431] In addition, the confinement of persons with psychosocial and/or intellectual disabilities masked by consent provided by a legally appointed guardian, constitutes arbitrary deprivation of liberty and as such runs counter to art 12 and 14 of the CRPD.[432] The CPT also found this practice inacceptable and urged states to provide additional safeguards in line with, ECHR article 5[433] while SPT made clear that placement in an institution is to be considered voluntary "*only when the person concerned has decided on it upon informed consent and retains the ability to exit the institution or facility.*"[434]

CRPD did not stop there but in article 19 envisaged a "hard" right to community living, which places a positive obligation on the state to close large residential institutions and provide support to services that will facilitate independent living of persons with psychosocial and/or intellectual disabilities in the community.[435] The ECtHR again did not follow suit and was unwilling to recognize right to independent living under article 8.[436] The position of both the CPT and SPT on the issue of replacing confinement in closed institutions with community based alternatives, while in principle positive, is far from being expressed in compelling terms.[437]

Therefore, the rejection of the deprivation of liberty of persons with psychosocial and/or intellectual disabilities under the CRPD encompasses corresponding negative and positive state obligations. While under the former, states are expected to refrain from detaining those with psychosocial and/or intellectual disabilities merely on grounds of their condition, the latter makes possible their life in the community by requiring states to provide support for life outside institutions including accommodation, medical services etc. This approach, in addition to preventing violations of

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[431] *Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the rights of persons institutionalized and medically treated without informed consent: UN Doc CAT/OP/27/2* (2016), § 8–8.

[432] *General comment No. 1-Article 12: Equal recognition before the law: UN Doc CRPD/C/GC/1* (2014), § 40–40; The CtRPD in its concluding observation on China recommended repealing laws allowing involuntary treatment and confinement including upon the authorization of guardians or family members see *Concluding observations on the initial report of China* (CtRPD, 15 October 2012), p. 38.

[433] *Report on Serbia* (CPT, 14 January 2009), § 175–175; *Report on Armenia* (CPT, 17 August 2011), §§ 164–5; *Report on Bosnia and Herzegovina* (CPT, 26 April 2012), §§ 125–7.

[434] *Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the rights of persons institutionalized and medically treated without informed consent: UN Doc CAT/OP/27/2* (2016), § 6–6.

[435] CRPD article 19 translates the policy approach towards removing persons from institutions to a right of persons with disabilities which needs to be realized immediately, see R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8, Human Rights Law Review, 1–34 at 29.; M. Schulze, Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities : Marianne Schulze, 3. ed (Lyon: Handicap International, 2010), p. 78.; D. Karsay and O. Lewis, 'Disability, torture and ill-treatment: taking stock and ending abuses' (2012) 16, The International Journal of Human Rights, 816–30 at 819.

[436] Nevertheless, four judges expressed their dissent and noted that violation of article 8 cannot be remedied only by finding violation of article 5, 6 and 3. Differently put, they were ready to look at right to community living under article 8, see *Stanev v. Bulgaria* (ECtHR, 17 January 2012); see also L. Nelson, Stanev v. Bulgaria: The Grand Chamber's Cautionary Approach to Expanding Protection of the Rights of Persons with Psychosocial Disabilities. http://strasbourgobservers.com/2012/02/29/stanev-v-bulgaria-the-grand-chambers-cautionary-approach-to-expanding-protection-of-the-rights-of-persons-with-psycho-social-disabilities/ (27 February 2015) and M. Burbergs, Remembering the private and family lives of mentally disabled persons (27 February 2015).

[437] The CPT considers this "*a very favourable development*" while the SPT points out that "*States should develop and make available alternatives to confinement, such as community-based treatment programmes*". see *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 58–58 and § 5–5.

the right to liberty of this group of persons, could significantly reduce the risk of their ill-treatment, in that it terminates the institutional surrounding in which abuses usually take place.[438]

It is safe to conclude that the detention of persons with psychosocial and/or intellectual disabilities based on their impairment or even based on the seemingly neutral criteria of dangerousness, constitutes a violation of the right to liberty and security of the person under CRPD but not, as of yet, under ECHR and CAT. As to the question whether the deprivation of liberty of persons with psychosocial and/or intellectual disabilities can amount to ill-treatment, it is not possible to give a straightforward answer. Bartlett argues that, similar to the excessive use of otherwise legitimate measures towards detainees (strip searches, handcuffing, solitary confinement etc.), the issue of ill-treatment can arise when persons with psychosocial and/or intellectual disabilities are placed in an institution even though they do not meet the admission criteria.[439] Both Nowak and Mendez in their role as Special Rapporteurs were of the opinion that the deprivation of liberty based on disability may amount to ill-treatment, provided that it produces a requisite level of pain and suffering.[440] Therefore, it seems reasonable to assume that deprivation of liberty based on disability might amount to ill-treatment especially when combined with other factors such as passage of time, inadequate material conditions of detention, lack of reasonable accommodation etc.

6.3 Non-consensual medical intervention

In general, free and informed consent[441] of the patient is a basic precondition for any medical intervention. The main exception to the consent rule relates to people considered unable to give a valid consent to treatment due to underage, a state of unconsciousness or disability (psychosocial or intellectual). Such disability is often a ground for deprivation of legal capacity as well as liberty, which in turn makes members of this group more at risk of being exposed to forcible medical treatment. In addition, those deprived of their liberty under the remit of criminal justice are in higher risk of being

[438] It stands beyond doubt that large residential institutions, by their very nature and organization, are in themselves conducive to occurrences of ill-treatment, see, for example, P. Bartlett, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' (2012) 16, The International Journal of Human Rights, 831–44 at 832–3; J. Fiala-Butora, 'Disabling torture: The Obligation to Investigate Ill-treatment of Persons With Disabilities' (2013) 45, Columbia Human Rights Law Review, 214–80 at 223–4.; G. Quinn, T. Degener and A. Bruce, Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability (New York: United Nations, 2002), p. 134.; Hunt and J. Mesquita, 'Mental Disabilities and the Human Right to the Highest Attainable Standard of Health' (2006) 28, Human Rights Quarterly, 332–56 at 333.

[439] P. Bartlett, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention', *The International Journal of Human Rights* 16 (2012), 831–44, at 833.

[440] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 65–65, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 69–69.

[441] Free and informed consent is to be understood as "*not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision*". This position is shared by Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the SRT, see A. Grover and J. Gaziyev, 'A Contribution by the Special Rapporteur on the Right to Health: Right to Health and Freedom from Torture and Ill-Treatment in Health Care Settings', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 3–17, at p. 13; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 28–28.

subjected to involuntary medical intervention (forcible feeding administered in case of expressing protest by resorting to hunger strikes, or medical intervention aimed at securing incriminating evidence) than the general population. Therefore, although the question of forcible treatment seems distinct from that of deprivation of liberty, there is a strong causal link between the two, especially in the light of special vulnerability of persons deprived of liberty arising from their subjection to almost total control of the authorities.

Bearing aforesaid in mind, in a deprivation of liberty context, forced treatment made necessary by reason of the so called medical necessity paradigm (for example resorting to forcible feeding in order to save the life of the prisoner) or legitimate concern to secure evidence from a suspect, is not *per se* considered inhuman or degrading treatment.[442] However, a range of precautions were introduced by the ECtHR in order to safeguard the well-being of the patient: convincing justification of every intervention,[443] the consideration of alternatives to invasive methods, making sure that an intervention does not reach the threshold of pain and suffering required for ill-treatment etc.[444]

The leading case in the field is Herczegfalvy v. Austria (the case concerned forcible administration of medication and food) in which, while referring to "*patients confined in psychiatric hospitals",* the ECtHR established the so-called medical necessity rule, which was meant to govern the validity of non-consensual medical interventions. It reads:

> "*While it is for the medical authorities to decide, on the basis of the recognized rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3 (art.3), whose requirements permit of no derogation."*[445]

However, in a case where a detainee not diagnosed with either psychosocial or intellectual disability was force fed, the ECtHR repeated the medical necessity standard established in Herczegfalvy but added

> "*The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food.*"[446]

It follows that unlike with persons considered incompetent to decide, here medical profession substitutes the detainee's decision, in principle, only when his life is at risk.

Common for both variations of the medical necessity approach is that the decision-making on vital aspects of one's personality is removed from the sphere of the individual and entrusted to the members of the medical profession. However, this approach differs regarding the extent of the discretion accorded

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[442] Under the ECtHR jurisprudence, leading cases as regards involuntary treatment is *Herczegfalvy v. Austria* (ECtHR, 24 September 1992), while as regards subjecting suspects to medical treatment in order to secure evidence *Jalloh v. Germany* (ECtHR, 11 July 2006).

[443] Medical necessity must be demonstrated in accordance with relevant medical standards, gravity of the crime in case of obtaining evidence from a suspect's body.

[444] *Nevmerzhitsky v. Ukraine* (ECtHR, 05 April 2005), § 94–94; *Ciorap v. Moldova* (ECtHR, 19 June 2007), §§ 76–7; *Jalloh v. Germany* (ECtHR, 11 July 2006), §§ 69–74.

[445] *Herczegfalvy v. Austria* (ECtHR, 24 September 1992), § 82–82.

[446] *Nevmerzhitsky v. Ukraine* (ECtHR, 05 April 2005), § 94–94.

to medical authorities in that treatment can be imposed upon a patient deemed incapable in an attempt to preserve his psychological and physical health while upon a patient deemed capable only when his life is considered to be in danger.

Another aspect of this difference is rather practical and it concerns the extent to which an imposed treatment invades the personal sphere of a particular individual. Namely, since persons with psychosocial and/or intellectual disabilities have a medical condition, which, in most cases, cannot be completely cured but only treated, they are usually under constant therapy. On the other hand, people without such condition are subjected to forced treatment in exceptional circumstances and for a limited time. In this sense, forced treatment impacts the former disproportionally more than the latter patients.

These two contexts where medical treatment can be imposed on a person deprived of freedom, namely, on persons deemed incompetent and those considered competent, are enshrined in a number of soft law documents. The CPT in the context of people involuntary placed in psychiatric institutions, upholds, in principle, a right to refuse treatment but envisages a twofold exception. The first one accords this right to every *competent* patient, implying that will of the incompetent one, that is a person not capable of giving or withholding consent, can be overridden. The second one allows for strictly defined exceptions even in cases of persons considered able to give consent.[447] The exception to the free consent requirement based on the notion of an incompetent patient and that of someone which by refusing consent puts his life and that of others at risk, is also enshrined in the 1991 UN Mental Illness Principles and 2004 CoE Recommendation to member states concerning the protection of the human rights and dignity of persons with mental disorder.[448]

Although the ECtHR did not revisit the doctrine of medical necessity in cases involving treatment of persons with psychosocial and/or intellectual disabilities, in X v. Finland it held that a forced psychiatric treatment violated, instead of Article 3 as the applicant claimed, art 8 due to deficiencies in legal provisions regulating forced treatment under Finnish law.[449] In line with the ECtHR approach is that of the HRC in Brough case, where it held that non-consensual administration of medication to a mentally disabled juvenile incarcerated in prison for adults did not constitute ill-treatment. Such a finding was justified by pointing out that the administration of medications was intended to control the patient's self-destructive behavior, that it was prolonged only after examination of a psychiatrist and carried out for purposes not contrary to article 7.[450]

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[447] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 41–41.
[448] P. Bartlett, O. Lewis and O. Thorold, *Mental disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2007), p. 125.
[449] *X v. Finland* (ECtHR), §§ 202–23.
[450] Reference to the purposes "*contrary to article 7*" of the ICCPR was meant to make clear that medications were not prescribed in order to conduct medical or scientific experiments. Namely, ICCPR article 7, in addition to standard formulation on prohibition of ill-treatment proscribes non-consensual subjection to scientific or medical experimentation, see *Brough v. Australia* (HRC, 17 March 2006), 9.5.

The SPT too conceded to this position and noted that will of a patient can be overridden in exceptional cases and subject to strict procedural safeguards. Namely, when the person concerned is not able to

> *"(a) Understand the information given concerning the characteristics of the threat to her or his life or personal integrity, or its consequences; (b) Understand the information about the medical treatment proposed, including its purpose, its means, its direct effects and its possible side effects; and (c) Communicate effectively with others."*[451]

By contrast, the CRPD, similar to issue of involuntary commitment, challenges the validity of the medical necessity doctrine since articles 25 and 17 make clear that free and informed consent of patients with disabilities, psychosocial or intellectual, is to be secured under the same conditions as for those without disability. Protection against forced medical intervention is accorded under CRPD article 17, which reads: *"Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others"* Article 25 d is more straightforward and obliges health professionals *"to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent"*. This rather general wording was utilized because during the drafting process states preferred to envisage strong safeguards for the administration of treatment in violation of patients' preferences instead of a clear prohibition of non-consensual treatment. This proposition was vehemently opposed by disability organizations since they felt that detailed regulation of forced treatment would only confer legitimacy upon acts, which, to their mind, should be altogether prohibited.[452] The end result, namely, neutral language used, brought this disagreement to an end by leaving the door for a ban of these practices open through authoritative clarification of the CtRPD.[453] Finally, CtRPD indeed took the position that instead of emulating person's with psychosocial and/or intellectual disabilities consent by means of substitute decision-making, efforts need to be taken on assisting them in reaching those decisions themselves.[454]

It has been argued that the CRPD as legally binding treaty takes precedence over provisions of mentioned soft law instruments which envisage exceptions to free consent rule.[455] It follows that, according to the CtRPD, medical interventions could be imposed against the will of persons with

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[451] *Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the rights of persons institutionalized and medically treated without informed consent: UN Doc CAT/OP/27/2* (2016), §§ 12–9.

[452] S. Tromel, 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law* 1 (2009), 115–37, at 130–2; R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review* 8 (2008), 1–34, at 29–30.

[453] S. Tromel, 'A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities', *European Yearbook of Disability Law* 1 (2009), 115–37, at 130–2; R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review* 8 (2008), 1–34, at 29–30.

[454] *General comment No. 1-Article 12: Equal recognition before the law: UN Doc CRPD/C/GC/1* (2014), § 41–41; *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities* (2015), § 11–11.

[455] T. Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions,', *Syracuse Journal of International law and* 34 (2006-2007), 405–28, at 407.

psychosocial and/or intellectual disabilities only under the rules applicable to the general population.[456] These rules, so the argument goes, should be enshrined in law satisfying international human rights standards and not disproportionally affecting persons with psychosocial and/or intellectual disabilities.[457]

This being said, it is safe to conclude that at least states parties to the CRPD, should make sure that prior to the administration of medication or other therapy, informed consent is freely given by patients with psychosocial and/or intellectual disabilities on equal terms with others. Otherwise, they will violate articles 17 and 25 of the CRPD.

The question that arises is whether coercive medical treatment of persons with psychosocial and/or intellectual disabilities, in addition to engaging the right to free and informed consent under article 25, or, eventually, privacy rights, can amount to ill-treatment?

Nowak in his role as the SRT noted that:

> *"medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned*".[458]

His successor as the SRT Mendez was more straightforward since he discarded justifications of forced interventions through the medical necessity doctrine as not in line with CRPD[459] and held that involuntary treatments in health care facilities are forms of torture and ill-treatment, provided they meet the required level of pain and suffering.[460]

Due to mounting critique,[461] Mendez later clarified his position by stating that he did not purport to recommend "*absolute ban on non-consensual interventions…..under any and all circumstances*". but only that "*based exclusively on discrimination against persons with disabilities*".[462]

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[456] This, of course should not imply that the right to free and informed consent to medical treatment should be reduced for people without disabilities in order to be brought in line with lower standard valid for people with mental disabilities; rather, it is the opposite, compulsory treatment could be, in principle, allowed only in life saving situations as with detained persons without disabilities, see P. Bartlett, 'Re-Thinking Herczegfalvy: The ECHR and the Control of Psychiatric Treatment', in E. Brems (ed.), Diversity and European human rights: Rewriting judgments of the ECHR (Cambridge, New York: Cambridge University Press, 2013), p. 358.

[457] T. Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions,', *Syracuse Journal of International law and* 34 (2006-2007), 405–28, at 406–7; For an attempt to develop CRPD compliant model law regulating non voluntary medical interventions see G. Szmukler, R. Daw and F. Callard, 'Mental health law and the UN Convention on the rights of Persons with Disabilities', *International journal of law and psychiatry* 37 (2014), 245–52.

[458] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 47–47.

[459] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 35–35.

[460] *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 64–64.

[461] American Psychiatric Association (APA) and the World Psychiatric Association (WPA), 'Joint Statement by the American Psychiatric Association (APA) and the World Psychiatric Association (WPA)', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 141–50, at p. 143.

[462] J. E. Mendez, 'Response by the Special Rapporteur to the Joint Statement by the American Psychiatric Association (APA) and the World Psychiatric Association (WPA)', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 151–3, at p. 152.

This position appears to be in line with that of the CtRPD which made clear that nonconsensual medical treatment in addition to violating art 25, constitutes

> "*a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16)".*[463]

In its concluding observations, the CRPD stated that excessive drug treatment represents cruel, inhuman and degrading treatment[464] while it expressed concerns under article 15 regarding continuous forcible use of medication including neuroleptics[465]or frequent application of involuntary electroconvulsive therapy.[466]

6.4 Use of means of restraint, solitary confinement and body searches

Similar considerations apply to other measures typical for the context of detention, such as the use of handcuffs or other means of restraint, body searches and solitary confinement. These measures are not absolutely prohibited provided that they meet strict criteria that aim to prevent their unnecessary, unreasonable or excessive utilization.[467] Moreover, even if considered as not amounting to ill-treatment on their own, their joined utilization usually does. In what follows, resort, manner of application and effects of these measures in custodial settings will be reviewed in more detail in order to establish when they are to be qualified as ill-treatment and delineate state obligations stemming from them.

6.4.1 Solitary confinement

Solitary confinement in a prison setting stands for isolating a person in a cell for 22 hours per day or more[468] as a punishment passed by a court or prison authorities; in addition, it can be used to facilitate criminal investigation of a person held in pretrial detention, to protect the persons undergoing it from other prisoners or the general public from him.[469]

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[463] *General comment No. 1-Article 12: Equal recognition before the law: UN Doc CRPD/C/GC/1* (2014), § 42–42.
[464] *Concluding observations on the initial report of the Republic of Korea* (CtRPD, 29 October 2014), § 29–29.
[465] *Concluding observations on the initial report of Peru* (CtRPD, 16 May 2012), § 30–30.
[466] *Concluding observations on the initial report of Denmark* (CtRPD, 30 October 2014), § 38–38; *Concluding observations on the initial report of Sweden* (CtRPD, 12 May 2014), § 37–37.
[467] D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), 94, 95, 99-100; B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, Sixth edition pp. 188–9; N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), 136-8: 402-7: 419-21.
[468] *The Istanbul statement on the use and effects of solitary confinement* (International Psychological Trauma Symposium, 09 December 2007), p. 1; *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 77–77; *Solitary confinement: UN Doc A/66/268* (2011), § 26–26; S. Shalev, *A sourcebook on solitary confinement* (London: Mannheim Centre for Criminology, 2008), p. 2.
[469] The SRT sets forth these justifications for use of solitary confinement, see *Solitary confinement: UN Doc A/66/268* (2011), § 40–40.

Despite the fact that resort to solitary confinement *per se* is not outlawed under international law,[470] the scope of its application is submitted to the following restrictions. The general rule is that solitary confinement should be utilized exceptionally, for periods as short as possible and as a measure of last resort.[471] The process of rendering and executing such a measure ought to be followed by appropriate safeguards, namely due process guarantees in case of the former[472] and daily visits by a medical doctor and members of prison management in case of the latter.[473] In addition, subjecting juveniles, persons with psychosocial and/or intellectual disabilities, pregnant women and mothers with children to solitary confinement, or a regime akin to solitary confinement, is prohibited, though not across-the-board.[474] Furthermore, the act of self-harm should not be considered a disciplinary offence and should not be punished by placing the prisoner in solitary confinement.[475] However, even if imposed and executed in a manner meeting the above criteria, solitary confinement may nonetheless amount to ill-treatment. In considering whether this is the case, basically, three factors play a role:

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[470] However, UN Basic Principles suggest that measures taken to abolish solitary confinement as a punishment are to be encouraged, see *Basic Principles for the Treatment of Prisoners: UN Doc A/RES/45/111* (1990), § 7–7; SRT called for total abolition of solitary confinement when used as a punishment as it amounts to violation of CAT article 1 or 16 and added that this also holds for solitary confinement as a disciplinary sanction in prison providing that it meets minimum level of severity, see *Solitary confinement: UN Doc A/66/268* (2011), § 72–72; The SPT seems to support outright prohibition of isolation when used for protective purposes "*Segregating persons in need of protection is a violation of their rights. ….(isolation) should not be used as a tool for prison management*", see *Report on Argentina* (SPT, 27 November 2013), §§ 65–7.

[471] *The Istanbul statement on the use and effects of solitary confinement* (International Psychological Trauma Symposium, 09 December 2007), p. 5; *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)* (CtAT, 16 December 2013), § 32–32; *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 83–83; European Prison Rules envisage these limitations only in respect of solitary confinement imposed as a punishment see *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 60–60; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 411–411; *Seventh annual report* (SPT, 20 March 2014), § 61–61; A. Coyle, *A human rights approach to prison management: Handbook for prison staff*, 2. ed., rev (London: International Centre for Prison Studies, 2009), p. 71.

[472] S. Shalev, *A sourcebook on solitary confinement* (London: Mannheim Centre for Criminology, 2008), p. 28; *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 57–57; *Report on Ukraine* (CPT, 29 April 2014), § 174–174; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 411–411; the SPT underlined significance of providing due process guarantees in prisons in general through which prisoners could challenge decision or acts of prison authorities, see *Seventh annual report* (SPT, 20 March 2014), §§ 54–8.

[473] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 57–57; SMR and EPR envisage daily visit of medical doctor to those undergoing solitary confinement, see *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 32–32; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 43–43; the SPT stressed daily visits of medical personnel only see *Report on Benin* (SPT, 15 March 2011), § 246–246.

[474] While the CtAT considered that solitary confinement ought not to be used as a punishment against all four mentioned categories, see *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)* (CtAT, 16 December 2013), p. 32; SRT and SPT are of the opinion that solitary confinement should not be used on juveniles and persons with mental disabilities, see *Solitary confinement: UN Doc A/66/268* (2011), pp. 77–8; *Report on Benin* (SPT, 15 March 2011), § 246–246; PBP in the Americas, in addition juveniles, suggested prohibition on use of solitary confinement on pregnant women and those residing with children in detention but not persons with mental disabilities, see *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle XXII (3); On the other hand, the CPT explicitly stated that although it disfavours use of solitary confinement on juveniles, it considers such practice not surpassing the period of three days acceptable, see *Report on Cyprus* (CPT, 09 December 2014), § 81–81; Finally, authoritative Istanbul statement on use and effects of solitary confinement in addition to juveniles and mentally-ill suggest that it should be absolutely prohibited for death row and life sentence prisoners by virtue of their sentence as well, see *The Istanbul statement on the use and effects of solitary confinement* (International Psychological Trauma Symposium, 09 December 2007), p. 4.

[475] *Report on Ukraine* (CPT, 29 April 2014), § 168–168; see also S. Shalev, *A sourcebook on solitary confinement* (London: Mannheim Centre for Criminology, 2008), p. 30.

Material conditions in a cell in which solitary confinement is effected in terms of space, air light, bed, hygiene etc. should meet the standards set for detention conditions of the general population of prisoners.[476] The SPT held that isolation cells should provide conditions respectful of physical integrity and dignity of detainees.[477]

As regards the maximal duration of solitary confinement, a number of international bodies have articulated a position that prolonged solitary confinement may amount to ill-treatment.[478] However, only few of them made clear what they consider prolonged. The SRT proposed that prolonged solitary confinement should be considered that lasting in excess of 15 consecutive days.[479] Similarly, the CPT suggests that solitary confinement imposed as a disciplinary punishment, should not exceed 14 days and preferably be lower,[480] while the IACmHR held that under no circumstances solitary confinement should exceed 30 days.[481] On the other hand, the ECtHR had found that periods of isolation much longer than those suggested above, did not amount to ill-treatment, provided that certain conditions are met. For example, the ECtHR held that solitary confinement lasting just short of one year in one case[482] and more than 8 years in the other[483] did not amount to violation of article 3 although it did note that this regime cannot be prolonged indefinitely.[484]

Degree to which a prisoner undergoing solitary confinement is deprived of sensory stimulus and social contact and the toll these restrictions have taken on him. This notion is best understood if one considers two poles of one continuum. On the one end is the complete sensory and social deprivation by, for instance, placement in a dark cell, whereas on the other a situation just falling short of a regular prison regime, in that a prisoner is prevented from associating with other inmates. The former case is prohibited and always amounts to ill-treatment while the latter does not.[485] Most of real-world cases, however, fall somewhere between these two opposites. In the above case, the extremely protracted utilization of the solitary confinement lasting more than 8 years was not considered to reach the level of severity necessary for ill-treatment as the applicant was only partially isolated (he was able to meet

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[476] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 58–58; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 414–414.
[477] *Report on Argentina* (SPT, 27 November 2013), § 67–67.
[478] *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 6–6; *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 77–77; *Report on Paraguay* (SPT, 07 June 2010), § 295–295; *Castillo Petruzzi et al. v. Peru* (IACtHR, 30 May 1999), § 194–194.
[479] *Solitary confinement: UN Doc A/66/268* (2011), § 26–26.
[480] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 56–56.
[481] R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 411–411.
[482] *Rohde v. Denmark* (ECtHR, 21 July 2005).
[483] *Ramirez Sanchez v. France* (ECtHR, 04 July 2006).
[484] *Ramirez Sanchez v. France* (ECtHR, 04 July 2006), § 145–145.
[485] The SMR explicitly noted that punishment by placing in a dark cell is prohibited, see *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 31–31. The commentary to the EPR distinguishes between total and relative sensory isolation and notes that former is absolutely prohibited see 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 79; for the similar position of the ECtHR see *Van Der Ven v. the Netherlands* (ECtHR, 04 February 2003), § 51–51.

a priest, a large number of his lawyers and his wife, had two hours outdoor exercise per day, access to health care, newspapers and a television set at his disposal). The most important consideration however was that there were strong reasons in favor of prolongation of his segregation on grounds of national security as he was considered an extremely dangerous terrorist who never expressed remorse for his acts. In any case, a prisoner undergoing solitary confinement should benefit from outdoor exercise,[486] family contact[487] and have access to reading material such as books, newspapers etc.[488]

As a final point, more often than not it is the cumulative effect of these factors, as with establishing ill-treatment on account of material conditions and regime in detention, that will determine whether a concrete use of solitary confinement amounted to ill-treatment. For example, even if withholding family contact or access to reading material would, in short term, not amount to ill-treatment, in longer term the cumulative effect of these eventually coupled with unsatisfactory material conditions in the cell, probably would.

6.4.2 Means of restraint

Handcuffs and other means of restraint may be applied exceptionally and removed at the earliest opportunity in order to prevent an escape during transfer, harm, self-harm or serious property damage when other means towards that end have failed or are inadequate.[489] It was underscored that means of restraint ought never be applied as a punishment.[490]

As long as applied in relation to lawful detention and use of force or public exposure do not overstep what is necessary, which, in turn, should be measured in light of danger of escaping, causing injury or damage, the ECtHR considers handcuffing a legitimate measure not running afoul of article 3.[491] Similarly, while discussing means or restraints, the CtAT made clear that their use needs to be governed by notions such as justifiability, necessity, proportionality, shortest duration, last resort and reasons in line with human rights standards.[492]

An assessment whether the above conditions are met is not to be made *in abstracto,* but by taking into consideration indications such as gravity of sentence, criminal record or prior record of violence of each individual.[493] On the other hand, one should not rely exclusively on the gravity of sentence,

[486] *Report on Benin* (SPT, 15 March 2011), § 246–246.
[487] The CtAT speaks of "*meaningful social contact*" that needs to be ensured see *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)* (CtAT, 16 December 2013), p. 34.
[488] The CPT held that prisoners undergoing solitary confinement as a punishment should not be restricted from family contact unless where offense itself stems from such contact, that he should have access to a lawyer and a range of reading material not restricted to religious texts, see *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 61–61.
[489] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), §§ 33–4; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 68–68.
[490] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 61–61; *Report on Maldives* (SPT, 26 February 2009), § 207–207.
[491] *Kashavelov v. Bulgaria* (ECtHR, 20 January 2011), § 38–38.
[492] *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)* (CtAT, 16 December 2013), § 36–36.
[493] *Kashavelov v. Bulgaria* (ECtHR, 20 January 2011), § 39–39.

prisoner's perceived dangerousness or risk of absconding to justify the continuation of the measure. Therefore, a routine practice of handcuffing prisoners serving life sentences whenever they leave their cell without personal assessment of risk, is unacceptable[494] and was, when applied continuously in a time span of 13 years, determined to constitute degrading treatment in violation of ECHR article 3.[495] Similarly, indiscriminate practice of routinely handcuffing prisoners during transfers[496] or medical examinations[497] cannot be justified and was found to constitute ill-treatment. It goes without saying that some means of restraint commonly used in the past such as shackles, chains and irons are now outlawed.[498] As to the manner of application of handcuffs, which are now by far the most commonly used means of restraint in the law enforcement context, the following is to be avoided: handcuffing a prisoner to the wall or to a fixed object such as radiator or a table leg in want of proper detention cells or out of mere convenience of law enforcement officials,[499] excessively tightly applied handcuffs prone to injure the detainee[500] and placing a handcuffed detainee in a cell.[501] On the other hand, disrespect of these standards does not automatically give rise to ill-treatment. For example, handcuffing an aroused woman to a radiator in the corridor of the police station for two hours, although considered improper way of handling a prisoner, did not, according to the ECtHR, amount to ill-treatment.[502]

6.4.3 Body searches

Body search is a measure aimed at maintaining security and order in prisons and police stations by preventing the acquisition of contraband such as weapons, illicit substances and devices. On the other hand, this kind of inspection should never be used to punish or simply harass the inmates. There are, basically, three types of body searches: frisk, strip and intimate searches. Frisk or pat-down search is the least intrusive and consists of feeling the prisoner's body through clothing. Strip search requires the removal of clothing and a visual confirmation that illegal objects are not hidden in or outside the body of the person being searched. Intimate or internal search entails physical verification that these objects are not hidden in a prisoner's body cavities such as anus, vagina or mouth.[503] While all three may amount to ill-treatment, their intrusiveness and hence danger of actually doing so exponentially grows starting with frisk, increasing with strip and ending with intimate search, which just stops short of being

[494] *11th General Report-Some Recent Developments Concerning CPT Standards in Respect of Imprisonment* § 33–33; *Report on Ukraine* (CPT, 29 April 2014), § 136–136.
[495] *Kashavelov v. Bulgaria* (ECtHR, 20 January 2011), § 39–39.
[496] *Report on New Zealand* (SPT, 25 August 2014), § 111–111.
[497] *Report on Czech Republic* (CPT, 31 March 2015), § 16–16.
[498] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 68–68; *Report on Benin* (SPT, 15 March 2011), § 258–258.
[499] *Report on Czech Republic* (CPT, 31 March 2015), § 21–21.
[500] *Report on Danemark* (CPT, 17 September 2014), p. 9.
[501] Locking an adolescent handcuffed behind his back in a police cell overnight, according to the SPT, amounted to inhuman and degrading treatment and punishment, see *Report on Benin* (SPT, 15 March 2011), § 107–107.
[502] Violation of article 3 was nevertheless found on account of excessive use of physical force by the police officer, see *Kuzmenko v. Russia* (ECtHR, 21 December 2010), § 45–45.
[503] APT/PRI, *Factsheet: Body searches - Addressing risk factors to prevent torture and ill-treatment*. http://www.apt.ch/content/files_res/factsheet-4_body-searches-en.pdf, p. 1.

regarded ill-treatment. In fact, some standards made clear that "*intrusive vaginal or anal searches shall be forbidden by law*"[504] while others were satisfied with favoring its replacement with less intrusive techniques and instructing that, for want of alternative, their application should be narrowed down to cases of absolute necessity and surrounded by strong safeguards. In that case, they should be effected as last resort, by qualified medical staff,[505] not acting as prisoner's personal doctor or at least staff with some medical training and in a manner respectful of prisoner's dignity. The CPT even suggested that prison authorities should obtain prosecutor's order before resorting to this measure.[506] In addition, it is well established that, as with the use of restraints, making use of any form of body search is subject to principles of necessity, reasonableness and proportionality.[507] Therefore, an answer to the question whether these principles were satisfied, depends on circumstances of each particular case and personal risk assessment is necessary before the decision is to be reached. It also follows that resorting to strip searches in certain situations[508] (such as return from leave, after closed visit etc.) or in respect of a specific group of prisoners[509] (such as those serving life sentences) as a matter of routine, cannot be justified and, consequently, constitute degrading and/or inhuman treatment.[510]

The manner of execution of a body search is also subject to strong safeguards. It must be executed by the staff member of the same gender[511] and out of sight of the opposite gender, in hygienic conditions, not in the presence of other inmates or more than few staff members.[512] Strip search ought to be effected in a manner that the prisoner is in no moment completely nude.[513] However, one should keep in mind that, similar to suggestions on the manner of applying handcuffs, disregard of the above standards does not necessarily amount to ill-treatment as the level of severity may not be met.[514]

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[504] *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), XXI; It appears that SPT has taken over this standard, see *Report on Brazil* (SPT, 05 July 2012), § 119–119 and *Report on Argentina* (SPT, 27 November 2013), § 72–72; In addition, Bangkok rules dealing with women prisoners set forth that both strip and intimate searches are to be replaced with non-invasive alternatives *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules): A/RES/65/229* (2011), p. 20; see also United Nations: United Nations Office on Drugs and Crime, *Handbook on Women and Imprisonment* p. 44.

[505] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 55–55.

[506] *Report on Greece* (CPT, 10 January 2012), § 50–50.

[507] *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle XXI; *Report on Brazil* (SPT, 05 July 2012), § 119–119; *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/68/295* (2013), § 59–59.

[508] See for example *Report on Czech Republic* (CPT, 31 March 2015), §§ 85–6; *Report on Bulgaria* (CPT, 29 January 2015), § 119–119.

[509] *Report on Latvia* (CPT, 27 August 2013), § 80–80.

[510] The ECtHR in a number of cases found a violation of article 3 to a large extent on account of daily or even more often subjection to invasive strip searches without apparent security justification, see, for example, *Chyla v. Poland* (ECtHR, 03 November 2015), § 97–97; For further references on case law see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 138.

[511] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 54–54; *10th General Report: CPT/Inf (2000) 13* (2000), § 23–23; *Report on Brazil* (SPT, 05 July 2012), p. 119.

[512] *Report on Czech Republic* (CPT, 31 March 2015), §§ 85–6; *10th General Report: CPT/Inf (2000) 13* (2000), § 23–23.

[513] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 76.

[514] For instance, article 3 violation only on account of accidental exposure of nude prisoner undergoing body search to views of third parties was not established as, according to the ECtHR, minimal level of pain and suffering was not reached, see *S.J. (no. 2) v. Luxembourg* (ECtHR, 31 October 2013), §§ 60–2.

Conditions warranting the use of body searches, methods of their implementation and relevant safeguards, need to be regulated by law and preferably made plain in a normative act such as instruction.[515]

Although the above, in principle, also applies to body searches of visitors, it is accepted that the standard of scrutiny should be higher as visitors are not persons deprived of liberty and the objective of maintaining security is to be balanced against their rights.[516]

Finally, it should be noted that the measures discussed (solitary confinement, restraint and body searches) can very easily slip into ill-treatment when used combined in the framework of implementing a stringent security regime. In several cases, it was established that social isolation together with routine resort to handcuffing and strip and/or intimate searches being applied without prior individual assessment, amounted to ill-treatment.[517]

6.4.4 Specificities relating to persons with psychosocial and/or intellectual disabilities

Special note is, again, needed regarding the position of those with psychosocial and/or intellectual disabilities. Of special interest in this regard is the use of means of restraint and seclusion, which, to all effects and purposes, is a measure identical to solitary confinement. These methods somewhat overlap with the medical treatment explained previously,[518] since restraint need not be only mechanical but can take the form of chemical restraint that is the administration of medicine to pacify the patient.[519]

Nowak as the SRT notes that a prolonged use of restraints and solitary confinement towards persons with psychosocial and/or intellectual disabilities may constitute torture or other ill-treatment.[520] The CPT, while not rejecting the use of restraint and seclusion against persons with psychosocial and/or intellectual disabilities altogether, proclaimed that certain means of restraint such as handcuffs, metal chains and cage-beds in psychiatric hospitals, are prohibited and constitute degrading treatment.[521] Also, in the CPT's view, a prolonged use of restraints ("*for days on end*") constitutes ill-treatment.[522] It was further explicated that normal use of restraints should last from few minutes to few hours, the decision

[515] APT/PRI, *Factsheet: Body searches - Addressing risk factors to prevent torture and ill-treatment*; *Report on Czech Republic* (CPT, 31 March 2015), § 22–22.
[516] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 55–55; A. Coyle, *A human rights approach to prison management: Handbook for prison staff*, 2. ed., rev (London: International Centre for Prison Studies, 2009), p. 64; APT/PRI, *Factsheet: Body searches - Addressing risk factors to prevent torture and ill-treatment*. http://www.apt.ch/content/files_res/factsheet-4_body-searches-en.pdf, p. 7.
[517] *Van Der Ven v. the Netherlands* (ECtHR, 04 February 2003), § 63–63; *Piechowicz v. Poland* (ECtHR, 17 April 2012), p. 178.
[518] Refer to section 6.3. Non-consensual medical intervention.
[519] The CPT enumerates methods for controlling patients in psychiatric establishments as follows: shadowing, manual control, mechanical restraint, chemical restraint and seclusion (involuntary placement of a patient alone in a locked room), see *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 39–39.
[520] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), §§ 55–6.
[521] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 40–40.
[522] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 45–45.

to prolong a restraint beyond six hours should be met by two doctors and in no case should a restraint be applied longer than 24 hours continuously.[523]

In addition to this, unlike with prisoners, seclusion can never be used to punish persons with psychosocial and/or intellectual disabilities. Similarly, institutions should never apply these measures for mere convenience (because they lack requisite personnel, to reduce the workload etc.) or to bring about change of conduct.[524]

Therefore, the use of means of restraints or seclusion[525] against persons with psychosocial and/or intellectual disabilities is allowed only when deemed strictly necessary for preventing patients from hurting themselves or others,[526] authorized by a doctor, applied under constant supervision of qualified medical staff, for the shortest period necessary and with an accountability mechanisms in place.[527] Only the excessive, unwarranted or incorrect application of these measures may amount to ill-treatment.

As is to be expected, only CtRPD made it unambiguously clear that both segregation and practice of restraining persons with psychosocial and/or intellectual disabilities are to be abolished without exceptions as they, in and of themselves, violate the prohibition of ill-treatment stipulated in CRPD article 15[528] and may even amount to torture.[529] In addition, concern was expressed regarding the use of straps or belts for more than 48 hours, chemical restraints[530] and continuous use of net beds,[531] solitary confinement in unhygienic conditions and with physical neglect.[532]

In sum, although, in addition to the outlined position of the CtRPD, there are voices arguing that the use of these methods should be absolutely prohibited,[533] the prevailing position is that seclusion and restraint of persons with psychosocial and/or intellectual disabilities are not banned *per se* but subject to conditions stricter even than those applicable to the general population of detainees.

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[523] *The Use of Restraints in Psychiatric Institutions-working document* (CPT, 13 June 2012), p. 17; *Report on Czech Republic* (CPT, 31 March 2015), § 165–165.
[524] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 43–43.
[525] Although it did not considered it illegal, the CPT voiced particular scepticism towards use of seclusion, see *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 42–42.
[526] The CPT speaks of preventing "*imminent injury or to reduce acute agitation and/or violence*", see *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 43–43.
[527] Y. Ginbar and J. Welsh, 'Torture in Health Care Settings: Urgent Issues and Challenging Questions', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 263–76, at pp. 274–5; see also *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), §§ 43–6; similar standards for use of these measures have been voiced by the CtAT and SPT as well, see *Concluding observations on Japan* (CtAT, 28 June 2013), § 22–22 and *Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the rights of persons institutionalized and medically treated without informed consent: UN Doc CAT/OP/27/2* (2016), §§ 9–10.
[528] *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities* (2015), § 12–12.
[529] *Concluding observations on the initial report of Mexico* (CtRPD, 27 October 2014), p. 31.
[530] *Concluding observations on the initial report of Denmark* (CtRPD, 30 October 2014), § 38–38.
[531] *Concluding observations on the initial report of Austria* (CtRPD, 30 September 2013), § 32–32.
[532] *Concluding Observations on the Czech Republic* (CtAT, 13 July 2012), § 21–21.
[533] For example, the SRT suggested an absolute prohibition of use of restraints and seclusion in all places were person with mental disabilities are held, see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/22/53* (2013), § 63–63; But even he, as with developments regarding forced treatment, moderated his position by noting that in his thematic report he argued against discriminatory use of these measures and did not advocate for an absolute ban, see J. E. Mendez, 'Response by the Special Rapporteur to the Joint Statement by the American Psychiatric Association (APA) and the World Psychiatric Association (WPA)', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 151–3, at p. 152.

6.5 Corporal punishment

Corporal punishment, (as a judicial or administrative sanction) is always inconsistent with the international prohibition of ill-treatment. In addition to being explicitly prohibited in III and IV Geneva Conventions and in Additional Protocols and qualified as, at least, degrading treatment by human rights bodies', the prohibition of corporal punishment forms a part of customary international law.[534] Moreover, while every corporal punishment inevitably contains elements of degradation or humiliation, it can rise to the level of torture as well, provided that the severity requirement is satisfied.[535]

[534] J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary international humanitarian law* (Cambridge, New York: Cambridge University Press, 2005), p. 319.

[535] For the overview of practice of different universal and regional human rights organs that confirm the position that corporal punishment always constitutes at least degrading punishment see M. Nowak, E. McArthur and K. Buchinger, The United Nations Convention against torture: A commentary, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2008), pp. 563–4.; However, the issue of absolute universal prohibition of corporal punishment is not without its uncertainties. Namely, while regional human rights systems, such as that in Europe, may have prohibited corporal punishment in absolute terms, at the universal level it could be argued that corporal punishment could not represent torture, due to CAT art. 1 lawful sanction clause. Moreover, specific corporal punishments such as flogging or cutting the hand would not even amount to other forms of ill-treatment since they, so the argument goes, are considered neither cruel nor inhuman or degrading by the population of Muslim countries where they are applied under Sharia law. For this argument see for example A. A. An –Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhumanr, or Degrading Treatment or Punishment', in M. Goodale (ed.), *Human rights: An anthropological reader* (Chichester, U.K.: Wiley-Blackwell, 2009), pp. 68–85, at pp. 68–85; This opinion is, however, rejected in the legal literature, see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 442; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), §§ 209–28. Physical punishment of children at home is more controversial since it is applied by a non-state actor on the one hand, and it intrudes into private relations in the family, on the other. In case of A v UK a man was acquitted before English courts for administering several blows with a cane onto his stepson on several occasions. The ECtHR found that these acts in terms of severity crossed the severity threshold required for violation of article 3. UK was, on the other hand, found responsible because it failed to envisage sufficient safeguards against this sort of treatment in its legislation. *A. v. the United Kingdom* (ECtHR, 23 September 1998), § 24–24; Although Committee on the Rights of the Child held that resort to any kind of violence towards children is not in accordance with the Convention on the Rights of the Child, this question is far from settled, since many of the national legal systems do not absolutely prohibit physical punishment of children by parents or guardians. Legal scholars versed with prohibition of torture are, as it appears, of the opinion that corporal punishment, including that administered by parents, is absolutely prohibited and thus support the position of the Committee, see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 211–211.

7 Chapter: Introduction to human rights obligations

7.1 Overview of obligations under international human rights law

As we have noted, the prohibition of ill-treatment is absolute and non-derogable. In addition to this, at least the prohibition of torture (and arguably inhuman and degrading treatment and punishment) holds the status of peremptory norm of general international law.[536] This tells us something about the nature of the right not to be subjected to ill-treatment, but it does not tell us which obligations correspond to this right. In what follows, a short summary of the general human rights obligations, their nature and scope, will be provided. Thereafter, it will be elaborated in more detail what obligations arise from the prohibition of ill-treatment.

Rights recognized as fundamental at the international level and specified in international instruments relating to human rights, generate certain obligations on the part of the duty bearer. In the context of enjoyment of human rights a question often asked is who the bearer of the duty to implement human rights is? There is no doubt that states are the principal duty bearers since human rights were devised to serve as check against the state power.[537] Nevertheless, some claim that the basic negative duty to refrain from violating human rights binds non-state actors as well.[538] There is some intrinsic truth in this position, since without the protection against non-state actors, especially violence stemming from private persons, one's enjoyment of rights remain illusory. On the other hand, this issue touches upon a larger debate on the nature of human rights and whether they produce the so called horizontal effect, that is to say protect against all violations, including those in the private sphere, or address the relation between the government and the governed only.[539] There is no need to try to resolve this dispute here. Without prejudicing any side of the debate, in what follows only obligations of states will be analyzed and obligations of individuals to the extent that regulating individual behavior and sanctioning violations stem from explicit obligations of the state as framed in international human rights law. However, before delving into different classifications of human rights obligations, special nature or character of human rights obligations deserve brief mention.

Whereas obligations arising from human rights treaties are generally similar to those arising under international treaties in general, there is a crucial difference in that the former acquire special character in respect of the latter. Megret explains this special character of human rights obligations by taking notice of the difference in relations between right holders and duty bearers. Namely, classical

[536] Refer to chapter 4 Character of the prohibition of ill-treatment in international law.
[537] N. Rodley, 'Can Armed Opposition Groups Violate Human Rights?', in K. E. Mahoney and P. Mahoney (eds.), Human rights in the twenty-first century: A global challenge (Dordrecht, Boston: M. Nijhoff, 1993), pp. 299–300.
[538] H. Shue, Basic rights: Subsistence, affluence, and U.S. foreign policy, 2nd ed (Princeton, N.J: Princeton University Press, 1996), p. 60. H. J. Steiner, P. Alston and R. Goodman, International human rights in context: Law, politics, morals : text and materials, 3rd ed (Oxford [UK], New York: Oxford University Press, 2008), p. 187. J. W. Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15, Human Rights Quarterly, 77–86 at 82–3.
[539] On horizontal effect of human rights see M. Nowak, *Introduction to the international human rights regime* (Leiden: M. Nijhoff, 2003), pp. 50–3.

international treaties are governed by the principle of reciprocity where contracting states are committing to each other to abide by obligations they assumed; they are simultaneously duty holder and beneficiary. By contrast, states parties to human rights treaties are committing to respect rights of individuals within their jurisdiction; they are duty holders but beneficiaries are private persons residing on their territory. Furthermore, given that accepting human rights obligations—different to constitutive character of obligations under normal international law—has a declarative character in the sense that states merely confirm their commitment to rights that predate the concrete instrument they have ratified, human rights obligations, as the author shrewdly pointed out, have a quasi-constitutional character. Megre goes on to say that

> "*International human rights thus appear as the cement that binds groups of states together in a collective project that is both domestic and supranational, rather than international in the strict sense of the term*."[540]

7.2 Negative and positive obligations

State obligations relating to human rights are usually divided in two basic clusters: negative and positive. Negative obligations are those where a state needs only to refrain from violating rights, while the notion of positive obligation implies that a state must act to enable their enjoyment. In the context of this dichotomy, violation in the former arises through action while in the latter out of omission. It was held that the observance of classical civil and political rights requires states only not to interfere while the so-called second generation of rights, social and economic rights—if recognized at all as human rights—necessitate positive action and thus, some kind of transfer of resources. This division, in its original form, was soon discarded since simple restraint is rarely sufficient to ensure the enjoyment of civil and political rights while proper observance of social and economic rights cannot be achieved merely by transfer of means.[541] A division of State obligations on negative and positive, however, remains of use if understood not to mirror the division on political and civil on the one and economic and social rights on the other side. Therefore, a state has a range of negative (to respect) and positive obligations (to ensure or secure rights).[542] An obligation to ensure is sometimes referred to as an umbrella obligation, which, besides the obligation to respect covers the obligation to create

[540] F. Megret, 'Nature of Obligations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 97–118, at pp. 98–101.
[541] H. Shue, Basic rights: Subsistence, affluence, and U.S. foreign policy, 2nd ed (Princeton, N.J: Princeton University Press, 1996), pp. 37–9.
[542] The ICCPR and the IACHR use the wording *respect and ensure*, the ECHR the term *secure* while the ACHPR uses *recognise*. The reason to somewhat weaker formulation in the ACHPR is that unlike its counterparts, in addition to civil and political it guarantees economic social and cultural rights. Common Article 1 to the Geneva conventions also contain basic obligations to *respect* and *ensure respect*. Despite the fact that reach of the Common Article 1 is not settled, it is beyond debate that it incorporates at least positive and negative obligations similar to those espoused in human rights treaties, see C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *European Journal of International Law* 21 (2010), 125–71, at 170; T. Koivurova, 'Due Diligence', in R. Wolfrum (ed.), *MPIL: (online ed.)* at §§ 32–33.

preconditions for enjoyment of rights and the obligation to provide protection against private interference with rights.[543]

7.3 Obligation to respect, fulfill and protect

In deliberations on the content of the obligations to respect and ensure or secure rights, one can discern three separate but interrelated sets of obligations applicable to all rights: obligation to respect, fulfill and protect. Obligation to respect reflects the basic negative obligation not to interfere with the rights guaranteed beyond the explicitly allowed limitations, if any, stipulated by the respective instruments. The obligation to fulfill implies a positive duty to take measures of legislative and practical nature to facilitate the enjoyment of rights. Lastly, the obligation to protect consists of measures aimed at protecting individuals from violations stemming from other private persons.[544] This arrangement, suggested by Henry Shue in his acclaimed book *Basic rights* and termed as duties to avoid, protect and aid,[545] was later renamed as obligation to respect, protect and fulfill and was utilized in human rights literature[546] and various documents of non-binding nature. The CtESCR employed the same classification while discussing the right to adequate food.[547] HRC General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant adopted on 29 March 2004, while not citing explicitly the formulation "obligations to respect, protect and fulfill", basically employs the same approach.[548] There are, of course other classifications, but they are all based upon this one and further specify its distinct features.[549]

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[543] T. Buergenthal, 'To Respect and to Ensure: State Obligations and Permisible Derogations', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 72–91, at p. 77; E. Klein, 'The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights', in E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (2000), pp. 295–318, at pp. 298–9.

[544] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 37–40; F. Megret, 'Nature of Obligations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 97–118, at pp. 101–4.

[545] H. Shue, *Basic rights: Subsistence, affluence, and U.S. foreign policy*, 2nd ed (Princeton, N.J: Princeton University Press, 1996), pp. 52–3.

[546] M. Nowak, Introduction to the international human rights regime, (Leiden: M. Nijhoff, 2003), pp. 48–51; Human rights indicators: A guide to measurement and implementation (New York, Geneva: United Nations Human Rights, Office of the High Commissioner, 2012), p. 10.

[547] *General comment No. 12: The right to adequate food (art. 11): UN Doc /C.12/1999/5* (1999), § 15–15.

[548] *General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: UN Doc CCPR/C/21/Rev.1/Add. 13* (2004), §§ 5–8.

[549] For example Steiner et al. proposed division based on 5 distinct obligations: (1) Respect Rights of Others, (2) Create Institutional Machinery Essential to Realization of Rights, (3) Protect Rights / Prevent Violations, (4) Provide Goods and Services to Satisfy Rights, (5) Promote Rights, see H. J. Steiner, P. Alston and R. Goodman, International human rights in context: Law, politics, morals : text and materials, 3rd ed (Oxford [UK], New York: Oxford University Press, 2008), pp. 187–9.

7.4 Obligations of conduct and result

This division of state obligations is intended to clarify when the breach of a particular obligation came to pass. The Maastricht Guidelines specify that obligations to respect, protect and fulfill contain elements of obligations of conduct and of result.

Through the obligation of conduct or due diligence states are not required to attain a specific result, but try their utmost to do so.[550] This obligation has been described as "*obligation to endeavor or to strive to achieve a certain result*".[551] State behavior is scrutinized against a certain standard of conduct (that of "*responsible citizen or responsible government*"[552]), not against achieving an exact result. The conduct required is measured against the international standard of a well-organized government although in some areas it may be higher.[553]

In contrast, the obligation of result requires reaching a certain result.[554] In this sense, the process of reaching the result is irrelevant and failure or success is judged only by the fact of existence or absence of a preferred outcome. An example often used to illustrate the difference in the context of national law, is that a medical doctor is obligated to do his best to cure the patient (obligation of conduct or due diligence) while a car salesman must deliver a car that was bought and paid (obligation of result).[555] Pisillo summarized the distinction between the two as follows: "*the obligation of result is an obligation to "succeed", while the obligation of diligent conduct is an obligation to "make every effort*"".[556] In accordance with this understanding, the obligation of result is stricter than the obligation of conduct since, in absence of a predetermined outcome, a state cannot exculpate itself by demonstrating that it did everything it reasonably could and what was in its power to reach a result.

In addition to this, the understanding of obligations of conduct and result derived from national, notably French legal order, there is another understanding that has been sponsored by the Special Rapporteurs on State Responsibility Roberto Ago in the course of drafting Articles on state responsibility under the auspices of the International Law Commission. According to his understanding, a breach of obligation of conduct would occur automatically as soon as a state fails to adopt a particular

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[550] Christian Tomuschat, International law. Ensuring the survival of mankind on the eve of a new century : general course on public international law Recueil des cours - Académie de Droit International de La Haye, 283–284 (2001, cop. 2001); Constantin P Economides, Content of the Obligation: Obligation of Means and Obligations of Result, in The law of international responsibility, 371, 372 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010).
[551] Pier Marie Dupuy, Reviewing the Difficulties of Codification: On Ago´s Classification of Obligations of Means and Obigations of Result in Relation to State Responsibility, 10 European Journal of International Law 371, 375 (1999).
[552] T. Koivurova, 'Due Diligence', in R. Wolfrum (ed.), *MPIL: (online ed.)*
[553] Riccardo Mazzeschi Pisillo, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 German Yearbook of International Law 9, 44–45 (1992).
[554] Pier Marie Dupuy, Reviewing the Difficulties of Codification:.On Ago´s Classification of Obligations of Means and Obigations of Result in Relation to State Responsibility, 10 European Journal of International Law 371, 375 (1999); Constantin P Economides, Content of the Obligation: Obligation of Means and Obligations of Result, in The law of international responsibility, 371, 372 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010).
[555] P. M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago´s Classification of Obligations of Means and Obigations of Result in Relation to State Responsibility', *European Journal of International Law* 10 (1999), 371–85, at 375.
[556] R. M. Pisillo, 'The Due Diligence Rule and the Nature of the International Responsibility of States', *German Yearbook of International Law* 35 (1992), 9–51, at 48.

conduct explicitly required by a certain obligation. In contrast, a breach of obligation of result takes place when a state, using means of its choice, does not reach a desired result.[557] However since this account of conduct/result dichotomy faced substantial criticisms and was eventually not included in the final version of the Draft Articles on State Responsibility,[558] it will not be discussed in more detail.

A division of state obligations on that of conduct or due diligence and that of result has a long history in general international law. Whilst not apparent on the face of it, this division can have a large impact on the actual level of enjoyment of human rights. Namely, by defining the boundaries of state responsibility, it indirectly sets incentives for states to secure this right to all persons under their jurisdiction by determining the extent of effort a state is required to undertake to comply with its international obligation. Although there are no universally applicable rules for distinguishing between obligations of result and conduct, an amount of risk a state is faced with while fulfilling the specific obligation probably makes the most important criteria. Namely, whether a state has greater or lesser discretion in executing a specific obligation depends on the notion of certainty, that is, described in negative terms, the absence of risk in fulfilling a particular obligation.[559] Low risk indicates an obligation of result while high risk that of conduct. This element is well established in the ECtHR case law as well as in the context of securing the rights envisaged by the Convention when violation occurs inside the private sphere, that is, by a non-state actor.

7.5 Obligation of prevention or repression

Human rights obligations can be further specified by differentiating between those of prevention and repression. This relation is twofold. Firstly, the obligation of prevention includes that of repression since repression has a preventive effect as well. Secondly, a failure of the obligation to prevent triggers the obligation of repression i.e. to adequately punish the perpetrators of the incident a state has failed to prevent.[560]

7.6 Conclusion

It is safe to conclude that among state obligations arising under IHRL and IHL, one can differentiate between those having a negative and a positive nature. Former, also referred to as duty to respect, are designed to shield individuals from the unjustified state interference while the latter, duty to ensure,

[557] Report of the Commission to the General Assembly on the work of its twenty-ninth session, vol. 2 29 (1977).
[558] J. Crawford, *The International Law Commission's articles on state responsibility: Introduction, text and commentaries*, 1. ed. (Cambridge: Cambridge University Press, 2002).
[559] R. M. Pisillo, 'The Due Diligence Rule and the Nature of the International Responsibility of States', *German Yearbook of International Law* 35 (1992), 9–51, at 49; Constantin P Economides, Content of the Obligation: Obligation of Means and Obligations of Result, in The law of international responsibility, 371, 379–380 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds., 2010).
[560] C. P. Economides, 'Content of the Obligation: Obligation of Means and Obligations of Result', in J. Crawford, A. Pellet, S. Olleson and K. Parlett (eds.), The law of international responsibility, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2010), p. 374.

entails facilitating observance of the negative obligation on the one hand, and provides protection from interference coming from non-state actors, on the other. These obligations were further specified as obligation to respect (not to violate rights), fulfill (create preconditions for observing rights) and protect (taking measures aimed at preventing and/or investigating and redressing violations coming from private persons). The conduct - result dichotomy addresses what a state needs to produce in order to comply with the obligation. In the former it needs to make every effort to achieve a result stipulated in an obligation while in the latter only reaching a specific result matters. Finally, obligations of repression and prevention, whilst obviously different, are interrelated.

8 Chapter: Public private dichotomy in international human rights law

Generally, international law deals only with the state responsibility effected by a breach of the specific obligation by an official whose acts are attributable to the state. This assumption is equally valid in respect of international human rights law.[561] It should follow that acts of purely private persons cannot be attributed to the state and thus, lead to responsibility.[562] In addition, an individual is precluded from seeking to establish individual responsibility of an alleged perpetrator (a physical person or legal entity) by addressing international instances. It is not that individuals or corporations cannot violate rights of individuals but the underlying rationale is that these kinds of offences are usually being dealt with within national legal orders.[563] State institutions, by applying national criminal or civil law, so the argument goes, ought to sanction attacks on physical integrity or other offences committed by third parties. Dealing with state induced violence at an international level was actually prompted by the concern that an effective and impartial functioning of a state-run justice system will be hindered when the alleged perpetrator is itself a member of state administration.[564]

An essentially similar argument applies to "elevating" specific instances of mistreatment perpetrated by private actors to the international plane. In some fields, especially as regards members of vulnerable groups such as women, children, minorities etc., a state, through the regular functioning of its legal system, is not able to secure the rights they are entitled to. Differently put, the main argument is that international law cannot keep its eyes closed in relation to states' passivity in the face of widespread abuse of vulnerable individuals even if committed by private persons. Although individuals can be held responsible for specific crimes under international criminal law, this is rather an exception and, even if we disregard specificities of ICL precluding its use outside the armed conflict, ICL's machinery cannot, even in its most optimistic development, manage to deal with all the violations committed by private actors. Therefore, it seems necessary to, again, hold the state liable for these crimes under IHRL rules. But this runs counter to the abovementioned general rule, stating that acts of private persons cannot be imputed to states and that consequently we cannot speak of state responsibility. International human rights bodies surmounted this hurdle by reasoning that acts of individuals need not be imputed to the state since state responsibility arises from a separate ground: its own omission to take appropriate steps to prevent private actions and/or punish the perpetrator of the

[561] On attribution in field of international human rights law see S. Marks and F. Azizi, 'Responsibility for Violations of Human Rights Obligations: International Mechanisms', in J. Crawford, A. Pellet, S. Olleson and K. Parlett (eds.), The law of international responsibility, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2010).
[562] J. Crawford, *The International Law Commission's articles on state responsibility: Introduction, text and commentaries*, 1. ed. (Cambridge: Cambridge University Press, 2002), p. 91.
[563] J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture. A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, vol. 9 119–120 (1988); Lene Wendland, A Handbook on State obligations under the UN Convention Against Torture 29.; R. McCorquodale and R. La Forgia, 'Taking of the Blindfolds: Torture by non-state Actors', *Human Rights Law Review* 1 (2001), 189–218, at 192.
[564] Id., 119–120.

offence. Under these circumstances, states are not (usually) designated as direct human rights violators since they (or their agents) did not violate rights. Rather, they failed to abide by a distinct obligation: the obligation to protect, that is to say, prevent and redress violations inflicted by third party actors. More precisely, the particular notion of passivity or omission to act in a situation when such acts would not have placed unreasonable burden on the state agents concerned, leads to state responsibility. This distinct obligation to protect or prevent is not new to general international law as it was developed in areas such as protection of aliens or environmental protection[565] and labeled as "*theory of neglected duties*".[566] In human rights context it has been referred to as "*indirect horizontal effect of human rights*".[567] Here, acts of private persons are not attributed to the state, but instead serve as a "*catalyst*" for rise of a violation of a discrete obligation.[568]

This type of responsibility has been recognized and utilized by international human rights courts and other supervisory bodies but expressed in different terms. The IACtHR used the concept of due diligence, the ECtHR used the notion of positive obligations, while the HRC stressed the obligations of states to respect, protect and fulfill.[569] The CtAT, for its part, emphasized the state obligation to prohibit, prevent and redress ill-treatment in, inter alia, "*contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm*".[570] Although these bodies grounded their decisions to compel states to react to dangers coming from non-state actors in different provisions[571] (the CAT in obligation to prevent ill-treatment, while the others in general obligation to ensure or secure rights to all individuals under their jurisdiction), they all had set a due diligence standard as a benchmark against which state performance and responsibility is to be assessed. In these situations, state responsibility was neither strict nor automatic, as with violations committed by public officials. Instead, state had to meet certain standard of best efforts, failing of which, it became responsible.

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[565] Riccardo Mazzeschi Pisillo, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 German Yearbook of International Law 9 (1992).; Christine Chinkin, A Critique of the Public/Private Dimension, 10 European Journal of International Law 387, 394 (1999).; Lehto 2009, S. 224–225.

[566] Franciszek Przetacznik, Protection of officials of foreign states according to international law 207 (1983).

[567] F. Megret, 'Nature of Obligations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 97–118, at p. 102.

[568] O. De Frouville, 'Attribution of Conduct to the State: Private Individuals', in J. Crawford, A. Pellet, S. Olleson and K. Parlett (eds.), *The law of international responsibility*, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2010), pp. 257–80, at p. 275; R. Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in *Schachter, Ragazzi (Ed.) 2005 – International responsibility today* pp. 423–34, at p. 425; R. Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC´s Definition of the 'Act of state' Meet the Challenges of the 21st Century?', in P. R. Baehr, M. C. Castermans-Holleman, Hoof, G. J. H. van and J. Smith (eds.), *The role of the nation-state in the 21st century: Human rights, international organisations, and foreign policy : essays in honour of Peter Baehr* (The Hague, Boston: Kluwer Law International, 1998), pp. 91–116, at pp. 96–7; M. Lehto, *Indirect responsibility for terrorist acts: Redefinition of the concept of terrorism beyond violent acts*, The Erik Castrén Institute monographs on international law and human rights (Leiden, Boston: Martinus Nijhoff Publishers, 2009), v. 10, pp. 224–5.

[569] S. Marks and F. Azizi, 'Responsibility for Violations of Human Rights Obligations: International Mechanisms', in J. Crawford, A. Pellet, S. Olleson and K. Parlett (eds.), The law of international responsibility, Oxford commentaries on international law (Oxford, New York: Oxford University Press, 2010), p. 731.

[570] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 15–15.

[571] Buergenthal, *Buergenthal 1981*, p. 77; M. Milanovic, *Extraterritorial application of human rights treaties: Law, principles, and policy*, Oxford monographs in international law (Oxford, New York: Oxford University Press, 2011), p. 46.

Therefore, protection of vulnerable individuals in the private sphere was achieved indirectly by construing that state failed to achieve the diligence standard due. This standard comes down to enacting and thoroughly implementing the legislation addressing or tackling the position of members of vulnerable groups. This would entail setting up mechanisms capable of preventing violations of rights and in case they nevertheless occurred, conducting effective investigation, adequately sentencing perpetrators and redressing victims.

9 Chapter: State obligations stemming from the prohibition of ill-treatment

The right not to be ill-treated had passed through substantial evolution in the previous several decades. It was gradually expanded in terms of what constitutes prohibited treatment and who is the beneficiary of this prohibition. The main trend since the first modern formulation of the prohibition of ill-treatment in UDHR, which took the form of a negatively formulated right, was centred around making this prohibition more effective and widening its scope beyond the one initially envisaged. These developments in turn generated corresponding state obligations. It needs to be emphasized that there is no true or false but only different classifications of State obligations arising from the prohibition of ill-treatment. In other words, different classifications illuminate different aspects of the same subject.

9.1 Obligation to respect, protect and fulfil the right not to be subjected to ill-treatment

Obligations arising from the prohibition of ill-treatment can be expressed within classical frameworks reflecting human rights obligations namely framework stressing negative and positive obligations and that underscoring obligations to respect, protect and fulfil rights. It follows that states have core negative obligation to refrain from acts amounting to ill-treatment and positive obligations requiring state action. These positive obligations can be further differentiated on the obligation to fulfil and to protect. The obligation to fulfil consists of diverse duties of mainly or partially preventive nature (to invest in building decent detention facilities, invest in medical care of prisoners etc. adopt appropriate legislative framework etc.). The obligation to protect stresses the state responsibility to safeguard everyone under its jurisdiction from abuse inflicted by non-state actors.[572]

9.2 Obligation not to ill-treat and obligation to prevent ill-treatment

This basic negative obligation to respect entails states not to interfere in one's physical and mental integrity when such interference amounts to ill-treatment. This would necessitate, *inter alia*, refraining from unwarranted use of violence, physical or psychological, against people within their jurisdiction with or without a forbidden purpose in mind, not to expose persons deprived of liberty to conditions and a regime amounting to ill-treatment etc. This obligation mostly but not exclusively deals with persons deprived of their liberty. Situations where states have a duty not to ill-treat outside the deprivation of liberty context encompass various situations, such as the use of force by law enforcement

[572] M. Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', in A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict*, Oxford handbook, First edition pp. 387–409, at pp. 396–7.

officers, the duty not to discriminate against certain groups as well as the duty not to extradite a person to a state where he might be ill-treated.

Positive obligations on the other hand, to ensure the right not to be ill-treated (to fulfil and protect), can be perceived as a general duty to prevent ill-treatment from taking place. The notion of prevention has been deliberately employed in order to incorporate related notions such as protection or promotion since their effects can be seen as preventive, in a broad understanding of the term.[573] Therefore, the general duty to prevent ill-treatment mandates undertaking a range of measures including those aimed at repression (investigating, indicting and adequately sentencing perpetrators), providing reparations to victims and protecting individuals from privately induced violence.

9.2.1 Relationship between obligation not to commit and prevent ill-treatment

The CAT stipulated the obligation to prevent torture and inhuman or degrading treatment, but it did not explicitly prohibited ill-treatment because its drafters considered it already outlawed in international law and did not find necessary to repeat it again in the main text of the treaty.[574] Similarly, the ICJ found that the obligation to prevent genocide implies the prohibition to commit genocide.[575] It follows that prohibition is implicit in the obligation to prevent. This can go *vice versa*. For example, although, opposite to the CAT and the Genocide convention, there is no mention of prevention in the texts of regional human rights treaties and the ICCPR, it was recognized that formal prohibition does not suffice and that states should aim to prevent ill-treatment from taking place. For example, the HRC remarked that

> "*it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.*"[576]

The ECtHR also found that the obligation of prevention, which together with the obligation to investigate forms the obligation to protect, is implied in the prohibition and spelled out a range of positive actions that a state should undertake in order to comply with it.[577] The conclusion to be drawn is that prohibition and prevention go hand in hand and that one is inferred from or incidental to the other. In what follows, more light will be shed on this general obligation to prevent ill-treatment.

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[573] N. S. Rodley, 'Reflections on Working for the Prevention of Torture' (2009) 6, Essex Human Rights Review, 15–21 at 19.
[574] J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture. A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, vol. 9 1 (1988); .Manfred Nowak, Elizabeth McArthur & Kerstin Buchinger, The United Nations Convention against torture. A commentary 8 (2008).
[575] International Court of Justice, vom 26.02.2007, § 166; for the opposite opinion see Gaeta 2007, S. 635.
[576] Human Rights Committee 1992, § 8.
[577] D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), p. 107.

10 Chapter: Obligations to prevent under the international prohibition of ill-treatment

The obligation to prevent torture is explicitly stipulated in Article 2 paragraph 1 of the CAT:

> *"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"*

Article 16 paragraph 1 envisages obligation to prevent other forms of ill-treatment:

> *"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."*

Regardless of the fact that the obligation to prevent is situated in two different articles dealing with different forms of ill-treatment, the substance of this obligation is common to both as measures taken to prevent torture at the same time prevent other ill-treatment and *vice versa*.[578]

10.1 Duality of the obligation to prevent ill-treatment

The public-private dichotomy between positive and negative obligations, that is the obligation to protect and the one to respect, translates into the obligation of prevention as well. This obligation, following the division of state obligations to respect and protect, in its broad meaning encompasses two conceptually distinct notions, which, nevertheless in some respects overlap. Prevention in an internal sense is tantamount to the obligation to fulfill and aims at preventing ill-treatment committed by state agents or arising from material condition in detention. Prevention in an external sense mirrors the salient features of obligation to protect and thus seeks to prevent violence among private persons.

While clarifying the scope of the obligation to prevent and state responsibility, the CtAT in para 15 of its General Comment of Article 2 implicitly recognized the two settings where the prevention of ill-treatment operates:

> "*each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.*"[579]

The CtAT also indicated that although the majority of the CAT articles envisage specific preventive measures for the context of deprivation of liberty, the obligation of prevention is not limited to these

[578] Committee Against Torture 1/24/2008, § 3; Ingelse 2001, S. 248,250.
[579] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 15–15.

measures and reduced only to context of detention.[580] In what follows these two preventive duties will be examined separately in order to avoid any misunderstanding.

10.1.1 Prevention in internal sense (obligation to fulfill)

This obligation consists of actions aimed to discipline or dissuade thousands of law enforcement officials (police and prison officers etc.) and other state agents from committing ill-treatment by, *inter alia*, enacting legislation, removing incentives to resort to ill-treatment, providing training and putting in place safeguards that are to facilitate an effective investigation and sanctioning of perpetrators. As Rodley points out *"Removing the opportunity to torture, of necessity prevents it"*.[581] It also obliges states to provide adequate medical care, living conditions and activities to persons deprived of their liberty. Whereas this obligation reflects the internal notion of prevention and is explicitly stipulated in CAT article 2,[582] its content is scattered through a range of documents and decisions of judicial and quasi-judicial bodies, which may contribute to the prevention of ill-treatment. Therefore, in addition to the CAT, whose each and every article can be seen as strengthening the basic prohibition of ill-treatment,[583] the OPCAT and ECPT, the content of this obligation is specified in a number of soft law instruments. These include documents such as the SMR, EPR, general comments of treaty bodies[584] or standards set out in reports of specific inspection bodies such as the CPT and the SPT. Some of these standards are transposed in legally binding treaties such as the CAT or the OPCAT thus acquiring separate standing as full-fledged legal obligations.[585] They may also acquire a more binding character through the incorporation in the case law of bodies for protection of human rights. The HRC has, for example, explicitly endorsed standards concerning the treatment of persons deprived of their liberty contained in soft law documents such as the SMR.[586] The ECtHR extensively referred to standards contained in a range of soft law instruments such as the EPR, SMR, the Istanbul protocol and CPT standards.[587] Outside of detention, there are rules governing the use of force, including the use of firearms. All these soft law instruments are actually aimed at preventing ill-treatment by assisting states to comply with its basic negative obligation to refrain from ill-treating. In conclusion, there is no ultimate list of measures whose application would ensure preventing ill-treatment in each and every

[580] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 25–25.
[581] Rodley, 18.
[582] R. McCorquodale and R. La Forgia, 'Taking of the Blindfolds: Torture by non-state Actors' (2001) 1, Human Rights Law Review, 189–218 at 193.
[583] Although not each and every obligation arising under the CAT falls squarely within the scope of obligation to prevent, they all, at least in part, contribute toward that end. For example, conducting effective investigation and adequately redressing the victims also serve the end of bringing justice to the victims. Similarly, observance of the exclusionary rule, besides producing a preventive effect, aims to maintain the integrity of judicial process, see Nowak et al. 2008, S. 113; Committee Against Torture 24.01.2008, § 1.
[584] See, for instance, Committee Against Torture 24.01.2008, § 13; Human Rights Committee 1992, § 11.
[585] Forlati 2011, S. 201–202
[586] Human Rights Committee 1992, § 5; see also Joseph und Castan, S. 317.
[587] See, for example, *S v. Switzerland* (ECmHR, 12 July 1990), § 93–93; *Nevmerzhitsky v. Ukraine* (ECtHR, 05 April 2005), 63, 97; *Vinter and Others v. the United Kingdom* (ECtHR, 09 July 2013), 77, 115-6; *Babar Ahmad and Others v. the United Kingdom* (ECtHR, 10 April 2012), § 115–115; *Harakchiev and Tolumov v. Bulgaria* (ECtHR, 08 July 2014), § 204–204. See also references cited in footnotes 362, 363 and 364.

situation. This is because much of real life situations are "content specific" and thus require the utilization of measures capable of preventing ill-treatment under specific circumstances.[588]

10.1.2 Prevention in external sense (obligation to protect)

This obligation is broader and, while it encompasses some aspects of the previous (for example both underline the importance of conducting thorough and effective investigations, punishing the perpetrators and redressing the victims), its main focus is placed on developing and implementing measures or policies which seek to eliminate negative societal phenomena such as domestic violence, abuse of children and other vulnerable individuals. It consists of several components: legislative, institutional and operational (taking measures to identify danger to individuals and remove it), which are aimed at preventing violence against members of vulnerable groups. The Special Rapporteur on violence against women assembled criteria to assess if and to what extent states have complied with their due diligence obligation to prevent domestic violence. The criteria include ratification of main human rights treaties, existence of constitutional guarantee of equality between man and women, adequacy of legislation, national policy plans regarding domestic violence, sensitivity of the criminal justice system on the issue of violence against women, availability of support services, education and media coverage and possibility of assembling relevant statistic.[589] In any case, here we can speak of the obligation to prevent as a self-standing obligation.

10.2 Breach of the obligation to prevent

While it is clear that a breach of the negative obligation to refrain from ill-treatment is effected when such treatment actually takes place, it is more ambiguous when an obligation to prevent ill-treatment is breached. Here again, the obligation to prevent in internal and external sense need to be differentiated.

10.2.1 Obligation to prevent in internal sense

As to when a state becomes responsible for the violation of prohibition of ill-treatment, the entire international law is based upon the assumption that a state can control actions of those acting in its name. Even in cases when state agents act beyond their competencies or clearly defy orders, if the act is committed in relation to official function it is imputable to the state and thus leads to state responsibility. Even the weakest state is expected to live up to this standard. Tomuschat notes that every state can live up to the obligation not to interfere (to abstain) with the rights protected, failing of which automatically becomes responsible.[590] The ECtHR has stated

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[588] *The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the OPCAT: UN Doc CAT/OP/12/6* (2010), § 3–3.
[589] *Violence against women in the family* (1999), 25.
[590] C. Tomuschat, 'What is a `breach` of the European Convention on Human Rights?', in N. Blokker, D. Curtin and R. Lawson (eds.), *Essays in honour of Henry G. Schermers* (Dordrecht [u.a.]: Nijhoff, 1994), pp. 315–35, at p. 326.

> "*It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.*"[591]

Therefore, whenever ill-treatment occurs state responsibility for the violation of the obligation to refrain from ill-treating follows.

As to the obligation to prevent ill-treatment, practical measures to be undertaken to prevent ill-treatment are not an end in themselves but means to prevent actual occurrences of ill-treatment. Burgers and Danelius, while commenting on the obligation to prevent torture under Article 2 paragraph 1 of the CAT, stressed the effectiveness of state endeavors to prevent torture in saying that "*a formal prohibition is not sufficient, but the acts shall actually be prevented*".[592] Similarly, the CtAT pointed out that measures undertaken to prevent torture "*must, in the end, be effective in preventing it*".[593] Therefore, in determining whether the obligation to prevent was violated, what counts is the occurrence or non-occurrence of an event that is to be prevented rather than setting up a mechanism generally able to prevent ill-treatment. It follows that states cannot, by demonstrating that they met their preventive obligation, escape responsibility for ill-treatment committed by their officials. By the same token, a state cannot be held accountable, at least in the sense of state responsibility, for failure to establish such a system in the absence of an individual case found to constitute ill-treatment.[594]

Consequently, the obligation to prevent ill-treatment, although analytically different from its negative counterpart, is inextricably linked with the prohibition itself since measures must at the end be effective in preventing it. It follows that whenever ill-treatment occurs, a state has failed to abide not only by its obligation to respect but also by its obligation to prevent ill-treatment.[595] The obligation of prevention has no separate standing but is subsumed within the first violation. However, this obligation is considered in its own right in non-judicial and especially in monitoring procedures. Moreover, reports of the latter do in effect provide an assessment of whether a state examined properly fulfilled its general obligation to prevent ill-treatment.

Therefore, since the presumption is that states can control their agents, the risk is absent which makes the obligation to prevent ill-treatment in an internal sense an obligation of result. On the other hand, precisely the discrepancy between the legal presumption that a state can always control its agents

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[591] *Ireland v. the United Kingdom* 1–246 (ECtHR, 18 January 1978), § 159–159.
[592] Burgers and Danelius, *Burgers et al. 1988*, vol. 9, pp. 123–4.
[593] Committee Against Torture 24.01.2008, § 2.
[594] This position is, to some extent challenged in respect of torture, at least with regard to enacting legislation, by the position of the ICTY: "*Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect*."See *Prosecutor v. Furundzija* (ICTY, 10 December 1998), §§ 148–50.
[595] Nowak et al. 2008, S. 113.

and the reality, where this is often not the case, is the field where internal prevention of ill-treatment operates.

10.2.2 Obligation to prevent in external sense

Preventing acts of violence, as we have seen, is traditionally dealt with under national law. It attracts the attention of international human rights law only in particular circumstances. Since a state cannot be held responsible for acts of private individuals, the test for determining violation is not the occurrence of an event, but instead the failure to meet a certain standard. Rodley sees due diligence as a test for state culpability. According to this view, precisely the omission to enforce domestic law, prompted by the lack of political will to protect people under its jurisdiction from violence, triggers a spillover of this traditionally internal notion to the human rights field.[596] Nowak, on the other hand, sees due diligence as a test for acquiescence, that is whether a state did its best to prevent acts of violence among private persons. It follows that state failure to prevent ill-treatment amounts to acquiescence and full-fledged human rights violation.[597]

What both approaches have in common, is that this is an obligation of conduct which, opposite to the obligation of result where simple absence of result leads to responsibility, presupposes some kind of fault that a state did not reach an expected standard and on the other absolves the state when this standard has been reached.

The level of risk in fulfilling this obligation is higher and therefore, to mitigate the risk, an additional element of knowledge or predictability of risk for the individual is required.[598] A classical expression of this risk can be found in Osman case where the ECtHR held

> *"bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[…] it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."*[599]

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[596] N. Rodley, 'Non-state actors and human rights', in S. Sheeran and N. S. Rodley (eds.), *Routledge handbook of international human rights law*, Routledge handbooks pp. 523–44, at p. 527.
[597] *Strengthening the Protection of Women From Torture: UN Doc A/HRC/7/3* (2008), § 68–68 *Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2010*, § 196–196.
[598] *Osman v. the United Kingdom* (ECtHR), § 116–116; *Opuz v. Turkey* 1–214 (ECtHR), § 129–129; *Milanovic v. Serbia* (ECtHR), § 84–84; *Đorđevic v Croatia* 1–176 (ECtHR, 2012), § 139–139.
[599] *Osman v. the United Kingdom* (ECtHR), § 116–116.

Therefore, unlike the prevention in an internal sense where state responsibility originates from the violation of the prohibition that is the fact that ill-treatment actually occurred, a violation of the obligation to protect, that is to prevent ill-treatment committed by non-state actors, is a self-standing obligation and stems out of failure to enact adequate legislation or to act to protect vulnerable individuals from violence of non-state actors of which it knew or ought to have known.[600] So, different to the first notion of prevention, it may well be that an act of ill-treatment takes place but the state did not violate its obligations to prevent since, even with the diligence due, it did not manage to prevent the violation.

The SPT, while discussing the relation between the prohibition and prevention of torture supports this view on the relationship between internal and external obligation to prevent torture by stating:

> „*Whilst the obligation to prevent torture and ill-treatment buttresses the prohibition of torture, it also remains an obligation in its own right and a failure to take appropriate preventive measures which were within its power could engage the international responsibility of the State, should torture occur in circumstances where the State would not otherwise have been responsible.*"[601]

Last but not least, this understanding of the nature of the obligation to prevent ill-treatment committed by state officials and private persons, is in line with the main criteria identified for differentiating between obligations of conduct and result i.e. the amount of risk a state faces in complying with a specific obligation.[602]

[600] Harris, *Harris 2009*, p. 107.
[601] *The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the OPCAT: UN Doc CAT/OP/12/6* (2010), § 1–1.
[602] Refer to chapter 7 Introduction to human rights obligations, section 7.4 Obligations of conduct and result.

11 Chapter: Mechanisms for ensuring compliance with the prohibition of ill-treatment

11.1 Diversity of bodies committed to preventing and sanctioning ill-treatment

One cannot but notice the thick web of international regulations (binding conventions, recommendations, resolutions, guidelines, jurisprudence, etc.) as well as proliferation of international and national bodies that deal solely[603] or in part[604] with the prohibition of ill-treatment. These bodies can be categorized in accordance with several criteria. For example, those established under a specific treaty or under the authority of a certain international organization, universal or regional, international or national, inter-governmental or non-governmental, judicial or non-judicial, political or legal and those established under IHRL or IHL. The distinct nature and role of international and national mechanisms for securing human rights should also be kept in mind. As states take on obligations to ensure the enjoyment of human rights to those under their jurisdiction, they also carry the main burden of delivering on those pledges.[605] International bodies are meant to supervise and facilitate, not replace national actors and efforts.[606] Their purpose is precisely to control whether states honoured their obligations arising from treaty or customary international law and, if need be, clarify what their proper implementation entails.

11.2 Procedures for ensuring compliance with human rights obligations

If, however, not bodies themselves but procedures they utilize to ensure compliance with the prohibition of ill-treatment (modus operandi) are looked at, the reporting, petition and inspection procedure can be

[603] Committee Against Torture, Subcommittee for the Prevention of Torture, UN Special Rapporteur on Torture, European Committee for the prevention of Torture, Special Rapporteur on Prisons and Conditions of Detention in Africa, Committee for the Prevention of Torture in Africa, Rapporteurship on the Rights of Persons Deprived of Liberty.

[604] HRC and other monitoring bodies established under core human rights treaties, ICRC, UPR, ECtHR; IACtHR; ICTY; ICTR, ICC etc.

[605] On methods of implementation and institutions within the state best suited to make true human rights guarantees see generally A. Byrnes and C. Renshaw, 'Within the State', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 458–75.

[606] Van Boven clearly articulates this point in the context of discussing international procedures for ensuring state compliance with their human rights obligations see T. van Boven, 'The International System of Human Rights An Overview', in United Nations (ed.), *Manual on human rights reporting under six major international human rights instruments: HR/PUB/91/1 (Rev.1)* (New York: United Nations, 1997), pp. 3–16, at p. 16; The preeminent role national authorities have in implementing obligations stemming from IHRL is reflected in the subsidiarity doctrine which conveys the principle that the state, through its machinery, is best placed to secure and protect human rights of those under its jurisdiction. To that end, under all of the international complaint procedures exhaustion of domestic remedies is called for in order to provide a state with an opportunity to address and redress the violation within its internal legal order. On subsidiarity principle in IHRL generally see for example C. Tomuschat, *Human rights: Between idealism and realism / Christian Tomuschat*, The collected courses of the Academy of European Law, Third edition pp. 103–4. For Inter-American human rights system where both the IACmHR and IACtHR held that ensuring human rights is the task of states see J. Pasqualucci, 'The Americas', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 398–415, at p. 401.

differentiated.[607] These procedures are not identical with a particular body as most international bodies employ multiple procedures, (e.g. the CtAT employs reporting, complaint and monitoring procedure).

11.2.1 Reporting procedure

The reporting procedure seeks to improve the position of persons deprived of liberty by examining whether and to what extent states gave effect to provisions contained in relevant international instruments. Under the reporting procedure states are mandated to regularly (in intervals between 2 and 5 years) provide reports on compliance with their human rights obligations, which are then, in presence of the respective state delegations, appraised by members of relevant international bodies in light of information assembled from other sources (other international bodies, national or international NGOs, etc.). This procedure was pioneered by the International Labour Organization (ILO) and then taken up as a basic form of ensuring compliance with core human rights treaties.[608] In addition, at the UN level, the Human Rights Council utilizes the reporting procedure also in the form of the Universal Periodic Review (UPR).[609] Different from treaty supervisory bodies, which consist of independent experts, the UPR functions as peer review mechanism since representatives of other states, namely members of the Human Rights Council, evaluate state reports. From regional human rights systems, only the African envisages a regular reporting procedure, which, however, has not proven successful in its implementation.[610] The procedure is finalized by issuing a paper (concluding observations), which essentially summarizes the developments taking place in a state under consideration in respect of the implementation of respective treaty provisions, outlines positive aspects, principal subjects of concern and recommendations.

It needs to be borne in mind that this procedure became the basic mandatory means of ensuring compliance partly because states considered it to some extent harmless and refused to subject themselves to greater scrutiny.[611] However, efforts have been taken by the treaty bodies, including the CtAT, to increase its effectiveness by relying more heavily on additional information from independent actors, requesting states to provide answers on specific questions beforehand (list of issues), make

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[607] From the perspective of compliance with human rights in general, Trinidade confirms that international protection is effected through three basic procedures: petitioning, reporting and fact-finding even though they may be intertwined in practice, see A. A. C. Trinidade, 'Reporting in the Inter-American System of Human Rights Protection', in P. Alston and J. Crawford (eds.), *The future of UN human rights treaty monitoring* (Cambridge, New York: Cambridge University Press, 2000), pp. 333–46, at p. 333. These international procedures for securing compliance can be divided in accordance with a number of criteria. For example, Van Boven finds that "*Many types of procedures coexist: regular procedures and special procedures; (quasi-)judicial and political procedures; country procedures and thematic procedures; treaty- based and charter- based procedures*". see T. van Boven, 'The International System of Human Rights An Overview', in United Nations (ed.), *Manual on human rights reporting under six major international human rights instruments: HR/PUB/91/1 (Rev.1)* (New York: United Nations, 1997), pp. 3–16, at p. 16.

[608] D. Kretzmer, 'Human Rights, State Reports', in R. Wolfrum (ed.), *MPIL: (online ed.)* at §§ 1–3; H. Keller, 'Reporting Systems', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 4–4.

[609] On UPR generally see J. Connors and M. Schmidt, 'United Nations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 359–97, at pp. 363–5.

[610] C. Heyns and M. Killander, 'Africa', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 441–57, at pp. 450–1.

[611] T. Buergenthal, 'The U.N. Human Rights Committee', in J. A. Frowein, R. Wolfrum and C. E. Philipp (eds.), *Max Planck Yearbook of United Nations Law* (Leiden: Brill Academic Publishers, 2001), pp. 341–98, at pp. 346–7.

available statistical information indicating the level of implementation of certain obligations and following up on most important recommendations in the period between the regular reports. To that end both the HRC and CtAT appointed a Rapporteur for follow-up to concluding observations and developed a special set of rules governing their activities.[612]

In addition to the non-mandatory nature of the recommendations, the effectiveness of this procedure continues to be limited due to the lack of reliable first-hand information gathered in the field. Since bodies using this procedure are, in a manner of speaking, blind they rely on information provided by the government supplemented by independent sources, if available, in order to form a picture on the issues of interest. Of course, there is a wide array of organizations providing reliable and useful information for purposes of both reviewing the periodic report and following up on recommendations, without which the contemporary reporting procedure would be unthinkable. However, the core problem, the treaty bodies' dependence on information they cannot control in terms of kind, quality, quantity or reliability, remains.[613] NGOs, NHRIs or other organizations forwarding such information may have an agenda of their own not necessarily corresponding with that of the treaty body.[614] In a worst-case scenario, they can be dominated or instructed by the respective government. This problem is especially visible with regard to information that can be obtained only by entering closed institutions. One should keep in mind that most of ill-treatment takes place behind closed doors and thus, cannot be detected and documented. This is different from other rights such as right of assembly, privacy, freedom of expression or even fair trial since their violations or suspect situations are easier to identify and document. As to the prohibition of ill-treatment, legal safeguards, whose setting up is continually promoted, can very well exist in law but to what extent they serve their purpose in practice is more difficult to discern. In some instances, activities of NGOs aimed at gathering information may be hindered by denying access or requesting prior notice to enter closed institutions, limiting access to detainees, registers, particular premises etc. Sometimes local NGOs are forwarding unusable information or even not conducting monitoring visits at all due to the lack of specific expertize or funding.

Finally, states can, as a means of last resort, simply deny the veracity of such information.[615] Though one need not agree with an outright rejection of the reporting procedure under the CAT on the

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[612] For the HRC and the CtAT respectively see *Note by the Human Rights Committee on the procedure for follow-up to concluding observations* (2013); *Rules of procedure: UN Doc CAT/C/3/Rev.6* (2014), § 72–72.

[613] For example, it was noted that for the purposes of reviewing USA report under CAT reporting procedure over 15 NGO reports were made available, while in the case of Togo only one and none for Qatar. In addition, faced with the problem of credibility of information received the CtAT members tend to rely more heavily on information provided by international NGOs which, in turn, reduces the pool of useful information, see T. Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty', *Human Rights Quarterly* 31 (2009), 777–800, at 787–8.

[614] Kretzmer summarizes shortcomings of acquiring info from NGOs such as their bias, veracity of information, selectivity due to uneven geographical dispersal of NGOs, sporadic interest of international NGOs, difficulties with closed states etc., see D. Kretzmer, 'Human Rights, State Reports', in R. Wolfrum (ed.), *MPIL: (online ed.)* at §§ 42–43.

[615] Dimitrijevic, while discussing state reporting procedure before treaty bodies, notes that in written submissions state usually reproduce passages of its legislation, while in oral proceedings deny any allegations made against them eventually admitting problems stemming from lack of resources, see V. Dimitrijevic, 'State Reports', in J. T. Möller and G. Alfredsson (eds.),

grounds of, allegedly, favouring liberal institutions and arrangements and thus, discriminating underdeveloped states, observation that it

> "*relies on information one stage removed from the infliction of violence that is gathered by states, NGOs, and other parts of the United Nations…(*and*)… is therefore a second order process that does not simply reveal information, but abstracts and codifies it*" [616]

hits the mark, in that it correctly depicts its main weakness.

11.2.2 Petition procedure

The petition procedure enables individuals to bring a case, alleging violation of their rights, against a state before an international body. Placing those that suffered abuse on the same footing with states before a court-like tribunal has a huge impact in terms of empowerment of the former and putting checks on the power of the latter. Finding a violation is of major importance for it restores the dignity of the victim by acknowledging that ill-treatment took place. What is more, it enables granting redress to victims and designating a state as responsible for a violation. However, access to this procedure is curbed by strict admissibility requirements where an applicant is expected to make use of domestic legal remedies before addressing international instances, respect specific time frame, pay attention to the victim requirement etc.

The outcome of the complaint procedure can be a legally binding judgment as in European and Inter-American systems or have no such effect as with communications under UN treaty body complaint procedures. In addition, adjudicating bodies cannot act on their own accord to address issues they consider critical but are dependent on receiving relevant applications. In other words, without applications addressing certain problems judicial of quasi-judicial bodies cannot adjudicate on their own initiative.

This procedure also, similar to the reporting procedure, suffers from a deficiency relating to the lack of a reliable factual overview of the case under examination. International courts, although sometimes authorized to carry out fact finding missions, usually refrain from doing so due to material constraints as well as the fact that passage of time between the impugned event and its examination renders efforts aimed at collecting evidence futile. Inspection procedures can prove useful in this regard since, in some cases, reports can corroborate the applicant's account on, say, state of repair of facilities etc. However, the main limitation of the complaint procedure is that it is not best placed to secure general compliance with obligations originating from the prohibition of ill-treatment. This is so because they deal with individual cases *ex post facto*, that is after the incident occurred, and seek to determine whether a certain set of circumstances amounted to ill-treatment, whether it can be attributed to the state and grant appropriate redress, provided of course that the application met strict admissibility

International human rights monitoring mechanisms: Essays in honour of Jakob Th. Möller (The Hague: Martinus Nijhoff, 2001), pp. 185–200, at p. 191.

[616] T. Kelly, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty', *Human Rights Quarterly* 31 (2009), 777–800, at 778–9.

requirements. In other words, they are designed to right individual wrongs in a strictly defined procedure not to pre-empt them by introducing changes into the legal system, setting up safeguards designed to prevent ill-treatment etc. Even if such changes have been suggested in the final decision, compliance remains uncertain, which leads us to the next point of concern.

The complaint system can be effective only if some sort of implementation machinery that is robust enough to instigate changes in the member states assists the execution of legally binding decisions. An example of such a system can be found in CoE where CoM regularly follows up on the execution of individual and general measures necessary to give effect to particular judgments. Even so, the ECHR system is overloaded with the so-called repetitive cases where the majority of thousands of applications reaching the court each year stems from a handful of structural problems within member states. Decisions of UN treaty bodies, on the other hand—although lacking binding force—even if followed up in accordance with a special procedure, cannot be hoped to achieve the success of the European system in terms of changing states' legal framework and practice.

In sum, the individual complaint procedures, though being a valuable element in the overall efforts of ensuring compliance with the prohibition of ill-treatment, cannot, taken alone, secure general compliance.

11.2.3 Inspection procedure

Inspection procedures make use of on-site visits to places of detention with the aim of closing the so-called "inspection gap",[617] namely the difference between treatment and rights of persons deprived of their liberty set out in law and that in reality. The inspection itself should, following a dialog with the respective government on contentious issues, result in drafting a report, communicating it to the government and, in most cases, making it public.[618] Evans and Haenni-Dalle correctly observe that a procedure based on direct evaluation of detention conditions by independent monitors, followed by a report and dialog with state authorities turns "*the usual pattern of human rights reporting mechanisms on its head*" as in the latter it is states that provide factual information, which are then being reviewed by the examining body.[619]

Establishing these procedures either by forming new or extending the competences of the existing mechanisms seems to be on the rise. An approach based on visiting persons deprived of freedom with the purpose of preventing their abuse, alleviate suffering or improve living conditions was introduced by the ICRC in the specific context of armed conflict and later extended to encompass political

[617] This term, meant to denote a gap "*between what ought to be and what is*", introduced by former head of UK prison inspectorate in the context of defining the role of inspection bodies in visiting prisons, correctly reflects the scope of work of inspection procedures more generally, see A. Owers, 'Imprisonment in the twenty-first century: a view from the inspectorate', in Y. Jewkes (ed.), *Handbook on prisons* (Cullompton: Willan, 2007), pp. 1–21, at p. 17.

[618] For a general overview of different visiting mechanism see E. Delaplace and M. Pollard, 'Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty', *International Review of the Red Cross* 87 (2005), 69–82.

[619] M. D. Evans and C. Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture', *Human Rights Law Review* 4 (2004), 19–55, at 31–2.

prisoners. The ICRC's practice of preventing and/or putting a stop to ill-treatment by entering places of detention served as an inspiration for devising an arrangement for a regular visiting procedure carried out under the auspices of the CoE. This arrangement was set up by means of a binding international treaty – *the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT) which established *the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) as an international inspecting body authorized to conduct periodic and ad hoc visits to places of detention within the member states not subject to their prior approval. Similarly, other regional and universal human rights bodies launched visiting mechanisms in the form of special mandates or Rapporteurships authorized to conduct on-site visits. Particularly influential is the *UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (SRT) established under the authority of the UN Commission on Human Rights—later replaced by Human Rights Council—as a part of the special procedure system.[620] His mandate is not attached to any specific convention but is based on the UN Charter, which is why a state under examination needs not be a party to any binding human rights convention prohibiting ill-treatment. Working methods of the SRT consist of receiving information, communicating with governments, conducting on site visits and publishing country or thematic reports. As those appointed to serve as the SRT are authorities in the field of human rights law, their legal views on specific issues shape, to a considerable extent, human rights standards in the field of the prohibition of ill-treatment.[621] Special mandates employing predominately the inspection procedure are established within regional human rights frameworks as well. In addition to the CPT operating under the auspices of the CoE, a Special Rapporteur on Prisons and Conditions of Detention in Africa and Committee for the Prevention of Torture in Africa were set up in Africa under the authority of the ACmHPR while the Rapporteurship on the Rights of Persons Deprived of Liberty established within the IACmHR[622] is active in the Americas. The CAT envisaged the inquiry procedure designed to address the systematic practice of torture whose main strength lies in the CtAT competence to deploy a fact-finding mission to states, albeit subject to their prior approval.[623] It is triggered by receiving reliable information indicating systematic practice of torture taking place on the territory of the state party, which did not opt-out from

[620] For general overview of mandate and role Special Rapporteurs played in universal and regional human rights systems see A. C. Berger, 'Special Rapporteurs of Human Rights Bodies', in R. Wolfrum (ed.), *MPIL: (online ed.)* For more detailed outline of mandate and practice of the SRT see M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19; A. Mukherjee, 'The fact-finding missions of the special rapporteur on torture', *The International Journal of Human Rights* 15 (2011), 265–85.

[621] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 208.

[622] However, on site missions, focused on getting first-hand information of the general human rights situation in a state, were a standard working procedure of the IACmHR since its inception, see A. A. C. Trinidade, 'Reporting in the Inter-American System of Human Rights Protection', in P. Alston and J. Crawford (eds.), *The future of UN human rights treaty monitoring* (Cambridge, New York: Cambridge University Press, 2000), pp. 333–46, at pp. 342–3.

[623] C. Tomuschat, *Human rights: Between idealism and realism*, The collected courses of the Academy of European Law (Oxford, New York: Oxford University Press, 2003), v. 13/1, pp. 187–8; J. Connors and M. Schmidt, 'United Nations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 359–97, at pp. 380–1.

this procedure during the ratification of the CAT. The inquiry consists of an investigation of veracity of initial allegations through; *inter alia*, confidential communication and a visit of the state concerned by the CtAT members. The report is communicated to the state for comments and its summary may be included in the CtAT's annual report. In 8 procedures of this kind conducted to date, the CtAT deployed fact-finding missions to all states concerned except to Egypt, which did not consent to a visit.

However, as regards on-site inspection within the CAT framework, the greatest stride was made by adoption of the OPCAT which, different to other inspection mechanisms to date, rests on two pillars: international and national inspecting bodies authorized to access all places of detention on the regular basis. The significance of this approach is that it—uncharacteristic for human rights treaty enforcement mechanisms—requests states to set up a national body charged with the implementation of international treaty. Even though the utility of independent monitoring of closed institutions in preventing ill-treatment conducted by national bodies is well recognized and, thus not *per se* a novelty, establishment of such a body, by means of a binding international treaty certainly is. As with reporting, under the inspecting procedure monitoring bodies usually meet and receive information both from the respective government and from independent sources such as NGOs, but verify such information by carrying out visits to places of detention. Visits made to places of detention by members of the monitoring bodies represent a great advantage of this procedure. To maximize this advantage, visits should be unannounced, and members of the visiting team should be allowed conduct of confidential interviews with inmates and staff alike as well as unrestricted access to all parts of a detention facility, custodial and medical records.

It follows that the reach of bodies employing on-site visits to discover what takes place within closed institutions is not limited to documenting visually observable circumstances and conditions. They can make inferences on what they did not personally encounter (ill-treatment) or what is impossible to verify during a relatively short visit (for example continuous observance of certain rights or safeguards number of hours spent outside the cell, presence of warders during medical examination or use of force etc.), by consulting and crosschecking diverse sources and accounts on the spot. This method of discerning what takes place in closed institutions was referred to as to triangular approach or triangulation. The main contours of this approach, although not expressly termed as such by the CPT, transpire from its practice.[624] On the other hand, by stating that it uses triangulation of information obtained from *inter alia* direct observations, interviews, medical examination and documentation to take a position on the particular issue under observation, the SPT made its utilization explicit.[625] Likewise, the SRT's approach to assessing the veracity of torture allegations received from persons

[624] M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), p. 216; S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Review* 6 (2009), 6–14, at 7.
[625] *Second annual report: UN Doc CAT/C/42/2* (2009), § 23–23.

deprived of freedom basically boils down to the triangular method.[626] Another advantage of the on-site visit is that the central authority as well as those officials directly in charge of places of detention are being personally confronted with findings in an attempt to bring about change in disputed practices, to introduce new or enhance practical worth of existing custodial safeguards and to improve material conditions in detention facilities etc. This is different from the reporting procedure where state delegations are being questioned in a rather formal setting without the benefit of first hand insight. Precisely this prospect of direct interaction between the international inspectors and officials of the country being inspected prompted some authors to claim that fact-finding missions make the most effective method of international protection of human rights.[627]

However, this procedure also suffers from certain drawbacks. Namely, international bodies can, at best, conduct regular visits once in several years.[628] States are well aware of the missions and in most cases even the exact places of detention an international body plans to visit and, thus, may forewarn institutions under their authority to be careful on designated dates or even cover their tracks by releasing undocumented detainees or transferring them to other facilities etc.[629] It follows that fact-finding carried out by international bodies cannot produce deterrent effects stemming from the fact that closed institutions can be "opened" i.e. receive a visit at any time. For the same reason, international fact-finding procedures are not in the situation to follow up on their recommendations to make sure that they are actually implemented.[630] On the other hand, national inspecting bodies have the possibility of carrying out frequent visits and thus both generate deterrent effect and follow up on previous recommendations but their shortcomings are of the other kind. Namely, national bodies with unrestricted access and features of international inspections are not so common. Those bodies, which are part of or aligned with the state apparatus, such as judicial or prosecuting organs, tend to lack necessary independence for their visits to make a meaningful impact. Similar problems can also hinder the effectiveness of formally independent institutions such as NHRIs or ombudspersons which, in effect, may cover the misdeeds of the government rather than exposing them. NGOs, when truly independent, are hardly ever allowed to conduct unannounced visits and are at times denied access to closed institutions, completely or partially.

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[626] M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 116.
[627] C. Tomuschat, *Human rights: Between idealism and realism / Christian Tomuschat*, The collected courses of the Academy of European Law, Third edition p. 271.
[628] The CPT, as most advanced international visiting mechanism, consisting of 47 experts that are to monitor 47 CoE member states, can visit each state once in 4 to 5 years. The SPT's capacity, considering that its membership is limited to 25 experts and that potential member states are all of current 158 state parties to the CAT, to conduct regular visit is even weaker than that of the CPT.
[629] SRT noted that since the state officials are well aware of the dates on which his visits are to take place it is highly unlikely that he would encounter torture in progress or "a smoking gun" as he had put it in the course of his visits, see M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 110–1.
[630] M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 118.

11.3 Condemning and preventive approach

On balance, however, the previously outlined procedures utilized by different bodies boil down to two basic approaches towards eradicating ill-treatment: condemning and preventing. By employing a condemning approach international bodies respond to allegations of ill-treatment, be it in individual case or as systematic practice, and seek to hold a state accountable. They do so either by examining a complaint concerning a certain individual in terms of the law of state responsibility and, in line with strict procedural rules[631] or by trying to identify a pattern of systematic ill-treatment.[632] The so-called preventive approach, is utilized unrelated to any specific claim and does not, in principle, seek to establish whether rights of any individual were violated or is there a pattern of state violence, but instead whether a state complied with the obligation to prevent ill-treatment in an internal sense.[633] This obligation, as already explained seeks to facilitate the setting up and ensuring of proper functioning of a range of custodial safeguards, decent state of repair of facilities, adequate activities etc., in order to forestall an accumulation of factors amounting to, or the emergence of environment conducive to, ill-treatment.[634]

At the very outset of implementing its mandate the CPT clarified the main difference between itself and the ECHR's organs, which to all intents and purposes mirrors that between the condemning and preventive approach, in the following manner:

> *"the main purpose of the Committee's fact-finding is not the minute and punctilious establishment of whether or not serious abuses have actually occurred that characterizes a judicial or quasi-judicial process. Rather, the CPT has a much broader remit: it must ascertain whether, in places where persons are deprived of their liberty by a public authority, there are general or specific conditions or circumstances that are likely to degenerate into torture or inhuman or degrading treatment or punishment, or are at any rate conducive to such inadmissible acts or practices".*[635]

Generally speaking, the preventive approach presupposes engaging member states in dialog, recommending good and discouraging bad practices rather than condemnation through establishing that ill-treatment took place either in an individual case or as systematic practice. This approach is, in

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[631] This is the case with international human rights courts as well as treaty monitoring bodies acting under individual communication procedure, although they render decisions with a different level of compulsoriness. Similar approach is that of international criminal courts such as the ICTY, ICTR or ICC with a major distinction that ill-treatment need to be imputed to individual perpetrator rather than a state.

[632] Inquiry procedure envisaged in CAT article 20, consists of features that could be understood as both reactive (initiated by submissions containing reliable information on systematic practice of torture and trying to determine whether definition of systematic practice of torture was met) and preventive (it conducts on site visit and—besides looking at whether systematic torture took place—recommends a number of safeguards aimed at preventing future ill-treatment).

[633] Refer to chapter 10 Obligations to prevent under international prohibition of ill-treatment, section 10.2.1. Prevention in internal sense (obligation to fulfil).

[634] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment.

[635] *1st General Report- Main features of the CPT, preventive nature of the CPTs functions and visits: CPT/Inf (91) 3* (1991), § 45–45.

principle, applied both in reporting and inspection procedures but in the latter the monitoring body has an advantage of personal insight into places of detention.[636]

Different to the condemning approach regularly employed by judicial bodies, those using a preventive approach are not too concerned with qualifying certain acts or treatments as a particular form of ill-treatment. In contrast, they look at the position of persons deprived of their liberty in its entirety in order to form a more general outlook on factors that may contribute to ill-treatment. Consequently, they are not primarily concerned with assessing whether the limit of pain and suffering was met, but rather with examining various aspects of a detention regime that might create the situation leading to pain and suffering. In addition, they scrutinize the existence and effectiveness of specific safeguards that are to prevent the occurrence of ill-treatment particularly in police detention where detainees are most vulnerable. In the context of discussing the preventive approach to combating ill-treatment Silvia Casale, former president of both the CPT and SPT, pointed out:

> *"For prevention to be effective, it is not enough to aim at keeping conduct and conditions below the threshold of actual ill-treatment. To safeguard people deprived of liberty from the risk of ill-treatment, it is important that the standards applied by independent preventive bodies reflect good practice in all types of custodial settings."*[637]

It is the preventive approach that the ICRC was espousing when it framed its activities in places of detention as follows:

> "*Together with the authorities, the ICRC will ensure that the professional practices of relevant staff are in line with the requirements arising from the prohibition of torture and cruel, inhuman or degrading treatment with respect to issues such as: methods to be used to obtain information during an investigation; management of discipline and security in places of detention; establishing detention conditions that are respectful of human dignity; the importance that detainees attach to understanding their detention process; and the use of force during arrest or transfer.*"[638]

The SPT, on its part, made clear that in the course of implementing its mandate it employs an approach based on preventing "*any form of abuse of people deprived of their liberty which, if unchecked, could grow into torture or other cruel, inhuman or degrading treatment or punishment.*" To that end in the course of conducting visits to places of detention, the SPT

> "*looks at legal and system features and current practice, including conditions, in order to identify where the gaps in protection exist and which safeguards require strengthening…(*and*) seeks to build upon existing protections and to eliminate or reduce to a minimum the possibilities for abuse*".[639]

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[636] Roland divides mechanisms for combating ill-treatment on international level roughly on country oriented approach and that dealing with individual cases which is similar to preventive and condemning approach, see R. Bank, 'International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?', *European Journal of International Law* 8 (1997), 613–37, at 615–6.

[637] S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Review* 6 (2009), 6–14, at 9.

[638] ICRC, 'International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty: Policy adopted by the Assembly Council of the ICRC on 9 June 2011', *International Review of the Red Cross* 93 (2011), 547–62, at 558.

[639] *First Annual Report* (SPT, 14 May 2008), § 12–12.

Its focus is empirical in that it, by conducting on site visits to places of detention, seeks to identify risk factors and conditions and suggests practical measures aimed at preventing ill-treatment from materializing.[640]

11.4 Practical application-towards convergence?

Although, in principle, the complaint procedure utilizes condemning while reporting and inspecting procedures apply the preventive approach, this division is not clear-cut and in practice these basic approaches are somewhat intertwined. The inquiry procedure, utilized in accordance with CAT article 20, is predominately based on on-site visits. However, as it aims to determine whether torture was practiced on widespread and systematic manner in a state of destination, leans more towards the condemning approach. Although utilizing a condemning approach, judicial bodies by rendering judgments in which they underline particular safeguards such as effective investigation, adequately punishing the perpetrators and redressing victims as well as scrutinizing material conditions of detention and underlying regime, contribute towards preventing future violations and thus employ the preventive approach. This is especially the case when the obligation to redress the victim by providing guarantees of non-repetition[641] is placed in the operative part of the decision. In addition, international bodies, most of all the ECtHR, made use of the state obligation to conduct an effective investigation—which squarely fits within the preventive framework—[642] to find states responsible in want of evidence that a substantive breach occurred. To be sure, formally speaking, a state is being held responsible for the failure to carry out effective investigation only and does not address the substantive breach. However, from a more practical perspective, this approach provided an opening through which state responsibility in contested cases where insufficient evidence and conflicting factual information rendered finding of substantive violation unfeasible, could nevertheless be engaged.

Bodies carrying out on-site visits are often confronted with individual or multiple allegations indicating a clear pattern of deliberate ill-treatment or encounter shortcomings pertaining to material conditions, regime, health care etc. Although predominately utilizing preventive approach, visiting bodies are in such cases compelled to articulate a view on whether these allegations are well-founded or whether a particular treatment or cumulative impact of regime and detention conditions amounted to torture, inhuman and/or degrading treatment. The CPT remarked that its non-judicial character does not preclude the verification of whether allegations are well founded[643] and to that end developed a rather demanding standard under which, in order to unequivocally label a concrete case as a certain form of

[640] *Report on Paraguay* (SPT, 07 June 2010), § 2–2.
[641] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.3. Duty to redress victims.
[642] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.2. Duty to conduct an effective investigation of ill-treatment.
[643] *1st General Report- Main features of the CPT, preventive nature of the CPTs functions and visits: CPT/Inf (91) 3* (1991), § 46–46.

ill-treatment, several independent indicators need to point to the same conclusion.[644] In other cases, the CPT expresses its position more delicately by making use of a conditional mood such as "*could be considered as amounting to*" or "*akin to inhuman treatment*".[645] The SPT, on the other hand, seems to be satisfied with making plain that medical examination conducted by a member of the SPT's visiting team established that injuries identified are consistent with detainees allegations of ill-treatment.[646] Alternatively, it would be rather bizarre if visiting team members, upon encountering a prisoner with physical injuries typical of ill-treatment, would neither conduct medical examination nor consult his medical records in an attempt to determine the veracity of his claims, but be satisfied with informing him on his rights or reminding the custodial staff on the absolute nature of the prohibition.

Similar but not identical to this is a situation where persons deprived of liberty allege to have been ill-treated, but without any tangible evidence. In these cases, inspecting bodies take into account the consistency between allegations of different detainees before taking a position on their credibility. The CPT established a practice of assessing the risk of ill-treatment in police custody by looking at the number and consistency among different accounts of ill-treatment received during private interviews with detainees.[647] Differently put, inspecting bodies ought to look for fact patterns buttressing the individual allegations. Although the SPT seems to follow this basic approach, it articulates a more balanced view by taking a range of positions on allegations and risk of ill-treatment. On one occasion the SPT recognized the consistency between testimonies alleging ill-treatment in police custody and expressed more general concern that, considering that same techniques were used in various parts of the country, a pattern of ill-treatment at the hands of the police can be discerned.[648] Similarly, multiple consistent accounts of torture and ill-treatment collected in two prisons prompted the SPT to conclude that prison staff "*routinely inflict ill-treatment*".[649] On other occasions, the SPT's observations on numerous consistent allegations of ill-treatment,[650] reports on consistent practices of abuse even amounting to torture[651] or that it did not receive any[652] or any consistent[653] allegation of ill-treatment were limited to the particular institution. Approach of the ICRC towards assessing the veracity of

[644] Refer to section 11.2.3. Inspection procedures. Triangulation. Also see M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), p. 216.
[645] For instance, the CPT held that: routine use of strip searches could be considered as amounting to degrading treatment, see *Report on Bulgaria* (CPT, 29 January 2015), § 119–119; allegations of severe ill-treatment could be considered as amounting to torture, see *Report on Ukraine* (CPT, 29 April 2014), § 38–38; poor material conditions of detention could be considered as akin to inhuman and degrading treatment *Report on Portugal* (CPT, 24 April 2013), § 50–50. Svanidze remarked that conditional language used reflects the CPT's effort aimed at indicating seriousness of the state of affairs without compromising its non-judicial character, see E. Svanidze, 'The European Convention For The Prevention Of Torture', in J. T. Möller and G. Alfredsson (eds.), *International human rights monitoring mechanisms: Essays in honour of Jakob Th. Möller*, 2nd rev. ed (Leiden: Martinus Nijhoff, 2009), pp. 493–502, at p. 500.
[646] *Report on Benin* (SPT, 15 March 2011), § 141–141; *Report on Honduras* (SPT, 10 February 2010), § 34–34.
[647] M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), pp. 222–30.
[648] *Report on Paraguay* (SPT, 07 June 2010), §§ 134–42.
[649] *Report on Paraguay* (SPT, 07 June 2010), § 211–211.
[650] *Report on Kyrgyzstan* (SPT, 28 February 2014), § 21–21.
[651] *Report on Brazil* (SPT, 05 July 2012), § 133–133.
[652] *Report on Sweden* (SPT, 10 September 2008), § 68–68.
[653] *Report on Sweden* (SPT, 10 September 2008), § 68–68.

allegations of ill-treatment is more difficult to discern due to its policy of strict confidentiality which, in principle, precludes publishing the visit reports.[654] However, a leaked report indicated the same approach towards assessing whether individual allegations are well founded (medical doctor confirms that injuries are consistent with allegations) and whether multiple allegations are consistent, namely indicate a clear pattern (congruence between various accounts).[655]

On the other level, independent of concrete situations or allegations encountered during visits to places of detention, some practical clarification of what torture, inhuman and/or degrading treatment is and what exactly amounts to its violation, is highly desirable as it signals the red line which must not be traversed if a state is to adhere to the prohibition of ill-treatment.[656]

11.5 Different understandings of ill-treatment

Although approach to ill-treatment espoused by bodies deciding upon complaints and that taken by bodies employing on-site visits operate within the same context and tend to make use of the same concepts, benchmarks and safeguards, they somewhat differ in their understanding of what amounts to a particular form of ill-treatment.

As already explained in detail, the leading understanding of ill-treatment established mainly by the practice of bodies acting upon complaints, is that it is an umbrella term encompassing torture on the one hand, and inhuman and/or degrading treatment, on the other.[657]

The CPT, in the course of utilizing a preventive approach within the framework of an inspecting procedure, developed a somewhat specific understanding of different forms of ill-treatment. According to Evans and Morgan, the CPT has used the term torture to denote physical and/or mental pain and suffering inflicted primarily in police custody with a specific purpose and, in addition, necessitated some form of preparatory activities. Inhuman and degrading treatment, according to these authors, was utilized to refer only to substandard physical conditions of detention of certain gravity as well as to a flawed regime of imprisonment the detainee is subjected to. When it refereed to physical abuse that did not amount to torture, the CPT labelled it simply as ill-treatment. Finally, inadequate conditions not

[654] Basically, the ICRC consciously conceded to forgo power of addressing the public in order to obtain access to detainees and maintain dialogue with the authorities, see ICRC, *Deprived of freedom*, International Committee of the Red Cross p. 8; A. Aeschlimann and N. Roggo, *Visits to persons deprived of their freedom: the experience of the ICRC*. https://www.icrc.org/eng/resources/documents/article/other/detention-visits-article-300906.htm (17 August 2016).

[655] ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*. http://www.informationclearinghouse.info/pdf/icrc_iraq.pdf (13 September 2016).

[656] Morgan note that the CPT needs to set the thresholds for different form of ill-treatment also to assist those who are being inspected, see R. Morgan, 'The CPT Model: An Examination', in L.-A. Sicilianos and C. Bourloyannis-Vrailas (eds.), *The prevention of human rights violations: Contribution on the occasion of the twentieth anniversary of the Marangopoulos Foundation for Human Rights (MFHR)* (Athens, 2001), pp. 3–37, at pp. 32–3.

[657] Refer to chapter 5 Mapping the content of ill-treatment under international law.

passing the verge of gravity required for inhuman and/or degrading treatment were simply described as unacceptable.[658]

Similar to this is also the approach of the SPT which makes use of the term ill-treatment in order to refer to cruel, inhuman or degrading treatment,[659] including that stemming from material conditions of detention,[660] in keeping with CAT article 16.[661] On the other hand, it seems that the SPT in implementing its mandate does not put too much weight on merely applying legal definitions[662] given that it did not differentiate between different forms of ill-treatment in a systematic manner during its visits. In addition to raising issues of inhuman and degrading treatment, the SPT is of the opinion that detention conditions can, provided that conditions contained in CAT art 1 are met, amount to torture as well.[663] Sometimes it referred to a specific set of circumstances as to ill-treatment, sometimes as CIDT. In many cases, it just described the actual state of affairs, commented that it left "*much to be desired*" and recommended necessary changes. The general pattern cannot be recognized but it seems clear that while in the first reports it shied away from labelling the combination of certain detention conditions as ill-treatment or torture in the more recent reports it regularly does. In a number of reports, it held that a combination of deplorable material conditions of detention coupled with factors such as lack of space, sleeping on the floor, poor hygiene, passage of time etc. amounted to CIDT. It also held that residing in extremely overcrowded premises (when capacity is exceeded for 300 or 400%) amounts to CIDT or even torture when it is coupled with lapse of time (months or years) and unacceptable material conditions especially in the case of pretrial detention.[664]

The ICRC appears not to be too concerned with qualifying cases of abuse it encounters during its visits as torture, inhuman or degrading treatment as it usually refers to them by using the generic term ill-treatment. Its main approach is rather pragmatic and the basic goal is to put an end to impugned

[658] M. D. Evans, 'Getting to Grips with Torture' (2002) 51, ICLQ at 374,375. See also M. D. Evans and R. Morgan, Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Oxford, New York: Clarendon Press; Oxford University Press, 1998), pp. 253–6.
[659] *Report on Argentina* (SPT, 27 November 2013), § 8–8.
[660] *Report on Paraguay* (SPT, 07 June 2010), § 2–2.
[661] *Report on Brazil* (SPT, 05 July 2012), § 7–7.
[662] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 28.
[663] *The approach of the SPT to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the OPCAT: UN Doc CAT/OP/12/6* (2010), 5d.
[664] *Report on Mali* (SPT, 20 March 2014), § 49–49.

practices[665] and, if possible, work with the authorities of the receiving state to prevent ill-treatment by, inter alia, "*establishing detention conditions that are respectful of human dignity.*"[666]

11.6 Conclusion

Different enforcement mechanisms buttress each other in different ways. In the course of reviewing state reports under UPR, members of Human Rights Council inquire on state of compliance with treaty body's recommendations and vice versa.[667] Similarly, while examining reports of CoE member states, the CtAT members inquire on the implementation of the CPT recommendations.[668] Visiting mechanisms cooperate to avoid duplication of work and thus ensure making better use of scant resources available.[669]

Reports obtained via fact-finding missions are being increasingly sought and used to cross check and challenge states' version of events put forward in state reports or complaint procedures. In addition, there is a rising convergence of standards established by different, universal, regional and national bodies.[670] However, there are limits to this convergence as is witnessed in an unorthodox approach of CtRPD towards persons with psychosocial and/or intellectual disabilities and measures to be taken to prevent their ill-treatment. In addition, there is a growing possibility of duplication of work due to a

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[665] S. R. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War', *European Journal of International Law* 22 (2011), 459–506, at 477; A. Aeschlimann, 'Protection of detainees: ICRC action behind bars: IRRC March 2005 Vol. 87 No 857' (2005) 87, International Review of the Red Cross, 83–122 at 112–3. However, it seems that the ICRC in its work on visiting places of detention sometimes did use the term torture to refer, *inter alia*, to "*cumulative effects of difficult conditions of detention and treatment have or could have major psychological consequences (for example a combination of factors over a certain length of time, such as keeping detainees in total uncertainty as to their fate, "manipulation" of their surroundings and living conditions, and the use of special interrogation techniques.)*", see A. Aeschlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross* 87 (2005), 83–122, at 112; On the other hand, in its 2011 policy on ill-treatment the ICRC adopted meaning of torture, cruel inhuman or degrading treatment in line with IHL, that is similar with IHRL but without the state perpetrator requirement. The ICRC adopted the following meaning of torture and cruel, inhuman or degrading treatment: "*Torture consists of (1) severe pain or suffering, whether physical or mental, inflicted (2) for such purposes as obtaining information or a confession, exerting pressure, intimidation or humiliation. Cruel or inhuman (synonymous terms) treatment consists of acts which cause serious mental pain or suffering, or which constitute a serious outrage upon individual dignity. Unlike torture, these acts do not need to be committed for a specific purpose. Finally, humiliating or degrading (synonymous terms) treatment consists of acts which involve real and serious humiliation or a serious outrage upon human dignity, and whose intensity is such that any reasonable person would feel outraged. The expression ill-treatment is not a legal term, but it covers all the above-mentioned acts.*" ICRC, 'International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty: Policy adopted by the Assembly Council of the ICRC on 9 June 2011', *International Review of the Red Cross* 93 (2011), 547–62, at 548.

[666] ICRC, 'International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty: Policy adopted by the Assembly Council of the ICRC on 9 June 2011', *International Review of the Red Cross* 93 (2011), 547–62, at 558.

[667] J. Connors and M. Schmidt, 'United Nations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 359–97, at p. 364.

[668] E. Delaplace and M. Pollard, 'Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty', *International Review of the Red Cross* 87 (2005), 69–82, at 82.

[669] E. Delaplace and M. Pollard, 'Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty', *International Review of the Red Cross* 87 (2005), 69–82, at 75.

[670] Danelius back in 1993 explained the process of mutual influence exerted at UN and regional levels leading to interchange of substantive standards pertaining to ill-treatment, see H. Danelius, 'Protection Against Torture in Europe and the World', in Macdonald, Ronald St. J., F. Matscher and H. Petzold (eds.), *The European system for the protection of human rights* (Dordrecht, Boston: M. Nijhoff, 1993), pp. 263–75, at pp. 274–5; see also J. Connors and M. Schmidt, 'United Nations', in D. Moeckli, S. Shah, S. Sivakumaran and D. J. Harris (eds.), *International human rights law*, Second edition pp. 359–97, at p. 384.

lack of coordination of different bodies and mechanisms. NPMs have the potential to continuously provide reliable information from places of detention as they are well placed to establish and maintain regular visits to closed institutions. Through this approach the lack of reliable information, due to periodic visits of relevant international bodies or sporadic and patchy information provided by NGOs, can be compensated.

As to the preventive and condemning approach, although conceptually different, they borrow each other's language and in practice often elaborate upon an issue normally outside their remit (judicial bodies speak of prevention while inspection bodies determine whether ill treatment took place under concrete circumstances). However, these inconsistencies in the application of the condemning and the preventive approach do not significantly challenge the the following proposition. Judicial bodies make use of state preventive obligations in general (different standards pertaining to material conditions and regime of detention, medical and custody reports, videotaping of interrogation etc.) to determine whether ill-treatment took place. Furthermore, they pay attention to the obligation to conduct an effective investigation in particular to engage state responsibility on procedural grounds in want of evidence sufficient for finding a substantive violation. In contrast, preventive bodies seek to strengthen these safeguards in law and practice with a view to dissuading potential perpetrators from resorting to ill-treatment and address critical points in regime and detention before violation occurs. Considering that all types of ill-treatment are absolutely prohibited, preventive work is, essentially, not contingent on qualifying certain circumstances as specific form of ill-treatment.[671]

Therefore, the crucial distinction between condemning and preventive approach can be portrayed in the following manner. While the former retrospectively inquires whether certain factors, combined or alone, amounted to ill-treatment the latter seeks to eliminate them altogether and thus ensure that ill-treatment does not occur in the first place. Put differently, by utilizing the condemning approach one seeks to determine whether existing pieces form a puzzle, while through the preventive approach one tries to preclude the puzzle from being assembled. For the former the puzzle is of primary interest, while for the latter the pieces themselves.

[671] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 28.

PART III

SYSTEMATIZED CONCEPT OF THE RESEARCH

12 Chapter: Review of state obligations stemming from the obligation to prevent ill-treatment

In the chapter dealing with human rights obligations the nature of the obligation to prevent ill-treatment was examined as well as its position within the human rights framework in general and that relating to ill-treatment in particular. This chapter will endeavour to determine the content of the positive obligation stemming from the prohibition of ill-treatment: obligation to prevent ill-treatment. It will look at different sources with the aim of establishing what a state needs to do in order to comply with its duty to prevent ill-treatment.

The obligation to prevent ill-treatment will be reviewed in somewhat limited scope, as it will encompass neither the obligation to protect from privately induced violence nor ill-treatment inflicted by state agents beyond the deprivation of liberty context. Therefore, it will address only obligations or measures found to be central to the internal aspect of prevention, i.e. preventing ill-treatment of persons deprived of their liberty. The reason for doing so is that places of deprivation of liberty such as prisons, police lock ups and others are venues where ill-treatment usually occurs and where inspection mechanisms operate. In addition, this division reflects the classical notion of ill-treatment addressing primarily persons deprived of their liberty by the state and its subsequent extension where the prohibition of ill-treatment served as a vehicle for combating some negative phenomena (excessive force, private violence) and extending rights guaranteed under distinct international instruments (right to asylum).

12.1 Obligation to refrain from and obligation to prevent ill-treatment - a short differentiation

In what follows, the difference between the obligation to refrain from and the obligation to prevent ill-treatment will be elaborated. A basic negative obligation of the state in this context is to respect the right of those it deprived of liberty not to be ill-treated. This implies that public officials should refrain from intentionally causing suffering of those brought under their control to achieve forbidden ends, using force, threat of force or other psychological violence unnecessary and subjecting them to acts (corporal punishment, placing in a dark sell, deprivation of food) or exposing to conditions amounting to cruel, inhuman and degrading treatment. In addition, it encompasses duties to abstain from discriminating members of vulnerable groups and extraditing individuals to countries where they might be ill-treated upon return.

Most of positive obligations are embedded into one general obligation, which seeks to facilitate the observance of the basic negative obligation, namely, the obligation to prevent ill-treatment of persons deprived of their liberty. It could be said that they are two sides of the same coin. While one side consists of a mere prohibition, the other, is shaped by a range of duties and measures a state needs to assume in order to ensure that individuals acting on its behalf (public officials but also those to which execution of state prerogatives is delegated) observe this prohibition. In other words, these obligations are parts of a general duty of a state to prevent ill-treatment of those it deprived of liberty. This general duty to prevent ill-treatment was clearly stipulated in the CAT Article 2 (1) as regards torture and Article 16 (1) as regards other forms of ill-treatment, IACPPT Articles 1 and 6 and CRPD Article 15 (2).

Although there is no mention of prevention in the texts of main regional human rights treaties and the ICCPR, it was recognized that the mere formal prohibition does not suffice and that states should aim to prevent ill-treatment from taking place. For example, the HRC remarked

> "*it is not sufficient for the implementation of Article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.*"[672]

The ECtHR also found that the obligation of prevention, which together with the obligation to investigate forms the obligation to protect, is implied in prohibition and spelled out a range of positive actions a state should undertake in order to comply with it.[673] Under the Inter American human rights system it is also well established that a state, in addition to the obligation to respect, has an obligation to undertake measures with the aim of preventing[674] ill-treatment from taking place. The ICTY held that states are under an obligation not only to prohibit ill-treatment but to adopt measures capable of forestalling its occurrence.[675]

Several measures aimed at preventing ill-treatment were clearly stipulated in binding international treaties, while others transpire from the practice of international bodies or soft law documents. Some of them, as obligation to establish visiting mechanisms to places of detention, acquired binding force *via* distinct international instruments, in this case the OPCAT. In what follows the most common measures laid out in international documents and those identified by international bodies will be summarized.

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[672] Human Rights Committee 1992, § 8; Nowak, in his authoritative commentary on the ICCPR, notes that the HRC has identified "*a number of preventive duties designed to prevent torture*", see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 179–82.

[673] D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), p. 107.

[674] The IACPPT contains explicit provisions stipulating obligation to prevent both torture and other forms of ill-treatment, see *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), § 2–2; Approach of the Inter American bodies are somewhat different as they differentiate between obligation to prevent, investigate and punish and redress the victims of torture. However, as previously noted, punishing the perpetrators and redressing the victims produce a preventive effect, see D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), pp. 138–41; The IACmHR also promotes taking measures aimed at preventing torture, see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 19–19.

[675] *Prosecutor v. Furundzija* (ICTY, 10 December 1998), §§ 148–50.

12.2 List of obligations falling within the scope of general obligation to prevent ill-treatment of persons deprived of liberty

12.2.1 Duty to criminalize acts of torture under national law

Whilst initially specified in non-binding documents,[676] obligation to criminalize torture was later expressly stated in CAT Article 4 and reaffirmed by other authorities.[677] The CtAT pointed out that the rationale of an obligation to envisage a distinct crime of torture under national law is to "*directly advance the Convention's overarching aim of preventing torture and ill-treatment*".[678]

In order to comply with this obligation, it is not enough to introduce new criminal offence and name it torture, but the definition of this offence needs to correspond to that set forth in CAT Article 1. Although crime of torture under national law can be broader than that outlined in CAT, it needs to, as a minimum, meet the basic features of the CAT definition.[679] Also, it does not suffice to criminalize the perpetration of torture only; the attempt and different modes of complicity need to be covered as well. Furthermore, sanctions need to be proportionate to the gravity of the crime. While it is beyond dispute that sanctions ought to be harsh enough to send a message that resort to torture is not to be tolerated, it is not exactly clear what is considered an adequate penalty. Burgers and Danelius note that penalties should be comparable to those envisaged for most serious crimes under national law—short of death penalty—which naturally differ from state to state depending on their general penal policy.[680] Penalties envisaged for torture should by no means be equal to that envisaged for plain injury or similar offences.[681] Despite the fact that the CtAT did not clearly articulate minimum or maximum penalties, Ingelse, based on an analysis of the individual opinions of the CtAT members, concluded that the appropriate sentence for crime of torture should be between 6 and 20 years of imprisonment.[682] Furthermore, in order to prevent perpetrators of torture from enjoying impunity with the passage of time and enable victims of torture to obtain redress, no statute of limitations should be applicable to the crime of torture.[683]

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[676] *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: UN Doc A/10034 (1975)* (1975), § 7–7; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: UN Doc A/43/49* (1988), § 7–7.
[677] *Inter-American Convention to Prevent and Punish Torture: IACPPT* (1985), § 6–6; *General Comment no. 20* (HRC, 1992), § 13–13.
[678] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), § 11–11.
[679] *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), §§ 8–9; *Concluding observations on the United States of America* (CtAT, 19 December 2014), § 9–9; *Report on Honduras* (SPT, 10 February 2010), §§ 77–8.
[680] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 129.
[681] *Report on Mexico* (SPT, 31 May 2010), § 57–57.
[682] C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001), p. 342.
[683] *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 40–40; *Concluding observations on Japan* (CtAT, 28 June 2013), § 8–8.

In sum, abiding by the obligation to introduce a distinct criminal offence sanctioning torture in national legal order is more demanding than at first sight may appear. In addition to replicating all the elements of torture set out in the CAT, national definition would have to envisage adequate penalties which should at least be equal to 6 years of imprisonment. Finally, statute of limitations in respect of this crime should be abolished. Finally, to state the obvious, bringing a definition and penalties for the crime of torture in line with international standards does not bring much if these provisions are not made use of in practice which brings us to the following state obligation.

12.2.2 Duty to conduct an effective investigation of ill-treatment

The duty to conduct impartial and prompt investigation of possible ill-treatment is set in motion either by following up on complaints or *ex officio*. To begin with, this duty, along with its corollaries, aims to prevent deliberate ill-treatment of detainees caused by some form of coercion. Consequently, ill-treatment stemming from substandard detention conditions, including but not limiting to its material aspect, lack of activities, inadequate hygiene, sanitary conditions and health care is not addressed by a web of measures derived from this core obligation.[684] Besides upholding the rights of the victims, prevention of future violations is the main aim of obligation to conduct effective investigation of allegations or suspicion that ill-treatment occurred.[685]

This obligation is explicitly envisaged in CAT Article 12 and 13 as well as in IACPPT Article 8. The CtAT had made use of these provisions and looked at the obligation to conduct effective investigation irrespectively of whether the substantive violation was established.[686] Under the ECHR law it is well established that Article 3 in conjunction with the obligation to secure rights, set forth in Article 1, gave rise to the obligation to investigate. It is beyond debate that this obligation, often referred to as the procedural limb of Article 3, is part and parcel of the prohibition of ill-treatment under the ECHR law.[687] Similar developments took place under other regional human rights systems[688] as well as

[684] This division is, however, not clear cut, since one can be subjected to a particularly harsh detention conditions deliberately and singled out from the rest of detainees with the aim of achieving prohibited ends.

[685] In somewhat broader perspective, while reaffirming the need for combating impunity of the gross human rights violations the CoE Committee of Ministers stressed that "*States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system*", see *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (2011), I.3.

[686] See, for instance, *Halimi-Nedzibi v. Austria* (CtAT, 18 November 1993), § 14–14.

[687] D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), pp. 108–11; B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, Sixth edition pp. 193–4; C. Grabenwarter, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1. Aufl (München: Beck, 2011), p. 42.

[688] Under Inter American human rights system procedural obligation to investigate whether ill-treatment took place was introduced by calling upon the specific obligation stipulated in IACPPT article 8 as well as by interpreting IACHR article 5 together with obligation to ensure in article 1 as generating state obligation to carry out an effective investigation, see L. Burgorgue-Larsen, Úbeda de Torres, Amaya and R. Greenstein, *The Inter-American Court of Human Rights: Case-law and commentary* (Oxford, New York: Oxford University Press, 2011), p. 383; African commission too reaffirms obligation to conduct an effective investigation with the aim of establishing veracity of allegations of ill-treatment by noting that principles 17-19 of the Robben Guidelines represent an authoritative interpretation of African Charter article 5, see *Abdel Hadi et al. v. Republic of Sudan* (ACmHPR, 05 November 2013), § 45–45; However, under African Commission case law the obligation to investigate appears to be not as strong as in practice of other human rights courts, see *Torture in international law: A guide to jurisprudence* (Geneva: APT, 2008), p. 132.

the ICCPR.[689] In addition, this obligation is enshrined in a number of non-binding documents.[690] Special place among these holds the *Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol). In addition to setting forth guidelines for the use of adequate forensic techniques in assessing the veracity of ill-treatment allegations, this document encompasses a set of principles on effective investigation and documentation of ill-treatment (Istanbul principles) which are designed to serve as "*minimum standards for States in order to ensure the effective documentation of torture*".[691]

The approach of international bodies as to what an effective investigation consist of is generally similar. Investigation should commence in case of credible allegations of the victim, his relatives but also *ex officio,* when detention authorities have "*reasonable ground to believe*"[692] that ill-treatment took place.[693] Investigation should not be understood as a mere formality, but as instrumental in testing the credibility of initial allegations or indications and, if substantiated, identifying and adequately punishing the perpetrators. Human rights bodies and documents utilized different language while outlining requirements an investigation needs to satisfy in order to meet the above standard. However, following notions run through most of their reasoning. Namely, an investigation ought to be independent and impartial, conducted by an adequately competent body, prompt, thorough and open to public scrutiny

[689] The HRC held that article 7, in conjunction with provisions guaranteeing a right to an effective remedy (2(3)), implies the right to lodge complaints which in turn must be recognized in national law. It went on to say that remedy must be effective in that complaints are investigated promptly and in line with requirements of impartiality, see *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 14–14.

[690] See generally *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (2011); *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 23–23; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), §§ 17–8.

[691] *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, p. 2.

[692] This formulation "*reasonable grounds to believe*" was used in CAT article 12. Burgers and Danelius stressed the importance of obligation to commence with investigation *ex officio* since in many cases detainees are afraid to submit a formal complaint due to fear of reprisals, see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 144; Positions found in other documents and practice of human rights bodies on state obligation to commence investigation without formal complaint being submitted are by and large similar although they use slightly different formulations. Istanbul principles speak of "*indications that torture or ill-treatment might have occurred*", see *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, p. 59; CPT "*credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred*", see *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 27–27; The ECtHR "*sufficiently clear indications that torture or ill-treatment might have occurred*" see *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia* (ECtHR, 03 May 2007), § 97–97; The IACtHR "*grounds to believe that an act of torture has been committed*", see *Tibi v. Ecuador* (IACtHR, 07 September 2004), § 159–159.

[693] For a more detailed discussion on measures aimed at facilitating submission of complaints in places of detention see section 12.2.9.4.2. Setting up an effective complaint scheme.

including the involvement of the victims.[694] The term effective is usually used as shorthand for the entirety of the attributes outlined above.[695]

Impartiality and independence play a significant role when it comes to effectiveness of investigation. The notion of impartiality primarily indicates that investigation of ill-treatment should not be biased. This understanding of impartiality, developed by ECtHR and HRC in the context of discussing fair trial rights, emphasizes that investigators should not harbour prejudices on the detriment of one of the parties.[696] To avoid this deviation, investigating allegations or other indications that ill-treatment occurred, should not be assigned to those officials connected with units where it allegedly took place or those which might try to cover up their or deed of their colleagues.[697] Put differently, investigators should be entrusted neither with cases involving allegations of ill-treatment against themselves, their acquaintances or friends nor those being under the same hierarchical chain of command.[698] For the same reasons, it is considered unacceptable that officials entrusted with examining certain aspects of criminal charges against an individual are at the same time investigating ill-treatment that same individual was subjected to.[699] Moreover, instances where the investigating body simply ignores complaints or does not properly follow up on signs that ill-treatment might have occurred indicate that such proceedings cannot be considered impartial.[700]

What is of relevance as well, is the adequacy of competencies. Namely, national bodies designated to carry out investigations about possible ill-treatment must be authorized to undertake all measures deemed necessary to establish the facts of the case, identify and punish the perpetrators. These should include the ability to access information, suspend the state official believed to have committed ill-

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[694] E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 50–68; *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), §§ 31–6; *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* (2011), pp. 11–3; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police.* (2009), §§ 62–79; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, 240, 271, 284, 345, 347-348; *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, § 74–74.

[695] This follows from the language used in relevant documents and practice of international bodies, see, for example, *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), §§ 31–6.

[696] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 435; Burger and Danelius also have this notion of impartiality in mind when they write "*Impartiality is important, since any investigation which proceeds from the assumption that no such acts have occurred, or in which there is a desire to protect the suspected officials, cannot be considered effective*", see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 145.

[697] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 145.

[698] *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, § 79–79; *Ramsahai and Others v. the Netherlands* (ECtHR, 15 May 2007), 325, 333-341; E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 52–3.

[699] *Barabanshchikov v. Russia* (ECtHR, 08 January 2009), § 48–48; For further references see E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 53–4.

[700] See a string of cases decided by the CtAT summarized in M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 423–30.

treatment, protect the victim from reprisals etc.[701] CAT Article 12 does not require that an independent state body, such as a court, is authorised to conduct investigations.[702] However, although the existence of legal obligation to delegate an investigation of initial allegations to a body entirely distinct from institution where ill-treatment supposedly took place and with no links whatsoever with those involved is *de lege lata* not clear, doing so is at least strongly suggested.[703]

What concerns promptness, it implies that an investigation should be carried out without delay in order to be able to achieve principally two goals: secure fresh and reliable evidence, since prospects for doing so tend to worsen with passage of time, and prevent continuation or recurrence of ill-treatment.[704] Maintaining public confidence that a state is adhering to the principle of the rule of law has been noted as an additional argument in favour of conducting prompt investigation.[705] It has been suggested that an investigation should ensue within "*hours or days*" after a competent body learned that ill-treatment might have occurred.[706] In addition, not only that investigation ought to be initiated promptly, but investigative measures should be carried out without delay and the entire investigation ought to be finalized in due time.[707]

The concept of thoroughness suggests taking all necessary and possible measures in case at hand to establish the facts and, if appropriate, punish the perpetrator and redress the victims. To further illuminate the main idea behind the concept of thoroughness, notions such as adequacy and comprehensiveness are often employed for they too convey that investigation should be a genuine and professional effort to determine the credibility of allegations or veracity of signs symptomatic of ill-treatment. Which measures in particular need to be taken depends on circumstances. The ECtHR and the CPT took notice of the following: taking adequate statements of alleged victims and conducting interviews with all possible witnesses, involving specially trained independent medical experts, making

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[701] E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 65–8.
[702] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 435.
[703] Burgers and Danelius emphasise that investigation ought to be entrusted to individuals with no personal or professional links with alleged perpetrators and made no notice of external body, see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 145; Nowak and McArthur, while admitting that involvement of prison and police chefs cannot be avoided at the beginning, prefer entrusting an external monitoring body with conducting investigations, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 435–6; For the HRC's position corroborating preference for investigation led by an external body see S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, materials, and commentary*, Third edition p. 296; The CPT recommends that disciplinary bodies within the police should include at least one independent member but prefers it to be completely independent *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), §§ 37–8; Istanbul protocol recommends formation of a completely independent commission of inquiry, see *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, §§ 85–7.
[704] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 144–5; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 433–4.
[705] *Bouyid v. Belgium* (ECtHR, 28 September 2015), § 121–121.
[706] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 434.
[707] E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 63–5.

use of custodial and medical records, making use of standard criminal technology such as searching for fingerprints and material evidence, video footage, etc., pay due attention to the existence of discriminatory motives of potential perpetrators etc.[708]

Finally, the involvement of the victim and informing the public, besides the self-explanatory requirement of providing the victim with a regular update on the progress of investigation,[709] is basically a preventive measure aimed at facilitating proper conduct of an investigation by ensuring that those in charge are held accountable for any omissions.[710]

It should be kept in mind that the duty to investigate, although it proved especially useful in cases where, due to insufficient evidence, no conclusive determination could be made on whether a substantive breach took place, constitutes a distinct obligation. Put differently, finding a breach of the procedural obligation is not a substitution or a second rate violation established only for want of sufficient evidence indicating the violation of a main state obligation: not to ill-treat, for it produces a substantial preventive effect in its own right.[711] In addition, a failure to provide a convincing explanation of physical injuries of a detainee inflicted while in custody, leads to rebuttable presumption of ill-treatment.[712] Although this approach is used to determine the responsibility of the state at the international level, it implicitly buttresses the obligation to conduct an effective investigation because only such investigation could be considered convincing enough to preclude finding a state responsible.

To sum up, effective investigation, initiated by complaint or *ex officio*, of whether ill-treatment came to pass makes the cornerstone of every effort to establish a system, at the national level, able to prevent ill-treatment. However, this is more easily said than done due to different factors such as frequent overlap between those which ought to investigate and the alleged perpetrators, secretive nature

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[708] E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 55–60; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police.* (2009), § 69–69.

[709] In addition to satisfying an understandable curiosity of the victim, this provision serves a rather practical purpose. Namely, by informing the victims on the main developments in investigations the competent bodies are enabling them to take actions in order to protect their interests. For instance, not informing the victim that the ongoing investigation had been discontinued was found to amount to violation of CAT article 13 as it prevented the victims from taking on private prosecution, see *Hajrizi Dzemajl et al. v. Yugoslavia* (CtAT, 21 November 2002), 9.5.

[710] There is a line of the ECtHR cases emphasising this standard, see, for instance, *Stanimirovic v. Serbia* (ECtHR, 18 October 2011), § 40–40; *Emin Huseynov v. Azerbaijan* (ECtHR, 07 May 2015), § 72–72; The CPT has also taken this position, see *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 36–36; The CtAT has, for example, suggested forming a public registry of complaints on ill-treatment and final outcomes of corresponding investigations, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 420.

[711] Violation of the procedural obligation could be established even without violation of the substantive obligation, see, for instance, *Halimi-Nedzibi v. Austria* (CtAT, 18 November 1993), § 14–14; Breach of both obligations can be also established, see A. Mowbray, 'Duties of Investigation Under the European Convention on Human Rights', *International and Comparative Law Quarterly* 51 (2002), 437–48, at 445.

[712] Shift of the burden of proof when one is injured while in custody was introduced by the ECmHR and thereafter affirmed by the ECtHR, see A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in Macdonald, Ronald St. J., F. Matscher and H. Petzold (eds.), *The European system for the protection of human rights* (Dordrecht, Boston: M. Nijhoff, 1993), pp. 225–61, at pp. 251–2; Similar position is taken over by the IACmHR as well, see D. Rodríguez-Pinzón, C. Martin and C. Grossman, *The prohibition of torture and ill-treatment in the Inter-American human rights system: A handbook for victims and their advocates*, OMCT handbook series (Geneva, Switzerland, 2006), p. 117; Also the HRC reaffirms the principle that when an individual is harmed while in custody, the state has an obligation to provide a reasonable account of how this came to pass, failing of which it is found responsible for ill-treatment, see *Zheikov v Russian Federation* (HRC, 11 April 2006), p. 7.

of the acts themselves and problems with identifying valid evidence which tend to obstruct the effectiveness of such investigations. The previously outlined requirements (impartiality, adequacy, promptness, thoroughness, involvement of the public) set a basic minimum, compliance with which can ensure that investigation is at least capable of being effective. Unlike other preventive obligations, the obligation to conduct an effective investigation can be invoked separately to engage state responsibility without necessarily involving material violation. In this case, fulfilment of this obligation is being assessed through a due diligence standard. Differently put, a state should demonstrate that its bodies made a genuine effort to establish the facts, find and punish a perpetrator in the manner described without necessarily being successful in doing so.

12.2.3 Duty to redress victims

The main purpose of the duty to redress victims is to, as far as possible, restore the dignity of the victim of ill-treatment by providing adequate reparations. This is to be done via domestic legal avenues including the above-described obligation to conduct an effective investigation. Both aspects, that is, making remedy capable of providing appropriate relief available (procedural) and restoring dignity via adequate modes of reparation (substantive) are parts of a greater whole: state obligation to redress the victims and are equally valid irrespective of the form of ill-treatment.

The framework for redressing violations of human rights and humanitarian law, including but not limiting to torture and other forms of ill-treatment, was set forth in *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter: Basic Principles and Guidelines).[713] This document, although adopted by the UN General Assembly and thus possessing no binding force, serves as a main point of reference when discussing obligation of states to redress violations of international human rights and humanitarian law norms. Its main strength is that it merely systematically recapitulated developments in international law, while, at the same time, pursuing a victim-centred approach to the notion of redress. It follows that somewhat diverse approaches towards redressing the victims of ill-treatment pursued by different international bodies can be adequately reviewed by means of the framework set out in Basic Principles and Guidelines.

The procedural component of the state obligation to redress rests on the general duty to provide an effective remedy and in particular the duty to carry out an effective investigation about allegations of ill-treatment. In the normal course of events, effective investigation would yield results in terms of identifying potential perpetrator, gathering evidence etc., which should subsequently lead to indicting and adequately punishing the wrongdoers. Although other remedies could exist alongside judicial, as

[713] For a detailed discussion on background, drafting, relevance and reach of the principles see C. Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6 (2006), 203–79; Redress Trust, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*; M. Zwanenburg, 'The Van Boven/Bassiouni Principles: an Appraisal', *Netherlands Quarterly of Human Rights,* 24 (2006), 641–68.

long as they are effective in the indicated sense, it is generally accepted that the judicial remedy is best placed to provide full redress, including criminal prosecution and punishment of perpetrators, at least in respect of gross violations of human rights such as torture.[714] However, the procedural element of the right to redress is broader than the obligation to conduct an effective investigation. For instance, in cases of unsatisfactory material conditions or inadequate medical care in detention, the underlying problem is not related to securing evidence of ill-treatment and identifying the direct perpetrator (as is the case with effective investigation) but to the availability of adequate remedy capable of awarding appropriate reparation. Differently put, while the duty to carry out effective investigation is meant to break the circle of abuse of those deprived of freedom committed with impunity, the scope of the procedural element of the right to redress also covers deplorable material state of detention facilities caused by factors such as lack of resources, overreliance on incarceration, pretrial detention etc. Therefore, effective remedy in respect of those detained in poor conditions should not be of repressive (able to lead to identification and punishment of perpetrators), but instead preventive nature (able to discontinue the violation either by effectuating swift improvement of material conditions, transfer to satisfactory detention facilities or releasing the detainee).[715]

As to the substantive notion of redress i.e. reparations, it is established that it encompasses at least the following types of relief: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.[716] Before briefly outlining the scope of each of these, it ought to be borne in mind that

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[714] Human rights organization Redress insist that, as regards torture, notion of effective remedy needs to encompass a remedy managed by a judicial body, Redress Trust, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, pp. 32–3; Goetz M. (ed.), *Introduction to Key Concepts in Providing an Effective Remedy for Victims of Torture* (2013), pp. 2–3; Similarly, the HRC made it clear that, in case of serious human rights violations, legal remedy of administrative or disciplinary nature cannot be considered effective, see *Bautista de Arellana v. Colombia* (HRC, 13 November 1993), § 8–8; Necessity of a judicial remedy, notwithstanding eventual existence of other remedies, has been emphasized by the CtAT as well, see *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 30–30; On the other hand, most of the commentators are of the opinion that remedies in case of gross human rights violations need not be strictly speaking judicial as long as they satisfy the standards of effectiveness, see T. van Boven, 'Victims' Rights to a Remedy and Reparation: Th e New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity* (Leiden: Martinus Nijhoff, 2009), pp. 19–40, at p. 22; D. Shelton, 'Human Rights Remedies', in R. Wolfrum (ed.), *MPIL: (online ed.)* at § 3–3; Nowak and McArthur, although stressing the importance of remedies granted by judicial bodies such as civil, criminal, constitutional or human rights courts, allow that ombudspersons, national human rights institutions and torture rehabilitation bodies may provide an effective remedy. On the other hand, these authors also acknowledge that criminal investigation is a precondition for appropriate redress of torture victims, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 482. In any case, it is hard to imagine how a non-judicial remedy alone can provide reparation of adequate punishment of the perpetrator of torture and arguably inhuman treatment when only criminal courts can hand down sentence of imprisonment. Nowak notes that a right of victims to demand criminal prosecution of perpetrators can be derived from jurisprudence of international human rights bodies. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), pp. 66–7.

[715] *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), § 97–97; *Yengo v. France* (ECtHR, 21 May 2015), § 59–59; N. Kobylarz-Lerner, 'Effective Remedies in Conditions of Detention Cases – the ECHR Requirements' at p. 4; *Guide to good practice in respect of domestic remedies* (2013), p. 25. The HRC too in cases related to poor detention conditions held that material conditions under which a detainee resides need to be improved; if this is not the case it even suggested release of detainees. For this see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 161; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas envisage that remedy "*intended to immediately address any situation of overcrowding*" should be established by law and that judicial organs should act even if this is not the case, see *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), 17.2.

[716] These modes of reparation were set forth in Principles and guidelines but reflect the position of relevant international instruments, human rights courts and other supervisory bodies. For an elaborate review of references confirming existence of

they are usually utilized together.[717] Therefore, substantive redress is best understood as a range of options standing at the disposal of the awarding body in tailoring reparations consistent with the gravity of the crime suffered and other particularities of the case under consideration.

Restitution is an ideal form of redress, in that it seeks to restore the victim to a position occupied before the violation occurred. Unfortunately for victims of gross violations, including torture, this can hardly be possible, since after the infringement of personal integrity causing serious psychical and/or psychological traumas one cannot be simply reinstated to his former position.[718] However, the previous argument is less convincing as regards inhuman and/or degrading treatment, because restitution is the most suitable to redress ill-treatment stemming from unsatisfactory detention conditions. Basic Principles and Guidelines make explicit note of the following modalities of restitution: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

Rehabilitation, according to Basic Principles and Guidelines, consists of "*medical and psychological care as well as legal and social services*".[719] The underlying rationale is that, as complete removal of negative consequences of ill-treatment is in most cases impossible, the second-best option is to make accessible a range of services to the victim in order to mitigate, as far as possible, the consequences of endured traumas. The CtAT understands rehabilitation in context of victims of ill-treatment as

> "*restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.*"[720]

Monetary compensation is the most commonly employed form of redressing the victims and it consists out of awarding material and non-material damages. Basic Principles and Guidelines stipulate that *"any economically assessable damage*"[721] should be addressed by way of compensation and as an example

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the particular mode of reparation see C. Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6 (2006), 203–79, at 265–75.

[717] T. van Boven, 'Victims' Rights to a Remedy and Reparation: Th e New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity* (Leiden: Martinus Nijhoff, 2009), pp. 19–40, at p. 39.

[718] Redress Trust, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, p. 34; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 483.

[719] The CtAT holds that rehabilitation should "*include a wide range of inter-disciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services; vocational training; education etc.*", see *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 13–13.

[720] *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 11–11.

[721] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: UN Doc A/RES/60/147* (2006), § 20–20; This wording is taken over by the CtAT, see *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 10–10.

name the following: physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[722] Even though monetary compensation alone cannot provide full redress in case of ill-treatment,[723] it is usually part of reparations granted to the victims of gross human rights violations. Monetary compensation should correspond to the damage suffered and is, therefore, not supposed to be punitive, that is to say, punish the state.[724] Basic Principles and Guidelines envisage that the direct perpetrator should compensate the victim or reimburse the state, if it already payed compensation and/or costs of rehabilitation to the victim.[725] In this connection, it has been argued that placing rehabilitation costs of torture victims on the individual perpetrators would—bearing in mind their high amount—generate a deterrent effect stronger even than that of criminal punishment.[726]

Satisfaction, as means of redressing the victim, communicates the idea that making good, to the degree possible, consequences of ill-treatment necessitates more than merely awarding pecuniary damages. In other words, if the state is truthful in its ambition to restore the dignity of the victims, it cannot just pay them off without taking other measures aimed at expressing regret for acts of its agents and rectifying the damage done. This gap between the remunerable harm and that suffered is to be filled by non-material modes of satisfaction, the most prominent of which are stopping the continuing violation,[727] acknowledging that ill-treatment took place and identifying, trying and adequately punishing those directly responsible.[728] Having in mind that the impunity of actual perpetrators is one of the main factors contributing towards perpetuation of ill-treatment, the importance of the obligation to adequately punish those responsible cannot be stressed enough. ECtHR consistently affirmed that compensating the victims without prosecuting the perpetrators does not suffice, since it leads to virtual impunity.[729] It further noted that suspension of already minor monetary fines imposed on police officials found responsible for inhuman treatment, does not produce the effect necessary to deter prospective perpetrators.[730] Similarly, the CtAT held that, although the existence of torture committed by three law enforcement agents was established before national courts, "*imposition of lighter penalties and the*

[722] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: UN Doc A/RES/60/147* (2006), § 20–20.
[723] The CtAT emphasized that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment, see *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 9–9.
[724] Redress Trust, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, p. 35.
[725] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: UN Doc A/RES/60/147* (2006), § 15–15.
[726] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 483.
[727] Stopping the continuing violation of rights of those forced to reside under deplorable detention conditions necessitates providing access to decent living conditions. Awarding monetary compensation only is, thus, not acceptable, see *Iliev and Others v. Bulgaria* (ECtHR, 10 February 2011), §§ 55–6.
[728] This is actually a cumulative obligation, since failing to abide by each of these (discontinuing and acknowledging the violation, compensating the victim and trying and adequately punishing the perpetrators) falls foul of the established standard.
[729] *Krastanov v. Bulgaria* (ECtHR, 30 September 2004), § 60–60.
[730] *Gäfgen v. Germany* (ECtHR, 01 June 2010), p. 124.

granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment."[731] In addition to these, Basic Principles and Guidelines also specify the following modes of providing satisfaction:

> "*(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;(g) Commemorations and tributes to the victims;(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels*."[732]

Guarantees of non-repetition are an integral part of reparation modalities suggested by the Basic Principles and Guidelines; they encompass civilian control of armed forces, observance of international due process standards, fairness and impartiality, strengthening the independence of the judiciary, protecting persons active in different branches such as media, law and medicine including civil rights defenders, provision of human rights and humanitarian law education to diverse society strata and particularly to members of law enforcement, military and security agencies. Furthermore, they envisage the promotion of observance of international standards enshrined in non-binding documents by both public officials and economic entities, promoting mechanisms for preventing, monitoring and resolving social conflicts and reforming legislation responsible for gross violations of human rights and serious violations of humanitarian law.[733] On top of these measures, the CtAT adds the following: combating impunity through delivering clear instructions to public officials on their obligations under the CAT and especially on absolute prohibition of torture, establishing independent monitoring of detention places, observance of the principle of non-refoulment, providing services such as shelter for victims of gender based violence or other ill-treatment.[734] HRC regularly stresses state obligation to prevent similar violations from occurring in the future by, for instance, bringing detention conditions in line with the requirements of the ICCPR and SMR.[735] The ECtHR, in a pilot judgement procedure concedes to put a large number of the so-called repetitive applications on hold until the state party implements general measures, aimed at solving the structural deficiency generating violations of the Convention rights, indicated in the operative part of the judgement, within a designated timeframe.[736] This scheme was

[731] *Guridi v. Spain* (CtAT, 24 May 2005), § 7–7.
[732] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: UN Doc A/RES/60/147* (2006), § 22–22.
[733] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: UN Doc A/RES/60/147* (2006), § 23–23.
[734] *General comment No. 3 (2012) Implementation of article 14 by States parties* (CtAT, 13 December 2012), § 18–18.
[735] *Lantsova v. Russian Federation* (HRC, 15 April 2002), § 11–11; *Pavlyuchenkov v. Russia* (HRC, 29 August 2012), § 11–11.
[736] Haider notes that the ECtHR in a pilot judgement procedure has, so far, ordered undertaking basically 3 types of general measures: solving the root problem, introducing effective remedy or granting individual redress to all the victims affected by a systemic problem, see D. Haider, *The pilot-judgement procedure of the European Court of Human Rights* (Leiden: Martinus

utilized regarding Article 3 cases as well on the subject of unsatisfactory material conditions in detention and lack of effective remedies to challenge them.[737] From the perspective of the obligation to provide redress, the pilot procedure can be considered an advanced variety of guarantees of non-repetition where a state is expected to prevent a recurrence of violation of a specific right by putting an end to a distinct problem via a specific set of measures in an assigned time frame.

It is worth noticing that outlined measures, falling within the scope of guarantees of non-repetition, do not sit well with other forms of reparation, because the former primarily addresses general issues and has little to do with a concrete violation. However, guarantees of non-repetition may also include measures aimed at protecting personal security of the victims or their families from future threats.[738] These guarantees can be understood as an extension of a basic form of reparation–putting a stop to the ongoing violation as they may serve a practical end: assuring the victim that ill-treatment will not recur. Therefore, it appears that the scope of guarantees of non-repetition includes both measures aimed at the prevention of ill-treatment in general as well as those seeking to prevent recurrence of ill-treatment in a particular case and reprisals against victims and/or their family members.

In summary, the obligation of states to redress victims of torture and other ill-treatment is multifaceted. It presumes the existence of accessible and effective legal remedies and consists of measures aimed at restoring dignity of the victim to the greatest extent possible where the latter is dependent upon the proper discharge of the former. These measures seek to restore the dignity of victims, first and foremost, by ending the violation and placing them in the position they were before it occurred. Second best but more frequently utilized measures include provision of compensation, rehabilitation and public recognition of violation together with adequate punishment of perpetrators. Guarantees of non-repetition, even if somewhat distinct, are recognized as constitutive part of the obligation to provide reparations and seem to call for a discharge of two sub duties. The first one is concrete and seeks to prevent reoccurrence of ill-treatment in respect of the same victim or member of his family. The second one reflects the main features of the obligation to prevent ill-treatment and consists of a range of general measures. Lastly, the obligation to redress victims of ill-treatment, besides its main purpose i.e. restoring the dignity of the victim, has a strong preventive component since the mere existence of legal remedies of attested effectiveness in redressing the victims, forestalls prospective ill-treatment. Also, a guarantee of non-repetition is substantively similar to the general obligation to prevent ill-treatment. The rationale for including general guarantees of non-repetition in modes of reparation crafted with the aim of redressing a specific individual (restitution, compensation, rehabilitation and satisfaction) could be that preventing others from suffering the same fate is part and parcel of restoring the dignity of the victim.

Nijhoff Publishers, 2013), p. 86; It follows that at least first two types of measures are predominantly preventive, that is, aim to ensure non-repetition of the violation.

[737] See, for instance, *Ananyev and Others v. Russia* (ECtHR, 10 January 2012); *Neshkov and Others v. Bulgaria* (ECtHR, 27 January 2015).

[738] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed. (2005), p. 72.

12.2.4 Duty to abide by the exclusionary rule

The obligation of states to ensure that evidence obtained through ill-treatment is excluded from any proceedings, serves a twofold purpose. First, it seeks to shield the integrity of the judicial process by precluding that facts of the case are established through unreliable evidence. Second, a comprehensive ban on the use of any evidence obtained by coercion, if strictly observed, renders resort to ill-treatment, in order to extract confessions, information or other incriminatory evidence, pointless.[739] This obligation is explicitly envisaged in CAT Article 15 and IACPPT Article 10 or considered part and parcel of provisions on prohibition of ill-treatment or a right to a fair trial in other universal and regional human rights treaties. It is equally valid under ICL framework. However, prospects that the exclusionary rule, as formulated in binding instruments,[740] realizes its full preventive potential, has been stalled by the following obstacles.[741] First, it relates to legal proceedings and, apparently, does not cover the use of information, most likely obtained through ill-treatment, by intelligence or law enforcement agencies with the aim of averting possible terrorist attack. Secondly, it proscribes use of statements obtained via torture only, thus falling short of those obtained by CIDT. Thirdly, it refers only to statements and does not include real or derivative evidence discovered due to information obtained by ill-treatment.[742] Finally, placing the burden of proof in establishing that evidence was obtained via ill-treatment on the victim only, coupled with the readiness of the judiciary to admit dubious evidence, in the face of possible ill-treatment, in order to secure criminal convictions, may render the entire premise ineffective in practice.

As to the first limitation, namely the type of proceedings in which the exclusionary rule operates, the prevailing approach is that every legal proceeding, including judicial and administrative, is covered. However, use of information possible obtained through illegal coercion (amounting to torture or other ill-treatment) for operative purposes (i.e. to prevent loss of life through, say, terrorist attack) is more contested. Nowak and McArthur argue that a state is not bound to inquire whether the information provided by foreign intelligence is tainted before taking practical measures aimed at preventing the loss of life, since the operative use of information cannot be subsumed under "any proceeding" and therefore falls outside the scope of CAT art 15.[743] On the other hand, these authors admitted that a borderline between operative action and legal proceeding may be blurred.[744] Other authors, while concurring that

[739] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, p. 148.
[740] To be precise, CAT article 15 and IACPPT article 10 explicitly stipulate that what is to be excluded from any proceedings are statements for which it was determined that they were obtained by torture.
[741] Most of these points of contention have been identified in the literature, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 505.
[742] A practical manifestation of this rule is that if one is tortured to confess a crime and reveal whereabouts of any physical evidence, his confession may be declared inadmissibly, but not other evidence such as stolen goods, weapon etc. It is clear that, from a preventive perspective at least, declaring confession inadmissible but basing a judgment on real evidence derived from it is meaningless, since it leaves the motivation to resort to ill-treatment intact.
[743] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 531–2.
[744] Ibid., pp. 531–2.

it is problematic to differentiate between the two, draw rather different conclusion, i.e. that use of such information should be prohibited altogether.[745] All things considered, as there is no practice of human rights courts and other supervisory bodies indicating that the operational use of tainted information falls under exclusionary rule, one can presume that such use is not prohibited.

As regards the question whether this rule precludes the use of evidence extracted by ill-treatment other than torture, the practice of treaty bodies and human rights court have in effect extended the reach of the exclusionary rule so as to cover CIDT as well.[746]

The third limit is closely related to the so-called *fruit of the poisonous tree doctrine,* which assumes that the use of coercion "taints", that is to say, renders inadmissible not only explicit confessions or statements extracted under duress, but rather all other physical evidence derived, i.e. directly stemming from them.[747] Granting that the meticulous enforcement of this doctrine would, from the preventive perspective at least, make most sense, its exact reach in the context of ill-treatment is as of yet not clear. ECtHR approached this issue by inquiring whether the use of tainted real evidence rendered the entire trial unfair. After ECtHR differentiated between torture and other forms of ill-treatment, it came to the conclusion that real evidence obtained by the former always renders the entire trial unfair, whereas as regards evidence obtained by the latter, a more differentiated assessment was called for. It proceeded by carefully conceding that, in case of incriminating evidence obtained by inhuman and/or degrading treatment—despite the absolute nature of prohibition—there are other factors (whether the disputed evidence would be discovered irrespective of the ill-treatment) and interests (effective suppression of crime and interest of the victims, their families and general public in punishing the offender) at play. Thereafter, ECtHR accepted to examine the role that evidence secured through ill-treatment other than torture played in securing the guilty verdict. Finally, it established that if the conviction is secured predominately by means of uncompromised evidence, admittance of real evidence procured by CIDT does not render the entire proceeding unfair. In exact words of ECtHR there needs to be

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[745] International Commission of Jurist, for example, is of the opinion that "*absolute prohibition on torture … entails a continuum of obligations – not to torture, not to acquiesce in torture, and not to validate the results of torture and other cruel, inhuman or degrading treatment…. a water-tight distinction between "legal" and "operational" use … is probably illusory,*", see International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Geneva, 2009), p. 85; Other instances also support the position that use of tainted information should be prohibited in every context, see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), § 47–47; *Report evaluating the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009)* (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012), §§ 48–9; *Beware the gift of poison fruit: Sharing information with states that torture* (Geneva, Switzerland: Association for the Prevention of Torture, 2013), p. 24.

[746] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 535–6; C. Ingelse, *The UN Committee against torture: An assessment / Chris Ingelse* (Boston: Kluwer Academic Publishers, 2001), p. 382; *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 12–12; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), § 26–26; *Gäfgen v. Germany* (ECtHR, 01 June 2010), § 166–166.

[747] For clarification of the "fruit of the poisonous tree" approach see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), § 29–29; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 503–5; *Gäfgen v. Germany* (ECtHR, 01 June 2010), §§ 69–74; *Beware the gift of poison fruit: Sharing information with states that torture* (Geneva, Switzerland: Association for the Prevention of Torture, 2013).

"*a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence*".[748]

In spite of the fact that only the ECtHR provided detailed reasoning on this subject, the position that exclusionary rule prohibits the admission of real or derivative evidence can find some support in practice of other treaty bodies and human rights courts.[749] However, taking everything into account, it would be far-fetched to assert that an exclusionary rule, under current international human rights law, requires the exclusion of every single piece of incriminating evidence obtained by ill-treatment not amounting to torture.

Finally, practical considerations, such as the question on whom the burden of proof lies and what standard of proof is required to render concrete evidence inadmissible, are, in a sense, crucial since a rigid approach towards them can render the entire protection accorded by the exclusionary rule illusory. In other words, debating whether an exclusionary rule covers statements only or extends to real evidence, makes little sense when the allegation of ill-treatment before the adjudicating body is, in practice, being routinely disregarded due to unfavourable procedural rules.[750] Beyond that a well-grounded allegation that a particular piece of evidence was obtained by ill-treatment shifts the burden of proof to the state,[751] which then tries to prove the opposite, little is clear. The following three questions are contested: what does a well-founded allegation need to consist of to shift the burden of proof (does one only need to rise a claim, a plausible claim, submit some evidence etc.); what course of action should an adjudicating body take in order to determine the soundness of the initial allegation (to suspend the criminal proceeding, entrust another body to establish whether ill-treatment took place, request relevant evidence such as custodial records, medical records, examine witnesses etc.); and finally what is the standard of proof for declaring evidence inadmissible (is it necessary to establish that ill-treatment actually took place or some lower standard of proof would suffice). Even though it is

[748] *Gäfgen v. Germany* (ECtHR, 01 June 2010), §§ 174–80.

[749] Reference to real or derivative evidence was deliberately excluded from the draft of the CAT article 15, see R. Pattenden, 'Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT', *The International Journal of Evidence and Proof* 10 (2006), 1–41, at 9; In spite of this the CtAT indicated that exclusionary rule should extend to cover real evidence as well, see S. Joseph, *Seeking remedies for torture victims: A handbook on the individual complaints procedures of the UN treaty bodies*, OMCT handbook series (Geneva, 2006), p. 235; The HRC noted that "*no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14*" *General Comment No. 32 Article 14:* (HRC, 23 August 2007), § 6–6); Reference to all evidence was recently included in practice of the IACtHR and the ACmHPR see *Cabrera García and Montiel Flores v. México* (IACtHR, 26 November 2010), p. 167 and *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* (ACmHPR, 01 March 2011), p. 212; Finally this position is shared by the SRT as well see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), § 29–29.

[750] For the short account of the SRT's experience regarding practical impediments to efficient observance of the exclusionary rule see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 98–98; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), §§ 24–5.

[751] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 533; *Cabrera García and Montiel Flores v. México* (IACtHR, 26 November 2010), p. 136; *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* (ACmHPR, 01 March 2011), § 218–218.

beyond the scope of this work to ponder upon these questions,[752] they forcefully demonstrate the predominance of practical challenges to securing a maximal effect of the exclusionary rule in preventing ill-treatment.

For the purposes of the current discussion it suffices to say that compliance with state obligations related to custodial safeguards, independent monitoring, effective investigation and providing redress to victims facilitate the observance of the exclusionary rule. For instance, if the adjudicator could consult custodial and medical records and examine reports of the independent monitoring body with respect to particular institution where ill-treatment allegedly occurred, he would be in a better position to decide whether to give faith to the allegations of the complainant. Similarly, if an investigation, triggered *ex officio* or via complaint submitted directly by detainees or forwarded by legal counsels, relatives or medical professionals, led to the identification and punishment of perpetrators, exclusion of evidence obtained by coercion, would be effectuated as a consequence of redress awarded to the victim. In other words, there is a great deal of complementarity between different state obligations arising from prohibition of ill-treatment.

To sum up, exclusionary rule is intended to serve as a powerful disincentive to fight crime by means of ill-treatment. On the other hand, its usefulness is limited only to situations where ill-treatment is used with the purpose of obtaining incriminating evidence against alleged offender. There is a constant tendency towards broadening the reach of the exclusionary rule. It is established that it covers every form of ill-treatment and that there is at least a clear tendency to include any evidence and extend its scope to all handlings of the state be it legal proceedings or operative actions. The main challenge, however, lies in practical impediments to its proper implementation. In this respect, it is to a large extent dependent on diligent discharge of other preventive obligations, in particular custodial safeguards and effective remedies.

12.2.5 Duty to provide education and training

The obligation to provide training and education to persons who, in the course of their work, come into contact with those deprived of liberty on the subject of prohibition of ill-treatment has been explicitly envisaged by CAT Article 10 and IACPPT Article 7, recognized by the practice of international

[752] For a general overview of the state of affairs regarding these issues see European Center for Constitutional and Human Rights and Redress Trust, *Intervention Submission before the European Court of Human Rights in the case of El-Haski v. Belgium*. http://www.redress.org/downloads/casework/REDRESS%20and%20ECCHR%20Written%20Submissions%20El-Haski%20v.%20Belgium.pdf (08 August 2015); For the position of the SRT see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez: UN Doc A/HRC/25/60* (2014), §§ 31–3.

bodies[753] and suggested in a number of soft law instruments.[754] A similar obligation is stipulated in the CRPD as well.[755] The rationale underlying this obligation is that putting in place a preventive legal framework alone, however commendable, does not suffice as law enforcement officials, in general, and the members of the custodial staff, in particular, need to be made aware of this framework and properly trained in giving effect to it. Only then state efforts in preventing ill-treatment can begin to bear fruit. Given that those in charge of detainees are, even in states where ill-treatment is endemic, well aware that inflicting pain to extract confession is, at least in some rudimentary sense, wrong, this cannot be said for a range of practices applied out of mere ignorance and amounting to at least degrading treatment. In this context, it is worth noting that acts or omissions that might amount or contribute to ill-treatment, and thus generate state obligations to prevent them, are prone to change with time. It follows that certain practices that were previously routinely applied in custodial settings, such as strip searches, solitary confinement and use of restraints, are—if not outright prohibited like corporal punishment—gradually becoming more humane by being restricted in scope, conducted less invasively or subjected to strong safeguards.[756] In addition, specialized education and training is indispensable in supervising those belonging to vulnerable groups such as persons with psychosocial and/or intellectual disabilities, hunger strikers, detainees in risk of suicide and the like. Therefore, if a state truly wants to be effective in preventing ill-treatment, these changes and specificities should be reflected in the preventive framework and thereafter imparted through adequate training to those officials best positioned to put them into practice.

It is beyond doubt that the main target group of this obligation are individuals, usually public officials but also those entrusted with powers that can impinge personal integrity such as employees of private security companies, authorized to use force especially but not exclusively against persons deprived of liberty. Furthermore, all those who in discharge of their professional duties are coming into contact with persons deprived of freedom, for instance medical professionals, lawyers, judges and prosecutors, should be educated on their role in overall efforts to prevent and punish ill-treatment.[757]

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[753] *General Comment no. 20* (HRC, 1992), § 10–10; *General Comment No. 21: UN Doc HRI/GEN/1/Rev.9* (1992), § 7–7; *Davydov and Others v. Ukraine* (ECtHR, 01 July 2010), § 268–268; The IACtHR has been routinely pronouncing an obligation to provide human rights training to law enforcement officials as a part of reparations that is guarantees of non-repetition see, for example, *Goiburú et al. v. Paraguay* (IACtHR, Judgment of 22 September 2006), § 178–178; *The "Las Dos Erres" Massacre v. Guatemala* (IACtHR, Judgment of 24 November 2009), 251–254.

[754] *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: Basic Principles on the Use of Force* (1990), § 20–20; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 81–81; *2nd General Report: CPT/Inf (92) 3* (1992), §§ 59–60.

[755] Obligation to provide adequate training to professionals on rights set forth in the CRPD envisaged in article 4 (i), in conjunction with prohibition of ill-treatment envisaged in article 15 indicates that those in contact with persons with disabilities deprived of liberty should undergo appropriate education and training, see M. L. Perlin and M. R. Schriver, '"You That Hide Behind Walls": The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients', in *Torture in healthcare settings: reflections on the Special Rapporteur on Torture's 2013 Thematic Report* pp. 195–217, at p. 210.

[756] Refer to chapter 6 Impact of the prohibition of ill treatment - a dynamic process.

[757] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 396–7.

In addition to the general remarks on the absolute nature of the prohibition, gravity of the crime demanding serious punishment and the obligation to report instances of ill-treatment, main focus should be put on practical instructions on how to prevent ill-treatment.[758] In reality, however, the content of every specific training should reflect the needs of a particular target group and can cover areas such as proper handling of detainees and maintenance of the custodial registers in detention facilities,[759] special knowledge and set of skills necessary for managing particularly vulnerable groups in detention (juveniles, persons with disabilities etc.), preventing ill-treatment during interrogation as well as education on effective investigation methods in order to minimize reliance on confessions,[760] avoiding ill-treating in the course of use of force,[761] arrest and use of restraints,[762] education of medical staff on documenting ill-treatment in line with the Istanbul protocol,[763] education of those working in psychiatric or social care facilities on particularities of persons with psychosocial and/or intellectual disabilities[764] such as how to "*administer nonviolent and non-coercive care*"[765] and the like. As a basis for such training one should make use of relevant standard setting documents pertaining to the prevention of ill-treatment.[766]

What is more, prohibition of ill-treatment should be clearly stated in any rules or instructions specifying professional activities and outlining duties of those working with persons deprived of freedom. The rationale is that setting out the prohibition in documents which regulate day-to-day activities of those directly in charge of detainees would make them more attentive to observing the prohibition and make it difficult for superiors to order or condone ill-treatment perpetrated by their subordinates.[767] The wording "*rules or instructions*" employed in CAT was meant to encompass regulation such as "*training manuals...codes of conduct… interrogation rules... instructions to prison guards, intelligence officers, criminal investigation police and similar personnel*".[768]

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[758] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 397.
[759] *Report on Paraguay* (SPT, 07 June 2010), § 106–106.
[760] *Report on Benin* (SPT, 15 March 2011), § 78–78.
[761] *Blanco-Romero et al. v. Venezuela* (IACtHR, 28 November 2005), § 106–106.
[762] *Concluding observations on Norway* (CtAT, 13 December 2012), § 19–19.
[763] *Gutiérrez-Soler v. Colombia* (IACtHR, Judgment of 12 September 2005), p. 110; *Report on Kyrgyzstan* (SPT, 28 February 2014), § 94–94.
[764] *Concluding observations on the initial report of Austria* (CtRPD, 30 September 2013), pp. 32–3; *Concluding observations on the initial report of Denmark* (CtRPD, 30 October 2014), §§ 38–9.
[765] *Concluding Observations on the Czech Republic* (CtAT, 13 July 2012), § 21–21.
[766] According to Nowak and McArthur, training on the subject of prohibition of ill-treatment should include information provided in the following documents: SMR, Code of Conduct for Law Enforcement Officials, Principles of Medical Ethics, Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, Body of Principles, Basic Principles on the Use of Force by Law Enforcement Officials, Basic Principles, Rules for the Protection of Juveniles deprived of their Liberty, Declaration on the Protection of all Persons from Enforced Disappearance and Istanbul Protocol. It should also cover, according to the CtAT, gender specific issues, discriminatory practices, racism etc. M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 398–9.
[767] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 142–3.
[768] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 399.

In sum, the obligation to provide training on giving effect to prohibition of ill-treatment is instrumental in actually preventing it. Thorough and continuously implemented training is crucial in two respects. First, it helps avoid prospective ill-treatment by instructing those in contact with detainees how to cope with them. It also reminds the members of the custodial staff that ill-treatment is absolutely prohibited and thereby sends a strong signal that its prevention is a priority of the state. Second, by stressing obligations central to discovering and punishing incidents of ill-treatment, such as conducting proper medical examinations, referring findings indicative of ill-treatment to competent bodies and keeping up to date registries, it deters potential perpetrators from resorting to ill-treatment.

12.2.6 Duty to secure adequate living conditions, nutrition and activities to persons deprived of liberty

As most binding international treaties only contain provisions envisaging general prohibition of ill-treatment and/or the state obligation to treat detainees humanely, standards detailing different aspects of life in custodial settings such as material conditions, nutrition, health care, activities, discipline, contact with the outside world etc. are set forth in non-binding documents and practice of international bodies.[769] An exemption to the non-binding character of standards regulating accommodation and treatment of persons deprived of their liberty is contained in III and IV Geneva conventions which regulate the internment of prisoners of war and civilians in international armed conflict.[770] In this case, IHL provides stronger protection of persons deprived of liberty than IHRL.[771] As regards the substance of provisions regulating material conditions under which detainees reside, they are by and large similar under IHRL soft law and IHL hard law provisions. The ICRC finds that a "*common catalogue of*

[769] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.4.5.2.1. Material conditions and regime of detention.

[770] A. Aeschlimann, 'Protection of detainees: ICRC action behind bars: IRRC March 2005 Vol. 87 No 857' (2005) 87, International Review of the Red Cross, 83–122 at 106–7; Situation is different as regards non-international armed conflict where no such detailed binding rules dealing with accommodation and treatment of persons deprived of freedom are envisaged. In addition to Common article 3 which envisages general guarantees for detainees, position and treatment in captivity, is regulated in II Additional protocol which does not apply to all types of NIAC and is not widely ratified. Moreover, II additional protocol equates standard of treatment of detainees (requiring provision of necessities such as food, water, hygiene, medical care) with that of civilian population residing in the area. Therefore, in case of general food shortages caused by war, detaining power has no obligation to provide food sufficient for maintaining health, but only that available to local population. Other obligations of the detaining power (separate accommodation for men and women, joint accommodation of families, correspondence, medical examinations etc.) are formulated in even weaker meaner (the wording „*within the limits of their capabilities*" is employed), see II AP article 5 para. 2. Thus, protection offered here is lower than that envisaged by non-binding IHRL instruments as well as jurisprudence of HR bodies (the HRC held that certain core minimum, such as food, has to be respected regardless of material considerations of the state). On the other hand, it binds non-state actors as well, which cannot be said for obligations under IHRL. See International Committee of the Red Cross, *Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict: Background Paper*. https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf (12 March 2015), pp. 8–9. For the position of customary IHL regarding conditions of detention see J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary international humanitarian law* (Cambridge, New York: Cambridge University Press, 2005), pp. 430–1.

[771] M. Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment', in A. Clapham and P. Gaeta (eds.), *The Oxford handbook of international law in armed conflict*, Oxford handbook, First edition, p. 408.

standards could even be derived from both bodies of law".[772] These standards, however, are not cast in stone but should reflect the societal progress and changing attitudes towards those deprived of liberty embodied in developments in human right law and several other disciplines such as criminology and medicinal science. Most instruments elaborating upon the treatment and detention conditions have, thus, already undergone or are currently in the process of revision.[773]

12.2.6.1 Material conditions of detention

One of the most important questions pertaining to material conditions of detention: the minimum and/or optimal floor space and cubic content of air per prisoner, has not been clearly answered in standard setting documents detailing detention conditions, but insread obscured by using a vague phrase "*due regard being paid to*".[774] This is so because it is difficult to establish a universally applicable standard on floor space without taking into account other aspects of detention that shape the overall situation of the detainee, such as number of hours a detainee spends confined in his cell.[775] Therefore, the adequate floor space can be rather different for a person spending 23 hours locked up in a cell, a detainee who has access to the common area within a building for several hours and to open space 1 hour and finally the one who uses the cell only for sleeping and spends his days working and being engaged in different activities.

Nevertheless, international bodies did, implicitly or explicitly, articulate a position on preferred and/or minimum space requirements per prisoner. The CPT held that 7 m² for single occupancy cells in police stations is desirable.[776] It set forth 4 m² as a minimum standard as regards multi occupancy cells, [777] but recently added that desirable space for cells accommodating 2, 3 or 4 inmates is 10,14 and 18 m²

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[772] ICRC, *Internment in Armed Conflict: Basic Rules and Challenges: Opinion Paper*. https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges#.VQIjqvnF-pe (13 March 2015), p. 2.

[773] CPT standards are in the constant state of revision through publication of the CPT's annual general reports which almost always contain a section clarifying certain aspect of detention. The EPR underwent revision in 2006, while the SMR (now called the Nelson Mandela Rules) in 2015. In addition to this, even the legally binding standards enshrined in Geneva conventions are to be interpreted in line with contemporary developments and present day reality through new ICRC Commentaries.

[774] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 10–10; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 18–18.

[775] Council of Europe, *Commentary to Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules*, paras. Rule 18.; International Committee of the Red Cross, *Water, sanitation, hygiene and habitat in prisons : supplementary guidance*. https://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf (14 March 2015), p. 35; Similarly, Aeschlimann, while discussing work of the ICRC in protecting detainees, notes that international standards on detention conditions, such as minimum floor surface per prisoner, are deliberately generally termed since they depend on number of factors, see A. Aeschlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross* 87 (2005), 83–122, at 115; Whether overpopulation will have adverse effects on affected detainee, according to the ICRC, in addition to amount of space available, depends on following factors: ventilation; lighting; access to sanitary facilities; the number of hours the detainees spend locked in their cells or dormitories; the number of hours they spend in the open air; whether they have the opportunity to take physical exercise and to work, etc. see ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 20. Similar approach is utilized within the Inter-American human rights system as well, see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 465–465.

[776] *2nd General Report: CPT/Inf (92) 3* (1992), § 43–43; *Report on Albania* (CPT, 22 January 2003), § 127–127.

[777] *Report on Slovak Republic* (CPT, 06 December 2001), § 62–62; CPT later specified that 4 m^2 standard for multi occupancy cells should not include sanitary annex *Report on Montenegro* (CPT, 22 May 2014), § 44–44.

respectively, without sanitary annexes. For single occupancy cells, it noted that, while they should not be smaller than 6 m²,[778] the desired space is 7 m²[779] and ideal 9 m².[780] As regards non-penal institutions, besides remarking that positive therapeutic environment includes *inter alia* sufficient space per patient, CPT made clear that a minimum of 4 m² for shared dormitories in psychiatric hospitals[781] and social care centres[782] ought to be met. The ICRC suggested the following minimum specifications: 3,4 m² of personal space per prisoner in shared and 5,4 m² (excluding toilets) in single accommodation cells.[783] It also introduced a bare minimum comprising of place for sleeping, enough room to move freely about and to store personal belongings.[784] The IACmHR accepted this minimum as well[785] and especially noted that a bed needs to be 2 meter long and 80 cm wide and that suspended beds cannot suffice.[786] The ICRC also introduced a somewhat novel category of total space requirement (entire prison area to which detainees normally have access to including workshops, classrooms, visiting areas, health clinics and recreation areas) ranging from 20 to 30 m² per person. The logic behind this requirement is that "*an effective prison will have a number of spaces where a range of services and opportunities can be accessed by the majority of detainees".*[787] The SPT did not, as of yet, take a clear position on the minimum or desirable floor space per detainee but only voiced objections to certain conditions it came across, such as, keeping a detainee in less than 1 m².[788]

Premises at disposal to prisoners, especially their cells, should be adequately heated and ventilated.[789] Inmates shall have access to toilets at all times, be it within (in a separate annex) or outside their cells; in the latter case access needs to be enabled at any time of day and night.[790] Prisoners should have access to natural light, sufficient to read or work and fresh air.[791] To that end windows should be

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[778] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), p. 59.
[779] *Report on Portugal* (CPT, 24 April 2013), § 49–49.
[780] *Report on Slovak Republic* (CPT, 06 December 2001), § 62–62.
[781] *Report on Bosnia and Herzegovina* (CPT, 26 April 2012), § 96–96.
[782] *Report on Croatia* (CPT, 18 March 2014), § 117–117.
[783] ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 24; ICRC, *Water, sanitation, hygiene and habitat in prisons : supplementary guidance*. https://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf (14 March 2015), p. 33.
[784] ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 21
[785] R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 465–465.
[786] R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 472–472.
[787] ICRC, *Water, sanitation, hygiene and habitat in prisons : supplementary guidance*. https://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf (14 March 2015), p. 40.
[788] *Report on Maldives* (SPT, 26 February 2009), § 141–141. For further indications regarding which level of overcrowding and under what condition would amount of ill-treatment see chapter 5 Mapping the content of ill-treatment under international law, section 5.4.5.2.1. Material conditions and regime of detention.
[789] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 10–10; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 18–18; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), XII.1.
[790] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 12–12; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 19–19; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), XII.2; *2nd General Report: CPT/Inf (92) 3* (1992), § 49–49.
[791] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 11–11; the EPR on light and air *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 18–18.

of adequate size.[792] Artificial light should also satisfy "*normal reading or working*" standard. SMR remarked that along with fresh air, access to ventilation should be provided while the EPR envisages it as an alternative. It has been noted that window glass should not be opaque[793] but transparent to allow a view at external environment.[794]

Conditions need to be created for inmates to maintain their personal hygiene at a satisfactory level. This includes washing hands, shaving, showering and the like. It is highlighted that inmates should be able to shower at regular intervals, ideally on a daily basis but not less than one[795] or two[796] times a week. Inmates need to be provided with sanitary material, implements and personal hygienic items to keep themselves and their surrounding clean.[797] Similarly, measures ought to be taken to prevent infestation of cells and other premises with vermin.[798] Every person deprived of liberty must be provided with a bed and clean bedding comprising of bed frame, bed linen and mattress. Bed linen ought to be regularly changed.[799] If mandatory, or an inmate cannot afford one, adequate clothing, suitable to the local climate and in no way degrading, should be supplied as well as some sort of laundry arrangement.[800] In addition, detention authorities as well as those in charge of psychiatric hospitals and social care homes are under an obligation to provide reasonable accommodation for persons with disabilities. Regarding material conditions of detention this necessitates that facilities are physically adjusted to specific impairments of the persons deprived of freedom.[801]

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[792] The ICRC prescribes minimum size of windows capable of enabling free flow of air and light as one tenth of the floor space, see ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 24.

[793] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 46.

[794] *Report on Portugal* (CPT, 24 April 2013), § 49–49.

[795] One should however bear in mind that the SMR recommended minimum of one shower per week in a temperate climate only, see *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 13–13; see also ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 47.

[796] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 19–19; the ECtHR had noted, with respect to Russian remand prisons, that one shower per week lasting 15-20 minutes does not suffice as it is "*manifestly insufficient for maintaining proper bodily hygiene*", see *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), § 158–158.

[797] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), §§ 14–5; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 19–19; The ICRC explicitly mentions mops, buckets, soap, protective clothing etc., see ICRC, *Water, sanitation, hygiene and habitat in prisons : supplementary guidance*. https://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf (14 March 2015), p. 54.

[798] ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons*. https://www.icrc.org/eng/assets/files/other/icrc-002-0823.pdf (14 March 2015), p. 97; *Ananyev and Others v. Russia* (ECtHR, 10 January 2012), p. 159.

[799] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 19–19; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 21–21; Bedding includes bed frame, mattress and bed linen see, 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 50; In Inter-American system reference is made to a bed measuring 2 x 0,8 m, bed clothing and mattress. Suspended beds are explicitly excluded. See *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), XII.1; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 472–472.

[800] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 17–17; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 20–20.

[801] This is well established in practice of international bodies, see, for instance, *Price v. the United Kingdom* (ECtHR, 10 July 2001), § 30–30; The CtRPD held that holding a prisoner with disabilities in a cell unsuited to his needs violated article 14.2, article 17 but did not amount to violation of article 15.2 mandating states to take measures to prevent ill-treatment although it added that this is possible, see *Mr. X v. Argentina* (CtRPD, 18 June 2014), § 8–8; Position that lack of reasonable accommodation in places of detention increases the risk of persons with disabilities being subjected to ill-treatment, or

Those residing in psychiatric institutions and social care homes, in addition to the outlined standards relating to prisoners, should benefit from conditions "*conducive to the treatment and welfare of patients*" and contributing towards a positive therapeutic environment.[802] These more favourable conditions also reflect the fact that they are not incarcerated as a punishment and that the main purpose of their stay is supposed to be their treatment and recuperation. Constituent parts of such environment according to the CPT, besides basic preconditions such as light, food etc., are the following:[803] bedside tables, wardrobes, possibility to keep personal items such as photographs and books as well as lockable space to store them. Rooms accommodating few patients should be preferred to large capacity dormitories and adequately decorated in order to provide visual stimulants. Clothing of patients should be individualized; toilets should provide minimum of privacy while hygiene is expected to meet hospital standards. Addressing or referring to patients only as numbers could be considered degrading.[804] Patient should have appropriate communal area at their disposal, but not be forbidden from retreating to their rooms if they so wish. In addition, suitable equipment for providing care to bedridden patients is necessary to prevent "*wretched conditions*". Finally, taking into account the scarcity of resources with which many states struggle, the CPT noted that in any case requirements related to food, heating, clothing and treatment and medication ought to be always respected. Similar considerations on bare minimum that should be always provided have been stated in relation to social care institutions as well.[805]

12.2.6.2 Food and water

It is well established that prisoners are to be provided with a sufficient amount of food, prepared and served hygienically, as well as with clean drinking water. As to the quality and quantity of food, the SMR speaks of "*food of nutritional value adequate for health and strength*".[806] The EPR uses the term "*nutritious diet*"[807] while the PBP in the Americas stipulates the need for "*food in such a quantity, quality, and hygienic condition so as to ensure adequate and sufficient nutrition*".[808] Besides, diet should take into account "*age, health, physical condition, religion and nature of work*" of prisoners.[809] The EPR further stipulates that "*The requirements of a nutritious diet, including its minimum energy*

practices tantamount to it, is supported by other authorities such as the SRT, see *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 38–38; On reasonable accommodation in practice of international bodies more generally see A. Lawson, 'Disability equality, reasonable accommodation and the avoidance of ill-treatment in places of detention: The role of supranational monitoring and inspection bodies', *The International Journal of Human Rights* 16 (2012), 845–64.

[802] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 32–32.

[803] These requirements regarding living conditions afforded to patients of psychiatric hospitals are formulated by the CPT, see *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), §§ 33–6.

[804] *Report on Portugal* (CPT, 24 April 2013), § 100–100.

[805] See, for example, *Report on Lithuania* (CPT, 25 June 2009), § 96–96; *Report on Croatia* (CPT, 18 March 2014), §§ 115–9.

[806] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 20–20.

[807] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 22–22.

[808] *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle XI.

[809] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 22–22;

and protein content, shall be prescribed in national law".[810] The commentary to the EPR noted that national rules should differentiate between different groups of prisoners in setting forth their caloric intake. It further added that, inspection bodies (national and international) should make use of this provision to establish whether food with specifications (nutrition value, quality and quantity) stipulated in the law and that one provided in practice, coincide.[811] Needless to say, this measure would make most sense if visits were carried out without prior notice.

These provisions, however, relate only to prisoners and not to those in police custody, psychiatric institutions or social care homes. As regards the former the problem is that, as they are held in police custody usually for short period of time ranging from few hours to few days, no proper catering arrangements may be envisaged. Nevertheless, the CPT held that "*They should be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day.*"[812] As regards the latter, it would be reasonable to assume that outlined standards pertaining to nutrition of prisoners constitute a minimum that is to be provided to persons with psychosocial and/or intellectual disabilities residing in institutions; nevertheless this minimum should be adjusted to the requirements and special needs arising from their medical condition. Furthermore, providing proper eating arrangements, including serving food at suitable temperature and "*eating with proper utensils whilst seated at a table*" contribute towards creating a positive therapeutic environment and, thus, further patients' psycho-social rehabilitation.[813]

12.2.6.3 Availability of in and outdoor activities and preserving contact with the outside world

All prisoners, including those undergoing solitary confinement,[814] should benefit from the possibility of spending at least one hour per day in the open air.[815] Engaging in sport activities should be made possible by constructing adequate sport facilities and providing equipment.[816] In addition to this one hour, prisoners should spend larger part of the day outside their cells engaged in other purposeful activities (work, vocational training, cultural activities, hobbies etc.). Even if there is no universally accepted minimum or desirable amount of time a prisoner should spend outside his cell, some conclusions may be drawn. The EPR suggest that prison regime should encompass a balanced program of activities allowing prisoners to "*spend as many hours a day outside their cells as are necessary for*

[810] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 22–22.
[811] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 50.
[812] *2nd General Report: CPT/Inf (92) 3* (1992), § 42–42.
[813] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 35–35.
[814] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 56; *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 61–61.
[815] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 21–21; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 27–27.
[816] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), p. 21; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 27–27.

an adequate level of human and social interaction".[817] The commentary to the EPR further clarified that "*Such activities should cover the period of a normal working day*."[818] Along the same lines, the CPT underscored that prisoners on remand should spend at least 8 hours per day outside their cells "*engaged in purposeful activity of a varied nature*", while the regime applied to those serving a prison sentence should be even more favourable.[819] Conversely, leaving detainees to languish for 23 hours per day in their cells is considered completely unacceptable.[820] Contact with the outside world, that is, family and friends via telephone, correspondence as well as visits and prison leave should be facilitated. In principle, even those undergoing solitary confinement should not be deprived of such contact.

Balanced and a well thought of set of activities is especially important for persons with psychosocial and/or intellectual disabilities as without adequate stimulation their mental health and skills tend to deteriorate. Therefore, similarly to sentenced and remand prisoners, persons with psychosocial and/or intellectual disabilities ought to benefit from outdoor[821] and a range of other activities which, in addition to increasing their life quality, have a profound therapeutic effect. Whereas SPT only suggested that patients should be provided with the opportunity to partake in rehabilitation activities,[822] the CPT addressed the issue in more detail by holding that

> "*Psychiatric treatment should be based on an individualised approach, which implies the drawing up of a treatment plan for each patient. It should involve a wide range of rehabilitative and therapeutic activities, including access to occupational therapy, group therapy, individual psychotherapy, art, drama, music and sports. Patients should have regular access to suitably-equipped recreation rooms and have the possibility to take outdoor exercise on a daily basis; it is also desirable for them to be offered education and suitable work*."[823]

It follows that withdrawal of these activities to persons with psychosocial and/or intellectual disabilities has a more profound negative effect.

12.2.7 Duty to provide adequate health care

In what follows, medical services provided to persons deprived of liberty will be separately examined in prisons and in health care settings. Those in police custody have the right to be examined by a doctor

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[817] *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 25–25.
[818] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 55.
[819] *2nd General Report: CPT/Inf (92) 3* (1992), § 47–47.
[820] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 55; *Report on Czech Republic* (CPT, 31 March 2015), § 57–57.
[821] With regard to persons held in psychiatric hospitals, minimum of one hour of outdoor activities should not be taken for granted given that special arrangements and supervision need to be in place to ensure realization of such activities. What is more, it seems that in reality not only bedridden patients but also those mobile suffer from lack of outdoor activities, see V. Pimenoff, *Towards new standards in psychiatry*, 9,13.
[822] *Report on Paraguay* (SPT, 07 June 2010), § 224–224.
[823] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 37–37; CPT repeated this standard in the context of social care homes see for example *Report on Georgia* (CPT, 21 September 2010), § 155–155.

of their choice; however, since their detention ends in a matter of days or even hours police establishment employ no medical personal on a permanent basis. This being said, some parallels can be drawn with health care service provided in prisons.

12.2.7.1 Health care in prisons

Safeguarding health, physical and mental, of persons deprived of freedom is central to preventing their ill-treatment because almost every aspect of confinement they are being subjected to negatively impacts their health. The main reason to this lies in the closed environment prisoners are forced to endure, which in turn expedites the development of certain diseases as well as the occurrences of violence. The role of health care in places of detention is not only to attend to sick prisoners, but also to prevent or at least to keep in check and alleviate the consequences of this basic detriment (deprivation of liberty). In the opinion of WHO "*All aspects of prisoners' lives in prison affect their health, not only the quality of the health services provided.*"[824] It follows that provision of adequate health care guards them against ill-treatment. It goes without saying that medical treatment should never turn to its opposite, that is to say, itself give rise to ill-treatment. Therefore, one, despite being deprived of freedom, retains his right to reject medical intervention.

The underlying principle of health care provided to persons deprived of their liberty is that incarceration should not result in deterioration of detainees health; the ultimate goal is to enable a prisoner to leave the institution in good health, or at least in the same condition as at the moment of his incarceration.[825] This would require not only providing timely and adequate medical treatment but also taking measures aimed at safeguarding detainees from risks to their health and personal integrity more common in closed environment than in the community. These specific duties addressing or touching upon health issues reflect the general obligation a state owes to those it deprives of liberty. This has been referred to as the duty of care.[826]

Therefore, medical personnel in places of detention, basically, plays a triple role in securing the wellbeing of those detained. Firstly, it ought to carry out measures aimed at mitigating negative consequences the carceral environment leaves upon individual (preventive role). Secondly, it provides

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[824] Enggist S. (ed.), *Prisons and health* (Copenhagen: WHO Regional Office for Europe, 2014), p. 174.

[825] The commentary to the EPR notes that "*Prisoners should not leave prison in a worse condition than when they entered. This applies to all aspects of prison life, but especially to health care*", see 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 63.

[826] Notion of the duty of care has been utilized to make plain that power to deprive of liberty carries with it specific duty to cater for the basic needs, including health, of those brought under the state control. This notion was explicitly or implicitly articulated by a range of international bodies in the context of providing health care to those deprived of liberty, see D. J. Harris, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd ed. (Oxford, New York: Oxford University Press, 2009), p. 97; *11th General Report-Some Recent Developments Concerning CPT Standards in Respect of Imprisonment* § 31–31; *Lantsova v. Russian Federation* (HRC, 15 April 2002), p. 9; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, §§ 525–6; 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 63; *Good governance for prison health in the 21st century: A policy brief on the organization of prison health* (Geneva: World Health Organization, 2013), pp. 5–8.

medical assistance to those suffering from a medical condition (curative role). Finally, medical personnel should in itself represent a safeguard against deliberate ill-treatment by conducting medical examinations in line with Istanbul protocol and reporting any allegation or indication to the relevant authorities. In what follows these three roles of health services in prisons will be examined in more detail.

12.2.7.1.1 Preventive role

Members of prison health care unit act preventively by conducting comprehensive medical examination upon admission and at regular intervals thereafter. This first examination, in addition to being a safeguard against deliberate ill-treatment by the police, has a preventive function as well since it seeks to determine health needs of newly arrived patients, inform them on health risks in closed institutions, measures of precaution, practical arrangement for scheduling a medical examination etc.[827] The WHO notes that the first examination of every newly arrived prisoner should, as a minimum, encompass the following: assessment of main health problems, risk of suicide or self–harm, existence of injury obtained during arrest and whether he poses a risk to other prisoners (likely to resort to violence due to his condition or suffers from infectious disease).[828]

Furthermore, medical personnel should regularly inspect various material aspects of detention (level of hygiene, sanitary conditions, heating, light and ventilation) and quality of nutrition in order to prevent the emergence of conditions detrimental to health or conducive to development of illness.[829] In addition, special attention should be paid to the needs, especially adequate medical treatment and suitable accommodation, of particularly vulnerable individuals such as mothers with babies, juveniles, persons with disabilities and older prisoners.[830] Qualified medical personnel should regularly visit prisoners undergoing solitary confinement in order to ensure that their health is not put at risk.[831]

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[827] *Report on Honduras* (SPT, 10 February 2010), § 213–213; The CPT notes that during the first examination a booklet outlining functioning of the health service and basic hygiene measures should be handed to the prisoner. It adds that a range of preventive measures related to transmittable diseases and suicide prevention including dissemination of information are to be taken although not necessarily during the first examination, see *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 33–33.

[828] Enggist S. (ed.), *Prisons and health* (Copenhagen: WHO Regional Office for Europe, 2014), p. 175.

[829] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 26–26; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 44–44; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 53–53.

[830] The commentary to the EPR noted that in plaining specialist care medical staff should accord due weight to the needs of vulnerable groups, see 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 69; The CPT devoted special attention to mothers with children, prisoners with personality disorders, juveniles, and prisoners unsuited for continued detention, see *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), §§ 64–70; see also *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle X. For the comprehensive analysis of the position of vulnerable prisoners see T. Atabay, *Handbook on prisoners with special needs*, Criminal justice handbook series (New York: United Nations, 2009).

[831] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 32–32; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 43–43; this does not however mean that medical personnel is to declare prisoner fit to undergo solitary confinement, but to safeguard his health during application of the measure, see 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at pp. 68–9.

Finally, medical personnel should take measures with the intention of eradicating, or at least containing, diseases usually thriving within prison environment such as tuberculosis, hepatitis, HIV/AIDS etc.[832]

12.2.7.1.2 Curative role

Primary duty of health care personnel is to provide medical assistance to those in need of it. This presupposes that prisoners have access to medical staff at all times. It follows that detention authorities should not filter requests for medical examination.[833] Moreover, non-medical personnel should not demand from prisoners to reveal reasons for requesting medical examination.[834] Ideally, a request is to be submitted in a manner ensuring confidentiality such as handing in a sealed envelope.[835] In any case, a prisoner should be informed on arrangements for scheduling an appointment with a medical doctor upon his admission.[836] This does not, however, imply that each and every place of detention needs to have a staff doctor permanently present at the facility, which is, in any case, unattainable for small prisons and police stations. Therefore, access to medical examination by a qualified physician in non-urgent cases ought to be made available within a reasonable time (without undue delay),[837] while medical assistance needs to be provided promptly in urgent cases.[838] In addition, according to the CPT, at least one staff member trained in first aid procedures, preferably with medical qualifications, should be present at the facility round-the-clock.[839] Although there are no clear guidelines indicating the minimum or ideal number of medical personnel for provision of adequate health care in prisons, the CPT, albeit in a working document, set forth a minimum of one full time medical doctor per 300 inmates

[832] The ECtHR established that states are under a positive obligation to take measures to prevent transmission of hepatitis c in prisons, see *Poghosyan v. Georgia* (ECtHR, 24 February 2009); *11th General Report-Some Recent Developments Concerning CPT Standards in Respect of Imprisonment* § 31–31; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 534–534; For WHO's account of measures necessary for prevention of communicable diseases in prison environment see Enggist S. (ed.), *Prisons and health* (Copenhagen: WHO Regional Office for Europe, 2014), pp. 45–55.

[833] *Report on Brazil* (SPT, 05 July 2012), § 43–43; *Report on Honduras* (SPT, 10 February 2010), § 218–218; *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 42–42.

[834] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67; *Report on Danemark* (CPT, 17 September 2014), § 53–53.

[835] *Report on Danemark* (CPT, 17 September 2014), § 53–53.

[836] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67.

[837] *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 34–34.

[838] The SMR recommend that at least "*medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency*", see *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 52–52; The EPR speaks of arrangements established to enable availability of a doctor "*without delay in cases of urgency*", see *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 41–41; The CPT note that doctor should be available on call see *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 35–35; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas consider "*permanent availability of suitable and impartial medical personnel*" a constitutive part of the right to health of those deprived of liberty principle, see *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle X (1).

[839] *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 35–35; *Report on Finland* (CPT, 20 August 2015), § 77–77.

and 1 full time nurse per 50 inmates.[840] Of course, in addition to this, proper health care in prisons necessities engagement of specialists, particularly psychiatrists and dentists.

On the other hand, mere access to medical professionals does not bring much if patients are not subsequently provided with adequate and timely medical care.[841] It is well established that the standard of medical care and services provided to detainees should, in principle, be equivalent to that available in the community at large.[842] This is often referred to as to principle of equivalence of health care. The general benchmark in this regard is the right to the highest attainable standard of physical and mental health, which, in turn, mandates the provision of preventive, curative and palliative medical services.[843] However, ECtHR seems to consider this principle more as a rule of thumb than a strict canon as it continuously refered to "*requisite medical assistance*".[844] In addition, health care in prisons must include dental services. Medicine and treatment need to be provided free of charge, at least to indigent prisoners.[845]

It has been recommended that, in order to facilitate the equality of care, medical personnel working in prisons should be placed under the authority, or at least closely aligned with, national health agency.[846] It should follow that, if medical treatment cannot be provided in a correctional facility one needs to be transferred to an appropriate specialized clinic able to successfully treat his condition.

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[840] This standard is however relative and prone to vary due to a number of factors (type of institution, number of pre-trial detainees in prison, drug users, average turnover of prisoners, availability of outdoor exercise, number of doctors in the state etc.), see *Health-Care Staffing Levels in Prisons* (CPT, 14 February 2005).

[841] The HRC held that "*appropriate and timely medical care must be available to all detainees*", see *Concluding Observations on Portugal* (HRC, 05 July 2003), § 11–11; the ECtHR noted that state is under an obligation to, as a minimum, provide "*timely diagnosis and treatment of .. illnesses*", see *Mechenkov v. Russia* (ECtHR, 07 February 2008), § 102–102; In other case, article 3 violation was established as prison authorities did not provide adequate and timely treatment for prisoner suffering from tuberculosis, see *Melnik v. Ukraine* (ECtHR, 28 March 2006), p. 106.

[842] *Basic Principles for the Treatment of Prisoners: UN Doc A/RES/45/111* (1990), § 9–9; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 40–40; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 31–31.

[843] *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant): UN Doc E/C.12/2000/4* (2000), § 34–34; see also *Report of the Special Rapporteur Theo van Boven: UN Doc E/CN.4/2004/56* (2003), § 56–56.

[844] *Kudla v Poland* (ECtHR, 26 October 2000), § 94–94; Moreover, in Pitalev the ECtHR remarked that, although medical aid in prisons may not be the same as in the best medical institutions, prisoner must be provided with requisite medical assistance, see *Pitalev v. Russia* (ECtHR, 30 July 2009), § 54–54.

[845] UN Body of Principles, the commentary to the EPR, PBP in the Americas envisage that medical care of persons deprived of liberty, including medication, shall be provided free of charge see *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: UN Doc A/43/49* (1988), § 24–24; 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 64; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle X.; Although the CPT did not address this issue in its General reports, in state reports it continuously recommended that state should cover medical costs for indigent prisoners, see for, example *Report on Czech Republic* (CPT, 31 March 2015), § 70–70; The SPT recommended increase of prison budget to cover medicine to prisoners who need them, see *Report on Mexico* (SPT, 31 May 2010), § 173–173; However in Benin report it recommended free emergency care, medicine and entry screening for those in police custody and covering medical costs of those suffering from common diseases in prisons, see *Report on Benin* (SPT, 15 March 2011), § 131–131.

[846] A number of instances recognize advantages of an arrangement where providers of health care in prisons are employed by or closely aligned with ministry of health as it strengthens medical personnel working in prisons both in their safeguard role against deliberate ill-treatment and as providers of medical services, see CPT, *The CPT at 25: taking stock and moving forward: Background paper*. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dbb96 (19 November 2016), p. 14; see also *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 22–22; *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules: European Prison Rules* (2006), § 40–40; 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states

From a more practical perspective, the premises in which a health-care unit is situated need to meet requirements of hygiene and state of repair appropriate for a medical facility. In addition, necessary medications, instruments and equipment need to be made available.[847] Every medical unit in prison must provide conditions for consultations, emergency interventions and outpatient treatment. Prisoners should not perceive medical personnel as part of a punitive system in charge for enforcing prison sentence or other measures, often resorted to in custodial setting, upon them. For that reason, the patient-doctor relation should be based on trust and, as far as possible, resemble the one in a non-prison context. Privilege of confidentiality is considered central to this relation and should, in principle, be equivalent to that governing a doctor-patient relation in the community.[848] Therefore, providing medical consultations to groups of prisoners or in hearing range of non-medical staff is unacceptable.[849] A prisoner should not be required to disclose the ground for seeking medical consultation to non-medical staff.[850] Finally, medical records pertaining to a specific prisoner should be kept separate from custody records, while information contained therein should not be made available without his consent,[851] except in strictly defined circumstances.[852] Moreover, in order to nurture this relationship, medical staff should abstain from taking part in any doings of punitive or security nature such as confirming that a prisoner is fit to undergo punishment, conducting bodily searches or other measures not made necessary by purely medical considerations.[853] The principle of informed consent to medical intervention should be strictly adhered to. Therefore, a prisoner, after being imparted all relevant information pertaining to his condition, retains the right to refuse medical treatment under same conditions applicable to non-prisoners.[854]

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on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 63; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle X.

[847] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 22–22; *Report on Brazil* (SPT, 05 July 2012), § 47–47.

[848] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 46–46.

[849] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 46–46; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, p. 186; *Report on Brazil* (SPT, 05 July 2012), § 51–51.

[850] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 46–46.

[851] 'Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules', in *European prison rules* (Strasbourg: Council of Europe Publ, 2006), pp. 39–99, at p. 67.

[852] The IACmHR adds that medical personnel can disclose confidential information only in very specific circumstances involving protecting interest of other prisoners or members of the general community see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, p. 186.

[853] *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 73–73.

[854] *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), §§ 46–7; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), Principle X.

12.2.7.1.3 Safeguard role

Medical staff also act as a safeguard against deliberate ill-treatment as they are well placed to document ill-treatment and notify competent authorities.[855]

12.2.7.2 Health care in non-prison setting

As regards persons with psychosocial and/or intellectual disabilities deprived of liberty in a non-prison context, health personnel, in principle, also has a triple role to play (preventive, curative and safeguard) as described above in relation to prisons. Likewise, basic principles such as confidentiality, informed consent and equivalence of care are also valid.[856] Medical doctors should abstain from imposing any punishment upon patients due to breach of internal rules.[857] However, the position of persons residing in psychiatric hospitals and social care homes differs from that of persons deprived of their liberty in a classical custodial setting, in that the state of their mental health is, if not a sole reason, then a significant factor contributing to their deprivation of liberty.[858] Therefore, medical care plays a much greater role in this case. It would be as if all prisoners would suffer from some kind of disorder. This has two consequences. Firstly, the provision of adequate medical care is of utmost importance and therefore health service in terms of number, diversity and expertise of personnel, supply of medication and related material including medical equipment ought to meet patients' needs.[859] Secondly, the entire population is much more vulnerable which, in consequence, gives rise to a situation where treatment or lack of it combined with poor material conditions, including but not limiting to hygiene and sanitation, as well as disregard of patients' needs can more easily degenerate into gross neglect which is, to all intents and purposes, tantamount to ill-treatment.

12.2.7.2.1 Preventive role

Concerning preventive measures, in addition to those outlined before, medical doctors are authorized to approve the use of intrusive measures (mechanical and/or chemical means of restraint and seclusion) in order to prevent harm to patients or third persons. The paradox is that excessive resort to these measures as well as their inadequate or prolonged application became the main cause of ill-treatment of persons with psychosocial and/or intellectual disabilities deprived of liberty. In order to reduce the risk arising from the use of means of restraint, the following guidelines for their proper application and

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[855] Refer to section 12.2.9.4.3. Obligation to report ill-treatment and section 12.2.9.4.4. Duty to perform proper medical examinations.
[856] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 26–26.
[857] *Report on Czech Republic* (CPT, 31 March 2015), § 159–159.
[858] Refer to chapter 6 Impact of the prohibition of ill-treatment - a dynamic process, section 6.2.1. Specificities relating to persons with psychosocial and/or intellectual disabilities.
[859] CPT was satisfied with making the following general remark "*Staff resources should be adequate in terms of numbers, categories of staff (psychiatrists, general practitioners, nurses, psychologists, occupational therapists, social workers, etc.), and experience and training*." See *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 42–42; Concrete adequacy of medical and non-medical staff, in terms of number and specialization, is always assessed on the spot by taking account the special needs of residents, see *Report on Bosnia and Herzegovina* (CPT, 26 April 2012), p. 120; Also more frequent resort to means of restraint would require more staff, see *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 43–43.

pertinent safeguards have been formulated in relevant documents and practice of international bodies, mainly the CPT.[860]

The use of means of restraint, as a measure of last resort, is justified when prospects of actual harm occurring to a patient or third person are rather strong.[861] Relevant documents speak of prevention of immediate or imminent harm and reduction of violence.[862] To illustrate circumstances under which the use of restraint to prevent self-harm is justified, a situation has been put forward where a patient has a knife or a noose and attempts to kill or hurt himself.[863] ECtHR held that "*mere restlessness*" as well as a situation where "*a person resists their application*" could not justify use of restraints.[864] It follows that danger needs to be interpreted narrowly and that the mere speculation that someone might hurt himself or others should not suffice to justify resort to such oppressive measures. Staff members effecting the measure should attempt to calm down the patient by using least intrusive techniques, such as oral persuasion, then move to manual restraint and only at the end, when other efforts proved to be without effect, resort to mechanical restraints, which should be removed as soon as possible.[865] Moreover, these measures should never be applied as a punishment, to discipline or bring about change in patients' behaviour or to alleviate problems caused by lack of personnel.[866] As to the duration of mechanical restraint, the standard: "*shortest possible time*" is usually employed.[867] More specifically, the CPT held that it should last from few minutes to few hours. Only exceptionally, and subject to the approval of two doctors, should mechanical restraint be prolonged for more than six hours and under no circumstances exceed 24 hours.[868] Handcuffs, chains, cage or net beds and similar contraptions

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[860] However, the CtRPD is of the opinion that complete prohibition of use of chemical and mechanical restraints is called for, see *Concluding observations on the initial report of the Czech Republic* (CtRPD, 15 May 2015), § 32–32.

[861] Refer to chapter 6 Impact of the prohibition of ill-treatment - a dynamic process, section 6.4.4. Specificities relating to persons with psychosocial and/or intellectual disabilities.

[862] MI Principles speak of "*immediate or imminent harm to the patient or others*", see *Principles for the protection of persons with mental illness and the improvement of mental health care: A/RES/46/119* (1991), § 11–11; the ECtHR also accepted this standard by holding that use of mechanical restraint is justified to prevent "*imminent harm to the patient or the surroundings*" see, *Bures v. the Czech Republic* (ECtHR, 18 October 2012), § 96–96; CoE recommendation employs the following wording "*prevent imminent harm to the person concerned or others*" see *Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum* § 27–27; the CtAT held that means or restraints ought to be used only to "*prevent the risk of harm to the individual or others*", see *Concluding observations on Croatia* (CtAT, 18 December 2014), § 17–17; the CPT suggests that means of restraint can be applied to "*prevent imminent injury or to reduce acute agitation and/or violence*", although agitation as a ground justifying use of means of restraint has been removed. See respectively *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 43–43; *The Use of Restraints in Psychiatric Institutions-working document* (CPT, 13 June 2012), p. 10.

[863] *Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum* § 197–197.

[864] *Bures v. the Czech Republic* (ECtHR, 18 October 2012), § 97–97.

[865] *Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum* § 196–196; the CtAT reasoned that means of restraint should be used to remove the danger "*only when all other reasonable options would fail to satisfactorily contain that risk*", see *Concluding observations on Croatia* (CtAT, 18 December 2014), § 17–17; the CPT suggests that measures most proportional to the situation encountered should be employed and that resort is not to be made to force when objectives can be achieved by talking, see *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 39–39.

[866] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 43–43; *Bures v. the Czech Republic* (ECtHR, 18 October 2012), § 98–98; *Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum* § 191–191.

[867] *Report on Czech Republic* (CPT, 31 March 2015), § 165–165; *The Use of Restraints in Psychiatric Institutions-working document* (CPT, 13 June 2012), p. 17; *Concluding observations on Croatia* (CtAT, 18 December 2014), § 17–17.

[868] *Report on Czech Republic* (CPT, 31 March 2015), § 165–165; *The Use of Restraints in Psychiatric Institutions-working document* (CPT, 13 June 2012), p. 17.

should never be used to mechanically restrain a patient.[869] The use of this measure needs to be approved by a doctor, or in urgent cases brought to his attention without delay,[870] effected in safe and decent conditions under continuous monitoring of qualified staff[871] and, if not requested otherwise, out of sight of other inmates.[872] In addition, restraint needs to be applied by properly trained staff without assistance of other patients or police officers, in a manner not harming the patient or disrupting his basic bodily functions such as respiration and the ability to eat or drink.[873] Finally, every institution should have a comprehensive restraint policy in place outlining the grounds and justifying its use, the authorisation and manner of application[874] and keep, preferably in a separate register, record on use of means of restraint.[875] This register needs to encompass the following information:

> "*time at which the measure began and ended; the circumstances of the case; the reasons for resorting to the measure; the name of the doctor who ordered or approved it; and an account of any injuries sustained by patients or staff. Patients should be entitled to attach comments to the register, and should be informed of this; at their request, they should receive a copy of the full entry.*"[876]

12.2.7.2.2 Curative role

Secondly, medical personnel's main task is to actually provide necessary health care to persons with psychosocial and/or intellectual disabilities. This is of primary importance, given that all patients or residents have greater needs as regards medical aid due to their disability. Basically, the standard of equivalency of care is applicable here as well. Therefore, patients of psychiatric hospitals and residents of social care homes should be provided with the same standard of health care as available in the community. Some treatments such as unmodified administration of electroconvulsive therapy[877] and surgical castration,[878] came to be considered outdated and therefore completely prohibited. Others, such as forced administration of psychiatric drugs, though in principle not prohibited, if producing a

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[869] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 40–40; *Concluding Observations on the Czech Republic* (CtAT, 13 July 2012), § 21–21.
[870] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 44–44; *Concluding observations on Croatia* (CtAT, 18 December 2014), § 17–17.
[871] *Principles for the protection of persons with mental illness and the improvement of mental health care: A/RES/46/119* (1991), § 11–11; *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), p. 48.
[872] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 48–48.
[873] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 48–48; *Report on Czech Republic* (CPT, 31 March 2015), § 168–168.
[874] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 51–51; *Concluding observations on Norway* (CtAT, 13 December 2012), § 14–14.
[875] Obligation of recording use of means of restraint is envisaged in MI Principles, CoE Reccommendation as well as by the CtAT and the CPT see respectively *Principles for the protection of persons with mental illness and the improvement of mental health care: A/RES/46/119* (1991), § 11–11; *Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum* § 27–27; *Concluding observations on Japan* (CtAT, 28 June 2013), § 22–22.
[876] *16th General Report - Means of Restraint in Psychiatric Establishments for Adults: CPT/Inf (2006) 35* (2006), § 51–51.
[877] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 39–39; *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 61–61.
[878] *Report on Czech Republic* (CPT, 31 March 2015), p. 184; *Concluding observations on the initial report of the Czech Republic* (CtRPD, 15 May 2015), § 30–30.

profoundly negative effect on the patient may even amount to torture.[879] While acknowledging that medication is a necessary part of treatment of persons with psychosocial and/or intellectual disabilities whose steady supply and availability needs to be guaranteed, the CPT adds that it "*will also be on the look-out for any indications of the misuse of medication*".[880] Its practice indicates that this misuse is related to the following situations: administration of excessively high dosages (overuse),[881] old generation of drugs,[882] combination of certain types of medication[883] causing negative side effects as well as use of medication to control behavioural disturbance caused by psychosocial or intellectual disability.[884] In addition, the CPT regularly expresses its concern apropos relying overly on pharmacotherapy to the detriment of other means of treatment (therapeutic, recreational and other activities) that can have beneficial effect on health of patients.[885]

Further emphasis is laid on the concept of informed consent implying that a patient should be in a position to agree with a proposed treatment after being thoroughly informed on its advantages and possible side effects. This information as well as consent should be recorded in a written form. Involuntary admission should not be interpreted as making consent to treatment unnecessary. Moreover, patients should retain the power to withdraw it and discontinue the treatment at any time.[886] Although the obligation to obtain informed consent increases with the intrusiveness and irreversibility of the treatment proposed,[887] there is no consensus on the matter under which circumstances, if at all, non-consensual treatment is acceptable. One approach pursues the strategy based on strengthening safeguards pertaining to forced intervention (necessity of acquiring opinion of the second, independent doctor); the other rejects treating persons with or without psychosocial and/or intellectual disabilities differently, and considers forced intervention permissible only under the terms equal for both groups.[888]

In any case, if the possibility of overriding patients' refusal of treatment exists, as is usually the case, it should be in line with a robust procedure precluding the possible misuse by the administration of medicaments for purposes other than therapeutic, arbitrary or excessive administration, producing unnecessary suffering that can be avoided etc.[889]

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[879] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 63–63.
[880] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), p. 38.
[881] *Report on Slovak Republic* (CPT, 06 December 2001), § 95–95; *Report on Cyprus* (CPT, 09 December 2014), § 96–96.
[882] *Report on Abkhazia, Georgia* (CPT, 23 December 2009), § 99–99.
[883] *Report on Serbia* (CPT, 14 January 2009), § 164–164.
[884] *Report on Latvia* (CPT, 10 May 2005), § 153–153.
[885] *Report on Armenia* (CPT, 17 August 2011), § 141–141; *Report on Bosnia and Herzegovina* (CPT, 26 April 2012), § 110–110.
[886] *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 41–41; see also *Report on Czech Republic* (CPT, 31 March 2015), § 158–158; *Report on Ukraine* (CPT, 23 November 2011), § 172–172.
[887] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 59–59.
[888] Refer to chapter 6 Impact of the prohibition of ill-treatment - a dynamic process, section 6.3. Non-consensual medical intervention.
[889] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: UN Doc A/63/175* (2008), § 63–63.

12.2.7.2.3 Safeguard role

The reach of the safeguard role, which medical personnel ought to assume in health care settings, is more limited as they lack necessary independence for acting as a safeguard against ill-treatment. One could even argue that they are expected to guard patients or residents from ill-treatment stemming from themselves and their colleagues.[890] This difference in the safeguard role of medical personnel in prisons and in psychiatric hospitals has been explained as follows:

> *"In the CPT's opinion the Health Care Unit of a prison can have a crucial role in preventing and detecting ill-treatment of detained persons. It has to be borne in mind that in a psychiatric hospital injuries can be treated even by the perpetrator. Thus there might be less protection in the closed hospital than in the prison where the wing relies on the assistance of the health care unit.*"[891]

In other words, the entire rationale of entrusting doctors with safeguarding persons deprived of liberty from police violence or that taking place in prisons, is turned on its head, as it is precisely them from whom patients need to be safeguarded in a health care setting and this is to be done by, inter alia, police ran investigations.[892] Resort to means of restraint as a routine practice, forced treatment, poor material conditions, lack of activities and continual failure to provide adequate care, are if not directly caused then at least condoned by medical personnel. Even if an individual health worker was not involved in ill-treatment, the same considerations discouraging policemen or a prison guard from reporting his colleague, the so-called *esprit de corps,*[893] are at play in the health care context as well. That said, it is being increasingly recognized that medical personnel should, similarly to the prison context, carry out full medical examination of involuntary patients during admission.[894] This practice would at least prevent the excessive use of force by the police towards persons with psychosocial and/or intellectual disabilities during their deprivation of liberty.

12.2.8 Overcrowding - an aggravating factor

The phenomenon of overcrowding and state obligations to prevent or put an end to it deserve special consideration due to its far-reaching impact on the position of persons deprived of their liberty.[895]

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[890] Effective investigation of allegations of ill-treatment in health care setting cannot even ensue as staff members, medical as well as non-medical, are responsible for commission either through positive act or negligence, see J. Fiala-Butora, 'Disabling torture: The Obligation to Investigate Ill-treatment of Persons With Disabilities', *Columbia Human Rights Law Review* 45 (2013), 214–80, at 259.

[891] V. Pimenoff, *Towards new standards in psychiatry*, p. 8.

[892] It was rightly suggested that in case of allegations of ill-treatment in psychiatric hospitals committed by the staff, police might be responsible for conducting an investigation see V. Pimenoff, *Towards new standards in psychiatry*, p. 7.

[893] *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 26–26.

[894] Pimenoff suggested that procedure regularly followed during admission to prisons should be extended to admission of involuntary patient to psychiatric hospitals, see *Report on Czech Republic* (CPT, 31 March 2015), § 162–162. It seems that this suggestion was accepted as the CPT made a remark to this effect in report to the Czech Government see *Report to the Czech Government* (CPT, 31 March 2015), § 162–162.

[895] On the origin, current state of affairs and promising strategies against overcrowding see, generally, H.-J. Albrecht, *Prison overcrowding - finding effective solutions: Strategies and best practices against overcrowding in correctional facilities*, Forschung aktuell, 1. Aufl. (Freiburg im Breisgau: Max-Planck-Inst. für Ausländisches und Internat. Strafrecht, 2012), vol. 43; R. Allen, 'Effective Countermeasures Against Overcrowding of Correctional Facilities', *UNAFEI Resource Material Series* 80, 1–16; For the overview of developments regarding prevention of overcrowding at the European level see H. De Vos and E. Gilbert, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at*

Overcrowding is the most common term used to refer to a lack of space in a detention facility. However, from a wider perspective, the notion of overcrowding goes well beyond subjecting inmates to cramped conditions. Namely, it is used to describe a situation where a detention facility accommodates more inmates than its capacity allows which, in turn, undermines the ability of the personnel to secure conditions and provide services necessary for normal functioning of life under regime of detention (access to light, air, proper food, health care, satisfactory sanitary conditions, appropriate set of activities etc.). Albrecht has this wider notion in mind when he argues that

> "*Overcrowding, of course, then refers to a multi-dimensional assessment as the core of the overcrowding problem is located in the judgment whether proper prison regimes, related programs of rehabilitation, health care, safety of prison inmates as well as staff and public security, kitchen and sanitary facilities, as well as visiting programs and facilities for work and education and outdoor exercise may be operated and delivered according to established standards under certain conditions of occupancy*."[896]

The main question is, then, in accordance with what criteria the capacity of one detention facility is to be determined and, consequently, when can one say that certain facility is overcrowded? Space available to a prisoner accommodated in an individual or shared cell or communal dormitory should serve as a starting reference point. However, there is no binding international norm or even clearly acknowledged position on minimum space per prisoner since stress arising from moderately lesser cell space can be compensated with greater access to the communal area, recreational, educational and other purposeful activities.[897] This does not, however, mean that minimum space is impossible to determine. From the practice of international bodies suggesting when lack of space in itself or combined with other shortcomings amount to ill-treatment[898] and standards laid out in non-binding documents on minimum or desired space per prisoner,[899] some minimum common denominators can be extracted.

For the purposes of the present discussion, it is sufficient to say that a state cannot escape honouring its international obligations simply by stipulating a substandard space per prisoner in law and arguing that its places of detention are not overcrowded. In order to keep the national criteria on space in check and under national and international scrutiny, this information should be made public.[900] This is a useful

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European level. http://www.reducingprison.eu/downloads/files/ReducingprisonpopulationEuropeanframework_FIN_101014.pdf (25 August 2015); for the review of the the causes, consequences and possible solutions to the problem of prison overcrowding in the USA see J. M. Pitts, O. H. Griffin and W. W. Johnson, 'Contemporary prison overcrowding: Short-term fixes to a perpetual problem', *Contemporary Justice Review* 17 (2014), 124–39.

[896] H.-J. Albrecht, *Prison overcrowding - finding effective solutions: Strategies and best practices against overcrowding in correctional facilities*, Forschung aktuell, 1. Aufl. (Freiburg im Breisgau: Max-Planck-Inst. für Ausländisches und Internat. Strafrecht, 2012), vol. 43, p. 5.

[897] International Centre for Prison Studies, *Dealing with prison overcrowding*. http://www.prisonstudies.org/sites/default/files/resources/downloads/gn4_9_0.pdf (24 August 2015), p. 3.

[898] On different approaches of international bodies towards what is considered overcrowding and when it amounts to ill-treatment see chapter 5 Mapping the content of ill-treatment under international law, section 5.4.5.2.1. Material conditions and regime of detention.

[899] On minimum or desired space per prisoners set out in non-binding documents see section 12.2.6.1. Material conditions of detention.

[900] The EPR obliges states to legislate in order to set minimum standards regarding floor space per prisoner, cubic content of air, size of windows etc., see *Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European*

requirement as it provides a national benchmark for whose actual implementation or alternation can be advocated.[901]

Overcrowding in places of detention is a principal cause of ill-treatment induced by detention conditions due to following reasons. First, lack of space can in extreme cases by itself or more usually combined with other factors, amount to ill-treatment.[902] Second, the effect of overcrowding, notwithstanding of how one qualifies it or whether it was found to have amounted to ill-treatment, tends to worsen prospects for proper observance of both standards related to material conditions and regime of detention. For example, with a surplus of prisoners it becomes more difficult or indeed impossible to organize time out of the cell, meaningful activities etc.; sanitary conditions usually deteriorate as well as prospects for maintaining personal hygiene. Moreover, it negatively impacts the ability of medical staff to provide adequate care, favours spread of disease as well as outbreaks of violence among prisoners.[903]

What measures or safeguards, then, states have at their disposal or what are they expected to do to prevent or reduce overcrowding when this state of affairs already took shape? Here, it should be kept in mind that measures seeking to prevent overcrowding as well as other substandard detention conditions are different from those aimed at preventing deliberate ill-treatment. This difference can be well illustrated if we consider an effective complaint system, which is one of the principal safeguards against deliberate ill-treatment. As mentioned earlier,[904] only remedy able to terminate the violation, in this case cramped living conditions in detention, could be considered effective. But then, in reality, the lack of effective remedy is merely a consequence of a deeper problem usually plaguing the entire national penal system: discrepancy between the capacities of places where persons deprived of liberty are held and their ever-increasing number.[905] Trying to solve the problem of an ineffective complaint system will necessarily entail dealing with a root problem: lack of space in detention. Additionally, in case of overcrowding there is no individual perpetrator who is to be deterred by the realistic possibility of being exposed and punished because the problem lies in structural inability of the penal system to

Prison Rules: European Prison Rules (2006), § 18–18; Similarly, PBP in the Americas envisage not only that states shall determine and make public maximum prison capacity of places of detention in line with international standards and occupation ration but also establish procedures through which this calculations can be disputed, see *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 17–17.

[901] The CPT regularly calls for implementation of national standards, see for example *Report on Serbia* (CPT, 14 January 2009), § 39–39 or changing the legislation in order to align it with its expectations regarding living space per prisoner see *Report on Poland* (CPT, 25 June 2014), § 42–42.

[902] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.4.5.2.1. Material conditions and regime of detention.

[903] See *7th General Report: CPT/Inf (97) 10* (1997), § 13–13; *Report on Lithuania* (CPT, 18 October 2001), § 56–56. Negative consequences of overcrowding in the custodial setting on state of health of inmates encompass favouring transmission of tuberculosis, HIV, Infectious diseases, mental health problems etc., see generally Enggist S. (ed.), *Prisons and health* (Copenhagen: WHO Regional Office for Europe, 2014).

[904] Refer to section 12.2.3. Duty to redress victims.

[905] Kobylarz-Lerner, while describing ECtHRs practice concerning effective remedy in the case of overcrowding correctly notes that preventive and compensatory remedies can be part of a greater problem which is structural overcrowding in prisons, see N. Kobylarz-Lerner, 'Effective Remedies in Conditions of Detention Cases – the ECHR Requirements' at p. 7.

process the rising number of detainees.[906] Therefore, the real question is whether legal remedies designed to fix individual wrongs are best placed to address structural problems whose solving entails changes on the policy level and substantial material resources?

The effect of the most readily contemplated answers to this problem, building new and/or enlarging existing detention facilities and granting mass amnesties, seems to be limited since available space tends to be occupied while the underlying forces within the criminal justice system pushing towards the increase of the number of prisoners (on remand and convicted) are left intact.[907] Superficial measures such as those aimed at alleviating the consequences of overcrowding, by constantly moving prisoners between institutions or relativizing national rules stipulating minimum space per prisoner, should be avoided as they are not only ineffective but tend to do more harm than good.[908] The effect of other short-term measures, such as enhancing contact with families, enlarging security perimeter and transferring part of prisoners to semi open regime, which, in principle, could lessen the strain put on inmates, is limited by practical considerations. Namely, increasing contact with family presupposes the supervision of that contact, suitable premises etc., which is difficult to secure in an overcrowded institution; enlarging the perimeter requires resources and supervision; transfer to semi open regime requires reclassification of detainees, the existence of such premises would need to take security risks into account etc.

Therefore, practical measures that would seem sensible to implement should strive towards attaining sustainable decrease of detainees. Main contours of these have been articulated by a number of international documents most notable of which are the *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*[909] and *Recommendation Rec(99)22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation*. Moreover, these documents are constantly suggested as a source of guidance for states facing this sort of problem and proposals contained therein are being continually reaffirmed by international bodies,[910]

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[906] However, PBP in the Americas explicitly state that in the situation where overcrowding is established competent organs should undertake investigation in order to determine individual responsibility of those who authorized such measures. *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), 17.3; Although this measure might make sense, one can imagine that in reality it represents more wishful thinking than that it fits into the pattern of states dealings with the issue of congested places of detention.

[907] The CPT regularly stresses limited effect of both expansion of accommodation capacities and exceptional measures such as amnesties or pardons see *7th General Report: CPT/Inf (97) 10* (1997), § 14–14; *Report on Azerbaijan* (CPT, 07 December 2004), § 72–72; as regards amnesties see *Report on Georgia* (CPT, 31 July 2013), § 22–22; *Report on Slovak Republic* (CPT, 25 November 2014), § 34–34.

[908] *Report on Hungary* (CPT, 30 April 2014), § 39–39.

[909] For a useful review of practical use of legal instruments on the universal level facilitating alternatives to imprisonment in pre and post-trial phase of the criminal proceedings with a special emphasis on Tokyo rules see D. van Zyl Smit, *Handbook of basic principles and promising practices on alternatives to imprisonment*, Criminal justice handbook series (New York: United Nations, 2007).

[910] The CPT highlights alternatives to imprisonment and measures aimed at supporting the ex-offender's re-integration efforts, see *7th General Report: CPT/Inf (97) 10* (1997), § 14–14; *Report on Serbia* (CPT, 14 January 2009), § 39–39; *Report on Georgia* (CPT, 31 July 2013), § 22–22; the ECtHR has emphasized measures seeking to increase use of non-custodial sanctions and decrease of pre-trial detention see *Varga and Others v. Hungary* (ECtHR, 10 March 2015), § 104–104; The IACmHR underlined measures such as reducing use of and setting maximal duration for pre-trial detention, promoting alternatives to imprisonment and pre-trial detention as well as more frequent resort to conditional release of prisoners, etc. see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 462–462; the CtAT suggests using alternatives to custodial

practice oriented organizations[911] and academia.[912] The bulk of these measures, standing at the centre of any debate seeking to formulate practical answers to the prison congestion challenge, are the following.

Firstly, a decrease in imposing sentence of imprisonment as a sanction by using the following methods is regularly suggested: decriminalization of certain offences (above all those related to consuming drugs and certain non-violent offences); making more frequent use of alternatives to incarceration especially of non-custodial sanctions such as fines, house arrest, community sanctions, probation orders or avoiding, whenever possible, criminal justice system altogether by resorting to mediation; preventing automatic conversion of unpaid fines into prison sentences or envisaging other sentences; reducing overall length of sentence of imprisonment and converting short sentences of imprisonment to other penalties.

Secondly, the incarceration period ought to be reduced by facilitating the discharge of prisoners that meet certain requirements; removing certain categories of prisoners such as persons with psychosocial and/or intellectual disabilities, terminally ill and drug addicts from correctional institutions either by transferring them to suitable health institutions or through other arrangements; devising programs aimed at rehabilitation of convicts and facilitation of their re-entry into society in order to reduce the recidivism rate; more frequent resort to conditional release with or without supervision.

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sanctions such as probation, suspended sentences, community services and out of court settlements. It also advised caution with use of pre-trial detention and that prisoners are not detained longer then their sentence stipulates, increase of judicial and non-judicial staff and using imprisonment of children as a measure of last resort, see *Concluding observations on Cameroon* (CtAT, 19 May 2010), § 15–15; *Concluding observations on Mozambique* (CtAT, 10 December 2013), § 15–15; the SPT called attention to alternatives to criminal prosecution and pre-trial detention see H. Orrü, *Eighth annual report: UN Doc CAT/C/54/2* (2015), § 89–89.

[911] International Centre for Prison studies recommends reducing level of imprisonment through decriminalization of certain acts, reduction in use of detention, shortening imprisonment as a sanction, focusing on alternatives to prison, using early and conditional release and removing certain inmates such as those with disabilities or youth from prisons, see International Centre for Prison Studies, *Dealing with prison overcrowding*. http://www.prisonstudies.org/sites/default/files/resources/downloads/gn4_9_0.pdf (24 August 2015), p. 6; Prison Reform International in its 10 point plan to reduce overcrowding suggested measures such as crime prevention, decriminalization of minor cases, improve access to justice and case management during pre-trial detention, focus on non-custodial sanctions, alternatives for parents with dependent children, special arrangement for children and young offenders, diverting drug users and those with mental health problems from prison system, reducing sentence length, using parole and supporting newly released prisoners to prevent re-offending, see Penal Reform International, *Ten-Point Plan to Reduce Prison Overcrowding*. http://www.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf (24 August 2015), pp. 1–4; Urban institute, with over-incarceration takin place in the USA in mind, calls for reduction in number of imprisoned by means of the so called *front end options* seeking to lower the number of people sentenced to prison and *back end options* seeking to release prisoners before the end of their sentence, see Julie Samuels, Nancy G. La Vigne, Samuel Taxy, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System*, p. 17.

[912] Similar to previously outlined suggestions, those in academia had also been drawing attention to measures such as decriminalization of certain offences, caution with imposing incarceration following a conviction, promoting non-custodial sanctions, sparing resort to detention on remand, facilitation of early release of convicts etc. see H.-J. Albrecht, *Prison overcrowding - finding effective solutions: Strategies and best practices against overcrowding in correctional facilities*, Forschung aktuell, 1. Aufl. (Freiburg im Breisgau: Max-Planck-Inst. für Ausländisches und Internat. Strafrecht, 2012), vol. 43, pp. 45–60; R. Allen, 'Effective Countermeasures Against Overcrowding of Correctional Facilities', *UNAFEI Resource Material Series* 80, 1–16, at 7–11; N. Morgan, 'Overcrowding: Cases, Consequences and Reduction Strategies', *UNAFEI Resource Material Series* (2010), 52–61, at 59–61; J. Roberts, 'Reducing the use of custody as a sanction: a review of recent international experiences', in J. M. Hough, R. Allen and E. Solomon (eds.), *Tackling prison overcrowding: Build more prisons? Sentence fewer offenders?*, Researching criminal justice series (Bristol: Policy Press, 2008), pp. 103–22, at pp. 103–18.

Finally, pre-trial detention should be resorted to only if absolutely necessary. Other measures such as bail, temporary seizure of travel documents, electronic monitoring etc. should be preferred. Remand detention is to be terminated or replaced with less intrusive measure at the earliest opportunity. Setting forth an absolute maximum for the duration of pre-trial detention also regularly emerges.

To sum up, it should be borne in mind that these measures are not capable of being merely replicated in any context but, to be effective, should be embedded in specific national setting. Therefore, every country should, taking into consideration its distinctive features, develop a set of measures, not necessarily excluding expanding accommodation capacities and amnesties, capable of, at least, keeping overcrowding of its places of detention under control. Finally, it goes without saying that designing and implementing alternatives to imprisonment is not guided only by preventing ill-treatment in overcrowded places of detention and that other considerations such as public opinion, crime rates etc. are taken into account.

12.2.9 Duty to introduce and/or strengthen the effectiveness of custodial safeguards

The utility of certain procedures for protecting personal integrity of detainees in different stages of deprivation of liberty has been long recognized.[913] These safeguards are intended to serve a twofold purpose: deter prospective perpetrators and, if ill-treatment nevertheless occurred, facilitate effective investigation capable of identifying and punishing those responsible. From the preventive perspective, the rationale is that when a comprehensive set of safeguards is in place and duly observed, it is highly unlikely that ill-treatment will go unpunished, which in turn functions as a strong disincentive for potential perpetrators. In other words, by increasing the likelihood of being exposed and punished it prevents ill-treatment from occurring.

Under the head of strengthening the effectiveness of custodial safeguards, one can subsume both a number of principal obligations and various practical arrangements aimed at safeguarding physical and mental integrity of those deprived of freedom. Whilst there is no authoritative or definite list of these safeguards,[914] they have been in the centre of interest of human rights bodies, especially those with a clearly preventive mandate. If we follow the usual chain of events in deprivation of liberty under rules of criminal justice, we can connect specific safeguards with different detention junctures.

[913] Basic safeguards against ill-treatment of those deprived of their liberty have been set forth in the SMR, a document adopted back in 1955. *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955).

[914] For an account on safeguards facilitating effective investigation extracted from the practice of CPT and ECtHR but also other international bodies and instruments, see E. Svanidze, *Effective investigation of ill-treatment: guidelines on European standards* (15 July 2015), pp. 29–43; Evans and Morgan describe safeguards developed by the CPT and other human rights bodies forming a protective net around the individual in police detention, see M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), pp. 257–94; SRT Theo Van Boven outlined guarantees for persons deprived of their liberty in one of his reports see *Report of the Special Rapporteur Theo van Boven: UN Doc E/CN.4/2004/56* (2003), §§ 27–49.

12.2.9.1 Duties during initial deprivation of liberty

In the course of initial deprivation of liberty, law enforcement officials effecting an arrest should not wear masks,[915] but visible name tags,[916] numbers or other marks by means of which they could be identified. Furthermore, one should be detained only in an officially recognized place of detention.[917] Immediately or a short time after being taken into custody, detainee should be informed on his rights, granted access to legal counsel, physician of his own choosing and a person that he designates should be notified of his arrest.[918] His interrogation should be conducted in the presence of his lawyer,[919] thoroughly documented (with at least the following information: place and date, name of all those present, duration of interrogation and time periods between sessions)[920] and preferably audio or

[915] *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 42–42.

[916] *Concluding observations on Belarus* (CtAT, 07 December 2011), pp. 7–9; see also *Conclusions and recommendations-Georgia* (CtAT, 25 July 2006), § 16–16.

[917] *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 11–11; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), § 23–23; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 3–3; *International Convention for the Protection of All Persons from Enforced Disappearance: UN Doc A/RES/61/177 (2006)* § 17–17.

[918] These guarantees, access to a doctor, lawyer and notification on arrest, together with information on rights, are considered principal safeguards against ill-treatment in the initial stages of deprivation of liberty effected by the law enforcement officials. They are enshrined in a number of instruments and reaffirmed by various human rights courts and treaty bodies. See *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), §§ 91–3; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), 16, 18, 24; *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 11–11; *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), §§ 13–4; Generally on approach of the CPT and other CoE bodies to basic safeguards during police custody see J. Murdoch, *The treatment of prisoners: European standards* (Council of Europe, 2006), pp. 161–6.

[919] This general rule is, as it seems, subjected to some exceptions that ought to be interpreted narrowly. The first one is related to the situation where interest of investigation requires exclusion of the lawyer as he, presumably, supports criminal enterprise of his client and can, thus, jeopardize the ongoing investigation. The second is when urgency of the matter requires immediate questioning of the detained. As to the first, it has been indicated that a state appointed attorney should be made available to the detainee so that the rule could be respected. As to the second, the CPT allows for this exception but notes that in this case police should nevertheless be held accountable for its act. This rule is firmly established in Europe as the ECtHR in 2008 found that lawyer must be present during interrogation of his client or violation of the ECHR will inevitably follow (albeit in the framework of article 6 para 3 c guaranteeing right to legal assistance in criminal proceedings). Moreover EU in 2013 adopted a directive explicitly envisaging this safeguard, see European Parliament, 'Directive 2013/48/EU: on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty', *Official Journal of the European Union* L (2013), at §3–3; The CPT, on his part, has been pushing for this safeguard from 1992 see *2nd General Report: CPT/Inf (92) 3* (1992), § 38–38 and *21th General Report - Access to a lawyer as a means of preventing ill-treatment* § 24–24; For the lead ECtHR judgment, see *Salduz v. Turkey* (ECtHR, 27 November 2008), § 55–55; For an account of the ECtHR jurisprudence on this matter until and after 2008 see E. Cape, *Effective criminal defence in Europe*, Ius commune europaeum (Antwerp: Intersentia, 2010), vol. 87, pp. 38–40; In addition, position that a lawyer should be present during interrogation is not limited to Europe since it has gained support from the following authorities. *Concludion observations on Rwanda* (CtAT, 26 June 2012), § 12–12; *Report on Maldives* (SPT, 26 February 2009), § 62–62; *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: (the Luanda Guidelines)* (2014), § 9–9; As to the position of human rights bodies under the Inter-American system of human rights protection, it seems that there are no explicit endorsement of this position in individual communications although the IACmHR suggested this safeguard in its reports. For further references see C. Foley, *Combating torture: A manual for judges and prosecutors*, 1st (Colchester: Human Rights Centre, University of Essex, 2003), p. 29.

[920] Record keeping of outlined information on interrogation as a precaution measure is envisaged by *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 21–21; This safeguard with somewhat extended information that is to be recorded is suggested in the following documents as well: *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 11–11; *2nd General Report: CPT/Inf (92) 3* (1992), § 39–39; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 368–368; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), § 28–28. Especially extensive set of information to be documented is envisaged by the recent Luanda

videotaped.[921] Objects suited for inflicting pain (baseball bats, metal rods and the like) should not be placed in premises where detainees are kept or interviewed.[922] Suspects should be brought promptly before a judge where they could challenge legality of their deprivation of liberty and/or submit a complaint concerning ill-treatment. They should be entitled to initiate court proceedings to the same effect.[923] A judge deeming the ill-treatment allegations credible, is mandated to exclude all evidence stemming from such treatment. In addition, a parallel investigation of allegations made by the suspect should be underway.[924]

12.2.9.2 Duties during detention on remand

If one is to be detained on remand pending investigation or trial, he should be examined by a qualified medical professional upon or shortly after admission to a remand facility.[925] Identification of injuries should not result in refusal of admittance and return to the hands of those who inflicted them.[926] The same procedure should be repeated in the case detainee is transferred back to police premises for questioning or whenever there are reasons to believe that persons deprived of liberty might have been

guidelines see *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: (the Luanda Guidelines)* (2014), § 9–9.

[921] Electronic recording has been for a long time advocated by the CPT, see *2nd General Report: CPT/Inf (92) 3* (1992), § 39–39 and *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 36–36; This measures has been suggested or welcomed by most of other authorities in the field. See *General Comment no. 2: Implementation of article 2 by States Parties: UN Doc CAT/C/GC/2* (2008), §§ 13–4; *Report on Maldives* (SPT, 26 February 2009), § 133–133; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), § 28–28; *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: (the Luanda Guidelines)* (2014), § 9–9; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 101–101.

[922] *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 39–39; *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 11–11.

[923] These guarantees were designed as safeguards of the right to liberty and as such enshrined in universal (ICCPR article 9 paras. 3 and 4) and regional human rights treaties (IACHR Article 7. paras 5 and 6, ECHR article 5). However, they are recognized as indispensable in safeguarding personal integrity of those deprived of their liberty since they provide them with an opportunity to present complaints, preferably in person, to an impartial adjudicator, see for example *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 11–11; Importance of this safeguard in preventing ill-treatment of those deprived of freedom has been recognized by the following authorities: the CPT commented: "*Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).*" *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 45–45; similar observations have been made by SPT as well, see *Report on Maldives* (SPT, 26 February 2009), p. 88; Importance of this safeguards has been stressed in the *Report of the Special Rapporteur Theo van Boven: UN Doc E/CN.4/2004/56* (2003), § 39–39; and in literature M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 449; M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), p. 259.

[924] Refer to section 12.2.4. Duty to abide by the exclusionary rule.

[925] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 24–24, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 24–24, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), 9.3; *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 33–33; The CPT further suggests that medical examination ought to be carried out as soon as possible and in any case not later than 24 hours upon admission *23rd General Report of the CPT: CPT/Inf (2013) 29* (2013), § 73–73; *Report on Mexico* (SPT, 31 May 2010), p. 172; Nowak and McArthur consider medical examination carried out upon arrival, before release and at detainees request "*one of the most effective measures to prevent torture and cruel, inhuman or degrading treatment or punishment*", see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 432.

[926] *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 130–130.

subjected to ill-treatment.[927] In addition to the opportunity to complain during the initial court hearing, those remanded in custody should have the opportunity to bring the issue of ill-treatment to the fore during subsequent periodical court reviews of their detention. Finally, detention on remand should be used as a measure of last resort and terminated as soon as possible. Detainees held in pretrial detention in excess of maximum prison sentence envisaged for offence they have been charged with ought to be released.[928]

12.2.9.3 Duties in the course of serving a prison sentence

In the context of imprisonment following a court sentence, prisoners should have access to medical care and the requests for medical aid should not be filtered by non-medical personnel.[929] Medical personnel working in detention facilities should preferably be employed by the Ministry of health rather than that in charge of the detention facility.[930] Inmates should have the right to be examined by a physician following every use of force or case of inter-prisoner violence and on his own request even if no violent incident was officially reported or indeed known to prison authorities.[931] In addition, special attention has been put on safeguards during the use of certain measures, which, if inadequately applied, might amount to ill-treatment such as use of physical force, handcuffs and other means of restraint, body searches and solitary confinement. Therefore, during the application of these measures recognized safeguards need to be respected.[932] In addition to the above-mentioned measures, detainees should be able to benefit from a number of general safeguards from the outset until the cessation of their deprivation of liberty.

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[927] The CPT held that "*any prisoner who has been involved in a violent episode within prison should be medically screened without delay*" see *23rd General Report of the CPT: CPT/Inf (2013) 29* (2013), p. 73; Nowak while serving as SRT emphasized that "*Examinations must be a routine practice after every transfer and every allegation or suspicion of torture*" see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 129–129.

[928] An extreme example of misuse of measure of pre-trial detention has been noted by the SRT who recommended release of more than 20 000 pre-trial detainees in Nigeria because time they spent in police lock up and pre-trial detention surpassed maximum sentence envisaged for criminal offence they were accused of. See *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 235–235; Similar recommendations has been made by SPT as well see *Report on Mali* (SPT, 20 March 2014), § 30–30.

[929] *Report on Honduras* (SPT, 10 February 2010), § 218–218.

[930] *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), p. 128, *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2013*, § 54–54; *Eighth annual report: UN Doc CAT/C/54/2* (2015), p. 94; Similarly, the IACmHR note that health professionals conducting examinations of those deprived of liberty should not be subordinate to detention authorities and should enjoy institutional autonomy in order to be able to carry out their duties independently and impartially see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 170–170; The CPT did not explicitly formulate this requirement but it did call for greater alignment between prison health care staff and general health system, see *3rd General Report on the CPT's activities: CPT/Inf (93) 12* (1993), § 71–71 In practice however, it supports this solution and welcomes any plans of the respective governments to that end, see *Report on the Czech Republic* (CPT, 31 March 2015), § 69–69.

[931] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 432; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 129–129; the CPT held that in addition to shortly after admission medical examination should follow every violent episode taking place within the prison, see *23rd General Report of the CPT: CPT/Inf (2013) 29* (2013), p. 73.

[932] Refer to chapter 6 Impact of the prohibition of ill-treatment - a dynamic process, section 6.4. Use of means of restraint, solitary confinement and body searches; refer also to section 12.2.7.2.1. Preventive role.

12.2.9.4 General safeguards in custodial setting

12.2.9.4.1 Keeping comprehensive custody records

Comprehensive custody records detailing different aspects of one's detention must be kept. There are several international non-binding and even binding instruments instructing the state to set up and maintain appropriate registers containing data on persons deprived of liberty. The content of these registers has been elaborated in greater or lesser detail as well as the procedure for their maintenance. Especially instructive is the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), which, in addition to explicitly stipulating a range of information to be maintained, requires states to sanction those who disregard proper keeping of custody records.[933] Furthermore, international human rights bodies specified the content of these registers in more detail as well as instructions for their correct maintenance.

In what follows, two types of custody records, those kept in police stations and in prisons, established with rather different motivation will be presented. Records in police stations keep track of basic information on different aspects of one's arrest and subsequent detention, as well as whether they were afforded pertaining rights. Records maintained in prisons cover a range of issues related to the position of those serving a sentence of imprisonment. Whereas many of the data are similar, these two registries differ, in that they aim to safeguard the integrity of detainees from *different kind* of risks. Registries kept by the police serve as a major safeguard against a particular type of ill-treatment, namely that effected for the purpose of extracting confessions or other information related with an ongoing investigation.[934] These records, by assigning the responsibility for wellbeing of the detainee to a particular law enforcement officer, seek to ensure that a detainee is accounted for during every moment of detention. The rationale is that proper record keeping and personal responsibility of those in charge for maintaining it, together with other safeguards, would bring the risk of police induced ill-treatment to a minimum. In contrast, as legal proceedings against convicted prisoners are concluded and accordingly one is not in direct danger of being ill-treated with the aim of securing incriminating evidence, proper record keeping in correctional institutions serve largely different purpose. Namely, these registries should shield inmates against ill-treatment materializing within prison environment which, *per se*, tends to be overly oppressive. In other words, ill-treatment might take place during conduct of regular activities, excessive reaction of the staff to improper behaviour or disobedience of inmates, inadequate use of means of restraints, solitary confinement etc. Of course, one cannot exclude ill-treatment with a prohibited purpose in mind, such as intimidation or further punishment which, provided that severity threshold has been met, can even amount to torture.

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[933] *International Convention for the Protection of All Persons from Enforced Disappearance: UN Doc A/RES/61/177 (2006)* § 17–17.

[934] In most cases victim of ill-treatment is a person suspected of having committed a criminal offence. However, those not being suspected as perpetrators can be abused with the intention of obtaining information or statements incriminating a third person.

Records kept in police stations should be comprehensive and keep track of every development regarding a concrete detainee. They need to contain at least the following information:[935] detainee's personal information; reasons for detention; exact time and date of arrest, admission to the detention facility and release; information on who authorized and/or made an arrest as well as those responsible for one's detention; detailed information on initial as well as eventual subsequent places of detention; when an arrested individual was brought before a judicial authority; any complaints he might have submitted; information related to exercise of the three basic rights (access to lawyer, doctor and family) and providing notification on them; observations regarding state of health, visible injuries or willingly shared health issues. In addition, the ICPPED requires that information in case of death of the detainee should encompass circumstances, cause of death and whereabouts of the remains. Although the main emphasis was placed on registration books (are they regularly updated, paginated, orderly and uniformly kept), centralized electronic registries were preferred.[936] Entries should be regularly monitored, signed by the officer on duty and countersigned by the superior officer.[937] For some entries, the personal signature of the detained or explanation of its absence is required.[938]

Presence of every person "*in a law enforcement establishment for investigative purposes*", even if not considered, according to national law, a person deprived of liberty, should be documented.[939] In addition to general information regarding identity, place of detention, legal grounds etc., resembling those stored in police records, records kept in correctional institutions ought to reflect different aspects of the day to day running of the facility.[940] Therefore, correctional institutions should, by documenting the implementation of different measures and incidents, prevent ill-treatment from taking place or facilitate its investigation. For that reason, an incident register should be kept detailing all circumstances surrounding the use of force against a prisoner including "*date and nature of the incident, nature of restraint or force, duration, reasons, persons involved and authorization of the use of force*." A description of eventual injuries stemming from such use of force should be recorded and together with

[935] Although recommended minimum content somewhat differ depending on the body or document (for example the CPT note that when detainee was provided with food or taken to questioning should be recorded), the hard core is the same, see *Report on Maldives* (SPT, 26 February 2009), § 117–117; *International Convention for the Protection of All Persons from Enforced Disappearance: UN Doc A/RES/61/177 (2006)* § 17–17; *2nd General Report: CPT/Inf (92) 3* (1992), § 40–40; *Report on Greece: CPT/Inf (2014) 26* (2014), § 34–34; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 9–9; in addition to these principles see R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 159–159; *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: (the Luanda Guidelines)* (2014), §§ 15–9.

[936] *Report on Sweden* (SPT, 10 September 2008), § 91–91; *Report on Mexico* (SPT, 31 May 2010), § 315–315.

[937] *Report on Mexico* (SPT, 31 May 2010), § 315–315; *Report on Benin* (SPT, 15 March 2011), § 64–64.

[938] The CPT held that for some information such as providing information on rights, exact time of beginning and end of detention the signature of the detainee or explanation of its absence is required, see *Report on Slovak Republic* (CPT, 25 November 2014), §§ 25–6; Principles and Best Practices on the Protection of Persons Deprived of Liberty in Americas stipulate that signature of the detainee or explanation of its absence is a standard part of the registry see *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 9–9.

[939] *Report on Russia: CPT/Inf (2013) 41* (2013), § 44–44.

[940] Of course, proper record keeping in prisons goes well beyond preventing ill-treatment. Different prison departments, such as that dealing with rehabilitation and treatment of prisoners, keep their own records. For this see generally *Handbook on prisoner file management*, Criminal justice handbook series (New York: United Nations, 2008).

other relevant information routinely referred to the director of the institution.[941] Similarly, all disciplinary sanctions should be kept in a separate record indicating "*the identity of the offender, the penalty imposed, its duration and the officer who ordered it*".[942] In addition, measures prone to negatively impact the prisoner, such as segregation, even if, formally speaking, may not be considered disciplinary measures should be duly recorded. Thus, the CPT recommended that

> "*a special register be kept of all measures of segregation, recording the identity of the prisoner, the reasons for the measure, the date and time of the outset and end of the measure, the deciding authority and the precise place(s) where the prisoner segregated has been accommodated*".[943]

This comes as no surprise since the CPT emphasized the importance of thoroughly recording different aspect of solitary confinement including decision making, prisoners input or lack of it, as well of all interactions with prisoner while undergoing this measure.[944] Prison authorities should also keep a register of complaints including the name of the complainant, subject, action taken and outcome of the complaint.[945] Although usually accommodated in prisons, pre-trial detainees are exposed to risks similar to those prevalent in police custody. To prevent such occurrences, custody records kept in prisons should correctly record every single transfer of detainee to a police facility for further questioning, court or any other place of detention. Moreover, medical registers should include files on medical examinations of detainees conducted upon their admission to prisons and return from establishments listed above.

12.2.9.4.2 Setting up an effective complaint scheme

Recourse to the effective complaint scheme need to be made available. Right to lodge a complaint is considered a fundamental safeguard against ill-treatment,[946] but is also a constituent part of the wider notion of the effective remedy firmly entrenched within international human rights law. Both persons deprived of liberty and those who are not should benefit from a functional complaints system. An assessment of the overall effectiveness of a specific complaint procedure can indicate adequacy of the entire preventive framework, but also shed light on the actual state of affairs concerning prohibition of ill-treatment in one society. The CPT regularly requires states to provide information on submitted complaints and their outcome.[947] Moreover, establishing a public register of complaints alleging torture

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[941] *Report on Maldives* (SPT, 26 February 2009), § 330–330.
[942] *Report on Honduras* (SPT, 10 February 2010), § 204–204.
[943] *Report on Turkey* (CPT, 08 December 2005), § 89–89.
[944] *21st General Report: substantive section on solitary confinement of prisoners: CPT/Inf (2011) 28* (2011), § 55–55.
[945] *Report on Paraguay* (SPT, 07 June 2010), § 218–218; *Report on Germany* (CPT, 24 July 2014), § 38–38.
[946] This right is most clearly termed in CAT article 13. The right to complain, and to have this complaint followed up by conducting effective investigation are, basically, part of the same whole: the right to an effective remedy. For practical reasons the right to submit a complaint in detention setting is dealt with within custodial safeguards, while what should follow after complaining (effective investigation) and eventual redress was explained in separate sub chapters. On the other hand, the right to submit a complaint and effective investigation are not indissolubly bonded since it can be that a prisoner can exercise his right to complain without hindrances or reprisals, but no effective investigation ensues, or differently put, his complaints are simply ignored. By contrast, it may well be that one is pressured not to complain, but if he does, effective investigation follows.
[947] See, for instance, concerning complaints submitted against prison staff *Report on Croatia* (CPT, 09 October 2008), § 52–52; for complaints against police officers see *Report on Serbia* (CPT, 14 January 2009), § 18–18.

or ill-treatment and their outcomes with the intention of facilitating effective investigations is recommended.[948]

Besides usual obstacles standing in the way of human rights remedies in general and those affecting the right not to be ill-treated in particular, persons deprived of freedom face further difficulties in exercising their right to complain, especially on ill-treatment.[949] Namely, their position is additionally aggravated due to the very fact of their detention, that is of being under the thumb of the authorities. From this basic problem stem others, such as that they may need to submit a complaint through intermediary, be subject to control of correspondence, perceived or real bias of the deciding body, the fact that the complainant is still in the hands of his tormenters and consequent fear of reprisal etc. To address these drawbacks, international bodies have called attention to several measures facilitating the right to complain of those confined in police premises, prisons, psychiatric or social institutions. To what has been already said while discussing effective investigation[950] and state obligation to redress[951] one might add the following.[952] Persons deprived of their liberty should have an effective, confidential and independent complaint system at their disposal. This system should provide them with the opportunity to submit a complaint to internal as well as external instances. Complaints should not be subject to approval or filtered, and detainees should not be discouraged from submitting them. Deciding bodies are obliged to process them promptly and communicate the outcome to the complainant. Not only that a state ought to refrain from exposing a detainee to reprisals for exercising the right to complain but also to resort to different arrangements with the aim of enabling detainees to submit complaints without fear of reprisals.[953] Moreover, detainees need to be kept informed and instructed on how to complain, whom to address and provided necessary means to do so (complaint forms, pencils and papers). To foster confidentiality, the installation of locked complaint boxes in common areas is

[948] The CPT frequently suggest establishing data bases indicating number of complaints and their outcome, see, for example: *Report on Serbia* (CPT, 14 January 2009), § 18–18; Similar recommendation was made by CAT as well M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 420.

[949] Several documents have specified this right in respect of persons deprived of liberty see *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 35–35; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 33–33; *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008), § 5–5; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), § 40–40.

[950] Refer to section 12.2.2. Duty to conduct an effective investigation of ill-treatment.

[951] Refer to section 12.2.3. Duty to redress victims.

[952] The following is a summary of practice of different bodies. For the position of CPT, IACmHR and SPT respectively see *8th General Report - Involuntary Placement in Psychiatric Establishments: [CPT/Inf (98) 12]* (1998), § 53–53; *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 39–39; *Report on Portugal* (CPT, 24 April 2013), § 84–84; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 243–243; *Report on Paraguay* (SPT, 07 June 2010), § 99–99; for the position of the SRT on conditions for existence of the effective complaint system within closed institutions see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), §§ 109–22.

[953] Following measures aimed at preventing reprisals for submitting a complaint have been advanced: transferring the detainee to another place of detention, changing custodial guards in charge for complainant , presence of a witness during interrogation see J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 145–6; L. Wendland, *A Handbook on State Obligations under the UN Convention Against Torture* p. 53.

strongly recommended. On the other hand, the validity of the complaint submitted should be conditioned neither by specific form nor formal prerogatives of officials with whom a complaint was raised. In principle, communicating allegations of ill-treatment to any member of the custodial staff including medical doctors but also others such as chaplains, members of inspection bodies or prosecutors, suffices to put the obligation to investigate in motion.[954] Providing information on rights and enabling unhindered contact with family members, lawyer or medical personnel, besides being safeguards in their own right, also facilitate the exercise of the right to complain, since they can forward complaints to competent bodies.[955]

12.2.9.4.3 Obligation to report ill-treatment

All those in contact with detainees should be under a legal obligation to report indications of ill-treatment and/or forward complaints to appropriate instances;[956] nevertheless, obligation to report ill-treatment manifests itself predominately with respect to medical professionals. Whether a medical doctor is mandated to report indications of ill-treatment against the wishes of the detainee concerned is more contested since here, one can speak of a conflict between this obligation and the principle of confidentiality governing doctor-patient relation. The CPT prefers the approach where medical professional, in prisons but also other places where persons deprived of liberty reside, is under an obligation to report findings indicative of ill-treatment even against the explicit wishes of the patient.[957] It appears that SPT has taken another position, for it recommends that a procedure authorising reporting of medical documentation indicative of ill-treatment to competent instances should be established "*with due consideration for medical confidentiality and the consent of the individual*".[958] The Istanbul protocol calls for a more balanced approach where a forensic expert shall always report his findings, whereas a prison doctor should balance arguments for and against before reaching a final decision.[959] In addition, when internal bodies responsible for processing complaints recognise circumstances indicating the commission of a criminal offence, they are under an obligation to forward the case to the competent prosecutorial authority.[960]

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[954] This was clearly articulated in relation to CAT article 13 see L. Wendland, *A Handbook on State Obligations under the UN Convention Against Torture* p. 53; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 449.

[955] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 443–4.

[956] The CPT held the following "*legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.*" *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 27–27; see also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: UN Doc A/43/49* (1988), § 7–7.

[957] *23rd General Report of the CPT: CPT/Inf (2013) 29* (2013), § 77–77; see also *Doctors' Obligation to Report Ill-Treatment* (CPT, 29 January 2010).

[958] *Report on Maldives* (SPT, 26 February 2009), §§ 325–6.

[959] *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, §§ 69–72.

[960] *14th General Report-Combating impunity: CPT/Inf (2004) 28* (2004), § 38–38; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 254–254.

12.2.9.4.4 Duty to perform proper medical examinations

Obligation to carry out proper medical examinations needs to be respected at all times. Medical examinations of physical injuries should be carried out in accordance with requirements of forensic science as set forth in the Istanbul protocol.[961] Final medical reports should include, *inter alia*, an assessment of whether the injuries identified in the course of examination are consistent with the detainee's allegation concerning their infliction.[962] Additionally, medical examinations need to be carried out beyond hearing range and preferably out of sight of custodians.[963] This should also apply to meetings of detainees with their lawyers[964] and members of independent monitoring bodies.[965]

12.2.9.4.5 Making documents available to prisoners

Documents pertaining to individual prisoner must be made available to him. More precisely, all documents related to detention of a particular individual including medical,[966] custodial[967] and interrogation records[968] should be made available to him, his family and legal counsel.

12.2.9.4.6 Collaboration with inspection bodies

State authorities should establish and cooperate with independent inspection bodies. The beneficial effect of on-site visits carried out to closed institutions by independent bodies has been long

[961] Importance of adequately documenting injuries and other physical traces of ill-treatment by making use of forensic techniques and procedures described in Istanbul protocol has been stressed by a number of authorities. *Report on Moldova* (CPT, 14 December 2009), § 25–25; *Balliktas v. Turkey* (ECtHR, 20 October 2009), § 28–28; *Gutiérrez-Soler v. Colombia* (IACtHR, Judgment of 12 September 2005), p. 110; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 261–261; *Eighth annual report: UN Doc CAT/C/54/2* (2015), p. 94; *Concluding observations on Mozambique* (CtAT, 10 December 2013), § 14–14; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 54–54.

[962] *Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment*, Professional training series, Rev. 1 (New York: United Nations, 2004), no. 8/rev. 1, § 105–105; see also *23rd General Report of the CPT: CPT/Inf (2013) 29* (2013), § 74–74; *Report on Maldives* (SPT, 26 February 2009), § 325–325; the ECtHR held that including such assessment in medical report is extremely important see *Barabanshchikov v. Russia* (ECtHR, 08 January 2009), § 59–59; *Premininy v. Russia* (ECtHR, 10 February 2011), § 111–111.

[963] The CPT stressed this requirement as regards those in police custody *2nd General Report: CPT/Inf (92) 3* (1992), § 53–53; as well as prisoners *2nd General Report: CPT/Inf (92) 3* (1992), § 53–53; this has been confirmed by the CtAT, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 404; for SPT see *Report on Mexico* (SPT, 31 May 2010), § 133–133; for the position of SRT see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 129–129; M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 407.

[964] *Standard Minimum Rules for the Treatment of Prisoners: SMR* (1955), § 93–93; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), p. 18; *21th General Report - Access to a lawyer as a means of preventing ill-treatment* § 23–23.

[965] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 29–29.

[966] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 26–26; *Report on Maldives* (SPT, 26 February 2009), § 325–325; *2nd General Report: CPT/Inf (92) 3* (1992), § 38–38; *2nd General Report: CPT/Inf (92) 3* (1992), § 53–53.

[967] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 12–12, *General Comment no. 20: Article 7: UN Doc HRI/GEN/1/Rev.9* (1992), § 11–11.

[968] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 21–21; R. A. Escobar Gil, *Report on the human rights of persons deprived of liberty in the Americas*, OAS official records (Washington, DC: Organization of American States, 2011), OEA/Ser.L/V/II, § 368–368.

recognized.[969] To further such an effect states are expected not only to enable international and national bodies to carry out visits to closed institutions under their control but also themselves establish and fund independent visiting mechanisms (NPM). This method, based on regular visiting, is increasingly associated with the so called preventive approach[970] and, arguably, represents the most effective means at states' disposal in preventing ill-treatment of those deprived of freedom.[971] Establishing independent inspection bodies on the national level has been recommended in non-binding documents[972] and belongs to the longstanding suggestions of both the CPT[973] and the CtAT.[974] In reality, however, establishment of such bodies started to gain momentum only with the adoption of the OPCAT, which stipulates the hard obligation not only to designate a specific national body but also furnish it with a set of strictly defined safeguards, competencies and powers so that it can act independently and efficiently.

Closer analysis of NPM's mandate, as envisaged in the OPCAT, reveals that its potential to prevent ill-treatment rests on two pillars. Firstly, by being able to conduct unannounced visits to all places of detention on a regular basis, carry out private interviews with detainees and staff, have access to the entire detention facility and documentation, acquire first hand insight into material detention conditions and regime etc., they generate a deterrent effect and are a vital component of the preventive framework in their own right. In addition, by being authorized to publish reports on visits undertaken they are able to "open up" places of detention to public scrutiny, which, in effect, should also contribute towards improving the position of those held therein. Secondly, as part of their mandate is to examine the existence of other safeguards in law and practice, they are well placed to assess, identify shortcomings and recommend their improvement and so enhance overall effectiveness of the entire preventive framework.[975] It then functions as self-improving mechanism of the preventive framework.

It goes without saying that, in order to produce a desired effect, observing the above obligations should be done in good faith; namely if a state tolerates fact-finding missions of international bodies

[969] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.2.3. Inspection procedure.
[970] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 228–9.
[971] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 890; *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), p. 157.
[972] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.: UN Doc A/43/49* (1988), § 29–29; *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa: The Robben Island guidelines* (2002), §§ 41–4.
[973] From the outset of implementing its mandate the CPT has been continuously suggesting forming independent external mechanism authorized to conduct regular visits to places of deprivation of liberty. As regards police establishments see *Report on Malta* (CPT, 01 October 1992), § 93–93; prisons *Report on Sweden* (CPT, 12 March 1992), § 137–137; for psychiatric hospitals and social care homes see *Report on Hungary* (CPT, 29 March 2001), § 164–164.
[974] The CtAT noted that inspecting body ought to be separate from police or judiciary and carry out unannounced visit, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 410.
[975] The APT defines two main advantages of visits to places of detention under the OPCAT: deterrent effect and contribution to mitigating risks of ill-treatment by identifying risk factors and proposing recommendations *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 42.

and even establish a national body to that effect, but in practice does everything in its power to obstruct their work, no positive developments as regards prevention of ill treatment are to be expected.

In summary, the overall aim of these safeguards is to form a protective net around an individual in an attempt to dissuade prospective perpetrators and, if the deed is already done, preclude impunity of those responsible. This protective net consists of a range of safeguards, which ought to lessen the risk of deliberate ill-treatment. However, making them effective requires a great deal of effort on the part of the state in terms of providing continual training and ensuring adequate collaboration between different state organs. As to the former (deterring prospective perpetrators), law enforcement officers need to be trained on how to make available the three basic rights upon arrest and information on rights, properly maintain registers, conduct interrogations, mark and store confiscated items etc. Medical doctors should be trained in conducting medical examination in line with the Istanbul protocol etc. In case of the latter (precluding impunity), not only that flow of information between detaining authorities, inspecting bodies, prosecutorial and judicial authorities need to be ensured, but taking a proper course of action upon receiving the information is equally important. Similarly, detaining authorities need to ensure unrestricted access to places of detention to inspecting bodies. Therefore, making the most of these safeguards in practice is anything but a routine operation and requires vigilance, teamwork and above all dedication of all public officials to combating ill-treatment in places of detention.

12.2.10Keeping regulations under systematic review

Finally, rules, instructions and other documents containing the outlined safeguards need to be kept "*under systematic review*" in accordance with CAT Article 11. This means that the obligation of the state does not end with the enactment of such documents, but calls for continual examination of new developments in the field with a view of improving existing and identifying and incorporating new procedures for preventing ill-treatment.[976]

12.3 General conclusion

Obligations set out in this chapter are explicitly specified in different hard and soft law instruments or identified by the monitoring bodies as contributing towards prevention of ill-treatment in places of detention. They differ in many respects, not the least of which is the level of binding force they possess. Some, being explicitly envisaged in binding treaties (for instance carrying out an effective investigation ex officio or upon complaint, criminalizing torture or establishing independent monitoring bodies) reflect full-fledged legal obligations. Others, as is the case with three fundamental rights upon deprivation of liberty, although not explicitly articulated in human rights treaties, were so many times

[976] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 143–4.

reaffirmed by different authorities that their binding nature is not called into question. In contrast, for some of them it would be hard to argue that they carry more weight than mere suggestions. On the other hand, focusing on the level of binding force of different safeguards misses the point. The true focus should be put on the effectiveness of the entire system in preventing ill-treatment and not its different parts. Readiness of a state to establish such a system through diligent implementation of the formerly outlined obligations should, in principle, lead if not to eradication then at least to making occurrences of ill-treatment a rare exception. However, the outlined set of obligations and standards should not be considered as forming a closed list. As humans are rather resourceful in inventing different ways of making other people's lives miserable, they should be at least equally resourceful in devising measures that are to prevent such devices. This observation is even more valid for persons deprived of liberty as they are placed in a position of total dependence from their captors that can think of various methods of impinging on their human dignity, thus subjecting them to at least degrading treatment.

13 Chapter: Preventive approach utilized lessons learnt

13.1 Implementation - the way forward

Back in 1998, Morgan and Evans in their seminal study of the CPT's practice, while assessing the multiplication of international mechanisms dealing with ill-treatment, remarked:

> "*One of the advantages of the complex maze of mechanisms described above is that all states are touched by it in one or more ways: no state is beyond the reach of international scrutiny*."[977]

Today, it appears clear that the existence of international scrutiny merely brushing upon states is not enough to ensure at least reasonable respect of dignity and personal integrity of detainees around the globe. On the one hand, it has been recognized that national actors need to be more heavily involved in implementing international human rights obligations. This comes close to what Hathaway labelled as "*the notion of "self-enforcement"* that is *"use of domestic institutions by domestic actors against the government to uphold international rules*".[978] On the other hand, there is a trend of favouring those procedures of human rights implementation based on prevention.[979] Against this background, the rise of new kind of national bodies established in line with a predetermined set of requirements, endowed with a broad human rights mandate and utilizing a preventive approach to ensuring compliance with human rights, is to be understood. These bodies, known as the National Human Rights Institutions (NHRIs), created a new paradigm in implementing human rights obligations. They began to flourish in the last decade of the 20th century and were meant to address a range of issues related with human rights. NHRIs were promoted especially within the UN system (Office of the United Nations High Commissioner for Human Rights (OHCHR)), but their establishment, which gained a momentum in the last two decades, was never mandatory.

This was about to change with the drafting of the OPCAT, which, similar to the ECPT, focused on preventing ill-treatment by designating an international body with a mandate of conducting regular visits to places of detention. However, the OPCAT, in addition to establishing one international preventive body, followed another good practice, that of NHRIs. To that end, it not only mandated all states parties to establish national bodies with a preventive mandate but also outlined their main features, which, to a large extent, mirrored those of NHRIs. Precisely these bodies, National Preventive Mechanisms, are the main objects of this study's further inquiry.

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[977] M. D. Evans and R. Morgan, *Preventing torture: A study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998), p. 68.
[978] O. A. Hathaway and H. H. Koh, *Foundations of international law and politics*, Foundations of law series (New York, N.Y: Foundation Press; Thomson.West, 2005), p. 206.
[979] See, for instance, M. Nowak, *Introduction to the international human rights regime* (Leiden: M. Nijhoff, 2003), pp. 27–30; V. Dimitrijevic, 'State Reports', in J. T. Möller and G. Alfredsson (eds.), *International human rights monitoring mechanisms: Essays in honour of Jakob Th. Möller* (The Hague: Martinus Nijhoff, 2001), pp. 185–200, at p. 199.

13.2 OPCAT

As briefly outlined earlier, an underlying principle of international human rights law is that the burden of enforcing rights guaranteed at an international level rests primarily on states, since only they own the means to ensure respect for basic human rights to those under their jurisdiction. Nevertheless, it seems that as regular state machinery such as administration, judiciary and the police more often than not does not live up to this task, other measures are called for. Some authors explain this failure by referring to the inaccessibility of treaty texts and their clarifications in form of jurisprudence and comments caused by, among other things language barrier as well as a lack of

> *"general awareness… that a state has submitted to a set of rules which are binding to all three branches of government" or "climate fostering compliance".*[980]

In the case of prohibition of ill-treatment additional difficulties hindering state compliance can be discerned. Namely, provisions in international treaties explicitly stipulating state obligation to prevent and punish ill-treatment came to existence precisely because it was recognized that national institutions could not be relied upon to prevent or to prosecute and punish perpetrators of ill-treatment, as they are part of the same national apparatus condoning if not openly committing it. In this sense, Burgers and Danelius in their authoritative commentary on the CAT remarked:

> "*The problem with which the Convention was meant to deal was that of torture in which the authorities of a country were themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally. In a typical case torture is inflicted by a policeman or an officer of the investigating authority.*"[981]

It follows that the state apparatus is in need of an additional push to overcome the limitations outlined above. This push was for decades, with varying degrees of success, provided through an international supervision of state compliance by means of the outlined procedures (reporting, complaint and fact finding). The latest attempt to assist states deliver on their pledges to put an end to ill-treatment brings about change of the approach from perfecting international to building up national supervision through specialized institutions with an explicit set of prerogatives. The OPCAT sets a model for this new implementation paradigm, for it seeks to expedite compliance with the CAT by coupling international and national supervision through opening places of detention to independent scrutiny. While an international inspecting procedure was already in operation at the regional level, establishing a national inspecting procedure prior to OPCAT had the strength of mere recommendation.[982] Moreover, the OPCAT does not only demands from states to establish body akin to NHRI, but also formulates

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[980] C. Tomuschat, *Human rights: Between idealism and realism / Christian Tomuschat*, The collected courses of the Academy of European Law, Third edition p. 181.

[981] J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: A handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, International studies in human rights (1988), vol. 9, pp. 119–20.

[982] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.2.3. Inspection procedure.

requirements on creation, powers and guarantees of independence the prospective body needs to meet. What is more, it obliges states to publish and disseminate reports of NPMs as well as to enter into dialog with them in an attempt to facilitate implementation of recommendations contained therein.

Therefore, the novelty of the OPCAT approach lies in bringing together international and national inspection procedures and formulating a clear legal obligation to establish the latter. It relies on the preventive approach and seeks to rectify limitations of international monitoring by matching it with a robust national counterpart capable of conducting visits on a much more frequent scale. Coupling international and national efforts by means of obligations set out in an international treaty became a new paradigm of efforts to enhance human rights observance, especially by preventing violations taking place in custodial or similar settings.

13.3 NPM

13.3.1 Introduction

In what follows the attention will be placed on the main novelty of the OPCAT: a detailed outline of the national body meant to carry the bulk of preventive activities aimed at improving compliance with the CAT.[983] Before we delve into the competencies and powers of NPMs, a few remarks will be provided in order to flesh out main contesting points on which the effectiveness of the novel approach will, presumably, hinge on.

The two-pillar enforcement mechanism, composed of an international body and its national counterparts, was not an outcome of a well-thought-out plan to enhance the implementation of obligations set out in the CAT; quite the reverse, the end result was rather an accidental consequence of deliberations taking place in the Working group aimed at finding a way out of a dead end in which the drafting process came to be stuck. In a nutshell,[984] during drafting of the OPCAT states were divided into two camps on the issue of the competences of a prospective international visiting body. One was reluctant to provide it with clear prerogatives to carry out fact-finding missions to states parties and conduct visits to closed institutions without asking for authorization beforehand. Similarly, it was unwilling to allow unrestricted access to places of detention, documentation and conduct of private interviews with detainees. The other was advocating the opposite. This disagreement boils down to a well-known sensitivity of states concerning issues they perceive as limiting their sovereignty such as losing control over who and on what terms enters places of detention. The deadlock was, somewhat

[983] The SRT considers establishment of NPMs crucial for the prevention of torture under the OPCAT as the SPT alone has no capacity to carry out regular visits, see *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention: UN Doc A/HRC/13/39/Add.5* (2010), § 160–160.
[984] Summary of the drafting process taking place within the UN Working Group and adoption of final version of the OPCAT is based on the following accounts M. D. Evans and C. Haenni-Dale, 'Preventing Torture? The Development of the Optional Protocol to the UN Convention Against Torture', *Human Rights Law Review* 4 (2004), 19–55; N. B. Naumovic and D. Long, *Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: A manual for prevention* (San José: Inter-American Institute of Human Rights, 2004), pp. 43–51.

surprisingly, broken by Mexico, which proposed an entirely new draft of the OPCAT. This proposal, which came to be known as "the Mexican Draft", envisaged a shift of visiting competencies from one international to many national bodies. Namely, according to this document, visits to places of detention would be carried out primarily by national bodies, whereas the role of the international body was to be limited to providing assistance and guidance to national bodies. The international body could carry out visits only if a state party failed to establish a national body in a designated time frame.

The Mexican draft incited mistrust in the camp of those advancing the idea of a strong international body. These states feared that assigning a key role to national bodies would diminish the effectiveness of the entire endeavour as it would allow states to exert influence on national bodies, thus rendering them, in a worst case scenario, a mere window dressing. The final outcome, reflected in the OPCAT text, was a compromise between the two approaches according to which both international and national bodies were to conduct visits and complement each other in an effort to prevent ill-treatment.

Yet, despite this troubled history, entrusting national bodies a central role in preventing ill-treatment on the state level came to be considered a major breakthrough in efforts to secure worldwide compliance with the prohibition. However, this assumption—that NPMs will significantly decrease ill-treatment locally and globally—carries with it seeds of its demise, as it, basically, hinges on the belief that a state will not only tolerate but also fund, foster independence and facilitate work of these bodies. In other words, states are expected to set up, maintain and collaborate with independent bodies whose, if not main purpose than an inevitable side effect, is to expose their misdeeds. While this is doable in states where independent institutions already exist, it is open to doubt whether the existence of state bodies of any kind not influenced by the regime in power is generally possible in countries where this is not the case.[985]

Having the previously noted in mind, one can argue that the strength and weaknesses of international and national visiting bodies are inverted. Independence and expertise on the topic of international standards, methodology etc. are the strong point of international bodies but may well be the weakness of national ones. The ability to conduct regular visits due to its constant presence in the state, as well as, and for the same reasons, familiarity with local legal and other contexts, are the advantages of national but weak spots of international visiting bodies. In what follows, we will now elaborate the main features of NPMs.

13.3.2 Main features

13.3.2.1 Setting up

OPCAT requires state parties to set up, designate, maintain or establish one or several NPMs at the national level.[986] The enumeration of different means of introducing an NPM into national legal order

[985] R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), p. 137.
[986] Articles 3 and 17, OPCAT.

makes clear that there is no proper procedure to be followed or model to be simply replicated when it comes to establishing NPMs. This is so because, every country has its own specificities which should be taken into consideration such as existence of independent monitoring bodies prior to ratification of OPCAT. Therefore, when this is the case, it is not necessary—or indeed wise—to establish an entirely new body but maintaining or designating the existing bodies will suffice. As the Paris Principles envisage that NHRIs mandate should be specified in a constitution or a law, it is a requirement as regards NPMs as well and serves, essentially, to insulate them from the executive branch of government.[987]

The NPM mandate can be assigned to one or several, new or existing state organs. Distinct bodies jointly carrying out the NPM mandate can cover different geographical regions, reflect jurisdictional division (one body on federal and others on state level) or deal with a specific issue (persons with disabilities, prisoners, juveniles etc.). NHRIs, acting alone or in collaboration with NGOs (the so called ombudsman plus model), can be designated to implement NPM activities.[988] SPT has noted that when deciding on a suitable NPM model, states should bear in mind "*the complexity of the country, its administrative and financial structure and its geography*"; it went on to state that whatever model is chosen, it should be compliant with requirements set forth in the OPCAT, and should not replace or duplicate, but rather complement the work of already existing independent visiting procedures.[989] Differently put, forming NPMs should not render existing independent inspections on national level superfluous. It would make sense that geographically large and populous states or states with a federal structure opt for joint performance of several bodies in discharging NPMs mandate. This follows from the assumption that one centralized body would be in need of vast resources or substantial competencies to successfully implement activities falling under NPM's mandate. Other than that, the NPM model adopted should reflect local particularities and, at least to some extent, represent a compromise between different societal actors.

13.3.2.2 Expertise

It is important that NPMs have access to expertise necessary for effective monitoring.[990] This presupposes particular knowledge on international standards used as benchmarks against which the local state of affairs is to be assessed, adequate visiting methodology etc. The required know-how encompasses a range of fields central to or touching upon NPMs mandate: human rights in general and prohibition of ill-treatment in particular, criminology, rights of persons with disabilities, antidiscrimination law, refugee law, rights of elderly, etc. In addition to this, medical, especially

[987] This position is confirmed by SPT, see *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 7–7; see also *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), p. 39.
[988] On strengths and weaknesses of different bodies (specialized bodies, NHRIs alone or with NGOs, one or several bodies) performing NPM function see in more detail *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), pp. 208–22.
[989] *Third annual report: UN Doc CAT/C/44/2** (2010), §§ 49–50.
[990] Article 18(2), OPCAT.

forensic and psychiatric expertise, is indispensable etc.[991] This know-how can be acquired either by employing qualified staff with relevant expertise, "borrowing" it from NGOs, or contracting it on the market. The option of building NPM staff's capacity up from scratch can also, in principle, solve the problem but is time consuming. In addition, this option offers no guarantees that a fully trained NPM employee will not resign, which would in consequence negatively affect NPMs ability to implement its mandate. Therefore, assembling relevant expertise under the NPM roof and financing it can pose quite a challenge. It is realistic to presume that even if requirements of independence in law and practice as well as funding are satisfied, without relevant expertise NPMs impact will be, at best, limited only to effects arising out of its safeguard role, i.e. making places of detention more transparent by conducting regular visits.

13.3.2.3 Independence

As briefly outlined earlier, the independence of NPMs in law and fact is probably the most crucial issue around which the success of the entire OPCAT project will revolve. One cannot stress this enough as "puppet" NPMs can make more damage than good. More precisely, NPM independent in name only can, at best, be outright useless, while in the worst case obstruct SPT and work of other human rights bodies by feeding them with false information on follow up and distorting the picture of ill-treatment in general.

The OPCAT expressly stipulates that NPMs functional independence and that of its personnel shall be guaranteed and added that NPMs should be adequately funded.[992] In addition, it pointed out that during establishment due consideration should be given to the Paris principles,[993] which deal with issue of NHRIs independence in more detail. What is to be made of this rather briefly framed instructions? The notion of independence could be roughly divided into three constituent parts: functional, personal and financial independence which in turn require taking measures aimed at strengthening the respective parts.

13.3.2.3.1 Functional independence

Functional independence connotes that

> "*NPMs must enjoy independence from all State authorities (the legislative, executive and judicial branches of government) in order to fulfill their functions*".[994] In a wider sense it implies that "*NPMs must be capable of acting independently and without interference from State authorities;*

[991] The SPT emphasizes professional knowledge, including but not limiting to legal and medical, necessary for successful implementation of NPM mandate, see *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 20–20; It is worth noting that for the CPT this does not pose a problem since it is comprised from 47 experts from variety of fields relevant to its mandate.
[992] Article 18 (1) and (3), OPCAT.
[993] Article 18 (4), OPCAT.
[994] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1074–5.

the authorities responsible for prisons, police stations and other places of detention; the government; civil administration; and party politics".[995]

This is to be done through grounding it in an act with the strength of law or constitution.[996] Moreover, such an act ought to set forth adequate provisions guaranteeing its separation from other state authorities (structural independence) and, more specifically, ensuring that it is not under their chain of command (operational independence).[997] Finally, SPT stressed something that could be termed internal independence. Namely, if NHRI or another state body is entrusted with carrying out NPM in addition to its national mandate, a special unit, with separate staff and budget, ought to be established within it.[998]

13.3.2.3.2 Independence of personnel

The requirement of independence of personnel is intended to secure that those working as appointed members or as staff of the NPMs are "*personally and institutionally independent from the state*"[999] i.e. not influenced by it. Satisfying the latter requirement is not overly problematic as persons occupying a post with the government are in conflict of interests, which in turn disqualifies them from consideration. It is, for instance, not acceptable that a prison director simultaneously assumes the role of NPM member and thus, in effect, controls himself and his colleagues. However, the former requirement (personally independent) is much more prone to be manipulated as there is no reliable way of determining private preferences. This is maybe the most precarious part since one does not need to be a civil servant in order to sympathize with or even zealously defend interests of those in power.

Another question that seems to be of relevance is would persons which were previously working or even made a carrier as state servants in institutions falling under NPM mandate (for example retired prison wardens or police officers), make suitable NPM members. On the one hand, it cannot be denied that their previous engagement can be an advantage as they are well acquainted with the state of affairs and main problems in the field and possess the inside knowledge on how the system functions. On the other hand, their impartiality can be put in question, as they are to monitor and, if required, be highly critical of their former colleagues and system in which they sometimes spent their carriers. In other words, in this case also loyalty between the members of the same profession (*esprit de corps*) could hinder the effectiveness of NPMs. This issue was not clearly addressed either in the OPCAT or its commentaries. The APT, a leading NGO in the field of prevention of ill-treatment, was satisfied with remarking that, as a matter of principle, NPM members

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[995] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 89.
[996] Refer to section 13.3.2.1. Setting up.
[997] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1074–5; see also E. Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention', *Human Rights Law Review* 14 (2014), 1–29, at 12.
[998] *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 32–32.
[999] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 195.

> "*should have no personal connections with leading political figures in the executive government, or with law enforcement personnel, such as political allegiances, close friendships, or pre-existing professional relationships."*[1000]

However, this is more easily said than done since, as one commentator noted,

> "*the very reason why a government chooses a particular individual to sit on such a body is precisely because that individual will act as a medium for its policies to be applied in practice*".[1001]

Casale, while imparting its extensive experience in conducting preventive visits, recognizes that national bodies are more prone to succumb to a lack of independence and notes:

> "*Proximity to an institution may, with time, diminish the ability of the members of a visiting mechanism to maintain a critical perspective and to distinguish risk. Mechanisms working at the national level may become familiar with the prevailing custodial culture in their country to the extent that they cease to question the validity of assumptions made and grow inured to certain persistent shortcomings on the ground.*"[1002]

Even if all other preconditions for a functional and independent NPM were met, appointing a wrong person as its head would render the entire endeavour futile. Although there is no perfect safeguard, making the entire process of appointing NPM members transparent as well as enabling them to select and employ their staff can at least make it open to public scrutiny. As to the guarantees accorded, it has been suggested that members and NPM staff "*shall be appointed for a minimum period of four to six years and shall be protected against any arbitrary removal during their term of office*."[1003] In addition, the requirement specified in the OPCAT Article 35 explicitly stipulates that members of NPMs and SPT "*shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions*." However, while the OPCAT extended the application of the appropriate provisions of the *Convention on the Privileges and Immunities of the United Nations* on SPT members, it remained silent as regards NPM members. It is however beyond dispute that immunities and privileges accorded to NPM members should be set out in law[1004] and that their content ought to be modelled on that accorded to SPT members.[1005] From these guarantees NPM members and staff are supposed to benefit only for activities carried out in discharge of their official duties and should encompass

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[1000] *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), p. 40.
[1001] R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), p. 122.
[1002] S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Review* 6 (2009), 6–14, at 10.
[1003] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1074–5; Even though this suggestion is obviously meant to foster independence of both NPM members and staff by strengthening security of their post, this precaution, which actually comes down to security of tenure, is usually applied to elected or appointed officials. Therefore, it is questionable whether states are willing to extend it to NPM staff members, especially as the OPCAT makes no mention of it, while the Paris principles speak only of stability of mandate of members appointed by an official act specifying its duration. See *Principles relating to the Status of National Institutions: UN Doc A/RES/48/134* (1994).
[1004] For position of the SPT see *Third annual report: UN Doc CAT/C/44/2** (2010), § 52–52; See also M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1183.
[1005] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1178.

> "*immunity from personal arrest, detention and seizure of personal baggage; and immunity from seizure or surveillance of papers and documents. NPM members should also be immune from legal actions in respect of words spoken or written, or acts performed, in the course of their NPM duties. Provisions regarding privileges and immunities should also guarantee that there is no interference with communications relating to the exercise of NPM members' functions*."[1006]

Nowak and McArthur further point out that these privileges and immunities should enable NPMs to carry out activities essential for their mandate (preventive and unannounced visits to places of detention and conducting confidential interviews with persons deprived of freedom) and by way of example indicate the following:

> "*members of NPMs shall be excluded from general rules applying to visits of detention facilities, or to the rule that communications with pre-trial detainees should be monitored by prison personnel.*"[1007]

13.3.2.3.3 Financial independence

The insistence on financial independence mirrors the assumption that a state, especially its executive arm, can, by allocating insufficient funds, exert pressure on NPM and thus endanger its independence or even prevent him from fulfilling his mandate. To prevent this the following safeguards should be envisaged: NPM should be able to draft its annual budget, free to decide how to spend the funds provided and source of financing should be specified in its founding instrument.[1008] In addition, the legislative rather than the executive branch of government should approve NPMs annual budget.[1009] Of course, expenditure of NPMs can be subjected to independent audit so as to prevent misappropriation of state funds.

13.3.2.4 Beyond independence

A few more considerations may be added what concerns independence. On the one hand, it is important that NPMs themselves, that is to say their staff, experts or members have awareness of their independence and act accordingly.[1010] On the other hand, NPMs and their staff need to be perceived by others as being independent.[1011] It has been suggested that, in order to foster the appearance of independence, NHRIs should, preferably, not be located in the same object in which government

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[1006] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 125; These guarantees and their anchoring in statutory text are, by and large, corresponding to those accorded to NHRIs members under Paris principles see *National human rights institutions: History, principles, roles and responsibilities / Centre for Human Rights*, Professional training series, 1020-1688 (New York: United Nations, 2010), no. 4a, p. 42.

[1007] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1182–3.

[1008] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 91.

[1009] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1074–5.

[1010] R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), p. 124.

[1011] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 89.

institutions reside. Transparent and inclusive procedures for designating NPMs, staff employments etc. also serve to ensure that NPM as institution and those acting on its behalf seem independent. Being seen as independent by persons deprived of liberty has a particular bearing on NPMs ability to collect information via interviews, as detainees are reluctant to confide in those they do not consider independent. The requirement of NPMs independence goes beyond that *vis-à-vis* the state and extends to independence from non-state actors such as NGOs.[1012]

However, the outlined notion of independence seems rather hollow as it specifies certain features of NPMs only in relation to others. In order to grasp the entire picture one needs to look at what is independence good for. The answer is: achieving autonomy, which can be depicted as conducting its activities as it sees fit (with self-appointed personnel and adequate funding) guided only by its mandate.[1013] The safeguards made necessary under the independence requirement are intended to shield institution and individuals from improper state influence. Therefore, the real problem is state interference and the requirement of taking measures aimed at ensuring independence is intended to fend off such encroachments or enhance NPMs ability to resist it. Of course, in some states undue government influence is not common, as officials generally do not ask their subordinates to act against or disregard legal rules. In principle, internal inspections operating under auspices of the authority responsible for places of detention could act autonomously and be effective in preventing ill-treatment although they are not independent.[1014] The opposite is also possible; that NPM remains ineffective, albeit it satisfied all the requirements pertaining to independence of NPMs set out in the OPCAT.

Therefore, although the safeguards outlined above certainly foster independence by blocking avenues usually used for exerting improper influence, they cannot serve as absolutely reliable indicator on whether a concrete NPM is truly independent, that is to say capable of acting autonomously. It follows that in order to determine the level of actual independence of a specific NPM, looking only at legal norms does not suffice. One should take the time to explore the context in which it operates, practice, reports, working methods, recommendations and interactions with the state as well as SPT of a specific NPM in a certain span of time to realize whether the practice lives up to what was enshrined in formal provisions.[1015] If the NPM mandate is embedded in NHRI or ombudsman office it may prove

[1012] R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), p. 126.

[1013] In NHRI context it has been recognized that NHRIs need to enjoy legal (distinct legal personality), operational (ability to enact its own procedure which, together with reports, recommendations or decisions, are not to be subject to approval or revision of any other authority) and financial autonomy (ability to freely dispose with budget sufficient for implementation of its activities which cannot be arbitrarily reduced), see *National human rights institutions: History, principles, roles and responsibilities / Centre for Human Rights*, Professional training series, 1020-1688 (New York: United Nations, 2010), no. 4a, pp. 40–1; In the OPCAT context, SPT stated that "*NPM should enjoy complete financial and operational autonomy*", see *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 12–12.

[1014] For instance, although the Dutch and UK NPMs are being structural part of the executive and thus formally not independent, one cannot say that they act under government instructions when fulfilling their mandate, that is, they operate without government's interference, see E. Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention', *Human Rights Law Review* 14 (2014), 1–29, at 12–4.

[1015] Steinerte in its comprehensive study of NPM independence requirement comes to basically the same conclusion as it held that "*the concept of NPM independence is not approached as a ticking-box exercise or an entirely fluid impression… There is*

useful to look at the bigger picture, that is, independence of NHRI as a whole. The level of compliance with the Paris principles expressed in ICC accreditation can serve as a starting point in this regard, but should not be relied upon too heavily since accreditation does not necessarily reflect NHRIs actual level of independence.[1016] A model of NGO participation in designation process and activities, if any, can also be helpful in discerning the overall independence, as it is not unreasonable to assume that a stronger involvement of genuine NGOs leads to greater independence.

13.3.2.5 Conclusion

Even if meeting OPCAT requirements regarding independence is important, one needs to look beyond formal compliance to determine if a certain NPM is genuinely independent i.e. autonomous. Therefore, it could be said that, though important, independence is but a means to an end which is autonomy or that genuine independence and autonomy, almost always, turn out to be two sides of the same coin.

On the other hand, independence and autonomy alone are not sufficient for ensuring NPM's effectiveness. For example, NPM can be independent and operationally autonomous but unable to reach a desired effect as its members lack adequate expertise in conducting visits or drafting necessary recommendation. Furthermore, NPM might be acting autonomously and in possession of know-how but lack financial means, political will or is simply incapable of implementing its recommendations.

13.3.3 Human rights standards used

Against what benchmarks are NPMs expected to assess treatment of persons deprived of liberty? It is logical that NPMs, as bodies established under the OPCAT, primarily look at standards set forth in CAT and developed by CtAT and SPT as well as those in other standard setting documents and practice at the UN level. The OPCAT in Article 19 (b) makes this clear by stipulating that NPM recommendations should take into consideration "*the relevant norms of the United Nations*".[1017] The question of utilization

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need to pierce the veil to see what is really going on in practice behind the formal or legal appearance of it….independence of NPMs is a multi-faceted concept which very much depends on the context in which NPM operates.", see E. Steinerte, 'The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention', *Human Rights Law Review* 14 (2014), 1–29, at 28–9; Similarly, in NHRI context it was recognized that "*In the final analysis, however, while these factors are fundamental, the key to, and proof of, independence lie in the institution's actions and its members' commitment. Whatever structural guarantees exist, an institution will quickly become known, both nationally and internationally, for what it does*" *National human rights institutions: History, principles, roles and responsibilities / Centre for Human Rights*, Professional training series, 1020-1688 (New York: United Nations, 2010), no. 4a, p. 40.

[1016] For example, according to accreditation status in 2016, whereas NHRIs in, *inter alia*, Afghanistan, Qatar, Egypt, Nigeria, Haiti and Russia are accorded A status (full compliance), those in Austria, Norway, Sweden were accorded B (Not fully in compliance). Finally, NHRIs in Switzerland, Romania and Iran acquired only C status (Non-compliance), see The Global Alliance of National Human Rights Institutions (GANHRI), *Chart of the status of national institutions accredited by the GANHRI: Accreditation status as of 5 August 2016*. http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf (12 December 2016). It is, therefore, clear that final assessment does not go further than ascertaining formal compliance with provisions of Paris principles. The SPT advised caution towards making inferences on effectiveness of NPMs based solely on accreditation status of NHRIs discharging NPM mandate by noting that NHRI accreditation is "*a supplementary mechanism but should not be used as a procedure for accreditation of national mechanisms in general, since it is for the Subcommittee to make such assessments in specific cases*", see *Third annual report: UN Doc CAT/C/44/2** (2010), § 61–61.

[1017] The SPT noted that NPMs in the course of making recommendations should take into account "*relevant norms of the United Nations in the field of the prevention of torture and other ill-treatment, including the comments and recommendations of the SPT*.",see *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 36–36; The OPCAT drafters

of standards established under regional human rights systems would normally not emerge, considering that basic standards regulating position of those deprived of liberty set out at universal and regional level have, to a large extent, converged. However, where this is not the case it would go counter to the preventive approach to completely disregard regional standards offering greater protection. Differently put, NPMs should have the authority to decide on which source they can draw. This is in line with the approach of the CPT, which, though created to give effect to ECHR Article 3, in its first annual report made clear that, in addition to the ECHR, it intends to make use of other human rights instruments as well as of the practice of human rights bodies.[1018] Similarly, NPMs should press for realization of national standards when they offer greater protection than those established at the international plane as it would contravene the spirit of NPM as a body with a human rights mandate to ignore standards offering greater protection by centring only on those developed at the UN level.[1019] In addition, it goes without saying that regional or national standards affording lesser protection should never be used in order to justify states for not applying those at the UN level offering greater protection as this runs counter to purpose of the OPCAT. Finally, nothing stands in the way of setting new benchmarks or safeguards according greater protection than international or national ones. Moreover, bearing in mind the basic obligation of states to ensure rights and take all measures available to prevent ill-treatment, this is highly desirable, especially since international standards are usually formulated as a bare minimum.

This debate has a practical significance as it touches upon rights of persons with psychosocial and/or intellectual disabilities who are often subjected to *de facto* deprivation of liberty. Namely, until the adoption of the CRPD human rights standards did not, in principle, challenge the different treatment of persons with psychosocial and/or intellectual disabilities, and main efforts were made to protect them by making certain that strong safeguards are in place and observed. However, the CtRPD is suggesting that deprivation of liberty, forced medication as well as means of restraint applied on persons with psychosocial and/or intellectual disabilities amount to ill-treatment. As this is not a line of reasoning shared by other actors, it is unclear which standards NPMs are going to resort to. The CPT, a body with the most experience in conducting regular preventive visits, is also confounded with this issue.[1020] On the one hand, as the CRPD is an instrument drafted under UN auspices it should follow that the new

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wanted to ensure that a range of binding and non-binding documents could serve as a pool of standards for activities undertaken under the OPCAT, see P. V. Kessing, 'New Optional Protocol to the UN Torture Convention', *Nordic Journal of International Law* 72 (2003), 571–92, at 588–9.

[1018] *1st General Report- Main features of the CPT, preventive nature of the CPTs functions and visits: CPT/Inf (91) 3* (1991), § 5–5.

[1019] For position that an NPM should take into account all standards pertaining to prevention of ill-treatment of persons deprived of their liberty see *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 46; R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), pp. 132–3.

[1020] See chapter "*Towards new CPT standards on psychiatry*" in CPT, *The CPT at 25: taking stock and moving forward: Background paper*. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dbb96 (19 November 2016), pp. 29–35.

approach is to be accepted by NPMs. On the other hand, rapid dismantling of large residential institutions, where persons with psychosocial and/or intellectual disabilities are held, enforcing absolute prohibition of forced medication and means of restrain is more easily said than done and it cannot rest on shoulders of NPMs alone. Hence, it is reasonable to assume that NPMs should employ a two-track approach: monitor the existence and functionality of safeguards meant to alleviate suffering of persons with psychosocial and/or intellectual disabilities in institutions on the one hand, and on the other tackle the issue of adopting and abiding by the CRPD's approach on the policy level.

13.3.4 Competencies

NPM is explicitly endowed with three main competences: to carry out preventive visits to places of detention, submit recommendations to authorities and comment on legislation pertaining to his mandate. The OPCAT explicitly defines places of detention that are to be visited by NPMs and SPT as follows:

> "*any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence*".[1021]

This rather broad understanding of deprivation of liberty is somewhat narrowed in the next paragraph where reference to consent and acquiescence was omitted.[1022] Nevertheless, deprivation of liberty is to be understood as covering all places from where "*an individual is unable to leave at will*"[1023] for which governments "*can be held accountable*".[1024] These places include but are not limited to police and remand facilities, prisons, psychiatric hospitals, privately or publicly run and social care homes.

NPMs acquired a more specific set of competences necessary for fulfilling their visiting mandate i.e. the right to enter all objects where persons deprived of liberty are held,[1025] to conduct confidential interviews with detainees and any other person they deem relevant,[1026] to obtain all information pertaining to places of detention and persons deprived of liberty including records and registries[1027] and access all parts of detention facilities.[1028] These are the core elements of a fact-finding methodology present in work of visiting bodies generally. However, there are some grey zones not directly addressed by the OPCAT but nevertheless crucial for its prospective effectiveness. The main questions are

[1021] Article 4 (1), OPCAT.
[1022] Article 4 (2), OPCAT reads: "*For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority*."
[1023] The APT interprets the OPCAT article 4 paras 1 and 2 in light of discussion of working group and concludes that deprivation of liberty does not require explicit order of authorities but only inability to leave at will, see *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), pp. 54–5.
[1024] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 932.
[1025] Articles 4, 19(a), 20(c), OPCAT.
[1026] Article 20(d), OPCAT.
[1027] Article 20(a) and (b), OPCAT.
[1028] Article 20(c), OPCAT.

whether NPMs are authorized to undertake visits without prior notice and how frequent should visits be in order to be considered effective.

13.3.5 Unannounced visits

The significance of conducting unannounced visits is twofold. Firstly, the element of surprise is crucial if one wants to produce the so-called deterrent effect, which comes down to making the potential perpetrator refrain from ill-treating as probabilities of exposure are increased by a genuine possibility of receiving a visit at any time of day or night. APT explained the essence of a deterrent effect produced by NPMs by noting that

> "*the mere fact of being able to enter places of detention unannounced reduces the risk of torture and other forms of ill-treatment*".[1029]

In a broader sense, however, effects of regular unannounced visits are not limited only to producing a deterrent effect by increasing the likelihood of deliberate ill-treatment being discovered. Such visits should also send a clear message to those in charge of places of detention that detainees, that is to say their treatment in the broadest sense (material conditions, regime, contact with the outside world etc.), are not outside the purview of state bodies. Differently put, continuous attention accorded to the position and treatment of detainees will, hopefully, serve as a reminder that what happens there will not stay walled in, and that those responsible can be held to account.

In the context of ill-treatment, a deterrent effect is produced not only by unannounced inspections, but also by other safeguards such as access to a lawyer from the outset of deprivation of liberty[1030] including during police interrogations,[1031] one's right to notify a close person on his deprivation of liberty,[1032] mandatory medical screening prior to or shortly after admission to a remand facility or prison[1033] and confidential medical examination while in police custody,[1034] functional complaint system in places of detention as well conducting effective investigations against alleged perpetrators and imposing adequate penalties.[1035] In fact, the prohibition itself[1036] as well as most if not all state obligations stemming from it,[1037] if properly implemented, create, to a greater or lesser degree, a deterrent effect because they increase the likelihood of potential perpetrators being exposed and punished which, in turn, lowers the likelihood that they will actually resort to ill-treatment. What,

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[1029] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 239.
[1030] *Fifth annual report: UN Doc CAT/C/48/3* (2012), § 77–77.
[1031] *Report on Maldives* (SPT, 26 February 2009), § 105–105.
[1032] *Report on Maldives* (SPT, 26 February 2009), § 101–101; *Report on Benin* (SPT, 15 March 2011), § 81–81.
[1033] *Report on Mexico* (SPT, 31 May 2010), p. 172.
[1034] *Report on Maldives* (SPT, 26 February 2009), § 109–109; *Report on Benin* (SPT, 15 March 2011), § 91–91.
[1035] *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 45–45.
[1036] The ICTY held that the prohibition of torture "*is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate*", see *Prosecutor v. Furundzija* (ICTY, 10 December 1998), § 154–154.
[1037] N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 228–9.

however, makes the deterrent effect produced by NPMs unannounced visits stand out, is that, different to that produced by other safeguards, triggering such an effect lies in NPMs hands alone. The usefulness of other safeguards is largely dependent on those whose excesses they are intended to prevent. For instance, police officers may withhold access to three basic rights (lawyer, doctor, family) to those taken into custody or enter incorrect data in custody registers precisely because they want to conceal resort to ill-treatment. In addition, medical doctors may lack necessary training to adequately document ill-treatment or independence to forward complaints, lawyers could be compromised or even work in collusion with perpetrators of torture. Similarly, judiciary may be passive in the face of credible allegations of ill-treatment and refuse to investigate, prosecute or adequately punish the perpetrators. In contrast, a range of factors hindering the effectiveness of other safeguards cannot obstruct unannounced visits made by NPMs. It follows that a truly independent NPM, could by conducting frequent unannounced visits to places of detention, contribute to lessening deliberate ill-treatment even if effectiveness of other safeguards is limited or non-existent.

Secondly, unannounced visits are instrumental for forming an accurate picture of detention conditions, the regime and occurrences of ill-treatment since prior notice might give the staff a heads-up, that is provide them with time needed to remove inmates with visible traces of ill-treatment or torture equipment or in other way mask the real state of affairs.[1038]

Finally, there is something deeply disquieting in announcing upcoming inspection visits on a regular basis as the notion of control as such, at least an effective one, postulate that the entity that is to be controlled is unaware of the exact time of its effectuation. One commentator shrewdly illustrated this point by remarking that:

> "*An inspection that occurs by the leave and at the convenience of the inspected agency is no inspection at all. This is so whether it relates to drug testing for athletes, to weapons of mass destruction allegedly possessed by rogue states, to environmental pollution by manufacturers, or to any other situation where the inspected persons may have something they prefer to conceal.*"[1039]

The CPT on a mission to a state party reserved the right to visit institutions other than those previously indicated to the authorities of the receiving state.[1040] On the other hand, in its recommendations addressing national inspection bodies, it stated that visits to those in police custody[1041] and in immigration detention[1042]need to be regular and unannounced in order to be fully effective. It repeated

[1038] SRT, *Thematic Report: Distinction between torture and Cruel, Inhuman or Degrading Treatment or Punishment: UN Doc E/CN.4/2006/6* (2005), § 24–24.
[1039] R. Harding, 'Inspecting prisons', in Y. Jewkes (ed.), *Handbook on prisons* (Cullompton: Willan, 2007), at p. 549
[1040] *Rules of Procedure: CPT/Inf/C (2008) 1* (1989), p. 33.
[1041] In its general report the CPT stated the following: "*To be fully effective, visits by such an authority should be both regular and unannounced*", see *12th General Report-some recent developments concerning CPT standards in respect of police custody: CPT/Inf (2002) 15* (2002), § 50–50.
[1042] *19th General Report-Safeguards for irregular migrants deprived of their liberty: CPT/Inf (2009) 27* (2009), § 89–89.

this position as regards prisons[1043] and psychiatric and social welfare establishments.[1044] It also pointed out that NPMs need to conduct regular and unannounced visits.[1045] Therefore, whereas it is not clear whether the CPT's visits to places of detention during its country missions are actually unannounced,[1046] this body promotes the view that national bodies should, if not solely than at least most of the time, conduct unannounced visits. It is the position of the former head of the UK prison inspectorate, one of the first independent national prison inspections in the world, that the ability to conduct unannounced inspections at any time is "*a critical human rights safeguard*".[1047] In addition to establishing a practice of carrying out all of its visits during a country mission as unannounced,[1048] SPT made clear that NPMs shall have "*the right to carry out unannounced visits at all times to all places of deprivation of liberty*".[1049]

Therefore, it is generally accepted that, in order to produce a meaningful impact, NPMs should not only have but also make use of the possibility to carry out visits to places of detention without prior notice.[1050] This makes sense since NPMs greatest advantage lies in its ability to conduct regular and unannounced visits. If this is not the case, the rationale of entrusting a distinct national body with implementation of international obligations is at risk. Differently put, if NPMs do not use their comparative advantages and visit places of detention only with prior notification and once in several years, then an international body, considering its indisputable independence and extensive expertise, is better positioned to do the job.

Of course, not every single visit must be conducted without prior notice. The CPT did not raise an objection to the information that the Finnish ombudsman conducted 50 visits to police establishments, 40 of which unannounced.[1051] The SPT cautioned German NPM that unannounced visits or those made on short notice should be a primary *modus operandi* of conducting visits and that, to that end, the

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[1043] See, for instance, *Report on Serbia* (CPT, 14 January 2009), § 110–110; *Report on Montenegro* (CPT, 09 March 2010), § 82–82.

[1044] As regards these establishments, the CPT used slightly different language as it stated: "*In order to be fully effective, such supervision should also include unannounced visits*" indicating that it does not expect that only unannounced visits are carried out, see *Report on Austria* (CPT, 11 March 2010), § 155–155.

[1045] *Report on Bulgaria* (CPT, 29 January 2015), § 37–37.

[1046] This conclusion comes from the fact that the CPT in most cases chooses institutions from the list it previously communicated to the receiving state which, in turn, gives the latter plenty of time to forewarn institutions that are to be visited. In addition, as state authorities are notified that the CPT is to visit a state on designated date, all institutions coming under the CPT purview could be instructed to be especially careful during designated period.

[1047] A. Owers, 'Imprisonment in the twenty-first century: a view from the inspectorate', in Y. Jewkes (ed.), *Handbook on prisons* (Cullompton: Willan, 2007), pp. 1–21, at p. 18.

[1048] Mari Amos, SPT member, Head of European NPM working group, SPT focal point for Europe in The European NPM Newsletter Issue No. 26 / 27, March - April 2012, page 17. However, the SPT too suffers from the same shortcomings as the CPT regarding its ability to conduct truly unannounced visits during its country missions.

[1049] *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 25–25;

[1050] See also, M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 933–4; *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 42 and M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 103; For review of international and national practice pointing in favor of conduct of visits without prior notice see N. S. Rodley and M. Pollard, *The treatment of prisoners under international law*, 3rd ed. (Oxford: Oxford University Press, 2009), pp. 242–3.

[1051] *Report on Finland* (CPT, 20 August 2015), §§ 7–8.

visiting schedule should be kept confidential. In addition, it held that visit should be carried out in all periods of a day, including nights.[1052] The APT held that, in order for deterrent effect to be produced, only *ad hoc* visits ought to be carried out unannounced. It further suggested that these visits should make up at least one third of total amount of time NPM spends in conducting visits.[1053] Conducting visits without prior notification is a usual modus operandi employed by the UK national prison inspection, as around one half of all visits conducted in the period between 1995 and 2001 were unannounced. Moreover, it seems that unannounced visits were mostly made as a follow-up and to institutions where indications of structural problems were identified.[1054]

As regards in depth visits, the reason usually put forward in favour of prior notification is that it facilitates productivity of the visit.[1055] Even if one concedes that *prima facie* this argument does not appear completely unsound, on a second look, it is difficult to comprehend in what sense exactly a prior notice does facilitate the effectiveness of the visit. All places of detention should function similarly before, during and after the visit. Monitoring bodies, in the course of the visit, request the management of the institution to enable access to relevant data and documentation they are already obliged to maintain. It follows that, in principle, institutions do not need additional time to prepare for visits. Similarly, taking the time to guide NPM members through the facilities and enable them to conduct private interviews with inmates and staff should not, under normal circumstances, place an unreasonable burden on the staff.

The only reasons that could justify prior notification are security or health considerations, or the opportunity to converse with employees that are not present every day at the facility (above all medical doctors or psychologists that might not be employed in the institution on a full-time basis). As regards the former, it is clear that a visit could not be conducted during prison riots or if there is some sort of epidemic taking place within the facility. On the other hand, if this is truly the case, NPM could be notified of these developments and refused entrance at the gate of the facility. If these justifications of denial of access turn to be true, those refusing access would suffer no consequences because of it. Concerning the latter, this could play a role only in case of smaller places of detention that are being visited, which do not have the need for full-scale medical or other ancillary services. This practical limitation could be however remedied in a number of ways without relinquishing the benefits stemming from unannounced visits. For instance, information on visiting hours of doctors or other practitioners could be collected beforehand *via*, for instance, telephone calls or additional consultations with them could be arranged after the visit. Therefore, it seems that infrequency or total absence of unannounced visits can be best explained as either another practical concession to the states which are, in general, uncomfortable with being subjected to control or as a consequence of inexperience, lack of knowledge

[1052] *Advisory Visits to NPM of Germany-Report to the NPM* (SPT, 29 October 2013), § 14–14.
[1053] APT Guide 2006 p 32.
[1054] R. Harding, 'Inspecting prisons', in Y. Jewkes (ed.), *Handbook on prisons* (Cullompton: Willan, 2007), at p. 550.
[1055] APT Guide 2006 p 55 "*For the longer in-depth visits, prior notice to the authorities will often contribute to a more productive visit*."

or outright passivity of NPM members. In addition, it could be argued that there is a correlation between the practical utilization of announced visiting on the one side and NPM real independence on the other.

All things considered, one can conclude that, if a deterrent effect is to be generated, unannounced visits, conducted in various time of day, including nights, should be the primary method of conducting visits by NPMs. It is central to conduct unannounced visits to police establishments since otherwise NPM might not find any, or relatively few, detainees in custody which, in turn, would diminish its ability to determine whether basic safeguards are observed. Therefore, unannounced visits ought to make substantial proportion of overall visits conducted. It is not unreasonable to assume that, as a minimum, 1/3 of all visits should be conducted without prior notice while as regards visits carried out to places of detention in which higher risk of ill-treatment was identified, this proportion should increase to at least 2/3.

13.3.6 Frequency of visits

The main objective of the OPCAT set forth in article 1 is to establish system of regular visits to places of detention. The SPT, on its part, somewhat diplomatically added that

> "*The NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment.*"[1056]

What is, then, regular visiting frequency sufficient for producing an effective contribution to the prevention of ill-treatment?

The CPT pointed out that two visits conducted by a visiting commission in ten years to a psychiatric institution are clearly insufficient.[1057] Despite increase of visits carried out by the Polish NPM from 76 in 2008 to 124 in 2012, the CPT found that one visit per place of detention in "*some years*" is not sufficient.[1058] It also held that visits made by the Finnish parliamentary Ombudsman to a remand facility every three years are insufficient and suggested that such visit should ideally be undertaken each month and be unannounced.[1059] In the course of commenting that Finnish parliamentary Ombudsman in 2012 conducted around 140 visits to closed institutions, the CPT stated that for effective performance of NPM role, which this institutions was about to assume, much more frequent visits are called for.[1060] On the other hand, information that the Czech Ombudsman, acting as an NPM, carried out 40 to 50 visits annually to various places of detention did not give rise to any remarks on the part of the CPT delegation.[1061] Moreover, the issue of frequency and methodology of conducting visits by domestic

[1056] *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 34–34.
[1057] *Report on Germany* (CPT, 12 March 2003), § 150–150.
[1058] *Report on Poland* (CPT, 25 June 2014), § 12–12.
[1059] *Report on Finland* (CPT, 14 June 2004), § 95–95.
[1060] Finnish ombudsman stated that, as a minimum, it aims to visit every police establishment once per year and each prions once in three to four years. The CPT also established that, for example, from beginning of 2013 until the CPT visit (September 2014) no psychiatric establishment were visited. See *Report on Finland* (CPT, 20 August 2015), §§ 7–8.
[1061] *Report on Czech Republic* (CPT, 31 March 2015), § 7–7.

monitoring bodies including NPMs does not turn up in a considerable number of the CPT reports. Hence, it is difficult to make something of these inconsistent remarks of the the CPT. One can speculate that it takes into account size of the state and types of detention places, where it expects that police establishments and remand prisons are to be visited more frequently. The ICRC does not conduct regular visits since it focuses on places of armed conflict or internal strife which break out and then, in most cases, cease to exist.

When the ICRC establish presence in a country, frequency of its visits may vary from once or twice a year, when situation is not overly problematic, to biweekly,[1062] weekly or even daily[1063] when there are reasons to assume that situation in place of detention is critical.

Nowak and MacArthur believe that, if NPMs are to produce meaningful deterrent effect, larger places of detention ought to be visited every few months. In addition, these authors also referred to detainees' fluctuation rate as a criterion for determining frequency of visits and as an example noted pre-trial and detention centres for illegal migrants.[1064]

The APT proposed the following arrangement as regards frequency of visits. First, police establishments previously identified as critical, that is to say "*with known problems*" and a number of those randomly selected are to be visited at least two times a year (one in depth and one ad hoc visit). Second, institutions holding high number of members of vulnerable groups, places where pre-trial and detainees on remand are held and those identified as problematic[1065]—through information collected during private interviews with detainees and otherwise obtained—at least once a year (one in depth visit with the possibility of carrying out, second, ad-hoc visit). Third, other places of detention ought to, as a minimum, be visited once (also one in depth and with the possibility of carrying out ad hock visit) in the course of three years but preferably on an annual basis. Finally, visiting body may extend periods between visiting two institutions in two cases: if other credible visiting mechanisms payed a visit to a particular institution in that period or if previous in depth visit did not reveal any deficiencies and prison officials were cooperating with the NPM team. However, under no circumstances should a place of detention be visited less frequently than once in 5 years.[1066]

These broadly framed guidelines are obviously mindful of the diversity of states parties to the OPCAT, some of which being vast in size, administering thousands of places of detention and suffering

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[1062] David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, D. P. Forsythe and B. A. J. Rieffer-Flanagan, *The International Committee of the Red Cross: A Neutral Humanitarian Actor // The International Committee of the Red Cross: A neutral humanitarian actor*, Routledge Global institutions (London, New York: Routledge, 2007), pp. 78–9.

[1063] A. Aeschlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross* 87 (2005), 83–122, at 98.

[1064] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1081; Nowak in the role of the SRT noted that "*In order to maintain a deterrent effect, national visiting bodies should carry out visits to larger or more controversial places of detention every few months, and in certain cases at even shorter intervals*." See *Report to the General Assembly: UN Doc A/61/259* (2006), § 71–71.

[1065] APT described places that ought to be visited more frequently due to higher probability that inmates are exposed to ill treatment as "*any place known or suspected to have significant problems with torture or other ill-treatment, or known to have poor conditions of detention relative to other institutions in the country,*" see *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), p. 34.

[1066] *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), pp. 33–5.

from a chronical lack of resources. In any case, even if one cannot object to the fact that NPMs are compelled to prioritize while deciding when and which institutions to visit, the requirement of frequency sufficient for an effective contribution to the prevention of ill-treatment should be kept in mind.

SPT offered further guidance by noting that NPMs selection criteria ought to "*ensure that all places of detention are visited regularly, taking into account the type and size of institutions and their size and level of known human rights problem*"[1067] and cover all types of places where people deprived of liberty are held and geographical areas of a given state.[1068] It added that in setting priorities, accessibility of institutions to other monitoring bodies should also be considered.[1069] This approach is broadly in line with those previously cited as they also indicate that one should take into account size and type of institutions as well as known human rights violations taking place therein.

Therefore, this prioritization needs to reflect the probability of occurrence of ill-treatment in certain places of detention. In those in which there are reasons to believe that ill-treatment occurs more often, frequency of visits need to be higher. In contrast, institutions where no indications point towards persistent practice of ill-treatment, visits could be conducted at a slower pace. Estimation of risk of ill-treatment in places of detention should be based on their capacity and turnover of prisoner, information obtained during visits (including allegations of ill-treatment received during private interviews of detainees) but also from various sources such as NGOs, international bodies etc. In any case, it is important to highlight that, at the end of the day, no institution should be forgotten that is left out of NPMs scrutiny.

Finally, expecting NPMs to, as a minimum, visit institutions identified as critical every six months and others, no less than twice in three years seems not unreasonable. Of course, which institutions NPMs deem critical is prone to change and frequency of visits made to these with it.

13.3.7 Methodology

General methodology employed by all inspecting bodies is by and large similar. At the outset, visiting delegation holds a preliminary talk with the head of the institution during which more general topics such as capacity and design of the facility, number of prisoners, staff, reported cases of ill-treatment and their outcome, health care, suicide rate, main problems etc. are discussed. This is followed by a tour of the detention facility, insight into relevant registers and other documentation, visiting the infirmary and speaking with the medical staff and conducting confidential interviews with persons deprived of their liberty and possibly staff members. It ends with a concluding meeting with the detention authorities where visiting delegation communicates initial impressions, issues of concern and suggestions.[1070]

[1067] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 10–10.
[1068] *Advisory Visits to NPM of Germany-Report to the NPM* (SPT, 29 October 2013), § 50–50.
[1069] *Advisory Visit to NPM of Senegal- Report to the NPM* (SPT, 31 July 2013), § 21–21.
[1070] A. Aeschlimann, 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross* 87 (2005), 83–122, at 104.

It should be emphasized once more that basic preconditions of effective monitoring are access to all premises in detention facility, all documents and, of course, possibility to conducts confidential interviews with inmates the delegation itself selects. It goes without saying that informed consent should be obtained from prisoners before conducting an interview.[1071] Moreover, first contact with detainees ought to be made by the member of the monitoring team instead of prison official to avoid eventual intimidation.[1072] Finally, states need to provide guarantees that those interviewed are not going to suffer reprisals on account of their talks with members of the inspecting body.

Generally speaking, visits can be in-depth, *ad hoc* or thematic. With in-depth visits members of monitoring bodies seek to conduct exhaustive examination of state of affairs in place of detention. To that end, they look at a range of issues such as material and sanitary conditions, health service, detention regime, solitary confinement, use of means of restraint, various custody registers and most importantly, conduct a great number of confidential meetings with prisoners.[1073] Due to the amount of the workload, in-depth visits of institutions accommodating hundreds or even thousands of inmates cannot be finalized in one or even two days. APT suggested minimal length of visits to places of detention depending on number of inmates as follows. For institution with up to 50 inmates one day would generally suffice, for those with up to 100 2 days, up to 200 3 days and more than 300 at least 4 days.[1074] Of course, these should be understood only as guidelines as length of visits is contingent upon many factors such as number of inspectors, their experience, size and type of the facility, number of interlocutors, need for translation, unplanned developments etc.[1075]

Ad hoc visits, as already noted, do not serve to thoroughly inspect place of detention but to demonstrate visiting body's ability to conduct visits without prior notification and generate a deterrent effect. In addition, they are suitable for verifying that formally accepted recommendations are implemented in practice.[1076]

Lastly, thematic visits are made with the purpose of thoroughly examining one particular segment of detention (solitary confinement, healthcare, complaint mechanisms etc.) or specific group of those deprived of freedom (juveniles or women deprived of liberty, ethnic minorities etc.).[1077] They serve to provide deeper understanding of certain problems and point towards most promising solutions.

[1071] This has been explicitly noted by the SRT, see M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 112–3.
[1072] The SRT noted that in the course of conducting visits to places of detention he introduces himself to prisoners and under no circumstances allows prison officers to do that for him as this could have an intimidating effect on the prisoner in question, see M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 115.
[1073] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 239.
[1074] *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), p. 31.
[1075] APT, *Monitoring places of detention: A practical guide* (Geneva: APT, 2004), pp. 68–70.
[1076] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), pp. 239–40.
[1077] *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 240.

The SRT makes sure that it always has a forensic doctor among delegation members in order to carry out medical examinations when required.[1078] In addition, medical expertise is vital for proper assessment of quality of medical services provided in institutions (adequacy of infirmary, equipment, therapy, medication etc.). Having in mind that NPMs are national bodies and conduct visits much more frequently it is reasonable to assume that presence of a medical doctor during each visit would not be indispensable requirement as it would put too great a burden on NPMs. However, should it be necessary, forensic examination of a detainee need to be arranged in a matter of days, if not hours. It may prove useful if visiting bodies have adequate photo and other useful equipment (for measuring floor space, temperature etc.) but, again, this is by no means a necessity.[1079] In ascertaining that persons deprived of liberty can exercise rights accorded to them and that safeguards aimed at preventing their ill-treatment are in place, it is to be expected that NPMs employ the outlined triangular method.[1080] Moreover, how NPMs go about verifying practical utility of formal safeguards and rights and extent of implementation of their recommendations is probably the most crucial part of their *modus operandi* which, to a large extent, determine the success of the entire endeavour. In this context Casale calls for a

> "*rigorous empirical approach*" and highlights the need to "*check improvements empirically by direct, methodical observation and collation of concrete examples confirming that a pattern of practice has shifted (or not, as the case may be)*".[1081]

13.3.8 Outcomes of visits

NPM staff ought to produce visit reports drafted in respect of each visit, annual reports, consisting of summary of activities implemented during the previous year and, eventually, thematic reports discussing certain aspect of detention in more detail.[1082] It should be borne in mind that as NPMs are not bound by the requirement of confidentiality they are mandated to publish annual and free to publish visit reports at point they deem appropriate.[1083]

SPT held that NPM visit reports should put emphasis on the principal issues namely

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[1078] M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 106.

[1079] The SRT prefers using photo equipment for documentation purposes, whereas the CPT decided to refrain from using such devices see M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 106; *1st General Report- Main features of the CPT, preventive nature of the CPTs functions and visits: CPT/Inf (91) 3* (1991), § 66–66.

[1080] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.2.3. Inspection procedures. Triangulation.

[1081] S. Casale, 'A System of Preventive Oversight', *Essex Human Rights Review* 6 (2009), 6–14, at 11–2.

[1082] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 22–22.

[1083] State itself is, in accordance with the OPCAT article 23, mandated to publish and disseminate NPMs annual reports. Nowak and McArthur noted that, different to SPT, "*NPMs are not only allowed to publish their annual reports….but also to publish and disseminate reports on its visits to places of detention, including recommendations to the relevant authorities* " see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1095; SPT also made clear that "*Visit reports, including recommendations, should be published, if the NPM considers it appropriate to do so*.", see *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 22–22.

"*reporting ill-treatment, gaps in policies, regulations, and practices, as well as the appropriateness of conditions under which inmates are living, reflecting systematic lack of protection of the rights of inmates*"

but observed that also "*Good practices should be noted and filed for systematic analysis.*"[1084] APT recommends that visit reports should reflect state of affairs regarding a range of issues (treatment, protection measures, material conditions, regime and activities, medical services, personnel) in order to identify deficiencies but suggest that attention ought to be drawn to positive aspects as well.[1085] Nowak and McArthur noted that NPM annual reports should offer "*a realistic picture of the situation in the country concerned,*" include "*any findings on torture and ill-treatment*", outline recommendations aimed at improving treatment, detention conditions, preventing deliberate ill-treatment and note down measures a state has taken in order to comply with these.[1086]

Therefore, the main part of the visit report should, on the one hand be dedicated to reflecting whether basic safeguards against deliberate ill-treatment are complied with. On the other, it ought to reveal whether material conditions of detention, regime, activities, medical care, food, are in line with international minimum standards. In addition, preventive bodies should not shy away from labelling certain situations as particular forms of ill-treatment, when there are convincing grounds for doing so. At any rate, visit reports should contain allegations of ill-treatment and results of their examination by using the triangular approach. Conversely, if this reaction lacks, states can interpret it as a condoning this state of affairs.

However, as already noted, different from annual, NPMs are not legally required to publish their visit reports, for no such requirement has been stipulated in the OPCAT. SPT, on its part, noted that a NPM should publish visit reports if it "*considers it appropriate to do so*".[1087] On the other hand it also underlined that NPMs ought to provide general public with relevant information pertaining to its mandate and to that end "*establish clear and accessible procedures*".[1088]

Short-term postponement of publication of visit reports is acceptable as a strategy employed in getting recommendations implemented and probably necessary in order to clear any misunderstanding as regarding factual observations. However, this more relaxed approach towards publishing visit reports should never amount to concealing the state of affairs in places of detention and even more so to burying indications pointing towards deliberate ill-treatment or wretched material conditions in order to extract some concessions from the state. Different to international monitoring bodies such as ICRC, CPT and SPT, which are, in principle, bound by the principle of confidentiality,[1089] the OPCAT does not refer to

[1084] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), p. 19.
[1085] APT, *Monitoring places of detention: A practical guide* (Geneva: APT, 2004), pp. 88–9.
[1086] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1101.
[1087] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 22–22.
[1088] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 33–33.
[1089] Principle of confidentiality, understood as a rule entailing that visit outcomes i.e. reports are kept confidential between the visiting body and the state, is fully respected only in relation to the ICRC mandate. As regards work of the CPT and SPT, although formally envisaged by the instruments establishing the respective bodies, this principle plays no major role in practice

this principle as regards NPMs.[1090] Therefore, as access to places of detention need not be negotiated and position of NPMs compromised by making concessions to the government, its prerogatives, including permanent right of access, being set out in binding international treaty as well as domestic legislation, NPMs should never resort to self-censorship or bartering silence for prospects of better protection in the future. Making places of detention transparent by disclosing conditions and accounts encountered and documented is NPMs' rationale and at the same time maybe the most powerful weapon on its disposal[1091] and should thus be made use of.[1092] Last but not least, this notion of confidentiality should not be confused with explicitly stipulated obligation of NPMs not to publish personal data or other confidential information pertaining to prisoners without their explicit permission.

13.3.9 Responding to allegations or other indications of ill-treatment

While during their visits NPM members might occasionally come across an actual perpetration of ill-treatment, it is far more likely that they will encounter inmates with injuries typical of ill-treatment or those only alleging occurrence of ill-treatment. Even if reacting to these situations by assessing veracity of such accounts is not, strictly speaking, part of their mandate, it stands to reason that they ought to be addressed along the lines suggested by the triangular method. The main question is, therefore, how NPMs ought to respond to allegations of ill-treatment articulated by those deprived of liberty? Here, one should differentiate between allegations of those bearing visible physical marks typical for ill-treatment and of those claiming that they themselves have been victimized or witnessed ill-treatment of others but cannot corroborate such claims.

As regards former, the SPT held that

> "*The NPM should have clear guidelines for reporting individual cases of deliberate ill-treatment, requesting inquiries and maintaining the confidentiality of the victim, as well as having clear guidelines for protecting such persons against reprisals.*"[1093]

The APT suggested that instruction to competent body such as a prosecution office or the NHRI to investigate the case can be part of recommendation which should be made only with consents of the inmate concerned.[1094] It is reasonable to expect NPMs to ensure that this person is examined by a forensic doctor acquainted with the Istanbul protocol, ask for clarification from detaining authorities,

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as states usually consent to publishing the reports, see E. Delaplace and M. Pollard, 'Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty', *International Review of the Red Cross* 87 (2005), 69–82, at 76.

[1090] The OPCAT—in contrast to the SPT— does not envisage condition of confidentiality for publishing NPM reports which may be explained by the fact that states perceive domestic body's report as less intrusive than that of international monitoring body, see M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), p. 1082.

[1091] The OPCAT Manuel recognizes that publishing visiting reports is an powerful tool in preventing ill-treatment *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 164.

[1092] NPMs are not bound by the principle of confidentiality and thus may opt to publish all or some of their visit reports, but in any case must publish their annual report *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 32.

[1093] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 18–18.

[1094] *Establishment and designation of national preventive mechanisms* (Geneva: APT, 2006), p. 65.

notify the competent prosecutor office, and make sure that inmate will not be subjected to reprisals either by effectuating his transfer to other facility or otherwise. Finally, it is important that cases encountered are followed up before the competent state organs, that it is insisted upon their clarification to prevent their rejection due to lack of proof, expiration of statute of limitations, etc. Omissions of detention authorities which led to deliberate ill-treatment going on unnoticed and unpunished should be also addressed and appropriate recommendations drafted.[1095] The SRT focuses on remand facilities where detainees are asked about their experience during arrest and in police custody. Usually a number of detailed consistent accounts of torture going on in certain police stations are obtained; even specific rooms are described where torture usually takes place. The SRT then pays a visit to identified police stations and, in most cases, finds evidence verifying allegations of detainees.[1096]

As regards latter type of allegations, those not in any way substantiated, situation is more complicated. Approach adopted by the CPT and SPT is based on assessing level of congruence between different accounts of ill-treatment in an institution visited and articulating a position on their consistency.

These assessments on consistency between allegations in different institutions visited sometimes serve as a reference point on taking position on risk of ill-treatment in police custody or prisons in general.[1097] This practice was criticized on the grounds that one cannot justify extension of impression gained in the course of visiting few police stations to police force per se in a state visited.[1098] However, NPMs are better placed to make that kind of assessment as they are able to conduct frequent visits to those in police custody and are well acquainted with the national setting in which they operate. Admitting that such risk assessment encompassing the entire country could be considered hostile, alienate NPM from the state authorities and thus produce a detrimental effect, NPMs should, as a minimum, clearly state number and nature of allegations, their consistency and, if available, any corroborative evidence. In addition, detainees need to be instructed on how to react in these cases, namely to insist on medical examination and file a complaint to competent authority. This assessment, whatever the form it may take, is essential for identifying critical places of detention, which are to be subjected to enhanced scrutiny via more frequent visit regime.

[1095] With respect to this issue the SPT instructed NPMs as follows: "*Cases of deliberate ill-treatment should be analysed to identify gaps in the protection of persons deprived of their liberty*", see *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), p. 19.

[1096] M. Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1 (2009), 101–19, at 113.

[1097] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.4. Practical application - towards convergence?.

[1098] R. Morgan, 'The CPT Model: An Examination', in L.-A. Sicilianos and C. Bourloyannis-Vrailas (eds.), *The prevention of human rights violations: Contribution on the occasion of the twentieth anniversary of the Marangopoulos Foundation for Human Rights (MFHR)* (Athens, 2001), pp. 3–37, at pp. 29–30.

13.3.10Recommendations and getting them implemented

Formulating and implementing recommendations is of key importance if NPMs are to exceed their basic safeguard role, which consist of generating deterrent effect and making places of detention more transparent. As mentioned earlier,[1099] NPMs as well as other inspection mechanisms have a dual nature given that in addition to being an important safeguard themselves also contribute towards establishing or improving institutional and procedural framework conducive to prevention of ill-treatment. This is to be done by reviewing how the relevant safeguards and standards are formulated in law and observed in practice, and recommending pertinent improvements of existing or introducing new safeguards. The quality of the improvements recommended depends, by and large, on expertise of NPM staff as well as willingness to articulate them, which is, in turn, conditioned by its substantial independence.

Central place in every report ought to be given to recommendations because their implementation secure that ill-treatment does not occur in the future. It follows that recommendations should address irregularities or deficits identified during the visit and suggest improvements. SPT highlighted that recommendations of NPMs need to "*be well founded … have a preventive focus, addressing systematic gaps and practices (root causes); and be feasible in practice*".[1100] In some cases this can be a difficult standard to satisfy, especially addressing root causes and at the same time being feasible in practice; in others, NPMs need only reiterate well-defined safeguards already formulated by CPT, CtAT or SPT. In any case, recommendations need to reflect reality encountered during visits and aim to close what was identified as the "*inspection gap*", that is to say, difference between position of detainees in law and fact.[1101] Lastly, NPMs should not blindly reproduce recommendations of other bodies, but seek to formulate answers to the real problems encountered in places of detention.

Extent of implementation of recommendations is maybe the ultimate test of NPMs ground-breaking approach to ensuring state compliance. In order to be realistic as to prospects of implementation, one should be reminded of NPMs specific position within the national legal order. Namely, their independence from the state apparatus is deemed crucial, while, at the same time, they are expected to profit from being perceived as part of it by state officials. It follows that this inherent contradiction of NPMs position can both advance and hinder implementation of their recommendations.

On the other hand, one must always remember that actual implementation rests on states alone which are explicitly required only to enter into dialog with NPMs. This dialog should involve written and oral discussions between NPMs and representatives of both government and institutions singled out in respective recommendations. [1102] The OPCAT's specific design has a role to play in this regard as well, in that it creates a triangular relation between SPT, NPM and state authorities where the first

[1099] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.9.4.6. Collaboration with inspection bodies.
[1100] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 20–20.
[1101] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.2.3. Inspection procedure.
[1102] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 22–22.

two would via concerted effort seek to persuade states to comply with recommendations made.[1103] It has been suggested that NPMs should, as part of the triangular relation, follow up on the implementation of SPT recommendations.[1104] This can go the other way around; SPT can reinforce recommendations of NPMs by, in a way, backing them with its authority. In addition, the CPT suggested that NPMs are "*ideally placed*" to follow up on their recommendations.[1105] NPM follow up activities on SPT and CPT recommendations seem particularly sensible since the main weakness of international preventive procedures lies with their diminished ability to directly verify whether proposed changes took place.

Therefore, it follows that NPM's ability to prevent ill-treatment, besides its personal safeguard role i.e. - opening places of detention and thus generating deterrent effect, lies in its capacity to continuously verify whether a number of basic safeguards and standards[1106] are followed in practice, and whether their previous recommendations, as well as those made by international bodes, were complied with.[1107] In this sense, it is not only the implementation of recommendations, but also their absence that can indicate the actual state compliance. Of course, mere absence is not enough, NPM will have to demonstrate that they looked at functionality of specific safeguards and make clear that on the spot inquiry and interviews with detainees confirmed that these safeguards are respected in practice.[1108] Hence, issues with which international bodies have been struggling, i.e. first-hand information on whether safeguards are in place, and in the best case scenario could verify in few places of detention once in four years, is to become the routine activity of NPM teams.

13.3.11Power to review legislation

As regards the power to review legislation, OPCAT authorizes NPMs "*to submit proposals and observations concerning existing or draft legislation*"[1109] which indicates that NPM's mandate is broader than mere visiting and drafting reports. This provision empowered NPMs to shape the legislative framework related to their mandate as well as to tackle a wider range of factors that are having an impact on the phenomena of ill-treatment including "*administration of criminal justice,*

[1103] This triangular relation goes well beyond pushing for implementation of recommendations and, in a sense, permeates the entire OPCAT via establishing "*obligations, corresponding duties, and points of contact between the States Parties, the SPT and NPMs.*". It consist of the following powers and obligations "*the SPT and NPMs have the power to conduct visits to places of detention; States Parties are obligated to allow visits by the SPT and NPMs; the SPT and NPMs have the power to propose recommendations for change; States Parties are obligated to consider their recommendations; the SPT and NPMs must be able to maintain contact; States Parties are obligated to facilitate direct contact (on a confidential basis, if required) between the SPT and NPMs*." See *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 14.
[1104] *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), § 38–38; see also R. Murray, E. Steinerte, M. Evans and A. Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), p. 134.
[1105] *22nd General Report-Relations between the CPT and National Preventive Mechanisms (NPMs): CPT/Inf (2012) 25* (2012), pp. 45–6.
[1106] Refer to chapter 12 Chapter: Review of state obligations stemming from the obligation to prevent ill-treatment.
[1107] In this context SPT noted that "*NPM should regularly verify the implementation of recommendations through follow-up visits to problematic institutions*" see *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 24–24.
[1108] SPT noted that "*Good practices should be noted and filed for systematic analysis*" see *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), p. 19.
[1109] Article 19(c), OPCAT.

including police and prison laws and regulations…aliens legislation and health legislation"[1110] This is the logical extension of its basic function of ensuring compliance with international obligations as this would often entail normative changes. Conducting visits to institutions and assessing legislation are, according to SPT, core NPM activities.[1111] Giving effect to this power would entail on the one hand, that states consult NPMs before introducing or amending legislation relevant to their mandate and NPMs to submit proposals on their own initiative, on the other.[1112]

Apparent candidates of interest to NPMs normative mandate are the alignment of a national definition of torture and corresponding penalties with requirements of CAT, abolishing the statute of limitations in respect of this offence and perfecting procedural rules ensuring prohibition of use of evidence obtained via ill-treatment. In addition to legislation, NPMs should review and propose changes of by-laws and guidelines instructing law enforcement officials in dealings with persons deprived of their liberty and regulating the use of solitary confinement, disciplinary proceedings against prisoners etc. In a broader sense, NPMs should take interest in a set of regulations impacting vulnerable groups that are in greater risk of being deprived of liberty and exposed to ill-treatment such as persons with psychosocial and/or intellectual disabilities, migrants, ethnic minorities etc. In this sense, it would make sense to tackle the deprivation of liberty on medical grounds, deprivation of legal capacity, institute of guardianship, involuntary medical treatment, use of means of restraint etc. It is logical that NPMs operating in CRPD states parties take interest in the deinstitutionalization process. Of course, this is not the only possible interpretation as it was put forward that the CPT, being a non-judicial body, should not seek to abolish places where it conducts its activities (psychiatric hospitals), but focus solely on preventing ill-treatment taking place therein.[1113] On the other hand, one should not equate the position of the CPT to that of NPMs in this respect as the latter is explicitly endowed with the right of legislative initiative and, as a body established in line with a human rights treaty created under UN auspices, expected to accord due weight to standards emerging under UN human rights framework. In addition, NPMs legislative mandate is not strictly limited to reviewing legislation as it can cover initiating, reviewing, facilitating and even advocating for policies touching upon its mandate. For instance, the SPT suggested that NPMs should systematically monitor and analyse proceedings against alleged perpetrators of ill-treatment and promote creating a national register of torture allegations and their outcomes.[1114]

[1110] M. Nowak, E. McArthur and K. Buchinger, *The United Nations Convention against torture: A commentary* (Oxford: Oxford University Press, 2008), pp. 1082–3.
[1111] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), p. 6.
[1112] APT held that "*To facilitate this aspect of the NPMs' mandate, the governments of OPCAT States Parties should make a practice of proactively sending draft legislation to their respective NPM(s). NPMs should also be able to initiate proposals for new legislation and/or amendments to existing legislation.*" *Optional protocol to the UN Convention against Torture: Implementation manual*, Rev. ed. (Genève, San José: APT; Inter-American Institute of Human Rights, 2010), p. 94; The SPT made a statement to this effect as well see *Guidelines on national preventive mechanisms: UN Doc CAT/OP/12/5* (2010), p. 28.
[1113] V. Pimenoff, *Towards new standards in psychiatry*, pp. 2–3.
[1114] *Analytical self-assessment tool for National Prevention Mechanisms (NPM): UN Doc CAT/OP/1* (2012), § 27–27.

13.3.12Conclusion

The above outlined discussion makes clear that many pieces need to be put together in order for NPMs to reach their full potential in preventing ill-treatment. Namely, they should possess powers stipulated in the OPCAT (to enter places of detention, conduct private interviews, have access to relevant information etc.) and be independent. This means that they must be capable of acting autonomously and making use of it by conducting regular unannounced visits, have sufficient resources and staff with adequate expertize. Finally, they should be close enough to the state to get recommendations implemented but far enough to be controlled.

One should, once again, be reminded of the NPM's dual nature: it is itself a safeguard against ill-treatment on the one hand, and a mechanism for monitoring the compliance of states with their obligations arising from the prohibition of ill-treatment, on the other. Accordingly, these two natures generate distinct effects. The former produces a deterrent effect and makes places of detention transparent, while the latter should identify the weakness within the existing anti ill-treatment framework, recommend changes and see to their implementation.

As to the deterrent effect, it is crucial that NPMs carry out frequent and unannounced visits to places of detention, some of which outside regular working hours including nights and weekends. One could argue that NPMs effectiveness tend to rise with the increase in number of unannounced and visits in general made to closed institutions. In addition, qualifying situations as certain form of ill-treatment and taking a position on risk of ill-treatment, also contributes to creating such effect. In order to make places of detention transparent, NPMs ought to look at key areas and safeguards pertaining to specific types of institutions, truthfully reflect main findings in their reports and publish them shortly after the visit. With regard to the second effect, improving anti-ill-treatment framework, the success of NPMs will be determined, at least in short and mid-term, neither by its ability to persuade the state to undertake complicated and costly reforms in order to address root causes of ill-treatment nor by ensuring that each and every procedural standard is implemented. It will rather be determined by making sure that those basic safeguards and some minimum material conditions are given practical effect across the board, in all places of detention. To that effect, again, NPM should conduct visits much more often than international bodies. Of course, this somewhat minimalistic approach must be adapted to states, which, generally, tend to respect personal integrity and dignity of persons deprived of freedom where the bar needs to be set higher.[1115] Nevertheless, given that in these states ill-treatment is by no means eradicated, they too would benefit from regular unannounced inspections making sure that basic safeguards are in place and borderline situations are timely identified and adequately addressed.

[1115] By this is meant that these states would be expected to meet somewhat higher standards. The reason to this is that setting low standards would render efforts put into establishing NPMs rather meaningless, as its only function would be to constantly verify proper implementation of basic safeguards observance of which has been long achieved.

PART IV

FORMULATING OBJECTIVES, BENCHMARKS AND INDICATORS FOR THE SYSTEMATIZED CONCEPT

14 Chapter: Objectives, benchmarks and indicators for evaluating effectiveness

As already outlined in more detail, NPMs capacity to prevent ill-treatment consists of two practically interrelated but conceptually separate components. First, they are empowered to inspect whether important parts of an anti-ill-treatment framework are in place, functional and suggest their improvement. Second, they are, in and of themselves, a constituent part of this framework as, by merely conducting regular unannounced visits to places of detention, they generate a deterring and transparency effect and thus decrease the likelihood that ill-treatment will take place.[1116]

The effectiveness of bodies utilizing a preventive approach to prohibition of ill-treatment in general, tends to be assessed mostly against the extent of compliance with their recommendations. Higher level of compliance indicates a more effective prevention body and vice versa. Although this observation is, for the most part, correct regarding international bodies,[1117] it is somewhat off the mark in respect of national bodies, especially NPMs, as they can undertake activities, other than making recommendations, capable of preventing ill-treatment. The argument is that the deterring and transparency effect contributes to the prevention in its own right and, thus, should be taken into consideration while assessing the effectiveness of NPMs. Moreover, these two effects are in principle easier to generate, since, different to recommendations, they do not require state endorsement but fall completely within the scope of NPM's competencies.[1118]

14.1 Rationale of suggested method for assessing effectiveness

For that reason, a more promising approach towards determining whether NPMs are effective, and thus eliminate or reduce ill-treatment in places of detention, should consider NPMs preventive potential in its entirety. Put differently, it comes down to establishing whether and, if yes, to what extent they realized their potential to prevent ill-treatment. This preventive potential can be summarized as follows. In the ideal case NPMs, possessing all the relevant competencies, adequately funded and independent, are to carry out regular unrestricted and mostly unannounced visits to places of detention and generate a deterring effect (discourage potential perpetrators from resorting to ill-treatment). This effect is also to be facilitated by labelling individual cases encountered as certain forms of ill-treatment by using the triangulation approach. These findings should in turn set in motion an effective investigation and, if

[1116] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.9.4.6. Collaboration with inspection bodies.
Research methodology, section 3.6. Four level model of measurement.

[1117] However, the main problem here is that of verifying whether the state really complied in all places of detention, or just made formal statement assuring compliance without changing anything in practice.

[1118] This holds true provided that functioning of an NPM including access to all places of detention, detainees and documentation, adequate funding etc. is not obstructed, see chapter 13 Preventive approach utilized - lessons learnt, section 13.3.4. Competencies.

confirmed in court, end in adequately sentencing the perpetrators and redressing the victims. At the same time, they ought to facilitate transparency by obtaining and making public on a regular basis an undistorted picture of material conditions, treatment, practices and utility of different safeguards in places of detention. The sum of impressions and observations made during a visit would then give rise to pertinent recommendations aimed at remedying deficiencies discovered. Lastly, implementation of recommendations should, in turn, lead to improving the system of safeguards and conditions of detention and hopefully prevent ill-treatment before it occurs. In addition, NPMs are expected to go beyond the confines of the inspection procedure and address a wider range of societal factors causing or at least contributing to occurrences of ill-treatment.

In order to reveal whether NPMs delivered on this promise, it may prove useful to deconstruct the outlined preventive potential of NPMs on its constituent objectives, which can be said to be the following: generating deterrence, making conditions, treatment and safeguards in places of detention transparent and improving material conditions, regime and overall anti ill-treatment framework in places of detention as well as remedying root causes and factors underlying, encouraging or perpetuating emergence of circumstances conducive to ill-treatment.

Therefore, whether a particular NPM succeeded in reaching these objectives could be verified by looking at certain benchmarks corresponding to one or more objectives whose attainment in specific units of observation (states) can be measured by using a number of indicators. Here, one should bear in mind that, in accordance with the overall approach and methodology of this thesis, these benchmarks and indicators do not purport to directly identify higher observance of the right to be free from ill-treatment itself, but instead refer to the performance of the national body (NPM) that is especially designed to achieve that end.[1119] In this context, benchmarks are understood as performance yardsticks extracted from practice of other preventive bodies, contributing towards the effectiveness of NPMs and ultimately the prevention of ill-treatment.[1120] Indicators are pieces of information determining whether these benchmarks have been met in a particular case.[1121] In addition to the above suggested objectives,

[1119] In the context of measuring effectiveness of NHRIs Carver distinguished between indicators measuring performance and impact where former should reveal whether a particular body realised its predetermined assignments while latter ought to discover whether successful implementation of these assignments lead to increased observance of human rights. He has put it as follows: "*performance indicators measure whether the institution has actually achieved what it set out to do; impact indicators assess whether those activities effectively changed the human rights situation*." R. Carver, *Assessing the effectiveness of national human rights institutions* (Geneva: International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, 2005), p. 10.

[1120] *Human rights indicators: A guide to measurement and implementation* (New York, Geneva: United Nations Human Rights, Office of the High Commissioner, 2012), p. 20; Organisation for Economic Co-operation and Development, *Glossary of Key Terms in Evaluation and Results Based Management* (2002), p. 18; R. Carver, *Assessing the effectiveness of national human rights institutions* (Geneva: International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, 2005), p. 10.

[1121] *Human rights indicators: A guide to measurement and implementation* (New York, Geneva: United Nations Human Rights, Office of the High Commissioner, 2012), p. 16; Organisation for Economic Co-operation and Development, *Glossary of Key Terms in Evaluation and Results Based Management* (2002), p. 25; R. Carver, *Assessing the effectiveness of national human rights institutions* (Geneva: International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, 2005), p. 10.

an additional category not specifying expectations of performance in themselves, but rather a set of preconditions enabling NPMs to reach their objectives will be assessed.

14.2 Overview of objectives, benchmarks and indicators

This research will evaluate the effectiveness of selected NPMs by inquiring whether and to what extent they met their preventive potential. Although formal compliance with the OPCAT will be looked at (above all, whether it is grounded in law, how independence is guaranteed, is it endowed with powers necessary for implementing its mandate (free access to places of detention, documentation, private interviews)), main focus of analysis will be put on the actual output and performance of NPMs, namely visits carried out, standards applied, published reports, recommendations made (including those suggesting normative changes) and their implementation. A four level model of measurement[1122] serves to facilitate the identification and utilization of adequate objectives, benchmarks and indicators capable of measuring whether the NPMs under observation proved effective.[1123] At this stage of the research, an operationalization of "*the systematized concept into meaningful, valid and reliable indicators*" takes place.[1124] Put differently, the elaboration of different forms of ill-treatment and state obligations aimed at preventing them, practices in detention and good practices in work of preventive visiting bodies was meant to enable the detection of indicators and benchmarks capable of capturing whether objectives instrumental for NPMs effectiveness have been attained. As a result, during this study four objectives, 19 benchmarks, and a large number indicators were identified and will be considered. They will be outlined in what follows:

Objective 1:

NPMs are endowed with powers, means and safeguards necessary for the implementation of their mandate. At the basic level, formal compliance with the OPCAT as well as basic functional preconditions in terms of independence, staff, material resources allocated will be examined.

Benchmark 1:

NPMs are formally independent. The broad notion of independence, as already noted[1125] should serve to enable these bodies to carry out their tasks guided by their mandate only.

Indicators:

- NPMs are established at least by an act with the force of a law.

[1122] Based on background and systematized concepts, indicators and evaluation.
[1123] Refer to chapter 3 Research methodology, section 3.6. Four level model of measurement.
[1124] T. Landman and E. Carvalho, *Measuring human rights* (Milton Park, Abingdon, Oxon, New York, N.Y: Routledge, 2010), p. 32.
[1125] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.2.3. Independence.

- NPMs can independently dispose of sufficient financial means for implementing their activities allocated annually preferably by the parliament. This does not imply that NPMs must be allocated large budgets notwithstanding of financial strength of the host state, but it does mean that they ought to be apportioned funds sufficient for carrying out at least minimum activities. Otherwise it makes no sense to ratify the OPCAT in the first place.
- NPMs are functionally, personally and financially independent from the state.

Benchmark 2:

NPMs are adequately staffed and have access to expertise.

Indicators:

- NPMs have sufficient permanent staff and/or members or experts for proper implementation of their activities whose engagement is not subject to approval of an external authority.

Benchmark 3:

NPMs are granted powers necessary for implementation of their mandate.

Indicators:

- NPMs can conduct regular unannounced visits to all places where persons are or might be deprived of their liberty and speak with them without restrictions and supervision.
- NPMs have access to relevant information and documentation.
- NPMs can make recommendations and publish all relevant information gathered during visits whenever they see fit either via visit, annual or thematic report or simple press statements.
- NPMs are authorized to review the existing regulations and propose changes or new acts related to their mandate.

Benchmark 4:

NPMs make use of relevant international standards as reference points for assessing safeguards, material conditions and regime in places of detention.

Indicators:

- NPMs refer both to international (universal or regional) and, when more favourable, national standards. NPMs formulate their own position surpassing national and international standards or when addressing situations dealt with by neither international nor national standards.
- NPMs refer to standards set in CRPD and clarified by CtRPD in reviewing the position of patients in psychiatric hospitals and social care homes as regards deprivation of liberty, use of restrains, isolation and forced treatment.

Objective 2:

NPMs managed to generate a deterrent effect. Whether NPMs meet their potential to generate a deterrent effect, that is, to dissuade potential perpetrators from actually resorting to ill-treatment by lowering the prospects of committing ill-treatment with impunity. This is to be

done by conducting frequent unannounced visits to places of detention, touring all parts of the respective facility where persons deprived of liberty are held or interrogated, conducting private interviews with them, cross checking different sources of information, taking a position whether ill-treatment occurred and referring its findings to the relevant instance for further processing.

Benchmark 1:

NPMs visit places of detention sufficiently frequent (those considered problematic[1126] two times a year, others at least once in three years).

Indicators:

- Number of visits carried out annually and in total from the establishment of NPM in relation to different places of detention is sufficient.
- Period during which NPMs can visit all the places where deprived of liberty are held at least once.
- List of institutions where those deprived of liberty are in higher risk of ill-treatment is established and regularly updated.
- Number of visits paid to problematic institutions.
- Are there any institutions that are visited more often than others and if so, in accordance with what criteria are they chosen?

Benchmark 2:

Unannounced visits are NPM's main method of work (preferably more than half while at least 1/3 of all visits and 2/3 of those made to critical places of detention are carried out without prior notification).

Indicators:

- Number of unannounced visits in relation to all visits conducted.
- Number of unannounced visits in relation to type of visit (in-depth or ad hoc, follow up) or type of institution visited (police stations, prisons, remand prisons, psychiatric establishments or social care homes, military facilities).

Benchmark 3:

At least 10% of unannounced visits are carried out outside working hours, at night, on weekends and holidays.

Indicators:

- Number of unannounced visits carried out outside working hours.

Benchmark 4:

Persons deprived of liberty can freely engage in confidential talks with NPM members, voice their concerns and denounce their jailors without fear of reprisals.

[1126] Problematic in the sense that persons deprived of liberty in these particular institutions are at a greater risk of being subjected to ill-treatment. According certain institutions priority in visiting is being based on several sources of information, see chapter 13 Preventive approach utilized - lessons learnt, section 13.3.6. Frequency of visits.

Indicators:

- Access to all persons deprived of their liberty including those in pre-trial detention and those residing in high security units is secured.
- NPM members personally explain purpose of their visits to persons deprived of liberty without presence of custodial staff.
- Selection of those detainees to be interviewed is conducted without influence of prison management.
- Number of interviews with detainees in each place of detention visited.
- Number of repeated visits in order to make sure that no reprisals against detainees are undertaken.
- Number of detainees preventively transferred to other place of detention in other to prevent reprisals.

Benchmark 5:

Credible allegations and/or material conditions indicative of ill-treatment are being qualified as such, followed up and reported to competent bodies.

Indicators:

- Number of encountered persons deprived of liberty with physical injuries and/or subjected to material conditions or treatment indicative of ill-treatment.
- Number of medical examinations of persons deprived of liberty with physical injuries typical of ill-treatment carried out by NPM expert.
- Number of instances where NPM qualified such situations as specific form of ill-treatment.
- Number of cases reported to competent organs.
- Number of followed up cases.

Benchmark 6:

Consistency of allegations without direct corroboration is being assessed and conclusion on risk of ill-treatment as regards each institution visited articulated.

Indicators:

- Procedure within NPMs for dealing with uncorroborated accounts of ill-treatment indicating a possible pattern is in place.[1127]
- NPMs describe in their reports allegations, their consistency and eventual risk of ill-treatment in a specific institution.

Benchmark 7:

NPMs during visits tour all premises where ill-treatment might take place and inspect them for implements of torture.

[1127] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.9. Responding to allegations or other indications of ill-treatment.

Indicators:

- Interrogation rooms in police stations and other spaces are examined in search of suspicions objects that might be used for ill-treatment.
- NPMs are inspecting the content of lockable space used by law enforcement officials.

Benchmark 8:

Cumulative effect of material conditions of detention, regime and inadequate health care and lack of reasonable accommodation is being considered and position whether combination of factors amounted to ill-treatment is voiced.

Indicators:

- Number of qualifications that combination of factors may amount to ill-treatment in concrete circumstances.

Benchmark 9:

NPMs recommended that certain premises are to be put out of use.

Indicators:

- Number of recommendations which suggest that cells or other facilities are to be put out of use.

Benchmark 10:

Duration of in depth visit is adequate to the size of the institution and complexity of issues.

Indicators:

- Visit duration of detention facilities holding up to 50 inmates is at least 1 day, up to 100 2 days, up to 200 3 days and more than 300 4 days.

Objective 3:

NPMs made places of detention transparent by directly observing material conditions and safeguards and publishing main findings. Providing relevant, up-to-date and accurate information on places of detention by continually verifying whether a set of well-established basic safeguards are in place and observed in practice and whether persons deprived of liberty are accorded minimum standards outlining material conditions of detention and underlying regime. The main approach utilised by international bodies and which is expected to be used by NPMs is to verify existence of safeguards through crosschecking information received from the detention authorities, detainees, those directly observed and those entered in custody records. Though some standards are the same or similar in all places of detention, others, differ with detention setting. Therefore, NPMs will need to address the main issues in a specific detention settings (police stations, prisons and health setting).

Benchmark 1:

Basic safeguards are inspected by crosschecking information received from detention authorities, detainees and those in relevant custody records (triangulation).

- Three basic safeguards upon deprivation of liberty and information on rights are being regularly observed.
- Interrogations of suspects in police custody are carried out in presence of a defence lawyer.
- Conduct of interrogations is thoroughly documented with at least following information: place, and date, name of all those present, duration of interrogation and time periods between sessions.
- Conduct of questioning is audio or videotaped.
- Premises where interrogations are taking place checked for suspicious object.
- Persons undergoing solitary confinement are visited on a daily basis.
- Records of disciplinary measures are consulted, discussed with prison authorities and crosschecked with an account of the events of randomly chosen detainees.
- Practices of isolation or segregation akin to solitary confinement are looked at and assessed in the similar fashion.
- Reports on the use of force are consulted including medical reports, discussed with prison authorities and crosschecked with a randomly chosen detainee's account of the events.
- Frequency and manner of body searches are examined, discussed with prison authorities and crosschecked with a detainees account.
- Basis, frequency and manner of applying means of restraint is inspected by perusing registers, consulting prison authorities and staff and cross checked with randomly selected detainees.
- Informed consent is obtained before administration of medication.
- Consent on admission to institution does not extend to medical treatment and the latter is separately secured.
- Legal basis and method of deprivation of liberty in health setting is being examined.
- Role of deprivation of legal capacity is being examined as well its contribution to deprivation of liberty or abuse of patients residing in institutions.
- Record and registries are examined with a view of establishing whether they are correctly kept, contain all relevant information, signed and contra signed where needed and regularly updated in due manner.
- Recourse to complaint scheme, internal and external is examined.
- Manner of submitting complaints is unanimous.
- Internal complaint scheme is assessed as regards independence and effectiveness.
- Detainees can address external bodies.
- Number of substantiated complaints alleging ill-treatment in relation to all complaints on ill-treatment is being regularly examined.
- Adequate sanctions are imposed to perpetrators of ill-treatment.
- Public prosecutor is being informed when incidents meet requirements of a criminal offence.

- Medical examinations, in line with requirements of forensic science as set forth in Istanbul protocol, are being carried out in police custody upon the request of the detainee and always before admission to a remand facility, return from a police facility, after use of force or at the request of detainees.
- Final medical reports include, inter alia, assessment of consistency between objective findings and detainee's allegation.
- Doctors are trained on providing an opinion on consistency of injuries identified and allegations of ill-treatment.
- Medical examinations are confidential (carried out beyond hearing range and preferably sight of custodial staff).
- Procedure envisaging referral of reports on consistency between allegations and identified injuries to competent instances is in place.
- Number of referrals of indications of ill-treatment established during medical examination to competent instances is being established.
- Staff of institutions where persons deprived of their liberty are held as well as those in contact with them (lawyers etc.) underwent training related to prevention of ill-treatment.
- Fields within which training was provided include the following: proper treatment of detainees and maintenance of the custodial registers in detention facilities, special knowledge and set of skills necessary for managing particularly vulnerable groups in detention (juveniles, persons with disabilities etc.), preventing ill-treatment during interrogation by providing training on investigation methods to reduce overreliance on confessions, avoiding ill-treating in the course of use of force, arrest and use of restraints, education of medical staff on documenting ill-treatment in line with Istanbul protocol, medical as well as non-medical personnel in psychiatric or social care facilities on particularities of the position of persons with psychosocial and/or intellectual disabilities, for example how to "administer nonviolent and non-coercive care" etc.
- Number of trainings provided.
- Number of public officials trained.

Benchmark 2:

State of material conditions of detention, regime and health care are determined by crosschecking information obtained by direct observation, received from detention authorities, detainees and those in relevant custody records.

- Assessment of whether a place of detention is overcrowded is carried out in accordance with international standards as regards square meters per prisoner in law and reality. Compliance with basic conditions is inspected as regards: sanitary conditions, are premises treated regularly against vermin, availability of bedding (bed frame, mattress and bed lining), is bed lining regularly washed, are they provided with clothing if they cannot afford one, hygiene (how many

times per week can they shower, whether they receive hygienic packages regularly, towels, cleaning material and utensils), bell, water, access to light and air, heating, access to toilet, food (whether quantity and quality is enshrined in national law and whether is respected in practice). For persons with disabilities reasonable accommodation is taken into account.

- Detainees spend outdoors at least one hour daily, while time spent outside cells in meaningful activities is at least 8 hours. Outdoor exercise facilities are available and adequately equipped. Contact with the outside world is adequately secured. Inmates do not, in regular course of events, spend 22 or 23 hours locked up in their cells.
- Non-medical personnel do not filter requests for medical examination. Period between applying and providing medical aid is in line with standards. Level of staffing (medical and non-medical personnel) is adequate as well as facilities, equipment and sanitary conditions of infirmaries. The presence of medics at the facility during night and weekends is secured. Employer of the medical staff is Ministry of Health. Effect of inspecting hygiene, premises and food in line with SMR performed by medical doctors is being examined. Existence and effectiveness of medical staff's obligation to report indications of ill-treatment established during medical check-ups is being examined. In psychiatric hospitals and social care homes adequacy of therapy (whether dosage, type and combination of drugs is not prima facie inappropriate) as well as whether patients are neglected is addressed.

Benchmark 3:

NPMs are making state of affairs identified during visits to closed institutions public in a timely manner. Established material conditions of detention, functionality of safeguards, risk or actual cases of ill-treatment within places of detention should be made public by means of adequate reports. This publicizing serves a twofold purpose. First, it can mobilize public opinion and thus generate pressure upon the state to implement recommendations. Second, if translated, it complements efforts of international bodies aimed at prevention of ill-treatment by feeding them with up to date reliable information on the various aspects of treatment and position of places deprived of their liberty.

Indicators:

- In addition to annual reports, visit reports are being regularly published.
- If visit reports are not published, annual reports contain all relevant information on safeguards, treatment and conditions encountered during visits to places of detention.
- Thematic reports addressing specific issues in places of detention are produced and published.
- International bodies are using NPM reports in assessing state reports under its reporting procedure.

Objective 4:

NPMs improved other safeguards *contributing to preventive framework*, brought about advances in detention conditions or regime or made possible termination of the root causes of ill-treatment. Although recommendations of NPMs cannot be expected to merely replicate those of other preventive bodies, they ought to follow the main contours of preventive approach as such. In this sense, existence and utility of main safeguards as well as material conditions and regime with minimal international standards need to be addressed and pertinent recommendations made. This should, at least to some extent, be made along the lines sketched in visit reports of international bodies such as SPT, CPT or SRT as it is hard to accept that insights into main problems and recommendations provided therein differ significantly from those identified by NPMs. More precisely, while it is plausible to assume that NPMs, due to the regularity of their visits and familiarity with the local context, were able to discover new or to establish the prevalence of problems identified as isolated incidents by international bodies, it is more difficult to accept that structural deficiencies identified by international bodies simply vanished in the NPM reports. Of course, it might be that national authorities implemented recommendations of international bodies, which rendered the problems obsolete. However, if this was indeed the case, these state efforts to comply with recommendations would be relatively easy to track down. Sudden lack of referral to well-established safeguards within places of detention or systematic deficiencies generating ill-treatment cannot be understood differently as inefficiency on the part of NPMs. Deficiencies detected should be addressed with recommendations suggesting an adequate course of action. These include but are not limited to establishing and/or strengthening those safeguards found to be ineffective during visits, not using certain cells or objects as they do not meet minimum requirements, training medical staff on examination consistent with principles set in Istanbul protocol etc. In addition, NPMs are explicitly authorized to suggest amending existing or introducing new legislation in line with obligations or standards stemming from prohibition of ill-treatment. This power, explicitly envisaged in OPCAT Article 19 (c), is a manifestation of a conviction expressed in both OPCAT and CAT that, to prevent ill-treatment, a broader framework of factors contributing, perpetuating or leaving ill-treatment unpunished ought to be addressed. Therefore, NPMs powers can go well beyond recommendations following visits to places of detention and even those proposing changes of legislation to shape issues at the policy level, initiate public debates etc. Finally, notwithstanding its deterring potential and making places of detention transparent, the compliance with NPMs recommendations remains the crucial factor determining their effectiveness. In contrast to international visiting mechanisms, NPMs are well placed to continually verify whether their recommendations are being observed in practice. Therefore, in assessing the actual degree of compliance with recommendations, one should differentiate between formal compliance (official statement of the competent state body accepting the

recommendation) and real compliance (authorities complied with the recommendations in reality), which can be verified only by conducting follow up visits to the same institutions. In addition, one should be mindful of compliance, full or partial, with recommendations addressing factors outside the detention context.

Benchmark 1:

NPMs identified relevant shortcomings and addressed them with pertinent recommendations.

Indicators:

- Deficiencies in detention conditions and safeguards encountered during inspection are addressed with pertinent recommendations in line with international standards.
- Root causes of certain systematic problems are addressed and pertinent recommendations are formulated.
- Recommendations of NPMs resemble those formulated by international bodies.

Benchmark 2:

The competent authorities have implemented recommendations made by NPMs.

Indicators:

- Overall number of recommendations designated as accepted in the official replies of the authorities (formal compliance).
- Number of accepted in comparison with all recommendations-ratio of formal compliance.
- Ratio of formal compliance concerning different types of recommendations (those addressing material conditions, custodial safeguards, legislative changes etc.). This is important since even if the rate of compliance is relatively high, if the recommendations complied with deal with less crucial matters, the contribution to an anti ill-treatment framework is not significant.
- Overall number of recommendations whose implementation has been verified by means of a follow up visit (real compliance).
- Number of recommendations whose implementation was verified in comparison with all recommendations-ratio of real compliance.
- Ratio of real compliance concerning different types of recommendations.
- Overall number of accepted recommendations dealing with legislation or other general issues.
- Number of accepted recommendations in comparison with all recommendations dealing with legislation -ratio of compliance.
- Ratio of accepted recommendations in comparison with different types of recommendations dealing with legislation.

14.3 Methodological remarks on application of indicators

At this point two important methodological notes are called for. Firstly, in applying the outlined indicators on the selected states a reference to the relevant NPM report or another source will be

provided. However, in some cases, this will not be possible, since the conclusion will not stem from one or two sources, but will be a result of thorough analysis of information scattered through several sources

Secondly, in the course of determining whether state authorities complied with recommendations of NPMs two different understandings of compliance will be made use of: formal and real compliance. Whilst the former is a mere reply of the authorities on whether they complied with recommendations made, the latter implies that the NPM empirically verified whether previously made recommendations were complied with. However, in applying both approaches substantial difficulties were encountered.

What makes the clear picture of formal compliance difficult to grasp, is the formulation and content of both recommendations and replies. In addition to clearly worded recommendations (for instance, install intercom in detention cell) and a clear reply (intercom has been installed), a great number of correspondence is rather inconclusive. Sometimes NPMs requested only a statement on a specific issue, or did not recommend certain action (for example organizing training for staff), but an examination of is there a need for an action (in this case need for further training). Responses of the authorities proved to be even more ambiguous, in that they were, at times, openly denying the facts established during NPM visit, thus making an implementation impossible. Similarly, a number of reactions noted only that recommendations are in the process of being examined or that they will be taken up in the future or when the necessary funds are made available. Finally, sometimes answers on specific remarks were simply omitted.

Analysis of real compliance proved to be even more challenging. The main reason to this is insufficient number of follow up visits made by NPMs. What is more, even when such visits were carried out, state of implementation was often not clearly specified. In addition, some recommendations were found to be partially implemented or that further monitoring is called for. Whereas designating compliance as partial might make sense in some cases, it is at least problematic in others. For example, recommendation to ensure supply of necessary medication could be said to be partially implemented if some but not all medications were made available. By contrast, designating in the same way a finding that some reports on medical examination after the use of force against a detainee contained the necessary elements, while others not, defeats the purpose of the entire safeguard. Finally, sometimes one could discern that clarification, during a follow up visit, of whether a recommendation was complied with was based on statements of personnel of the institutions instead of empirical verification on the the ground.

Therefore, it is fairly difficult to produce a reliable account of the state of implementation of recommendations, both formal and real However, it is possible to provide a general assessment regarding whether the relevant authority took a positive or negative stance towards a particular recommendation. More precisely, one can provide an annual overview of accepted, rejected and recommendations whose status of implementation is unclear. In this sense, marking a recommendation as *accepted* implies that the reply of the respective authorities was generally positive and included a

range of options starting from immediate implementation of the recommendations to implementation in the future or, in the third scenario, when necessary means are allocated. *Rejected* means that the authority clearly stated that it will not comply with the recommendation or omitted to reply to a specific recommendation although it did provide a general reply. Finally, the *unclear* status of implementation includes a wide range of situations where authorities noted that recommendations are still being examined, failed to reply altogether or where they denied facts established by the NPMs. Regarding real compliance, it should be understood not as clear findings that recommendations were indeed implemented or not, but rather as indications that substantial compliance took place. Although this solution may appear to be too vague or inconclusive, it is the best one could do with the given sources of information.

PART V

APPLYING THE INDICATORS ON THE SELECTED STATES

15 Chapter: Country report on Serbia

15.1 Introduction

After the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), two out of its six constitutive federal states, namely Serbia and Montenegro, joined together in 1992 to establish the Federal Republic of Yugoslavia (FRY). In an attempt to preserve the union between the two states, FRY was in 2002 transformed into a loose federation: The State Union of Serbia and Montenegro (SUSM). This attempt, however, proved futile as Montenegro in 2006, following a referendum, opted for independence thus rendering Serbia an independent state as well. Serbia consists of a central part (also called Serbia proper) and two autonomous provinces, namely Vojvodina in the north and Kosovo in the south. However, given that Kosovo is *de facto* not under the control of the central authority from 1999 and formally declared independence in 2008, Vojvodina is, in effect, the only autonomous province. It may be added that a major point of reference is the toppling of the so-called Milosevic regime on the 5th of October 2000, which created conditions conducive for holding free elections and thus consolidating Serbia's road to democracy. Serbia became a member of the Council of Europe in 2004 thus accepting ECHR and ECPT. The individual complaint procedure under CAT article 22 was accepted in 12 March 2001, OP to ICCPR on 6 September 2001 and the OP to CRPD on 31 July 2009.

15.2 An overview of the state of affairs in closed institutions concerning ill-treatment

The first independent on-site inspection of places of deprivation of liberty in Serbia took place in the framework of the CAT article 20 inquiry procedure. After receiving information indicating that torture was practiced in the FRY, members of the CtAT visited SUSM in 2002 in order to clarify whether the systematic practice of ill-treatment is being or was utilized. The CtAT's delegation visited several prisons and police stations, conducted private interviews with detainees and held consultations with government officials, members of civil society and victims of ill-treatment. In a nutshell, CtAT came to the conclusion that a systematic practice of torture was taking place in Serbia before the 5th of October 2000. It also established that such treatment was carried out predominately with a view of suppressing political dissent. However, a number of credible allegations of ill-treatment, predominantly of criminal suspects in police custody, were also received.[1128]

[1128] *Summary account of the results of the proceedings concerning the inquiry on Serbia and Montenegro* (CtAT, 01 October 2004).

CtAT, acting under its individual complaint procedure, found Serbia responsible for violation of the CAT in 6 cases,[1129] three of which were found to amount to torture as defined in CAT article 1 (these cases display classical features of torture: using violence to extract confessions from those suspected of having committed a crime).[1130] In addition, victims in all three cases were Serbian citizens of Romani origin. Furthermore, in three more recent cases decided by the ECtHR it was established that persons in police custody have been subjected to violence with the principal aim of eliciting confessions thus amounting to inhuman and degrading treatment.[1131]

The CPT carried out 4 missions to Serbia (2004, 2007, 2011 and 2015). Its reports paint the following picture as to incidence of ill-treatment in closed institutions in Serbia. In respect of police establishments, a discernible pattern is that during the first visit the CPT found numerous consistent indications of routine resort to violence (physical and physiological) with the aim of extracting information and/or confessions.[1132] In the subsequent two visits evidence pointing towards resort to ill-treatment were less numerous while in the fourth visit the CPT again documented considerable number of allegations. In all four visits the CPT delegation discovered non-standard objects in the police premises (iron rods, baseball bats and the like).[1133] Material conditions (state of repair, access to light, air, cleanness, heating etc.) of cells used for detention in police stations were, according to the CPT, generally poor, thus making the utilization of such premises adequate only for detention not exceeding few hours. In addition, in most police establishment matrasses, pillows and clean blankets were not provided. The same is true for meals and daily outdoor exercise.[1134]

As to making use of three fundamental rights, namely access to a lawyer, doctor and notification of third person, and information on these rights, the CPT continually revealed larger or smaller shortcomings. It was noted, for instance, that some detainees were able to meet their lawyer only after signing a confession. Sometimes reference was made to the ineffectiveness of state-appointed lawyer or not making these rights available to those taken into police custody from the moment of apprehension; written notification on rights, when it existed, was often incomplete.[1135]

[1129] *Hajrizi Dzemajl et al. v. Yugoslavia* (CtAT, 21 November 2002); *Dragan Dimitrijevic v. Yugoslavia* (CtAT, 29 November 2004); *Jovica Dimitrov v. Yugoslavia* (CtAT, 23 May 2005); *Danilo Dimitrijevic v. Yugoslavia* (CtAT, 29 November 2005); *Slobodan Nikolic v. Yugoslavia* (CtAT, 09 December 2005); *Besim Osmani v Serbia* (CtAT, 08 May 2009).

[1130] *Dragan Dimitrijevic v. Yugoslavia* (CtAT, 29 November 2004), 5.3; *Danilo Dimitrijevic v. Yugoslavia* (CtAT, 29 November 2005), 7.1; *Jovica Dimitrov v. Yugoslavia* (CtAT, 23 May 2005), 7.1.

[1131] *Stanimirovic v. Serbia* (ECtHR, 18 October 2011); *Hajnal v. Serbia* (ECtHR, 19 June 2012); *Lakatos and Others v. Serbia* (ECtHR, 07 January 2014).

[1132] Allegations heard during the first visit such as beating on the soles of the feet (falaka), electric shocks, placing a plastic bag over one's had, deprivation of sleep etc. prompted the CPT to conclude that some of the allegations could, as regards severity reached, be qualified as torture. See *Report on Serbia and Montenegro* (CPT, 18 May 2006), § 30–30.

[1133] *Report on Serbia and Montenegro* (CPT, 18 May 2006), § 32–32; *Report on Serbia* (CPT, 14 January 2009), § 15–15; *Report on Serbia* (CPT, 14 June 2012), § 15–15; see also *Concluding observations on Serbia* (CtAT, 03 June 2015), § 12–12.

[1134] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 42–3; *Report on Serbia* (CPT, 14 January 2009), §§ 34–7; *Report on Serbia* (CPT, 14 June 2012), §§ 28–31.

[1135] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 47–53; *Report on Serbia* (CPT, 14 January 2009), §§ 21–8; *Report on Serbia* (CPT, 14 June 2012), §§ 19–25; see also *Concluding observations on Serbia* (CtAT, 19 January 2009), § 6–6 and *Concluding observations on Serbia* (CtAT, 03 June 2015), § 9–9.

Similarly, custody records were either inexistent or poorly kept in most of the establishments the CPT visited.[1136] Remand prisoners were often transferred to police stations for further questioning.[1137] Allegations of deliberate ill-treatment by prison officers as well as inter-prisoner violence were also detected. These allegations were especially frequent in the high security unit (Pavilion VII) of Požarevac-Zabela Correctional Institution.[1138] As to the material conditions in prisons, most of the premises visited were dilapidated, overcrowding was prevalent and the provision of hygienic items and clothes was either non-existent or insufficient. Some prisoners have been sleeping on the floor due to the lack of space.[1139] The CPT noted that a situation where remand prisoners spend 23 or more hours per day locked up in their cell for several years, can be said to amount in itself to inhuman and degrading treatment.[1140] Similarly, it labelled poor material conditions (high level of overcrowding (up to 4 persons in 9 m^2), inadequate light and ventilation etc.) and absence of any purposeful activities as "*totally unacceptable conditions of detention*".[1141]

Although none, or only few, allegations of physical ill-treatment were detected in psychiatric hospitals and social care homes, the presence of inter patient violence was identified.[1142] As to material conditions in psychiatric hospitals and social care centres, notwithstanding that certain wings were found satisfactory and/or with an appropriate level of cleanliness, living conditions were, for the most part, found to be rather poor.[1143] Therapy was based almost exclusively on pharmaceutics with other methods (therapeutic activities etc.) being available to only a fraction of patients or residents. The minimum requirement of at least one hour of outdoor exercise per day was not always met.[1144]

The CPT identified irregularities as regards the use of means of restraint and its subsequent documentation. More precisely, it detected instances of its perpetual and/or prolonged use, the absence of direct and continual supervision by the staff and utilization in the presence of other patients or sometimes even with their assistance.[1145] Moreover, on one occasion the CPT noted that immobilizing several patients together in one room, in presence of other patients and without constant staff supervision could amount to degrading treatment.[1146]

[1136] *Report on Serbia and Montenegro* (CPT, 18 May 2006), § 54–54; *Report on Serbia* (CPT, 14 January 2009), 31; *Report on Serbia* (CPT, 14 June 2012), § 26–26.
[1137] *Report on Serbia and Montenegro* (CPT, 18 May 2006), § 57–57; *Report on Serbia* (CPT, 14 January 2009), § 33–33.
[1138] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 83–5; *Report on Serbia* (CPT, 14 January 2009), § 41–41; *Report on Serbia* (CPT, 14 June 2012), § 37–37.
[1139] *Report on Serbia* (CPT, 14 June 2012), § 41–41.
[1140] *Report on Serbia* (CPT, 14 January 2009), § 48–48; *Report on Serbia* (CPT, 14 June 2012), § 43–43.
[1141] *Report on Serbia* (CPT, 14 January 2009), § 63–63.
[1142] *Report on Serbia* (CPT, 14 January 2009), 114, 149-50; *Report on Serbia* (CPT, 14 June 2012), §§ 109–10.
[1143] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 173–6; *Report on Serbia* (CPT, 14 January 2009), 115-21, 154-63; *Report on Serbia* (CPT, 14 June 2012), § 111–111.
[1144] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 180–3; *Report on Serbia* (CPT, 14 January 2009), 123-26; 164-70; *Report on Serbia* (CPT, 14 June 2012), §§ 116–20.
[1145] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 189–93; *Report on Serbia* (CPT, 14 January 2009), 131-33, 173-4; *Report on Serbia* (CPT, 14 June 2012), §§ 125–30; *Concluding observations on Serbia* (CtAT, 03 June 2015), § 18–18.
[1146] *Report on Serbia and Montenegro* (CPT, 18 May 2006), § 191–191.

However, the situation is most perplexed as to the legal status of patients and residents in psychiatric hospitals and social care centres. Namely, the CPT visits shed light on gross irregularities concerning the legality of hospitalization, keeping appropriate documentation and renewal of such placement. Even when hospitalization was imposed by a court, procedural safeguards were not met (judge did not even see the patient, medical doctors providing expert opinion necessary for such placement were not independent etc.). In many cases, the legal status of patients residing in hospitals was not clear. In respect of social care homes, it was determined that most of the placements therein were based on consent given not by the persons being placed, but rather their legal guardians. This situation was considered by the CPT as *de facto* deprivation of liberty and could be said to, practically, comes down to arbitrary detention. In addition, in most cases consent to hospitalization, mainly flawed, was interpreted as including consent to treatment as well.[1147] Finally, Serbia, contrary to its obligations arising under CRPD article 12, retained the system based on deprivation of legal capacity and plenary guardianship. Similarly, although declaratively adopting a course of action aimed at closing large residential institutions and facilitating life in the community, noticeable advancements in this area have not been reported.[1148]

As to the issue of impunity, that is, adequately punishing perpetrators of ill-treatment, the situation seems unfavourable, to say the least. Although data somewhat differ due to different sources and absence of proper statistics, one can conclude that at best a few state officials were actually sentenced to imprisonment for committing the criminal offence of torture or other forms of ill-treatment in the course of several years examined. Proceedings, disciplinary or criminal, were concluded either with rejection of further prosecution or pronouncing monetary fines or probation sentence.[1149]

[1147] *Report on Serbia and Montenegro* (CPT, 18 May 2006), §§ 194–200; *Report on Serbia* (CPT, 14 January 2009), 134-40; 175-79; *Report on Serbia* (CPT, 14 June 2012), §§ 131–6; *Concluding observations on Serbia* (CtAT, 03 June 2015), § 18–18.

[1148] *Concluding observations on Serbia* (CtAT, 03 June 2015), § 18–18.

[1149] CtAT expressed concern regarding information that between 2009 and 2012 disciplinary proceedings against police officers examining allegations of ill treatment were normally concluded with fines while criminal cases with probation sentence. It also underscored reports alleging lack of effective investigations of overly restrictive measures taking place in mental healthcare institutions. See *Concluding observations on Serbia* (CtAT, 03 June 2015), 10, 18. In its response to CPT's 2011 report Serbian government provided data on criminal charges submitted in respect of police officials by the Sector of Internal Control from 2008 to 2011 and acting on petitions and complaints of citizens but did not specify the outcome. On the other hand, it did provide information on how many police personnel were found responsible in internal disciplinary proceedings but again did not specify the sentence imposed. See *Response of Serbia to the CPT report on its 2011 visit to Serbia* (Government of Serbia, 14 June 2012), pp. 12–3. Serbian authorities in their report under ICCPR note that in the two-year period 2011-2013 4 persons were convicted to prison sentence for committing the criminal offence ill-treatment and torture. However, as, according to the article 137 of the Serbian criminal code, perpetrator of this offence can be anyone, state authorities failed to mention whether those sentenced to imprisonment were indeed public officials or private individuals. It is clear that incarcerating private individual for abusing another individual has nothing to do with prohibition of ill-treatment under international law, but rather with suppression of crime. On the other hand coalition of NGOs submitted that in the period from 2012 to 2014 out of 138 public officials whose acts were subject to investigation only one person was sentenced to 8 months imprisonment for committing the said criminal offence. See respectively *Third periodic report on the implementation of the ICCPR* (Government of Serbia, 26 November 2015), § 46–46 and Coalition of Serbian NGOs, *Torture and Ill-treatment in Serbia: Alternative report to the UN Committee Against Torture* (2015), p. 24.

15.3 The Serbian NPM: designation and main characteristics

Serbia signed the OPCAT on 25 September 2003, passed the law on ratification on 1 December 2005 and became OPCAT state party on 26 September 2006. The designation of the NPM took 5 years and was finalized by adopting a Law on amending the Law on Ratification of OPCAT on 28 July 2011. Serbia opted for the so called Ombudsman + model where the Protector of Citizens (Serbian ombudsman) was entrusted with discharging the NPM mandate in collaboration with the Ombudsman of the Autonomous Province of Vojvodina (Provincial ombudsman) and associations of citizens whose founding charters envisage the promotion and protection of human rights and freedoms as their objective (NGOs). As there are more than two actors involved, this model has been referred to as Ombudsman ++ model. The Serbian ombudsman signed a memorandum of understanding with the Provincial ombudsman and, after initial consultations with NGOs, announced a public call for partner NGOs. Nine NGOs[1150] submitted applications and were all accepted. Most of these NGOs had, to some extent, previous experience in implementing projects dealing with the prohibition of ill-treatment and rights of persons deprived of their liberty, in general and monitoring closed institutions, in particular.

However, five of them where entrusted with special responsibilities, i.e. to *"systematically monitor the status of PDLs and presence of torture*"[1151] in certain institutions or toward certain groups. To that end, the Belgrade Centre for Human Rights (BCHR) was assigned the area of police detention, Helsinki Human Rights Committee in Serbia was assigned to monitor penal institutions, MDRI-S was designated to deal with social welfare institutions, IAN for monitoring psychiatric hospitals, the Dialogue and Committee for Human Rights Valjevo were to focus on the position of minors deprived of their liberty and the Victimology Society of Serbia was to focus on women deprived of liberty.[1152] NGOs receive monetary remuneration for their participation in NPM activities, the reference point being average monthly salary in the country.[1153] On the other hand, Provincial ombudsman bears the costs of participation of its staff in implementing activities falling within the NPM mandate.[1154] Moreover, the established cooperation proved to be not merely formal as NGOs and the Provincial ombudsman took part in almost all of the NPM visits. The published reports covering the first three years of NPM activities reveal that the BCHR took part in at least 154 visits (106 police stations, 7 prisons and 41 different institutions dealing with refugees and migrants). Helsinki Committee participated in ten visits, IAN visited three psychiatric hospitals, YUCOM participated in visits to four prisons, the Victimology Society visited one prison, Valjevo Human Rights Committee visited two prisons and MDRI-S one

[1150] Victimology Society of Serbia; Belgrade Center for Human Rights; Helsinki Committee for Human Rights in Serbia; Dialogue; the Committee for Human Rights - Valjevo; Human Rights Center - Niš; International Aid Network (IAN); Mental Disability Rights International Serbia (MDRI-S); and Lawyers' Committee for Human Rights (YUCOM).
[1151] Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 2.4.2.
[1152] Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 2.4.2.
[1153] See Decision on the fees for performing tasks of the National Preventive Mechanism against Torture, available in Serbian NPM, *Annual Report 2013* (2014), pp. 123–5
[1154] See Memorandum of Cooperation Signed between the Protector of Citizens and Provincial Ombudsman available in Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 4.8.

social welfare institution. Moreover, the development of future cooperation between NGOs and the Serbian ombudsman should encompass independent visits by NGOs to places of detention in discharging the NPM mandate as well as participation of self-help groups or NGOs run by members of vulnerable groups (ex-convicts and persons with psychosocial and/or intellectual disabilities) in NPM visiting teams.[1155] The Ombudsman of Vojvodina participated or independently implemented 75 visits mostly to institutions on the territory of Vojvodina province.[1156] Besides prisons and police stations, this institution paid special attention to elderly homes. Notwithstanding of certain inconsistencies on the exact number of visits conducted by respective NGOs,[1157] the fact remains that the Provincial ombudsman and NGOs took full part in the visits conducted by the Serbian ombudsman in discharge of the NPM mandate.

The Serbian NPM made use of experts in specific fields important for proper discharge of its mandate, namely, two specialists in forensic medicine, three psychiatrists, one internal and emergency medicine specialist and one professor at the Faculty of Special Education and Rehabilitation.[1158] According to the the visit reports, in the period from 2012 to 2014 a forensic doctor was present in 12 visits, mostly to prisons, a psychiatrist was present in four visits, while an expert in the field of treatment and re-socialization attended three visits. However, the Deputy Ombudsman, claims that the participation of experts, mainly forensic doctors, was much more frequent.[1159] The monetary remuneration for experts is more generous as the salary of a civil servant of the highest rank has been set as a reference point.[1160]

15.4 The NPM met conditions considered necessary for effective discharge of its mandate

15.4.1 It is formally independent

As already noted, the NPM in Serbia is established by a *Law amending the Law on the Ratification of the Optional Protocol*, adopted on 28 July 2011. This act stipulated that the Serbian ombudsman, in cooperation with the Provincial ombudsman and NGOs, is to implement NPM's mandate. However, this law is rather rudimentary as it consists of only a few sentences and thus does not specify

[1155] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016); M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016); D. C. Milovanovic, *Interview with director of the Mental Disability Rights Initiative of Serbia (MDRI-Serbia)* (2016).
[1156] This estimate transpires from visit reports and annual reports of the provincial ombudsman. NPM annual reports specify that Provincial ombudsman conducted 70 visits.
[1157] A difference between the number of visits in which NGOs participated set forth in NPM annual reports and collected in published visit reports can be attributed to the fact that not all visit reports have been published.
[1158] Serbian NPM, *Annual Report 2012* (2013), p. 22; Serbian NPM, *Annual Report 2013* (2014), p. 23; Serbian NPM, *Annual Report 2014* (2015), p. 23.
[1159] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1160] See Decision on the fees for performing tasks of the National Preventive Mechanism against Torture, available in Serbian NPM, *Annual Report 2013* (2014), pp. 123–5.

organizational, financial and other preconditions necessary for proper discharge of activities falling within the NPM's mandate. This is to be rectified by a distinct statute on NPM whose enactment has been recommended by the Serbian ombudsman.[1161] The Deputy Ombudsman made clear that this statute should not envisage new, but instead clearly express established competencies, prerogatives, means of financing, employees and other logistical preconditions in their entirety.[1162]

As Ombudsperson has been designated to implement the NPM mandate in Serbia, one should look at the position and guarantees accorded to this institution in order to grasp the main contours of the NPM's independence vis-à-vis the state. The institution of Ombudsman is a novelty in the Serbian legal system introduced on 14 September 2005 with the passage of the *Law on the Protector of Citizens* (Ombudsman). By enshrining its basic features in the Constitution of the Republic of Serbia enacted in 2006, the position of the Serbian ombudsman was additionally strengthened. The Serbian ombudsperson is nominated by the parliamentary committee for constitutional issues and appointed at the parliament's plenary sitting with a simple majority for a five-year term of office.[1163] He has four deputies, likewise appointed by the parliament but on the proposal of the Ombudsman himself.[1164] Both Ombudsman and his deputies can be re-elected only once in succession.[1165] The constitution envisages that the Ombudsman is an independent state body with the immunity equal to that of the member of parliament.[1166] The law specifies that Ombudsman is "*independent and autonomous in performance of his/her duties … and no one has the right to influence* (his) *work and actions*".[1167] It is further prescribed that the Ombudsman and his deputies shall not hold other public office, perform other duties that might influence his independence and autonomy and even shall not be member of any political party.[1168] They shall not be held accountable for opinion, criticism or recommendation voiced in the course of performing their duties.[1169] He can be dismissed only by the parliament on the proposal of the committee if he acted incompetently or negligently, violated provisions on conflict of interest or was convicted for a criminal offence.[1170] As to his financial independence, the Ombudsman himself plans his annual budget, which is to be approved by the parliament as an integral part of the state budget. The amount accorded needs to be sufficient for efficient execution of his mandate.[1171] As to personal independence, the solution that the parliamentary committee is authorized to propose candidates for the position of the Ombudsperson and that his deputies are, following his endorsement by the general assembly, proposed by the Ombudsman, serves to further his personal independence. On the other hand, it needs to be noted that the Deputy Ombudsman in charge for persons deprived of their liberty served as a head of the

[1161] Serbian Ombudsman, *Annual Report for 2015* (2016), pp. 154–5.
[1162] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1163] *Law on the Protector of Citizens* (2005), 4 (1).
[1164] *Law on the Protector of Citizens* (2005), 6 (4).
[1165] *Law on the Protector of Citizens* (2005), 4 (6), 6 (5).
[1166] *Constitution of the Republic of Serbia* (2006), § 138–138.
[1167] *Law on the Protector of Citizens* (2005), § 2–2.
[1168] *Law on the Protector of Citizens* (2005), 9 (1–2).
[1169] *Law on the Protector of Citizens* (2005), 10 (1).
[1170] *Law on the Protector of Citizens* (2005), 12 (3).
[1171] *Law on the Protector of Citizens* (2005), § 37–37.

Directorate for the Execution of Criminal Sanctions (DECS) between 2004-2005.[1172] NGOs have been selected following a public announcement and on basis of their previous experience. Appointment, privileges and guarantees of independence of the Provincial ombudsman are similar to those accorded to the State Ombudsman.[1173] Finally, the Serbian ombudsman has been accorded the A status by the ICC in 2010, which was renewed in 2016.

The official head of the NPM in Serbia is the Ombudsman himself. However, as he delegated the implementation of the NPM related tasks to his deputy in charge for the protection of rights of persons deprived of their liberty, the latter has performed most of the substantive work regarding the establishment and functioning of the Serbian NPM. From the end of 2012, a distinct organizational unit within the Ombudsman's office was set up in order to carry out activities falling within the NPM mandate. This unit was initially directly administered by the Deputy Ombudsman[1174] and later by an employee reporting to the Ombudsperson or his Deputy.[1175] It is located within the Ombudspersons premises where two offices have been made available to its staff.[1176] Different from the Ombudsman's reactive role, that is, acting upon complaints, this unit was described as proactive, that is contributing towards the prevention of ill-treatment. This practical arrangement was formalized in 2015 when the parliament sanctioned the Ombudsman's internal act envisaging the set-up of a separate organizational unit dedicated solely to carrying out NPM related activities: the NPM Secretariat.[1177]

15.4.2 It is adequately staffed, resourced and has access to expertize

From the outset until the present day, four job positions are envisaged for the implementation of NPM activities within the Ombudsman's office: senior adviser, adviser and two junior advisers.[1178] These employees form the NPM secretariat and cannot be assigned tasks other than those falling within the NPM mandate.[1179] However, it transpires that only three employees were actually hired (two full-time and one part-time position).[1180] This was found to be inadequate as at least five full-time positions are required to ensure the adequate implementation of tasks related to prevention of ill-treatment.[1181] Later on, it was noted that a special sector within the Serbian ombudsman ought to be formed with a Secretary

[1172] This Agency is situated within and is constitutive part of the Ministry of Justice.
[1173] *Decree on the Provincial Ombudsman* (2002), §§ 1–14.
[1174] Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 2.2.
[1175] Serbian NPM, *Annual Report 2014* (2015), p. 22.
[1176] Serbian NPM, *Annual Report 2012* (2013), p. 19.
[1177] Serbian Ombudsman, *Annual Report for 2015* (2016), p. 154.
[1178] Apart from having university degree and certain professional experience requirement for these positions is passed state exam, knowledge of English and ability to work on the computer. See Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 2.2; *The Rulebook on Internal Organization and Job Classification in the Secretariat of the Protector of Citizens* (2014).
[1179] This information was emphasised by the Deputy Ombudsman who also stressed that this has been stipulated in the Rulebook on Internal Organization and Job Classification in the Secretariat of the Protector of Citizens. See M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1180] Serbian NPM, *Annual Report 2011-Setting-up of National Preventive Mechanism in Serbia* (2012), 2.2; Serbian NPM, *Annual Report 2013* (2014), p. 21; Serbian NPM, *Annual Report 2014* (2015), p. 22.
[1181] Serbian NPM, *Annual Report 2013* (2014), p. 21.

at its head, two assistants and a number of advisers.[1182] Lastly, the Deputy ombudsman asserted that an adequate number is more close to 15 employees working solely in the NPM department of the Serbian ombudsman institution.[1183] Of course, staff of the NGOs and Provincial ombudsman involved in NPM activities needs to be added to the NPM personnel employed by the Ombudsman. However, considering that the level of their activities oscillates, it is difficult to determine an exact number of positions they occupy. In addition to this, associates of NGOs can undertake visits only within the framework set out by the Ombudsman office and accompanied by its staff, while their involvement ends with drafting a part of the visits report and sending it to the NPM secretariat. What is certain is that in these NGOs there are no positions dedicated solely to the execution of NPM activities. However, judging on the level of implemented activities, it seems reasonable to conclude that activities implemented by NGOs are equivalent to two full time positions.[1184] Workload of the Provincial ombudsman also corresponds to roughly one position.

With regard to structure and background of the staff, the first employee is a lawyer, the second graduated from the Faculty of Special Education and Rehabilitation, while the third from the Faculty of Organizational Sciences. None of them underwent structured education or training in the field of prevention of ill-treatment but became familiar with it mostly by learning by doing method as well as by attending various conferences and seminars organized by the Ombudsperson. The Deputy ombudsman is also a lawyer with experience in corrections and is currently serving as a member of the SPT. Last but not least, the NPM receives assistance from Ombudsman´s office staff and deputies other than that in charge for persons deprived of their liberty as they occasionally take part in the NPM visits as experts.[1185]

The NPM budget is an integral part of the budget allocated to the Ombudsman institution as a whole by the parliament. The funds allocated for such purpose were 68 000 euros in 2012, 45 700 euros in 2013 and 60 302 euros in 2014. These sums cover salaries of the NPM staff, travel expenses, office costs and remuneration paid to NGOs and experts.[1186] Making use of these resources is made more difficult due to the absence of a specific budget line in the Ombudsman's budget designated solely for execution of NPM activities and special measures introduced by the government such as approval of budget spending.[1187] Moreover, it was noted that the Serbian ombudsman initially supported carrying out NPM related tasks on the detriment of activities falling within its general competencies. It follows that full implementation of Ombudsman competencies, without securing additional resources for executing the NPM mandate, will produce "*negative repercussions to the prevention of torture in the Republic of Serbia*".[1188] Lastly, it transpires that the indicated annual NPM budgets are only

[1182] Serbian Ombudsman, *Annual Report for 2015* (2016), p. 155.
[1183] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1184] Activities realised by BCHR amount to one full time position while those of remaining NGOs to the second positon.
[1185] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1186] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1187] Serbian NPM, *Annual Report 2013* (2014), pp. 20–1.
[1188] Serbian NPM, *Annual Report 2013* (2014), pp. 48–9.

approximate figures set aside within the Ombudsman budget and not explicitly allocated to that end by the parliament. A separate budget line would ensure that parliament allocates a certain sum solely for implementing NPM mandate which, then, could not be used for purposes other than those intended.[1189]

15.4.3 It is accorded prerogatives necessary for implementation of its mandate

Considering that the OPCAT through ratification became part of the national legal system and acquired the status of a law, all prerogatives contained therein are binding. In addition, the members of the Ombudsman staff, notwithstanding of the OPCAT, are by virtue of the Law on the Protector of Citizens authorized to enter all places where persons deprived of liberty are held, conduct private interviews and have access to documentation.[1190] The institution is also authorized to review draft laws and submit amendments or legislative proposals.[1191]

As to the methodology, the NPM draws on the visiting methodology established for the purposes of Ombudsman's general mandate relating to the protection of persons deprived of their liberty. Namely, as Ombuds-institution in Serbia was established in 2005, it commenced with visiting closed institutions in 2009 under its national mandate. The methodology established to that end was, to a large extent, taken over by the NPM.[1192] This methodology is generally in line with that employed by international visiting bodies. It sets forth usual prerogatives of the visiting bodies such as unlimited and unannounced access to institutions including all premises and installations; documentation and persons deprived of liberty. Furthermore, it envisages that visits consist of several phases: namely an initial meeting with the head of the institution, tour of the premises, inspecting relevant documentation, interviews with both staff and detainees and a final meeting with the management. It also clearly stipulates that information is to be verified by cross checking several information sources.[1193]

In NPM annual reports it has been continuously stressed that all authorities responsible for places where persons are deprived of their liberty (Ministry of Interior, Justice, Health and Social issues), cooperated fully with the NPM and enabled, inter alia, unrestricted and confidential contact with persons deprived of freedom.[1194] Although all of the interlocutors confirmed that, in general, the authorities did cooperate by providing unhindered access to facilities, documentation and persons deprived of liberty, occasional cases of non-cooperation did occur.[1195]

[1189] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1190] *Law on the Protector of Citizens* (2005), §§ 21–2.
[1191] *Law on the Protector of Citizens* (2005), § 18–18.
[1192] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1193] Methodology of work of the preventive mechanism of protector of citizens – ombudsman (PM) for monitoring places of detention of persons deprived of liberty available in Serbian NPM, *Annual Report 2013* (2014), pp. 134–47.
[1194] Serbian NPM, *Annual Report 2012* (2013), p. 26; Serbian NPM, *Annual Report 2013* (2014), p. 25; Serbian NPM, *Annual Report 2014* (2015), p. 25.
[1195] This transpires from two visit reports where on one occasion photographing of documentation was not allowed while on the other night visit was delayed. See respectively Serbian NPM, *Visit report: Sremska Mitrovica Police Directorate* p. 5 and Serbian NPM, *Visit report: Krusevac Police Directorate* p. 4; Deputy ombudsman noted that he was denied entry in one Psychiatric ward of General Hospital, and that police officers could not open some rooms in the police stations as they could not find the keys. Representatives of NGOs also reported few incidents see M. Jankovic, *Interview with Deputy ombudsman*

15.4.4 It makes use of relevant international standards

NPM did not in its annual reports explicitly specify standards it draws on while assessing the position of persons deprived of liberty. Likewise, it did not establish a hierarchy between different legal norms (national and international). However, it did list national and international norms pertaining to the prohibition of ill-treatment. On the national level, the NPM mentioned *Serbian Constitution*, *Criminal Procedure Code*, *Law on the Police*, *Law on the Execution of Criminal Sanctions* and *Criminal Code*. On the international level, it made specific reference to the ICCPR, CAT, ECHR and ECPT. In one visit report NPM made clear that it considers CPT standards desirable and thus makes use of them in its recommendations.[1196] Furthermore, it alluded that these standards have greater strength than mere recommendations as they draw directly on the Serbian Constitution whose provisions on human and minority rights are to be interpreted

> "*in accordance with applicable international standards of human and minority rights, and the practice of international institutions which supervise their implementation*".[1197]

The Deputy Ombudsman went even further and asserted that this constitutional provision allows NPM to consider international standards an integral part of the national legal order. Consequently, reasons for emphasising national regulations are mostly pragmatic as public officials are better acquainted with them.[1198]

From the commencement of its activities, the NPM of Serbia was backing its recommendations by citing provisions and standards espoused in various national and international documents. As regards national legislation it usually referred to the Constitution, different laws and bylaws as well as the Ombudsman's recommendations. On the international plane, in addition to CPT standards (set forth in substantive sections of their annual reports and reports to governments) and the EPR, which were by far the most often invoked set of standards, it occasionally referred to the following instruments or instances: SPT visit reports, SRT, CRPD, UN Mental Illness Principles and UN Rules for the Protection of Juveniles Deprived of their Liberty. On the CoE level of it made reference to ECtHR case law, European Social Charter (Revised), Recommendations on the Rights of Children Living in Residential Institutions and the European Rules for Juvenile Offenders Subject to Sanctions or Measures. A situation of potential conflict between national and international standards was not addressed. The Deputy ombudsman did not give a clear answer on which standard would prevail but concluded that everything depends on the particularities of the situation at hand.[1199] On the other hand representatives

in charge for persons deprived of their liberty (2016) and N. Kovacevic, D. Pokusevski and G. Pantovic, *Interview with legal advisers at the Belgrade Centre for Human Rights* (2016).

[1196] Serbian NPM, *Visit report: Sremska Mitrovica Correctional Institution 2012* p. 11.

[1197] *Constitution of the Republic of Serbia* (2006), 18 (3).

[1198] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

[1199] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

of NGOs noted that they are being guided in their work by international rather than national standards.[1200]

15.4.5 Summary

The Serbian NPM is designated by law, which stipulates that the Ombudsperson is to carry out functions of the NPM in collaboration with the Provincial ombudsman and NGO's. The Serbian ombudsman is elected by the parliament with a simple majority on the proposal of the parliamentary committee. He and his deputies have been granted immunity similar to that granted to members of parliament, as well as guarantees from arbitrary removal from office. The budget is approved by the parliament as a part of general state budget. Although the Deputy ombudsman in charge for persons deprived of their liberty served as a high official of justice ministry in charge for execution of penal sanctions, considering the relative short duration of holding such office there are no indications that this experience compromised his personal independence in its role of acting head of the Serbian NPM. The method of selection of NGOs also satisfies basic preconditions necessary for members to be personally independent. The financial independence of the entire Ombudsman institution is in principle ensured although some restrictions on spending the allocated funds have been noted. On the other hand, the NPM budget is not separate from that of the Ombudsman, and sums specified in reports are to be understood more as an estimate than exact amounts of fund allocated. This negatively impacts both the NPM and Ombudsman in general as the former cannot be truly autonomous but is dependent on the Ombudsman and the latter is forced to transfer much of its scarce resources on the NPM's activities.

A distinct organizational unit has been set up within the Ombudsman institution with a sole task of implementing the NPM mandate. Three persons, of which two hold a full time and one holds a part time position, currently fill this unit. If we add activities of other employees of the Ombudsman and the participation of NGOs' and Provincial ombudsman's representatives, it seems that it still significantly falls short of the suggested number of 15 employees dedicated solely to NPM activities. Although the NPM's staff, made of employees with a degree in law, special education and organizational sciences, did not undergo special training, expertise from a number of its associate NGOs as well as experts was made use of. The members of the NPM staff are granted powers necessary for the successful implementation of the NPM mandate (right to enter institutions without prior notice, speak with detainees in private and access documentation). Moreover, no substantial problems in exercising these powers were reported. From the outset, the Serbian NPM established a practice of regularly referring to numerous international and national documents to buttress its recommendations.

[1200] M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016); D. C. Milovanovic, *Interview with director of the Mental Disability Rights Initiative of Serbia (MDRI-Serbia)* (2016).

15.5 The NPM managed to generate a deterrent effect.

15.5.1 Frequency of visits

During 2012, the NPM conducted 69 visits to places where persons are or might be deprived of liberty More exactly, 41 police stations, eight prisons, four psychiatric hospitals, five stationary-type social welfare institutions, five homes for the elderly and two asylum centres. In addition, in order to monitor the reception of returnees under the readmission agreements, Belgrade airport was on four occasions visited as well.[1201] In the course of 2013, 77 visits were carried out to the following establishments: 44 police stations, 11 prisons, two psychiatric hospitals, one social welfare institution of a nursing home type, 13 private homes for the elderly, two visits to asylum centres and four visits to Belgrade airport.[1202] 79 visits have taken place in 2014 out of which 38 were regular and 41 in the course of addressing the area of migration and asylum. In the course of the former, the NPM visited 25 police stations, three prisons, two psychiatric hospitals, five elderly homes and Belgrade airport (three times).[1203] In 2015 116 visits were made including visits to 40 police stations, 10 prisons, two psychiatric hospitals, two mental health centres, three social care homes and 59 institutions dealing with migrations and asylum (these include but are not limited to police establishments including border police posts, asylum centres, social care centres, homes for minors etc.) Within these, six follow up visits were made (three prisons and three police stations) with the aim of verifying compliance with recommendations previously made. Also, seven thematic visits were made (four prisons and three police stations) with the specific aim of determining whether ill-treatment in visited establishments took place. Moreover, in the course of 2015 the NPM undertook four visits with the sole aim of verifying compliance with the CPT recommendations in two prisons and two psychiatric hospitals. Finally, at the Belgrade airport NPM monitored the reception of rejected asylum seekers deported from the Dusseldorf airport.[1204]

Serbian NPM has in several of its annual reports stressed that it intends to visit all institutions where persons deprived of liberty are held in the course of the initial four years of its operation.[1205]

Although not explicitly specified by the NPM, one can discern that number of places of deprivation of liberty in Serbia of interest to NPM hovers around 418 (29 prisons, around 200 police establishments, 21 social institutions for persons with psychosocial and/or intellectual disabilities, 118 elderly homes, five psychiatric hospitals, around 40 psychiatric wards adjacent to general hospitals and five asylum centres). The Deputy ombudsman differentiates between places where persons are and might be deprived of liberty. The first group of institutions encompasses prisons and police stations, while the second includes asylum centres, psychiatric hospitals and psychiatric wards, social institutions for

[1201] Serbian NPM, *Annual Report 2012* (2013), p. 24.
[1202] Serbian NPM, *Annual Report 2013* (2014), p. 11.
[1203] Serbian NPM, *Annual Report 2014* (2015), p. 24.
[1204] Serbian Ombudsman, *Annual Report for 2015* (2016), pp. 153–4.
[1205] Serbian NPM, *Annual Report 2012* (2013), p. 18; Serbian NPM, *Annual Report 2013* (2014), p. 18; Serbian NPM, *Annual Report 2014* (2015), p. 20.

persons with psychosocial and/or intellectual disabilities and homes for the elderly. In accordance with this classification, the first group counts 229 while the second amounts to 189 institutions.

All in all, the Serbian NPM during the first four years conducted 341 visit. It payed 150 visits to police facilities. If we consider that follow up visits were made to 2 police directorates[1206] which consist of 4 police stations each, it transpires that 142 police stations were visited. As to penal institutions, 32 visits to prisons were carried out. If we take into account that 5 follow up visits were made,[1207] it transpires that 27 prisons were visited. Visits were conducted to 12 psychiatric hospitals, nine social welfare institutions and 23 homes for the elderly. Lastly, NPM monitored readmission of repatriated persons in 11 cases and made 104 visits in the course of monitoring procedures addressing migrants and asylum seekers.

Therefore, one can conclude that in the course of the first four years of its operation the Serbian NPM did visit all or almost all police stations, prisons and psychiatric hospitals but not all social welfare institutions and especially homes for the elderly and psychiatric wards within the hospitals. Finally, it visited more than once all asylum centres in Serbia. It may be added that it is commendable that NPM put emphasis on migrants and asylum seekers in the context of their increased vulnerability in 2014 and especially in 2015. If we take a look at institutions visited twice in the course of the first four years of its operation one can see a following pattern. Largest prison in the country holding over 2000 prisoners as well as prisons holding vulnerable groups such as women and minors were visited two times.

15.5.2 Announcement of visits

Serbian NPM has been continually recognizing the importance of conducting unannounced visits to closed institutions. It stressed that its methodology focuses on "*preparation and implementation of unannounced visits*".[1208] On the other hand, methodology of the NPMs predecessor, the so-called Serbian ombudsman's preventive mechanism, when differentiating between regular, control and emergency visits stipulates that only the latter are as a rule conducted without previous notification.[1209] On the occasion of commenting frequency of unannounced visits in the first year of its operation the NPM held that "*the unannounced visits will be intensified with some of them conducted at night*".[1210] One report later it pointed out that it will strive to increase the number of unannounced visits as it "*will create a more complete insight of the real situation, which will result in an increase of the preventive*

[1206] Serbian NPM, *Follow-up report: Bor police directorate* (2015) and Serbian NPM, *Follow-up report: Zajecar police directorate* (2015).
[1207] Serbian NPM, *Follow-up report: Sremska Mitrovica Correctional Institution 2013* ; Serbian NPM, *Follow-up Report: Correctional institution for women in Pozarevac* (2013); Serbian NPM, *Follow-up visit: Cacak District Prison* (2013); Serbian NPM, *Follow-up visit: Juvenile Penal Correctional Institution in Valjevo* (2015); Serbian NPM, *Follow-up report: Novi Sad District Prison* (2015).
[1208] Serbian NPM, *Annual Report 2013* (2014), p. 18; Serbian NPM, *Annual Report 2014* (2015), p. 20.
[1209] See paragraph 3 of the Methodology of work of the preventive mechanism of protector of citizens – ombudsman (PM) for monitoring places of detention of persons deprived of liberty, available in Serbian NPM, *Annual Report 2013* (2014), pp. 134–47.
[1210] Serbian NPM, *Annual Report 2012* (2013), p. 47.

effect".[1211] Lastly in its 2014 annual report the Serbian NPM announced that its 2015 plan of visits includes mostly unannounced visits.[1212] Deputy ombudsman noted that initial reliance on announced visits was part of the effort aimed at creating relation of trust between the NPM and institutions. He is also of the opinion that systematic visits are better carried out when announced as this facilitates quick access to employees and necessary documentation.[1213]

However, it transpired that reality stands in stark contrast to these statements and pledges. First unannounced visits took place in 2012 when NPM team together with the SPT member Mari Amos during one night payed a visit to a psychiatric hospital, two police stations and a home for the elderly.[1214] According to the reports made available on the NPM web site, only one unannounced visit per year were conducted in 2013[1215] and 2014[1216] respectively. Finally, 19 out of 116 visits carried out in 2015 were made without prior notification. Out of these, seven were carried out at night (four prisons and three police stations) within thematic group designed to find out whether ill-treatment takes place, two follow up to prisons and one to psychiatric hospital[1217] and nine in the course of following up on recommendations addressing treatment of migrants and/or asylum seekers.[1218] All in all, in the first four years NPM made 25 were unannounced (six police stations, two psychiatric hospitals, one social welfare institution, one elderly home, six prisons and nine institutions dealing with migrants and refugees) which makes around 7% of overall number of visits (341) conducted.

15.5.3 Confidential interviews are being carried out

Persons deprived of liberty that are to be interviewed are selected among those that previously submitted complaints to the Serbian ombudsman and those who voluntarily applied for an interview or were randomly chosen. Interviews are conducted by two members and usually take place in prisoners' cells.[1219] In addition, some of those undergoing special measures, such as solitary confinement or enhanced surveillance are usually interviewed as well as those tipped off by an NGO, individuals and even prison administration.[1220] Sometimes perusal of documentation can point towards certain individuals.[1221] The first contact with persons deprived of liberty (short presentation of the NPM and its role and asking whether some of them are willing to partake in an interview) is usually being established

[1211] Serbian NPM, *Annual Report 2013* (2014), p. 18.
[1212] Serbian NPM, *Annual Report 2014* (2015), p. 25.
[1213] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1214] Serbian NPM, *Annual Report 2012* (2013), p. 30. It appears that these visits mainly served to demonstrate that entering these institutions unannounced is possible as little time was left for performance of any substantial activities.
[1215] Serbian NPM, *Visit report: Home for Children and Young People with Developmental Disabilities-Veternik* (2014), p. 5.
[1216] Serbian NPM, *Visit report: Krusevac Police Directorate* p. 3.
[1217] Serbian Ombudsman, *Annual Report for 2015* (2016), pp. 153–4.
[1218] Serbian NPM, *Report on monitoring of the treatment of refugees and migrants 2015* (2015), p. 3.
[1219] See paragraph 4.6 of the Methodology of work of the preventive mechanism of protector of citizens for monitoring places of detention of persons deprived of liberty in Serbian NPM, *Annual Report 2013* (2014), pp. 134–47.
[1220] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1221] M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016).

in absence of the members of the custodial staff.[1222] There are no statistics on the number of interviews held. Exact number has been noted in some reports, while not in the others. Deputy ombudsman stated that interviews can be rather short and consist only of an inquiry whether abuse by the members of the custodial staff took place.[1223] Especially evident is lack of interviews with those in police custody. As in most visits to police stations no detained persons were found on site, number of interviews conducted with persons at police premises is negligible. More precisely, although few interviews have been made, including with those in the custody of the police but accommodated in district prisons,[1224] overall assessment is that there is a discrepancy between number of visits to police establishments and persons found and interviewed therein. For instance, it appears strange, to say the least, that during the tour of the Belgrade police directorate, carried out in 2013, lasting four days and covering at least 15 different police facilities only one interview with a detainee was made. It seems that this is at least partially compensated by making inquiries with remand prisoners on their treatment by the police during and following arrest.[1225] However, as this approach relatively recently started to be utilized,[1226] its overall effect on discovery and documentation of police ill-treatment remains uncertain. No special measures against reprisals have been taken as, according to Deputy Ombudsman, no indication whatsoever have been noticed by the NPM team or received by Ombudsman that a person has been subjected to reprisals for cooperating with the NPM team.[1227]

15.5.4 Credible allegations are being qualified as specific forms of ill-treatment

The NPM of Serbia in its annual reports made clear that it sees its role as exclusively preventive. It follows that standard procedure in individual cases is to, after acquiring consent of the person concerned, notify the Ombudsman unit dealing with complaints of persons deprived of their liberty.[1228] Nevertheless, NPM team will crosscheck allegations received or injuries determined with records on use of force and medical reports. More precisely, the doctor, member of the NPM team, will carry out medical examination of the alleged victim and specify, *inter alia*, level of consistency between allegations and objective injuries in the final report. If no medical doctor is present, NPM team member acquainted with the Istanbul protocol will note down the injuries in appropriate forms and photograph them together with relevant documentation. Forensic doctor would, if need be, pay additional visit to

[1222] M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016).
[1223] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1224] In a situation where police establishments have no adequate detention facilities, arrangement is often being made with district prisons according to which the latter secure the premises and food while the security matters remains with the former.
[1225] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016); M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016).
[1226] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1227] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1228] Serbian NPM, *Annual Report 2013* (2014), p. 18; Serbian NPM, *Annual Report 2014* (2015), p. 19; M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

the institution and carry out medical examination personally.[1229] It appears that this arrangement, where the NPM forwards complaints to the Ombudsman's unit dealing with complaints, began to bear fruit as the Ombudsman has on several occasions established that persons deprived of their liberty in both police establishments and prisons were subjected to torture.[1230] However, Ombudsman's appeal to the competent organs to conduct effective investigation and adequately punish those responsible remained unheeded.

On the other hand, Serbian NPM has thus far avoided characterizing individual cases indicating deliberate abuse as certain form of ill-treatment. For example, when reviewing records on use of force it has on at least two occasions recognized indications pointing towards excessive use of force but stopped short of classifying them as a particular form of ill-treatment. Instead it spoke of disproportionate force used not to subdue but to cause pain. In these cases, the NPM was satisfied with reminding the prison doctor to detailly describe the injuries in medical documentation and calling the warden of the institution concerned to thoroughly examine every use of force case in light of complete medical documentation with a view of determining whether it was necessary and proportionate. Moreover, the warden was instructed to provide training to security personnel on adequate use of restraining techniques and make clear that intentional infliction of pain amounts to ill-treatment. In addition, security staff members involved in concrete cases at hand were to be dealt with internally and relevant information communicated to competent prosecutor office.[1231]

As regards ill-treatment caused by factors other than use of brute force, the Serbian NPM has made clear that keeping persons deprived of their liberty in poor material conditions and under unfavourable treatment regime for a prolonged time periods "*in itself assume the character of inhuman or degrading treatment*".[1232] More to the point, it has held that the following excesses constitute inhuman and degrading treatment and may in specific circumstances even lead to torture: several hours of police custody in inadequate facilities,[1233] keeping persons suffering from severe mental disorders in prison environment for a prolonged period of time without creating conditions for their medical treatment,[1234] prolonged placement of persons with psychosocial and/or intellectual disabilities in dislocated psychiatric hospitals or social institutions under inadequate material conditions only due to absence of arrangements for providing them with care in the community,[1235] isolation or seclusion of persons with mental problems[1236] and placing patients in hospitals on grounds other than medical.[1237] It also held that

[1229] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1230] Serbian NPM, *Annual Report 2012* (2013), 34-5, 40; Serbian NPM, *Annual Report 2013* (2014), 34, 41.
[1231] Serbian NPM, *Annual Report 2014* (2015), pp. 37–8; Serbian NPM, *Visit report: Juvenile Correctional Institution in Krusevac 2014* p. 53.
and Serbian NPM, *Visit report: Novi Sad District Prison 2014* p. 59.
[1232] Serbian NPM, *Annual Report 2012* (2013), p. 32.
[1233] Serbian NPM, *Annual Report 2012* (2013), p. 33.
[1234] Serbian NPM, *Annual Report 2013* (2014), p. 40; Serbian NPM, *Follow-up report: Sremska Mitrovica Correctional Institution 2013* p. 35.
[1235] Serbian NPM, *Annual Report 2012* (2013), 41,43; Serbian NPM, *Annual Report 2013* (2014), 43,45.
[1236] Serbian NPM, *Annual Report 2012* (2013), p. 43; Serbian NPM, *Annual Report 2013* (2014), p. 45.
[1237] Serbian NPM, *Annual Report 2014* (2015), p. 40.

inadequate material conditions coupled with large number of users of different ages and lack of staff can lead, and in individual cases has led, to treatment best described as ill-treatment.[1238]

Deputy Ombudsman commented that it exercises great restraint in employing the word torture in order to avoid the inflation of the term. Furthermore, he made clear that, from an NPM perspective, labelling certain situation as a specific form of ill-treatment is less important than issuing a recommendation providing guidance to state bodies on proper reaction in such cases.[1239]

15.5.5 Consistency of allegations is being determined and conclusion on risk of ill-treatment articulated

With regard to assessing congruence between various accounts of ill-treatment not corroborated by other evidence,[1240] the Serbian NPM took a rather conservative position as it does not attempt to estimate the risk of ill-treatment but uses this information to put the concrete institution under enhanced supervision. According to the Deputy ombudsman, NPM team will try to corroborate these allegations by looking at documentation or making an unannounced visit.[1241]

15.5.6 All premises are being inspected during a visit

The NPM has reported on several occasions[1242] that it has found non-standard objects capable of being used for intimidation or infliction of injuries such as metal rods, wooden clubs, knives, etc. in police premises (offices used for questioning, police lockers etc.) that were-not properly marked. Having this in mind one can conclude that the NPM indeed inspects premises with a view of visually verifying absence of such objects. Moreover, according to the Deputy ombudsman, the NPM team improved its inspection methodology along the lines of that employed by the SPT. Namely, whereas the standard practice was to request police officers to point out which room is being used for interrogating suspects and open it for inspection, the NPM team started to specify which rooms, lockers or draws are to be opened up for inspection.[1243] On the other hand, NGO representatives noted that in many cases visits to police stations are being done hastily leaving no or little time for thorough tour of premises.[1244]

15.5.7 Cumulative effect is taken into account

As the NPM refrained from qualifying whether treatment of concrete individuals amounted to ill-treatment, it follows that it also did not consider a cumulative effect as well. However, in a more general

[1238] Serbian NPM, *Visit report: Veternik Residential Facility 2013* p. 33.
[1239] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1240] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.9. Responding to allegations or other indications of ill-treatment.
[1241] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1242] Non-standard objects were encountered in at least nine police stations in the period between 2012 and 2014 (Police premises in Novi Becej, Jagodina, Cuprija, Paracin, Cajetina, Zajecar, Kovin, Pancevo and Belgrade).
[1243] Ombudsman M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1244] N. Kovacevic, D. Pokusevski and G. Pantovic, *Interview with legal advisers at the Belgrade Centre for Human Rights* (2016).

formulation on what can amount to ill-treatment, it usually put together several factors, such as poor material conditions, isolation, passage of time, lack of adequate medical care, overpopulation, special vulnerability of the victim etc.

15.5.8 Certain premises are recommended to be put out of use

The NPM has often recommended withdrawing certain detention cells in police establishments from use until renovation on the grounds that they are not fit to serve their purpose for even a short-term detention lasting several hours. This has been done in at least 27 cases in the course of initial three years.

15.5.9 Duration of visits is proportionate to size of institutions

Duration and composition of the NPM visiting team varies depending on the institution visited and the type of visit. Regular comprehensive visits usually last one to three days and encompass up to 11 NPM members. For instance, a visit to the biggest prison in Serbia accommodating more than 2000 prisoners lasted three days and was carried out by a 11-person strong visiting team. Visit to Novi Sad prison accommodating around 500 prisoners lasted two days and was carried out by a NPM team consisting of eight members. A visit of the Juvenile Correctional Facility accommodating 220 prisoners lasted two days and was carried out by eight NPM members. Follow up visits usually take one to two days to finish, while the visiting teams are less numerous.

15.5.10Summary

From the outset of its activities, the Serbian NPM has set itself a goal to visit each place of deprivation of liberty at least once in four years. It turned out that it succeeded, or came close, in doing so in respect of police stations, prisons, psychiatric hospitals and asylum centres, but not regarding social institutions, psychiatric wings within general hospitals and homes for the elderly. More precisely, around 420 establishments where persons are or might be deprived of liberty were, during the initial four years, visited 341 times (including 13 follow-up visits). The biggest prison in Serbia holding more than 2000 people as well as prison for women and minors were visited two times. Only 25 unannounced visits, out of which six to police stations, were made from 2012 to 2015. Some of these visits were conducted at night, while the others with the specific purpose of examining whether inmates have been exposed to ill-treatment. No official statistic is available in NPM reports on the number of interviews conducted. However, the lack of interviews with those kept in police custody is noticeable. As to qualification of certain situations involving deliberate abuse as ill-treatment, the NPM team forwards these cases to the Ombudsman's unit acting upon complaints. Although this unit qualified at least three cases as torture, effective investigation carried out by a competent prosecutor did not follow. The NPM, on its part, conducts an evaluation of some cases at hand by using the triangulation method but stops short of

applying the term ill-treatment. However, the overall findings of deliberate ill-treatment in the course of the initial four years do not correspond to those made by the CPT in its 2015 visit. Namely, the CPT documented numerous allegations of ill-treatment collected during only several days. The situation is most disturbing concerning police establishments where received allegations included, inter alia,

> "*slaps, punches and truncheon blows, but also included striking persons with various non-standard objects (such as bicycle locking cables, wooden floor tiles and baseball bats). Detailed allegations were also received of the handcuffing of criminal suspects in stress positions for hours on end, the placing of plastic bags over their heads, the infliction of shocks with hand-held electric discharge devices and the hit of the soles of their feet with hard objects (i.e. the so-called falaka)*".[1245]

Less alarming but also frequent complaints came from convicts alleging that prison staff routinely turns to violence (slaps, punches and batons blows) to dispense punishment and/or to maintain control in the facility.[1246] Finally, sporadic allegations were documented even in one psychiatric hospital and social care institutions.[1247]

As to ill-treatment stemming from material conditions and regime, NPM voiced a rather wide understanding of what might amount or fall under this term, but did not actually establish that such treatment took place in individual cases. Though the Serbian NPM does not evaluate the risk of ill-treatment in particular institutions based only on allegations, it tries to corroborate these allegations by consulting other sources in order to advocate for additional safeguards. Consistent findings of nonstandard objects corroborate the position that the Serbian NPM, in most cases, tours all premises in institutions visited including questioning rooms. Visits last from one to three days and the the visiting team may consist of up to 11 persons. It has regularly recommended that certain premises be put out of use.

15.6 The NPM made places of detention transparent

15.6.1 Triangulation

The approach where facts are being established by comparing and crosschecking information coming from several sources (direct observation, interviews with both staff and persons deprived of liberty, review of records and documentation), has been explicitly endorsed by the NPM.[1248] Those interviewed confirmed that during visits they strive to crosscheck information by comparing different sources to the

[1245] *Report on Serbia* (CPT, 24 June 2016), § 13–13.
[1246] *Report on Serbia* (CPT, 24 June 2016), 46-48, 129.
[1247] *Report on Serbia* (CPT, 24 June 2016), 153,182.
[1248] See paragraph 4.7 of the Methodology of work of the preventive mechanism of protector of citizens – ombudsman (PM) for monitoring places of detention of persons deprived of liberty, available in Serbian NPM, *Annual Report 2013* (2014), pp. 134–47.

extent possible.[1249] Of course, problems might arise in police stations, since information obtained from police authorities cannot be crosschecked with those coming from detainees.

15.6.2 All relevant aspects, issues and safeguards are being looked at during visits

The Serbian NPM has from the outset of conducting visits applied a predetermined structure of issues that are to be examined. Although every report starts with an outline of basic information (summary of NPM mandate, information pertaining to the visit itself and institution that is to be visited), a different structure was followed in different deprivation of liberty contexts. It follows that issues addressed differ to a large extent in case of prisons, psychiatric hospitals, social institutions and police establishments.

As regards prisons, all regular visit follow a more or less similar template. Namely, each report provides an overview of the following: Accommodation (space per prisoner, bed and bedding, state or repair of the object, access to light and air, sanitation, existence of outdoor space fitted with canopy and exercise equipment), food, legal protection (information on rights and access to regulations, provision of legal aid, visits of lawyers, complaint system), security (searches of people, premises and packages, video surveillance, buzzers for calling prison officers, use of force, disciplinary measures, solitary confinement), treatment and rights (treatment program, preparation for release), education, training, work, leisure, time spent outdoors and physical activities, access to information, visits, correspondence, package delivery, use of telephone, disabled people's access to premises, health care, (organization, staff, premises, equipment, storing and administration of medication, keeping of health records) medical examinations (upon admission, after use of force, upon request, conformity of the examination with benchmarks set by the Istanbul protocol) infectious diseases, addictions, deaths and supervision of health care provisions.

In police establishments following data are provided: number of detention cells, number of persons detained during the previous year, number of medical examinations, provision of food, use of force (physical strength, baton, handcuffing, firearms,) number of complaints (out of these number of complaints found justified), disciplinary proceedings against police officers. In addition, following issues are regularly addressed: notification on and making use of three fundamental rights upon arrest (access to doctor, family member and lawyer), existence and proper maintenance of records, use of force, complaint system, fire protection and first aid, tour of the premises, including detention cells, toilets, offices and premises for interrogation, material conditions of detention cells, including level of hygiene, access to toilets, light, air, cell buzzers, possibility of outdoor exercise, provision of food and water, video surveillance.

[1249] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016); M. Antonijevic and K. Dr. Golubovic, *Interview with director and attorney at law at Lawyers Committee for Human Rights – YUCOM respectively* (2016); N. Kovacevic, D. Pokusevski and G. Pantovic, *Interview with legal advisers at the Belgrade Centre for Human Rights* (2016).

Finally, due to the small number of reports published after visits of large residential institutions (online available only for Veternik residential facility), psychiatric hospitals (public available only recommendations but no report) and homes for the elderly, the question remains whether structure of the main issues addressed during visits represent a pattern that is always being used. Whatever the case may be from the available reports the following safeguards and aspects of detention the Serbian NPM usually looks at during visits to psychiatric hospitals and social welfare institutions: Legal ground and soundness of the admission procedure. Number and position of persons deprived of legal capacity and placed under guardianship (whether they are being admitted or subjected to therapy solely on grounds of consent given by a legal guardian). In addition to food, accommodation, dormitories, dayrooms, therapy rooms, toilets and restrooms, space, furnishings, availability of daily time in the fresh air etc., special attention is devoted to various activities and therapy.

Whether patients or residents are being considered as voluntary or involuntary and whether and to what extent they face restriction of freedom (encompassing situations ranging from asking permission to leave the institution during the day, being locked in a room overnight to subjection to full blown isolation or fixation). Resort to measures of isolation, segregation, increased supervision, physical and chemical restraint as well as observance of safeguards and maintenance of records pertaining to these. Health care, premises, staff, equipment, and therapy provided, including pharmacotherapy (type of medication, dosage etc.), availability of other therapies (physical therapy, psychotherapy, occupational therapy etc.), electroconvulsive therapy (ECT). Right to give an informed consent on medical intervention, provision of health care outside of institution, injuries registered during the previous period and mortality of patients, supervision of institution from the health care authorities, right to submit complaints and submissions and number of persons that left the institution in previous period.

15.6.3 General issues

In addition to the above listed set of safeguards and standards, NPM kept addressing issues of more general nature which create conditions conducive to ill-treatment. For instance, it has cautioned against the absence of effective investigation of complaints alleging abuse at the hands of the police.[1250] A similar position was taken towards the lack of official investigation of verified cases of ill-treatment that took place in prisons.[1251] In addition to the prosecutor office and courts under whose competence effective investigation falls, special emphasis was put on increasing the effectiveness of internal control mechanisms in police stations, prisons, psychiatric hospitals and social welfare institutions.[1252] It dealt more specifically with pre-trial detainees by urging against automatic withholding of their rights such as time spent outdoors, in common areas and engaged in purposeful activities[1253] and addressed the

[1250] Serbian NPM, *Annual Report 2013* (2014), p. 34.
[1251] Serbian NPM, *Annual Report 2012* (2013), p. 47; Serbian NPM, *Annual Report 2014* (2015), p. 30.
[1252] Serbian NPM, *Annual Report 2012* (2013), p. 35; Serbian NPM, *Annual Report 2014* (2015), p. 30.
[1253] Serbian NPM, *Annual Report 2013* (2014), p. 37.

situation of persons with psychosocial and/or intellectual disabilities more generally by recognizing "*inadequate causal connection*" between deprivation of legal capacity and placement in institutions.[1254] Furthermore, it looked beyond the deprivation of liberty context by suggesting increasing efforts to prevent reoffending by improving the preparation for release and mechanisms for reintegration of former prisoners in the community.[1255] All in all, Serbian NPM took a broad position towards preventing ill-treatment by focusing not only on direct concerns of those deprived of liberty but also on a range of issues contributing towards or perpetuating ill-treatment.

15.6.4 The NPM regularly reports on the state of affairs encountered during visits

Based on available reports, one can conclude that although most visit reports were published within few months after the visit, some delays and gaps in publishing reports persist.

Firstly, not all reports are made available on the web site. Comparison of information on visits set forth in NPM annual reports with those visit reports made available online, indicate that in the period from 2012 until the end of 2014 at least 40 visit reports were not published. Secondly, there are cases where reports have not been made available to the public for one year after the visit or even longer.[1256]

Although it is not clear whether these gaps in publishing visit reports are a simple oversight or a deliberate action of the NPM, the lack of transparency is especially evident in the case of psychiatric hospitals and social care centres. Namely, out of eight visits to psychiatric hospitals made in the course of the first three years, there are no comprehensive reports available (only recommendations as regards two institutions and follow up as regards one). Similarly, out of six visits to residential social welfare institutions housing persons with psychosocial and/or intellectual disabilities, only one comprehensive report published 11 months after the initial visit is made public. An explanation offered by the Deputy Ombudsman is that failure to publish the reports was not a deliberate omission but was caused by the mere overstrain of the NPM staff and himself.[1257]

Reports following regular visits are comprehensive, correspond to the size of the institution visited and to the complexity of the issues dealt with. They can range from 168 pages on the biggest penal institution in the country housing more than 2000 inmates to several pages on reports of police stations. Average report on prison is approximately from 40 to 80 pages long; on police stations 10 to 40 pages, on homes for the elderly range from 20 to 40 pages. The only available comprehensive report on social welfare institution consist of 35 pages. Most of them contain photographs of premises illustrating the state of repair of the premises visited.

[1254] Serbian NPM, *Annual Report 2012* (2013), p. 43.
[1255] Serbian NPM, *Annual Report 2012* (2013), p. 46; Serbian NPM, *Annual Report 2014* (2015), p. 39.
[1256] The delays regarding publishing of the visit reports are the following: Home for Children and Young People with Developmental Disabilities Veternik 11 months; Juvenile Penal Correctional Institution in Valjevo -7 months, District prison in Pancevo 8 months; Penal - Correctional Institution Sremska Mitrovica-7 months; District Prison in Negotin -9 months; District Prison in Zaječar-9 months; District prison in Cacak 13 months; Correctional institution for women in Pozarevac 20 month.
[1257] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

As to thematic reports, in 2015 NPM published a Report on the Monitoring of the Treatment of Refugees and Migrants conducted in 2014.

In 2015 the NPM conducted seven unannounced visits with a sole purpose of determining whether persons deprived of liberty have been battered. It visited four prisons and three police stations. According to the Deputy Ombudsman, the approach was simple: to enter the most problematic units of the respective prisons and conduct extensive survey among the inmates asking them whether they were abused and whether they have any knowledge of other inmates being abused.[1258] According to the annual report of the Ombudsman, out of a total of 210 inmates interviewed in private during these visits no one has raised allegations of torture.[1259] However, if we take a look at the individual visit report we can read the following observation

> "*The overall impression of NPM team members is that the number of cases of inadequate conduct in the institution visited has decreased. Number of allegations of ill-treatment decreased. In fact, out of the 35 interviewed convicts 7 persons reported that they were ill-treated by officials more than a year ago, most of them at the moment of immediate admission to the Institute, while only one person said they were abused at the beginning of previous year. Not a single interviewee had visible injuries at the time of the NPM visit. Two prisoners have alleged that they were victims of abuse by another convicted person and that these events took place a few months ago. However, 10 interviewed convicted persons stated that they have information that other prisoners were ill-treated in the last three months*".[1260]

Therefore, although the Ombudsman was technically correct in that probably no one made a specific allegation to have been tortured, the language used seems unusual, to say the least. Namely, while one usually alleges to have been abused in one way or another, a legal qualification of such abuse as torture or inhuman and/or degrading treatment falls within the purview of legal bodies, usually courts. In absence of pertinent qualification, the general term ill-treatment encompassing all forms of prohibited conduct is preferred.[1261] The fact that the annual report included that no one alleged to have been tortured while leaving out that several persons did claim to have been ill-treated or to know of others being ill-treated, is at least misleading.

15.6.5 Summary

Triangulation as an approach to verify information by crosschecking different sources has been, according to the NPM reports, explicitly endorsed and applied in practice. The NPM took a broad view on areas of its interest during visits and in addition to material conditions of detention, food, regime (time spent outdoors, leisure activities etc.) it took notice of safeguards such as medical examination,

[1258] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1259] Serbian Ombudsman, *Annual Report for 2015* (2016), pp. 153–4.
[1260] Original report is written in Serbian language. See Serbian NPM, *Visit report: Požarevac-Zabela Correctional Institution 2015* p. 6.
[1261] Refer to chapter 5 Mapping the content of ill-treatment under international law; refer also to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.5. Different understandings of ill treatment.

complaint system, video surveillance, cell buzzers, and the three fundamental rights upon arrest. As regards psychiatric hospitals and social institutions it looked at the reason for deprivation of liberty, the deprivation of legal capacity, the use of seclusion, restraints and informed consent etc.

The length of visit reports themselves varied from several to more than 160 pages depending on the size of the institution visited and on the number of persons deprived of liberty therein. However, the main problem is that some visit reports were published with a considerable delay (from six months to two years) while a number of others were not published at all. For instance, around 60 reports on visits made in the first three years of NPMs operation are missing on its web site. This problem becomes direr in respect of psychiatric hospitals and social institutions as hardly any reports, more precisely only one, on visits undertaken were made public. Finally, attempt has been identified to somewhat downplay the testimonies alleging deliberate ill-treatment by pointing out only that allegations of torture were not identified.

15.7 The NPM improved other safeguards, conditions and regime in closed institutions and removed causes of ill-treatment

15.7.1 The NPM made pertinent recommendations

There is a great number of recommendations addressing deficiencies encountered in practice made by the Serbian NPM, which are identical or similar to those issued by the CPT and other international bodies. Moreover, in the course of 2015 the NPM carried out thematic visits to four institutions with the sole aim of verifying compliance with the CPT recommendations.[1262] The Deputy ombudsman noted that this practice will be applied to verifying compliance with recommendations of other international bodies such as the CtAT and CtRPD as well.[1263]

In respect of police establishments, recommendations issued by both NPM and CPT are those requesting to bring inadequate material conditions of detention in line with the relevant standards, making outdoor time available, remove nonstandard objects from police premises, confidentiality of medical examination, handing out comprehensive information on rights upon arrest in writing on a language that arrestee can understand, written forms and proper maintenance of custody registers. Moreover, the NPM made other sensible recommendations aimed at improving the investigation of incidents that might amount to ill-treatment. These include making medical examination in line with the principles set out in the Istanbul protocol upon arrival to a police station mandatory whenever coercive means have been used against a detainee, or always acquiring a statement of the victim or witnesses to facilitate official inquiry on whether it was justified.

[1262] Serbian Ombudsman, *Annual Report for 2015* (2016), p. 154.
[1263] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

As to prisons**,** recommendations addressing the refurbishment of facilities, improving hygiene, expanding the range of activities including work and stressing activities aimed at re-socialisation and classification are common. Both bodies kept suggesting hiring more medical staff, improving access to dental services, carrying out medical examinations thoroughly and confidentially and including all relevant points such as opinion on correlation between allegations and injuries identified in the medical reports. Concerning more general recommendations, NPM suggested placing medical staff in prisons under the jurisdiction of the Ministry of Health, removing oversight department from the Administration for the execution of criminal sanction and making the position of remand detainees equal to that of sentenced prisoners.

Finally, there is a significant overlap between NPM's and CPT's recommendations addressed to psychiatric hospitals and social care institutions. Besides those addressing material conditions, an emphasis is put on increasing the range of therapeutic options, creating less prison-like surroundings by allowing residents or patients to wear their own clothing and keep personal belongings, the need to regulate and bring to minimum use of restraints and the need for providing information on rights and complaint mechanisms. Both mention the need to proceed with the process of deinstitutionalization.

However, there are some aspects where we can see that the recommendations of the two go apart. For instance, the NPM did not follow the CPT's recommendation meant to ensure independence of law enforcement officials and bodies conducting investigations into ill-treatment.[1264] Similarly, it did not pay attention to guarantees that should accompany questioning of the suspects by the police. On a more general level, one can say that the NPM did not put sufficient emphasis on complaint mechanisms, their formal independence and how they operate in practice. Similarly, while the NPM calls for the abolishment of the practice of placing persons in mental hospital on the basis of consent of his guardian, it explicitly refers only to temporary guardian but not the regular, permanent guardian,[1265] which goes below the international standard. In addition, the NPM does not repeat the same recommendations as regards persons residing in social institutions. Similarly, although the NPM inquired on number of residents or patients deprived of legal capacity in institutions visited, it did not call for discontinuing such practice. In terms of general recommendations, NPM has called for a decrease of the number of residents in both mental hospitals and social care institutions, abandoning seclusion and regulating the use of restraints of persons with psychosocial and/or intellectual disabilities.

[1264] *Report on Serbia* (CPT, 14 January 2009), § 17–17.

[1265] Under Serbian law temporary guardian can be appointed to protect interests of persons in possession of legal capacity when this is called for by specific circumstances. For instance, such guardian can be appointed during the incapacitation proceedings Regular guardian, on the other hand, is being appointed to protect interests of person deprived of legal capacity and acts, in effect, as his substitute decision maker. See *Guardianship and human rights in Serbia: Analysis of guardianship law and policy 2006* (Budapest: MDAC, 2006), 23 In the context of the above discussion, it is reasonable to presume that much more persons with psychosocial and/or intellectual disabilities are affected by detrimental effects of regular guardianship. Reason to this is because reinstatement of legal capacity, which is a precondition for ending guardianship, hardly ever takes place. See S. Lazarevic, D. C. Milovanovic and L. Simokovic, *Practicing Universality of Rights: Analysis of the Implementation of the UN Convention on the Rights of Persons with Disabilities in View of Persons with Intellectual Disabilities in Serbia* (2006), pp. 15–6.

In what follows an overview of the compliance with the recommendations made by the NPM in the initial three years will be provided. This estimation will proceed on three levels. Firstly, an assessment of formal compliance (indicated in formal replies of the authorities to the NPM recommendations) will be provided. Secondly, an estimation of real compliance (actual compliance verified by follow-up visit) will be made. Lastly, recommendations will be grouped in clusters and an estimation of formal and real compliance of these clusters will be provided.

15.7.2 Recommendations were implemented[1266]

During the first three years of its activities, the Serbian NPM issued at least 910 recommendations to different authorities. In addition, in its annual reports it articulated a number of general recommendations addressed predominately to relevant ministries.

15.7.2.1 Formal compliance

In 2012, the NPM made 365 recommendations and received 249 replies. In 165 cases recommendations were accepted (130 dealing with police stations and 35 with other institutions). 48 recommendations were rejected or an answer was omitted (34 police stations and 14 addressing other institutions). The status of 36 recommendations is unclear (35 related to police stations and one to other institutions). In 2013, 323 recommendations were made and 259 replies received. 140 recommendations were accepted (63 addressed to police stations and 77 to other institutions). 60 (28 to police stations and 32 to other institutions) were rejected or an answer was omitted, whilst the state of implementation of 59 recommendations (6 to police stations and 53 to other institutions) is unclear. Finally, in 2014, 222 recommendations were made and 175 replies were received. In the case of 115 recommendations the reply was positive, that is they were formally accepted (56 made to police stations and 59 to other institutions). In 41 cases recommendations were rejected (11 made to police stations and 30 to other institutions). The status of 19 recommendations could not be discerned from the replies submitted.

All in all, out of 910 recommendations issued in the course of 2012, 2013 and 2014 state institutions provided official replies in respect of 683 recommendations (75% of all recommendations). 420 were officially designated as accepted (249 to police stations and 171 to prisons), 149 were rejected or answer was omitted (73 police stations and 76 to other institutions). In 114 recommendations (45 to police stations and 69 to other institutions) the state of implementations is not clear. This amounts to a rate of compliance of 61 %, rejection of 22% and those unclear 17%.

However, designating recommendations as “accepted” does not indicate that the authorities have put each and every one of them into practice, but that they merely took a positive stance towards them

[1266] Number and kind of recommendations as well as the state of formal and real compliance with them have been extracted from the Serbian NPM’s annual and visit reports. This entailed careful reading of the reports, identification of recommendations, state replies and follow up information and their classification. For this reason, no apposite footnotes to the information set forth above could be provided as their origin is scattered across numerous paragraphs within the NPM reports.

without necessarily indicating when and to what extent are they to be implemented.[1267] Moreover, in only a fraction of replies to concrete recommendations (41), the authority clearly stated that it had accepted and implemented the recommendation. In this case, most of the recommendations clearly marked as implemented where those not necessitating larger financial means such as minor refurbishments of dormitories or installing new showers in common bathrooms, improving the state of cleanness or placing a note that a room is under video surveillance.

15.7.2.2 Real compliance

During the initial three years of NPM's activities only two police directorates, 4 prisons and 1 psychiatric hospital received a follow up visit. Compliance with 224 recommendations was examined, which makes 25% of the overall number of recommendations issued. Roughly half of these (111) was found to be fully implemented, 34 partially, 63 not implemented while status of 16 was not clear (in most cases they were found to be in need of further monitoring). Therefore, 65% of recommendations were fully or partially implemented, 28% not implemented and the situation as regards 7% was not clear. A closer look reveals that a large majority of those recommendations found not to be implemented addressed structural problems related to a lack of space, material conditions and other actions requiring larger financial investments. One needs to be careful with the number of recommendations found to be fully implemented, since in some recommendations the NPM did not address substantive issues, but instead asked the institutions visited to undertake some formal actions; for instance, to submit the estimation of staff required to the competent authority and Ombudsman office.

15.7.3 Overview of formal and real compliance with clusters of recommendations

15.7.3.1 Material conditions

There are 369 recommendations pertaining to material conditions in closed institutions. State responses to 325 recommendations were identified, out of which 236 were labelled as accepted, 52 as rejected while status of 37 was not clear. As to the extent of real compliance, from 84 recommendations followed up on 37 were found to be implemented, 38 not implemented while the status of the remaining nine was not clear. Therefore, the rate of formal compliance with recommendations regarding material conditions was 73%. The rate of real compliance, on the other side, was around 44%.

In 22 cases NPM recommended that detention cells or offices should not be used for holding those in police custody and that proper premises should be established. 19 replies were received out of which 10 were said to be accepted, seven rejected or the answer was omitted and two not clear. Only three recommendations were followed up and it was found that two recommendations were not implemented while one was because two detention rooms were brought in line with standards.

[1267] Refer to chapter 14 Objectives, benchmarks and indicators for evaluating effectiveness, section 14.3. Methodological remarks on application of indicators.

The renovation and adaptation of detention facilities were recommended 163 times and replies were received in 125 cases. 82 recommendations were designated as accepted, 25 as rejected and the situation regarding 18 was not clear. Considering real compliance, out of 58 recommendations followed up on compliance was verified in 25 cases and not verified in 25 cases. In 25 cases the renovation and adaptation of detention facilities in police establishments (painting, repairing floors, removing dangerous objects, etc.) were recommended. Most of replies marked these recommendations as accepted (18), five of them were rejected or answer was omitted while the status of two is unclear. Only one police station provided photos confirming that two detention cells have been renovated. In all other accepted cases, the renovation, although accepted, was made dependent on funds. As to real compliance, in both of the two recommendations followed up on implementation was not verified. As regards formal compliance, out of 118 recommendations aimed at improving material conditions in prisons (refurbishment of premises, shelters, yards, providing furniture, painting walls etc.), according to available data institutions replied in 90 cases. These recommendations were accepted in 56 cases, rejected in 18 cases and in 16 cases the position is unclear. As regards real compliance established in follow-up visits, it covered 54 recommendations. Out of this, the implementation of recommendations was verified in 18 cases, partial implementation in five and the implementation was not verified in 23 cases while the situation necessitated further monitoring in eight cases. 13 recommendations were identified addressing the inadequate state of repair of social care institutions including homes for the elderly and psychiatric hospitals. Nine replies were received out of which in eight cases recommendations were classified as accepted, while in one as rejected, that is the reply to particular recommendations was omitted. Only two recommendations were followed on and in both cases the implementation was verified. Recommendations to create a special area within police stations in order to allow outdoor exercise were made on seven occasions and none of them was accepted (either not replied on or outright rejected).

In 41 cases, recommendations were made to provide access to light (natural and artificial), fresh air, install ventilation or heating system. From 41 replies it follows that 31 recommendations were accepted, four rejected while the situation regarding six is not clear. As to replies marked as accepted, in most cases it was indicated that funds are or will be requested and in some cases that reconstruction plans were drawn. Only one recommendation was followed up on and determined that it was not implemented.

36 recommendations aimed at improving the fire protection system and providing training and first aid kit were made in the initial three years. All of them were marked as accepted. None of the follow up visits addressed the recommendations pertaining to fire protection and first aid.

Lack of space in places of detention figured in 15 recommendations whereas six replies were received out of which recommendation was in one case accepted, in four rejected and not clear in one. As to the real compliance, from 10 recommendations followed up on in three cases compliance was verified, in further six not verified and situation as regards one, is not clear. Concerning

recommendations explicitly addressing the lack of space in prisons most of them were rather straightforward as they suggested that minimum space requirements, eight cubic metres and four square metres of space per detained, are to be respected. Two recommendations required institutions to stop the practice of placing a third frame on double beds so as to accommodate more people. Out of 13 recommendations only four were replied to (three were rejected while one is not clear). 10 of them were followed up on. In six cases recommendations were not implemented, one necessitated further monitoring, two were partially implemented while one was designated as implemented. However, this last recommendation related to the removal of third bed frame from double beds was actually not fully complied with in the entire prison. As to space accorded to residents of social care institutions, including home for elderly and psychiatric hospitals, two recommendations not to place more than four users in each room were made. One was reported as rejected and the others were accepted but to be implemented later.

With regard to installing cell buzzers, overall 56 recommendations addressing this subject were identified and replied to. 43 were accepted three rejected while the status of 10 is not clear. Seven were followed up and it was established that four were implemented while three were not. Out of 43 recommendations where the NPM suggested installing mechanisms for calling police officers in detention cells, 38 replies indicated that they were accepted, at least formally while the situation regarding the remaining five is unclear. Out of four recommendations followed up, it was established that in two cases cell buzzers were not while in the other two cases they were installed. Out of 10 recommendations to prisons suggesting installing cell buzzers in cells or dormitories, three were accepted, two rejected while other replies are either not available or not clear. In three follow up visits, a partial implementation was verified in two cases while in the third case the implementation lacked completely. It was recommended to install buzzers in 3 elderly homes out of which one replied that it installed it, the second that it is in the process of doing so while the third justified its inability to install a buzzer system by the lack of funds.

Out of 36 recommendations addressing state of hygiene in closed institutions, 33 were designated as accepted and three as rejected. Five follow-ups indicate that four recommendations were implemented while one was not All of the 28 recommendations pertaining to maintaining basic hygiene in the police detention cells by providing clean blankets, mattresses, linen, pillows, ensuring cleanness of toilets and cells by whitewashing the walls were accepted. However, only on few occasions it was clearly indicated that these recommendations were actually, albeit partially, implemented. In most of the cases, implementation was made dependent on funds available. Real compliance with recommendations addressing hygiene was in one case not established and in another case established. Most of recommendations mandating prison authorities to keep prison premises clean by, *inter alia*, supplying convicts with adequate means and equipment for maintaining hygiene (eight) were accepted while their implementation was noted as well (five accepted and three no reply). In three cases where follow up visit was taken, improvements in state of sanitation were confirmed.

15.7.3.2 Nutrition

62 recommendations dealing with nutrition were identified. Judging on 53 replies, 23 were marked as accepted, 12 as rejected while the status of 10 is not clear. In 10 follow up visits, the compliance with recommendations has been confirmed. Therefore, formal compliance amounted to 43%, whereas real compliance to 100%. In more detail, 57 recommendations on providing water in plastic containers or installing a tap and providing one meal no later than six hours and three meals for any detention exceeding 12 hours from the beginning of depravation of liberty effected by the police, were made. Recommendations were replied to in 50 cases out of which 20 were labelled as accepted, 12 as rejected while the status of 10 is not clear. As to real compliance, in eight follow ups the implementation of all eight recommendations was verified. However, a number of recommendations relating to the provision of one meal no later than six hours from commencement of detention, were rejected as this was not envisaged in relevant regulations. Yet, as at the end of 2012 a special *Instruction on Treatment of Persons brought in by Police and Persons in Custody* was issued by the Ministry of interior stipulating that a detainee is to receive one meal within six hours of detention, these recommendations were not made in the following years, except on one occasion at the beginning of 2013. Moreover, both of the two follow up visits made to police establishments verified the observance of recommendations (totalling to eight) dealing with the provision of access to food and water while in police detention. Five recommendations made to prison authorities suggested that special attention needs to be paid to quality and quantity of food. In three available replies the recommendation was marked as accepted. In two follow up visits it was found that the recommendations have been implemented. However, it seems that a discrepancy exists between formal replies and complaints of the prisoners, which could be resolved only by unannounced visits.[1268]

15.7.3.3 Health care

Out of 51 recommendations dealing with health care, 29 replies were identified (13 accepted, four rejected and 12 not clear). Out of the 28 recommendations followed up, it is indicated that 17 recommendations were implemented, nine not implemented while situation concerning two is not clear. From this it follows that formal compliance equalled 45%, while real compliance 61%. As to the recommendations addressing health care in prisons the NPM laid out a range of suggestions touching upon issues such as employing enough staff (doctors and other medical personnel), renovating prison medical wings, acquiring equipment, ensuring steady supply of medications, improving access to medical services outside the institution, dental care and transferring persons with severe mental disorders to external medical institutions. It was accepted that a person with at least some medical training should be present in the institution around the clock. Out of 46 recommendations 29 were replied to (13 were accepted, four rejected while 12 are not clear). 24 recommendations were followed

[1268] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

up on in control visits. It was determined that six recommendations were implemented, seven partially implemented, nine not implemented while the status of two necessitated further monitoring. Most of the recommendations necessitating hiring additional staff were either rejected or accepted but made contingent upon funds. Five recommendations were identified dealing with health care in social institutions and psychiatric hospitals. No official reply was available indicating formal compliance while the implementation of four recommendations followed up was verified. Four of these were addressed to the same institution (Sveti Vraci psychiatric hospital) suggesting that it should draft an analysis of its staff needs and financing, indicate a new model of financing, introduce regular staff meetings and establish an electronic database. One suggested that the Ministry of Health is to be alerted when health care institutions refuse to provide adequate health care. The implementation of all of the recommendations addressed to Sveti Vraci psychiatric hospital were verified.

15.7.3.4 Training

The NPM in 19 recommendations suggested that further training of personnel need to be carried out. In all 18 available replies, the recommendations were designated as accepted. In two follow-ups, the implementation was verified. Thus, formal compliance rate amounted to 95%, while real compliance to 100%. All the 14 recommendations addressed to police establishments, advised that police officers should attend first aid training. As to the prison officers, on two occasions it was pointed out that they should be trained in safe techniques for physically restraining persons with minimum force. These recommendations, judging on the replies of the institutions concerned, were accepted. In one follow-up to a prison it was established that this recommendation was implemented, albeit partially. As to psychiatric and social institutions, three recommendations to promote initial and continual training of staff were made, out of which two were designated as accepted. In one follow-up to psychiatric hospitals, it was verified that three to four lectures a year have been held at the institution in previous years.

15.7.3.5 Regime, treatment, activities, work

87 recommendations altogether were identified on the subject of regime, treatment, activities and work. Out of 51 replies received, 24 recommendations were marked as accepted, 24 as rejected while the situation as regards three is not clear. 35 recommendations were followed up with the result that the implementation was verified in 28, not verified in five and not clear in two of the cases. Formal compliance came to 47% and real to 80%.

As to recommendations addressing different issues related to the position of sentenced and prisoners on remand (duration of daily outdoor time including for those undergoing solitary confinement, spending time out of cells engaged in purposeful activities, possibility for exercise, availability of education, work and its remuneration, preparation for the release, duration of visits, sufficient number of staff etc.), out of 65 identified 45 were replied to. Out of those 17 were marked as

accepted, 19 as rejected (or answer to particular recommendation was omitted) while the status of nine could not be determined. As to recommendations whose compliance was checked in follow up visits, out of 65 recommendations the compliance with 28 was inspected. Compliance was verified in 16 cases, partial compliance in five, no compliance in five while in two cases recommendations necessitated further monitoring. It may be added that in a number of cases the compliance with recommendations made was fairly difficult to determine due to the complex nature of recommendations. Therefore, the NPM just cited statements of the director of the treatment department in order to verify the recommendations made. 32 recommendations dealing with treatment, therapy, different aspects of daily regime and activities for residents of social care institutions, including home for elderlies and patients of psychiatric hospitals, were identified. These recommendations contain a large spectre of suggestions such as enabling patients or residents to wear their own clothing, encouraging them to spend time outdoors, involving them in different kinds of therapeutic work (occupational therapy, group therapy individual psychotherapy etc.) and creating and regularly reviewing individual treatment plans. Out of 16 replies received seven recommendations were designated as accepted, five as rejected and four as not clear. Seven recommendations were followed up on and all were found to be fully implemented.

15.7.3.6 Body searches and means of restraint

21 recommendations dealing with searches, handcuffing and restraints were identified out of which 15 were replied to (Five were accepted, six rejected and four not clear). Four recommendations were followed-up and found implemented. Accordingly, formal compliance reached 33%, whilst real 100%.

Three recommendations addressed the issue of body searches of prisoners or their visitors. These recommendations specified that during a search attention should be paid to the protection of privacy and dignity of the searched person, that intimate search may be effected only by a medical doctor and that non-medical staff, as a rule, will not be present during the search. In addition, only prison officers of the same gender as the person being searched may carry out the search. The only available formal reply rejected the recommendation, while in two others, by means of follow-up visits, it was established that recommendations was in one case fully and in the other one partially implemented.

Eight recommendations dealt with handcuffing detainees during transport. Contrary to *Instructions on Treatment of Persons brought in by Police and Persons in Custody*, which envisaged mandatory handcuffing during transport, the NPM suggested that handcuffing ought to be effected only when called for by special circumstances. Most of replies, however, rejected this reasoning by referring to the above-mentioned Instruction. The NPM directly addressed police directorates in seven recommendations out of which two were accepted, four were rejected while the status of one is not clear. It also addressed the Ministry of the Interior with a suggestion to amend the said Instruction but to no avail.

There are ten recommendations dealing with the use of various measures in social care institutions and psychiatric hospitals such as means of restraint, isolation or segregation. As to the use of restraints,

the NPM repeated the standard that they should be resorted to only if all other attempts to pacify the patient fail. In any case, under no circumstances should restraining be used as or amount to a disciplinary measure. As far as the Serbian NPM is concerned solitary confinement in health care context should be forbidden as it can amount to ill-treatment. However, putting a patient in "increased surveillance" rooms, while also should not be used as a disciplinary measure, is allowed in order to protect the patient or third persons. Out of six recommendations replied to, three were accepted, one was rejected, while the status of two is not clear. Both recommendations followed upon in control visit were implemented.

15.7.3.7 Safeguards and rights upon and during deprivation of liberty

There are recommendations aiming to prevent ill-treatment by making persons deprived of liberty aware of their rights and strengthening the pertaining safeguards. If, however, ill-treatment did take place, some recommendations buttress effective investigation into allegations and thus help to break the circle of impunity. 137 of such recommendation were identified and 92 replies were received, out of which 69 recommendations were designated as accepted. From 30 recommendations followed up, implementation was verified in all 19 cases. It follows that formal compliance amounts to 75 %, real to 63 %. In what follows an overview of such recommendations made by the Serbian NPM will be provided.

15.7.3.7.1 Three fundamental rights

As to the three fundamental rights upon deprivation of liberty (ensuring unhindered access to lawyer, medical doctor and possibility to notify close persons), the recommendation made—almost exclusively—dealt with the notification about these rights. The NPM was stressing that a leaflet containing information on rights should, in addition to Serbian, be made available in English and in languages of national minorities. This handing out should be documented by obtaining a detainee's signature on two copies (one for the police records and the other for detainee himself). Furthermore, these rights should be accorded to all those physically deprived of liberty by the police officers notwithstanding whether they are considered detained under national law and regardless of the legal basis of their detention. Out of 17 recommendations, 15 were accepted while the answer to two was omitted. However, the practical utility of access to a lawyer, doctor and the notification of a designated person on one's arrest was not examined. Differently put, from the reports, one cannot see what is the quality of legal aid rendered to arrested persons, whether access to a doctor was in practice accorded and how were designated persons notified of detention.

15.7.3.7.2 Moment of commencement of detention

Out of eight recommendations indicating that the commencement of detention should be counted from the moment of factual deprivation of liberty, four were accepted while as regards the rest the answer was omitted.

15.7.3.7.3 Improving control procedures over the use of force

On few occasions the NPM suggested improvements to the procedure of inquiring whether use of force by the police was justified. This was to be done by obtaining the statement from persons against whom force was used and possible witnesses and medical reports containing an opinion on consistency between allegations and objective injuries. Replies to two were omitted while the other two were rejected.

15.7.3.7.4 Nonstandard objects

In eight recommendations, the NPM suggested that nonstandard objects ought not to be kept in the police premises but properly labelled, recorded and stored away in specially designated storage space. State authorities in two replies accepted the recommendations and in others omitted to comment upon them. In one follow-up visit the implementation was verified.

15.7.3.7.5 Medical examinations

All in all, 47 recommendations addressing different aspects of medical examinations in prisons were identified. 32 were replied to (18 designated as accepted, five rejected and nine not clear) while 19 recommendations were followed up on (implementation was verified in ten cases, not verified in eight while not clear in one). Within this category of recommendations special emphasis was put on a complete check-up during admission to the institution and after the use of force. Basically, it was emphasised that examinations should be normally done without presence of law enforcement officials, cover the entire body and that reports ought to encompass the examinee's account of circumstances under which the injury was inflicted as well as the doctor's opinion on the correlation between objective findings and means of coercion applied in case of the latter (after use of force) or prisoners account of how the injuries came about, in case of the former (upon admission). When a physician recognises indications of ill-treatment, the entire case needs to be forwarded to the prison warden.

It seems that a slight inconsistency exists as a number of recommendations follow a formulation utilized in the *Law on the Execution of Criminal Sanctions*, which stipulates that a medical report made after the use of means of coercion should include an opinion on the correlation between the measures applied and objective injuries. Others, guided by international standards, suggest that a doctor should correlate between allegations of the injured person and objective findings. Finally, in some cases the NPM was satisfied with recommending that a doctor should provide an opinion on origins of the injuries. These two recommendations mandating a medical doctor to provide a written opinion on how the injuries were sustained, are similar in the sense that if it is established that identified injuries could not be inflicted by the indicated use of means of coercion and that injuries could have been inflicted in the manner alleged by the person that sustained them, both lead to the same conclusion: a strong presumption of ill-treatment. On the other hand, it seems that where this does make a difference is the question of the burden of proof. The option preferred by the Serbian legislator (opinion on correlation

between the measures applied and sustained injuries) in effect places the burden of proof on the detainee whereas the international standard on the state. This follows from the fact that if it is established that injuries might have been inflicted via measures indicated by the law enforcement official, the detainee has almost no chance to prove otherwise. In contrast, if the doctor establishes consistency between the detainees' account and injuries, alleged perpetrators have more chances to prove the opposite during legal proceeding that should follow. The Deputy ombudsman clarified that recommendations dealing with this issue can be differentiated in those where the examination is made after use of force and those made where no such use was reported. In the first case, it upheld that the medical report should encompass both the opinion stipulated by Serbian legislation (that is consistency between injuries and means of coercion applied) and that envisaged by international standards (consistency between objective injuries and allegations). In case of the latter, as no use of force was reported and correlating between injuries and reported use of force is impossible, the medical doctor is to provide an opinion only on objective injuries and allegations of the injured person.[1269] The state is not organizing any training for doctors on the Istanbul protocol in general and how to provide mentioned opinions in particular. The NPM itself has organized one meeting with prison doctors to that effect but, according to the Deputy ombudsman, that is not sufficient.[1270]

29 recommendations made to prisons addressing the above outlined content of medical reports were identified. Out of these, in eight cases a reply of the institution was not available, in five cases a reply was not clear while recommendations were accepted in 15 cases and rejected in one. Out 10 recommendations that were followed up, in five cases compliance with recommendations was verified, in two partially verified, in one it was found that further monitoring is called for; in two the compliance was not verified.

In addition to this, it was suggested that regular medical examinations consisting of the same elements as the initial examination, should be repeated periodically. Specifically, this means in intervals not shorter than three months. Out of six recommendations of this kind, two were accepted, one rejected while in three cases a reply was lacking or was not clear. Compliance with these recommendations in the three cases identified in follow-up visits was not verified

As regards medical examination of those remanded in police custody, the Serbian NPM issued 11 recommendations. It repeated eight times that as a rule it should not be conducted in presence of the police officers. It added on two occasions that, similar to the solution adopted with regard to the execution of penal sanctions, medical examination should be mandatory after use of force. Furthermore, in one recommendation it appealed that a doctor's report should, in addition to objective findings, include the detainee's statement and the opinion on the correlation between this statement and objective findings. Recommendations that a police officer can be present during medical examination only

[1269] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).
[1270] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

exceptionally and at the explicit request of a medical doctor, has been rejected in 2 replies. One reply was lacking, one was not clear, while in four replies the institutions accepted the recommendation. As regards recommendations suggesting the extension of mandatory examination after the use of force, the reply was on one occasion lacking, whereas the second recommendation was rejected. Finally, the recommendation advising that medical examination should consist of objective finding, allegations and the correlation between the two was rejected. The main problem hindering the implementation in this field is that the Ministry of Interior has at the end of 2012 issued an *Instruction on Treatment of Persons brought in by Police and Persons in Custody*, which mandates the presence of a police officer during medical examinations of persons in police custody. Despite repeated recommendations and consultations, the Ministry of the Interior did not alter this instruction to date.

15.7.3.7.6 Information on rights in prisons

In five recommendations, the Serbian NPM stressed that prisoners need to be informed on their rights upon admission and that the relevant regulation needs to be made available in the language they understand. Out of four replies, recommendations were accepted in three cases while the remaining one is not clear. One recommendation was followed-up on and was found partially implemented.

15.7.3.7.7 Legal assistance in disciplinary proceedings

On three occasions the NPM has stressed that prisoners against whom disciplinary proceedings are initiated should be granted legal assistance. Two of these were accepted while one rejected.

15.7.3.7.8 Obligations of prison wardens

In two recommendations to prisons, the NPM linked the doctor's obligation to undertake full medical examination after the use of force with an obligation of the prison warden to take into consideration the medical report when reaching a decision whether use of force was justified, proportionate and commensurate. In addition to this the following obligations of the warden were spelled out: to provide training for security staff on techniques of physically restraining a person with minimum force, to make clear to prison personnel that any unlawful use of force (disproportionate or force used with the aim of punishing the prisoner) amounts to ill-treatment and thus leads to disciplinary and criminal liability and in terms of the individual level to take action within his powers and notify relevant prosecutors' office. In reply one of these recommendations was marked as accepted while compliance was partially verified during the follow-up.

15.7.3.7.9 Complaint procedures

Recommendations related to setting up a complaint system and keeping records of complaints as well as providing relevant information on rights and procedures for their protection have been issued eight times in the health care and social setting. In four replies provided, recommendations were accepted

and in one case the situation remains unclear. Similarly, during the follow-up visit to psychiatric hospital implementation of two recommendations was verified.

15.7.3.7.10Documentation

Out of 35 recommendations addressing documentation identified in the course of the initial three years, 24 were replied to. 20 were designated as accepted and four as not clear. Out of six recommendations followed up on, two were found not to be implemented and four were implemented. Therefore formal compliance is 83%, while real 67%. The NPM issued 31 recommendations dealing with remand records kept in police stations. In most of the recommendations the focus was put on maintaining special records containing information on the physical condition of detainees and on water and food provided (20). In all the remaining cases, it recommended keeping uniform remand records in agreement with relevant laws and with the *Instruction on Treatment of Persons brought in by Police and Persons in Custody*. Although in some cases it disputed the fact determined in the visit by asserting that such records are already being kept (four cases) or omitted to send a reply, in most cases it formally accepted the recommendations. Therefore, out of all 23 replies received 19 were designated as accepted while the situation concerning four recommendations is not clear. As to the recommendations that were followed up on in control visits, two recommendations were found not to be implemented, while one was implemented. Recommendations aimed at improving or introducing proper record keeping in prisons were made on three occasions and addressed to one prison (reports of disciplinary action, records of complaints and appeals and visits of the increased surveillance unit). Though their status was not made clear in replies, compliance with all three recommendations was verified. One recommendation to an elderly home which addressed keeping proper records on the use of means of restraint was designated as accepted.

15.7.3.8 Privacy, confidentiality of medical documentation and video surveillance

There are 67 recommendations encompassing the above-mentioned fields out of which replies were communicated 57 cases. Out of these, 46 were designated as accepted, four as rejected, whereas the situation as regards seven is not clear. Seven recommendations were followed up on and found to be implemented. This would then lead to formal compliance of 81% and real compliance 100%. In 33 recommendations, the NPM endeavoured to improve the respect for privacy in police custody. In 24 cases it requested that toilet areas in detention cells are not covered by video surveillance and that a note, with an information that they are being observed, is placed on a visible spot. In the nine remaining recommendations, the NPM suggested that medical information ought to be treated confidentially, that is to say that a medical doctor communicates medical information to police officers only when it pertains to detention itself and consequently medical reports containing sensitive data are not placed in the detention file. In most of 28 replies received these recommendations were designated as accepted (25) by the police establishments visited (two were rejected while the situation concerning one is not

clear). Observance of two of these recommendations was verified. In 21 cases, the NPM recommended the installation of a video surveillance system covering detention facilities with recording that can be stored for a period no shorter than 30 days. Although formally accepted in most of the cases (accepted formally 15, rejected two, not clear four, verification by a follow up visit was not conducted), the installation of surveillance system has usually been put on hold until securing necessary funds.

Recommendations related to privacy in prisons mostly addressed the issue of placing a visible notification that a room is under video surveillance. In addition to this, recommendations related to video surveillance suggested that the video surveillance system should extend its coverage and that recordings are to be stored up until minimum of 30 days. From nine recommendations dealing with these issues six were formally replied to, out of which five answers were mostly positive, while one was not clear. As to real compliance, out of four recommendations, three were found fully and one partially implemented. A closer look reveals that the highest ratio of success have those recommendations suggesting to put visible notices on surveillance. Four recommendations made to social institutions and psychiatric hospitals dealt with privacy. The two available replies reveal that one recommendation was accepted (providing screens in rooms) while the status of the other (ensuring that existing screens are used) is not clear. One recommendation is followed up on and its implementation was confirmed (privacy in the toilets have been ensured by installing doors).

15.7.3.9 Medical monitoring of nutrition and cleanness

In several cases the Serbian NPM put an emphasis on the role of prison health service in monitoring different aspects of deprivation of liberty such as hygiene, sanitary conditions, ventilation, nutrition etc. and making pertinent written reports with recommendations for its improvement to the director of the institution. This role of the health service and in particular of medical doctors is not a novelty introduced by the Serbian NPM but is specified in international standards and even in national legislation. To 18 such recommendations identified in the initial three years of NPM activities, 13 formal replies were sent most of which were designated as accepted (10) while the situation regarding three was not clear. As to the real compliance, six recommendations were followed up, two of which were found not to be implemented, two implemented and two partially implemented. Therefore, formal compliance equaled 77%, real 67%.

15.7.3.10 Separation of different categories of detainees

14 recommendations addressed the separation of different categories of detainees (smokers and non-smokers; persons in police custody, detainees and convicts; detainees with and without previous sentences; minors and adults etc.). Nine replies to recommendations were received out of which five were designated as accepted, three rejected and one not clear. Six recommendations were followed up, out of which three were implemented, one partially implemented, one not implemented and one not clear. Thus, formal compliance amounted 56%, while real to 67%.

15.7.3.11 Specificities of psychiatric and social institutions

15.7.3.11.1 Safeguards against misuse of involuntary commitment and treatment

Ten recommendations addressing safeguards related to admission to institution and consent to treatment were identified. As to the content of these recommendations, it was noted that consent to admission to the psychiatric hospital should be made in the presence of two witnesses, that, when in doubt whether a patient is capable of stating his will, the procedure of involuntary admission should be initiated, that keeping a person in a hospital cannot rest on the consent of his temporary guardians, that consent to admission and to treatment should be obtained separately and that persons in institutions should be assisted in making use of their right to challenge their admission by resorting to legal remedies. Although no formal replies to these recommendations are available, it was established that six were implemented by means of follow up visit which amounts to real compliance rate of 60%.

15.7.3.11.2 Deinstitutionalization

There are at least five recommendations dealing explicitly with deinstitutionalization, namely, facilitating processes and preconditions aimed at removing persons with psychosocial and/or intellectual disabilities from institutions and enabling them to live in the community. Two of these recommendations suggest that an analysis should be carried out on needs for providing mental health care services in the community. One recommendation was followed up on and established that it was implemented while there is no information on the other. The remaining three recommendations insisted that a social institution holding juveniles with psychosocial and/or intellectual disabilities should carry out a sharp cut in the number of residents and that community services ought to be put in place to cater for their needs outside the institution. The local government was designated as a principal duty bearer of an obligation to set up medical services in the community. No indications on the implementation of these recommendations are available. Neither formal nor real compliance are known.

15.7.4 General recommendations

In addition to recommendations made after a visit to a concrete institution, the NPM made recommendations of more general nature. These general recommendations, in addition to repeating individual recommendations in a more general manner,[1271] made the following suggestions: detach health care services in prisons from the Ministry of Justice and place medical staff under the jurisdiction of the Health Ministry,[1272] relocate the oversight department from DECS to the Ministry of Justice and set it up as a separate organizational unit,[1273] increase efficiency of the internal control sector within the

[1271] Serbian NPM, *Annual Report 2012* (2013), pp. 46–7; Serbian NPM, *Annual Report 2013* (2014), p. 42; Serbian NPM, *Annual Report 2014* (2015), pp. 38–9.
[1272] Serbian NPM, *Annual Report 2012* (2013), p. 46; Serbian NPM, *Annual Report 2013* (2014), p. 42; Serbian NPM, *Annual Report 2014* (2015), p. 38.
[1273] Serbian NPM, *Annual Report 2012* (2013), pp. 46–7; Serbian NPM, *Annual Report 2013* (2014), p. 42; Serbian NPM, *Annual Report 2014* (2015), p. 39.

Ministry of Interior in fight against impunity for the abuse taking place during exercise of police powers by, inter alia, taking all relevant facts into account and objectively determine liability of police officers,[1274] allow those held in pre-trial detention more relaxed regime of detention akin to that enjoyed by sentenced prisoners and implement limitations only if imposed by a court. [1275] Furthermore, it suggested to discontinue the practice of isolation and solitary confinement and regulate the use of restraint of persons residing in psychiatric hospitals and social institutions,[1276] step up efforts aimed at reducing the number of occupants of psychiatric hospitals[1277] and social residential institutions[1278] by creating structures and support for their life in the community. Moreover, the overall goal should be complete deinstitutionalization and closure of at least social care institutions where persons with psychosocial and/or intellectual disabilities reside.[1279] The NPM pointed out that from the standpoint of overcrowding, biggest problems are to be found in the three major penal correctional institutions in Sremska Mitrovica, Pozarevac and Nis holding almost half of all the prisoners and that a number of inmates should be transferred from these institutions to other prisons in Serbia.[1280] The Deputy Ombudsman, however, commented that this recommendation did not stem from the NPM but these institutions themselves and added that such practice led to overcrowding in other prisons.[1281]

15.7.5 Legislative changes

In addition to general recommendations, the NPM made explicit recommendations concerning amending or revising certain regulations affecting persons deprived of their liberty. The NPM did not produce any comprehensive draft of a law, bylaw or other regulation but was satisfied with flashing out certain aspects that should be removed or added. On few occasions it was of the opinion that an entire statute should be enacted. Some of the above general recommendations, even if not proposing change of regulations, can be implemented only if a relevant legislative framework is amended. This goes for a dislocation of the oversight department, placing health care personnel under the jurisdiction of the Health Ministry. Further it suggested that the *Law on Probation* should be enacted without going into details on what it should consist of. The NPM has advocated for the enactment but then criticized several provisions stipulated in the *Act on Protection of Persons with Mental Problems*. It has held that allowing and regulating seclusion of persons with psychosocial and/or intellectual disabilities in psychiatric hospitals is not in line with international standards and should be reconsidered. Also, involving regular

[1274] Serbian NPM, *Annual Report 2012* (2013), p. 46; Serbian NPM, *Annual Report 2013* (2014), p. 35.
[1275] Serbian NPM, *Annual Report 2013* (2014), p. 37; Serbian NPM, *Annual Report 2014* (2015), p. 35.
[1276] Serbian NPM, *Annual Report 2013* (2014), 44, 46; Serbian NPM, *Annual Report 2014* (2015), 41, 42.
[1277] Serbian NPM, *Annual Report 2014* (2015), p. 40.
[1278] Serbian NPM, *Annual Report 2012* (2013), p. 43; Serbian NPM, *Annual Report 2013* (2014), p. 46; Serbian NPM, *Annual Report 2014* (2015), 41, 42.
[1279] Serbian NPM, *Annual Report 2013* (2014), p. 46.
[1280] Serbian NPM, *Annual Report 2013* (2014), p. 38.
[1281] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016); compare with measures usually recommended by international bodies for reducing overcrowding, summarized in chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.8. Overcrowding - an aggravating factor.

police force in forced hospitalization and maintaining order in psychiatric hospitals should also be revised.[1282]

The NPM has continuously been asking the Ministry of Interior to revise the *Instruction on Treatment of Persons brought in by Police and Persons in police Custody* so as to remove the mandatory use of handcuffs during transport of detainees and presence of police officers during medical examinations. In addition it was critical towards some other provisions of the said Instruction such as that of dealing with the jurisdiction of the control mechanism or making the installation of cell buzzers not mandatory when the detention cell is under video surveillance.[1283] It further suggested that a special guideline on the use of force should be created setting out facts to be taken into account in assessing whether and what amount of force is to be used.[1284] A *Rulebook on enforcement of detention measures* should, according to the NPM, be amended so as to explicitly envisage that prisoners on remand can spend their free time outside their cells, in communal premises together with other detainees and engaged in different social and cultural activities. The only exception should be based on a court order.[1285]

15.7.6 State of compliance with general recommendations and legislative changes

The compliance with general recommendations, including those relating to amending legislation, despite holding more than 30 meetings with various governmental bodies in the 3 initial years[1286] and the fact that most of them were backed by parliament resolution requesting government compliance,[1287] left much to be desired. Despite minor improvements, remand prisoners are still subjected to the detention regime inferior to that applied to sentenced prisoners.[1288] Although some laws such as the *Non-Custodial Sanctions and Measures Enforcement Act* (dealing inter alia with probation) or the *Law on Protection of Persons with Mental Disabilities* have been enacted, most of the suggestions, previously articulated by the NPM, were not complied with. Similarly, in spite of persistent suggestions, the *Instruction on Treatment of Persons brought in by Police and Persons in police Custody* was not amended to reflect suggestions of the NPM. Although the *Law on the Execution of Criminal Sanctions* was enacted in 2014, suggestions of the NPM were not take into account. This also holds true for the new *Law on the Police* passed in 2016. The Deputy Ombudsman confirmed that cooperation with relevant authorities on the subject of improving legislation pertaining to the NPMs mandate is not satisfactory.[1289] Little or no headway has been made concerning deinstitutionalization as well. It follows that, large social institutions are not closed and their residents are not enabled to live in the

[1282] Serbian NPM, *Annual Report 2013* (2014), pp. 43–4.
[1283] Serbian NPM, *Annual Report 2013* (2014), 32, 35; Serbian NPM, *Annual Report 2014* (2015), pp. 32–3.
[1284] Serbian NPM, *Annual Report 2013* (2014), p. 32.
[1285] Serbian NPM, *Annual Report 2014* (2015), p. 35.
[1286] Serbian Ombudsman, *Observations on Implementation of CAT in Serbia* (2015), p. 11.
[1287] See Conclusions of the National Assembly of the Republic of Serbia based on a review of the report on activities of the National preventive mechanism for 2013 available in Serbian NPM, *Annual Report 2014* (2015), pp. 79–83.
[1288] *Report on Serbia* (CPT, 24 June 2016), § 65–65.
[1289] M. Jankovic, *Interview with Deputy ombudsman in charge for persons deprived of their liberty* (2016).

community.[1290] Belated reply[1291] to the NPM recommendations set forth in its 2014 report, of the Ministry of Labour, Employment, Veteran and Social Affairs was rather disappointing. Besides restating a few technical improvements, it did not seem convincing either on the process of deinstitutionalization or on the use of coercive measures and isolation in the institutions under its authority.

15.7.7 Summary

The Serbian NPM made 636 recommendations addressing material conditions, food and water, regime, health care and privacy, 155 addressing documentation, medical examination and reporting, medical monitoring of nutrition and cleanness, safeguards and rights upon and during deprivation of liberty, 35 addressing searches handcuffing and restraint and separation of different categories of detainees, 15 dealing with specificities of psychiatric and social institutions and 19 suggesting further training of custodial staff. A number of recommendations issued by the NPM and CPT coincide. In addition to those addressing material conditions and regime, recommendations are similar as regards custody safeguards, medical examination upon placement in detention facility or prison and handing out information on rights in writing. What is more, the NPM conducted several visits with the sole purpose of checking the state of implementation of the CPT's recommendations. However, there are some differences; for example, the NPM did not repeat CPT recommendations on ensuring an effective investigation by the police. Similarly, the NPM, at least to some extent, pays heed to the CtRPD standards while the CPT position towards that issue remains rather conservative. As already noted, there are a number of sensible general and legislative recommendations made by the Serbian NPM. On the other hand, it did not provide more information or suggestions on the practical utility of the three fundamental rights upon arrest. Almost all of the recommendations suggesting carrying out staff training dealt with first aid help. It is hard to imagine that no need for further or continuous training in different fields pertaining to the prohibition of ill-treatment was encountered. The issue of solitary confinement was not addressed at all.

Based on two third of around 910 recommendations replied to, the rate of compliance amounts to 61%, 22% are found to be rejected while the situation concerning 17% is not clear. The rate of real compliance is difficult to establish due to a low number of follow-up visits. However, based on the 224 recommendations followed up (25% of the overall number of recommendations), 50 % were found to be fully implemented, 16 % partially, 27 % not implemented and 7% not clear.

However, there is ample ground to doubt the veracity of determined compliance, both formal and real. Namely, further doubt has been casted on the level of compliance with the Serbian NPM's recommendations by the latest CPT report on Serbia. This report, published in 2016, provides an

[1290] Serbian NPM, *Annual Report 2014* (2015), p. 41.
[1291] Serbian Ministry of Labour, Employment, Veteran and Social Affairs, *Response of the Ministry on the NPM 2014 report.* http://npm.rs/index.php?option=com_content&view=category&layout=blog&id=113&Itemid=117 (12 November 2016).

unfavourable picture of practical worth of both safeguards and material conditions and regime in places of detention. Moreover, in several cases, it was even demonstrated that individual recommendations NPM made to specific establishments, visited by both bodies at different junctures, were in fact not implemented. Admitting, that the CPT, during its stay in Serbia, visited only nine police, six prisons, one psychiatric and one social establishment, its findings, although limited, can point toward trends confirming or disapproving the established rate of compliance.

The main findings of the CPT can be summarized as follows. A number of deficiencies in making use of the three fundamental rights (access to a lawyer, doctor and notification on custody) in practice were identified. These include low quality services bordering with the breach of the professional code of conduct rendered by *ex officio* lawyers, no confidentiality during medical examination or refusal to notify persons of detainee's choice on the fact of his arrest. In addition, several allegations were recorded that written notification on rights was delivered only after the police interrogation was finalised.[1292] Safeguards against ill-treatment in the form of thorough, confidential and prompt medical examination following admission and use of force carried out in line with the Istanbul protocol was, by the CPT, found not to be established. Moreover, instances were recorded where a prison doctor was openly threatened because he insisted on examining prisoners in private.[1293] Deficiencies in maintaining complete and accurate custody records in police establishments were identified as well.[1294]

As to material conditions, despite commending the renovation of certain detention units in police stations and prison wings, the CPT restated an unfavourable picture of detention conditions and did not hesitate to, at times, qualify them as inhuman and or degrading treatment.[1295] Moreover, several inconsistencies can be identified between formal and/or real compliance with the NPM's recommendations, on the one hand and observations made in same institutions by the CPT, on the other. For instance, in 8 out of 9 police establishments visited by the CPT, food was not provided to detainees in line with valid regulations (3 meals per day) despite the fact that the NPM's recommendations to that effect were generally accepted.[1296] Although the recommendation to put one detention room in the police station in Becej out of use was accepted, the CPT established that it was still being used.[1297] Similarly, although the recommendation to improve conditions in detention premises in Ruma police station was accepted in 2013, CPT encountered similar deficiencies in 2015.[1298] While the recommendation to install buzzers in the police station in Srbobran was accepted in 2012, CPT in 2015 concluded that this police station had no such system.[1299] The recommendation to ensure that custody cells in Mladenovac police station are provided with adequate light was accepted, and yet CPT again

[1292] *Report on Serbia* (CPT, 24 June 2016), §§ 24–8.
[1293] *Report on Serbia* (CPT, 24 June 2016), 22, 50, 82.
[1294] *Report on Serbia* (CPT, 24 June 2016), § 29–29.
[1295] *Report on Serbia* (CPT, 24 June 2016), 56, 61, 93.
[1296] *Report on Serbia* (CPT, 24 June 2016), § 35–35.
[1297] *Report on Serbia* (CPT, 24 June 2016), § 33–33.
[1298] *Report on Serbia* (CPT, 24 June 2016), § 32–32.
[1299] *Report on Serbia* (CPT, 24 June 2016), § 32–32.

criticized poor light in the very same cell.[1300] Even when the NPM in a follow-up visit verified compliance with the recommendation to stop with the practice of making prisoners sleep on matrasses placed directly on the floor in Sremska Mitrovica Correctional Institution, two years later the CPT encountered the same practice.[1301] Again, although the management of Veternik social care facility assured the NPM that bed-ridden patients will be transferred from second to the ground floor to enable them to spend time in the fresh air, this was found not to be the case by the CPT.[1302] Lastly, most of the general and legislative recommendations, according to available data were not implemented.

[1300] *Report on Serbia* (CPT, 24 June 2016), § 32–32.
[1301] *Report on Serbia* (CPT, 24 June 2016), § 57–57.
[1302] *Report on Serbia* (CPT, 24 June 2016), § 196–196.

16 Chapter: Country report on Germany

16.1 Introduction

The Federal Republic of Germany is a parliamentary democracy situated in Central and Western Europe. It has a federal structure and is comprised of 16 states plus a central federal level.[1303] After the Second World War, it was divided into four occupation zones which later grow to be the US backed West Germany (Federal Republic of Germany) and USSR dominated East Germany (German Democratic Republic). In the midst of the Cold War the West Germany underwent a profound transformation, reflected not only in strong economic development, but also in confrontation with the atrocities caused by the rule of the Nazi regime (1933-1945). The enactment of the democratic constitution, the so-called Basic Law, in 1949 laid the groundwork for democratic institutions. independent judiciary and respect for human rights. Especially relevant in this regard is the notion of legal state (Rechtsstaat), a German equivalent to the Anglo-Saxon rule of law, which, from a rather formal principle denoting that state affairs should be governed by statutes came to encompass substantive values stipulated in the Basic law.[1304] Germany was established in today's form in 1990 by unification of the two German states. With more than 80 million inhabitants it is the second most populous and economically most advanced state in Europe. It places great worth on upholding the principle of the rule of law and takes pride in its strong independent judiciary. It ratified all relevant international instruments pertaining to the prohibition of ill-treatment.

16.2 An overview of the state of affairs in closed institutions concerning ill-treatment

The CPT thus far conducted eight visits to Germany, the first being in 1991 and the last in 2015. All reports have been published except, as of yet, that addressing the 2015 visit. International visiting bodies continuously reaffirmed that allegations of deliberate ill-treatment or other clues indicating such treatment have been identified neither in police establishments nor in prisons, places where persons are deprived of liberty pending deportation or homes for elderly.[1305] That being said, sporadic claims of

[1303] For basic facts about Germany see BBC, *Germany country profile*. http://www.bbc.com/news/world-europe-17300915 (04 July 2016) or CIA, *The World Factbook: Germany*. https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html (07 July 2016).

[1304] On the notion of Rechtsstaat see, for instance, P. Tiedemann, 'The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now', in J. R. Silkenat (ed.), *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (New York: Springer, 2014), pp. 171–92; D. von der Pfordten, 'On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat', in J. R. Silkenat (ed.), *The legal doctrines of the rule of law and the legal state (Rechtsstaat)* (New York: Springer, 2014), pp. 15–29.

[1305] *Report on Germany* (CPT, 24 July 2014), § 11–11; *Report on Germany* (CPT, 22 February 2012), 14, 35, 51; *Report on Germany* (CPT, 18 April 2007), 14, 47, 68, 85, 108; *Report on Germany* (CPT, 12 March 2003), 15, 52, 88, 154; *Report on Germany* (Working Group on Arbitrary Detention, 23 February 2012).

rough treatment have been voiced by the patients residing in psychiatric hospitals.[1306] Moreover, allegations of excessive use of force by the police officers, such as striking individuals after they have been put under control, tight handcuffing etc.[1307] and inter-prisoner violence,[1308] have been appearing more regularly. The same goes for verbal abuse and addressing persons deprived of freedom in undignified or even racist manner.[1309] On the other hand, the HRC did express concern as regards allegations of ill-treatment carried out by police and prison officers.[1310]

All things considered, it can be concluded that inflicting pain with the classical purpose of torture (extracting confessions or information from persons suspected of having committed a criminal offence) is in Germany—if not ruled out—at least uncommon. The well-known case, which found its way to the ECtHR (Gäfgen v. Germany[1311]) where police officers threatened a child abductor with torture in order to extract information on whereabouts of the child in an attempt to save his life can thus be considered an exception. All in all, Germany was found responsible for the violation of prohibition of ill-treatment under the ECHR only three times. In addition to the above-referred case, the second violation was found on account of keeping a prisoner in a secure room without clothing for seven days (Hellig v. Germany)[1312] while the third due to the use of an aggressive non-consensual medical intervention to retrieve bags with drugs that the applicant swallowed shortly prior to his arrest. (Jalloh v. Germany).[1313]

The CtAT noticed that the criminal offence proscribing the act of torture stipulated in the general criminal code is not in line with the definition of torture specified in CAT article 1.[1314] Attention was drawn to the lack of awareness of external complaint procedures as well as independent investigations into alleged police misconduct.[1315] German authorities, on their part, offered assurances that the execution of investigative measures into alleged ill-treatment are not being delegated to units whose members were reportedly involved in carrying out such acts. However, the outcome of such investigations (how many state officials were indicted, found guilty and type of sentence rendered) is not easily discernible as official data is missing.[1316] As only a few states require police officers to wear

[1306] *Report on Germany* (CPT, 18 April 2007), § 156–156; *Report on Germany* (CPT, 12 March 2003), § 123–123.
[1307] *Report on Germany* (CPT, 22 February 2012), § 14–14; *Report on Germany* (CPT, 18 April 2007), § 14–14; *Report on Germany* (CPT, 12 March 2003), § 15–15.
[1308] *Report on Germany* (CPT, 22 February 2012), § 52–52; *Report on Germany* (CPT, 18 April 2007), § 109–109; *Report on Germany* (CPT, 12 March 2003), § 91–91.
[1309] *Report on Germany* (CPT, 18 April 2007), 14, 47, 108.
[1310] *Concluding Observations on Germany* (HRC, 12 November 2012), § 10–10.
[1311] *Gäfgen v. Germany* (ECtHR, 01 June 2010).
[1312] *Hellig v. Germany* (ECtHR, 07 July 2011).
[1313] *Jalloh v. Germany* (ECtHR, 11 July 2006).
[1314] *Concluding observations on Germany* (CtAT, 12 December 2011), § 9–9.
[1315] *Concluding observations on Germany* (CtAT, 12 December 2011), §§ 18–9; *Concluding Observations on Germany* (HRC, 12 November 2012), § 10–10.
[1316] As to the issue of impunity, it is far from clear whether any police officials were adequately punished in disciplinary and criminal proceedings for ill-treating. At the request of the CPT, German federal government provided a summary of available statistic data from 2009 to 2010 of different lander and at the federal level with reference to criminal offences falling under the scope of ill-treatment. With the reservation that data are incomplete and not easy to grasp, one can conclude that only few are actually sentenced under criminal procedure while sentences rendered were not specified, see *Response of Germany to the CPT report on its 2010 visit to Germany* (German Government), pp. 6–15; The disparity between the number of criminal proceedings dealing with police violence on the one hand, and convictions on the other, has been noted. See *Report on the Follow-up mission to Germany* (Working Group on Arbitrary Detention, 10 July 2015); CtAT commenting on the lack of relevant data called state authorities to provide information on "*complaints, investigations, prosecutions and convictions of*

identification badges while on duty, the HRC, CPT and CtAT stressed the importance of introducing this safeguard across the board.[1317]

As to the observance of the three basic guarantees and information on rights upon deprivation of liberty, the CPT delegation received some allegations that detainees were not informed of their rights and even denied access to a lawyer and the notification of a third person from the outset of deprivation of liberty.[1318] Moreover, the CPT has continually disapproved of the German regulation according too much discretion to police officers in deciding whether and when to allow a detainee to inform a third person of his detention and the absence of the right to have a lawyer present during police questioning.[1319] The CPT found material conditions in police custody satisfactory for a short-term stay though it did criticize the lack of matrasses in some of the establishments visited.[1320] Lack of sleeping arrangements for those deprived of liberty at airports was also found inadequate.[1321] It preferred the use of regular means of restraint in police stations and prisons to practice of immobilizing the entire body (fixation), which is to be applied only in medical setting and subject to strong safeguards (detailed records, continuous supervision during the entire duration).[1322]

Although the resort to special security measures of prohibition of outdoor exercise have been detected only sporadically, the CPT repeated that envisaging such measure in federal and state legislation is incompatible with obligations stemming from the prohibition of ill-treatment and should, thus, be abolished.[1323] The CPT recommended terminating the use of surgical castration of sex offenders, as despite strong safeguards, among which explicit request of the candidate, this procedure "*could easily be considered as amounting to degrading treatment*".[1324] The CPT expressed a strong reservation towards holding migrants pending deportation in a prison-like setting and under the same conditions as sentenced prisoners or those on remand. It underscored that subjecting juvenile migrants to such conditions is especially unacceptable.[1325] The regulation and implementation of the so-called preventive detention by means of which those considered a danger to the society could be kept confined indefinitely, regularly came under the scrutiny of monitoring bodies.[1326] The CPT also found—albeit

cases of torture and ill-treatment by law enforcement, security, military and prison personnel, trafficking, domestic and sexual violence, crimes with racist motives, and on means of redress". See *Concluding observations on Germany* (CtAT, 12 December 2011), § 33–33.

[1317] *Concluding observations on Germany* (CtAT, 12 December 2011), § 30–30; *Report on Germany* (CPT, 22 February 2012), § 17–17; *Concluding Observations on Germany* (HRC, 12 November 2012), § 10–10; *Report on the Follow-up mission to Germany* (Working Group on Arbitrary Detention, 10 July 2015), §§ 16–7.

[1318] *Report on Germany* (CPT, 22 February 2012), § 19–19.

[1319] *Report on Germany* (CPT, 22 February 2012), §§ 20–1.

[1320] *Report on Germany* (CPT, 22 February 2012), § 27–27.

[1321] *Report on Germany* (CPT, 22 February 2012), § 28–28.

[1322] *Report on Germany* (CPT, 22 February 2012), § 29–29; *Report on Germany* (CPT, 24 July 2014), §§ 42–4; *Concluding observations on Germany* (CtAT, 12 December 2011), § 16–16.

[1323] *Report on Germany* (CPT, 22 February 2012), § 86–86; *Report on Germany* (CPT, 24 July 2014), 40, 48.

[1324] *Report on Germany* (CPT, 22 February 2012), §§ 144–5; *Report on Germany* (CPT, 24 July 2014), § 51–51.

[1325] *Report on Germany* (CPT, 22 February 2012), §§ 33–4.

[1326] *Concluding Observations on Germany* (HRC, 12 November 2012), § 14–14; *Concluding observations on Germany* (CtAT, 12 December 2011), § 17–17; *Report on Germany* (CPT, 22 February 2012), §§ 99–114; *Report on Germany* (CPT, 24 July 2014), §§ 7–39.

on one occasion only—that prisoners are being tied to the bed when residing in external medical facilities and that, in these cases, medical examinations are conducted in presence of police officers.[1327]

Concerning psychiatric institutions, the HRC criticized the inadequate use of means of restrains in residential homes on persons suffering from dementia (tied to a bed or kept behind closed doors).[1328] It also stressed that one hour of outdoor exercise should, if the state of health of patients allows it, be always respected. Moreover, the CPT made clear that the legislation allowing such restrictions on security grounds should be brought in line with international standards.[1329] On one occasion it noted that the practice of handcuffing patients in medical institutions is inacceptable and should thus be immediately discontinued.[1330] Besides looking at accommodation, therapy, use of medication, means of restraint etc., the CPT placed an emphasis on the legality of their placement in the institutions; that is to say, whether all safeguards have been respected. Although it found instances where voluntary nature of patients stay has not been properly documented, the situation regarding this aspect was on the whole satisfactory.[1331] However, institutionalization and involuntary treatment, if deemed necessary by medical professionals, has not been challenged as such and remains widespread in Germany.[1332] The CtRPD called Germany to prohibit involuntary placement and forced treatment in its entirety[1333] and to recognize physical and chemical restraint and solitary confinement as acts of torture and discontinue its use.[1334] What is more, despite reference to supported decision making in the relevant legislation, the right of persons with psychosocial and/or intellectual disabilities to make decisions affecting their lives remains, for the most part, illusory.[1335] Although the German government saw no reason to reform the legislation regulating guardianship, the CtRPD, German Institute for Human Rights and Alliance of German NGOs on the CRPD are of the other opinion.[1336]

[1327] *Report on Germany* (CPT, 22 February 2012), § 43–43.
[1328] *Concluding Observations on Germany* (HRC, 12 November 2012), § 15–15.
[1329] *Report on Germany* (CPT, 22 February 2012), § 133–133; *Report on Germany* (CPT, 18 April 2007), 161, 163.
[1330] *Report on Germany* (CPT, 12 March 2003), §§ 134–5.
[1331] *Report on Germany* (CPT, 18 April 2007), 178–183.
[1332] German Institute for Human Rights, *Parallel Report to the UN Committee on the Rights of Persons with Disabilities in the context of the examination of the Initial Report of Germany under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (2015), § 99–99; BRK-Allianz, *For Independent Living, Equal Rights, Accessibility and Inclusion!: First Civil Society Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Germany* (2013), 34-35, 41-42.
[1333] *Concluding observations on the initial report of Germany* 115 (CtRPD, 13 May 2015), 30, 38b.
[1334] *Concluding observations on the initial report of Germany* 115 (CtRPD, 13 May 2015), §§ 33–4.
[1335] German Institute for Human Rights, *Parallel Report to the UN Committee on the Rights of Persons with Disabilities in the context of the examination of the Initial Report of Germany under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (2015), § 81–81; BRK-Allianz, *For Independent Living, Equal Rights, Accessibility and Inclusion!: First Civil Society Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Germany* (2013), p. 32.
[1336] *Concluding observations on the initial report of Germany* 115 (CtRPD, 13 May 2015), §§ 25–6; German Institute for Human Rights, *Parallel Report to the UN Committee on the Rights of Persons with Disabilities in the context of the examination of the Initial Report of Germany under Article 35 of the UN Convention on the Rights of Persons with Disabilities* (2015), § 83–83; BRK-Allianz, *For Independent Living, Equal Rights, Accessibility and Inclusion!: First Civil Society Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Germany* (2013), p. 33.

16.3 The German NPM: designation and main characteristics

The establishment and designation of the NPM of Germany will be briefly outlined in what follows. Germany signed the OPCAT on 20 September 2006 and ratified it on 4 December 2008. Shortly before ratification, the German parliament passed an act of assent envisaging the formation of two bodies, one on the federal and the other on the state level, which together constitute the German NPM: the National Agency for the Prevention of Torture (NA). This act was followed by the *Administrative Order of the Federal Ministry of Justice* creating the Federal Agency for the Prevention of Torture, which commenced with implementing its mandate on 1 May 2009. On 25th of June 2009 the interstate agreement on creating a Joint Commission of the States was signed and entered into force on 1 September 2010.[1337] On 8 November 2010, the SPT was notified that the German NPM was established comprising of two distinct bodies. Namely, the Federal Agency, responsible for places of detention on the federal level (detention facilities under the responsibility of the Federal Armed Forces, Federal Police, Customs Administration), and the Joint Commission of the States, in charge of places of detention under competency of the 16 German federal states (institutions for execution of criminal sanctions and effectuating measure of pre-trial or detention pending trial, police stations, psychiatric hospitals, places of detention where those awaiting deportation are held, nursing and homes for the elderly, youth etc.). Day to day running of both bodies is supported by the standing Secretariat established under the auspices of the Centre for Criminology in Wiesbaden, which also serves as the NA's official seat.[1338]

Functioning and the modes of collaboration between the two bodies forming the National Agency are regulated in more detail by the *Administrative agreement on the National Agency for the Prevention of Torture in accordance with the Optional Protocol of 18 December 2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and *Rules of procedure of the National Agency for the Prevention of Torture*. Both Federal Agency and Joint Commission outlined main contours of the methodology they utilize in carrying out their activities in the *Guidelines for the work of the Federal Agency* and *Rules of procedure of the Joint Commission for the Prevention of Torture* respectively. Up to the moment of completion of this thesis, the National Agency published five reports covering activities implemented in the following periods: 2009-2010; 2010-2011; 2012; 2013; 2014.

[1337] German NPM, *Annual Report 2014* (2015), p. 77.
[1338] German NPM, *Annual report 2010/11* p. 13.

16.4 The NPM met conditions considered necessary for effective discharge of its mandate

16.4.1 It is formally independent

Although the formation and competencies of the two bodies constituting the NA are for the most part set out in acts decreed by the executive, the ratification bill specifying the NA's basic structure is passed by the Federal parliament. Therefore, it is to be concluded that, on balance, the German NPM is established by law. In addition, the NA's members are not subject to receive instructions or abide by orders of any other government authority. Members of the Federal Agency are appointed by the *Joint Agreement of the Federal Ministries of Justice, Interior and Defence*. Those active in the Joint Commission are appointed by the *Conference of the State's Justice Ministers* for a 4-year term of office. Persons acting as members of both bodies serve on a honorary basis, are independent and not subject to instruction or control from the appointing or any other authority in implementing their mandate. The security of tenure is ensured by the reference to the relevant provisions of the *German Judiciary Act*.[1339]

In addition, when there is suspicion of partiality, a member will not participate in the visit or will abstain from voting.[1340] In practice, this clause serves to prevent any NA member from conducting visits to institutions located in the federal state in which they reside.[1341] However, the fact that the appointment procedure rests solely in the hands of the executive branch of government has been subjected to criticism. Namely, the GIHR pointed out that, in order to ensure transparency of the appointing process and strengthen independence and diversity of NA membership, candidates should, following a public call, be selected by a body consisting of both state and NGO representatives.[1342] It appears however that not much thought was given to this suggestion by the authorities. Furthermore, even though the NA and civil society organizations are not completely alienated, relations between them are rather formal. Namely, their collaboration comes down to attending different events such as seminars and lectures where opinions on certain matters are being exchanged. However, closer cooperation including, for instance, coordination of visits or carrying out of visits jointly, does not take place.[1343]

[1339] Organisational Decree of the Federal Ministry of Justice of 20 November 2008 and State Treaty on the Establishment of a National Mechanism of all the Länder in accordance with Article 3 of the Optional Protocol of 18 December 2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 25 June 2009, both available in German NPM, *Annual Report 2013* (2014), pp. 110–3.

[1340] Rules of procedure of the National Agency for the Prevention of Torture, available in German NPM, *Annual Report 2013* (2014), pp. 117–9.

[1341] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

[1342] See P. Follmar-Otto, *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!: Zur völkerrechtskonformen Ausgestaltung und Ausstattung*, Policy paper / Deutsches Institut für Menschenrechte (Berlin: Dt. Inst. für Menschenrechte, 2013), vol. 20, p. 16.

[1343] P. Dr. Follmar-Otto, *Interview with the Head of Unit Human Rights Policies Germany/Europe of the German Institute for Human Rights* (21 March 2016).

16.4.2 It is adequately staffed, resourced and has access to expertize

Members can freely plan and conduct activities, employ staff and engage experts of their choosing though within the boundaries of the allocated budget.[1344] In practice, although the NA made use of expert services, it currently relies on expertise of its members and research assistants only.[1345] Budget, initially 300 000 and from 2015 540 000 euros annually, is secured through contributions of the Federal (one third) and state governments (two thirds).[1346]

The original number of persons appointed as members of the Federal Agency and Joint Commission was extended from one member in case of the former and four of the latter to two and eight respectively. Their professional backgrounds differ to encompass those coming from state administration, law enforcement and corrections (including three retired directors of correctional institutions and one retired senior police officer), two psychologists and one medical doctor with a specialization in psychiatry. Being engaged on a honorary basis, they are not dedicated full time to NPM activities. A rough estimate is that, in addition to the time spent on conducting visits, they commit around five hours per week to NPM activities.[1347] The secretariat was additionally staffed as well and at present counts six research and two administrative assistants. Out of these six research assistants, there are three lawyer positions: one is specialized in international human rights law and has a full contract, while the other two hold 60% positions and are specialized in European and administrative law respectively. In addition, there are two medical positions; one, a professional medical educator with a focus on geriatrics, holds a full-time position while the other 50 % position, is held by a nursing educator. Finally, the sixth research assistant has a background in political sciences and holds a 60% position. Therefore, in reality NPM operates with only 4,3 full time research positions. None of the research assistants underwent special training or education organized by the National Agency. In addition, one person managing the office is working full-time while the other is on 20% (one day per week).[1348]

Whilst the NA has occasionally availed itself of external expertise, mostly psychiatric, at present it engages only translators when need for their services arises. This is because it considers that enlarged membership and staff can cover all the relevant fields of expertise and thus no additional engagement is called for.[1349]

[1344] Administrative agreement on the National Agency for the Prevention of Torture sections 2, 4 available in German NPM, *Annual Report 2013* (2014), pp. 114–6.
[1345] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1346] See Administrative agreement on the National Agency for the Prevention of Torture section 3, available in German NPM, *Annual Report 2013* (2014), pp. 114–6.
[1347] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1348] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1349] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

The National Agency, by making use of the outlined human, logistical and financial resources, ought to ensure regular monitoring of around 13 000 places where persons deprived of their liberty are or may be held. More precisely, although the data available in annual reports and other relevant documents slightly differ, it seems that there are at least 280 places of detention at the federal level under the authority of federal police, armed forces and custom authority. The number of places of detention under competency of the states goes up to 13 000 and includes 186 prisons, around 1.430 police stations, more than 300 psychiatric hospitals, courts equipped with detention cells, seven facilities for holding those awaiting deportation, 27 child and youth facilities and approximately 10.900 care and nursing homes for the elderly. In sum, there are around 11 000 homes for the elderly and 2230 of other places of detention.[1350] Obviously, a considerable discrepancy persists between the human, financial and logistical resources put at the NA's disposal and the extent of activities to be carried out if the NA is to meet its mandate. The GIHR suggested a range of measures aimed at enhancing the NA's capacity such as rising the NA budget to 900 000 immediately and effecting further increase in four years. Moreover, it proposed increasing the number of members to 19, reviewing the viability of having members act on honourable basis only, more transparent and inclusive members appointing procedure etc.[1351] Finally, the NA itself is aware of these shortcomings as it has been stated that

> "*In order to even come close to complying with the requirements of the Optional Protocol, the Commission of the Länder would need at least 16 honorary members. Such a significant expansion of the number of honorary members would then however also entail a considerable increase in the number of staff at the secretariat in Wiesbaden.*"[1352]

16.4.3 It is accorded prerogatives necessary for implementation of its mandate

The NA is endowed with all the powers envisaged by the OPCAT, it is authorized to carry out visits to all places of detention without any restrictions and limitations such as prior notification,[1353] to have access to relevant information and documentation and conduct private interviews with persons deprived of their liberty. No pattern of obstructing NA's members and staff in making use of these competencies in practice could be discerned from the reports and interviews. However on at least one occasion the

[1350] German NPM, *Annual Report 2014* (2015), p. 10.
[1351] See P. Follmar-Otto, *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!: Zur völkerrechtskonformen Ausgestaltung und Ausstattung*, Policy paper / Deutsches Institut für Menschenrechte (Berlin: Dt. Inst. für Menschenrechte, 2013), vol. 20, pp. 16–7.
[1352] German NPM, *Annual report 2010/11* p. 14.
[1353] Rules of procedure of the Joint Commission for the Prevention of Torture in section 8 envisages the following: "*Implementation of the inspection visits (1) Visits may take place both announced and unannounced*"; Guidelines for the work of the Federal Agency, in section 1.2 "*Implementation of the objectives As the national mechanism for the prevention of torture within the meaning of OPCAT, the Federal Agency is to carry out the following tasks: - to visit places where people are deprived of their liberty in the responsibility of the Federation, regularly and unannounced*" and in section 3.1 "*Announcement of the visit Visits to detention facilities (depending on the facility) shall either be carried out unannounced or with 12-24 hours' advance notice. To this end, contact shall initially be established with the agreed contact in the Federal Ministry of the Interior or of Defence. Direct contact is then established with the respective head of the facility. In smaller facilities in particular, an unannounced visit can be carried out with no advance notice. Where possible, several unannounced visits should also be carried out in a period under review. Where visits are announced, initial information should be requested on current occupancy, coming deportations, as well as further details that are necessary for preparation (such as whether an interpreter is needed)*". Both documents are available in German NPM, *Annual Report 2012* (2013), pp. 126–37.

NA had to suspend an unannounced night visit as access was allowed one hour after arrival.[1354] Similarly, immediate access to files was once denied.[1355] Moreover, for making insight into complaints against the police, the NA had to submit a query to the prosecution office.[1356] However, private institutions with no central authority such as homes for the elderly and psychiatric hospitals potentially pose the greatest challenge regarding access because their staff is usually unaware of the NA and its mandate.[1357]

According to the OPCAT, the NA is empowered to visit all places where persons are or may be deprived of liberty. This wide formulation ought to enable NPMs to enter a wide range of institutions.[1358] Besides institutions in which preventive bodies operate (prisons, police stations, psychiatric hospitals, social care homes etc.), the NA included homes for the elderly. On the other hand, it did not include reception centres for asylum seekers. Prompted by several incidents where personnel of the private security agencies mistreated asylum seekers, the NA inquired with each state whether asylum seekers accommodated in reception centres are deprived of their liberty. Results of this inquiry did not lead to reconsideration of the position that asylum centres are not places of detention.[1359] The reason to this seems to be grounded in a perception that asylum seekers are not obliged to actually reside in reception centres as they may—in theory at least— live elsewhere and just occasionally collect their post from the reception centre.[1360] This view was criticized as being too formalistic and against the idea of the OPCAT as

> "*you may have broad areas where you have no legal bases for restriction of liberty but where it happens in fact, where the same mechanisms of power and control exist that are favourable to ill-treatment*".[1361]

What regards access to medical files, since the NA up until 2015 did not have a medical doctor among its members, a review of medical files was not practiced.[1362] This is a rather big deficiency as without a medical doctor and access to medical files neither the triangulation method nor forensic medical examination of potential victims of ill-treatment could be properly utilized.

[1354] Visit to Konstanz police station carried out on 31 May 2013. See German NPM, *Annual Report 2013* (2014), p. 74.
[1355] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 26–26.
[1356] German NPM, *Annual report 2010/11* p. 74.
[1357] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1358] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.4. Competencies.
[1359] German NPM, *Annual Report 2014* (2015), pp. 10–1.
[1360] As to powers of security guards at the asylum centres NA held that "*obviously the security guards have the possibility to detain people but ... under the general regulations ... if they are posing an immediate danger to others. .... Our line of thought was if we would check all places where someone may be detained under the general criminal law of emergency you would have to go, for example, at department stores and check offices of store detectives, you would have to go to schools etc.*" J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1361] P. Dr. Follmar-Otto, *Interview with the Head of Unit Human Rights Policies Germany/Europe of the German Institute for Human Rights* (21 March 2016) Also NA member Osterfeld does not agree with the decision not to visit reception centres for asylum seekers M. Osterfeld, *Interview with the member of the National Agency for the Prevention of Torture* (18 March 2016).
[1362] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

16.4.4 It makes use of relevant international standards

In conducting its mandate, the NA makes use of both international and German law. While in the first reports the NA indicated that valid German law and jurisprudence have predominance,[1363] in those that followed it brought international treaties to the fore.[1364] It also indicated that it draws on national and international jurisprudence and practice of the CPT and SPT. Applying German law and jurisprudence seems sensible as long as its application does not erode higher standards established on the international plane.[1365] The rationale behind calling upon the German law is that, as institutions are accustomed to the German legal system, citing German law or jurisprudence increases the likelihood of compliance. International standards are used to fill the gaps in national regulation by addressing questions still not dealt with at the national level. However, in case of divergence between national and international law predominance would be given to the latter, since the NA sees its task as ensuring that "*international legislation is being respected in Germany*".[1366]

Moreover, the NA established its internal list of standards and benchmarks to be used during visits, mostly reflecting positions of national and international bodies. A summary of standards on particular issues is being published annually from 2013 onwards. It even developed its own standards such as that obliging prison and police officers to knock on the cell door before they use a peephole in order to respect prisoner's privacy. Similarly, it decided to recommend informing those taken into police custody, in addition to the three fundamental rights, of their right to legally challenge the conditions of detention.[1367] The German NPM is aware of standards addressing position of persons with psychosocial and/or intellectual disabilities embodied in the CRPD, but is not taking them as a reference point in assessing positions of persons held in health and social institutions. Reason to this is that the NPM considers implementation of the the CRPD as falling outside of its mandate. On the other hand, these standards might come into play if their disregard encroaches upon human dignity of persons with psychosocial and/or intellectual disabilities, as this notion is considered central to the NA's mandate.[1368]

[1363] "*The National Agency applies above all valid German law, the case-law of the Federal Constitutional Court and that of the Federal and Higher Regional Courts when carrying out its visits. Furthermore, where appropriate the National Agency includes international agreements relevant to its remit, as well as international case-law including that of the European Court of Human Rights. Equally, it includes the recommendations of the Subcommittee on the prevention of torture and of the European Committee for the Prevention of Torture (CPT), in its decision-making".* German NPM, *Annual report 2010/11* p. 15.

[1364] "*The National Agency conducts its visits on the basis of international treaties and German law. In addition, it draws on the established practice of the Federal Constitutional Court, of the federal supreme courts and higher regional courts, as well as on international case law, including that of the European Court of Human Rights. It also incorporates the recommendations of the SPT and of the CPT into its assessments".* German NPM, *Annual Report 2014* (2015), p. 14.

[1365] P. Follmar-Otto, *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!: Zur völkerrechtskonformen Ausgestaltung und Ausstattung*, Policy paper / Deutsches Institut für Menschenrechte (Berlin: Dt. Inst. für Menschenrechte, 2013), vol. 20, pp. 14–5.

[1366] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

[1367] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

[1368] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

16.4.5 Summary

The German NPM consists of two bodies entrusted with monitoring places of detention under federal and state jurisdiction respectively. The NA and its constitutive parts are grounded in an act with the strength of law and further specified in three different instruments. The NA's members are serving on a honorary basis and are appointed by common accord of ministries on federal and state level respectively. Most of the individuals actually appointed come from the ranks of acting or retired public officials.

Although the number of members, staff and funding were somewhat increased in comparison to that originally envisaged, considering the number of places of detention falling under the NPM remit, the NA remains grossly underfunded and understaffed. The secretariat consists of only 5,5 full time positions (4,3 research and 1,2 administrative full time positions). Especially worrisome is the shortage of medical doctors as among the members there is one psychiatrist only and staff includes two nursing educators. As the German NPM has ended with the practice of engaging experts for visits, it is uncertain whether the medical part of visits can be adequately covered. This is especially true as regards medical experts with specialization in forensics.

As to the powers, the relevant regulation refers to OPCAT articles 19 and 20, which enumerate the power of NPMs. The right to conduct unannounced visits was therefore not envisaged in these acts but set out in an internal regulation. On the whole, however, it appears that basic powers, including that warranting unannounced visiting, has not been brought into question. Although it prefers referring to the national legislation so as to improve compliance, it appears that the NPM is principally guided by international standards. However, the NPM does not consider itself an authority called to implement standards set out in the CRPD. While it is clear that the GIHR was designated to monitor the CRPD's implementation, this fact does not prevent other actors, national or international, to draw on the CRPD as Germany, being a full-fledged state party, is bound to give full effect to its provisions. It follows that as there are no legal obstacles for making use of the CRPD standards, rejecting to do so is ultimately a choice of its members.

16.5 The NPM managed to generate a deterrent effect

16.5.1 Frequency of visits

The work of the NA commenced with activities of the Federal Agency only, which in the period between 2009 and 2010 carried out four visits to police stations and two to facilities of armed forces, totalling thus to six visits. In the course of the period between 1 May 2010 and 31 December 2011, the NA visited 42 facilities. The Federal Agency carried out visits to 17 police stations, five to facilities of armed forces and two to custom offices, totalling thus 24 places of detention visited. The Joint Commission inspected seven prisons, eight police stations, two psychiatric hospitals and one facility

for detention pending deportation, amounting in total to 18. During 2012, the NA visited 45 facilities out of which the Federal Agency visited 19 police stations and five locations of armed forces, amounting to 24 visits in total. The Joint Commission visited nine prisons, seven police stations, one psychiatric hospital, three child and youth welfare institutions and a detention cell in a court, amounting to 21 objects visited. In the course of 2013, the NA visited 36 facilities paying particular attention to custody pending deportation and forced return through air. The Federal Agency visited 12 police, one custom and five facilities of the armed forces and accompanied two forced return measures, amounting to 18 objects. The Joint Commission visited 8 pre-deportation objects, four police stations, two prisons, one detention cell in the court, and three institutions where youth are accommodated. During 2014, the NA visited 58 facilities while focusing on youth detention centers. The Federal Agency carried out visits to 20 police stations and three custom service facilities. The Joint Commission on its part visited 22 youth detention centers, two prisons, four police stations, six facilities holding those awaiting deportation and one youth welfare facility. Finally, in 2015 55 institutions were visited. The Federal Agency visited 16 police facilities and one deportation, one military detention facility and one ship of the custom service. The Joint Commission visited five prisons, 12 police establishments, 12 juvenile prisons and other institutions where juveniles or young adults are held, one psychiatric hospital, three geriatric homes, two youth homes and one facility where those awaiting deportation are held.

Therefore, the NA during seven years of its existence carried out 242 visits to places of detention, which in average amounts to 34 visits per year. Even with assuming that the number of visits would reach 100 per year, it turns out that the NA would need 130 years to visit all places where persons are or may be deprived of liberty in Germany only once, provided that it does not conduct any follow-up visits. NA itself noted that it would need to conduct around 1 300 visits per year in order to visit every place of detention once in ten years.[1369] If one takes into consideration the fact that the Joint Commission became active only in the second half of the second year of the NA's existence, usual complications related to setting up and running a new body and subsequent increase of members, staff and budget from 2015, one cannot but conclude that it is still a rather poor performance, at least as far as frequency of visits is concerned. In addition, the NA does not include reception centres for asylum seekers, which, although not places of detention, could fall under the scope of its activities. On the other hand, the NA, being well aware that it cannot reach the desired frequency of visits, employs an approach based on thematic focus on certain areas during one reporting year. Thus, it has up until now visited all places of detention where persons pending deportation are held, short-term youth detention facilities, youth prisons and in 2016 it plans to focus on women in detention.[1370] It also emphasizes that it expects that state authorities on federal and state level implement its recommendations across the board thus saving the NA the trouble of visiting each and every institution on a regular basis. However, the NA is aware

[1369] German NPM, *Annual Report 2012* (2013), p. 7.
[1370] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

that this approach is promising only in respect of rather technical issues affecting all institutions such as video surveillance or issues of peep holes. It is much more questionable whether it can be effective in preventing excesses stemming from deliberate abuse or disrespect of clearly guaranteed rights.[1371] All things considered, it appears that the number of visits remains a matter of concern.

NA's members, carry out a provisional selection of the institutions that are to be visited at the start of every calendar year. While doing so, they are guided by the following criteria: diversity, size and location of institutions, possible problem areas which are in turn identified via information gathered from persons deprived of liberty, their families, other citizens, NGOs, media coverage or reports of other, national or international, inspecting bodies. The geographical position of a particular institution also plays a certain role.[1372] The Federal Agency added that it also takes into account recorded incidents in the recent past taking place in different institutions as well as the need to avoid duplication of work with other visiting bodies.[1373] On the other hand, as regards prisons and police stations as most visited type of institutions thus far, the NA does not consider that ill-treatment could take place in some institutions more likely than in others and does not make this kind of differentiation. This approach, however, does not exclude that this may not be the case regarding psychiatric hospitals and elderly people homes as persons deprived of liberty therein could be in a more vulnerable situation rendering active defence of their rights more troublesome.[1374] In practice however only a few institutions were visited twice as the focus is being put on carrying out initial visits.

16.5.2 Announcement of visits

Relevant documents of both bodies make clear that they are free to conduct visits with or without prior notification and that the final decision rests with them alone. The National Agency noted that this decision is being made on a case by case basis by taking into account the following factors: "*typical frequency of detentions in the facility, the aim of the visit and the added value of an announcement in a specific case (e.g. the possibility to talk to staff council representatives)*".[1375] It is the visiting team that, after considering all previously gathered information on the place of detention that is to be visited, makes this choice.[1376] Nevertheless, it transpires that the Federal Agency normally announces visits less

[1371] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1372] German NPM, *Annual Report 2014* (2015), p. 14; German NPM, *Annual Report 2012* (2013), p. 19; German NPM, *Annual report 2010/11* p. 15; *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), p. 17; see also section 6 para. 2 of the Rules of procedure of the Joint Commission for the Prevention of Torture available in German NPM, *Annual Report 2012* (2013), pp. 126–31.
[1373] Guidelines for the work of the Federal Agency para 2.1 and 6.2, available in German NPM, *Annual Report 2012* (2013), pp. 132–7.
[1374] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1375] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 1–1.
[1376] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

than 24 hours in advance while the Joint Commission does so 30 minutes before an actual visit.[1377] The Federal Agency justified its practice of announcing visits by noting that due to the relatively seldom resort to deprivation of liberty by state bodies under its competence, there is a "*limited probability in encountering persons in detention*".[1378] Accordingly, it prefers an approach ensuring the presence of relevant interlocutors in institutions. The Joint Commission, on the other hand, clarified that short-term announcements are to accelerate the entrance of the visiting team into the facility.[1379] However, this practice has been changed, as visits are currently either announced a day earlier or unannounced.[1380]

In spite of this general trend, the Federal Agency noted that it considers unannounced visit preferable in smaller places of detention while the Joint Commission remarked that it sometimes conducts unannounced visits to police stations or prisons, also at night and weekends. Finally, although the NA's reports regularly indicate that unannounced visits, including those carried out at night or during weekends, are being occasionally conducted,[1381] an official breakdown of exact numbers of such visits is not available. Examination of the annual and visit reports available online reveals the following picture.

The NA commenced with carrying out unannounced visits by paying a night visit to 3 police units in 2012.[1382] Two further unannounced night visits took place in 2013[1383] and at least 4 (out of which 3 were conducted during night-time) ensued in 2015. Although the NA indicated that out of 4 visits to police units made in 2014 some were unannounced,[1384] it did not provide further detail but only specified that the visit to one of them (Chemnitz North East Police Station) was announced.[1385] Therefore, from the commencement of its activities up until the end of 2015, the NA conducted at least 10 unannounced visits to police stations out of which 8 were carried out at night. As elderly people's homes are not acquainted with the NA mandate, all visits to these institutions thus far were announced to facilitate entrance.[1386] However, there are no indications in the reports that unannounced visits were paid to institutions other than police stations.

On a more general note, the NA's rationale, based on its experience as well as that of the CPT, for favouring announced visits is twofold. On the one hand, given that material conditions in institutions are mostly satisfactory, it came to realize that detaining authorities are not trying to distort the picture of detention conditions prior to their arrival. On the other hand, no complaints alleging deliberate ill-

[1377] German NPM, *Annual Report 2012* (2013), p. 19.
[1378] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 29–29.
[1379] German NPM, *Annual Report 2012* (2013), p. 19.
[1380] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1381] German NPM, *Annual Report 2012* (2013), p. 19; German NPM, *Annual Report 2013* (2014), p. 18; German NPM, *Annual Report 2014* (2015), p. 14.
[1382] German NPM, *Annual Report 2012* (2013), p. 64; German NPM, *Annual Report 2013* (2014), p. 71.
[1383] German NPM, *Annual Report 2013* (2014), p. 74.
[1384] German NPM, *Annual Report 2014* (2015), p. 47.
[1385] German NPM, *Annual Report 2014* (2015), p. 52.
[1386] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

treatment were ever received.[1387] The head of the Federal Agency has explicitly voiced the defence of this position as follows:

> "*In the past, the Federal Agency announced each of its visits one day before arrival in order to ensure that the relevant contact persons could be available and that access could be unhindered. All the author's experience shows that announced visits in Germany do not generally cause the time before arrival on the spot (always much shorter than 24 hours) to be used build a Potemkin village. We are ultimately neither in Eastern Europe nor in Asia, where the author has several times experienced the smell of fresh paint in prison detention areas when visits had been announced, leading one to presume that these facilities had been quickly re-decorated before the visit by the foreign delegation*".[1388]

Bearing this in mind, the NA places emphasis on gaining better insight into practices, ensuring access to relevant interlocutors, such as medical doctors, and more quality information which, in turn, are more easily obtainable with visits being notified in advance. In addition, it resorts to unannounced visits under specific circumstances. Namely, it conducts one announced visit to a police establishment and after it receives assurances from the superior authority that their recommendations were complied with not only in that particular institutions but across the board, it carries out unannounced visits to another police station under the same authority in order to examine the veracity of such assurances.[1389]

While it is not to be denied that the number of unannounced visits carried out yearly by the NA is gradually increasing, most, if not all, of the institutions visited without prior notice were police establishments. However, the beneficial effect of unannounced visits is not limited only to persons in police custody.[1390] All things considered, it appears that in the work of the NA, announced visits are a rule while unannounced an exception. This approach was a regular point of contention between the NA and GHRI as the latter considered that proportion between announced and unannounced visits should be the other way around, namely that most of the visits should be carried out without prior notice.[1391]

16.5.3 Confidential interviews are being carried out

During visits, the NA prefers to present its role and mandate to the prisoners and inform them that they could sign up for a confidential interview without members of the custodial staff being present. Interviews are then carried out in a private setting, usually prison cells.[1392] As a rule, at least some

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[1387] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1388] Klaus Lange-Lehngut, the president of the Federal agency, authorized article "*The preventive visiting procedure of the Federal Agency for the Prevention of Torture*" available in German NPM, *Annual report 2009/10* p. 29.
[1389] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1390] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.5. Unannounced visits.
[1391] P. Dr. Follmar-Otto, *Interview with the Head of Unit Human Rights Policies Germany/Europe of the German Institute for Human Rights* (21 March 2016).
[1392] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 43–43. But see SPT remark during visit to Germany para 59 of the SPT report addressed to German NPM stating that "*The SPT noticed that the majority of interviews conducted during the visits were collective, often done in the near presence of the warders*." *Report on the visit made for the purpose of providing advisory assistance to the German NPM* (SPT, 29 July 2013), § 59–59.

prisoners placed in specially secured cells or those exposed to any other special regime, are interviewed.[1393] Despite the fact that the official data on the number of interviews conducted is not available, it has been asserted that whenever prisoners are available interviews are being conducted.[1394] It is, however evident from the reports that in the large majority of cases no one was found in police custody at the time of the visit.

Although there is apparently no document outlining a formal list of questions, the following issues are routinely raised: relation with the staff, possibility to work, daily activities, quality of food, position of other prisoners and whether they are aware of any problems. In addition, health conditions and access to health care is also being discussed.[1395] The NA did not routinely inquire whether pre-trial detainees were subjected to ill-treatment at the hands of the police but is planning to do so on a more systematic basis when pre-trial detention comes into its focus.[1396] Finally, interviewees are handed a leaflet with the NA's address to which they can send additional information or notification in case of reprisals. There was no need for additional measures aimed at preventing reprisals as no hints of such activities were discovered.[1397]

16.5.4 Credible allegations are being qualified as specific forms of ill-treatment

In the course of conducting visits to places of detention, the NA, so far, neither encountered any person deprived of liberty with physical injuries that may indicate ill-treatment nor did it receive complaints alleging deliberate physical abuse. It follows that it did not have the opportunity to qualify a certain situation involving deliberate abuse as either torture or inhuman and/or degrading treatment or assess the consistency between accounts alleging the illegal use of force towards persons deprived of freedom. On the other hand, the NA made clear that it does not understand its role as being an arbiter "*classifying situations in a legal way*" or "*institution that is to conduct investigations*".[1398] It follows that if the NA is to encounter a situation indicative of ill-treatment, it would be satisfied with inquiring whether guarantees and safeguards, such as the right to complain, to see a lawyer or to have access to independent medical examination, were made available to the alleged victim. If this has not been the case, the NA would make a recommendation outlining safeguards related to deliberate ill-treatment and,

[1393] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1394] The only exception are night visits when detainees are sleeping or when influence of alcohol or other substances renders conduct of interviews pointless. See J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1395] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016); *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 43–43.
[1396] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1397] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 48–48.
[1398] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

eventually, forward such complaints to the competent organs.[1399] Moreover, in most of the visits its team does not even include a medical doctor, who could perform independent medical examination of the alleged victim in line with the Istanbul protocol.

By contrast, where inadequate material conditions and regime of detention reached a certain level of gravity, the NA did not hesitate to qualify the subjection of a detainee to such circumstances as a violation of human dignity. However, when it took a clear position it did so in cases where there are clear legal precedents sanctioning a situation identical to that encountered. In cases where there is no clear jurisprudence to refer to, the NA employed a less compelling language by holding that it assumes that this could amount to the violation of human dignity.[1400] For example, while double occupancy and inadequate toilets led the NA to assume that "*the human dignity of the women accommodated was not adequately protected*",[1401] a miserable state of cleanness of specially secured cells where, inter alia, matrasses were stained and covered with dead insects, prompted the NA to state that *"this form of dirt can be considered to be a violation of human dignity*".[1402] In other cases it used an even more cautious language by stating that providing persons locked in specially secured cells only with a pair of paper underpants is "*questionable from the point of view of preserving human dignity*".[1403]

16.5.5 All premises are being inspected during visits

According to the reports, the NA visiting teams personally examine not only detention cells but also tour the entire or major part of the facility visited. In police stations, in addition to detention cells, they are visiting the sanitary area, interrogation, search and/or identification rooms. In addition, although not being a standard procedure, police officers are occasionally required to open their lockers.[1404]

As regards prisons and other places of detention, a fairly comprehensive approach is taken to visiting various parts of the facilities including detention cells, admission wings, different types of segregation cells, common and work areas, recreation yards, medical wing, visiting premises etc.

16.5.6 Cumulative effect is taken into account

The NA's approach to assessing whether material conditions and the detention regime persons deprived of liberty are subjected to are inadequate or amount to violation of human dignity, is similar to that utilized by its international counterparts. Namely, it takes into account the so called cumulative effect of a number of identified deficiencies (lack of privacy, available space, access to light and air, state of

[1399] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 46–46; J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1400] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1401] German NPM, *Annual Report 2012* (2013), pp. 34–5.
[1402] German NPM, *Annual report 2010/11* p. 42.
[1403] German NPM, *Annual Report 2014* (2015), p. 35.
[1404] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

repair, cleanness, time spent outside the cell etc.), duration of such situation as well as whether there is a reasonable justification of subjecting detainees to such conditions.[1405] For instance, it has been consistently found that making two or more detainees reside in cramped conditions, coupled with inadequately separated toilet and eventually aggravated by non-transparent windows and passage of time constitutes a violation of human dignity.[1406]

16.5.7 Certain premises are recommended to be put out of use

Recommendations for an entire prison wing (the pre-deportation detention wing in Bützow prison) to be put out of use was made on one occasion only due to an inadequate state of repair and cleanness. In several other cases, the NA recommended that cramped detention cells with open toilets be not used for accommodating more than one detainee.[1407]

16.5.8 Duration of visits is proportionate to size of institutions

From the fact that almost all of the NA's visits lasted one day only follows that one working day must suffice not only for scrutinizing institutions accommodating several but also thousands of persons deprived of liberty.[1408] Even if on a couple of occasions two days were envisaged for larger institutions and assuming that the visiting team is in that case more numerous,[1409] the time allocated is clearly insufficient for mid-size and larger institutions.[1410]

16.5.9 Summary

The frequency of visits carried out to closed institutions determine, to a large extent, whether one visiting body managed to produce a deterrent effect. In case of the German NPM, this indicator is extremely unfavourable due to a vast number of institutions to be visited and comparatively low number of visits conducted annually. In addition, mitigating methods developed to address this disproportion, such as expecting competent authorities to implement recommendations across the board, although well intended, are of limited reach, at least insofar as the deterrent effect is concerned. As to unannounced visits, both the Federal Agency and the Joint Commission prefer announced visits and have up until the end of 2014 carried out only 10 unannounced visits, which makes around 5% of all visits made. No official statistic on the number of interviews conducted with persons deprived of their liberty is

[1405] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1406] German NPM, *Annual Report 2013* (2014), p. 81; German NPM, *Visit report: Juvenile Prison Facility in Lebach* (2015), p. 3.
[1407] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1408] For example, Joint commission on 25 January 2012 visited Cologne prison with the capacity of 1171 inmates and occupancy of 1109 prisoners at the time of the visit. See German NPM, *Annual Report 2012* (2013), p. 33.
[1409] NA visiting team to prisons and elderly people's homes may consist of up to 6 persons. See J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1410] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.7. Methodology.

available. However, it appears that confidential talks are being conducted whenever possible and that standard issues regarding life in detention are being discussed. Although the NPM visiting teams did not encounter any situations indicative of deliberate ill-treatment, it was made clear that even if such situation came to pass, the NPM would refrain from exercising a quasi-judicial function and merely forward the case to the competent bodies. It did, however, label inadequate detention conditions of certain gravity as violation of human dignity, which to all intents and purposes could be understood as ill-treatment. Almost all visits were conducted in the course of one day, which must be considered insufficient for larger institutions. Only on one occasion did the NPM recommend that certain premises are to be put out of use because of inadequate detention conditions. Takin everything into consideration, the conclusion to be made must be that the NA did not manage to produce deterrent effect.

16.6 The NPM made places of detention transparent

16.6.1 Triangulation

As to the general approach taken to determining whether basic safeguards and rights of those deprived of liberty are observed in practice, in view of the information made available in NPM's reports as well as the account of its research associate, the NA meets the main features of the triangular approach. Namely, it verifies the practical observance of safeguards and rights by crosschecking information obtained by personal insight, from the detention authorities, custody records and detainees themselves.[1411]

16.6.2 All relevant aspects, issues and safeguards are being looked at during visits

As regards issues usually looked at during visits, the NA reports display the following picture.[1412]

In police stations, access to fundamental rights and information on them has been examined as well as the availability of these information in a language the detainee understands, wearing identification badges, custody records, material conditions of detention (cell size, temperature, access to light, ventilation, night lightning, functionality of the cell buzzers (these systems serve to alarm police officers in case of emergency), mattresses, pillows, blankets access to toilet, state of the repair of facilities, fire protection, food, clothing), fixation and use of means of restraints and body searches.

In prisons and other comparable institutions (youth welfare and facilities for detention pending deportation), medical examination upon admission is being examined, the placement and regime in

[1411] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016); *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), p. 9.

[1412] Although NA developed guidelines for visiting different types of institutions containing checklist of issues to be looked at as well a summary of standards, it did not felt comfortable with sharing these information. See respectively *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), §§ 37–8; J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016); For this reason, this section is based on information available in NA documents and collected via interviews.

specially secured cells as well as any other special regime, measures that can impinge on the privacy of inmates (video recording toilet area in cells, use of peep holes without prior warning) material condition (floor space per prisoner, separation of toilets, access to light and air) and regime (out of cell time, outdoor exercise, use of means of restraints, body searches, contact with family etc.), resort to means of restraint (fixation and use of handcuffs) and common showers in terms of protection of privacy. The issue of providing training was addressed as well. The NA also looked at, albeit briefly, the position and treatment of persons held in preventive detention.

As only two (one in 2012 and second in 2015) visits to psychiatric hospitals were made thus far, it is more difficult to draw conclusions on which aspects are being regularly examined. However, based on one visit conducted in 2012 one can note that the following issues were addressed: staffing, state of repair and furnishing of patient's rooms, adequacy of therapy rooms and yard, training of staff, fixation and the possibility of lodging complains.

On the other hand, the NA reports indicate that insufficient attention was devoted to examining the reach and quality of health care in prisons.[1413] More precisely, it was not being inspected whether medical doctors are trained to provide medical examinations in line with the Istanbul protocol and in how many cases they actually indicated whether allegations corresponded with the injuries identified.[1414] Furthermore, the obligation of doctors to report indications of ill-treatment to competent organs after carrying out medical examination, is not examined or commented upon. It is not evident from the reports that ensuring confidentiality during medical examination[1415] is being regularly looked at. Similarly, complaint mechanisms, especially the question of their practical utility, are not thoroughly assessed.[1416] Procedures and safeguards related to interrogations of suspects were also not examined. In a medical setting, the adequacy of therapy, possible misuse of medication, consent to treatment, resort to isolation as well as the lawfulness of deprivation of liberty were not addressed. The NA does not examine the legality and/or necessity of deprivation of liberty in psychiatric hospitals as it considers that this question falls outside of its mandate.[1417]

The general impression from the reports and the interviews is that the NA puts less emphasis, if any, on ensuring that there are mechanisms in place to prevent and eventually detect and adequately

[1413] That is to say, whether members of medical personnel are fulfilling their preventive, curative and safeguard role, see chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.7. Duty to provide adequate health care.
[1414] NA itself disclosed that medical doctors working in custodial setting, as far as they know, do not receive training on the topics covered by Istanbul protocol and that they provide no information on whether medical doctors can influence opening an official investigation on allegations of ill-treatment. See Council of Europe, *The European NPM Newsletter: Issue No. 19/20* p. 21.
[1415] By preventing a law enforcement official from attending or at least hearing the course of medical examination.
[1416] However, the issue of outcome of complaint procedures has been addressed and preliminary results should be available in 2015 report. See J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1417] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

punish deliberate ill-treatment in closed institutions.[1418] Moreover, it does not routinely include a medical doctor able to conduct medical examination in line with the Istanbul protocol in its visiting teams. In addition, in a medical setting, as far as it can be discerned, it does not draw on the CRPD standards. All things considered, it can be concluded that not addressing the before-outlined issues is hardly an oversight on the part of the NA, but rather a conscious decision not to deal with issues it considers not problematic. What is more, this approach allows the NA to focus on issues in places of detention it considers critical.[1419]

16.6.3 The NPM regularly reports on the state of affairs encountered during visits

In addition to annual, the NA regularly publishes visit reports. From the commencement of its activities in 2009 up until 2014 it did not publish visit reports separately but made relevant findings available in the annual report. However, from 2014 it regularly publishes visit reports as well as a summary of state replies to specific recommendations set out therein.[1420] As of 2015, two documents per visit are made available: the visit report and an integral version of the relevant Ministry's comments. Although visit reports are to be published, "*as soon as the Government's statement has been received*",[1421] the usual time span between a visit and publishing a report online is around five months. However, this approach has been put to the tests as regards privately run institutions where persons deprived of liberty reside. More precisely, the NA faced a specific obstacle to publishing reports outlining visits to privately run geriatric homes, as they feel that making these reports available to the general public would, in effect, put them at a disadvantage vis-a-vis geriatric homes that were not an object of the NA´s inquiry. Options for resolving this problem, which in principle could be viewed as a conflict of constitutional rights, are currently being considered by the NA.[1422] Although the National Agency does not prepare and publish separate thematic reports, it does focus on specific topics in its annual reports, which in effect serve the same purpose. This practice was introduced in 2013, the NA's first topic being measures affecting foreigners.[1423]

Though one can find slightly longer or shorter visit reports, most of them consist of four to five pages. While this is sufficient to provide a glance into the institution visited, none of the reports make available a comprehensive in depth overview of different aspects within a place of detention (material

[1418] Ms Follmar Otto share this opinion, as she noted "*It's not so much the type of institutions but what their methodology is, what are they looking at … mostly material conditions and security measures but not so much on really signs of ill-treatment*". See P. Dr. Follmar-Otto, *Interview with the Head of Unit Human Rights Policies Germany/Europe of the German Institute for Human Rights* (21 March 2016).
[1419] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1420] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 18–18.
[1421] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 49–49.
[1422] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1423] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 32–32.

conditions, regime, work, activities, disciplinary proceedings, special measures, use of means of restraint, body searches, contact with the outside world etc.)

16.6.4 Summary

In the course of conducting visits, the German NPM visiting teams seeks to crosscheck different sources of information (those coming from the staff, detainees and those revealed by perusing custody records) in order to arrive at the most accurate conclusion on the state of affairs in the institutions they are visiting. As to areas looked at, in addition to material conditions and regime of detention a particular emphasis was placed on ensuring privacy and fire protection. Also, issues of body searches, fixation, and contact with the outside world were occasionally addressed. On the other hand, custodial safeguards, other than access to the three fundamental rights upon deprivation of liberty, such as the complaint system, were not, as it seems, of special interest to the NA. For example, the appropriateness and functionality of medical examination upon admission to institutions was only superficially looked at while the examination after use of means of coercion was not considered at all. Similarly, safeguards pertaining to police interrogations were not tackled. As to the health care context, the question whether the deprivation of liberty amounted to arbitrary detention as regards persons with psychosocial and/or intellectual disabilities, was neither examined nor considered. With regard to the reporting itself, it is evident that the National Agency reporting, that is the availability of reports, gradually improved. Starting from not publishing visit reports at all but providing information by means of short overviews of visits in annual reports, the NPM came to making available every visit report online together with a separate file containing state reply. The web site is well organized and structured and files are easy to access. As to the content of the report, most of them are four to five pages in length and do not provide an in-depth analysis of different aspects of detention conditions and regime in institutions visited.

16.7 The NPM improved other safeguards, conditions and regime in closed institutions and removed causes of ill-treatment

16.7.1 The NPM made pertinent recommendations

As already stated in assessing the state of affairs and the treatment in places of detention, the NA refers to German legislation and jurisprudence as well as to standards set up at an international level. This approach is sensible as authorities are more acquainted with German law and thus more prone to align its activities with it. On the other hand, the problem might arise when there are inconsistences with national and international standards.[1424]

As in Germany, at least in respect of the material condition of detention, national standards generally meet or go beyond international ones, the issue of primacy of standards does not arise.

[1424] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.3. Human rights standards used.

However, one could note that, at first, the NA recommended that fixation in a non-medical context should be effected with a bandage system instead of handcuffs thus falling short of CPT's recommendations to abandon fixation in non-medical context altogether.[1425] However, it seems that the NA reconsidered its position and now recommends abandoning this practice in a non-medical context. In addition, the position of persons deprived of liberty in psychiatric hospitals might prove problematic as in this case there is a conflict not only between national and international standards but also between international standards (regional and universal) themselves. Although only a few psychiatric hospitals were visited and no definite conclusions can yet be drawn, it seems that the NA does not go beyond addressing material conditions of detention and strengthening safeguards as regards their treatment in the institution. In other words, it is not to be expected that the NA will work on eliminating the deprivation of liberty setting contributing to ill-treatment of persons with psychosocial and/or intellectual disabilities nor that it will declare certain practices (non-consensual medical intervention, use of means of restraint etc.) illegal.

According to the NA's research associate, the NA understands its role as working on putting the CPT recommendations in practice and thus refers to them whenever it can.[1426] If one looks at recommendations issued by the NA it can be concluded that there is a high degree of consistency between the NA's and recommendations issued by international monitoring bodies. Similar to the CPT and CtAT, the NA addressed the issue of fixation, identification with badges, access to rights upon arrest and insisted that persons awaiting deportation be detained in less prison-like setting. The ECtHR's finding of a violation in similar circumstances probably drove the NPM to suggest providing those placed in specially secured cell with additional clothing. On the other hand, the issue of surgical castration and preventive detention has not, as of yet, been properly followed upon.[1427] Similarly, safeguards against deliberate ill-treatment, medical checks, and complaint procedures were not taken up.

16.7.1.1 Recommendations related to improving legislation

In addition to visiting places of detention and making pertinent recommendations, commenting existing and proposing new legislation touching upon NPM's mandate is in fact the third tire of its power. It is then somewhat surprising that the NA from the outset continuously conceded that it, due to financial

[1425] This was criticized by GIHR as well see P. Follmar-Otto, *Die Nationale Stelle zur Verhütung von Folter fortentwickeln!: Zur völkerrechtskonformen Ausgestaltung und Ausstattung*, Policy paper / Deutsches Institut für Menschenrechte (Berlin: Dt. Inst. für Menschenrechte, 2013), vol. 20, p. 15.
[1426] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1427] According to secretariat member NA is very well aware of problematic related to preventive detention but that it has made a conscious decision to look at it at a later stage as significant changes have relatively recently been introduced and relevant practice is being established. J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

and a personnel constraint, lacks the capacity to adequately address this task.[1428] It has, instead, focused on including recommendations concerning legislative framework in its visit reports.[1429] However, it appears that in the last couple of years this began to change as the NA commented on a number of draft laws on the state level[1430] and even contributed to parliamentary debates by taking part in expert hearings.[1431] In any case, the NA reports reveal a number of references to legislation suggesting, for instance, a revision of information sheets so as to include information on the right of access to a lawyer,[1432] enactment of custody regulation,[1433] changing electronic record system to be able to ascertain whether detainees have been fully instructed of their rights,[1434] adding the NA to the list of facilities and persons whose correspondence with the detainees may not be monitored,[1435] expand contacts with the outside world[1436] and provide an official meeting upon discharge from institution as well as measures of support after discharge if needed.[1437]

In addition, the implementation of a number of recommendations concerning more technical issues entailed amending or changing the respective legislation (statutes, guidelines, rulebooks etc.). For instance, building detention cells with windows,[1438] installing fire alarms,[1439] providing reading material to segregated detainees[1440] and to include toothpaste and toothbrush to hygienic packages.[1441]

On the other hand, it seems that these types of recommendations, in a sense, also set a line up to which the NA feels comfortable with influencing the legislative process. For instance, although the NA looks into issues related to youth detention (material conditions and treatment), it made clear that *"It is not in a position to make any statements regarding the – much-discussed – issue of the purpose and prospects of success of youth detention as a disciplinary measure"*.[1442] More to the point, the NA does not see it as part of its mandate to comment on more general issues beyond the custodial setting.[1443]

[1428] German NPM, *Annual report 2010/11* p. 13; German NPM, *Annual Report 2013* (2014), pp. 14–5; *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 15–15.
[1429] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 15–15.
[1430] Five or six prison laws during 2015, see J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1431] NA participated in three expert hearings to date on the subject of adult and juvenile prisoners. See J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016). However, according to GIHR, it seems that most of NPM contributions in legislative process dealt with increasing NPM budget. See P. Dr. Follmar-Otto, *Interview with the Head of Unit Human Rights Policies Germany/Europe of the German Institute for Human Rights* (21 March 2016).
[1432] German NPM, *Annual report 2009/10* p. 22; German NPM, *Annual Report 2013* (2014), pp. 75–6.
[1433] German NPM, *Annual Report 2013* (2014), p. 39.
[1434] German NPM, *Annual Report 2014* (2015), p. 55.
[1435] German NPM, *Annual Report 2013* (2014), p. 49; German NPM, *Annual Report 2014* (2015), p. 41.
[1436] German NPM, *Annual Report 2013* (2014), p. 89.
[1437] German NPM, *Annual Report 2013* (2014), p. 89.
[1438] German NPM, *Annual report 2010/11* p. 72.
[1439] German NPM, *Annual Report 2013* (2014), p. 86.
[1440] German NPM, *Annual Report 2013* (2014), p. 48.
[1441] German NPM, *Visit report: Stuttgart Airport Federal Police District Office and Stuttgart Main Station Federal Police Stations* p. 3.
[1442] German NPM, *Annual Report 2014* (2015), p. 27.
[1443] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

Therefore, the NA understands its prerogatives concerning making suggestions as regards legislation narrowly that is operating only within the deprivation of liberty context.

16.7.2 Recommendations were implemented

The National Agency, as already noted, seeks to compensate its limited reach, caused by serious underfunding, by insisting on the compliance of not only institutions to which visit was made and then a concrete set of recommendations submitted but also all those places of detention under the same authority as the institution visited.[1444]

This approach, however commendable, is not too innovative as it is similar to the one employed by international bodies where they expect states to implement their recommendations across the board and thus eliminate certain risks or enhance safeguards. Unfortunately, this approach displays the same weakness as his international counterpart; that is to say, relying only on state replies to determine whether certain recommendations have been complied with did not prove to be an effective method of implementation.

16.7.2.1 Formal compliance

The NA could not specify how many recommendations were formally complied with by the relevant institutions (the official notification coming from a relevant authority that NA recommendation was considered, accepted and implemented or is about to be implemented). More precisely, it has started to collect this information but, at the moment of the interview, could not produce a credible assessment on formal compliance.[1445] However, the perusal of reports available, which outline the response to the recommendations, indicate the following picture.

If we take the aforementioned outcomes of recommendations as criteria the following picture emerges. In the 2009-10 out of 13 recommendations made 12 were accepted, while one was rejected. In the 2010-2011 out of 139 recommendations 71 were accepted, 40 rejected, while status of 26 is not clear and 2 replies were missing. In 2012 98 recommendations were made, out of which 64 were accepted, 22 rejected and 12 were unclear. In 2013 the NA made 104 recommendations, out of which 68 were accepted, 22 rejected, 11 unclear and three replies were missing. In 2014 the NA issued 104 recommendations, out of which 74 were accepted, 21 rejected, seven unclear, while two replies were missing.

Therefore, from the commencement of its work up until the end of 2014 the NA issued 458 recommendations in total, 451 were replied to (which makes 98% of the overall number of recommendations issued) out of which 289 were accepted (64%), 106 rejected (24%) and 56 unclear

[1444] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 34–34; J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).
[1445] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

(12%). Admittedly these data alone do not disclose much without indicating which recommendations were accepted or rejected. This leads to the next point, namely the level of compliance with a concrete set of measures states were called to implement.

16.7.3 Overview of formal compliance in respect of specific recommendation clusters

16.7.3.1 Material conditions

125 recommendations addressing material conditions of detention were issued, out of which 123 replied to and 104 designated as accepted. From this it follows that formal compliance rate amounted to 85%.

Recommendations to clean certain rooms or premises, to ensure hygiene and to regularly provide hygienic packages were followed almost without exception. Out of ten recommendations, nine were accepted.

As regards few instances of overcrowding combined with lack of privacy and out of cell time, the NA suggested that the practice of accommodating two persons in single occupancy cells should be brought to an end. The authorities conceded that such accommodation is inadequate but nevertheless admitted that they cannot guarantee that such measure will not be resorted to as a short time solution in extreme situations. As to small cells in police stations where detainees are held, it was stressed that cells measuring a minimum of four square meters could be used only for short periods (a matter of hours). This was also by and large accepted. Therefore, out of 15 recommendations 12 were designated as accepted, one as rejected while two as not clear.

Windowless detention cells in police stations were deemed acceptable for a short-time stay, providing that cells with windows are constructed in the future. This was generally complied with, in that the authorities confirmed that detention cells are used for short-term stays only and that forthcoming construction plans include fitting the cells with windows. Where police custody cells had windows, recommendations suggesting the removal of opaque glass from the windows so as to enable prisoners to look outside were also generally complied with. However, compliance with recommendations to remove sight guards and/or thick wire netting from prison windows was unsatisfactory because other considerations justifying such measures, namely that of preventing prisoners from acquiring illicit substances or objects, were given priority. Therefore, recommendations suggesting the removal of these devices were generally not complied with. Generally, out of 24 recommendations given, 16 were formally accepted, six rejected while the situation concerning two is not clear. Four recommendations aimed at installing adequate ventilation system in cells were accepted. Recommendations suggesting the installation of night lightning, mostly addressed to police stations, were generally complied with. The point of compliance, however, varied from those reactions indicating that lightning was installed to those that although generally accepting noted that it could be implemented only with the construction of new facilities. All in all, out of 23 recommendations, 16 were marked as accepted, four as rejected, two as unclear while in one case reply was lacking.

Recommendations instructing the competent authorities to install fire alarms or smoke detectors in detention cells were almost without exception accepted and implemented. Out of 31 replies to recommendations none was framed as explicit rejection and most were clearly accepted.

Suggestions advising that detention cells ought to be equipped with furniture including mattresses were in a large part accepted. Out of 18 recommendations of this kind 13 were accepted, while five rejected.

Installing either intercom of buzzers in detention cells were generally accepted as out of six five were accepted while one remained to be discussed.

Recommendations aimed at improving the state of repair of the facilities where persons deprived of liberty are held, installing tap or enlarging prison yards were in general mostly accepted, although sometimes to be implemented when funds are secured. Out of 22 of such recommendations identified, 18 were marked as accepted, three as rejected while one was not replied to.

16.7.3.2 Nutrition

Two recommendations out of four aimed at introducing the provision of food or improving existing food have been formally accepted, one is unclear, while one was not replied to. Formal compliance, thus, amounts to 50%.

16.7.3.3 Health care

25 recommendations dealing with health care in places of detention were identified. These recommendations addressed a diverse set of issues such as adequacy of therapy, provision of medicines, access to medical service and staffing levels (more precisely on seven occasions increasing the number of medical doctors, psychologists and other personnel was advised). In addition, in six recommendations the procurement of equipment and/or enlargement of facilities to enhance the spectrum of services available were advised. All in all, out of 25 recommendations of this kind 19 were accepted, four rejected while the situation concerning two is not clear. Formal compliance rate is, therefore, 76%.

16.7.3.4 Training

Most of the recommendations (nine) suggested training addressing typical situations, which arise in custody such as proper use of force including de-escalation techniques, recognizing signs of suicidal tendencies, dealing with addictive or drunk detainees, drawing up relevant documentation etc. One recommendation suggested that a training of those working with juvenile and young adult prisoners should be undertaken. The remaining six addressed specific issues arising in custody pending deportation and thus highlighted the need for education on recognizing traumatization, psychological help and intercultural skills. The reaction of the authorities to these recommendations has been altogether positive. In most of the answers it was either noted that staff had already undertaken similar training or that such training would be offered in the future. A few reactions where continual training

was considered not necessary came from authorities such as the Ministry of Defence or custom office, effecting a low number of detentions annually. From 16 recommendations suggesting further training, 12 were either accepted or taken into consideration and four were rejected, which makes formal compliance rate of 75%.

16.7.3.5 Regime, treatment, activities, work

Recommendations aimed at enhancing the regime to which persons deprived of liberty are subjected to by increasing out of cell time, introducing purposeful activities, more jobs for prisoners, duration of outdoor exercise, sport activities etc. were taken up only sporadically. Out of 25 recommendations 12 were accepted, six rejected while situation as regards seven is not clear. A main reasons for the inability to comply with recommendations set forth are related to a lack of staff, constructional inadequacy of the facility, structure of the inmates, security considerations etc. Formal complianc rate, therefore, came to 48%.

16.7.3.6 Body searches and means of restraint

The issue of body searches was addressed in two recommendations. In the first, while examining the issue of a detainee being made to walk naked on the premises in order to determine whether he had hidden drugs in his bodily orifices, the NA noted that a medical doctor should carry out such medical examination. In the second, routine practice of undressing and resort to body searches by the police was considered inadequate. Both recommendations were rejected by the relevant authorities (Authority for the Interior and Sport (Hamburg) and Ministry of the Interior and Sport of Hessen). Recommendations of the NA as regards means of restraint differ from context to context. As regards the law enforcement and penal context it is generally suggested to resort to means of restraint only when strictly necessary and for the shortest period, while complete fixation is to be effected in medical institutions only. If, however, fixation is nevertheless resorted to, metal hand and foot cuffs should not be used and a staff member should personally observe fixated persons. Not all authorities did take up the rejection of fixation in police context and only the federal police and that in Baden Wurttemberg, Berlin, Saarland and Thuringia complied. Resort to handcuffs in short notice and for short transfers is considered necessary. In the context of psychiatric hospitals, the NA recommended using floor beds as an alternative to full fixation, which was on one occasion accepted. On the same occasion, reducing the resort to fixation in the geriatric wing using criteria similar to those used in an emergency room was rejected as reasons for applying means of restraint differ significantly between these two groups of patients. From 13 recommendations addressing fixation 12 were replied to. Out of these, six were accepted, five were rejected with the justification that legal regulation in force allows such treatment, while reply to one was not clear. All in all, taking into account body searches and use of means of restraint, the formal compliance rate amounts to 43%.

16.7.3.7 Safeguards and rights upon and during deprivation of liberty

Custodial safeguards such as facilitating exercise of three fundamental rights of those taken into custody, effective complaint procedures and comprehensive documentation were recommended in 71 case, and formally accepted in 53 cases. It follows that formal compliance came to 75%.

16.7.3.7.1 Three fundamental rights

As to making use of the three fundamental rights upon arrest (right to consult a lawyer, to be examined by a medical doctor and right to notify trusted third party on the fact of his detention),[1446] all recommendations dealt with providing information on these rights. More precisely, in the examined period, the NA made 22 recommendations requiring from state authorities to ensure that all persons deprived of their liberty, notwithstanding the legal ground of such deprivation, are informed on their rights in written form. In addition, it was set forth that one needs to be informed in a language he understands and that those not able to understand due to intoxication are to be informed at a later point but in any case, before release. This should be documented and thus made verifiable. However, no recommendations were made examining or addressing the practical worth of these rights in more detail that is access to a lawyer, to a doctor and the notification of a third person. Thus, issues such as, for instance, the quality of legal services provided by an appointed lawyer, privacy of medical examination etc. were neither examined nor addressed by means of a recommendation. Anyhow, out of 22 recommendations of this kind identified in most of the replies (16) the relevant authorities assured the NA that adequate information sheets will be created and handed out to all detainees and properly documented. Five replies were not clear while in one recommendation to amend regulation in order to enable written notification on rights was rejected (formal compliance rate 73%).

16.7.3.7.2 Displaying the house rules, personal check of cells.

In addition to this, the NPM mentioned a number of safeguards pertaining to police custody such as displaying the house rules in the custody room, to ensure that custody cells are checked in person by police officers every few hours, that policemen do not openly carry weapons in custody areas etc. All in all, there are seven of these recommendations out of which 4 were accepted and three rejected (those rejected dealt with accessibility of records on incidents in police custody, use of pepper spray and carrying arms in detention area), (formal compliance rate 57%).

16.7.3.7.3 Badges

The recommendation to police authorities to make wearing identification badges mandatory was not accepted. The NA issued at least five recommendations to that effect but to no avail as wearing badges is considered voluntary and thus left to the individual policeman. 4 were rejected while the reply

[1446] Under German law, these rights are guaranteed in Article 114 of the Code on Criminal Procedure, see E. Cape, *Effective criminal defence in Europe*, Ius commune europaeum (Antwerp: Intersentia, 2010), vol. 87, p. 271.

concerning 1 was not provided. It appears that the NA as well does not see the issue of displaying identification badges in places of detention as central, since police officers could in any case be identified (formal compliance rate 0%).[1447]

16.7.3.7.4 Medical examinations

Five recommendations addressing the issue of medical examinations upon admission to the institution were identified out of which three were accepted while two were rejected. Two institutions for the placement of detainees awaiting deportation did not comply with recommendations to conduct prompt medical examination upon admission of persons deprived of liberty as a matter of routine. Namely, one facility does not conduct routine medical examination upon admission while in the other up to six days may come to pass until an examination is effected as a medical doctor visits the institution once a week. One police station conceded to the recommendation to cover initial costs of medical examination, while a youth detention facility accepted to provide initial medical examination upon admission as soon as possible (formal compliance rate 60%).

16.7.3.7.5 Complaint procedures

Recommendations addressing complaint mechanisms and their efficiency in places visited were only sporadically made (five times) in the context of institutions under the Ministries of Health and Social Affairs and have formally been accepted. In addition to noting that information sheets on complaint possibilities are to be handed out, the NA recommended introducing an external complaint mechanism only in few social institutions. If one bears in mind the importance of an effective complaint mechanism for preventing ill-treatment, it seems somewhat odd that the NA did not address this issue in police stations and prisons (formal compliance rate 100%).

16.7.3.7.6 Documentation

Recommendations relating to custody records, ranging from introducing relevant registers, entering exact times of periodical check up of detainees and name of the controller in relevant custody records, submitting the books to the superior control and modifying electronic custody records so as to be able to document all important aspects of detention, were generally accepted. Out of 27 recommendations identified relating to misuse in the maintenance of custody records, 25 were accepted to a greater or a lesser degree. This acceptance however typically manifested itself in reminding the police officers of their duty to correctly, promptly and comprehensibly maintain custody records (formal compliance rate 93%).

[1447] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

16.7.3.8 Privacy protection

In NA reports considerable attention was accorded to the protection of privacy of persons deprived of their liberty. Several issues were considered in that regard. First, whether prisoners in common shower rooms can use separated booths. Second, the issue of a complete separation of the toilet in multi-occupancy rooms and the prevention of visibility of the toilet area either through peephole or CCTV camera has been raised. Only the separation of the toilet area is unambiguously accepted while the partition of shower rooms and covering toilet areas in cells proved to be more controversial, although due to different reasons. As regards the first, the reason put forward for not partitioning shower rooms is that of security of inmates. It is argued that partitioning would hinder efforts to prevent inter prisoner violence. As to the latter, again, the prevention of infliction of self-harm or suicide, is brought forward in order to justify the refusal to limit the extent of surveillance of prisoners especially those subjected to enhanced scrutiny in segregation rooms. In sum out of 67 recommendations dealing with privacy 37 were accepted, 21 rejected, situation regarding eight was not clear while state reply failed as regards one (formal compliance rate 55%).

16.7.3.9 Solitary confinement

Solitary confinement and various forms of segregating prisoners by placing them in specially secured rooms has been the object of a NA inquiry. Recommendations were usually suggesting lowering the frequency of resort and duration of these measures. In addition, the NA recommended minor repairs in the segregation cell, providing inmates, in addition to paper pants at least with a shirt, reading material etc. Out of 21 of recommendations of this kind 15 were formally accepted at least to a certain extent, 4 were rejected while the situation as regards 2 was unclear (formal compliance rate 71%).

16.7.3.10 Miscellaneous recommendations

The NA issued a number of recommendations addressing miscellaneous issues. In 7 cases, it intervened on behalf of those subjected to a regime of solitary confinement and suffering from problems, to end their solitary confinement or transfer them to suitable medical institutions where they could be provided with necessary medical care. The authorities did not effectuate the transfer or did so belatedly or when further incidents took place. More precisely, five requests were rejected while the outcome of two is not clear. 24 recommendations to provide translations of house rules or information sheets in languages most spoken by detainees and/or to provide services of professional interpreters were mostly accepted (17). Out of the remaining seven, mostly dealing with services of interpreters, six were rejected as securing services of professional interpreters in short notice proved to be difficult. Authorities were not keen to abide by the two recommendations suggesting that the pre-deportation facilities look less like a prison (removing barbed wire, high walls etc.) Four recommendations requiring the removal of racist or otherwise improper graffiti (swastika etc.) have been complied with. In six recommendations, the NPM called for a change of practice and/or regulations so as to ensure access of the NPM visiting teams

to institutions and confidential talks with inmates. The respective authorities accepted them all. Finally, the NPM issued additional 12 recommendations addressing diverse issues such as providing one-off financial aid to deportees and providing them with relevant information as concerns their deportation, better structuring of internal regulation, access of patients in psychiatric hospitals to lawyers etc. 5 were accepted, 4 rejected and the situation as regards 3 is not clear (formal compliance rate 58%).

16.7.4 Real compliance

As to the real compliance, that is to say, a situation where the implementation of recommendations addressed to a particular institution is being verified on the spot by conducting a follow up visit to that very institution, the situation is unclear. This, however, arises from the generally low number of visits caused by insufficient funding where the initial visits have priority and thus are leaving the NA no choice but to "*rely on accepting the information provided by the Ministries regarding implementation as accurate*".[1448] In order to circumvent this handicap, the NA focused on an approach checking the extent of implementation of recommendations in institutions other than that visited but under the same supreme authority. The NA is well aware that this approach seems sensible primarily as regards technical adjustments and that change of practices cannot be adequately followed up in this manner.[1449] However, in several instances (at least four[1450]) when particularly grave conditions were encountered during the initial visit NA did conduct follow up visits.[1451] In addition to establishing that a number of its accepted recommendations have been implemented and that those not accepted have not been implemented, it found that some of those formally accepted were in fact not put into practice. So, disciplinary cells in Berlin youth prison were still dirty while pre-deportation detainees in Eisenhüttenstadt were not enabled to prepare their own meals, despite the formal acceptance of the recommendation to that effect from the previous visit.

Due to a low number of follow up visits it is not possible to draw any further conclusions as regards the level of real compliance. In any case the NA is managing a list of institutions, which are to be visited again so as to verify whether the situation has improved.[1452]

[1448] German NPM, *Annual report 2010/11* p. 13.

[1449] Member of the secretariat illustrated this point by noting that "*regarding something that is either black or white there is no reason to believe that they are giving us false information…. It is more difficult if they say we have changed some practice in the place of detention. Than this probably hasn't really been done completely*" J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

[1450] Berlin youth prison was visited on 7 April 2011 with a follow up conducted on 29 August 2012; BERLIN-Köpenick pre-deportation detention facility was visited on 8 April 2011 and 26 June 2013; Eisenhüttenstadt pre-deportation detention facility 18 March 2013 and 16. October 2015 and Short-term youth detention facilities Düsseldorf and Wetter (Ruhr)on 1 an 2 October 2014 and 2 December 2015.

[1451] *Replies to the recommendations and requests for information made by the SPT in its report on its visit to Germany* (German NPM, 18 February 2014), § 50–50.

[1452] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

16.7.5 Implementation of recommendations suggesting change of regulations

Practical reach of the NA's activities such as participation in expert hearings in parliaments remains unclear, as the NPM does not keep track of whether their suggestions were accepted.[1453] Concerning concrete suggestions set forth in the NAs annual reports and mostly dealing with technical issues, responses from the authorities indicate that most of them were included in the draft law regulating the area of concern.

16.7.6 Summary

The German NPM, to a greater or a lesser extent, addressed issues raised by international bodies above all the CPT, such as putting a definite stop to the fixation of detainees in a non-medical context; ensuring written notification on the three fundamental rights upon arrest, the obligation of law enforcement officers to wear identification badges, to provide detainees placed in specially secured cells with clothing and to improve detention conditions for persons awaiting deportation. Basically, all recommendations addressing material conditions are in line with the CPT standards. On the other hand, the suggestion to strengthen the independence of bodies deciding upon complaints against the police, for instance, was not followed up on. A broad spectrum of recommendations encompassing various aspects of material conditions, food, training and those dealing with individual cases, medical care, regime, privacy etc. amounted to 309. Those recommendations dealing with safeguards or guarantees such as medical examination upon admission, providing information on rights upon deprivation of liberty, badges as means of identification of police officers, complaint mechanisms in place and different registers and translation amounted to 98. Finally, recommendations dealing with body searches, means of restraint and solitary confinement amounted to 36. From this it follows that recommendations lacking or not sufficiently covered are those dealing with safeguards against deliberate ill-treatment. Moreover, even if some guarantees are tackled, this is being done in a rather superficial manner. For example, while all of the recommendations addressing access to 3 basic guarantees upon arrest (lawyer, doctor and notification of arrest) deal with providing information on these rights in written form, none of them examines the extent of actual utilization of these rights or quality of services provided. The NA took a minimalistic view towards proposing change of legislation or other regulations, as it appears to look at a regulation only if it is directly connected with deprivation of liberty. Therefore, it suggested the change of bylaws so as to improve information sheets handed out after arrest, the maintenance of electronic records, fitting windows in a detention cell or adding toothpaste to the hygienic package. By the same token, it refrained from commenting upon legislation dealing with guardianship, deprivation of legal capacity or deinstitutionalization. The formal compliance rate based on almost all recommendations issued amounts to 64%, the rate of rejection to

[1453] J. Dr. Schneider, *Interview with the Research Associate of the National Agency for the Prevention of Torture* (22 February 2016).

24% while the status is unclear as regards 12% of recommendations. As the NA managed to carry out only four follow up visit until the end of 2014, no reliable conclusions could be drawn as regards real compliance. In any case, at least once it was determined that a recommendation accepted as regards material conditions was not put into practice.

17 Chapter: Country report on Azerbaijan

17.1 Introduction

The Republic of Azerbaijan gained independence after the dissolution of the Soviet Union. It has a population of 9,7 million and possesses large fossil fuel deposits, which only slightly contributed to the rise of the living standard. However, shortly after gaining independence in 1991 it plunged into conflict with neighbouring Armenia over the autonomous region Nagorno-Karabakh populated mostly with ethnic Armenians. After the conflict, Azerbaijan lost factual control over this region and a fragile truss has been established cementing the status quo between these two states that last until the present day. Officially, Azerbaijan is a multi-party democracy with a directly elected president who, after parliamentary elections, appoints a prime minister, who is then confirmed by the parliament. However, in reality the actual president, son of a former president, enjoys the third term of office and is accused of leading an autocratic regime and supressing the opposition.[1454]

17.2 An overview of the state of affairs in closed institutions concerning ill-treatment

Azerbaijan ratified the ICCPR (1992) and its optional protocol authorising the HRC to receive and consider communications from individuals (2001) as well as the second optional protocol prohibiting the death penalty (1999). It also ratified the CAT (1996), accepted art 22 envisaging individual communications and the OPCAT (2009). It ratified the CRPD and accepted its Optional Protocol introducing an individual complaint mechanism in 2009. It is a member of the Council of Europe since 2001 and thus bound by the the ECHR and ECPT and subject to supervision of its pertinent organs: the ECtHR and CPT.

The practice of international bodies outlines a pattern that has been reaffirmed in different documents during the previous 15 years. Namely, it has been found that persons in police custody run a considerable risk of being ill-treated or even tortured. Ill-treatment is used, generally speaking, with the purpose of extorting confessions from suspects or suppressing political dissent. As to the latter, there are numerous instances where prominent human rights defenders, journalists and politicians have been subjected to excessive use of force during demonstrations, deprived of liberty, mistreated in custody, prosecuted and eventually sentenced under false pretences. Moreover, on one occasion the ECtHR found that subjecting an opposition leader to beatings of the soles of the feet by the police officers amounted to torture.[1455] In sum, Azerbaijan was found responsible for violation of ECHR article 3 in

[1454] BBC, *Azerbaijan profile - Overview*. http://www.bbc.com/news/world-europe-17045694 (12 November 2014); CIA, *The World Factbook: Azerbaijan*. https://www.cia.gov/library/publications/the-world-factbook/geos/aj.html (13 March 2015).
[1455] *Mammadov (Jalaloglu) v. Azerbaijan* (ECtHR, 11 January 2007), 69.

17 cases, three of which were related to non-refoulement, while the rest was found on account of excessive or unjustified use of force (in police stations[1456] and during dispersal of demonstrations),[1457] lack of adequate medical care,[1458] cumulative effect of unfavourable detention conditions,[1459] prolonged solitary confinement.[1460]

Under its reporting procedure, the CtAT and HRC repeatedly expressed concerns over a number of credible allegations of ill-treatment effected predominately but not exclusively at the hands of the law enforcement agents.[1461] By way of example in the last concluding observations from November 2015, the CAT expressed concerns regarding

> "*numerous and persistent allegations that torture and ill-treatment are routinely used by law enforcement and investigative officials, or with their instigation or consent, often to extract confessions or information to be used in criminal proceedings*".[1462]

As to international bodies employing a visiting procedure, the SRT back in 2000 made a visit to Azerbaijan and concluded:

> "*torture or similar ill-treatment is widespread. Indeed, it is believed by so many to be automatic, that the mere threat or hint of adverse consequences for failure to comply with investigators' wishes (such as to sign a confession) is assumed to mean torture. For some, the mere fact of detention has the same implication.*"[1463]

In addition, it has found objects suitable for inflicting pain (metal bar, knife etc.) in the police stations, more precisely interrogation rooms.[1464] The CPT, quite uncommonly for its practice, was paying visits to Azerbaijan at an almost annual basis. The first visit was carried out in 2002 and followed by visits in 2004, 2005, 2006, 2008, 2011, 2012, 2013 and 2015. Moreover, a visit is scheduled for 2016 as well. Even more surprising is that, in contrast to practice established by the state parties to the ECPT, Azerbaijan agreed to publishing of only two CPT reports, outlining the initial visit and the one made in 2008. In other words, it opted against publishing seven out of nine visit reports. Observations of the CPT made during the 2002 visit corroborate the above estimation that individuals in police custody are in high risk of ill-treatment. More precisely, numerous allegations of physical ill-treatment, in many instances found to be consistent with physical injuries, prompted the CPT to conclude that

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[1456] *Emin Huseynov v. Azerbaijan* (ECtHR, 07 May 2015); *Jannatov v. Azerbaijan* (ECtHR, 31 July 2014); *Lavyijov v. Azerbaijan* (ECtHR, 10 April 2014); *Mehdiyev v. Azerbaijan* (ECtHR, 18 June 2015); *Igbal Hasanov v. Azerbaijan* (ECtHR, 15 January 2015); *Mammadov (Jalaloglu) v. Azerbaijan* (ECtHR, 11 January 2007); *Uzeyir Jafarov v. Azerbaijan* (ECtHR, 29 January 2015).

[1457] *Muradova v. Azerbaijan* (ECtHR, 02 April 2009); *Najafli v. Azerbaijan* (ECtHR, 02 October 2012); *Rizvanov v. Azerbaijan* (ECtHR, 17 April 2012); *Case of Tahirova v. Azerbaijan* (European Court of Human Rights, 03 October 2013).

[1458] *Case of Hummatov v. Azerbaijan* (European Court of Human Rights, 29 November 2007).

[1459] *Insanov v. Azerbaijan* (ECtHR, 14 March 2013).

[1460] *Rzakhanov v. Azerbaijan* (ECtHR, 04 July 2013).

[1461] *Conclusions and recommendations on the initial report of Azerbaijan* (CtAT, November 1999), 68-b; *Conclusions and recommendations on the second report of Azerbaijan* (CtAT, 14 May 2003), 5-a; *Concluding observations on Azerbaijan* (CtAT, 08 December 2009), 9, 11; *Concluding observations on Azerbaijan* (HRC, 12 November 2001), § 10–10; *Concluding observations on Azerbaijan* (HRC, 13 August 2009), § 11–11.

[1462] *Concluding observations on Azerbaijan* (CtAT, 26 November 2015), § 8–8.

[1463] *Report on Azerbaijan* (SRT, 14 November 2000), § 114–114.

[1464] *Report on Azerbaijan* (SRT, 14 November 2000), §§ 16–7.

> "*persons deprived of their liberty by the police in Azerbaijan run a significant risk of being ill-treated while in police custody (in particular when being interrogated), and that on occasion resort may be had to severe ill-treatment/torture.*"[1465]

In addition, the CPT in its 2008 visit found credible allegations of physical ill-treatment and excessive use of force towards prisoners sentenced to life imprisonment and residing in the Gobustan prison,[1466] investigative isolator in Ganja[1467] and Republican Psychiatric Hospital No. 1 in Mashtaga.[1468]

In respect of safeguards and guarantees upon arrest, deficiencies in ensuring access to the three fundamental rights accorded to person upon arrest (lawyer, doctor, notification on custody) and providing information on them have been continually stressed.[1469] In addition, custody records in police establishments were poorly, if at all, kept.[1470] As to the material conditions and regime of detention in police custody, it was established that most of detention cells display serious shortcomings. In one case, conditions were described as inhuman and degrading on account of, *inter alia*, poor state of repair, lack of light and ventilation, deplorable state of hygiene and overcrowding.[1471] Also, it has been noted that medical confidentiality is not respected as medical reports are being countersigned by police officers who effected an arrest and may thus be actual perpetrators of ill-treatment.[1472] It was also established that the complaint system against the police is practically ineffective as initial investigation is conducted by police officers belonging to same units as those suspected of ill-treatment.[1473] Similarly, members of the custodial staff regularly read prisoner complaints submitted to external authorities.[1474]

As regards penal institutions, the CPT in 2002 visited two large institutions where pre-trial detainees were held and made a number of critical comments as regards the state of repair, access to light and air, poor heating, disrespect of a minimum of one hour of outdoor activities per day[1475] and keeping prisoners 23 hours or more per day locked in their cells.[1476] As to the preliminary medical examination upon admission, it was established that proper examination and identification of injuries with the purpose of discovering and documenting ill-treatment committed by the police was unsatisfactory.[1477]

In its 2008 report, the CPT dealt in particular with psychiatric hospitals and established that a great number of patients were, although for all intents and purposes persons deprived of liberty, formally

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[1465] *Concluding observations on Azerbaijan* (CtAT, 26 November 2015), § 8–8.
[1466] *Report on Azerbaijan* (CPT, 26 November 2009), § 11–11.
[1467] *Report on Azerbaijan* (CPT, 07 December 2004), § 74–74.
[1468] *Report on Azerbaijan* (CPT, 26 November 2009), § 61–61.
[1469] *Report on Azerbaijan* (SRT, 14 November 2000), § 87–87; *Report on Azerbaijan* (CPT, 07 December 2004), §§ 30–8; *Concluding observations on Azerbaijan* (CtAT, 26 November 2015), § 12–12.
[1470] *Report on Azerbaijan* (CPT, 07 December 2004), § 41–41.
[1471] *Report on Azerbaijan* (CPT, 07 December 2004), §§ 45–60.
[1472] CtAT, *Summary record of the 1360th meeting: Consideration of the fourth periodic report of Azerbaijan*, UN Doc CAT/C/SR.1360 (2015), § 15–15.
[1473] CtAT, *Summary record of the 1360th meeting: Consideration of the fourth periodic report of Azerbaijan*, UN Doc CAT/C/SR.1360 (2015), § 16–16.
[1474] *Report on Azerbaijan* (CPT, 07 December 2004), § 147–147.
[1475] *Report on Azerbaijan* (CPT, 07 December 2004), § 97–97.
[1476] *Report on Azerbaijan* (CPT, 07 December 2004), § 98–98.
[1477] *Report on Azerbaijan* (CPT, 07 December 2004), § 111–111.

considered voluntary patients.[1478] Similarly, a proper procedure for obtaining their informed consent to medical treatment does not exist.[1479] The CtAT, for his part, expressed concerns as to involuntary hospitalization for non-medical reasons and urged Azerbaijan to resort to hospitalization on medical grounds only, on basis of an independent medical opinion and subject to appeal. In addition, it called the authorities to improve material conditions in institutions and ensure independent monitoring.[1480] In addition to this, material conditions were generally inadequate or even *per se* amounting to ill-treatment.[1481] Therapy was based exclusively on pharmaceutics;[1482] recreational activities were virtually non-existent, while the right to engage in outdoor exercise seriously curtailed.[1483] Seclusion, sometimes lasting for weeks, was resorted to in one of the establishments visited, while a comprehensive instruction on use of means of restraints and pertaining guarantees was missing.[1484] The CtRPD reprimanded Azerbaijan for maintaining legislative framework allowing for deprivation of liberty based on disability alone, involuntary hospitalization and forced institutionalization as well as inappropriate health care in these institutions.[1485] It also noted that despite the adoption of a "*State Programme on De-Institutionalisation and Alternative Care 2006-2015*", institutionalisation remains high among persons with psychosocial and/or intellectual disabilities while no information on the promotion of life in the community is available.[1486] It added its concern on poor living conditions in places of detention.[1487]

On a more general note, the main problem regarding compliance with the prohibition of ill-treatment in Azerbaijan seems to be that of a "*substantial gap between the legislative framework and its practical implementation*".[1488]

Against the outlined background, in what follows an examination of role and reach of the Azerbaijani NPM[1489] in preventing ill-treatment shall be carried out.

17.3 The Azeri NPM: designation and main characteristics

The Republic of Azerbaijan in 2005 signed and at the beginning of 2009 ratified the OPCAT. The Office of the Commissioner for Human Rights (Ombudsman) was by means of a Presidential Decree designated to implement the mandate of the NPM. Although the mode of implementation was set forth in more detail in the amendments to the Ombudsman Act[1490] enacted in 2011, the NPM commenced

[1478] *Report on Azerbaijan* (CPT, 26 November 2009), § 76–76.
[1479] *Report on Azerbaijan* (CPT, 26 November 2009), § 78–78.
[1480] *Concluding observations on Azerbaijan* (CtAT, 08 December 2009), §§ 15–6.
[1481] *Report on Azerbaijan* (CPT, 26 November 2009), § 63–63.
[1482] *Report on Azerbaijan* (CPT, 26 November 2009), § 68–68.
[1483] *Report on Azerbaijan* (CPT, 26 November 2009), § 68–68.
[1484] *Report on Azerbaijan* (CPT, 26 November 2009), §§ 73–4.
[1485] *Concluding observations on the initial report of Azerbaijan* (CtRPD, 12 May 2014), § 28–28.
[1486] *Concluding observations on the initial report of Azerbaijan* (CtRPD, 12 May 2014), § 32–32.
[1487] *Concluding observations on the initial report of Azerbaijan* (CtRPD, 12 May 2014), § 30–30.
[1488] *Conclusions and recommendations on the second report of Azerbaijan* (CtAT, 14 May 2003), § 6–6.
[1489] In what follows, for the sake of brevity, the Azerbaijani NPM will be referred to as to the Azeri NPM.
[1490] The official name of the statute is *Constitutional Law of the Republic of Azerbaijan On Making Additions and Amendments to the Constitutional Law of the Republic of Azerbaijan "On the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan"* available in Azeri NPM, *Annual report 2011* pp. 103–7.

with its activities in 2009. This text entrusts discharge of the NPM mandate to the Commissioner personally as well as to members of a distinct department within his office: the National Preventive Group (NPG). The NPG members are to be appointed by the Commissioner for a period of three years through a transparent procedure, ought to be above 25 years of age, have a university degree, possess experience in the field of human rights protection and high moral standing. The said act explicitly endowed the Commissioner and NPG members with the authority to access, at any time and without prior notification, closed institutions, obtain information and copies of documents they deem relevant and speak in private with persons deprived of liberty. In addition, the NPG members cannot be forced to testify on what they learned in the course of performing their duties. Finally, members of the NPG cannot be detained, searched or examined while performing their duties and enjoy confidentiality of correspondence.[1491]

17.4 The NPM met conditions considered necessary for effective discharge of its mandate

17.4.1 It is formally independent

Although the initial designation of the Azerbaijani Ombudsman to serve as an NPM was effected in 2009 by a Presidential Decree, this was later rectified by amending the Ombudsman act to reflect its newly acquired NPM role and competencies.[1492] Thus, it is to be concluded that Azeri NPM is grounded in a legal act with a constitutional strength.

The Azeri Ombudsman is elected to a once renewable seven-year term of office by the parliament with a two third majority from the list of three candidates proposed by the president of Azerbaijan.[1493] At this point, it may be noted that this solution, although commendable in that two thirds majority is required, does not further personal independence of the ombudsperson as nomination of suitable candidates is the prerogative of the president alone. While in office, the Ombudsman cannot perform lucrative activities incompatible with his office, be engaged in political activity, member of a political party or NGO leader.[1494] The Ombudsman is independent and in performing his tasks should be guided only by the constitution and laws.[1495] This is to be ensured by proscription of its replacement[1496] and interference in his competences by other state officials.[1497] Moreover he enjoys immunity and is

[1491] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, articlr 18 para 1.
[1492] Azeri NPM, *Annual report 2014* pp. 8–9.
[1493] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, art. 2 para 1 and art. 4 para 1 and 2 available in English at APT, *Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan*. http://www.apt.ch/content/files/npm/eca/Azerbaijan_Law%20Ombudsman_Eng.pdf (21 June 2015).
[1494] Ibid art. 3 para 2 and 3.
[1495] Ibid art. 5. para 1.
[1496] Ibid art. 5.2.1.
[1497] Ibid art. 5.2.3.

provided with financial and social guarantees.[1498] As to the immunity, it is further specified that the Ombudsman is inviolable and as such cannot be subjected to any proceedings, searched or detained except if caught red handed or if two thirds of MPs terminate his immunity on the motion of the prosecutor general.[1499] Immunities of the NPG members have been set more narrowly as they enjoy immunity only while performing their duties in places of detention and exchanging correspondence within the scope of their work.[1500] Furthermore, his activities cannot be curtailed under the state of emergency or martial law.[1501] Lastly, similar to the Serbian ombudsman, the Azeri Ombudsman was also granted A status by by the ICC.

NPM tasks within the Ombudsman office were, at first, performed by a unit in charge for investigating complaints.[1502] Later on, a distinct NPM unit (Department on Prevention of Torture) within the Ombudsman's office was set up consisting of two sub-units: the visits unit and the legal analysis and reports unit.[1503] Moreover, as Ombudsperson's staff carrying out NPM related tasks need to be authorized to enter places of detention and possess other competencies for successful discharge of their duties, the Ombudsman act was amended to that effect. Namely, this law created the above outlined NPG whose members are at the same time members of the Azeri Ombudsman's NPM unit.[1504] Therefore, it can be concluded that personnel carrying out NPM related tasks make a separate internal unit within the Azeri Ombudsman's office.

17.4.2 It is adequately staffed, resourced and has access to expertize

The Ombudsman act stipulates that the Ombudsman's activities are to be financed from the state budget and that annual funds allocated to that end cannot be lesser than those allocated the previous year.[1505] Activities of the NPM unit are funded from an annual budged allocated to the Ombudsman.[1506] Therefore, as there is no indication that a separate NPM budget within the Ombudsman´s budget is being recognized,[1507] it is to be concluded that NPM activities are financed from the overall budget of the Azeri Ombudsman. The exact amount of funds allocated on the annual basis has been indicated neither as regards the Ombudsman nor the implementation of its NPM mandate.

Initially, five members of Ombudsman staff performed the NPM related tasks. This number was increased to 8 and finally amounted to 17 individuals including those stationed in the Ombudsman's

[1498] Ibid art. 5.2.2 and 4.
[1499] Ibid art. 6.
[1500] Ibid art. 18-1.2.4.
[1501] Ibid art. 5.3.
[1502] Azeri NPM, *Annual report 2009/2010* p. 18.
[1503] Azeri NPM, *Annual report 2012* pp. 12–3; see also sections 1.4-1.5 of the Regulations of the Department for the Prevention of Torture of the Office of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan available in Azeri NPM, *Annual report 2012* pp. 78–82.
[1504] Azeri NPM, *Annual report 2012* p. 13.
[1505] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, article 19.
[1506] See section 1.8 of the Regulations of the Department for the Prevention of Torture of the Office of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan available in Azeri NPM, *Annual report 2012* pp. 78–82.
[1507] APT, *OPCAT Database: Azerbaijan - NPM Resources*. http://www.apt.ch/en/opcat_pages/npm-resources-3/#financial-resources-3 (09 August 2015); Azeri NPM, *Annual report 2011* p. 11.

regional outposts.[1508] More precisely, two employees out of each of the four regional outposts of the Ombudsman's office have been appointed to serve as members of the NPG.[1509] However, information submitted to the CtAT for the purpose of reviewing its 4th periodical report indicated that the torture prevention department within the Ombudsman's office consists of ten positions including a full-time medical doctor.[1510]

As to the competence and expertise of the NPM staff, the professional background of most of them is not made available although, judging on the letter of the Ombudsman act, they should have some experience in the field of human rights. That being said, it is known that most of the Ombudsman's personnel is made of lawyers (according to data from 2010 50 out of 70 employees are lawyers said to have human rights expertise while the rest is made of supporting staff)[1511] and that one NPG member is a medical doctor. It was only mentioned that one member of NPG is a psychologist.[1512] Ombudsman's staff in general as well as members of the NPG group in particular, are appointed by the Ombudsman himself.[1513] There are no indications that the Ombudsman is not autonomous in engaging staff of its choice. All things considered, it is not clear whether experts in fields related to the prevention of torture other than lawyers and one medical doctor have been contracted. As to the continual education of the NPM staff, annual reports made clear that the Ombudsman's office has organized or was involved in a number of events with the principal aim of increasing the knowledge and skills of the NPG members in the field of prevention of ill-treatment. Most of these events dealt with the OPCAT implementation, visiting methodology and the preparation of reports and recommendations and international standards pertaining to the prohibition of ill-treatment.[1514]

Finally, it has been pointed out that the Azeri NPM can, in line with the relevant legislation,[1515] engage experts and include them in its visiting team.[1516] However, it is not clear to what extent was this possibility made use of in practice. The only information available is that a psychologist accompanied NPG members in some visits carried out in 2011.[1517] Also in the same year the "*Chief Psychiatrist of the Ministry of Health*" participated in few visits made to psychiatric hospitals.[1518] In the course of 2014 two experts (one on child rights and the other on prisons, without specifying his concrete field of

[1508] Azeri NPM, *Annual report 2009/2010* pp. 13–4.
[1509] Azeri NPM, *Annual report 2011* p. 11.
[1510] Government of Azerbaijan, *Fourth periodic report of Azerbaijan on the implementation of CAT*, CAT/C/AZE/4 (2015), § 117–117.
[1511] Azeri NPM, *Annual report 2009/2010* p. 20.
[1512] Azeri NPM, *Annual report 2009/2010* p. 104.
[1513] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, art. 18 para 1. and subparagraph 1.
[1514] Azeri NPM, *Annual report 2009/2010* pp. 95–8; Azeri NPM, *Annual report 2011* pp. 73–4; Azeri NPM, *Annual report 2012* pp. 41–3; Azeri NPM, *Annual report 2013* p. 55; Azeri NPM, *Annual report 2014* p. 72.
[1515] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, article 12.2.1. and 18-1.2.1.
[1516] Government of Azerbaijan, *Fourth periodic report of Azerbaijan on the implementation of CAT*, CAT/C/AZE/4 (2015), § 117–117.
[1517] Azeri NPM, *Annual report 2011* 51, 61.
[1518] Azeri NPM, *Annual report 2011* pp. 53–4; It is questionable whether this can be considered an expert participation since Chief Psychiatrist of the Ministry of Health was, in effect, chief or a supervisor of the institution visited.

expertise) were involved in "*visits and preparing reports*".[1519] There are no indications that psychologists and/or psychiatrist participated in more visits than described above or that experts in other fields crucial for NPM's work were engaged.

The Ombudsman's staff consists of around 35% women and in addition to Azerbaijanis, includes members of several minorities (Avar, Georgian, Lezgin, Russian, Talysh, Tat and Jewish).[1520] Although no information is available on NPG members in particular, one can presume that members of NPG include at least some of the mentioned minorities.

It is unclear whether the NPM visiting teams always include a medical doctor. The NPM indicated that a physician, member of the NPG, took part in all of its visits carried out in 2014, which in that year amounted to 365.[1521] However, taking into account that only one medical doctor is permanently employed and the high number of visits, it is highly unlikely that a medical doctor could have taken part in each and every visit.

17.4.3 It is accorded prerogatives necessary for implementation of its mandate

At the outset of its NPM mandate, the Azeri Ombudsman examined to what extent are its prerogatives, powers and guarantees compatible with those set out in the OPCAT.[1522] As a result, amendments to the Ombudsman act were passed at the end of 2010, which by and large, aligned the Ombudsman mandate and prerogatives with that envisaged for the NPM in the OPCAT. Competences and guarantees such as the right of staff to enter closed institution and their immunity when acting in official capacity were introduced or made clearer. The Ombudsman was clearly authorized to submit recommendations to relevant authorities and demand answers.[1523] The power to submit proposals to the parliament so as to enact new or amend existing legislation was already envisaged in the Ombudsman act.[1524] Furthermore, the Ombudsman's prerogative to enter places of detention unannounced, conduct confidential interviews and have access to information and documentation have been specified in a number of other statutes.[1525]

As to the visit methodology itself, the Azeri NPM did not enact a distinct internal act elaborating its methodology. However, NPM annual reports outline the core of visit methodology, which generally meets the requirements set out in international standards. Namely, there is a distinction made between regular and ad hoc visits. A list of regular visits is being scheduled at the beginning of each year and kept confidential. Institutions to be visited are selected in accordance with their specificities including prior findings regarding material conditions and treatment of detainees. *Ad hoc* visits encompass follow-up visits as well as those aimed at preventing reprisals towards detainees and cover situations where the

[1519] Azeri NPM, *Annual report 2014* p. 11.
[1520] Azeri NPM, *Annual report 2009/2010* p. 20.
[1521] Azeri NPM, *Annual report 2014* p. 13.
[1522] Azeri NPM, *Annual report 2009/2010* pp. 12–3.
[1523] Azeri NPM, *Annual report 2009/2010* pp. 15–29; Azeri NPM, *Annual report 2011* pp. 9–10.
[1524] Constitutional Law on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan, article 1.8.
[1525] Azeri NPM, *Annual report 2013* p. 9.

NPM is in need of reacting quickly.[1526] Visits themselves are conducted in the following manner. Preparations preceding the actual visit consist of collecting information on the institution to be visited, looking into the state of implementation of previously issued recommendations and forming a visiting team. The visit itself consists of an introductory meeting with the management, tour of the premises, review of documentation, confidential interviews with persons deprived of liberty and staff and a final conversation with the management where the first impressions and preliminary findings are presented. Finally, post visit activities consist of drafting a final report with recommendations, submitting it to both institution visited and relevant ministries and examining the need for and timing of a follow-up visit.[1527] To facilitate the collection of information, appropriate questionnaires for conducting interviews as well as a list of issues to serve as reminders for observing detention conditions have been developed and are made use of during visits.[1528] The application of the so called triangulation approach to collecting and verifying information by crosschecking different sources, although not explicitly specified, follows from the reports.

Considering a large number of visits undertaken, the reports did not indicate a disproportionate number of cases of non-cooperation or active obstruction of NPM activities by the management of the institutions visited. Still, 13 cases of active or passive obstruction were identified. Sometimes the absence of a particular employee was used as an excuse to deny the NPM team members access to certain facilities and sometimes they were actively prevented from conversing with detainees in private or examining documentation.

17.4.4 It makes use of relevant international standards

The Azeri NPM clarified that it, in addition to national legislation, during visits makes use of "*international legal documents*". It seems that this formulation encompasses both legally binding conventions and a set of standards or instructions with persuasive force only.

By way of example the following have been listed: international conventions, CPT standards, Istanbul Protocol, SMR, EPR.[1529]. As to the national legislation consistent references have been made to the *Constitution of Azerbaijan*, *Criminal Procedure Code*, *Execution of Punishment Code*, *Psychiatric Act*, and a number of bylaws. The Azeri NPM did not state which norms it considers superior. Neither international nor national standards have been routinely referred to but they were occasionally cited to buttress the recommendation given. This has been the case for keeping persons in police custody for a prolonged time.[1530] There were no cases of outright conflict between standards stemming from national and international norms. However, sometimes the Azeri NPM did

[1526] Azeri NPM, *Annual report 2012* p. 15.
[1527] Azeri NPM, *Annual report 2013* pp. 13–4; Azeri NPM, *Annual report 2014* pp. 12–3.
[1528] Government of Azerbaijan, *Fourth periodic report of Azerbaijan on the implementation of CAT*, CAT/C/AZE/4 (2015), § 122–122.
[1529] Azeri NPM, *Annual report 2011* p. 13; Azeri NPM, Annual report 2014 p. 20.
[1530] Azeri NPM, *Annual report 2011* p. 29.

recommended following international standards when a certain situation was not regulated by the national legislation. For example, conducting medical examinations without presence of non-medical staff.[1531] There are no indications that the NPM developed its own set of standards differing from those outlined above. As to the standards addressing persons with psychosocial and/or intellectual disabilities, the NPM did not in any way invoke, or made reference to the CRPD.

17.4.5 Summary

The Azeri NPM is established by an act with a constitutional strength. The Ombudsman, a state body designated to act as an NPM, is functionally independent (established by law with constitutional strength and hierarchically insulated from other branches of government). However, guarantees of personal independence are more questionable as the final say in nominating candidates for ombudsperson lies in the hands of the president of Azerbaijan. Ombudsman staff performing NPM activities forms a separate unit within the Ombudsman office which is not financially independent from it. No information is available as to the financial resources annually granted to the NPM activities. The information available indicate that the Azeri NPM has at least 10 but most probably 17 staff members, which should be considered a sufficient. There is no information on expertise and professional background of the staff but it seems that most of them are lawyers and one a medical doctor. Experts can be contracted but their engagement is only seldom registered in the reports. Ombudsman and NPG members are granted adequate powers, prerogatives and immunities necessary for implementation of NPM mandate. The methodology they use is in all important respects in line with that employed by international visiting mechanisms. The Azeri NPM occasionally refers to international standards, in most cases CPT standards, EPR and SMR and call upon definition of torture in CAT article 1.

17.5 The NPM managed to generate a deterrent effect.

17.5.1 Frequency of visits

According to the Azeri NPM 244 places of full or partial deprivation of liberty fall under its remit out of which there are 120 under the authority of Ministry of the Interior; 38 Ministry of Justice; two Ministry of National Security; 11 Ministry of Defence; 41 Ministry of Education; 22 Ministry of Health and ten Ministry of Labour and Social Protection.[1532]

From commencing its activities until the end of 2014, the Azeri NPM carried out 2352 (In 2009-416; 2010-396; 2011-381; 2012-411; 2013-383; 2014-365;) visits out of which 1796 scheduled and 556 ad-hoc. In the same period 1623 visits were made to establishments under the Ministry of Internal Affairs (In 2009-294; 2010-274; 2011-276; 2012-276; 2013-284; 2014-219), 577 under Ministry of

[1531] Azeri NPM, *Annual report 2014* p. 24.
[1532] Azeri NPM, *Annual report 2011* pp. 86–7.

Justice (In 2009-108; 2010-94; 2011-86; 2012-115; 2013-62; 2014-112), 15 under Ministry of National Security (In 2009- 2; 2010- 2; 2011-2; 2012-2; 2013-4; 2014-3), 22 under Ministry of Defence (In 2009-2; 2010-3; 2011-3; 2012-5; 2013-5; 2014-4), 36 under Ministry of Education (In 2009-6; 2010-4; 2011-5; 2012-3; 2013-10; 2014-8), 42 under Ministry of Health (In 2009-4; 2010-11; 2011-6; 2012-8; 2013-9; 2014-4), 28 under Ministry of Labour and Social Protection (In 2009-; 2010-8; 2011-3; 2012-2; 2013-5; 2014-10), 4 under the State Migration Service (2013 2;2014-2) and 5 under local executive authorities (2013 2; 2014-3). [1533] Considering the number of places of deprivation of liberty, one cannot but conclude that this is an outstanding performance, as far as frequency of visits is concerned. On average, each type of institutions was visited annually the following number of times: police establishment- 2,25 times, penitentiary institutions 2,5 times, places of detention under Ministry of National Security-1,25 times, places of detention under the Ministry of Defence-0,32 times; places of detention under the Ministry of Education -0,15 times; mental hospitals and other institutions where persons might be deprived of their liberty under Ministry of health-0,32; places of detention under the Ministry of Labour and Social Protection-0,47 times. It follows that police and penal establishments were at the centre of the Azeri NPMs attention as, on the one hand, they were most frequently visited and, on the other, visits to these institutions make up 93,5 % of all visits made. In addition, the planning of preventive visits, that is the selection of institutions to be visited, has been influenced by factors such as location, previously identified problems related to detention conditions and treatment and other specificities of a particular institution, as well as the number and type of appeals submitted to the Ombudsman's complaints department.[1534]

17.5.2 Announcement of visits

From the Azeri NPM annual reporting follows that all the visits conducted (both scheduled and ad hoc) were unannounced, that is to say, carried out without notifying institutions in advance.[1535] In addition, list of scheduled visits of the NPM is kept confidential, as "*the non-disclosure of the schedule is vital in terms of the effectiveness of the visits*".[1536] On the other hand, according to the information available on the APT OPCAT database, the Azeri NPM conducts both announced and unannounced visits. Some sources[1537] even question whether visits conducted by Azeri NPM are truly carried out without prior notification. There is nothing to indicate that NPM carried out visits at night, after working hours or during weekends.

[1533] Azeri NPM, *Annual report 2009/2010* p. 33; Azeri NPM, *Annual report 2011* p. 16; Azeri NPM, *Annual report 2012* p. 16; Azeri NPM, *Annual report 2013* p. 14; Azeri NPM, *Annual report 2014* p. 13.
[1534] Azeri NPM, *Annual report 2013* p. 12; Azeri NPM, *Annual report 2014* p. 11.
[1535] Azeri NPM, *Annual report 2009/2010* p. 32; Azeri NPM, *Annual report 2011* p. 13; Azeri NPM, *Annual report 2012* p. 15; Azeri NPM, *Annual report 2013* p. 12; Azeri NPM, *Annual report 2014* p. 11.
[1536] Azeri NPM, *Annual report 2014* p. 11.
[1537] K. Koroteev, *Mechanisms for the prevention of torture in nine CIS states: Synthesis report* (London: Penal Reform International, 2012), p. 22; CtAT did not clearly stated that NPM announces its visits but called for practical implementation of formally envisaged right to enter institutions without prior notification. See *Concluding observations on Azerbaijan* (CtAT, 26 November 2015), § 23–23.

17.5.3 Confidential interviews are being carried out

During the period under consideration (2009-2014) the Azeri NPM conducted an extraordinary large number of interviews with persons deprived of freedom, namely 9351 out of which more than 4000 with those kept in police custody.[1538] The NPM pointed out that it conducted interviews with 8 to 10 % of overall number of persons deprived of liberty "*without any witnesses*" even if detention conditions were satisfactory.[1539] Moreover in the course of the same period private interviews were carried out with 1159 employees of the institutions visited.[1540] No information was provided as regards the method of establishing the first contact and selecting detainees to be interviewed. On the other hand, considering the extremely high number of interviews conducted, it is to be assumed that all detainees, who signed up for an interview were granted one. Again, these numbers and outcome of interviews stands in stark contrast with the overall human rights situation in Azerbaijan.

17.5.4 Credible allegations are being qualified as specific forms of ill-treatment and referred to the competent bodies

The Azeri NPM did not clearly specify its understanding of the terms torture, inhuman or degrading treatment. However, it did on two occasions cite the definition of torture set out in CAT article 1.[1541] Although, as of yet, NPM did not qualify any situation as torture, having in mind that the CAT definition is reflected in the Azeri Criminal code, it is to be assumed that the NPM's understanding is in line with that of CAT. As to forms of ill-treatment other than torture, the NPM emphasized that these too, are absolutely prohibited and made special reference to the prohibition of ill-treatment of persons deprived of liberty under IHRL and IHL.[1542] However, as is to be seen below, when it qualified a situation as inhuman and/or degrading it referred exclusively to inadequacies in material conditions, food, hygiene or combination of these.

The Azeri NPM had occasionally labelled certain shortcomings regarding material conditions in closed institutions it visited, including the detention regime, or their cumulative effect as certain form of ill-treatment. Namely, on one occasion[1543] while assessing material conditions of detention cells in police establishments, it held that keeping detainees in "*unbearable detention conditions….. in itself could be evaluated as inhuman treatment*". On the other,[1544] it noted that placing prisoners in inadequate prison cells could be considered as "*additional punishment"* or that *"detention in degrading conditions*

[1538] Azeri NPM, *Annual report 2009/2010* p. 34; Azeri NPM, *Annual report 2011* p. 17; Azeri NPM, *Annual report 2013* p. 14; Azeri NPM, *Annual report 2014* pp. 13–4.
[1539] Azeri NPM, *Annual report 2011* p. 16.
[1540] Azeri NPM, *Annual report 2009/2010* p. 34; Azeri NPM, *Annual report 2011* p. 17; Azeri NPM, *Annual report 2012* p. 16; Ombudsman of the Republic of Azerbaijan, *Annual report 2013* p. 12; Ombudsman of the Republic of Azerbaijan, *Annual report 2014* p. 10.
[1541] Azeri NPM, *Annual report 2009/2010* pp. 10–1; Azeri NPM, *Annual report 2011* p. 8.
[1542] Azeri NPM, *Annual report 2011* p. 8.
[1543] Azeri NPM, *Annual report 2011* p. 20.
[1544] Azeri NPM, *Annual report 2014* p. 26.

may be tantamount to ill-treatment".[1545] Furthermore, inadequate material conditions in mental hospitals coupled with the lack of hygiene and insufficient nutrition were held to *"imply that they are subjected to inhuman treatment".*[1546] Likewise, the NPM held that deficiencies in living conditions, nutrition, education and healthcare in boarding schools might be equal to inhuman and degrading treatment.[1547] Finally, it was acknowledged that placing a convict's family (wife and two children) in inadequate visiting room where children had to sleep on matrasses placed directly on the floor, although other visiting rooms offering better conditions were available, "*may be deemed as a degrading treatment based on discrimination against the convict and persons visiting him*".[1548]

On several occasions the NPM team recorded allegations of ill-treatment voiced by persons deprived of their liberty. More precisely in the NPM reports, 21 complaints or indications of ill-treatment were identified: 8 in police establishments, seven in prisons, two in institutions under Ministry of Labour and one in an institution under the Ministry of National security, Ministry of Health, Ministry of Defence and Ministry of Education, respectively.

In at least 7 of these complaints clear claims of being subjected to violence to extract confession or other information were identified. Other complaints alleged other forms of abuse such as inadequate use of force, rude behaviour or the use of insulting language.[1549] Further developments following the encounter of the NPM team with such allegations display a similar pattern. The Ombudsman asks the respective ministry, management of the establishment concerned (penitentiary institution or police station) or prosecutor's office to conduct an inquiry into the allegations. As initial allegations remained unconfirmed the involved law enforcement officers were either left alone and did not undergo any consequence[1550] or were dismissed, received warnings or reprimands on the grounds of certain "rudeness" in dealing with detainees, unlawful detention or disrespect of other legal provisions.[1551] In one case, despite the fact that allegations of physical violence proved to be well-founded, senior police officers directly inflicting the blows were only dismissed from duty without being indicted and prosecuted under the rules of criminal law.[1552] Neither of NPM annual reports indicates that an independent medical doctor, NPG member or associate of the visiting team as an appointed expert, carried out a full-scale forensic examination of a detainee in order to verify his allegations.[1553] However, published annual reports do reveal that in several cases the NPM team confirmed the existence of bodily injuries. More precisely on one occasion "*during the examination of the bodies of … convicts the traces*

[1545] Azeri NPM, *Annual report 2011* p. 38.
[1546] Azeri NPM, *Annual report 2009/2010* p. 72; Azeri NPM, *Annual report 2011* p. 60.
[1547] Azeri NPM, *Annual report 2011* p. 51.
[1548] Azeri NPM, *Annual report 2009/2010* p. 57.
[1549] Refer to section 17.7.3.11. Fight against impunity and carrying out effective investigations.
[1550] See for instance Azeri NPM, *Annual report 2009/2010* pp. 40–1; Azeri NPM, *Annual report 2013* p. 20.
[1551] Azeri NPM, *Annual report 2009/2010* pp. 41–2; Azeri NPM, *Annual report 2013* pp. 20–1; Azeri NPM, *Annual report 2012* p. 18.
[1552] Azeri NPM, *Annual report 2011* p. 25.
[1553] However, on several occasions NPM recommended that thorough investigation into allegations should be carried out by the competent bodies including forensic examination. See for instance Azeri NPM, *Annual report 2009/2010* p. 82; Azeri NPM, *Annual report 2013* p. 21.

of a rubber baton were observed and the members of the NPM Group drew up a corresponding report",[1554] on the other "*NPM Group examined B.A.'s body, they found several signs of injury*"[1555] and lastly "*during the examination of their bodies numeral slash marks were noticed on two of them*".[1556] Two of these cases took place in a prison and one in a police facility. In two cases, it was found that medical records kept in the institution visited did not record the injuries identified. It is not clear whether an NPM doctor carried out the examination of the alleged victims or not. In any case, no further details were provided as to whether the examination was done in line with valid forensic rules. In these cases, recommendations were made to the Ministry of Justice, prosecutor office and the Ministry of Interior respectively to investigate further. No reply was provided regarding the first case, the investigation of the second was said to be on-going while allegations made in the third case were confirmed, which resulted in a dismissal from service of the police officer found responsible. Therefore, it can be concluded that when the NPM receives an allegation or detects signs suggesting that abuse might have taken place, it is satisfied to bring this allegations or indications to the attention of the competent body. The NPM remained silent on the question of credibility of allegations. Also, contradiction between state authorities finding the allegations not substantiated and yet disciplinary "punishing" police officers involved was not addressed by the NPM.

As regards control of the use of force in places of detention, the Azeri NPMs performance, again, left much to be desired. On the one hand, it did, on one occasion, express its concern as to the use of force by noting that "*sometimes adequacy is not respected*".[1557] On the other hand, the Azeri NPM did not demonstrate initiative in determining the actual state of affairs regarding the use of force against those deprived of freedom. For example, NPM members were satisfied that use of force, (handcuffs and rubber truncheons) applied due to rudeness towards the staff and attempt of self-injury, was properly recorded.[1558] Apparently, no further inquiries were taken regarding whether the use of force was necessary, proportionate to the legitimate aim pursued or commensurate to the resistance.[1559] Of course, the NPM is not bound to examine whether these conditions were met, let alone, make a binding decision, but it could articulate a *prima facie* position by triangulating different sources of information.[1560] On another occasion,[1561] the fact that none of the complaints alleging unnecessary use of force in prison in the course of five years were found substantiated, did not motivate the NPM to examine more closely few randomly selected cases in order to gain further insights.

In addition to the above-described cases where the Azeri ombudsman acted as an NPM, that is to say, in its preventive role, it should be emphasized that it did not determine that any person deprived of

[1554] Azeri NPM, *Annual report 2009/2010* p. 59.
[1555] Azeri NPM, *Annual report 2009/2010* p. 62.
[1556] Azeri NPM, *Annual report 2011* p. 24.
[1557] Azeri NPM, *Annual report 2012* p. 28.
[1558] Azeri NPM, *Annual report 2014* p. 27.
[1559] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.3.2. Use of force.
[1560] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.2.3. Inspection procedures. Triangulation.
[1561] Azeri NPM, *Annual report 2013* p. 34.

liberty was subjected to any form of ill-treatment even when it acted under its complaint procedure. The complaints addressed to the Ombudsman again led to recommendations to competent organs to conduct thorough investigation and adequately punish those responsible, which either found its conclusion in disciplinary sanctioning the perpetrator or in no sanctions at all. Recommendations to bring the one responsible to account in a process governed by criminal justice rules went unheeded. The Azeri NPM offered the following explanation of the situation:

> "*irrespective of the form of investigation, in some cases even when signs of violence are discovered, it is still impossible to prove the case beyond reasonable doubt because of the shortage or absence of evidence*".[1562]

On another occasion, the Ombudsman designated a phenomenon of "*police-prosecutor-judge solidarity*" as a principal reason for impunity.[1563] However, no explanation was offered as to why the Azeri Ombudsman itself did not qualify individual cases brought to his attention by way of complaints as torture, inhuman or degrading treatment.

It seems that measures most resorted to, in cases relating both to allegations of ill-treatment and poor material conditions and regime, are warning, reprimanding or dismissing chiefs or other staff members of the establishments visited. Although taking disciplinary actions against those responsible is not uncommon, relying exclusively on such proceedings and pertaining sanctions can hardly prevent future ill-treatment.[1564] Namely, in the case of shortcomings stemming from material conditions and regime, the root of the problem mostly lies in a lack of funds or training and inadequate regulations and practices rather than the members of the custodial staff. In case of deliberate abuse, given that disciplinary sanctions such as warnings, reprimands and even dismissing those directly perpetrating or condoning ill-treatment, can hardly suffice to either compensate the victims or to bring about a deterrent effect, this practice is even more questionable

In sum, the Azeri NPM in the period between 2009-2014 did not clearly qualify any situation of deliberate abuse of persons deprived of freedom as torture or other form of ill-treatment.[1565] This is especially unusual if one takes into account the high number of unannounced visits and interviews carried out with detainees on the one hand, and consistent accounts of ill-treatment in Azerbaijan, on the other.

[1562] Azeri NPM, *Annual report 2009/2010* p. 81.
[1563] Ombudsman of the Republic of Azerbaijan, 'Annual report 2010', at 13.
[1564] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, sections 12.2.2. Duty to conduct an effective investigation of ill-treatment and 12.2.3. Duty to redress victims.
[1565] K. Koroteev, *Mechanisms for the prevention of torture in nine CIS states: Synthesis report* (London: Penal Reform International, 2012), p. 25.

17.5.5 Consistency of allegations is being determent and conclusion on risk of ill-treatment articulated

As to the consistency of allegations not corroborated by evidence,[1566] the NPM noted that the interviewed detainees, in addition to issues falling out of its scope, mostly complained on "*various pressures exerted during investigations*".[1567] However, it did not provide an assessment of risk or articulated a position on whether complaints stemming from some particular institution form a pattern or are consistent with one another.

17.5.6 All premises are being inspected during visits

It was stated that, as a rule, the NPM team tours the premises of the establishment it visits to examine whether they meet basic standards in terms of size, access to light, air etc.[1568] Sometimes inspected premises in a particular institution were specified. For instance, it was said that in police stations "*operators' rooms, as well as rooms with the probability of having detained persons there, were checked*"[1569] or that in a certain penitentiary institution "*cells of investigation isolators, penal isolator, medical-sanitarian unit, housing building, library, kitchen, laundry*" were observed.[1570] Similarly, in reporting on visits to psychiatric hospitals it is occasionally noted that "*comprehensive investigations were carried out on all departments of the establishment, including wards, manipulation rooms, kitchen, refrigerator, the production and expiry dates of the food and medicine kept there*"[1571] or that "*all objects of the dispensary were inspected.*"[1572] On the other hand, not any non-standard object was found in police establishments but, rather surprisingly, in one psychiatric hospital and one boarding school.[1573] In addition, annual reports do not indicate that interrogation rooms in police establishments are being regularly inspected. All things considered, it would be safe to conclude that it is not known how thoroughly the Azeri NPM inspects the premises of the institutions it visits.

17.5.7 Cumulative effect is taken into account

In situations considered as inhuman and/or degrading treatment, the NPM clearly took account of several shortcomings stemming from poor material conditions, inadequate nutrition, treatment etc. employing, thus, the so called cumulative effect approach to finding ill-treatment.[1574]

[1566] Refer to chapter 11 Mechanisms for ensuring compliance with prohibition of ill-treatment, section 11.4. Practical application - towards convergence?.
[1567] Azeri NPM, *Annual report 2009/2010* p. 34; Azeri NPM, *Annual report 2011* p. 17.
[1568] Azeri NPM, *Annual report 2013* p. 13.
[1569] Azeri NPM, *Annual report 2011* p. 15.
[1570] Azeri NPM, *Annual report 2014* p. 25.
[1571] Azeri NPM, *Annual report 2013* p. 45.
[1572] Azeri NPM, *Annual report 2014* p. 46.
[1573] Azeri NPM, *Annual report 2012* p. 32; Azeri NPM, *Annual report 2014* p. 51.
[1574] Refer to chapter 5 Mapping the content of ill-treatment under international law, section 5.4.5.2.1. Material conditions and regime of detention.

17.5.8 Duration of visits is proportionate to size of institutions

As to the duration of visits, it has been consistently repeated that scheduled visits last 1 to 3 days depending on the size of the institution visited and number of detainees accommodated therein.[1575] It was also noted that some small police establishments take only several hours to visit.[1576] The actual duration of visits undertaken was not indicated in the NPM annual reports.

17.5.9 Certain premises are recommended to be put out of use

Although it identified a number of institutions with highly inadequate material conditions, the Azeri NPM did not, in any of these cases, recommend that the critical establishment, or part of it, should be put out of use. The standard recommendation in these cases was to step up with the refurbishment of existing or construction of new premises.

17.5.10Summary

The Azeri NPM managed to establish and maintain a high frequency of visits to places of deprivation of liberty as, in the period examined, each of them was visited in average around 2 times per year. This being said, police and penitentiary establishments were visited more often whereas others at a considerable lower rate. Similarly, according to NPM reports, all visits are conducted unannounced which, again, is a remarkable achievement. What is more, the number of interviews conducted with persons deprived of liberty is unusually high and amounts to more than 9 000 persons in the course of six years, which makes 8 to 10 % of all detainees in Azerbaijan. In addition, a large number of custodial personnel have been interviewed as well. However, only the combination or cumulative effect of inadequate material conditions, regime, nutrition etc. has been occasionally qualified as mostly inhuman treatment. Indications collected or complaints received alleging deliberate abuse (21 in initial six years) were neither labelled as torture nor other forms of ill-treatment but only referred to the competent instances. Investigations, which followed, ended either in rejecting the complaint or in disciplinary punishment of those responsible. Moreover, there are no suggestions that the NPM physician carried out forensic medical examinations of persons in custody with visible bodily injuries. This stands in stark contrast with recent findings of the UN Working Group on Arbitrary Detention, which during its ten-day visit to places of detention in Azerbaijan documented numerous complaints of ill-treatment. In particular, it was specified that following allegations were recorded:

> "*having a gun pointed at their head, severe beatings, sometimes lasting several hours, verbal abuse and psychological pressure, practices such as standing on one's knees for long hours, threats of physical and sexual abuse as well as threats to arrest family members*".[1577]

[1575] Azeri NPM, *Annual report 2009/2010* p. 33; Azeri NPM, *Annual report 2011* p. 15; Azeri NPM, *Annual report 2012* p. 15; Azeri NPM, *Annual report 2013* p. 12; Azeri NPM, *Annual report 2014* p. 11.
[1576] Azeri NPM, *Annual report 2011* p. 15.
[1577] Although no recent reports of bodies able to conduct on the spot visit to places of detention are published, statement of the UN Working Group on Arbitrary Detention upon the conclusion of its visit to Azerbaijan (16-25 May 2016) has been made

In addition, the veracity of complaints received by the Azeri NPM was not being examined by a triangulation approach nor was the level of risk of ill-treatment articulated. It is not clear, whether all the facilities, installations, rooms and lockers are being examined in detail during every visit as a matter of routine. Visits can last up to three days depending on the size of the institutions and number of persons being detained. Lastly, no explicit recommendations for some premises or objects to be put out of use were identified.

17.6 The NPM made places of detention transparent

17.6.1 Triangulation

The Azeri NPM does not explicitly refer to the term triangulation but in effect it observes its main tenants. To be precise, the NPM regularly reported that during visits relevant documentation is being examined and interviews with both persons deprived of their liberty and staff are carried out. Having said this, it is another question how often and thorough is this approach utilized. For example, on one occasion the NPM regarded consistent allegations of 30 interviewed convicts on poor food, staff not forwarding their complaints and being entangled in corruptive practices as truthful because

> "*issues have been voiced by not just one convict, but by majority of them, which lets us believe in the truthfulness of the provided information*".[1578]

Allegations of physical abuse, on the other hand, even when corroborated with medical findings, did not give rise to a similar conclusion regarding the truthfulness of allegations.

17.6.2 All relevant aspects, issues and safeguards are being looked at during visits

Although the NPM makes use of questionnaires and a list of issues as a reminder during visits, these documents were not published in the annual reports nor were they made accessible otherwise. In what follows, a brief overview of issues and guarantees the NPM is looking at during visits will be provided based solely on published annual reports. The Azeri NPM has been continuously repeating that during visits to places of detention he primarily focuses on

> "*detention conditions, treatment of detainees by staff, state of medical services, food ration, food quality, as well as reformatory means applied to convicts, organization of their leisure time*".[1579]

It further clarified that while looking at material conditions it examines

public. While short and containing only a summary of preliminary findings, this statement can be used as a benchmark since it addressed issues dealt with in this thesis. The working group stayed in Azerbaijan for 10 days, visited 22 facilities where persons deprived of liberty are held (17 detention facilities, two psychiatric hospitals and institutions for persons with psychosocial and/or intellectual disabilities) and managed to conduct confidential interview with 80 persons. Even though members of the visiting team were denied access to some rooms or even entire parts of institutions, they managed to enter most of the establishments and premises of their choice. See Working Group on Arbitrary Detention, *Statement upon the conclusion of its visit to Azerbaijan: (16-25 May 2016)*. http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20021&LangID=E (21 December 2016).

[1578] Azeri NPM, *Annual report 2009/2010* p. 59.

[1579] Azeri NPM, *Annual report 2009/2010* p. 33; Azeri NPM, *Annual report 2011* pp. 16–7.

"*the size, capacity and state of cells and rooms, actual placement, light, ventilation, furniture supply, personal hygiene and sanitary conditions*".[1580]

However, it made clear that meeting standards on material conditions does not necessarily imply that ill-treatment does not take place.[1581] Therefore the treatment of detainees is also examined. NPM reports indicate that the following issues in all places of deprivation of liberty are being looked at: access to light, artificial and natural, air, ventilation, heating, space per prisoner, furniture, table, chairs, matrasses, state of cleanness and functionality of sanitary facilities, access to water, general state of repair of facilities including floors, provision of hygienic means and clothing and quality of food offered. Beyond this, it has continuously looked at the separation of different categories of detainees, keeping and maintaining relevant registries in places of detention, adequacy of staffing levels, contacts with outside world through making telephone calls, amount of time spent outdoors per day. Furthermore, it inspected access to and quality of medical care at disposal to persons deprived of liberty, availability of appropriate medication, staffing, whether there is an employee with some medical background present in the facilities at nights and during weekends.

In police establishments, in addition to the ones previously outlined, the NPM looked at the following issues: forced labour and ensuring access to three fundamental rights upon deprivation of liberty, especially the confidentiality of medical examination. On the other hand, providing written information to detainees on their rights was mentioned only once.[1582] The examination of actual exercise of three fundamental rights in practice was not adequately addressed. Moreover, complaint mechanisms, its adequacy and independence were not addressed at all. Although confidentiality of medical examination was stressed, the content of medical reports has not been raised. Finally, safeguards during questioning of the suspect in police custody were neither addressed nor examined. It is not clear whether interrogation rooms are being inspected for nonstandard objects.

In prisons**,** the NPM looked at the detention regime (time spent in the open air and outside the cell, recreational activities and leisure time including possibility to exercise their right to worship, adequacy of phone lines) as well as on the confidentiality of meetings between lawyers and prisoners. It only briefly touched upon complaint mechanisms (it mentioned complaint mechanism in penitentiary institutions in passing by noting that convicts complained that they could not get envelopes to send their appeals confidentially),[1583] considered solitary confinement inconsistently and in a superficial manner. Moreover, not only that it did not examine preliminary medical examination upon admission to penal institutions, after the use of force or upon request, but addressed the wide subject of health care, which, in addition to the outlined safeguard role, include preventive and curative role[1584] only partially. More

[1580] Azeri NPM, *Annual report 2013* p. 13.
[1581] Azeri NPM, *Annual report 2011* p. 16.
[1582] Azeri NPM, *Annual report 2011* p. 28.
[1583] Azeri NPM, *Annual report 2009/2010* p. 58.
[1584] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.7.1. Health care in prisons.

precisely, it was not inspected whether these examinations are confidential, that is carried out without presence of prison officers, conducted in line with the Istanbul protocol, how many cases have been referred to the competent instances etc. Instances of use of means of coercion by the members of the custodial staff, though mentioned on few occasions were not, as it appears, systematically examined during every visit.

Finally, in institutions under the Ministry of Health and Ministry of Labour and Social Issues, the legality of placement was examined either briefly or not at all. On the other hand, the rationale of depriving persons with psychosocial and/or intellectual disabilities of liberty has not even been discussed. Deinstitutionalization and life in the community was tackled only indirectly by recommending fostering renewal of family ties so that residents or patients may at some point leave the institution. The issue of deprivation of legal capacity and its detrimental consequences were not considered at all. Adequacy of medical treatment and availability of treatment methods other than those relying exclusively on pharmaceuticals was, albeit just on few occasions, addressed. On the other hand, involuntary medical treatment was not looked at. As to the material conditions, beside those applicable to all persons deprived of liberty (adequate hygiene, light, air etc.), issues such as personalization of private space by allowing patients to keep personal items and have a bedside table have been raised. The issue of use of means of restraint as well as solitary confinement was addressed as well.

17.6.3 The NPM regularly reports on the state of affairs encountered during visits

The Azeri NPM does not publish visit reports but is satisfied with sporadically communicating press releases on certain visits containing information on when and where they took place but not much else.[1585] Between 2009 and 2014 627 press releases were published out of which 379 addressed the visits made.[1586] Therefore, most of the information on activities of the NPM is made available through annual reporting. Each annual report is structured in sections reflecting implemented activities: preventive visits, legal analysis, legal enlightenment, public relations, international cooperation and a list of recommendations made. While legal analysis mainly deals with the legislative component of NPM's mandate, the public relation section only briefly outlines the number of press releases issued. The legal enlightenment and international cooperation section describe activities undertaken on disseminating knowledge on the prevention of ill-treatment among law enforcement officials and the public at large, as well as training and capacity building of the NPM team. Sections describing preventive visits and recommendations are central for assessing NPM's effectiveness. Namely, the preventive visits section, in addition to providing basic information on the visiting methodology, offers an overview of visits undertaken in the reporting year, whereas in the proposals and recommendations section the output of these visits are specified.

[1585] K. Koroteev, *Mechanisms for the prevention of torture in nine CIS states: Synthesis report* (London: Penal Reform International, 2012), p. 20.
[1586] Azeri NPM, *Annual report 2014* p. 76.

However, the NPM in the preventive visits sections of its annual reports neither makes clear to which institutions exactly were all the visits made nor describe in a coherent manner the situation encountered therein. For example, the 2014 annual report somewhat confusingly describes the visits undertaken. Namely, though names of around 50 police establishments visited in 2014 can be discerned, one cannot learn to which institutions the remaining 170 visits were carried out. Similarly, it was not made clear whether all police establishments were visited at least once, and if so why others were visited several times. As to the situation regarding compliance with standards and safeguards, one can find out bits and pieces but not the entire picture. Put differently, by reading annual reports, one cannot conclude that during visits the practical utility of basic safeguards (access and functionality) is being routinely verified. This is rather a large deficiency, since if one does not know which establishments were visited and outcome of these visits, highlighting their sheer number has no practical value. The same is valid for other institutions visited in the sense that one is not provided with a pattern indicating that the observance of basic safeguards is being regularly verified but only hinted with selected fragments of a certain visit focusing mostly on improvements and/or shortcomings in the state of repair of premises. Photos inserted in the 2009/10 and 2012 report mostly display renovated rooms and scenes of the Ombudsman and NPM staff chatting with inmates or on training sessions. Dilapidated premises are shown only as illustration of how the facility looked like before it was completely renovated.

17.6.4 Summary

Although the method based on crosschecking information by using different sources to discover the real state of affairs is generally recognized, it remains unclear to what extent it was utilized. Material conditions of the establishments visited (space, state of repair, access to light, air, heating, state of hygiene etc.), nutrition, the detention regime (outdoor and indoor activates), contact with the outside world (visits, telephone calls) and health care were most regularly examined. On the other hand, in general, considerably less attention was put on safeguards and guarantees that should prevent or reduce the possibility of resorting to deliberate ill-treatment such as access to a lawyer, to a doctor and to inform a designated person of one's arrest, providing written information on rights, the complaint system etc. In addition, in a health care and social context, the novel approach introduced by the CtRPD providing higher protection was not followed. Moreover, issues such as deinstitutionalization, arbitrary deprivation of liberty and non-consensual treatment were not addressed at all, while the use of means of restraints and seclusion was only sporadically addressed. Results of the visits are being made public via annual reporting only. The core of the reporting is placed in a section dealing with preventive visits. Considering the number of visits and interviews conducted, annual reports could hardly do anything else but scratch the surface of the problem. Namely, while those visits being reported on were briefly outlined in a space ranging from one passage or less up to half a page, most of the visits were actually not mentioned at all. Neither findings on whether authorities comply with standards nor a follow-up on previously given recommendations were systematically presented and kept track of.

17.7 The NPM improved other safeguards, conditions and regime in closed institutions and removed causes of ill-treatment

17.7.1 The NPM made pertinent recommendations

If we look at what types of recommendations were submitted by the NPM, the following picture emerges. Most of the recommendations dealt with material conditions of detention and were in line with international standards. Namely, improving the state of repair of facilities including prisoner's cells and dormitories, solving deficiencies related to insufficient light, air, ventilation, heating, constructing outdoor facilities or acquiring recreational equipment etc. cannot in itself be misguided. The same can be said for those recommending that the quality of food, access to water, outdoor exercise, recreational activities, health care etc. ought to be improved.

With regard to police establishments, the CPT suggested ensuring that the duration of police detention prescribed by law is not overstepped and that detainees are moved to remand facilities in a legally defined timeframe.[1587] Similarly, NPM has provided a number of recommendations advising that the legal threshold for transfer should not be exceeded.[1588] The NPM generally follows one of the basic CPT recommendations[1589] that upon arrest one should be ensured three fundamental guarantees (access to a lawyer, a medical doctor and to notify a relative or other person of his choosing of its detention).[1590] However, the NPM did not pay adequate attention to assurances designed to facilitate use of these guarantees in reality such as recording exercise of these rights in writing and asking detainees to sign a statement to that effect. In addition, only on one occasion did the Azeri NPM note that a person arrested by the police ought to be informed of his rights in written form.[1591] On the other hand, there are several recommendations that suggest that information on this right should be publicly displayed.[1592] This method of informing, namely displaying written information, falls short of routinely handing out forms outlining information on rights to arrested persons, which should be followed by signing a statement attesting that they have indeed been properly informed.[1593] To conduct medical examination without the presence of non-medical personnel is recommended both by the CPT and NPM.[1594] The right of the arrestee to be examined by a doctor of his own choice is also supported by both bodies.[1595] The NPM did not follow up on CPT recommendation[1596] to introduce additional guarantees in the process of interrogating criminal suspects by enacting a code of conduct for police interviews, nor did it touch upon this issue in any other way (for example, by repeating longstanding

[1587] *Report on Azerbaijan* (CPT, 07 December 2004), p. 15.
[1588] Azeri NPM, *Annual report 2012* p. 28; Azeri NPM, *Annual report 2013* p. 17.
[1589] *Report on Azerbaijan* (CPT, 07 December 2004), §§ 28–36.
[1590] Azeri NPM, *Annual report 2011* p. 23.
[1591] Azeri NPM, *Annual report 2011* p. 28.
[1592] Azeri NPM, *Annual report 2014* p. 21.
[1593] *Report on Azerbaijan* (CPT, 07 December 2004), § 38–38.
[1594] *Report on Azerbaijan* (CPT, 07 December 2004), § 36–36; Azeri NPM, *Annual report 2014* p. 24.
[1595] *Report on Azerbaijan* (CPT, 07 December 2004), § 36–36; Azeri NPM, *Annual report 2011* p. 23.
[1596] *Report on Azerbaijan* (CPT, 07 December 2004), § 40–40.

CPT recommendation to videotape the interviews). Although the NPM did recommend, in line with the CPT standards, that medical examination is to be carried out within 24 hours upon admission to the temporary detention place, it did not specify that the medical report should outline allegations, objective findings of the examination and a possible correlation between the two.[1597] Finally, the Azeri NPM did not deal with access to, independence and effectiveness of the complaint system within the police. It also did not repeat CPT recommendations to the courts not to ignore allegations of ill-treatment when the accused are brought before them at the end of police custody but take steps to facilitate their investigation (record them in writing and order forensic examination).[1598] The NPM did not criticize amendments to the *Law on Administrative Offenses* prolonging administrative detention from 15 days to 3 months as such, but only suggested that in light of these changes, detention conditions should be improved by, inter alia, increasing the numbers of showers.[1599]

As regards penal institutions and remand facilities, conducting medical examinations upon admission to these institutions and after the use of force in line with Istanbul protocol (report outlining allegations, objective findings and level of correspondence between the two) was recommended by the CPT[1600] but does not appear in recommendations of the NPM. Both the CPT[1601] and NPM[1602] suggested that medical workers should be present at the prison at night and during weekends. The problem that prisoners sometimes spend up to 23 hours per day locked up in their cells and the need to offer more activities including to ensure time in the fresh air in duration as stipulated by law was noted by both bodies.[1603]

In respect of psychiatric hospitals, the CPT issued several rather detailed recommendations addressing the procedure and guarantees to be afforded to patients in case of their involuntary hospitalization (training of all actors involved including psychiatrists, judges etc., provision of full and accurate information, decision made by a judge after personally hearing the patient, serving a copy of the final decision to the patient together with instruction on lodging an appeal, ensuring access to legal assistance) and suggested that the status of all patients currently hospitalized without their consent ought to be reviewed.[1604] The NPM, on its part, was satisfied by issuing two brief recommendations stating "*thoroughly audit placement in the mental hospitals*".[1605] Unlike the CPT,[1606] NPM did not address the issue of ensuring informed consent to medical treatment placed in psychiatric hospitals. The CPT and NPM called for enacting a policy regulating the use of means of restraint in institutions and generally paid attention to their application.[1607] Similarly, they both looked at the issue of seclusion of patients

[1597] Azeri NPM, *Annual report 2013* p. 66.
[1598] *Report on Azerbaijan* (CPT, 07 December 2004), § 25–25.
[1599] Azeri NPM, *Annual report 2013* 16, 66.
[1600] *Report on Azerbaijan* (CPT, 07 December 2004), 26, 112.
[1601] *Report on Azerbaijan* (CPT, 26 November 2009), § 31–31.
[1602] Azeri NPM, *Annual report 2013* p. 32.
[1603] *Report on Azerbaijan* (CPT, 07 December 2004), § 98–98; Azeri NPM, *Annual report 2012* p. 23.
[1604] *Report on Azerbaijan* (CPT, 26 November 2009), § 77–77.
[1605] Azeri NPM, *Annual report 2009/2010* p. 112; Azeri NPM, *Annual report 2011* p. 83.
[1606] *Report on Azerbaijan* (CPT, 26 November 2009), § 78–78.
[1607] *Report on Azerbaijan* (CPT, 26 November 2009), § 74–74; Azeri NPM, *Annual report 2011* p. 56.

residing in mental hospitals. The CPT suggested enactment of detailed instructions on the use of seclusion,[1608] while the NPM called for proper documentation of resort to this measure[1609] and adopting general rules governing activities taken in mental hospitals.[1610] The principal position of the NPM regarding the use of seclusion in psychiatric hospitals is not altogether clear as it on one occasion called for its abolishment.[1611] However, as the Azeri NPM does not draw on the letter of the CRPD,[1612] it is to be concluded that it does not support complete abolition of this measure. In addition, in two recommendations the NPM called authorities to promote "European Standard Minimum Rules" in a mental health care setting.[1613] While standard setting documents addressing prisons such as European prison rules, which was probably meant by European standard minimum rules, may prove useful for addressing material conditions and some elements of the daily regime, they are hardly appropriate to serve as a reference for anything else concerning persons deprived of their liberty in hospitals and social care institutions.

Finally, an important statute governing treatment of those deprived of liberty, namely the *Law Ensuring the Rights and Freedoms of the Persons Held in Detention Facilities* was adopted in 2012. This piece of legislation addressed police custody and remand detention and envisages a range of safeguards to those deprived of liberty such as mandatory medical examination within 24 hours from admission to the facility, obligation to refer documentation containing indices of ill-treatment to the competent prosecutor, safeguards addressing transfer of detainees, providing information on rights, complaints etc. It also set out minimum material and hygienic conditions, provision of clothes, minimum of 4 square meters per detainee, daily outdoor activities and daily medical checks of those undergoing solitary confinement. However mandatory content of medical reports in line with the Istanbul Protocol and other standards was not envisaged as well as instructions on the content and maintenance of registers. Similarly, while it affirms the right of petition, that is to submit complaints, it does not deal with the quality of the decision making process (impartiality and or independence of the complaint instances or bodies or individuals collecting evidence and making a decision). In addition, the right of persons deprived of liberty to be examined by a doctor of their choice at their own expense is made conditional upon approval of the body administering criminal proceedings.[1614]

A general conclusion might be that the Azeri NPM, in spite of making a number of sensible recommendations, did not consistently address the central problem, that is to say, risk of deliberate

[1608] *Report on Azerbaijan* (CPT, 26 November 2009), § 42–42.
[1609] Azeri NPM, *Annual report 2013* p. 47.
[1610] Azeri NPM, *Annual report 2013* p. 68; Azeri NPM, *Annual report 2014* p. 83.
[1611] Actually, NPM just briefly noted that" *practice of locking patients should be abolished*" see Azeri NPM, *Annual report 2011* p. 57.
[1612] For the CRPD's position on different acts often leading to ill-treatment of persons with psychosocial and/or intellectual disabilities see chapter 6 Impact of the prohibition of ill-treatment - a dynamic process.
[1613] Azeri NPM, *Annual report 2011* p. 84.
[1614] Azeri NPM, *Annual report 2012* pp. 36–8; National Assembly of Azerbaijan, *Law on the rights and freedoms of individuals kept in detention facilities*. http://www.legislationline.org/topics/topic/8/country/43, 22.6.

abuse in custodial institutions. Put differently, the question to be posed is whether certain recommendations that might improve safeguards are lacking or are only occasionally mentioned.

17.7.2 Recommendations were implemented

As the Azeri NPM does not publish visit reports, in order to identify recommendations one needs to rely on its annual reports. In every annual report to date the NPM listed recommendations addressing a broad range of issues arising from its visits. Although, among these, one can find specific recommendations aimed at particular institutions, most of them either address general issues and propose legislative changes or call for solving deficiencies encountered during visits in a general manner. For example, it calls the Ministry of Justice to improve material conditions in penitentiary institutions without listing each and every inconsistency encountered during visits. However, in a preventive visits section of NPM's annual reports deficiencies encountered during visits to particular places of detention are set forth. These deficiencies are then, according to the report, referred to the authorities in form of an appeal and repeated or summarized in the section outlining general recommendations. In most cases a response of the authorities is documented as well and, occasionally, results of the follow-up visits.

In what follows an overview of individual recommendations addressed to institutions after visits and the state of their implementation, formal and real, will be reviewed. These will take into account general recommendations but will mainly draw on sections of NPM reports describing visits. The recommendations identified will subsequently be further sorted into clusters according to their type. Finally, an overview of more general recommendations including those introducing new or changing existing legislation will be presented. The state of compliance with these recommendations will, to the extent possible, be provided as well.

17.7.2.1 Formal compliance

In 2009 and 2010 the NPM issued 147 individual recommendations. No replies were received as regards 65 recommendations. The remaining recommendations were mostly designated as accepted (63), three were rejected while the situation concerning 16 is not clear. During 2011 the NPM issued 108 individual recommendations and received 67 answers according to which 56 were designated as accepted and one as rejected. The situation as regards ten is not clear. 85 individual recommendations were identified in the course of 2012. No answer was provided in relation to 21, 56 were said to be accepted, one rejected and the situation regarding seven is not clear. In 2013 96 individual recommendations were made whereas replies to 26 are lacking. 59 recommendations were designated as accepted, one as rejected while the situation regarding the status of ten is not clear. During 2014 out of 128 individual recommendations issued replies were not available for roughly one half (61). As regards the rest, 43 were accepted, one rejected while the situation regarding remaining 23 is not clear.

Therefore, in the period from the outset of NPMs activities in 2009 up until the end of 2014 564 individual recommendations, or appeals, were identified. Out of 350 recommendations where a state reply could be identified, which amounts to 62% of the overall number of recommendations issued, 277 were designated as accepted, 7 were rejected while the situation concerning 66 is not clear. It follows that, according to available data, 79 % of all recommendations replied to were accepted, 2 % rejected while the situation regarding 19% is not clear.

17.7.2.2 Real compliance

As to the real compliance, follow up information was made available only concerning 33 out of 147 recommendations issued during 2009 and 2010. The implementation was verified in 12 cases, in 8 not verified while the state of implementation was not clear regarding 13 recommendations. In the course of 2011 19 out of 108 recommendations were followed up on. The implementation was verified in five, not verified in eight and not clear in six cases. From 85 recommendations identified in the year 2012 follow up information on compliance was provided only as regards 13. Implementation was verified in five, not verified in two and is not clear as regards six recommendations. No information on follow up was indicated regarding 79 out of 96 recommendations made in the course of 2013. Out of 17 recommendations followed up on, implementation was verified in eight cases, not verified in five and unclear in four. In the year 2014 only eight out of 128 recommendations were followed up on and in all cases compliance was verified.

As regards the overall assessment on real compliance during the period from the commencement of NPM activities up until the year 2015, no firm conclusions could be drawn as no information regarding a follow-up was indicated for 474 recommendations. The remaining 90 recommendations make 16% of the overall number of the recommendations issued in the given time period. Implementation was, however, verified in 38 cases, not verified in 23 cases and not clear regarding 29 recommendations. It follows that, although as much as 474 recommendations were not followed up, if we analyse those remaining (90) one can conclude that in 42% of cases implementation was verified in practice, in 26% not verified while the situation is not clear in 32 % of cases.

17.7.3 Overview of formal and real compliance in respect of specific recommendation clusters

If one considers different types of recommendations submitted to the authorities, the following picture emerges.

17.7.3.1 Material conditions

247 recommendations are addressing material conditions of detention. Out of 168 recommendations replied to 135 were designated as accepted, 2 as rejected and 31 not clear. 54 recommendations were

followed up whereas the implementation was verified in 20 cases, not verified in 14 and not clear in 20 cases. Consequently, formal compliance came to 80%, whereas real to 37%

30 recommendations addressed issues such as inadequate illumination (natural and/or artificial) and heating or ventilation of premises were persons deprived of liberty are held (police or prison cells, hospital dormitories etc.). Most of the premises where these shortcomings were observed fall under the authority of the Ministry of Internal Affairs and the Ministry of Justice. Out of 21 recommendations replied to, 14 were accepted and the situation as regards 7 is not clear. No follow up was indicated as regards 23 recommendations. Implementation was verified in 3 cases, not verified in 1 and not clear in 3 cases.

The problem of overcrowding has been, to a greater or lesser degree, raised in 24 recommendations. State authorities have provided response in 20 cases, accepting 13 recommendations, rejecting 1 while its position concerning 6 remained unclear. No follow up was indicted concerning 19 recommendations. Implementation was not verified in case of 3 and not clear as regards 2 recommendations. On a more general note, state authorities stressed that they are addressing the problem of overcrowding by building new penitentiary institutions.

Recommendations addressing a variety of deficiencies pertaining to state of repair of facilities ranging from lack of electric bulbs, furniture, and water taps to erecting completely new detention facilities amounted to 164 recommendations. There are 15 recommendations addressing inadequate or lack of furniture, chairs and tables, in places of deprivation of liberty, 11 noting problems with water supply in detention cells, lack of running water or water taps, 4 criticising a lack of doors in toilets and in 5 cases matrasses were unfit for use or altogether lacking. In 13 recommendations the NPM recommended that stone or concrete floors be coated with a wooden cover. Approximately 20 recommendations suggested conducting capital renovation of existing facilities or erecting entirely new buildings. Out of 164 recommendations identified, state authorities did not provide replies in relation to 51 recommendations, accepted 98, rejected 1 while their position could not be determined as regards 14 recommendations. As to real compliance no follow up information were provided concerning 127 recommendations, implementation was verified as regards 16, not verified 9 and unclear 12.

According to the available reports 29 recommendations dealing with issues related to hygiene in places of detention were identified. Most of these criticized the state of cleanness of premises where persons deprived of liberty dwell such as detention cells, toilets, kitchens, and canteens. In 6 cases a lack of provision of hygienic items to persons deprived of liberty was documented. As to the formal compliance reply on 15 recommendations was not provided, 10 recommendations were designated as accepted while the situation as regards 4 was not clear. Real compliance could hardly be determined as no follow up information was indicated referring to 24 recommendations. As to the remaining 5 recommendations, implementation was verified in one case, not verified in the other and not clear in 3 cases.

17.7.3.2 Nutrition

23 recommendations addressing nutrition were identified. Ten of them stressed that inmates have been provided with insufficient amount of food (meals not meeting the prescribed calorie intake or offering less than three meals per day) or drinkable water. Nine dealt with quality and variety of food offered as well as with the provision of special meals to sick inmates. The others dealt with various issues related to food safety such as sanitary conditions under which food is delivered and kept. As to the formal compliance, as regards ten recommendations no comments were provided, 11 were accepted while the state of compliance was not clear in two cases. No sound conclusion could be drawn on real compliance as no feedback was identified in 17 cases, implementation was not verified in one case and the situation is not clear as regards five recommendations**.** Therefore, as regards nutrition, formal compliance rate amounted to 85%, while real to 0%.

17.7.3.3 Health care

Recommendations addressing medical care (53) were diverse and suggested improving a range of issues such as increasing the number of staff members, ensuring steady access to medicine, increasing the quality and range of medical services provided, ensuring that a staff member with some medical training is present at the facility 24/7, undertaking prophylactic measures against diseases typical of places of deprivation of liberty etc. As to the formal compliance in roughly one half of recommendations identified (26) there is no official reply available. In 23 cases recommendations were endorsed, in one rejected while the position of authorities as regards 3 is not clear. As to the real compliance no follow up was indicated as regards 44 recommendations, implementation of four recommendations was verified and in five cases it was not (formal compliance 85%, real compliance 44%).

17.7.3.4 Training

Further training and education, especially in the area of child rights, for the staff of mostly psychiatric hospitals and social institutions were recommended in 11 cases. More precisely, six recommendations suggested conducting training on rights of children and on measures to prevent their self-injuries. Remaining five spoke of need for further training without specifying its exact content. While two were designated as accepted, no reply was provided as regards nine. Similarly, all of 11 recommendations were not followed up as regards the state of their implementation (formal compliance 100%, but based on replies to two out of 11 recommendations, real compliance n/a).

17.7.3.5 Regime, treatment, activities, work

The NPM issued 43 recommendations directly addressing or touching upon daily regime of persons deprived of their liberty in different institutions. No reply was provided concerning 18 recommendations, 21 were designated as accepted, two as rejected while the status of two is not clear. Despite the fact that implementation was verified as regards three recommendations, real compliance

remains by and large unknown as no follow up information were indicated with regard to 40 recommendations. It follows that compliance amounted to 84%, whereas real compliance to 100% but based on following up on only three out of 43 recommendations.

Types of recommendations vary. In 13 recommendations the focus was put on maintaining and improving contact of inmates with the outside world by, in most cases, increasing the number of available telephone lines. Eight dealt with introducing or developing leisure or purposeful activities that inmates can practice outside their cells and three reminded that each person deprived of liberty ought to benefit from time spent in the fresh air. On four occasions it suggested that authorities should facilitate the enjoyment of access to information by providing convicts with newspapers. Specific issues like prohibition of forced labour and ensuring freedom of worship were addressed in five recommendations, while the rest dealt with issues related to personnel (additional staffing, special training etc.)

17.7.3.6 Body searches and means of restraint

The NPM in three recommendations referred to the use of restrains in psychiatric hospitals and social institutions. In essence it noted that resort to and use of this measure should be thoroughly regulated including, inter alia, that restraint ought to be applied only exceptionally, for the shortest time possible, never as a punishment and subjected to approval of psychiatrist. Neither reply nor information on follow up was provided as regards these three recommendations.

17.7.3.7 Safeguards and rights upon and during deprivation of liberty

There are 76 recommendations identified as belonging to this cluster. Out of 59 replies, 47 recommendations were designated as accepted. Only seven recommendations were followed up on out of which in all seven cases the implementation was verified. All things considered, formal compliance amounted to 80%, while real to 100%.

17.7.3.7.1 Three fundamental rights

The NPM issued 10 recommendations addressing the issue of providing three fundamental rights upon deprivation of liberty (access to lawyer, doctor and notification of arrest) as well as informing of those rights. In one it simply stated that those arrested by the police should have the right to a lawyer, to contact person of their choosing and to be examined by a doctor. In 4 cases it suggested the change of practice that police officers are present during medical examinations taking place while in police custody. In three cases it noted that detainees have been denied the right to have telephone conversations with those of their legal interest. In one recommendation criticized that minors are not provided with information on their rights in writing and the other that there was no doctor available for emergency cases. No reply was provided concerning two recommendations, 4 were designated as accepted while situation regarding the others could not be clearly established. As to the real compliance no follow up

was indicated regarding the state of implementation of 8 recommendations while 2 were verified to be implemented.

17.7.3.7.2 Information on rights and duties

In eight cases the NPM determined that no written notifications outlining the detainees' rights and duties, daily regime rules etc. were displayed on the walls or otherwise accessible in institutions visited. Seven of these recommendations were accepted, while one reply is lacking. Real compliance could not be established, as no information on follow up was available.

17.7.3.7.3 Confidentiality of lawyer-client communication

In five recommendations NPM established that in prisons confidentiality of communication with a lawyer was not secured and requested this to be corrected. Four requests were formally accepted, whereas in one case the situation is not clear. Real compliance cannot be determined due to a lack of follow up information.

17.7.3.7.4 Nonstandard objects

In two establishments (one psychiatric hospital and one special boarding school for children with limited psychical capacities) nonstandard objects such as wooden sticks were found. In one case, no reply was provided, while in the other the authorities denied that sticks were used for beating, but instead claimed that their use was pedagogical; namely sticks were teaching tools i.e. classroom pointers for geometric shapes. As to the real compliance in one case implementation of the recommendation to remove this objects was not clear and in the other follow up information was lacking.

17.7.3.7.5 Medical examinations

The NPM addressed the issue of medical examination upon deprivation of liberty in four recommendations all of them addressed to the so-called temporary detention places under the jurisdiction of Ministry of the Interior. In one case, reports drawn up after medical examinations did not encompass all relevant components, while in the other three initial medical screening has not been undertaken at all. As to the formal compliance, one recommendation was not replied to while as regards other 3 situations is not clear as authorities, in essence, only denied NPM findings. No follow up on these was provided either. However, the reply to general recommendations set forth in the year 2013 states that, in accordance with a recently enacted regulation, a doctor and police officer on duty sign the medical book of persons detained by the police. In addition, eventual physical injuries conducive of ill-treatment are documented, signed by a doctor and detainee and referred to the competent prosecutor.[1615] It may be noted that co-signing of the medical book by the police officer is not the best solution as he automatically gains insight into confidential medical information including those related to ill-treatment.

[1615] Azeri NPM, *Annual report 2014* p. 58.

17.7.3.7.6 Complaint mechanisms

In dealing with complaint mechanisms the NPM only briefly mentioned that prisoners are not provided envelopes to send complaints and that the Ombudsman hotline service is not announced in one police establishment. Out of two recommendations issued to rectify the identified shortcomings, one was accepted while reply was lacking as regards the other. No follow up was indicated.

17.7.3.7.7 Not respecting relevant legal provisions aimed at safeguarding detainees

In six cases the NPM established that, contrary to positive regulation, detainees were not transferred to another place of detention in a timeframe determined by law. No reply was given in relation to two recommendations while four were accepted. As to the real compliance no follow up was indicated in four cases while the implementation was verified in the remaining two cases.

17.7.3.7.8 Documentation

In most of the recommendations addressing keeping of records in places of detention (39), the NPM simply suggested rectifying irregularities or inconsistences or even sheer absence of any registries in the facilities visited. In three recommendations it reminded that specific registers, documenting different aspects of resorting to and applying means of restraint in psychiatric hospitals and social institutions, ought to be kept. In nine cases it noted that existing records were not properly stamped or sealed. In at least three cases the deprivation of liberty effectuated in premises other than police cells (waiting rooms and such) were not dully entered in the respective registrars. Most of the 39 recommendations identified were formally accepted (27), the situation regarding three is unclear while reply from the authorities failed in nine cases. As regards real compliance, follow up information were lacking as regards 36 recommendations while 3 recommendations were verified as implemented.

17.7.3.8 Medical monitoring of nutrition and detention conditions

Three recommendations addressed the medical doctor's role in monitoring the state of hygiene, process of preparation and quality of food served in institutions. One recommendation was accepted while two were not replied to. No follow up information on the state of implementation was available (formal compliance 100%).

17.7.3.9 Separation of different categories of detainees

In 12 recommendations NPM requested that certain categories of persons deprived of liberty (convicted and non-convicted persons, those suspected of the same crime, smokers and non-smokers, those held under administrative and criminal legislation) should not be kept in the same cells or even in the same establishment. One half of these recommendations were formally accepted, the situation is not clear concerning two and no information was provided on four. No follow up information was provided

regarding nine, the implementation was verified as regards one and not verified as regards three (formal compliance 75%, real compliance 33%).

17.7.3.10 Solitary confinement

The NPM issued five recommendations relating to solitary confinement. In two cases it criticized its excessive use in penitentiary institutions. The situation as regards three recommendations addressing the use of solitary confinement in mental hospitals in somewhat perplexed. While in two it preferred the position that use of these measures is psychiatric hospitals should be well documented in the third case it stated that this practice ought to be abolished altogether. As regards formal compliance no reply was provided in two cases, two recommendations were designated as accepted and one is not clear. No follow up information or real compliance was indicated. If follows that formal compliance amounted to 67%, whereas real compliance could not be determined.

17.7.3.11 Fight against impunity and carrying out effective investigations

In 3 general recommendations, the NPM suggested that investigations addressing ill-treatment conducted by the law enforcement agencies should be intensified and put under stricter control of the Prosecutor general. Similarly, in three further recommendations it pleaded for enhanced control of the prosecutors over places of detention and especially temporary detention places. Besides noting that the Ministry of Justice ensured investigations and bringing perpetrators to disciplinary responsibility, no official answer was provided. As to the individual recommendations, the NPM in 21 instances either received allegations or came across indications of ill-treatment. In all of these cases it recommended that competent bodies, before all the prosecutor's office but also respective ministries, should carry out investigation into allegations received. Some kind of reply was received in 16 cases out of which one half was accepted, that is investigations were conducted. In the other eight cases the situation is unclear (it could not be distinguished whether an investigation actually took place and, if yes, what is the final outcome). Formal compliance in these cases was already dealt with.[1616] As to the real compliance, in this case carrying out a follow-up visit does not suffice. Instead, the quality of investigations, that is, whether they were conducted in line with international standards dealing with effective investigations ought to be looked at.[1617] However, no follow up in this sense was indicated and the NPM was satisfied with the information indicating that investigation was conducted. Moreover, final outcomes of these investigations (either that allegations were not confirmed or that they were, at least partly confirmed, but led to rather mild sanctions for the perpetrators (dismissal from service or disciplinary actions)) and the procedure through which they were reached did not stimulate further scrutiny on part of the NPM. Formal compliance was therefore 50%.

[1616] See above section 16.5.4. Credible allegations are being qualified as specific forms of ill-treatment.
[1617] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.2. Duty to conduct an effective investigation of ill-treatment.

17.7.3.12 Interference with the NPM work

There are 13 recommendations responding to instances of failure of the staff of institutions visited to enable the NPM team full access to facilities, persons and documentation. In eight cases the NPM could not gather information from absent staff members or even enter certain rooms as keys went missing. In five cases the NPM faced outright interference as officials were disturbing interviews with the detainees or openly denied access to certain premises or registers. In seven replies the recommendation to ensure that in the future NPM team can work without interference was accepted and those responsible reprimanded. No reply was received as regards four and the situation is not clear as regards two recommendations. As to real compliance no follow up information were provided. Formal compliance amounted to 78%, while real could not be determined.

17.7.3.13 Specificities of psychiatric and social institutions

17.7.3.13.1 Deinstitutionalization

No recommendations directly addressing deinstitutionalization were made. However, on two occasions the NPM did recommend that work with families of patients placed in one mental hospital and a social institution should be strengthened in order to facilitate their release from institution and into family care. Similarly, on one occasion work on solving social problems of children leaving the institution was emphasized. However, recommendation mandating transfer of 350 patients from mental hospitals to social establishments could hardly be understood as effort aimed at facilitating life in the community as persons with psychosocial and/or intellectual disabilities are to be merely relocated from one institution to another. No replies from state authorities or follow up on these were identified.

17.7.3.13.2 Placement in psychiatric hospitals

In two cases the NPM recommended that procedures for placement in psychiatric hospitals are to be thoroughly reviewed as it was established that patients have been hospitalized without their consent in one case and that deprivation of liberty in another was justified only by a letter sent from a local police station. The outcome of these suggestions is not clear as state authorities replied only in one case by noting that they ordered remedy of shortcomings and dismissed the acting doctor. No follow up indicating real implementation is available.

17.7.3.13.3 Miscellaneous

In five recommendations the NPM addressed different issues relating to persons residing in mental hospitals and social institutions. It set forth criticism towards the practice of keeping these people indoors or not letting them leave the institution during the day. Also, it criticised the practice of using non-disabled residents to help their disabled roommates due to shortage of staff in the institutions. No replies or information on follow up were indicated regarding these recommendations.

17.7.4 General recommendations

There are 266 general recommendations issued until the end of 2014 by the Azeri NPM. With regard to compliance, only 42 of these were provided with some reply. In essence, all the replies were positive and indicated at least partial observance of the recommendations. No follow up information by the NPM was provided.

In addition to general recommendations addressing issues summarized above in individual recommendations, following general recommendations were made.

In four recommendations the NPM suggested that the state should adequately finance its activities so as to be able to diligently discharge its duties under the OPCAT. In 11 recommendations the NPM urged different state authorities (Ministry of Defence, Ministry of Education, Ministry of Labour, Ministry of Health) to enhance cooperation with the NPM and constructively approach its recommendations.

NPM had on four occasions put forward the need for enhancing cooperation with international bodies dealing with prevention of ill-treatment such as the CtAT, SPT, CPT and APT.

In four recommendations the NPM suggested that deficiencies established in visits ought to be eliminated, those responsible punished and conditions of detention improved without going into more detail.

Seven recommendations suggested undertaking general measures aimed at reducing number of persons deprived of liberty. In three recommendations the NPM suggested establishing shelters where newly released prisoners could stay and facilitating their employment, while in two called for increased efforts aimed at implementation of a relevant statute dealing with integration of former prisoners. Finally, in two it suggested introducing sanctions other than deprivation of liberty. No reply to these recommendations is available.

In three recommendations the NPM suggested that prison staff should soften the treatment of convicts and that staff working in mental hospitals should treat patients kindly and politely.

In nine recommendations the NPM suggested to the relevant ministries to enhance their supervision of places of detention so that staff applies the law correctly. Three replies to this type of recommendations were provided but the state of compliance could not be determined as mostly general regulations were cited.

17.7.5 Legislative changes

Both general and individual recommendations addressed legislative issues pertaining to the prohibition of ill-treatment. Out of 15 recommendations identified four were not replied to, four were designated as accepted, one partially accepted, three not accepted while the situation as regards three is not clear.

From the outset of its activities the NPM was asking for harsher sanctions for those interfering with Ombudsman activities and specifying the responsibility for interference with NPG activities as well.[1618] The New Administrative Offences Code was finally adopted at the end of 2015 but in most parts it did not reflect the recommendations of the Ombudsman. Namely only one article dealt with interference in the work of the Ombudsman without mention of NPG or further differentiations as suggested by the NPM.

Although the NPM was more successful in prompting bringing the crime of torture set out in Azerbaijan Criminal code in line with CAT article 1.,[1619] this definition was not, as it seems, fully replicated as some of the purposes of torture enumerated therein are missing (for instance punishing the victim).[1620]

Following two consecutive recommendations[1621] the NPM reported that the *Law Ensuring the Rights and Freedoms of the Persons Held in Detention Facilities* was adopted in 2012.[1622]

The NPM further stipulated that the *Law on Psychiatric Assistance* ought to be brought in line with the UN Mental Illness Principles[1623] as well as that Ombudsman's prerogatives to conduct unannounced visits and private talks with patients should be explicitly laid down in this law.[1624] The latter recommendations have been complied with as necessary changes to the said act were made.[1625] As to the former, it was not clear whether the aforementioned amendments addressed issues other than Ombudsman's prerogatives. However, according to available information coming from Azeri authorities it appears that this act is by and large consistent with main tenets of the said UN principles (Envisaging strong safeguards and entrusting courts with deciding on involuntary hospitalization based on expert opinion).[1626] In any case this recommendation was not repeated in subsequent reports (2012, 2013, 2014).

It also recommended updating or enacting new internal acts regulating the regime in certain institutions where persons deprived of liberty are held such as boarding, vocational schools, psychiatric hospitals etc.[1627]

[1618] Azeri NPM, *Annual report 2009/2010* pp. 109–10; Azeri NPM, *Annual report 2011* 69, 81; Azeri NPM, *Annual report 2012* p. 47; Azeri NPM, *Annual report 2013* p. 65.
[1619] Azeri NPM, *Annual report 2009/2010* p. 110; Azeri NPM, *Annual report 2011* p. 81; Azeri NPM, *Annual report 2012* pp. 38–9.
[1620] Human Rights House Foundation, *Azerbaijan NGO coalition report on the implementation of CAT: Reply to the list of issues (CAT/C/AZE/Q/4) of 11 July 2012* §§ 15–9.
[1621] Azeri NPM, *Annual report 2009/2010* p. 110; Azeri NPM, *Annual report 2011* p. 81.
[1622] Azeri NPM, *Annual report 2012* pp. 36–8.
[1623] Azeri NPM, *Annual report 2009/2010* p. 110; Azeri NPM, *Annual report 2011* p. 81.
[1624] Azeri NPM, *Annual report 2011* pp. 68–9.
[1625] Azeri NPM, *Annual report 2012* p. 10.
[1626] Government of Azerbaijan, *Fourth periodic report of Azerbaijan on the implementation of CAT*, CAT/C/AZE/4 (2015), §§ 442–54.
[1627] Azeri NPM, *Annual report 2011* p. 64; Azeri NPM, *Annual report 2014* 50, 54.

Though amending certain legislation in order to strengthen the prohibition of forced labour and confidentiality of the lawyer client relation was suggested,[1628] the state of affairs regarding acceptance and implementation of these recommendations was not indicated.

Amend internal detention rules so as to enable contact of relatives undergoing sentence in different correctional institutions.[1629] Personal contact was not made possible due to technical difficulties, but connection via video link has been explored.[1630]

Amend the *Law Ensuring the Rights and Freedoms of the Persons Held in Detention Facilities* and relevant bylaw so as to enable uncensored correspondence between detainees and NPG.[1631] According to available data to this suggestion was neither replied nor are there any information on its implementation.

In several recommendations the NPM was suggesting enacting a law regulating the detention of administratively arrested persons in order to secure this group of detainees the same rights as to those deprived of liberty under criminal law provisions.[1632] It appears that this law was enacted although exact changes and their content were not made available.[1633]

After several recommendations, internal disciplinary rules in detention facilities (penitentiary institutions, investigation isolators and temporary detention places)[1634] were affirmed in 2014.[1635]

Recommendation to regulate the use of video surveillance[1636] was honoured by inserting a provision dealing with this issue into the *Law Ensuring the Rights and Freedoms of the Persons Held in Detention Facilities* and corresponding sub legislation.[1637]

The NPM suggested that certain provisions of the *Regulations of the Garrisons and Guard Services of Armed Forces* is discriminative, since it unjustifiably differentiates between treatment of common soldiers and officers in places of detention.[1638] This recommendation was, according to available information, not accepted to date.[1639]

In addition to this, the NPM suggested that the *Charter on Homes for Disabled Children* should be updated in line with modern standards.[1640] No information on the state of compliance and implementation of this recommendation was provided.

The NPM recommended repealing provisions of the Internal disciplinary rules envisaging that the time of visit is to be determined by dividing the number of visits with 12 months. This in effect limits

[1628] Azeri NPM, *Annual report 2011* p. 81.
[1629] Azeri NPM, *Annual report 2012* 39, 47.
[1630] Azeri NPM, *Annual report 2013* p. 35.
[1631] Azeri NPM, *Annual report 2012* p. 47.
[1632] Azeri NPM, *Annual report 2013* 17, 65; Azeri NPM, *Annual report 2014* p. 15.
[1633] Azeri NPM, *Annual report 2014* p. 71.
[1634] Azeri NPM, *Annual report 2011* p. 81; Azeri NPM, *Annual report 2012* p. 47; Azeri NPM, *Annual report 2013* p. 65.
[1635] Azeri NPM, *Annual report 2014* pp. 61–2.
[1636] Azeri NPM, *Annual report 2013* p. 23.
[1637] Azeri NPM, *Annual report 2014* pp. 57–8.
[1638] Azeri NPM, *Annual report 2011* p. 67.
[1639] Azeri NPM, *Annual report 2013* pp. 52–3.
[1640] Azeri NPM, *Annual report 2011* pp. 81–2.

the choice of the inmates since they cannot utilise unused visits later than envisaged during the same calendar year.[1641] In addition, changing of the same ordinance was suggested so as to allow inmates to talk to more than one telephone subscriber within a certain period of time.[1642] The NPM identified a need for enacting an instruction governing application of means of coercion within the penitentiary system in line with international standards.[1643] No reply regarding compliance or information on implementation was identified.

The NPM noted an improvement in regulating the use of electrical discharge weapons by creating a list of authorised police officers and specifying circumstances in which resort to this means is justified. However, it is not clear whether this took place as a consequence of the NPM recommendations.[1644]

17.7.6 Summary

Approximately one half of all individual recommendations addressed issues related to material conditions and nutrition. If we were to add recommendations tackling issues revolving around health care and regime in places of detention, their sum would amount to around two thirds of all recommendations. The remaining ones encompass a mixture of issues including safeguards and guarantees against deliberate abuse. Although there are a number of individual recommendations issued by the NPM that coincided with those made by the CPT, there are relatively few addressing the burning issue of deliberate physical abuse by law enforcement officials (prompt access to three fundamental rights upon arrest, information on rights etc.). Moreover, some essential safeguards in this context such as mandatory medical examination in line with the Istanbul protocol and those buttressing the interrogation of criminal suspects (presence of a lawyer, relevant registers, videotaping the questioning itself), are missing altogether. For example, the mentioned summary report of the UN Working Group noted that the right to a lawyer and legal assistance upon deprivation of liberty is usually not functioning in practice (situations listed range from not informing those taken in police custody on a right to a lawyer, openly denying one, withholding conditions required for confidentiality of client-lawyer discussion, or even collaboration between lawyers and police officers to the detriment of the detainee). The Azeri NPM only briefly touched upon this question by insisting on separate premises for meetings with a lawyer in police establishments. This is even more surprising if one takes into account that the Azeri NPM conducted 1623 unannounced visits to police establishments.

Similarly, the main problematic areas in psychiatric hospitals and other institutions where persons with psychosocial and/or intellectual disabilities might be held were not adequately addressed. These areas include the following: manner of deprivation of liberty (consent of a legal guardian, family member etc., in a legal process decided by a judge, safeguards in such process), consent to medical

[1641] Azeri NPM, *Annual report 2012* p. 47.
[1642] Azeri NPM, *Annual report 2012* p. 48.
[1643] Azeri NPM, *Annual report 2014* p. 70.
[1644] Azeri NPM, *Annual report 2014* p. 71.

treatment, seclusion, use of means of restraint, proper use of medication. On the other hand, the UN Working group found that in social institutions under the Ministry of Labour and Social Protection the practice of arbitrary deprivation of liberty of persons with psychosocial and/or intellectual disabilities is common and amounts to lifelong detention. Persons are being placed therein based on consent of parents, guardians or social services without any safeguards and particularly the opportunity to challenge their deprivation of liberty before a court or any other instance able to grant effective remedy. Those deprived of liberty in psychiatric hospitals by a court decision also face obstacles to present independent medical expertise at the initial hearing and later, which creates conditions for indefinite detention. Finally, in both types of institutions extremely poor material and sanitary conditions, lack of privacy, no organized activities, keeping the patients behind bars, restriction of the freedom of movement, involuntary treatment and forced medication and chemical restraints followed by "light" electroshocks were identified. The Azeri NPM either mentioned these or similar shortcomings in passing or not at all. From this it should follow that the NPM did not provide similar recommendations as these or dealt with the problems.

As to the general recommendations, one can note that most of them are formulated in such terms (i.e. state servants should respect the law, be kind to patients or inmates, exercise control over their subordinates etc.) to resemble more a list of wishes rather than implementable recommendations.

Legislative recommendations also partly correspond to those made by international bodies. Most importantly, both CtAT and the NPM stressed bringing criminal offence of torture in line with CAT article 1. Besides this, the NPM made a number of recommendations to improve the legal framework pertaining to ill-treatment. Again, safeguards to prevent deliberate ill-treatment and guarantees to that effect were not at the centre of attention.

Based on limited data provided in the reports, one can certainly identify the discrepancy between formal compliance (79 %) and real compliance (42%). However, considering, the scarcity of information provided on real compliance one should avoid grounding any definite conclusions on whether the NPM managed to improve conditions of detentions and the practical worth of legislative framework on these information alone. This is to be supported by findings of the UN Working group, which during visits to more than 20 closed institutions in Azerbaijan made in 2016, found that material conditions in a number of institutions visited were generally poor.

Despite being only selectively provided, all replies to the general recommendations were more or less positive, that means they are signalling that recommendations have been accepted. As to the legislative activities, the status of around one half of 15 recommendations is unclear, 5 were, fully or in part, accepted and 3 were not accepted. Probably the biggest success is the enactment of the Law Ensuring the Rights and Freedoms of the Persons Held in Detention Facilities.

PART VI

ANALYSIS AND CONCLUSIONS

18 Chapter: Comparative analysis

18.1 NPMs are endowed with powers, means and safeguards necessary for implementation of their mandate

18.1.1 Serbia

Although the Serbian NPM, consisting of the Ombudsperson as a lead institution and assisted by the Provincial ombudsman and NGOs, is designated by law, there is a need for a separate statute setting out its features in more detail. The Ombudsman is elected by the parliament on the proposal of the parliamentary committee, while a special commission within the Ombudsman office, following a public call, appoints NGOs that are to collaborate in implementing the NPM mandate. This should point toward a conclusion that, from a formal perspective, the NPM is independent from the state. In addition, the Serbian NPM possesses adequate powers and prerogatives to successfully carry out its mandate and applies a visiting methodology similar to that used by international monitoring bodies. Although there is an apparent shortage of qualified staff dedicated solely to implementing NPM activities within the Ombudsman office, negative consequences of this shortcoming have been mitigated by including personnel of the Provincial ombudsman, representatives of NGOs, experts as well as Ombudsman´s staff from other departments into its activities. The same goes for expertise, as it seems that NGOs and experts provided NPM with know-how crucial for the implementation of its mandate. Finances granted for conducting NPM activities were not separated from those allocated to the Ombudsman and, as it appears, negatively impacted the ability of the Ombudsman to implement other activities falling under its mandate. However, these funds were sufficient for the NPM to conduct a minimum of its activities. Therefore, all things considered, the Serbian NPM attained functional (structural (established by law) and operational (not part of chain of command of executive or legislative branch of government)) independence by virtue of being part of the Ombuds-institution in Serbia. Financial independence of NPM alone appears to be non-existent as the legislator is designating no funds specifically for NPM purposes. As to personal independence, it is fair to say that there are no indications that acting head or members of the NPM are not personally independent from the executive. Also, although there is a need for further improvements especially increasing the number of staff and providing adequate training, securing adequate annual financing separate from that of the Omubuds-institution and detailing NPM's prerogatives in a separate statute, the NPM was endowed with sufficient powers, staff and resources to conduct at least minimum of its activities. Finally, it made use of international standards for assessing safeguards and conditions of detention and buttressing its recommendations.

18.1.2 Germany

The German NPM, that is the NA, consists of two distinct bodies dealing with the deprivation of liberty effected at federal and state level respectively. They are established by law and in principle enjoy all prerogatives and powers necessary for the effective discharge of their mandate.

On a more general note, one can criticize the solution that the appointment of members falls within the exclusive domain of the executive branches of government (ministries on the federal and state level). This general outlook on potential danger for the NA's independence attains more concrete contours when coupled with the fact that most members of both bodies are former or current state officials and that at least four out of ten members, including presidents of both the Federal and the Joint Commission, are retired prison wardens and one former police official. Differently put, the Ministries of Justice and Interior are appointing its former high ranking officials to independently monitor places under their jurisdiction with the aim of, *inter alia*, discovering instances of ill-treatment. The clause of conflict of interest, according to which an NPM member will not participate in visits to institutions from the federal state he comes from, appears to have been introduced to address this contradiction. Nevertheless, entrusting individuals with the control of a system in which they spent their entire carriers, in addition to some advantages such as an inside knowledge on how these systems operate, can, at least potentially, generate emergence of *esprit de corps* phenomena[1645] thus compromising independence and ultimately NPMs effectiveness. Another danger stemming from this is that even if the above peril does not come to pass, retired state servants might hold more conservative views on NPMs role and priorities or prevention of ill-treatment in general. Namely, if one is convinced that a system is perfect, then it follows that it does not need repairing. In other words, as no deliberate ill-treatment was being reported, there is no need looking for one or strengthening safeguards that are to prevent it. However, the main problem following the NA from the outset is of financial nature. The German NPM is grossly underfunded, which, in turn, prevents it from properly performing its basic task - regular visits to places of detention. This led to a lack of staff and members whereby the honorary nature of member's engagement, although it may contribute to their independence, as they claim, certainly is not helpful in increasing the volume of activities, since it prevents them from attending to NPM activities fulltime. Therefore, the main impediment to NPM's effective conduct of operation is a consequence of insufficient funding. The NA draws on both international and national standards in assessing safeguards, material conditions and regime of detention. However, it willingly ignored the new approach towards rights of persons with psychosocial and/or intellectual disabilities personified in the CRPD whose implementation is, according to the NA, not part and parcel of NPM's mandate set forth in the OPCAT.

In conclusion, main challenges faced by the German NPM are related to financing and, consequently, acquiring adequate number of staff to carry out its activities. As to the NA's

[1645] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.2.3.2. Independence of personnel.

independence, as previously noted, formal independence does not guarantee real independence let alone effectiveness.[1646] However, the state-centred selection procedure as well as practice of appointing former officials in the field of corrections and law enforcement as NPM members could, in principal, produce a negative impact on NA's independence and, eventually, reduce its effectiveness.

18.1.3 Azerbaijan

To begin with, the solution that the parliament selects an Ombudsman from a list of three candidates proposed by the president of the republic, in effect, gives the latter the power to control, who the Ombudsperson will be. Although this method of appointment *per se* does not necessarily generate an independence deficit, in a state with authoritarian rule and week institutions it is more likely that it will undermine independence and thus the performance of the entire institution. However, if one looks at other guarantees, the general conclusion to be drawn must be that both the Azeri Ombudsman and NPM are, from a formal perspective at least, set up as independent from the state. The NPG group together with the Ombudsman are granted sufficient powers and guarantees to implement NPM's mandate. Whilst financial details were not disclosed, judging on the sheer extent of activities implemented and personnel placed at the disposal of the Azeri Ombudsman's NPM unit, it is to be presumed that funds made available to it are at least sufficient. On the other hand, NPM's budget is not separated from that of the Ombudsman institution as a whole. As to international standards, the Azeri NPM mostly referred to CPT standards, SMR and EPR but not to CRPD.

All things considered, it could be said that, formally, the Azeri NPM is endowed with prerogatives and preconditions for successful implementation of its mandate.

18.1.4 Conclusion

All three NPMs are established by an act with, at least, the strength of law. The method of appointment of NPM members differs in all three cases. In Germany, it is the prerogative of the executive, on federal and state level. In Serbia, the NPM mandate is to be implemented by the Ombudsman of Serbia, together with the Provincial ombudsman and NGOs. The Ombudsman is elected by the parliament from a list of candidates proposed by the parliamentary committee. NGOs are selected by the Ombudsperson itself. In Azerbaijan, the Ombudsman, elected by the parliament on proposal of the President of Azerbaijan, is designated to act as the NPM. While a scarcity of funds allocated is most evident in case of the German NPM, it affects his Serbian counterpart as well. No such conclusion could be made in respect of the Azeri NPM. Financial independence of the Serbian and Azeri NPMs vis-à-vis their host institution that is to say Ombudspersons have not been verified. Organizational separation, on the other hand, is visible though not consequently implemented. Given that the German NPM has been established as an entirely separate institution, notwithstanding its technical ties with the Wiesbaden

[1646] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.2.4. Beyond independence.

Centre for Criminology, no such problem has been identified. It appears that entrusting an Ombudsperson or similar human rights institution with the NPM mandate has its advantages and weaknesses. As to the former, the NPM mandate will come under the Ombudsman's umbrella as far as guarantees of independence are concerned. Also, NPM members and staff would be in a better position to coordinate their activities with other departments within the Ombudsman institution and draw on expertise of their staff. Similarly, this would simplify cooperation between NPM and the Ombudsman's unit acting upon complaints, which should lead to findings of ill-treatment in individual cases and, thus, enhance a deterrent effect. In respect of the latter, i.e. weaknesses of this arrangement, it is difficult to establish a department independent, above all financially but also personally, from the Ombudsman itself. In addition, funds necessary for the implementation of the NPM's mandate may diminish Ombudsman's capacity to implement its general mandate under national law due to a lack of financial resources and vice versa. Finally, if the Ombudsman institution were itself not independent, the NPM unit would, instead to benefit, inevitably incur disadvantages stemming from such state of affairs.

18.2 NPMs managed to generate deterrent effect.

18.2.1 Serbia

In deliberating whether the so-called deterrent effect was created let us first look at number and frequency of visits. The main goal the Serbian NPM set itself at the outset of its mandate: to visit all places of deprivation of liberty within four years, was only partially implemented. However, as previously noted, this somewhat slower pace of visits can be compensated if combined with the more frequent visiting of institutions in which inmates are at greater risk of being ill-treated. In the same period 13 follow-up visits were made to police stations and 5 to prisons. Among these, the most populous correctional institution in Serbia (holding more than 2000 prisoners), the correctional institution for women and that for juvenile offenders were visited twice. However, bearing in mind that the structure of other places visited does not reflect the special vulnerability of those residing therein, there is not enough evidence to identify a pattern of systematically revisiting all problematic institutions during the initial four years. As to unannounced visits, even though their number has been gradually increasing, the overall number (7% of all visits conducted during the initial four years) remains altogether unsatisfactory. This has especially grave consequences for the prevention of ill-treatment in police establishments as only a handful of unannounced visits were carried out, which, in turn, led to the situation that only few detainees held in police custody were found and interviewed.

The situation is peculiar, to say the least, as regards cases qualified as ill-treatment, received complaints alleging abuse and other indices pointing towards ill-treatment. Namely, the NPM refrained from qualifying situations involving deliberate abuse either as torture or other forms of ill-treatment. It has, for instance, found that the use of force against two prisoners was inadequate but stopped short of labelling these incidents as particular form of ill-treatment. Even in its unannounced visits conducted

with the sole purpose of detecting deliberate ill-treatment it documented nothing more but several uncorroborated allegations. Nevertheless, while acting upon complaints, the Ombudsperson, albeit on few occasions only, held that certain incidents amounted to torture. The prosecutors and courts however, did not follow upon these findings.

On the other hand, not only that the CPT reports from 2004, 2007, and 2011 continually documented ill-treatment on a more frequent scale but the latest report from 2015 exceeds the previous with respect to number of received complaints of ill-treatment many of which were corroborated by medical examination carried out by the CPT medical expert. How is this discrepancy to be explained? It seems unlikely that the NPM was directly concealing the number of allegations received or indications discovered (as NGO representatives participated in almost every visit it is hard to imagine that they would go along with covering up signs of ill-treatment discovered during visits). Regular announcement of visits, if not the sole reason, probably contributed considerably to a low number of cases encountered. It also may be that the NPM team, as opposed to the CPT, was not experienced enough in collecting accounts of deliberate abuse, especially among prisoners on remand regarding their treatment by the police. After all, the Serbian Deputy Ombudsman did admit that the NPM only recently started to look for cases of police brutality during visits to the remand wings in prisons. Finally, it could also be that victims of ill-treatment did not consider the NPM sufficiently independent from the state and, consequently, decided not to denounce those responsible due to fear of reprisals.

To sum up, reaching a conclusion on whether the Serbian NPM managed to generate deterrent effect is somewhat complicated. On the one hand, it is misfortunate that unannounced visits were not carried out more regularly while on the other hand, the frequency of visits is not altogether unsatisfactory. In addition, it did tour all premises of establishments visited, constantly reported on non-standard objects found therein and took sufficient time to thoroughly inspect at least some places of detention. Furthermore, the Ombudsman did, albeit on a few occasions only, establish that deliberate ill-treatment took place. Taking everything into account, the lack of unannounced visits as a standard mode of operation tips the balance in favour of the conclusion that the NPM did not manage to produce deterrent effect.

18.2.2 Germany

Concerning the deterrent effect, one can immediately notice that insufficient funding necessarily reflects upon the number of visits undertaken, especially in a country the size of Germany with 13 000 places where persons are or may be deprived of liberty. Having this in mind, it is even more surprising that the NA did not more often avail itself of conducting unannounced visits as arguably the most promising method of mitigating negative consequences of infrequent visiting. Namely, when visits are infrequent it makes more sense to carry them out without prior notification and, thus, send a message that new visit can ensue at any time. The standard practice of announcing visits has in the NA's reports been justified as necessary to facilitate entrance into institution and ensure that relevant interlocutors

and information are made available upon arrival. Moreover, it appears that the NA's members do not consider unannounced visits indispensable as in Germany, so the argument goes, one can hardly imagine that management of closed institutions would attempt to misrepresent the state of affairs therein.

Be that as it may, the NA opted for announced visits as a rule and conducts unannounced visits exceptionally. As things stand, within the initial six years of the NA's activity, on average 31 visits were taken annually out of which only 5% have been made unannounced. In addition, given that the NA does not have a mechanism in place to ensure that independent forensic examination is carried out, even if cases of ill-treatment were to be discovered, it does not seem likely that adequate reaction would follow. Lastly, the German NPM sees itself exclusively as a preventive body and rules out completely an option to qualify a certain situation involving deliberate abuse as ill-treatment. On the other hand, exposing individuals to inadequate material conditions and regime was, by the NA, found to constitute a violation of human dignity. The NA did conduct interviews with those deprived of liberty and toured the premises of visited institutions. Therefore, considering especially the low number of visits and the fact that, as a rule, they are being announced one must conclude that the NA did not manage to produce a deterrent effect.

18.2.3 Azerbaijan

A final conclusion on whether the Azerbaijani NPM managed to create the so called deterrent effect is difficult to reach as there is a clear discrepancy between information provided by the NPM and that collected from other sources. If only the frequency of visits carried out to places where persons are or might be deprived of liberty is to be taken into account, it can be concluded that the results are outstanding. Similar praise deserves the fact that, according to NPM reports, all visits were conducted without prior notice as well as a great number of detainees interviewed. Aforesaid favours the conclusion that a strong deterrent effect should follow.

However, the initial impression of the Azeri NPM's effectiveness may wither away when put to the practical test. Namely, one needs to inquire whether such activities produced the expected results? For that reason, the main findings of the Azeri NPM and international visiting bodies will be compared. During the initial six years, the NPM identified a relatively small number of allegations and/or indications of physical or mental abuse (21). In all of these cases, full scale forensic examination conducted by the NPM's physician was not reported. Nonstandard objects were not discovered in police and penitentiary establishments. In contrast, the CPT in its two reports published after visits carried out in 2002 and 2008 explicitly held that ill-treatment in Azerbaijan is widespread. What is more, in a quite recent statement published following a UN Working Group on Arbitrary Detention's mission to Azerbaijan, it was made clear that members of this body gathered many allegations of ill-treatment ranging from psychological abuse and threats to severe beatings. The Azeri NPM, on the other hand, categorized only a few cases dealing exclusively with detention conditions as a particular form of ill-

treatment. All the cases where allegations or indications of deliberate physical abuse of detainees have been identified were not found to amount to torture or other forms of ill-treatment, but were merely forwarded to competent authorities for further processing, which in the end, yielded no satisfactory results.

In sum, the discrepancy between the output of the four-member Working Group on Arbitrary Detention team (identifying numerous allegations of ill-treatment) produced in the course of 10 days, encompassing 22 facilities visited and 80 persons interviewed on one hand and a handful of allegations reported by a 17-man strong national body, which in the course of six years conducted 2352 unannounced visits to closed institutions and talked in private with 9351 persons deprived of liberty, on the other, is too great not to be taken seriously. In addition, independent NGOs have also confirmed that ill-treatment is not isolated but prevalent in places of detention in Azerbaijan.[1647]

An explanation of this discrepancy could be either that the Azeri NPM's activities, more precisely the number of visits and interviews conducted, were grossly exaggerated and/or that the NPM did not truthfully convey the information gathered during visits. Alternatively, it could also be that persons deprived of liberty had no confidence in members of the NPM team and thus refused to inform on their abusers.

Whatever the reason might be, this paradox coupled with the fact that the authorities refused to allow publishing of as much as seven CPT and one SPT visit report cast a shadow over the Azeri NPM's credibility. Therefore, it is safe to conclude that the information set out in NPM reports should, at the very least, be treated with caution and not exclusively relied upon in reaching the final conclusions on whether a deterrent effect was generated. On the other hand, disciplinary sanctions quite frequently imposed by the Azerbaijani authorities upon the members of the custodial staff on account of certain irregularities ranging from alleged physical abuse to deficiencies related to material conditions and regime cannot, taken on their own, produce a deterrent effect. Therefore, the large number of unannounced visits and interviews notwithstanding, the discrepancy between findings of the Azeri NPM and those of international bodies, together with continuous refusal of the Azerbaijani government to allow publishing reports made following fact-finding missions, indicate that the Azeri NPM did not manage to produce a deterrent effect.

18.2.4 Conclusion

One of the main strong points of national bodies authorized to frequently visit places of detention is that they can, over time, produce a deterrent effect. Namely, this implies the discouragement of state agents from resorting to ill-treatment by increasing likelihood of being discovered and adequately punished. Frequent visits are one of the main factors contributing to this effect. If, as a reference point, one

[1647] See Human Rights House Foundation, *Azerbaijan NGO coalition report on the implementation of CAT: Reply to the list of issues (CAT/C/AZE/Q/4) of 11 July 2012.*

considers the rather minimalistic benchmark that all institutions should be visited at least once in three years and problematic institutions two times each year, we can conclude that the German NPM is way behind this standard while the Serbian, although considerably more close, did not manage to meet it either. By contrast, the Azeri NPM with its frequent visits managed not only to meet, but surpass this standard. Similar can be said for unannounced visits as in the period under consideration neither the German nor the Serbian NPM managed to conduct a bare minimum: 1/3 of all visits, 2/3 for critical places of detention. Again, the Azeri NPM, according to its annual reports, conducted all the visits without prior notice. However, the problem with the outstanding performance of the Azeri NPM is that its output lacks credibility. Namely, facts that the Azeri NPM's performance could not be verified by an independent source and results produced do not correspond to those of its international counterparts, cast a shadow over the entire Ombudsman institution. As to reacting to allegations or indices of deliberate ill-treatment, the situation varies. First of all, their understanding of these terms, though generally in line with the CAT, is not identical to that of international bodies. The Serbian NPM, for instance, provided some wider understanding of what might amount to ill-treatment. The German NPM did not come across any allegation or indication that such incidents came to pass, while the Serbian and Azeri NPMs did. However, none of them actually labelled such findings as torture, inhuman and/or degrading treatment. This was somewhat rectified in case of the Serbian NPM where the Ombudsman, acting upon complaints, established that the abuse reached the level of torture. However, what is common to both the Serbian and the Azeri NPMs is the absence of an adequate judicial follow-up on their findings. Namely, there are no information that can support the conclusion that effective investigations were carried out and that perpetrators were adequately sentenced and victims redressed.

As the German NPM in the course of its visits did not encounter any individual alleging or exhibiting symptoms typical of ill-treatment, the ability of German prosecutors and courts to follow up on these findings by carrying out an effective investigation never came to be tested. On the other hand, the German and Azeri NPMs on several occasions labelled inadequate material conditions combined with shortcomings in regime as ill-treatment. Finally, none of the three NPMs provided an assessment of risks of ill-treatment in the particular institutions visited, although the Serbian and Azeri NPMs did on a couple of occasions consult the medical file of the alleged victims. Taking everything into account, none of the NPMs under observation managed to generate a deterrent effect due to somewhat different reasons. The German NPM grossly failed to conduct frequent and unannounced visits. The Serbian NPM did conduct a considerable number of visits but most of them were announced. Finally, the most peculiar is the case of the Azeri NPM, which in spite of the outstanding performance reported, in terms of number of unannounced visits and interviews with persons deprived of liberty, failed to produce findings at least remotely similar to those reported by its international counterparts.

18.3 NPMs made places of detention transparent

18.3.1 Serbia

The answer to the question whether the NPM managed to open institutions, namely to make transparent what is going on inside of them, must be differentiated. The Serbian NPM publicises its findings by means of both annual and visit reports. It appears that most topics relevant for preventive on-site visits were being either regularly or occasionally examined. However, it is not clear whether all these issues are being looked at during each and every visit as a matter of routine as well as whether the triangular method is constantly employed. In addition, the NPM looked at issues not directly connected to the deprivation of liberty but capable of decreasing the risk of ill-treatment. Although most of the visit reports were reasonably elaborated and published in good time, there are sporadic delays in publishing and gaps in reporting, especially as regards institutions in health and social care settings. As to the reporting on deliberate ill-treatment or allegations of such treatment, the situation is somewhat complicated. On the one hand, it appears that most reports offer an undistorted picture of the situation in institutions, including safeguards against and allegations of deliberate ill-treatment, to the extent possible with previously announced visiting. On the other hand, at least on one occasion, the NPM tried to downplay the allegations of abuse voiced by prisoners by stressing only that no allegations of torture had been encountered. It is to be concluded that the NPM mainly managed to open up institutions to public scrutiny. However, this cannot be said for psychiatric hospitals and social institutions, visits to which have been grossly underreported. Therefore, in sum, it seems reasonable to conclude that the Serbian NPM made institutions more transparent save for those whose reports were not published.

18.3.2 Germany

As to whether the German NPM managed to make closed institutions transparent by providing reliable, detailed and timely flow of information from places of detention to the public, the situation is as follows. The German NPM publishes both annual and visit reports. However, practice of publishing visit reports online was introduced only in 2014. From this it follows that during the initial 5 years the NA was satisfied with providing information on visits in its annual reports. This being said, from 2014 onwards visit reports were being published timely, that is to say, in the course of several months after the visit was made. The NA focused predominately on material conditions and the detention regime including resort to measures that can easily transgress the boundary between legitimate measures and ill-treatment (solitary confinement, body searches, fixation etc.). As to the medical care in places of detention, whilst this area has been addressed, this was done sporadically and in partial manner. The addressed aspects of health were considered mostly in relation to other safeguards such as medical examination upon entry or use of fixation. In other words, the NA is not systematically examining health care provided in places of detention and providing an assessment of whether medical personnel properly discharge their

preventive, curative and safeguard roles.[1648] In examining whether the standards were met, it made use of the so-called triangulation method. On the other hand, considering that up until 2015 medical files were not consulted due to a lack of medical doctors in visiting teams, it follows that proper utilisation of the triangulation approach was not possible. The standard length of visit reports amounting to several pages at best, even if it may prove sufficient for smaller police establishments, simply does not suffice in case of larger institutions holding hundreds if not thousands of persons.

In sum, even though reports do not provide in depth information on visits and certain areas were not sufficiently tackled, the German NPM is as of 2014 regularly publishing up-to-date, easily accessible and well-structured data on visits. Therefore, it is to be assumed that the NA managed, albeit partially, to open up institutions by making them transparent.

18.3.3 Azerbaijan

In grasping whether the Azeri NPM succeeded in making what takes place within closed institutions transparent the following uncontested findings of this research should be considered. The Azeri NPM does not publish visit reports but only occasional press statements outlining basic facts about the visits made. Annual reports mainly outline material conditions and the regime in places of deprivation of liberty. The functionality of safeguards designed to prevent a resort to, above all, deliberate violence against detainees was only scarcely examined, if at all. Similarly, the position of persons with psychosocial and/or intellectual disabilities is not being assessed against the background set by the CRPD. As to reporting, the fact that so many visits are being conducted coupled with the absence of visit reports inevitably leads to unsatisfactory outcome. More precisely, despite being in a position to carry out an adequate number of both regular and follow-up visits, annual reports of the Azeri NPM merely give a cursory overview of some of the visits conducted. For frequent unannounced visits to produce full effect, thorough, consistent and timely reporting is called for, which, unfortunately in this case did not take place. Therefore, the conclusion to be made is that, despite frequent visits, the Azeri NPM did not manage to "open up" places of detention to public scrutiny, at least not in a satisfactory manner. On specificities surrounding the Azeri NPM, one can add that carrying out many visits is of little practical value if not followed by a sound reporting and methodology of monitoring the implementation of recommendations.

18.3.4 Conclusion

As to triangulation, all NPMs explicitly stated that they crosscheck different sources to arrive at a conclusion on the practical worth of certain safeguards or whether alleged incidents took place. This being said, it is much more difficult to determine to which extent, or whether at all, they lived up to

[1648] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.7. Duty to provide adequate health care.

these assurances in practice. A lack of interviews with persons in police custody, evident in the case of German and Serbian NPMs, necessarily leads to the conclusion that the most important source of information that is to be crosschecked, namely the information coming from persons deprived of their liberty, is lacking. In addition, the absence of doctors in visiting teams considerably diminishes the ability to arrive at some sensible conclusions. Whilst such instances have been identified in all three NPMs examined, it appears that the Azeri and German NPMs are especially affected by this shortcoming. All things considered, it seems beyond doubt that the standard of determining the utility of different safeguards and observance of rights termed as "*rigorous empirical approach*" has not been met. As the Serbian NPM is the only one amongst those examined which publishes reasonable elaborated visit reports, it did provide an overview of many issues relevant to the prevention of ill-treatment such as health care, regime etc. On the other hand, even though the Serbian NPM published most of its reports, there are considerable gaps in publishing that supposedly came to pass due to technical difficulties. The German NPM, on the other hand, as of 2014 publishes all reports regularly and made them easily accessible but failed to provide a comprehensive picture of places of detention due to overly short reports. Finally, the Azeri NPM, in spite of excellent performance in terms of frequency of visits surpassing standards extracted from the practice of international bodies, failed almost altogether to convert these activities into timely published, comprehensive and intelligible reports.

18.4 NPMs improved other safeguards, conditions and regime in closed institutions

18.4.1 Serbia

The relevance and degree of compliance with recommendations are central to determining the practical reach and effectiveness of NPMs in improving detention conditions, regime and safeguards against deliberate ill-treatment. As to relevance of recommendations issued, it was shown earlier that most of them are relevant and mirror those issued by international bodies. However, it is unusual that the Serbian NPM formulated more than 30 recommendations to improve fire protection systems in institutions visited. To be clear, it is not that fire safety in closed institutions is not important—far from it—but rather whether these kinds of matters should be regularly examined by NPMs. Arguably, internal inspection by the respective ministries is better placed to carry out this and similar tasks.

More to the point, insufficient attention has been put on guarantees during the interrogation of those suspected to have committed criminal offences. Access and quality of legal services made available to persons taken into police custody as well as medical examination and notification of custody (three fundamental rights) was, according to available information, not routinely verified during each and every visit. As to training of those attending to persons deprived of liberty, the NPM in most of its

recommendations only suggested that first aid courses ought to be provided. Moreover, the deprivation of freedom based on the consent of the legal guardian was not called into question. As to recommendations made, the main question turns out to be what is to be made of the established rate of compliance (61% formal compliance (based on state replies to 75% of total number of recommendations) and 50% real compliance (based on 25% of the overall number of recommendations issued)) with individual recommendations? In other words, should these numbers, despite the described deficiencies (lack of replies, indefinite answers, recommendations marked as accepted but implementation made conditional upon availability of financial resources) be taken as a reasonable estimate of compliance rate or be discarded altogether?

In order to answer this question, the best one can do is to crosscheck these results with information coming from an independent source. Such a source is made available in 2016 when the CPT published a report on its 2015 visit to Serbia. Although the CPT team was able to cover only a fraction of institutions where persons deprived of liberty are held, the information provided seem sufficient to point not only at a general trend of non-compliance, but also to the practice of deceptive designation of recommendations as accepted. Therefore, all in all, the rate of compliance with individual recommendations goes well below the mentioned 61% and most probably even below 50%. As to general recommendations including those addressing legislation or other normative acts, despite more than 30 meetings held with state officials on the topic of getting recommendations implemented, the state of compliance is, yet again, unsatisfactory.

Therefore, to conclude, despite a number of sensible recommendations being issued, both individual and general, the actual implementation of most of them could not be verified. Moreover, judging on the CPT findings, it appears that neither 61% nor 50% can serve as a reliable indicator as to the level of compliance with individual recommendations and that the real rate of compliance is considerable lower.

18.4.2 Germany

Practical impact of a NPM is determined mainly by looking at the quality and practical worth of recommendations it makes. It appears that the NA placed emphasis on recommendations dealing with material conditions of detention and privacy, while not so much on those establishing or strengthening safeguards designed to prevent deliberate ill-treatment and ensure a swift discovery and punishments of eventual perpetrators. For instance, it did not address the use of excessive force by the police and the set-up and efficiency of complaint mechanisms. As to the three fundamental rights that are to be ensured upon taking a person into custody, only providing information on them was being tackled, whereas practical utility of the right to a lawyer, access to a medical doctor and that a designated person is notified of one's custody remained unclear.

Similarly to its Serbian counterpart, the NA has in many recommendations dealt with inadequate fire protection systems. The same thought on the pertinence of such suggestions is valid in this case as

well. As to the extent of implementation of recommendations made, the only benchmark is a 64% compliance rate based on state replies to 98% of recommendations made. No real compliance could be established nor could NPM performance be crosschecked with relevant information coming from international bodies employing a preventive approach. A part of the NA's mandate, consisting of commenting upon and ultimately improving legislation pertaining to the prohibition of ill-treatment could not, according to the NA itself, be properly discharged due to financial constraints. On the other hand, the NA did set forth a number of recommendations that would require change of legislation. It also took part in deliberations on new pieces of legislation on the state level. However, as the NA understands its role in this field as strictly limited to custodial settings, it provides comments on legislation only with regard to situations stemming from or directly related to the deprivation of liberty. It follows that the NA failed to address issues contributing to a perpetuation of circumstances under which ill-treatment can thrive as these,[1649]according to the NA at least, fall outside of its official mandate.

All things considered, it appears that the German NPM did not meet its potential to improve anti ill-treatment safeguards in practice and thus prevent deliberate ill-treatment from taking place. However, considering that the German criminal justice system, that is police facilities and prisons, unlike in other countries, do not suffer from being chronically overcrowded and bad state of repair, NPM visits probably contributed towards locating problems in places of detention and rectifying them before they became critical.

18.4.3 Azerbaijan

To establish whether the Azeri NPM managed to at least contribute to strengthening the preventive framework and improve detention conditions, one needs to look at the relevance of the recommendations submitted and whether they were implemented.

Regarding whether recommendations address all the relevant factors causing or contributing to ill-treatment, it can be concluded that, though not many recommendations are out-of-place, there is a number of those which should have been made. In other words, it seems that this NPM did not devote requisite attention to improving practical arrangements and safeguards aimed at preventing deliberate ill-treatment, such as ensuring prompt access to the three fundamental rights upon arrest. The quality and utility of mandatory consultation with a lawyer upon arrest did not give rise to pertinent recommendations as well. Similarly, the position of persons held in psychiatric hospitals and social care institutions was not adequately addressed, despite clear indices that such placement may well amount to arbitrary detention and that these persons are subject to oppressive practices that might reach the level of pain and suffering required for ill-treatment. As to general recommendations and legislative proposals, at a first glance it appears that several amendments were passed or bylaws adopted on

[1649] For example, deinstitutionalization or deprivation of legal capacity.

initiative of the NPM. While it is not to be denied that a certain, one might even say a considerable, number of regulations was improved, practical reach of these changes remains contested. Namely, while changing the legislative framework may improve the observance of rights in reality, it is by no means a guarantee that such improvement will actually take place. As it was already noted, it seems that the essence of the problem pertaining to Azerbaijan's compliance with the prohibition of ill-treatment lies not so much in a lack of appropriate legislative framework, but in not giving effect to it in practice.[1650] Therefore, it follows that the poor state of affairs regarding ill-treatment in Azerbaijan is to a lesser degree induced by an inadequate legislative framework, but stems from an outright disregard of standards stipulated at both national and international level.

Concerning how many recommendations have been implemented on the whole, it is at least doubtful that the state compliance rate is 79% as available state replies indicate (62% of total number of recommendations). On the other hand, the real acceptance rate determined (42%) is also far from being indisputable as some kind of follow-up information was provided in respect of only 16 % of the overall number of all individual recommendations identified. The UN working group, although not elaborating in detail on its findings, makes clear wretched material conditions encountered in most of the places of detention that have been visited. This should then imply that even the area on which the main part of NPM recommendations was centred failed to undergo a substantial improvement. In addition, the real acceptance rate can be manipulated by making follow-up visits to institutions where one knows that most of the recommendations were in fact implemented or selectively publishing results of follow-up visits. In the worst-case scenario, the NPM can even fake the information to increase the acceptance rate.

All things considered, whilst it would be fair to say that the implementation of some of the recommendations including those addressing material conditions (for instance, refurbishing or building new places of detention and improving hygiene) did take place, it would be reasonable to assume that the rate of compliance could at best reach 42% but is most probably considerably lower.

18.4.4 Conclusion

Common for all three NPMs is that they laid emphasis on recommendations addressing material conditions and detention regime. By contrast, recommendations addressing practical safeguards against ill-treatment and mechanisms that are to make the resort to ill-treatment more difficult were accorded considerably less attention. This is not to say that some of these issues, for instance access to three fundamental rights upon arrest, were not taken up at all, but rather that recommendations were sporadic and/or superficial and that their practical utility for persons deprived of liberty was not routinely examined. On the other hand, none of the NPMs dealt in detail either with accessibility and quality of

[1650] Refer to chapter Country report on Azerbaijan, section 17.2. An overview of the state of affairs in closed institutions concerning ill-treatment.

the complaint mechanism or with safeguards during police questioning. The position of persons with psychosocial and/or intellectual disabilities placed in psychiatric hospitals and social care institutions deserves a special mention. Namely, all three NPMs failed to make use of the CRPD's approach to challenge the deprivation of liberty of this group in itself, as well as a number of other measures routinely resorted to in this context (means of restraint, seclusion, involuntary treatment etc.). Similarly, despite of the fact that training of the law enforcement personnel has been addressed, one cannot discern that the content of trainings recommended corresponded to specificities of the respective states.[1651] For instance, although the risk of ill-treatment at the hands of the police being present in Azerbaijan and Serbia, no recommendation suggesting training on collecting evidence and investigating without reliance on confessions has been identified. Likewise, no training has been recommended to enhance the ability of medical doctors to carry out examinations in line with the Istanbul protocol.

In sum, it appears that compliance with basic safeguards and guarantees against ill-treatment were not put at the centre of attention and thoroughly examined during each and every visit as a matter of routine. However, at this point an important differentiation is in order. Namely, the Serbian NPM did make a number of sensible recommendations addressing in particular medical examinations as well as suggesting measures on a more general level, which could contribute to more robust safeguards. For instance, it recommended that medical personnel in prisons ought to be put under the competence of the Health Ministry, that the directorate dealing with complaints should be removed from the administration for the execution of criminal sanctions, that medical examination should be mandatory when force was used by the police officers, that statement of the alleged victim should always be recorded etc. It also recommended to step up with the process of deinstitutionalization and suggested that the resort to solitary confinement in medical context should be prohibited altogether. The problem in this case is that these recommendations in most cases were not complied with. As to the level of compliance with recommendations in general, no firm conclusions could be made as state replies could be identified in 98%, 75% and 62% of total number of recommendations made by the German, Serbian and Azeri NPMs respectively. Moreover, the German NPM did not follow up on almost any, the Serbian NPM on 25% and the Azeri on 16% of the overall number of recommendations. Therefore, determined formal and real compliance rates (Serbia formal compliance 61% and real compliance 66%; Germany formal compliance 64%; Azerbaijan formal compliance 79 % and real compliance rate being 42%) are, all things considered, unreliable. This conclusion is principally validated by the comparison of information provided in NPMs reports with that coming from international bodies in case of Serbia and Azerbaijan. Both indicate a level of compliance considerably lower than that specified in both state replies and determined by follow-up visits (formal and real compliance). This procedure could not be applied to the German NPM as no relevant preventive body published a report covering the period when

[1651] Refer to chapter 12 Review of state obligations stemming from the obligation to prevent ill-treatment, section 12.2.5. Duty to provide education and training.

this NPM was active. As to general recommendations including those aimed at improving legislation, the main impression is that NPMs do not have sufficient personnel to deal with this issue in a structured and comprehensive manner. In addition, NPMs in most cases did not follow up on whether and to what extent were general recommendations actually implemented. This is especially true in regard to the German NPM. Most of the Serbian NPM's recommendations were not implemented. Finally, although a number of legislative recommendations made by the Azeri NPM were designated as implemented, prospects that these changes improved the situation on the ground remain at least dubious.

18.5 Final conclusion on effectiveness of selected NPMs

With the aim of identifying the most promising research method for ascertaining whether NPMs were effective, advantages and shortcomings of quantitative and qualitative research methods as well as different approaches to measuring effectiveness (impact and performance assessment) were examined. In addition, different techniques of case selection were considered (most similar and most different system design) to maximise the ability to make inferences of wider relevance and enhance the so-called causal leverage. Ultimately, this thesis opted for qualitative assessment of the NPM's performance in three jurisdictions differing in respect of economic development, strength of institutions, respect accorded to human rights, rule of law and corruption level. To put this research plan into effect, a four-step structure of the research consisting of background concept, systematized concept, developing indicators and applying these indicators was adopted. More precisely, the empirical research on selected NPMs and their performance consisted out of the following phases. First, an overview of the content of the prohibition of ill-treatment under international law, nature of state obligations arising from it and main mechanisms for implementation of human rights treaties was provided (*background concept*). Second, best practices in establishing NPMs and carrying out preventive on site visits as well as state obligations stemming from the prohibition of ill-treatment of persons deprived of their liberty were outlined (*systematized concept*). In the third part, a set of relevant indicators capable of measuring the performance of NPMs in preventing ill-treatment based on the systematized concept, were developed. To facilitate such measurement, four objectives[1652] capturing NPMs preventive potential as well as a set of benchmarks corresponding to each objective were identified. The level of attainment of these benchmarks and, ultimately, objectives was determined through the application of indicators. In the fourth and final step of this research these indicators were applied on three jurisdictions under examination and relevant conclusion were drawn.

In order to offer a more nuanced account of NPMs' effectiveness, besides two basic poles to assessing its performance in reaching the four objectives, namely successful and unsuccessful, three

[1652] Formal set up and powers, generating deterrence, making places of detention transparent and improving legal framework pertaining to deprivation of liberty, material conditions and regime in detention and eliminating root causes of ill treatment, see chapter 14 Objectives, benchmarks and indicators for evaluating effectiveness.

additional options were added in-between: moderately successful, minimally successful or not altogether unsuccessful and mostly unsuccessful. This gradation generally corresponds with a five-point rating scale commonly used in social sciences.[1653] So, going downwards from the finding that NPM met its potential to prevent ill-treatment in places of detention in full and ending with utter failure to do so, one can differentiate the following levels:

- **Successful** (*very good*) **4**
- **Moderately successful** (*good*) **3**
- **Minimally successful or not altogether unsuccessful** (*fair*) **2**
- **Mostly unsuccessful** (*poor*) **1**
- **Unsuccessful-** (*very poor*) **0**

If one looks at the results, coming from the application of selected indicators and benchmarks on the four main objectives that the NPM is to attain, through the lens of this gradation the following picture emerges:

Serbia		**8**
Main features:	Moderately successful	3
Deterrence:	Mostly unsuccessful	1
Transparency:	Moderately successful	3
Improvement of other safeguards:	Mostly unsuccessful	1
Germany		**7**
Main features:	Minimally successful or not altogether unsuccessful-	2
Deterrence:	Mostly unsuccessful	1
Transparency:	Minimally successful or not altogether unsuccessful	2
Improvement of other safeguards:	Minimally successful or not altogether unsuccessful	2
Azerbaijan		**4**
Main features:	Moderately successful	3
Deterrence:	Unsuccessful	0
Transparency:	Unsuccessful	0
Improvement of other safeguards:	Mostly unsuccessful	1

[1653] L. E. Sullivan, *The SAGE glossary of the social and behavioral sciences* (London, Thousand Oaks CA: SAGE, 2009), p. 433.

19 Chapter: General conclusions

19.1 Introduction

This thesis endeavoured to assess effectiveness of NPMs in preventing ill-treatment in three jurisdictions displaying different scores on variables which, presumably, have some bearing on NPMs and their effectiveness.[1654] In this chapter explanations of final outcomes by using three hypotheses developed to that end will be provided.

Three working hypothesis on a possible correlation between effectiveness or ineffectiveness of selected NPMs and presence or absence of the said traits were developed and taken as a starting point.[1655]

The first hypothesis assumes that established democracies provide an environment conducive for strong NPMs, which, in turn, augments their ability to prevent ill-treatment and thus considerably lower the prospect of its occurrence. It follows that NPMs in semi-democracies are less effective while in autocracies their effectiveness will be minimal or none. The second hypothesis presumes that semi-democracies will produce the best score regarding NPMs effectiveness as they are eager to establish themselves and be recognized as countries in which rule of law and human rights are observed. To that end they are willing to go the extra mile and devote special attention to designation, operation and compliance with NPM's recommendations. Those in democratic states follow NPMs in semi-democratic states, whereas NPMs in autocratic countries are, again, least effective. Finally, the third hypothesis set forth proposed that no strong causal inferences could be established between NPMs performance and the outlined traits.

Three states have been selected exhibiting different scores on the characteristics of interest: Germany as a prosperous state with strong institutions, rule of law and low corruption level (established democracy), Azerbaijan as mostly authoritarian state with weak institutions and no tradition of rule of law (autocracy) and Serbia as a state positioned somewhere in between the other two on the points of interest (semi-democracy).

19.2 Testing the hypothesis

In what follows, the veracity of these three hypotheses will be tested in light of the final results of the qualitative performance assessment of the three selected NPMs.

[1654] Three model states considered are established democracy, semi-democracy and autocracy, see chapter 2 Research design, section 2.2. Framing the answers: research hypothesis.
[1655] Refer to chapter 2 Research design.

19.2.1 The first hypothesis

This hypothesis posits that established democracies will demonstrate best results in respect of creating an independent body, providing it with sufficient funds, staff and powers. This will enable NPMs to produce a strong deterrent effect, make institutions transparent and, finally, improve material conditions, safeguards and the legislative framework pertaining to the prohibition of ill-treatment. Additionally, this hypothesis further suggests that semi-democracy will show worse results, while the performance of the NPM situated in an autocratic state will not match accomplishments of its other two counterparts. According to the scale outlined above, the performance of the German NPM (7 points) somewhat lags behind that of the Serbian NPM (8 points), while it clearly surpasses achievements of the Azeri NPM (found to have 4 points). However, if we look more closely at different benchmarks and indicators the picture gets more complex as in many respects, from a formal standpoint at least, the Azeri NPM outperformed its counterparts from Germany and Serbia. This is the case concerning the level of activities implemented and thus funds allocated. Similarly, the Serbian NPM showed better results than the German NPM as far as frequency of visits to places of detention is concerned. In addition, it made more use of higher standards, set by the CRPD, addressing persons with psychosocial and/or intellectual disabilities. Finally, the German NPM consciously decided not to make the issue of safeguards against ill-treatment central for its work nor to draw on methods, which are to increase chances for identifying ill-treatment. Similarly, it deliberately opted for not addressing the position of persons with psychosocial and/or intellectual disabilities placed in institutions by making use of progressive standards set out in the CRPD. What is more, not only did the German NPM fail to demonstrate excellent performance, but it also displayed greater or lesser deficiencies in meeting every of the objectives considered. On the other hand, its performance was better than that of the Azeri NPM. However, on the whole, it seems indisputable that the performance of the German NPM did not prove to be superior to that of its Serbian counterpart. Therefore, it follows that judging on the results of the assessment of three jurisdictions selected, this hypothesis does not hold.

19.2.2 The second hypothesis

Even though results established (Serbian 8, German 7 and the Azeri NPM 4 points) support, albeit marginally, the second hypothesis, claiming that NPM in semi-democracy ought to be most effective among the three examined, the situation turned out to be more ambiguous. The Serbian NPM has indeed, even if in a few respects only, demonstrated slightly better results. Examples for this claim include involving NGOs in its activities, more regular visits, tackling a wide range of factors that may contribute to prevention of ill-treatment, publishing comprehensive visit reports. However, further findings, it would seem, cast doubt upon the second hypothesis. Namely, the outlined achievements cannot in themselves, validate the general conclusion that the Serbian NPM performed considerably better than the other two, especially the German NPM. This conclusion is based on two main reasons. First, it

showed sizable deficiencies in respect of conducting unannounced visits and publishing visit reports. Second, the CPT in its 2015 visit to Serbia received a number of credible complaints alleging deliberate ill-treatment in places of detention. The CPT also established deficiencies with regard to both safeguards crucial for prevention of deliberate ill-treatment and material conditions, which, in turn, indicate that most of its recommendations were in fact not complied with. Moreover, competent organs did not follow NPM recommendations that effective investigations into allegations of ill-treatment must be carried out. Therefore, on balance, it cannot be concluded that the Serbian NPM clearly outperformed its other counterparts and significantly contributed to a decline of ill-treatment in places of detention.

19.2.3 The third hypothesis

At first glance, it appears that the third hypothesis, suggesting that no sound inferences can be made between the performance of NPMs and characteristics examined, corresponds most closely to the established facts. However, although the NPMs of Germany and Serbia did not clearly outperform each other, they, all things considered, did perform better than their Azerbaijani counterpart.

19.3 Conclusion

Taking into account that the performance of selected NPMs was, to a greater or a lesser extent, unsatisfactory in most respects, one can posit the results of the research somewhere between the second and the third hypothesis. Namely, if we look at all three NPMs in their entirety, there are indications that the Serbian NPM performed slightly better than its German counterpart and clearly better than the Azeri NPM. However, this assessment holds true only to the extent that NPM's performance, as a safeguard in its own right, is considered separately from the improvement of material conditions and safeguards.[1656] Namely, only when looking at three basic objectives (formal establishment, deterrent effect and transparency) without considering the fourth (relevance and extent of implementation of recommendations), the general picture would tip to the side of effectiveness. The reason for this is the fact that the authorities did not implement most of the Serbian NPM's recommendations.

[1656] Refer to chapter 14 Objectives, benchmarks and indicators for evaluating effectiveness.

20 Chapter: Final reflections

The results of this research indicate that the practical functioning of NPMs in all three jurisdictions faces considerable difficulties. These difficulties inevitably diminish NPMs ability to prevent ill-treatment. Maybe the best depiction of this study's outcome is that all NPMs examined did not live up to international standards in designation and functioning of the NPMs and thus underperformed.

How are then these results to be understood? What is to be made of them? At first sight, one can easily be misled into oversimplifying the reasons that led to this outcome by arguing that the lack of funds is a principal weakness from which all other shortcomings, such as understaffing and infrequent visits, stem. Nevertheless, further differentiation is called for as careful reading of this thesis suggests that NPMs underperformed due to basically different reasons. Namely, the Serbian and German NPMs underachieved largely because of lack of frequent unannounced visits to places of detention. In case of the Azeri NPM, on the other hand, substandard performance took place despite carrying out frequent unannounced visits. Both Serbian and Azeri NPMs failed to break the circle of impunity, that is, to make competent authorities carry out effective investigations of indices and/or allegations of ill-treatment, whereas the German NPM failed to undertake measures capable of detecting such occurrences.

In addition, the German NPM faced a problem of a large number of places where persons are or might be deprived of liberty, which, arguably, even with sufficient funding cannot be regularly visited. Namely, as Germany is by far the most populous of the countries examined, the number of institutions that are to be visited exceeded 13 000. Carrying out regular visits in accordance with international standards (every institution at least once in three years and those shown to be problematic two times a year) would entail conducting approximately 5 000 visits per year, which is, even for wealthy states, quite unattainable. Moreover, the Azeri and German NPMs failed to involve civil society organizations into their activities, while the Serbian NPM included NGO representatives in NPM's visiting team during practically every visit to places of detention.

In conclusion, perhaps the main failure of Serbian and Azerbaijan NPMs concerns their inability to turn the tide in respect of deliberate ill-treatment fuelled, *inter alia*, by the passivity of judiciary and other institutions. Germany failed to live up to its reputation and establish a functional NPM, which would, in a best-case scenario, verify that deliberate ill-treatment does not take place. It appears that the German NPM does not consider ill-treatment, especially deliberate, a pressing issue that should be taken seriously and prevented seriously**.**

Taking everything into account, it is to be concluded that the designation of the NPM, appointing members and hiring staff, equipping it with required powers, securing necessary financial resources, acquiring expertize, producing methodology to be used, deciding on standards, interaction with state and civil society actors, conducting visits regularly, drafting and publishing reports and recommendations, analysing and improving legislation, getting recommendations implemented etc. is

an extremely complicated and fragile undertaking. Moreover, as states are accorded considerable discretion in establishing and operating NPMs, their role could be further manipulated in that they can be presented as effective though, in fact, they are failing to fulfil their raison d'être: the prevention of ill treatment of persons deprived of their liberty.

However, what appears to be certain is that if a state is an established democracy, it does not have to mean that it managed to create and maintain a functional NPM endowed with all prerogatives and adequate budget. Unfortunately, it also does not follow that if an autocratic state designates the NPM in line with the OPCAT and secures sufficient funds, the effectiveness of the NPM would necessarily follow. Therefore, it appears that setting up an NPM in accordance with best international practices and securing adequate financing is neither certain in established democracies nor sufficient in autocracies for the NPM to be effective.

It remains open to what extent can an independent state body authorized to visit places of detention and submit recommendations contribute to the eradication of ill-treatment. This research points to the conclusion that NPMs did not manage to match or surpass the performance of international visiting bodies as regards visit methodology and drafting reports. What is more, they did not capitalize on their comparative advantage, namely continuous presence in the state and thus ability to make more frequent visits to places of detention. Hence, a deterrent effect could not be generated, while opening up of places of detention, although moderately better in case of the German and especially Serbian NPM, was, in the end, also not satisfactory. As far as implementation of recommendations is concerned, expectations that domestic body's engagement would lead to greater compliance appear not to be justified. More precisely, some recommendations that ought to have been made were not, whereas the compliance with those addressing material conditions and regime of detention, could not be confirmed.

20.1 Further inferences

In what follows, several further inferences can be drawn that could explain the results of this research i.e., unsatisfactory performance amounting to relative ineffectiveness of all three NPMs in preventing ill-treatment in places of detention

20.1.1 Trade-off between width of institutions covered and frequency of visits

A trade-off effect appears to take place between the frequency of NPMs visits on the one side, and the number of institutions coming within the scope of their activities on the other. Namely, with an increase of institutions that are to be visited, ability of NPMs to reach a satisfactory frequency of visits is decreasing and vice versa. This is especially visible in Germany where, the NA should, as things stand, visit more than 13 000 institutions. If asylum centres were to be added to the list of institutions to be regularly visited, the overall number or institutions would have become even more unmanageable. So, in this case a conflict between two extremes, which could be formulated as maximum coverage of

institutions and minimal frequency of visits on the one side and minimum coverage of institutions and maximal frequency of visits on the other, is evident. One conceivable response to this predicament might be the introduction of a two-tire visiting system. Namely, one could differentiate between institutions where persons are undoubtedly deprived of liberty and those where that only might be the case; or between those where the risk of ill-treatment is greater and those where it is lesser. NPMs would then proceed with frequent visiting of the former in accordance with international standards while the latter would be visited less frequently but with other arrangements in place to mitigate negative consequences of infrequent visiting. These arrangements might be based on enhanced coordination with other visiting mechanism (national and international) in order to divide institutions that are to be visited or at least to avoid visiting same institutions in a certain time period and/or a more robust system of assessing the risk of ill-treatment in institutions to be visited.

20.1.2 Reason for infrequent resort to unannounced visiting

If one bears in mind that international bodies made benefits of unannounced visits to places of detention abundantly clear, the differing practice of the Serbian and German NPMs in this respect deserves further deliberation. What is more, the question which arises is how the standard practice of the German and Serbian NPMs to previously announce visits to places of detention is to be understood?

Representative of the Serbian NPM explained that the standard practice of announcing visits serves to establish a relation of trust with the authorities as well as to get them used to NPM activities. Moreover, it pointed out that previous announcement facilitates more productive visit in terms of access to relevant interlocutors and documentation. Similar remarks were made on the part of the German NPM as well. However, none of them commented on the advantages of unannounced visits and how the lack of these is to be compensated. As already outlined, arguments favouring announced visits do not seem convincing and most of potential advantages stemming from such visits could be ensured by other means.[1657] Therefore, origins of the NPMs reluctance to conduct unannounced visits presumably lie elsewhere. While admitting that it is problematic to speculate on possible reasons, a general impression is that NPMs do not want to alienate or antagonize state representatives with unannounced visits. By previously announcing visits they opt to avoid a potentially confrontational course of action in order to preserve good relations with the authorities. From the other perspective, precisely this can be considered a consequence of an innate flaw of NPMs design as it was intended to be sufficiently disconnected from the state to be objective and yet close enough to bring about change through the implementation of its recommendations. It appears that these traits are hard to reconcile in practice.

In addition, the German NPM seems to view places of detention in Germany as ill-treatment free, at least as long as deliberate ill-treatment is concerned, which in turn renders unannounced visiting unnecessary. It is somewhat ironic that strengths of democratic states in terms of robust institutions and

[1657] Refer to chapter 13 Preventive approach utilized - lessons learnt, section 13.3.5. Unannounced visits.

rule of law turned out to hinder rather than to advance NPM's effectiveness as the German NPM, on account of being overly confident that deliberate ill-treatment does not take place, did not make full use of methods that could definitely verify that that is indeed the case.

20.1.3 Formal approach to monitoring places of detention

Furthermore, as to areas looked at, it appears that NPMs prefer to put an emphasis on material conditions and, to some extent, on the regime, but not on discovery of instances of ill-treatment and practical worth of safeguards that are to prevent it. As any other state-funded body, NPMs find themselves under pressure to justify funds allocated on an annual basis. From this it might follow that NPMs focus predominately on relatively benign shortcomings such as obsolete practices or inadequate material conditions stemming from lack of funds. By contrast, situations, which can lead to individual legal responsibility of the law enforcement officers and give a bad name to institutions—if not whole states—are not being thoroughly inspected by using the triangulation method as a matter of routine. It is too easily forgotten that one should not only verify that certain safeguards are in place but also if and to what extent persons deprived of liberty are able to benefit from them. This, again, can be traced back to the NPM being a state body.

20.1.4 Limits to NPM effectiveness in preventing deliberate ill-treatment

The major assumption related to strong institutions, namely that NPM can achieve results in preventing deliberate ill-treatment in places of detention only in partnership with other institutions, was not proven wrong. Namely, despite the fact that the Serbian and Azeri NPMs reported on some situations indicative of ill-treatment, competent authorities did not carry out effective investigations able to ensure that perpetrators are adequately punished and victims compensated and rehabilitated to the extent possible. On the other hand, the absence of such reaction sets limits to NPM's effectiveness as notwithstanding of its performance, if other state organs are continuously failing to do their bit, activities undertaken with the aim of preventing ill-treatment will not produce a desired effect. In Germany, where one would expect that courts and prosecution authorities would conduct effective investigations based on indications set forth in NPM reports, this could not be verified as the NPM simply did not encounter such instances. Although this scenario might prove to be authentic, namely that ill-treatment indeed does not take place, the problem lies in the fact that the NPM did not make use of all methods capable of detecting deliberate ill-treatment in places of detention. Namely, frequent unannounced visits to places of detention and systematic inquiry with prisoners on remand on their treatment during arrest and while in police custody were lacking.

20.1.5 Limited results in preventing ill treatment of persons with psychosocial and/or intellectual disabilities

If one is to assess NPMs performance in relation to the three main types of institutions visited, namely police establishments, prisons, and psychiatric hospitals and social institutions, it is to be concluded that the least attention was devoted to the latter. Namely, the frequency of visits made to this type of institutions lags considerably behind the other two types. Moreover, NPMs in general did not make use of a new approach towards persons with psychosocial and/or intellectual disabilities embodied in the CRPD. This was clearly stated in case of the NA and is evident in case of the Azeri NPM. The practice of the Serbian NPM is more peculiar as it did make several references to the CRPD as well as recommendations demanding the acceleration of the deinstitutionalization process, making available life in the community and abolishing solitary confinement. However, this was done to no avail as none of these suggestions were actually put into practice. Finally, the Serbian NPM did not make full use of CRPD standards and stopped short of taking a clear position that some well-established practices in these institutions (involuntary treatment, use of means of restraint, deprivation of legal capacity) as well as the deprivation of liberty itself are unacceptable and should thus be abolished.

20.2 Closing remarks

Finally, despite the established underachievement of all three NPMs from the perspective of international standards and good practices, one should not fall into the trap of denying that NPMs have any worth whatsoever. In all three jurisdictions NPMs have been established by law and managed to enter places of detention in most cases without hindrance, sometimes unannounced. Members of NPMs were able to conduct interviews with a number of individuals deprived of their liberty. Reporting ensured the flow of information from institution to the outside world. Finally, recommendations were drafted and sometimes implemented. Therefore, as to the German NPM, notwithstanding all material personal and methodological limitations, and taking into consideration that material conditions in German places of detention are mostly adequate, it is to be presumed that NPM recommendations contributed to rectifying inconsistences that could, with passage of time, grow to ill-treatment. As to Serbian and Azeri NPMs, to be fair, maybe the best explanation of discrepancy between NPMs performance and the unfavourable picture of prohibition of ill-treatment is that it remained bleak despite the NPM performance. Differently put, NPMs did not succeed in the first years of their activities to improve safeguards and thus reduce ill-treatment in places of detention, at least not to any significant level. Other factors, such as lack of willingness to break the circle of impunity noticeable in the passivity of judicial authorities as well as a lack of funds played a role in NPMs failure to prevent ill-treatment.

To a general recommendation that an NPM ought to be established in line with the OPCAT requirements, possess adequate powers, guarantees of independence and be properly funded the following can be added:

- As NPMs embedded in an institution with a broader human rights mandate (NHRIs, Ombud-institutions), have better prospects of being effective, this mode of designation should be seriously considered. This being said, greater financial organisational and personal independence from such institutions ought to be secured.
- NPM members and staff should be sufficient for carrying out at least a minimum of activities pertaining to their mandate, including commenting legislation. Staff, members and individual experts should possess adequate expertise in various files pertaining to NPMs mandate such as law, medicine, psychology etc.
- Greater involvement of NGOs in all aspects of NPMs work, including conducting visits, should be ensured, as it seems that such involvement furthers NPMs effectiveness.
- Appointing individuals that spent a greater portion if not entire careers as public officials in corrections or law enforcement to serve as members of NPMs should be avoided.
- Frequency of visits as well as quality should be ensured. A sound methodology should be developed aimed at identifying critical institutions calling for more frequent visits. Furthermore, a balance needs to be struck between the width of institutions to be visited on one side, and available resources that would enable achieving satisfactory frequency of visits, on the other.
- Unannounced visiting, especially to police establishments, should be the standard mode of operation. In practice this would entail carrying out at least 50% of all visits without prior notice.
- Frequent resort should be made to interviewing remand prisoners on their treatment by the police as the most efficient method of determining the extent of police misconduct including ill-treatment and torture to extort confessions.
- Greater attention should be put on strengthening the practical utility of custodial and other safeguards such as complaint system, interrogation process, three fundamental rights, etc.
- Efforts should be made to facilitate a setting up or refining adequate statistics pertaining to ill-treatment. For example, exact number and outcome of complaints on ill-treatment including investigations, eventual prosecutions, court proceedings and redress awarded to the victims.
- Cooperation with prosecutorial and judicial authorities should be sought in order to tackle the issue of effective investigation and impunity
- Greater synergies should be sought with different actors, international and national, governmental and non-governmental including media, NGOs, bar associations, universities and the like, to avoid duplication of efforts, ensure greater coverage of institutions that are to be visited, improve advocacy efforts etc. Special significance in that regard should be accorded to working with organizations or support groups bringing together former prisoners, psychiatric

patients, residents of social institutions, minorities etc. Moreover, participation of these groups in NPM activities, including visiting closed institutions, should be strongly encouraged.

- More efforts should be put on developing and implementing a dependable and viable strategy of determining the real extent of state compliance with NPM recommendations.
- Visit reports should be published despite the lack of explicit provision in the OPCAT mandating states to do so. Reports need to be comprehensive and provide an overview of all relevant issues, including recommendations.
- Lastly, it is to be hoped that state authorities and NPMs will be able and willing to learn as they go and improve NPM's formal arrangements and practical performance. Here an important role is to be played by the SPT and the CPT as their reports can serve as correctives or sign posts indicating shortcomings in NPM set-up and methodology. What is more, these reports provide periodical assessment of compliance with standards in places of detention against which NPMs performance could be evaluated.

SUMMARY

This thesis aimed to evaluate the effectiveness of specific national bodies (National Preventive Mechanisms, NPMs), established under the Optional Protocol to the Convention Against Torture (OPCAT), in order to address the discrepancy between formal proclamations confirming the absoluteness of the prohibition of ill-treatment and its constant disregard in reality. NPMs were meant to close this gap by conducting regular visits to closed institutions, drafting and publishing reports, issuing recommendations and cooperating closely with the authorities in getting them implemented with the overall aim of preventing ill-treatment from taking place. In addition, this thesis also endeavours to shed light on factors that might have had some bearing on the final outcome.

The method of enforcement of human rights obligations introduced by the OPCAT represents a novelty in international law and draws on two distinct developments in the field. The first is related to conducting regular on-site visits to closed institutions, while the second to the rise of national human rights institutions designed to improve the observance of human rights at the national level. Central to this new method of implementation are NPMs, bodies envisaged and regulated at an international level, but firmly embedded in a national legal setting, financed by a state, yet independent from the undue influence of a state's organs or officials.

After examining various arguments in favour of and against different modalities of ascertaining the effectiveness of human right treaties in general and specific mechanisms that aim to prevent ill-treatment in particular, a qualitative comparative approach was selected. Through this method, the performance of NPMs established in countries with different scores on presumably causal factors has been evaluated. Therefore, the methodology adopted is a qualitative one and it aims to assess the setting up of NPMs, their formal powers, available means, methodology used, performance, and the relevance and extent of compliance with their recommendations. More precisely, it does not purport to directly determine whether the activities of NPMs led to the reduction of ill-treatment, but instead whether they met their full potential to prevent ill-treatment in closed institutions and then presume that this has led to greater prevention of ill-treatment in reality.

To facilitate the execution of this study, a four-stage approach was adopted, consisting of the following phases: defining the background and systematized concept, developing indicators and applying the indicators.

In background concept a detailed outline of a contemporary understanding of torture, cruel, inhuman or degrading treatment or punishment was provided. In addition, certain invasive practices (capital and corporal punishment, deprivation of liberty itself, body searches, solitary confinement, use of means of restraints, involuntary treatment) often resorted to in the custodial settings were further analysed in order to determine when these mostly lawful practices turn to ill-treatment. Furthermore, the general overview of the nature and typology of human rights obligations in general and those

stemming from the right not to be subjected to ill-treatment in particular as well as a human rights implementation mechanisms was provided.

Systematized concept consists of a thorough account of different facets of a state's general obligation to prevent ill-treatment that may come to pass during and after deprivation of liberty. In addition, an overview of the conditions NPMs would have to meet in order to be considered effective was provided. This was done by taking into account the letter of the OPCAT, both academic and non-academic literature dealing with prevention of ill treatment, as well as best practices and standards extracted from reports, concluding observations and general comments of treaty bodies and other international instances dealing with ill-treatment.

In the third phase information put together in a systematized concept was used to develop objectives, benchmarks and indicators capable of measuring NPMs' performance. More precisely, four general objectives (together with a number of benchmarks and indicators) that an NPM ought to meet in order to achieve its maximal potential were formulated. The first dealt with powers, means and safeguards necessary for the implementation of the NPM mandate. The second presumes that the NPM managed to produce the so-called deterrent effect (prevent ill-treatment by increasing the risk for potential perpetrators of their misdeeds being discovered and punished through regular unannounced visits to closed institutions). According to the third objective, the NPM managed to make closed institutions transparent by conducting visits, addressing relevant issues and timely and comprehensively reporting on its insights. The fourth objective posits that an NPM managed to improve the situation in closed institutions by formulating relevant recommendations and getting them implemented. As a corrective to the final conclusion on whether and to what extent these four objectives were reached, reports of international visiting bodies providing an overview of the state of affairs in places of detention of the state examined were used.

Finally, in the fourth phase this framework was applied on three countries displaying different scores on factors considered causal i.e. democratic capacity, economic development, strong and independent institutions, observance of human rights in general and corruption. Depending on the extent of meeting these factors, three model countries were differentiated: established democracy, semi-democracy and autocracy. To accommodate prospective results, three working hypothesis were developed. The first posits that the most effective NPM will be the one designated in an established democracy, the less effective one in a semi-democracy and the marginally effective or entirely ineffective one in an autocracy. The second hypothesis assumes that the NPM will show the best results in a semi-democracy, somewhat worse in an established democracy, while autocracy would once again exhibit the poorest results in relation to NPM effectiveness. The third hypothesis posits that no meaningful relation could be established to explain the achievements of NPMs in three model states under examination.

After consulting different databases providing cross country rankings on the potentially causal variables, Serbia (semi-democracy), Germany (established democracy) and Azerbaijan (autocracy)

were selected since they exhibited fairly different scores as regards to each potentially causal factor taken into consideration.

In addition, a general overview of state of affairs regarding ill-treatment in the course of preceding two decades or so in respect of each country was provided drawing on reports and concluding observations of treaty bodies. Finally, a comparative analysis of each of the objectives in the three states under examination and projection of their success on a five-point rating scale was provided. It was then proceeded to see to what extent, if at all, the final results correspond with initial hypothesis on factors favouring or disfavouring NPMs' effectiveness.

The final result suggests that all three NPMs, to a greater or lesser degree, underperformed. More precisely, on a five-point rating scale extent of attainment of each of 4 formulated objectives by an NPM under examination was measured. The scale consists of 5 options ranging from best to worst performance in the following order: successful (4 points), moderately successful (3 points), minimally successful, or not altogether unsuccessful (2 points), mostly unsuccessful (1 points) and unsuccessful (0 points). Out of 16 maximal points, Serbia was graded as having achieved 8, Germany 7 and Azerbaijan 4. Therefore, what transpired was that the performance of the NPMs of Serbia and Germany was generally similar, although the former did slightly better. On the other hand, according to the results the Azeri NPM did considerably worse than the two examined counterparts.

However, if one is to acquire a more accurate picture of NPMs in three jurisdictions examined, a greater differentiation is called for.

All three NPMs were grounded in an act with, at least, force of law and are provided with powers considered necessary for effective implementation of their mandate. The appointment of members of the German NPM is made by the executive branch of government without consulting other actors that are active in the field such as NGOs, and are composed mostly of former law enforcement officials and civil servants. Considering that the head of NPMs of Serbia and Azerbaijan is the Ombudsman, their appointment is made by their respective parliaments. Good practice was encountered with the Serbian NPM, in that it involved NGOs in all of its activities, including carrying out visits to closed institutions. However, lack of sufficient resources and, consequently, qualified staff is evident in the case of the German NPM and, to a lesser extent, the Serbian NPM. As to the standard used, all of them formally call upon a range of standards, in most cases extracted from the CPT's practice. However, it is evident that the position of persons with mental or intellectual disabilities was not evaluated from the standpoint of the CRPD offering greater protection. Generally speaking, they all did not adequately address particular problems pertaining to this group of persons deprived of their liberty.

As to the activities implemented that could generate a deterrent effect, it appears that the Azeri NPM, judging on its reports alone, achieved the best results. Namely, in the course of six years it conducted more than 2300 unannounced visits and interviewed nearly 10 000 persons deprived of their liberty. This performance surpassed benchmarks on frequency of both unannounced visits and visits in general. The problem is that the results of these visits stand in stark contrast with the state of affairs in

closed institutions depicted by international bodies and NGOs, which ultimately brings the credibility of the Azeri NPM into question. On the other hand, the German NPM, as a result of the discrepancy between its inadequate funding and a large number of places where persons are or might be deprived of liberty, carried out an unacceptably small number of visits. In addition, the performance in regards to conducting unannounced visits fell way below the standards suggesting minimum frequency of such visits. The situation is not so critical as regards to the Serbian NPM, but he too did not meet the minimal standard on the frequency of visits and clearly underperformed in respect to the number of unannounced visits.

The situation is somewhat complicated regarding transparency. The Azeri NPM showed the poorest results, since it did not publish any visit reports and thus failed to convert information gathered in numerous visits and interviews into comprehensive, structured and intelligible reports. The Serbian NPM did publish comprehensive visit reports which provided a good overview of places of detention, but failed to publish all reports. Finally, the German NPM showed considerable improvement over time from not publishing visit reports, but only giving an overview of visits in annual reports, to regularly providing both visit reports and state replies in their original form. However, the German NPM's visit reports are usually shortened and do not provide a comprehensive overview of all relevant safeguards, material conditions and regime of detention to which persons deprived of liberty are subjected.

The other contentious issue relates to failure of all three NPMs, to a greater or lesser degree, to continually and methodically examine and report on the practical utility of the so-called custodial safeguards that ought to be in place and functional to prevent deliberate ill-treatment, especially in police custody.

As to the implementation of recommendations, the rate of formal compliance (based only on official answers of institutions visited) in the case of Serbia and Germany hovers around 60% (61 to 64% respectively) and in the case of the Azeri NPM reaches almost 80% (79%). On the other hand, in respect to the real compliance (compliance verified in follow up visits) the situation is more ambiguous. The German NPM, due to a low number of follow up visits, failed altogether to provide sufficient information based on which the level of real compliance with its recommendations could be determined. Based on following up 25% of the overall number of its recommendations, the Serbian NPM came to 66 % of fully or partially implemented recommendations, while real compliance of the Azeri NPM, based on only 16% of overall number of recommendations issued, amounts to 42%. On the other hand, reports of international bodies available in the case of Serbia and Azerbaijan, although based on a limited number of institutions, indicate that the rate of compliance with NPM recommendations is low, since most of the recommendations designated as accepted in state replies turned out to have produced a weak impact, if any, on the ground. Similarly, the number of allegations of ill-treatment documented and in several cases corroborated by results of medical examination conducted by the CPT doctor and/or high level of consistency among different accounts of ill-treatment, exceeded those reported by NPMs. This fact alone should be sufficient to cast doubt on the practical utility of these NPMs. Not only did

the German NPM not encounter any allegations of deliberate ill-treatment, but it also did not make any substantial effort to discover such instances by, for example, conducting unannounced visits more regularly or collecting information on treatment during police custody from prisoners on remand.

Despite the fact that activities of all three NPMs were mainly focused on addressing poor material conditions and shortcomings as regards regime and to a lesser extent medical care in closed institutions, this study cannot confirm that profound or at least noticeable improvement in these fields took place. To be sure, some improvement without doubt took place, but it is difficult to establish their real extent. It is indicative that the CPT in its report on Serbia documented same shortcomings which Serbian authorities, following NPM recommendations, had designated as corrected.

Against this background, it is hard to make anything out of the three hypothesis suggested. On the one hand, the fact that the Serbian NPM achieved somewhat better scores should not be taken at face value as further analysis demonstrated that it did not clearly outperform its German counterpart. Therefore, hypothesis II does not hold. Hypothesis I is also not valid for the same reasons. Although the third hypotheses by itself does not fit as well, it seems that the described state of affairs can be posited somewhere between hypothesis II and III, considering hints at the slightly better performance of the Serbian NPM and no correlation at all. However, an assumption that effective prevention of torture and other deliberate ill-treatment requires action of state organs other than NPMs most of all courts and prosecutors has not been proved wrong.

A more general remark may be that the outlined factors such as democracy, rule of law and respect for human rights need to be indeed met if an NPM is to be effective. However, the fact that a country in which the NPM operates generally meets these criteria (i.e. it is an established democracy) is by no means a guarantee that an effective NPM should follow. On the other hand, setting up an NPM in line with the OPCAT, securing sufficient funds and implementing activities above average in a state with clear autocratic rule or tendencies does not necessarily reduce the level of ill-treatment.

As to the more practical lessons learned, it appears that the greater involvement of civil society actors favours a better performance of NPMs. It also follows that double danger should be avoided; the presumption that as no case of ill-treatment has been encountered efforts made at continually looking for one are not necessary on the one hand, and that larger funds and greater level of activities are sufficient for NPMs to be considered effective.

In addition, NPMs should seek to forge alliances with other societal actors such as judiciary, civil society organizations and media in an effort to prevent and properly sanction ill-treatment. Maybe most important of all, best practices in terms of frequency and nature of visits, should be constantly employed; the same is valid as to utilizing techniques, such as inquiring with prisoners on remand on their treatment by the police, capable of shedding light on usually secretive practices of torture. Furthermore, greater efforts should be made to empirically verify compliance with basic safeguards against ill-treatment and recommendations as a matter of routine during every visit to closed institution.

Finally, this thesis explored the effectiveness of NPMs only during the initial several years of their operation. It is to be hoped that NPMs will be able to improve their performance over time.

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