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Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level "FILL"

Training Manual on the Prohibition of Torture and Inhuman and Degrading Treatment and Punishment

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Introduction

The texts of presentations suggested in this publication have been developed as a part of materials on the Prohibition of Torture and Inhuman and Degrading Treatment and Punishment for training of judges and prosecutors in Montenegro. They are designed so to comprise a course with the aim of providing the participants with a profound level of knowledge of Council of Europe and other international standards closely related to the prohibition of torture and other forms of ill treatment, related judicial, including prosecutorial.

The presentations are supposed to serve as a reference text for future national trainers and participants of relevant trainings carried out within different national professional training frameworks. In combination with the module-specific elements for power point presentation and case studies, tools for practical exercises they are aiming at enhancing the relevant skills of the participants that are necessary for understanding and application in practice of their duties deriving from the domestic legal framework and overall standards on the issues concerned.

The texts of presentations and related training materials (sample power point presentations and practical exercises) have been prepared by Mr Erik Svanidze,[1] who besides coordinating the exercise drafted presentations and related training materials under Modules 2, 3, 4.1 and 5 of the course, and Mr. Graham Smith,[2] who drafted presentations and related training materials under Modules 1, 4.2 and 6. The training course materials have been prepared under the auspices of the joint Council of Europe and European Union Project Fighting ill-treatment and impunity and enhancing the application of the ECtHR case-law on national level "FILL".

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Module 1
Definitions of torture, inhuman or degrading treatment or punishment

- **European Convention on Human Rights**
- **Article 3 of the ECHR**
- **Torture**
- **Inhuman treatment or punishment**
- **Degrading treatment or punishment**
- **Conclusion**

1.1 European Convention on Human Rights

The global international framework for the prohibition of torture and ill-treatment has been developed by the United Nations.[3] Montenegro was accepted as a Member State of the United Nations on 28 June 2006. The regional international framework for Europe has been developed by the Council of Europe,[4] which is based in Strasbourg, France. Montenegro became the 47th Member State of the Council of Europe on 11 May 2007. Obligations under international law requiring that the Montenegrin authorities ensure the prohibition of torture and other ill-treatment derives from membership of these two international bodies. In this Module, priority is given to the Council of Europe framework and where relevant, when citied in judgments of the Strasbourg Court for example, references will be made to United Nations documents.

The European Convention on Human Rights (ECHR),[5] which established the European Court of Human Rights (ECtHR),[6] and the European Convention for the Prevention of Torture and

[3] The address of the United Nations webpage is http://www.un.org/en/index.html.
[4] The address of the Council of Europe webpage is http://www.coe.int/en/. Regional international frameworks have also been developed in the Americas by the Organisation of American States (http://www.oas.org/en/), including the *American Convention on Human Rights* (http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm), the Inter-American Commission on Human Rights (http://www.oas.org/en/iachr/) and the Inter-American Court of Human Rights (http://www.corteidh.or.cr/index.php/en): and in Africa by the African Union (https://www.au.int/), including the African Commission on Human and Peoples' Rights (http://www.achpr.org/), *African Charter on Human and Peoples' Rights* (http://www.achpr.org/instruments/achpr/) and the African Court on Human Rights (http://en.african-court.org/).
[5] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5: http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[6] The address of the ECtHR's webpage is http://www.echr.coe.int/Pages/home.aspx?p=home&c=.

Inhuman or Degrading Treatment or Punishment,[7] which established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),[8] entered into force in Montenegro on 6 June 2006.

The ECHR was drafted in 1950 for the purpose of putting into effect some of the rights stated in the Universal Declaration of Human Rights[9] and entered into force in 1953.[10] The obligation to respect human rights under Article 1 of the ECHR establishes that a State is required to maintain a national framework to protect human rights.[11] One of several fundamental rights and freedoms detailed in Section I of the ECHR, the prohibition of torture and other ill-treatment, is stated in Article 3 (see below).

Section II of the ECHR provides for the structure and procedures of the ECtHR. Applications to the ECtHR may be made by a State, under Article 33 of the ECHR, or an individual, Non-Governmental Organisation (NGO) or group of individuals claiming that they have been a victim of a human rights violation by the State, under Article 34 of the ECHR. The machinery for enforcement of the ECHR was rationalised in 1998 under Protocol No. 11 to the ECHR.[12]

This involved abolition of the European Commission of Human Rights, to which applications to the ECtHR were previously made and which served as a fact-finding tribunal, and the ECtHR was enlarged and made a full time body.[13] Judgments of the five section Chambers and the Grand Chamber of the ECtHR may be easily accessed on the HUDOC ECtHR online search engine.[14] The composition of the ECtHR, overview of ECHR case law and statistics are provided in ECtHR annual reports.[15] Documents of the CPT may be easily accessed using the HUDOC CPT online search engine[16] or the CPT's Standards and tools webpage.[17]

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[7] Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987, ETS 126: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dbaa3.

[8] The address of the CPT webpage is http://www.cpt.coe.int/en/.

[9] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III): http://www.un.org/en/universal-declaration-human-rights/.

[10] For helpful background see European Court of Human Rights, *The ECHR in 50 questions* (2014): http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

[11] For helpful background see Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Human Rights Handbook, No 7 (2007) Council of Europe: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d.

[12] Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155: http://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf.

[13] For helpful background see Andrew Drzemczewski, "The European Human Rights Convention: Protocol No. 11-Entry into force and first year of application." *Human Rights Law Journal* 21.1/3 (2000): http://www.gddc.pt/actividade-editorial/pdfs-publicacoes/7980-a.pdf.

[14] The address of the HUDOC ECHR online search engine is http://hudoc.echr.coe.int/eng#.

[15] The address of ECtHR online annual reports is http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=.

[16] The address of the HUDOC CPT online search engine is http://hudoc.cpt.coe.int/eng#.

[17] The address of the CPT *Standards and tools* online is http://www.coe.int/en/web/cpt/standards.

Under the principle of subsidiarity it is for the State to determine in the first instance whether there has been a breach of an ECHR right. Under Article 35(1) of the ECHR the ECtHR is precluded from considering a case unless and until domestic remedies have been exhausted.[18] Judgments of the ECtHR are binding on the State and Article 46 of the ECHR provides for the Committee of Ministers of the Council of Europe to supervise the execution of judgments. The Department for the Execution of Judgments of the European Court of Human Rights (Execution of Judgments Department)[19] assists and advises the Committee of Ministers and provides support to member states on the execution of judgments.[20] In meeting their obligation to remedy the violation of a right or freedom protected under the ECHR a margin of appreciation is available to the State. This allows the State to set out, under the supervision of the Committee of Ministers and with guidance from the Execution of Judgments Department, how the violation will be addressed in an Action Plan. Separated out into individual and general measures, the execution process serves to remedy, as far as possible, the negative effect of the violation and protect against future violations.[21] The Execution of Judgment Department presents statistical data and thematic overviews of their work, dating back to 2007, in Annual reports,[22] and progress on individual cases is available on the HUDOC EXEC online search engine.[23]

As a means of endeavouring to ensure the effectiveness of the machinery for enforcement of the rights and freedoms protected under the ECHR, the Convention has been developed by the ECtHR as a living instrument that serves to protect human rights practically and effectively.[24] In regard to the evolution of society and developing social values and standards of behaviour, the ECHR is understood to be a "*living instrument which must be interpreted in the light of present-day conditions.*"[25]

Alongside the negative obligations on member states not to interfere with human rights as set out in the ECHR, the jurisprudence of the ECtHR has developed positive obligations that require the State take positive steps or measures to protect human rights from state agents and private individuals.[26] The State's negative obligations apply to the acts of state agents, and in regard to

[18] For guidance on applying to the ECtHR see Council of Bars and Law Societies of Europe, *The European Court for Human Rights: Questions and Answers for Lawyers* (2014), CCBE: http://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf.
[19] The address of the Execution of Judgments Department webpage is http://www.coe.int/en/web/execution/home.
[20] See, *Mandate of the Department for the Execution of Judgments of the European Court of Human Rights*: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a997c.
[21] For more information on the supervision process, see http://www.coe.int/en/web/execution/the-supervision-process.
[22] The address of Execution of Judgments Department online annual reports is http://www.coe.int/en/web/execution/annual-reports.
[23] The address of the HUDOC EXEC online search engine is http://hudoc.exec.coe.int/eng#{"EXECDocumentTypeCollection":["CEC"]}.
[24] See, for instance, *El-Masri v. the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, Paragraph 134: http://hudoc.echr.coe.int/eng?i=001-115621.
[25] See, for instance, *Selmouni v. France* (Application no. 25803/94) Judgment of 28 July 1999, Paragraph 101: http://hudoc.echr.coe.int/eng?i=001-58287.
[26] For helpful background see Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Human Rights

the prohibition of torture and ill-treatment the State is responsible for the actions of all of its agencies, such as the police, security forces, other law enforcement officials, and any other State bodies who hold the individual under their control, whether the official acts under orders, or on their own accord. Positive obligations are premised, firstly, on the obligation under Article 1 of the ECHR that the State secures ECHR rights to everyone within their jurisdiction. Secondly, that ECHR rights must be practical and effective and not theoretical and illusory. And, thirdly, the principle under Article 13 of the ECHR that the State provides an effective remedy for an arguable breach of an ECHR right. The doctrine of positive obligations has particular relevance for the protection of personal life and integrity, which are covered by the right to life under Article 2; prohibition of torture under Article 3; prohibition of slavery and forced labour under Article 4; some aspects of the right to liberty and security under Article 5; and the right to respect for private and family life under Article 8 of the ECHR.

Under the principle of subsidiarity and when allowing the State a margin of appreciation in how they implement judgments of the ECtHR, discretion is available to the State for how they meet their positive obligations to prevent violations of human rights. The positive duties imposed on States are to:

- put in place a legal framework that effectively protects ECHR rights;[27]
- prevent breaches of ECHR rights;[28]
- provide information and advice relevant to the breach of ECHR rights;[29]
- effectively investigate breaches of ECHR rights;[30] and
- the provision of resources to individuals to participate in proceedings where there has been a breach of ECHR rights.[31]

1.2 Article 3 of the ECHR

The prohibition of torture and other forms of ill-treatment is set out simply and straightforwardly in Article 3 of the ECHR:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*[32]

Handbook, No 7 (2007) Council of Europe: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d.

[27] See, for instance, *X & Y* v *The Netherlands* (application no. 8978/80) Judgment of 26 March 1985: http://hudoc.echr.coe.int/eng?i=001-57603.

[28] See, for instance, *Dordavic* v *Croatia* (Application no. 41526/10) Judgment of 24 July 2012: http://hudoc.echr.coe.int/eng?i=001-112322.

[29] See, for instance, *Nogin* v *Russia* (Application no. 58530) Judgment of 15 January 2015: http://hudoc.echr.coe.int/eng?i=001-150312.

[30] See, for instance, *Aydin* v *Turkey* (Application no. 23178/94) Judgment of 25 September 1997: http://hudoc.echr.coe.int/eng?i=001-58371.

[31] See, for instance, *Savitsky* v *Ukraine* (Application no. 38773/05) Judgment of 26 July 2012: http://hudoc.echr.coe.int/eng?i=001-112417.

[32] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5:

Written in unqualified terms the prohibition on torture and other forms of ill-treatment is an absolute right. Article 3 does not provide for exceptions and derogation is not permissible under Article 15(2) of the ECHR. This is the case even in the event of a public emergency threatening the life of the nation, the suppression of terrorism[33] or organised crime,[34] for example, and nor can exception be made for the purpose of saving an individual's life.[35] Neither the conduct of the victim or the nature of the offence be taken into consideration as justification for torture or ill-treatment, and nor may the motivation of the authorities responsible.

> *"the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue."* [36]

Article 3 includes three separate categories of prohibited treatment or punishment: i) *torture*; ii) *inhuman treatment/punishment;* iii) *degrading treatment/punishment*. Inhuman or degrading treatment/punishment are commonly referred to as ill-treatment. Whereas Article 2 of the ECHR expressly allows for the State to take a life if absolutely necessary, on grounds of self-defence or to effect an arrest for example, no such restriction or qualification is written in to Article 3. The authority of the State to resort to coercive force, the proportionality of the violence and level of suffering inflicted, and the scope of Article 3 have been developed in the Strasbourg Court's jurisprudence. In general terms for Article 3 to be engaged the suffering and humiliation inflicted on a victim must go beyond the level associated with legitimate forms of treatment or punishment.[37]

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http://www.echr.coe.int/Documents/Convention_ENG.pdf. The prohibition of torture and other forms of ill-treatment is also set out in Article 5 of the *Universal Declaration of Human Rights* (http://www.un.org/en/universal-declaration-human-rights/index.html); Article 7 of the UN *International Covenant on Civil and Political Rights* (http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx).

[33] *Tomasi* v *France* (Application no.12850/87) Judgment of 27 August 1992, Paragraph 115: http://hudoc.echr.coe.int/eng?i=001-57796.

[34] *Selmouni* v. *France* (Application no. 25803/94) Judgment of 28 July 1999: Paragraph 95. http://hudoc.echr.coe.int/eng?i=001-58287.

[35] *Gäfgen* v *Germany* (Application no. 22978/05) Judgment of 1 June 2010, Paragraph 107: http://hudoc.echr.coe.int/eng?i=001-99015.

[36] *Gäfgen* v *Germany* (Application no. 22978/05) Judgment of 1 June 2010, Paragraph 107: http://hudoc.echr.coe.int/eng?i=001-99015.

[37] See, for instance, *Kalashnikov* v *Russia* (application no. 47095/99) Judgment of 15 July 2002, Paragraph 95: http://hudoc.echr.coe.int/eng?i=001-60606.

The ECtHR commonly asserts that *"Article 3 of the Convention enshrines one of the most fundamental values of democratic societies."*[38] The Court has found in total a violation of the prohibition of torture in 135 cases, and inhuman or degrading treatment or punishment in 1,864 cases between inception in 1959 and 31 December 2016. In addition, the Court has found a breach of the procedural obligation to conduct an effective investigation into an alleged violation of Article 3 on 733 occasions (see Module 5).[39]

Conduct must reach a minimum level of severity before Article 3 is breached. The assessment of this minimum threshold is relative and depends on the circumstances in each case.[40] Factors that the Court may take into account when determining the level of severity may include the duration of time spent in detention;[41] sex and age of the applicant;[42] and mental health of the victim.[43]

Applications to the Court alleging a violation of Article 3 may also include a complaint that Article 8 has been breached. The Court may decide that it is not necessary to examine an Article 8 allegation if taken into account in the context of Article 3.[44] Alternatively, having determined a violation of Article 8 the Court may not consider an Article 3 allegation.[45]
Consistent with the status of the ECHR as a living instrument, definitions of torture and other forms of ill-treatment have been developed in the case law of the ECHR.

> *"having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions", the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."*[46]

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[38] See, for instance, *El Masri* v *the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, Paragraph 195: http://hudoc.echr.coe.int/eng?i=001-157670.
[39] European Court of Human Rights, Annual Report 2016 (2017), Council of Europe, Page 203: http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf.
[40] See, for instance, *Cestaro* v *Italy* (Application no.6884/11) Judgment of 7 April 2015, Paragraph 171: http://hudoc.echr.coe.int/eng?i=001-153901.
[41] See, for instance, *Kalashnikov* v *Russia* (Application no. 47095) Judgment of 15 July 2002, Paragraph 102: http://hudoc.echr.coe.int/eng?i=001-60606
[42] See, for instance, *Aydin* v *Turkey* (Application no. 23178/94) Judgment of 25 September 1997, Paragraph 84: http://hudoc.echr.coe.int/eng?i=001-58371
[43] See, for instance, *Keenan* v *The United Kingdom* (Application no. 27229/95) Judgment of 3 April 2001, Paragraph 116: http://hudoc.echr.coe.int/eng?i=001-59365.
[44] See for instance, *Ilaşcu and Others* v *Moldova and Russia* (Application no. 48787) Judgment of 8 July 2004, Paragraphs 465-470: http://hudoc.echr.coe.int/eng?i=001-61886
[45] See, for instance, *X & Y* v *The Netherlands* (application no. 8978/80) Judgment of 26 March 1985, Paragraphs 33/34: http://hudoc.echr.coe.int/eng?i=001-57603
[46] *Selmouni* v. *France* (Application no. 25803/94) Judgment of 28 July 1999: Paragraph 101. http://hudoc.echr.coe.int/eng?i=001-58287.

The Court has referred to the meaning of torture provided in Article 1(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT),[47] and the obligation to prevent cruel, inhuman or degrading treatment or punishment under Article 16(1)[48] when distinguishing between torture and other ill-treatment.[49] The Court does not always distinguish between torture and other forms of ill-treatment and may simply find that there has been a breach of Article 3.[50] Whereas the Court may not consider it necessary to draw such a distinction, because all categories of abuse listed are prohibited, the boundary between torture and inhuman or degrading treatment is relevant to the amount of compensation that may be awarded under Article 41 of the ECHR and the stigma that attaches to a finding of torture:

> *"In principle, in determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."*[51]

When determining whether there has been a violation of Article 3 the Court considers all of the evidence presented to it by the applicant, respondent State and third parties that may have been granted permission by the Court to intervene. This includes, where relevant, international instruments and reports of treaty bodies, non-governmental organisations and international experts.[52] In addition to the UNCAT, United Nations texts often referred to by the Court include the International Covenant on Civil and Political Rights (ICCPR);[53] Optional Protocol of the Convention against Torture (OPCAT);[54] Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

[47] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85: http://www.un.org/documents/ga/res/39/a39r046.htm.
[48] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85: http://www.un.org/documents/ga/res/39/a39r046.htm.
[49] See, for instance, *Cestaro* v *Italy* (Application no.6884/11) Judgment of 7 April 2015. http://hudoc.echr.coe.int/eng?i=001-153901.
[50] See, for instance, *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015. http://hudoc.echr.coe.int/eng?i=001-158885.
[51] *Cestaro* v *Italy* (Application no.6884/11) Judgment of 7 April 2015: Paragraph 171. http://hudoc.echr.coe.int/eng?i=001-153901.
[52] See, for instance, *El-Masri* v. *the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012: Paragraphs 42-63; 75-77; 93-129. http://hudoc.echr.coe.int/eng?i=001-115621.
[53] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[54] UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

("Istanbul Protocol");[55] Code of Conduct for Law Enforcement Officials;[56] and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[57]

Although the ECtHR generally upholds the principle that the applicant should provide evidence (for example, medical reports, witness statements and photographs) in support of a breach of an ECHR right, it has declined to place a burden of proof on either party in proceedings. The Court has determined that under certain circumstances the domestic authorities alone have access to information that is 'capable of refuting' an alleged violation of Article 3.[58] The standard of proof required for a violation of Article 3 is 'beyond reasonable doubt', which may be concluded on the *"coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"*.[59]

In Bouyid v Belgium the Court explained that the burden of proof falls on the authorities to counter complaints of ill-treatment in circumstances where the authorities have exclusive knowledge of events, when detained in police custody for example:

> *"where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government. That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them"*[60]

1.3 Torture

[55] UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1: http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.
[56] UN General Assembly, *Code of conduct for law enforcement officials*, 5 February 1980, A/RES/34/169: http://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf.
[57] *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.
[58] See, for instance, *Morozov* v *Russia* (Application no. 38758/05) Judgment of 12 November 2015: Paragraph 69. http://hudoc.echr.coe.int/eng?i=001-158484.
[59] *El Masri* v *the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, Paragraph 151: http://hudoc.echr.coe.int/eng?i=001-157670. See, also, *Labita* v *Italy* (Application no. 26772/95) Judgment of 6 April 2000: Paragraph no. 121: http://hudoc.echr.coe.int/eng?i=001-58559.
[60] *Bouyid* v *Belgium* (Application no.23380/09) Judgment of 28 September 2015: Paragraph 83. http://hudoc.echr.coe.int/eng?i=001-157670. See also *Milić and Nikezić* v *Montenegro* (Application nos. 54999/10 and 10609/11) Judgment of 28 April 2015. http://hudoc.echr.coe.int/eng?i=001-154149. *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, paragraphs 133 and 142. http://hudoc.echr.coe.int/eng?i=001-158885.

In *Ireland v the United Kingdom* the Court defined torture as *"deliberate inhuman treatment causing very serious and cruel suffering."*[61] In finding that five interrogation techniques – wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and water[62] – were in violation of Article 3, the Court determined that they did not reach the level of severity required for torture and amounted to inhuman and degrading treatment.[63]

Since the *Ireland* case the Strasbourg jurisprudence on Article 3 has been significantly developed. With the UNCAT entering into force in 1987 and, although the Convention is not binding on the ECtHR, the Court has routinely sought assistance[64] from the definition contained in Article 1(1) of the UNCAT:

> "*For the purposes of this Convention, 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."*[65]

Thus, along with the severity test, the ECtHR takes into account the deliberate and purposive nature of abuse and the stigma, or reputational damage to the State associated with a finding of torture.[66] In regard to the minimum level of severity, importance attaches to the view expressed by the Court in *Selmouni v France*[67] that increasingly high standards apply to the protection of human rights. In that case the applicant was beaten when in custody, called upon to perform oral sex on a police officer, urinated upon and threatened with a blow lamp and syringe. In determining that the level of severity required for torture was met and by stressing the living instrument principle, the Court implied that if the standards decided more than two decades earlier in the *Ireland* case were applied in the *Selmouni* case, the abuse would have amounted to inhuman and degrading treatment.

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[61] *Ireland v the United Kingdom* (Application no. 5310/70) Judgment of 18 January 1978, Paragraph 163: http://hudoc.echr.coe.int/eng?i=001-57506.
[62] *Ireland v the United Kingdom* (Application no. 5310/70) Judgment of 18 January 1978, Paragraph 96: http://hudoc.echr.coe.int/eng?i=001-57506.
[63] *Ireland v the United Kingdom* (Application no. 5310/70) Judgment of 18 January 1978, Paragraphs 167/168: http://hudoc.echr.coe.int/eng?i=001-57506.
[64] Starting with *Soering v The United Kingdom* (Application no. 14038/88) Judgment of 7 July 1989: http://hudoc.echr.coe.int/eng?i=001-57619.
[65] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85: http://www.un.org/documents/ga/res/39/a39r046.htm.
[66] See, for instance, *Cestaro v Italy* (Application no.6884/11) Judgment of 7 April 2015, Paragraph 171: http://hudoc.echr.coe.int/eng?i=001-153901.
[67] (Application no. 25803/94) Judgment of 28 July 1999, Paragraph 101: http://hudoc.echr.coe.int/eng?i=001-58287.

The first occasion the ECtHR found a violation of the prohibition of torture was in the case of *Aksoy v Turkey*.[68] In that case the applicant was stripped naked, his arms were tied together behind his back, and he was suspended by his arms (known as "Palestinian hanging"). The Court noted that the treatment was deliberately inflicted and that a certain amount of preparation and exertion would have been required to carry it out. It was administered with the aim of obtaining admissions or information from the applicant. The Court noted that not only did the applicant suffer severe pain; the medical evidence showed that it led to paralysis of both arms which lasted for some time.

Another early case was *Aydin v Turkey*,[69] in which the Court established that a single act of rape by a state agent may amount to torture (rape is also a crime against humanity and a war crime contrary to international humanitarian law). Other torture cases include *Nevmerzhitsky v Ukraine*, where the Court held that the manner in which the applicant, who was on hunger strike, was subjected to forced feeding constituted torture.[70] In *Ilaşcu and Others v Moldova and Russia* the Court held that living under a death sentence, combined with an extreme regime of solitary confinement, including denial of food and medical treatment, the threat of execution and savage beatings, constituted torture.[71] The use of electric shocks against the applicant was found by the Court to amount to torture in *Mikheyev v Russia*.[72] In *Menesheva v Russia* it was determined that a particularly vulnerable young woman detained in custody and questioned about a murder by male police officers, throttled and beaten with sticks and threatened with rape and violence against her family had been subjected to torture.[73] In *Corsacov v Moldova* the applicant, arrested when 17 years old, was repeatedly assaulted and subjected to *falaka* (beating of the soles of the feet) for the purpose of obtaining a confession, which the Court held to be decisive when determining that the abuse constituted torture.[74] In *Gäfgen v Germany* the Court established that "a threat of torture can amount to torture" as the fear of physical torture may constitute mental torture.[75]

The Court has attached particular importance to the gratuitous nature of violence committed against a detained applicant. In *Vladimir Romanov v Russia* the Court held that the striking of the applicant with a truncheon after he complied with an instruction to leave his cell was a

[68] (Application no. 21987/93) Judgment of 18 December 1996, paragraph 62: *http://hudoc.echr.coe.int/eng?i=001-58003*.
[69] (Application no. 23178/94) Judgment of 25 September 1997: http://hudoc.echr.coe.int/eng?i=001-58371.
[70] *Nevmerzhitsky v Ukraine* (Application no. 54825/00) Judgment of 5 April 2005, Paragraph 98: http://hudoc.echr.coe.int/eng?i=001-68715.
[71] *Ilaşcu and Others v Moldova and Russia* (Application no. 48787) Judgment of 8 July 2004, Paragraph 440: http://hudoc.echr.coe.int/eng?i=001-61886.
[72] (Application no. 7761/01) Judgment of 26 January 2006, Paragraph 129: http://hudoc.echr.coe.int/eng?i=001-72166.
[73] *Menesheva v Russia* (Application no. 59261/00) Judgment of 9 March 2006, Paragraph 61: http://hudoc.echr.coe.int/eng?i=001-72700.
[74] *Corsacov v Moldova* (Application no. 18944/02) Judgment of 4 April 2006, Paragraph 65: http://hudoc.echr.coe.int/eng?i=001-73012.
[75] *Gäfgen v Germany* (Application no. 22978/05) Judgment of 1 June 2010, Paragraph 108: http://hudoc.echr.coe.int/eng?i=001-99015.

form of reprisal or corporal punishment that constituted torture.[76] The Court similarly held that the use of rubber truncheons against the applicants amounted to torture in *Dedovskiy and Others v. Russia*,[77] but on this occasion describing the violence as 'gratuitous' rather than 'punitive'. In *Cestaro v Italy* the Court found that the gratuitous violence the applicant, then aged 62, had been subjected to by police when taking refuge in a school constituted torture.[78]

In *El Masri v "the former Yugoslav Republic of Macedonia"*, an extraordinary rendition case, the Court held that the applicant, a German national arrested when travelling on a bus at the Serbian-Macedonian border, was subjected to torture at Skopje airport. Having been held incommunicado for 23 days in a Skopje hotel, where he was questioned about possible links to Islamic organisations, the applicant was then taken handcuffed and blindfolded to the airport and handed over to a United States of America CIA rendition team. In the presence of Macedonian personnel the applicant was severely beaten, forcibly undressed, sodomised with an object, given a suppository and dressed in a nappy and tracksuit. Shackled, hooded and subjected to sensory deprivation he was forcibly placed on a CIA plane guarded by Macedonian security guards and flown to Afghanistan.

The Court found that the treatment to which the applicant was subjected to at Skopje airport cumulatively amounted to torture:

> "[the] *measures were used in combination and with premeditation, the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant. In the Court's view, such treatment amounted to torture in breach of Article 3 of the Convention. The respondent State must be considered directly responsible for the violation of the applicant's rights under this head, since its agents 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."*[79]

1.4 Inhuman treatment or punishment

'Treatment' and 'punishment' are understood according to their common meanings. In *Kudla v Poland* the Court set out the minimum level of severity for ill-treatment stressing that it must cause *"either actual bodily injury or intense physical or mental suffering"* and *"go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."*[80]

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[76] *Vladimir Romanov v Russia* (Application no. 41461/02) Judgment of 24 July 2008, Paragraph 70: http://hudoc.echr.coe.int/eng?i=001-87836.
[77] (Application no. 7178/03) Judgment of 15 May 2008, Paragraph 85: http://hudoc.echr.coe.int/eng?i=001-86218.
[78] *Cestaro v Italy* (Application no.6884/11) Judgment of 7 April 2015, Paragraph 182: http://hudoc.echr.coe.int/eng?i=001-153901.
[79] *El Masri v the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, Paragraph 211: http://hudoc.echr.coe.int/eng?i=001-157670.
[80] *Kudla v Poland* (Application no. 30210/96) Judgment of 26 October 2000, Paragraph 92: http://hudoc.echr.coe.int/eng?i=001-58920.

The ECtHR takes the level of severity into consideration as the principal factor when distinguishing inhuman treatment from torture. In *Ireland v the United Kingdom* having established the five coercive interrogation techniques complained of constitute inhuman and degrading treatment the Court continued:

> *"although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."* [81]

In contrast to torture, the suffering caused by inhuman treatment may not have been intentional and may not have been for a purpose. The Court has referred to Article 16(1) of the UNCAT for assistance when considering cases of inhuman treatment contrary to Article 3,[82] which reads:

> *"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 1, 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."*[83]

In *Denizci and Others v Cyprus* the Court held that the applicants had been intentionally subjected to varying degrees of inhuman treatment in violation of Article 3, but not to torture. This was partly on the grounds that it had not been established that the ill-treatment had been inflicted for the purpose of extracting a confession.[84]

In *Selçuk and Asker v Turkey* the Court found that the level of severity for inhuman treatment contrary to Article 3 was met irrespective of the intention on the part of members of the security forces who destroyed the home of the elderly applicants:

> *"even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment."*[85]

In *El Masri v "the former Yugoslav Republic of Macedonia"* the Court noted that no physical force was used against the applicant while detained incommunicado for 23 days in a hotel room, interrogated by Macedonian security personnel and threatened with a gun. The Court found that the applicant's mental suffering was increased by the 'secret nature of the

[81] *Ireland v The United Kingdom* (Application no. 5310/70) Judgment of 18 January 1978, Paragraph 167: http://hudoc.echr.coe.int/eng?i=001-57506.
[82] See, for instance, *Gäfgen v Germany* (Application no. 22978/05) Judgment of 1 June 2010, Paragraph 108: http://hudoc.echr.coe.int/eng?i=001-99015.
[83] Article 16(1) of the UNCAT. http://www.un.org/documents/ga/res/39/a39r046.htm.
[84] *Denizci and Others v Cyprus* (Application nos. 2532/94 and 27207/95) Judgment of 23 May 2001, Paragraph 384: http://hudoc.echr.coe.int/eng?i=001-59474.
[85] *Selçuk and Asker v. Turkey* (Application nos. 23184/94 23185/94) Judgment of 24 April 1998, Paragraph 79: http://hudoc.echr.coe.int/eng?i=001-58162.

operation' in 'an extraordinary place of detention outside of any judicial framework' and concluded, "*the treatment to which the applicant was subjected while in the hotel amounted on various counts to inhuman and degrading treatment in breach of Article 3 of the Convention.*"[86]

The Court characterises assaults perpetrated in violation of Article 3 as either inhuman or degrading treatment, both[87] or simply a violation of Article 3.[88] As in the case of *Siništaj & Others v Montenegro*[89] assaults tend to have occurred at the moment of arrest or during detention. The Court has established that *"in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is an infringement of the right set forth in Article 3."*[90]

The Court first looks to the evidence presented by the applicant in cases of assault, normally independent medical evidence. In *Tomasi v France* medical certificates and reports by four doctors after release from police custody attesting that the injuries sustained were consistent with the applicant's complaint of assault while in police custody were sufficient for a finding of inhuman and degrading treatment contrary to Article 3.[91] In *Ribitsch v Austria* the evidence of witnesses at the time of the applicant's release from police custody, which was unlawful, were important to the evidencing of inhuman and degrading treatment in the absence of the authorities offering a plausible explanation for the cause of his injuries.[92]

In *Milić and Nikezić v Montenegro* the Court set out its established approach to evidencing complaints of assault in detention:

> *"where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."*[93]

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[86] *El Masri v the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, Paragraph 204: http://hudoc.echr.coe.int/eng?i=001-157670.
[87] See, for instance, *Ribitsch v Austria* (Application no. 18896/91) Judgment of 4 December 1995, Paragraph 39: http://hudoc.echr.coe.int/eng?i=001-57964.
[88] See, for instance, *Siništaj & Others v Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, Paragraph 149: http://hudoc.echr.coe.int/eng?i=001-158885.
[89] (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015. http://hudoc.echr.coe.int/eng?i=001-158885.
[90] *Barakhoyev v Russia* (Application no. 8516/08) Judgment of 17 January 2017, Paragraph 33: http://hudoc.echr.coe.int/eng?i=001-170353.
[91] *Tomasi v France* (Application no.12850/87) Judgment of 27 August 1992, Paragraph 115: http://hudoc.echr.coe.int/eng?i=001-57796.
[92] *Ribitsch v Austria* (Application no. 18896/91) Judgment of 4 December 1995, Paragraphs 34-40: http://hudoc.echr.coe.int/eng?i=001-57964.
[93] *Milić and Nikezić v Montenegro* (Application nos. 54999/10 and 10609/11) Judgment of 28 April 2015, Paragraph 81: http://hudoc.echr.coe.int/eng?i=001-154149. See also *Siništaj & Others v Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, Paragraph 142: http://hudoc.echr.coe.int/eng?i=001-158885.

Injuries to the applicants had been noted by a medical examiner and it was accepted by the authorities that the use of rubber batons by prison guards constituted excessive force. Taking into account the *"acts described and established in the domestic proceedings, as well as the injuries noted in the medical reports"* the Court concluded that there was a violation of Article 3 in respect of both applicants.[94]

In regard to an assault during arrest, the Court determined in *Ergün v Turkey* that when examining an allegation of ill-treatment where medical evidence is present:

> *"the burden rests on the Government to demonstrate by convincing arguments that the use of force during arrest was rendered strictly necessary by the applicant's own behaviour and that the force used by members of the security forces was not excessive."*[95]

In that case the Court found that the use of force against the applicant, a lawyer who was arrested when attending a demonstration, was disproportionate on grounds that the police had advance knowledge of the demonstration, time to prepare for a peaceful dispersal and demonstrators were not threatening public order or engaging in acts of violence.[96] In *Najafli v Azerbaijan*[97] the Court found the physical force used against the applicant, a journalist covering a demonstration, when arrested was not strictly necessary as a result of his own conduct, and the ill-treatment complained of met the minimum level of severity for inhuman and degrading treatment contrary to Article 3.

In *Siništaj & Others v Montenegro*[98] the Court noted that after the arrest of one of the applicants the investigating judge and prison doctor noted injuries on him and the applicant filed a criminal complaint of ill-treatment. The Government did not contest the existence of the injuries nor provide an explanation for their origin and the Court concluded that the threshold of Article 3 had been reached.

The use of tear gas or pepper spray by the police for law enforcement purposes, including domestic riot control, is not contrary to Article 3. In *Ali Güneş v Turkey* the Court concurred with the CPT recommendations on the correct use of pepper spray and necessary safeguards[99] when finding that spraying the applicant when he was already under control amounted to inhuman

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[94] *Milić and Nikezić v Montenegro* (Application nos. 54999/10 and 10609/11) Judgment of 28 April 2015, Paragraph 82: http://hudoc.echr.coe.int/eng?i=001-154149.
[95] *Ergün v Turkey* (Application no. 238/06) Judgment of 24 July 2012, Paragraph 42: http://hudoc.echr.coe.int/eng?i=001-112430.
[96] *Ergün v Turkey* (Application no. 238/06) Judgment of 24 July 2012, Paragraph 50: http://hudoc.echr.coe.int/eng?i=001-112430.
[97] (Application no. 2594/07) Judgment of 2 October 2012, Paragraphs 39/40: http://hudoc.echr.coe.int/eng?i=001-113299.
[98] (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015: http://hudoc.echr.coe.int/eng?i=001-158885.
[99] See, for example, *Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 March to 2 April 2008*, CPT/Inf (2009) 8, Paragraph 46: http://www.cpt.coe.int/documents/cze/2009-08-inf-eng.htm.

and degrading treatment within the meaning of Article 3.[100] In *Dembele* v *Switzerland* the Court found that the use of batons against the applicant when detained by gendarmes for an identity check was disproportionate to the determined yet passive resistance he showed.[101]

The Court found there to have been inhuman treatment to applicants who are close relatives in violation of Article 3. The Court concluded that the authorities caused anguish and distress over a prolonged period of time to a mother who complained about her missing son after witnessing his arrest in an enforced disappearance case.[102] In *Cyprus* v *Turkey* the Court noted that the respondent State was responsible for providing information to relatives of missing persons and found: *"the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3."*[103] In *Salakhov and Islyamova* v *Ukraine* the Court found that the authorities' indifferent and cruel attitude towards a mother who watched her HIV positive son's slow death while he was held on remand, and during the investigation after his death, amounted to inhuman treatment.[104] In cases of this type, the Court has held that importance attaches to the proximity of the family tie, especially the parent-child bond, the extent to which the relative has witnessed the abuse and the way in which the authorities responded to enquiries.[105]

There has been little Strasbourg jurisprudence specifically on inhuman punishment. In *Chember* v *Russia*[106] the Court did conclude that there had been inhuman punishment. As punishment for not cleaning the barracks adequately, a soldier known to have a weak knee was ordered to do 350 knee bends. He collapsed and had to be discharged from the military on medical grounds, and was subsequently classified as a disabled person.

1.5 Degrading treatment or punishment

Treatment is degrading if it is *"such as to arouse in the victims feelings of fear, and inferiority capable of humiliating and debasing them."*[107] Whereas for inhuman treatment stress is placed on physical and mental suffering, for degrading treatment humiliation or debasement are important. The two forms of ill-treatment overlap, which explains why the Court has commonly

[100] *Ali Güneş* v *Turkey* (Application no. 9829/07) Judgment of 10 April 2012, Paragraphs 39-42: http://hudoc.echr.coe.int/eng?i=001-110262.
[101] *Dembele* v *Switzerland* (Application no. 74010/11) Judgment of 24 September 2013. http://hudoc.echr.coe.int/eng?i=001-126452.
[102] *Kurt* v *Turkey* (Application no. 24276/94) Judgment of 25 may 1998, Paragraph 133: http://hudoc.echr.coe.int/eng?i=001-58198. See also
[103] *Cyprus* v *Turkey* (Application no. 25781/94) Judgment of 10 May 2001, Paragraph 157. http://hudoc.echr.coe.int/eng?i=001-59454.
[104] *Salakhov and Islyamova* v *Ukraine* (Application no. 28005/08) Judgment of 14 march 2013, Paragraphs 203-206: http://hudoc.echr.coe.int/eng?i=001-117134.
[105] See *Çakıcı* v *Turkey* (Application no. 23657/94) Judgment of 8 July 1999, Paragraph 98: http://hudoc.echr.coe.int/eng?i=001-58282.
[106] (Application no. 7188/03) Judgment of 3 July 2008, Paragraph 56: http://hudoc.echr.coe.int/eng?i=001-87354.
[107] *Kudla* v *Poland* (Application no. 30210/96) Judgment of 26 October 2000, Paragraph 92: http://hudoc.echr.coe.int/eng?i=001-58920.

found that both standards have been breached.[108] However, degrading treatment or punishment is not necessarily inhuman.[109] The same as for inhuman treatment the test is a relative one, and the humiliation experienced must go beyond legitimate forms of treatment associated with imprisonment, for example.[110] It is not necessary for the suffering to have been intentionally inflicted, it is sufficient that the level of severity test is met.[111]

Conditions of detention and the duty to provide medical assistance are examined in detail in Module II and some general points are made here. Although conditions of detention and the treatment of detainees may amount to inhuman or degrading treatment or both, there is tendency for the ECtHR to consider Article 3 claims arising out of detention as degrading treatment. The State must ensure that detainees are held in conditions which are compatible with respect for human dignity, that the manner and method of execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured through, among other things, requisite medical assistance.[112]

When assessing detention conditions the Court takes into account the allegations of the applicant, the length of time for which the conditions existed and their cumulative effect. If available, particular weight attaches to reports of CPT visits to places of detention.

Justified on security and discipline grounds, or to protect the segregated prisoner from other prisoners or *vice versa*, or in the interest of law enforcement or the fair administration of justice, solitary confinement[113] of a prisoner has rarely been found to be in breach of Article 3.[114] The Court holds that complete sensory and social isolation may destroy a prisoner's personality and constitutes a form of inhuman treatment, and lesser forms of solitary confinement may also violate Article 3. Although considered undesirable, the Court has not laid

[108] See, for instance, *Ireland v the United Kingdom* (Application no. 5310/70) Judgment of 18 January 1978, Paragraph 168: http://hudoc.echr.coe.int/eng?i=001-57506; also, *Tomasi* v *France* (Application no.12850/87) Judgment of 27 August 1992, Paragraph 115: http://hudoc.echr.coe.int/eng?i=001-57796.
[109] See, for instance, *Yankov* v *Bulgaria* (Application no. 39084/97) Judgment of 11 December 2003, Paragraph 120: http://hudoc.echr.coe.int/eng?i=001-61539.
[110] *Kudla* v *Poland* (Application no. 30210/96) Judgment of 26 October 2000, Paragraph 92: http://hudoc.echr.coe.int/eng?i=001-58920.
[111] See, for instance, *Yankov* v *Bulgaria* (Application no. 39084/97) Judgment of 11 December 2003, Paragraph 120: http://hudoc.echr.coe.int/eng?i=001-61539.
[112] *Kudla* v *Poland* (Application no. 30210/96) Judgment of 26 October 2000, Paragraph 94: http://hudoc.echr.coe.int/eng?i=001-58920.
[113] Helpful guidance is provided by the CPT: *Solitary confinement of prisoners, Extract from the 21st General Report of the CPT, published in 2011*, CPT/Inf(2011)28-part2: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cccc6.
[114] There have been exceptions, taken in combination with other factors as in the finding of torture in *Ilaşcu and Others* v *Moldova and Russia* (Application no. 48787) Judgment of 8 July 2004 (see above): http://hudoc.echr.coe.int/eng?i=001-61886; and the finding of inhuman and degrading treatment: *Van der Ven* v *the Netherlands* (Application no. 50901/99) Judgment of 4 February 2003, (see above): http://hudoc.echr.coe.int/eng?i=001-60915.

down precise rules governing solitary confinement and advises that procedural safeguards accompany a decision to place a prisoner in solitary confinement.[115]

Strip searches of prisoners that are not justified on security grounds or conducted in an appropriate manner and with a clear lack of respect for the applicant have been found to amount to degrading treatment.[116] When carried out routinely every week over three and a half years in the absence of convincing security needs, strip searching in a high security remand facility was found to amount to inhuman and degrading treatment.[117] In *Yankov v Bulgaria*[118] the Court held that the forced shaving off of a prisoner's hair could in principle amount to degrading treatment. The Court found that in the case of the 55 year old applicant, who was in solitary confinement as a punishment at the time and due to appear in court several days later, that even if it was not intended to humiliate him the removal of his hair without justification was "in itself an arbitrary punitive element" and constituted degrading treatment.

The use of restraints, the handcuffing of a prisoner for example, is not degrading in breach of Article 3 if reasonably necessary in the circumstances. In *Portmann v Switzerland*[119] the hooding, handcuffing and leg shackling of a particularly violent suspect for two hours during a court appearance and transit was not found by the Court to be in breach of Article 3. In *Sarban v Moldova*,[120] in contrast, the Court determined that restraining the applicant, who had three serious medical conditions, with handcuffs and holding him in a cage during proceedings in court, amounted to degrading treatment. In *Ramishvili and Kokhreidze v Georgia*,[121] the public presentation in court of the applicants, a television celebrity and executive, in a caged dock and surrounded by heavily armed guards wearing masks was judged to be in violation of Article 3. In *Erdoğan Yağız v Turkey*,[122] the Court found that the handcuffing of the applicant, a doctor, when arrested and taken to his place of work and home in the sight of his colleagues, family and neighbours was not in the public interest and amounted to degrading treatment in violation of Article 3.

[115] For a concise summary of the case law, see *Barbar Ahmad and Others v the United Kingdom* (Application nos. 24027/07; 11949/08; 36742/08) Judgment of 10 April 2012, Paragraphs 205-212: http://hudoc.echr.coe.int/eng?i=001-110267.
[116] See, for instance, *Iwańczuk v Poland* (Application no. 25198/94) Judgment of 15 November 2001, Paragraph 59: http://hudoc.echr.coe.int/eng?i=001-59884; *Valasinas v Lithuania* (Application no. 44558/98) Judgment of 24 July 2001, Paragraph 117: http://hudoc.echr.coe.int/eng?i=001-59608.
[117] *Van der Ven v the Netherlands* (Application no. 50901/99) Judgment of 4 February 2003, Paragraph 62: http://hudoc.echr.coe.int/eng?i=001-60915.
[118] (Application no. 39084/97) Judgment of 11 December 2003, Paragraph 117: http://hudoc.echr.coe.int/eng?i=001-61539.
[119] (Application no. 56) Judgment of 11 October 2011, Paragraph 56: http://hudoc.echr.coe.int/eng?i=001-106793.
[120] (Application no. 3456/05) Judgment of 4 October 2005, Paragraphs 88 and 89: http://hudoc.echr.coe.int/eng?i=001-70371.
[121] (Application no. 1704/06) Judgment of 27 January 2009, Paragraph 101: http://hudoc.echr.coe.int/eng?i=001-90941.
[122] (Application no. 27473/02) Judgment of 6 March 2007, Paragraph 47: http://hudoc.echr.coe.int/eng?i=001-79666.

The State must ensure that the health and well-being of detainees are adequately secured by providing them with the requisite medical assistance (see further in Module II).[123] This includes ensuring that the diagnoses and care are prompt and accurate, and where necessary as the result of a medical condition, supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation.[124] When the lack of appropriate medical care results in the death of a detainee, the right to life under Article 2 of the ECHR may be engaged under both its substantive and procedural limbs.[125] When the lack of requisite medical assistance caused distress and suffering and posed a very serious risk to health, the Court has found a breach of Article 3 on grounds of inhuman and degrading treatment.[126] When the risk posed has not been very serious, the strong sense of insecurity caused combined with physical suffering has been found to amount to degrading treatment.[127]

Other kinds of degrading treatment found by the Court to have been in violation of Article 3 include the denial of basic needs to an asylum seeker during the long period of time that his application was under consideration;[128] return of a mutilated body to a close relative;[129] requiring a 71 year old man do military service and undertake physical exercises;[130] removal of spectacles from a prisoner;[131] repeated transfers from one prison to another without good security reasons.[132]

The Court has rarely found punishment to have been degrading. In *Tyrer v the United Kingdom*,[133] the Court found that a sentence of three strokes of the cane on a 15 year old boy, privately administered by a police officer in a police station, amounted to degrading

[123] For useful background, see ECtHR, *Health-related issues in the case-law of the European Court of Human Rights*, Jurisconsult's Department, 2015, Pages 13-20: http://www.echr.coe.int/Documents/Research_report_health.pdf.
[124] *Pitalev v Russia* (Application no. 34393/03) Judgment of 30 July 2009, Paragraph 54: http://hudoc.echr.coe.int/eng?i=001-93874.
[125] See, for instance, *Jasinskis v Latvia* (Application no. 45744/08) Judgment of 21 December 2010: http://hudoc.echr.coe.int/eng?i=001-102393; *Dzieciak v Poland* (Application no. 77766/01) Judgment of 9 December 2008: http://hudoc.echr.coe.int/eng?i=001-102393.
[126] See, for instance, *McGlinchey and Others v the United Kingdom* (Application no. 50390/99) Judgment of 29 April 2003, Paragraph 57: http://hudoc.echr.coe.int/eng?i=001-61058; *Vasyukov v Russia* (Application no. 2974/05) Judgment of 5 April 2011, Paragraph 75: http://hudoc.echr.coe.int/eng?i=001-104295.
[127] *Khudobin v Russia* (Application no. 59696/00) Judgment of 26 October 2006, Paragraph 96: http://hudoc.echr.coe.int/eng?i=001-77692.
[128] *M.S.S. v Belgium and Greece* (Application no. 30696/09) Judgment of 21 January 2011, Paragraph 263: http://hudoc.echr.coe.int/eng?i=001-103050.
[129] *Akkum and Others v Turkey* (Application no. 21894/93) Judgment of 23 March 2005, Paragraph 259: http://hudoc.echr.coe.int/eng?i=001-68601.
[130] *Taştan v Turkey* (Application no. 63748/00) Judgment of 4 March 2008, Paragraph 31: http://hudoc.echr.coe.int/eng?i=001-85316.
[131] *Slyusarev v Russia* (Application no. 60333/00) Judgment of 20 April 2010, Paragraph 43: http://hudoc.echr.coe.int/eng?i=001-98331.
[132] *Khider v France* (Application no. 39364) Judgment of 9 July 2009, Paragraph 111: http://hudoc.echr.coe.int/eng?i=001-93513.
[133] (Application no. 5856/72) Judgment of 25 April 1978, Paragraph 35: http://hudoc.echr.coe.int/eng?i=001-57587.

punishment. In *Ülke* v *Turkey*,[134] the applicant having been imprisoned on eight occasions for his refusal to wear a uniform and perform military service, the Court judged that the disproportionate punishment was in violation of Article 3 on grounds of degrading treatment.

1.6 Conclusion

In this Module, the Council of Europe framework for protecting human rights under the European Convention on Human Rights has been introduced. The simply stated absolute prohibition of torture and other forms of ill-treatment under Article 3 of the ECHR has been significantly developed in the jurisprudence of the European Court of Human Rights. Recognised to represent values that are fundamental to democratic society, definitions of torture, inhuman and degrading treatment or punishment have been presented here by reference to some of the Court's leading cases.

[134] (Application no. 39437/98) Judgment of 24 January 2006, Paragraphs 61-63: http://hudoc.echr.coe.int/eng?i=001-72146.

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Module II
Prohibition of ill-treatment and conditions of detention and medical treatment of prisoners

- **Conditions of detention and cumulative effect**
- **Material and other conditions**
  - **Living space and overcrowding**
  - **Other conditions and regime**
- **Medical treatment**
- **Conclusions**

2.1. Conditions of detention and cumulative effect

The rationale of the ECtHR and CPT standards on conditions of detention, requirements to be met in the context of ordinary deprivation of liberty are based on the notion and test of 'minimum level of severity' used for identifying a violation of Article 3 of the ECHR and relevant prohibition.[135] This context is to be distinguished from premeditated ill-treatment, when even the conditions, accommodation, provision of food, necessary services to inmates are intentionally worsened or reduced for infliction of physical or mental suffering. This can be illustrated by subjecting to noise, deprivation of sleep, food ,and water of terrorist suspects in *Ireland* v. *UK*,[136] or subjecting a prisoner to torture by keeping him in a solitary confinement, for years in an unheated, badly ventilated cell without natural light, without the treatment required by his state of health, despite a few medical examinations authorised by the prison authorities engendering pain and suffering, both physical and mental, which was exacerbated by the applicant's total isolation and were calculated to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will.[137]

Thus, when dealing with ordinary course of detention, in particular imprisonment, conditions provided to inmates the international standards presume that there is no positive intention to cause suffering or humiliation. Thus, in *Peers* v. *Greece*, where the applicant for at least two months had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot, use the toilet in the presence of another inmate and be present while the toilet was being used by

[135] See the materials under Module I of the current course.
[136] Judgment of 18 January 1978, application no. 5310/70, paragraph 163. http://hudoc.echr.coe.int/eng?i=001-57506
[137] *Ilascu and Others* v. *Moldova and Russia*, Judgment of 18 January 1978, application no. 48787/99, paras. 444-447. http://hudoc.echr.coe.int/eng?i=001-61886.

his cell-mate, the ECtHR has specified there was no evidence of a positive intention of humiliating or debasing the applicant. However, the Court noted that, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.[138]

At the same time, it is taken into account that even a legitimate, appropriate imprisonment, deprivation of liberty and related treatment involve certain inevitable elements of suffering or humiliation. Measures depriving a person of his liberty are usually accompanied by such suffering and humiliation. For constituting a violation of the prohibition in issue, they must in any event go beyond them. Article 3 requires the State to ensure that every prisoner is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.[139]

The set of practical demands, conditions to be provided to a prisoner, who due to deprivation of liberty is not in a position and is not supposed to ensure their provision, includes many seemingly insignificant elements. For example, taken separately dim artificial light or insufficient ventilation and so on, in particular if they affect an inmate for short periods of time, do not cause physical or mental suffering exceeding the minimum level of severity. However, international standards, the approach maintained by the CPT and ECtHR take into account that all the factors, their effects are to be assessed in their totality. The CPT has introduced the wording 'cumulative effect' that is used for spelling it out.[140]

The Strasbourg Court, in its turn, following the relative approach,[141] according to which the severity of suffering depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim is constantly applying the same approach in assessing them. Its judgments concerning the conditions of detention and related treatment of persons deprived of their now often include a standard paragraph stating that having regard to the cumulative effects produced by them. Thus, in *Ostrovar v. Moldova*, it specified the *cumulative effects* of the conditions in the cell (including severe overcrowding), the lack of full medical assistance (including required by the applicant suffering from asthma), the exposure to cigarette smoke, the inadequate food, the time spent in detention and the specific impact which these conditions could have had on the applicant's health, the Court considered that the hardship the

[138] *Peers v. Greece*, Judgment of 19 April 2001, application no. 28524/95, paras. 71-75 http://hudoc.echr.coe.int/eng?i=001-59413.
[139][139] *Ilascu and Others v. Moldova and Russia*, Judgment of 18 January 1978, application no. 48787/99, para. 428. http://hudoc.echr.coe.int/eng?i=001-61886.
[140] See CPT report on its visit 2013 to Ukraine, para. 126, CPT/Inf (2014) 15 http://hudoc.cpt.coe.int/eng?i=p-ukr-20131009-en-42.
[141] See the materials under Module I of the current course.

applicant endured appeared to have exceeded the unavoidable level inherent in detention and found that the resulting suffering went beyond the threshold of severity under Article 3 of the Convention.[142] It is to be noted, that in the context of deprivation of liberty, the factor of duration gains particular importance and could be considered as multiplier or a summand that is to be specifically taken into account.

Accordingly, when tackling the conditions of detention, it is crucial to take note of seemingly minor factors, elements of material conditions and circumstances.

Moreover, besides the material conditions and related services, as well as provision of adequate health care, covered by this Module, it is to be noted that prisoners are subject to searches, including strip searches, isolation, other security measures, disciplinary liability and procedures that also significantly contribute to the cumulative effect of their treatment. In addition to the relevant ECtHR and CPT standards outlined in the preceding Module of this course,[143] it is worth highlighting that as far as the disciplinary framework is concerned, the case law of the Strasbourg Court has evolved beyond careful assessment of resultant stringent conditions and regime usually applied to prisoners under it. In *Ramishvili and Kokhreidze* v. *Georgia*, it once more elaborated on the standards applicable to the prisoners' disciplinary framework under the prohibition of ill-treatment and stressed that it is rather the proportionality of its imposition and the conditions of the confinement which may be questionable under the above provision. The Court observed that, amongst the several available disciplinary sanctions envisaged for a breach of prison regulations, the administration chose the most severe one – confinement in a punishment cell. No consideration was apparently given to such facts as, for example, the nature of the first applicant's wrongdoing, his personality and the fact that it was his first such breach. The Court recalls in this connection that the proportionality of an additional punitive measure imposed upon a prisoner is of importance when assessing whether or not the unavoidable level of suffering inherent in detention has been exceeded.[144]

2.2. Material and other conditions

2.2.1 Living space and overcrowding

Since its early workings, the CPT has been advancing the standards on minimum living space that should be made available to an inmate. It is a leading authority in this regard and its approaches and standards are used or endorsed by other international mechanisms, including the ECtHR. Thus, in *Bulatovic* v. *Montenegro*, where the Strasbourg Court indicated that the applicant's submissions were supported by the CPT, which observed in its report "the alarming

[142] *Ostrovar* v. *Moldova*, Judgment of 13 September 2005, application no. 35207/03, para. 89 (italics added) http://hudoc.echr.coe.int/eng?i=001-70138

[143] See section 1.5 of presentation under Module I of the current course.

[144] *Ramishvili and Kokhreidze* v. *Georgia*, Judgment of 27 January 2009, application no 1704/06, para. 83. http://hudoc.echr.coe.int/eng?i=001-90941.

level of overcrowding" in the remand prison at the relevant time. In particular, it found that a cell measuring 28 m² with fifteen sleeping places was holding twenty-one male prisoners, which fell well below the 4 m^2 per person recommended by the CPT.[145]

Recently the CPT has advanced and fine-tuned its standards on living space per prisoner in prison establishments.[146] According to it, minimum standards for personal living space are not as straightforward a matter as they might appear at first sight. A police cell for short-term detention of several hours up to a few days does certainly not have to meet the same size standards as a patients' room in a psychiatric institution; and a prison cell, whether for remand or sentenced prisoners, is again an entirely different matter. Moreover, there is a need to differentiate in terms of the intended occupancy level of the accommodation in question (i.e. whether it is a single cell or a cell designed for multiple occupancy). The term "multiple occupancy" comprises a double cell, which is arguably different from a cell designed for holding, for instance, six or more inmates. As regards large-scale dormitories, accommodating dozens and sometimes even up to one hundred inmates, the CPT has fundamental objections which are not only linked to the question of living space per inmate, but to the concept as such.

In its earlier 11th General Report4 the CPT criticised the very principle of accommodation in large capacity dormitories; frequently such dormitories hold prisoners in extremely cramped and insalubrious conditions. In addition to a lack of privacy, the Committee has found that the risk of intimidation and violence in such dormitories is high, and that proper staff control is extremely difficult. Further, an appropriate allocation of individual prisoners, based on a case-by-case risk and needs assessment, becomes an almost impossible task. The CPT has consequently long advocated a move away from large-capacity dormitories towards smaller living units.[147]

In the 1990s the CPT developed a basic "rule of thumb" standard for the minimum amount of living space that a prisoner should be afforded in a cell: 6m² of living space for a single-occupancy cell and 4m² of living space per prisoner in a multiple-occupancy cell. The minimum standard of living space should exclude the sanitary facilities within a cell. Consequently, a single-occupancy cell should measure 6m² plus the space required for a sanitary annexe (usually 1m² to 2m²). Equally, the space taken up by the sanitary annexe should be excluded from the calculation of 4m² per person in multiple occupancy cells. Further, in any cell accommodating more than one prisoner, the sanitary annexe should be fully partitioned. Any cell used for prisoner accommodation should measure at least 2m between the walls of the cell and 2.5m between the floor and the ceiling.

At the same time, the 4m² per prisoner standard may still lead to cramped conditions when it comes to cells for a low number of inmates. Indeed, given that 6m² is the minimum amount of

[145] *Bulatovic* v. *Montenegro*, Judgment of 22 July 2014, application no. 67320/10, para. 122, http://hudoc.echr.coe.int/eng?i=001-145705

[146] Living space per prisoner in prison establishments: CPT standards. CPT/Inf (2015) 44. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2015-44-en-1

[147] *Ibid*, with further references.

living space to be afforded to a prisoner accommodated in a single occupancy cell, it is not self-evident that a cell of 8m² will provide satisfactory living space for two prisoners. In the CPT's view, it is appropriate at least to strive for more living space than this. For these reasons, it designed a standard regarding multiple occupancy cells of up to four inmates by adding 4m² per additional inmate to the minimum living space of 6m² of living space for a single-occupancy cell. For 2 prisoners: at least 10m² (6m² + 4m²) of living space + sanitary annexe. For 3 prisoners: at least 14m² (6m² + 8m²) of living space + sanitary annexe. For 4 prisoners: at least 18 m² (6m² + 12m²) of living space + sanitary annexe. Thus, it would be desirable for a cell of 8 to 9m² to hold no more than one prisoner, and a cell of 12m² no more than two prisoners.

Although the cell-size standards should not be regarded as absolute, i.e. a minor deviation from them does not in itself amount to inhuman and degrading treatment of the prisoner(s) concerned, as long as other, alleviating, factors can be found, such as, in particular, the fact that inmates are able to spend a considerable amount of time each day outside their cells (in workshops, classes or other activities). Nevertheless, it is still recommended that the minimum standard be adhered to.

The question of minimum living space per inmate is intrinsically linked to the more complex concept of prison overcrowding. Usually insufficiency of living space leads to cramped and unhygienic accommodation; constant lack of privacy; reduced out of cell activities, due to demand outstripping the staff and facilities available; overburdened healthcare services; increased tension and hence more violence between prisoners and between prisoners and staff, as well as other negative consequences. Often the cell or dormitory-specific overcrowding is exacerbated by an establishment, or even system-related dimension of excessive number of inmates.

However, it is the factual availability of living space for each inmate and in a specific cell and not an average ratio available per detainee in the prison or even system that is of primary importance. There are instances, when some inmates are discriminated or there are not enough cells for specific categories and prisoners belonging to them are kept in overcrowded premises, while others benefit from better conditions or some cells are not used and so on. The number of square metres available per person is but one factor, albeit often a very significant or even decisive one. The ratio of the number of inmates and overall living space in a prison is an indicator relevant for assessing sufficiency of entire infrastructure, other facilities and staff.

It remains to be seen how these advanced standards will affect the ECtHR case-law, but in general it has stated that it cannot decide, once and for all, how much personal space should be allocated to a detainee in terms of the Convention. That depends on many relevant factors, such as the duration of detention in particular conditions, the possibilities for outdoor exercise, the physical and mental condition of the detainee, and so on. This is why, whereas the Court

may take into account general standards in this area developed by other international institutions, such as the CPT, these cannot constitute a decisive argument.[148]

2.2.2 Other conditions and regime

The indicated interrelation between insufficient living space and consequential deficiencies in securing all the practical demands, health and well-being, including rehabilitation of prisoners are almost inevitable. In fact, the likelihood that a place of detention is very overcrowded but at the same time well ventilated, clean and equipped with a sufficient number of beds and so on is extremely low.[149]

At the same time, all other requirements are important and even in spacious cells their disregard could lead to considerable suffering of inmates and violation of the prohibition accordingly. The international texts, including the CPT standards, its visit reports as well as ECtHR judgments suggest a set (non-exhaustive, however) of conditions and services that are of relevance for securing adequate living conditions and treatment of inmates, accordingly.

Cells and other premises used by prisoners are to be of an appropriate state of repair and cleanliness. They, including furniture, should be in a decent state of repair and every effort should be made to keep the living areas clean and hygienic. Any infestation with vermin needs to be tackled vigorously. Inmates should be provided with the necessary personal hygiene products and cleaning materials.

There should be sufficient access to natural light, ventilation and heating. In particular, all living accommodation for prisoners (both single- and multiple-occupancy cells) should have access to natural light as well as to artificial lighting which is sufficient for reading purposes. Equally, there needs to be sufficient ventilation to ensure a constant renewal of the air inside the cells. Cells should be adequately heated. There is no uniform or specific indicator in this regard, it is expected that the level of heating (season or weather-specific) is to provide comfortable temperature.

In terms of sanitary facilities, each cell should possess a toilet and a washbasin as a minimum. The CPT standards require that in multiple-occupancy cells the sanitary facilities should be fully partitioned (i.e. up to the ceiling). In those few prisons where no in-cell sanitary facilities are available, the authorities must ensure that prisoners have ready access to the toilet whenever needed. No prisoner should be obliged to "slop out", a practice that is degrading both for the prisoners and for the staff members who have to supervise such a procedure.

As to the regime-related minimum requirements, firstly they concern outdoor exercise. The CPT considers that every prisoner should be offered a minimum of one hour of outdoor exercise

[148] *Trepashkin* v. *Russia*, Judgment of 19 July 2007, application no 36898/03, para. 92. http://hudoc.echr.coe.int/eng?i=001-81801.
[149] *Ibid*, para. 23.

every day. Outdoor exercise yards should be spacious and suitably equipped to give inmates a real opportunity to exert themselves physically (e.g., to practise sports); they should also be equipped with a means of rest (e.g., a bench) and a shelter against inclement weather. Secondly, inmates are to be offered sufficient purposeful activities. The CPT has long recommended that prisoners should be offered a range of varied purposeful activities (work, vocation, education, sport and recreation). To this end, the CPT has stated since the 1990s that the aim should be for prisoners – both sentenced and on remand – to spend eight hours or more a day outside their cells engaged in such activities, and that for sentenced prisoners the regime should be even more favourable.[150]

Besides the abovementioned conditions addressed in the Appendix "Examples of other factors to be taken into consideration when assessing detention conditions in prison" upended to the quoted CPT document on its standards concerning living space per prisoner in prison establishments, there are general requirements as to other conditions, practical demands to be secured for prisoners. As far as the provision of food is concerned, it is to be noted that, although many jurisdictions operate with indicators referring to specific numbers of calories, the CPT refrains from following the same criteria and often limits itself to mentioning just a general requirement that *"all detained persons are provided with food in adequate quantities and at appropriate times."*[151] For police establishments, i.e. short stays it recommends that the detainees are provided with *"sufficient food, including at least one cooked meal (preferably warm) per day."*[152]

There is a well-established standard as to providing inmates with regular opportunities for taking shower or bath, which in its turn refers to Rule 19.4 of the *European Prison Rules* stating:

> *"Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene."*[153]

Thus, often the CPT reports and ECtHR judgments enumerate the inadequacies in terms of detention conditions, rather than just referring to insufficient living space. It is indicative, that in its report on its latest visit to Montenegro, when describing the conditions available for the remand prisoners, the CPT specified:

> *"The renovated double occupancy cells located on the third and second floors (measuring some 10 m2) offered on the whole adequate conditions. However, the larger unrenovated cells were fetid and badly ventilated, with signs of damp on the walls. These cells were also*

[150] *Ibid*, Appendix "Examples of other factors to be taken into consideration when assessing detention conditions in prison'.
[151] The CPT's Report on the 2007 visit to Latvia, CPT/Inf (2009) 35, para 31. http://hudoc.cpt.coe.int/eng?i=p-lva-20071127-en-14
[152] The CPT's Report on the 2008 visit to Greece, CPT/Inf (2009) 20, para 48. http://hudoc.cpt.coe.int/eng?i=p-grc-20080923-en-14
[153] Rule 19.4 European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers to member states: http://www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules.

still affected by overcrowding, with eight prisoners sharing 25 m2 including the space taken up by the semi-partitioned sanitary annexe. Further, inmates complained about the lack of supply of cleaning products for the maintenance of the cells. These shortcomings were exacerbated by the fact that inmates on remand were spending systematically 23 hours each day locked in their cells."[154]

The ECtHR echoed it in *Bulatovic* v. *Montenegro* and, besides quoted findings as to the living space available,[155] took into account that the cells were stuffy and humid, despite the presence of large windows and air conditioners; remand prisoners remained inside their cells for twenty-three hours or more a day, in some cases for several years, as well as found that the applicant was allowed two thirty-minute walks per day, whereas the relevant legislation provided for at least two hours' exercise, and shortages of water, although apparently only occasional.[156]

Furthermore, juveniles, elderly,[157] women, people with special medical conditions[158] and other special categories of prisoners require provision of additional conditions that would address their specific needs. For example, they have particular need for physical activity and intellectual stimulation. Juvenile inmates should be provided throughout the day with a full programme of education, sport, vocational training, recreation and other purposeful out-of-cell activities.[159] The need in taking into account the particularities of juveniles or other special categories of inmates, as well as relevant international standards, can be illustrated by the ECtHR judgment in *Güveç* v. *Turkey*,[160] where besides holding the juvenile applicant in a prison for adults, has disagreed with the Government's submissions that the applicant's problems did not reach the minimum level of severity to fall within the scope of Article 3 of the Convention. It took into account that the applicant was only fifteen years old when he was detained in a prison where he spent the next five years of his life together with adult prisoners. For the first six and a half months of that period he had no access to legal advice.

Prisoners with serious mental conditions should not be kept in cells accommodating ordinary inmates and provided with targeted medical treatment. Thus, in *Kucheruk* v. *Ukraine* concerning a placement of such applicant in an ordinary cell in remand prison, who had been

[154] The CPT's Report on the visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 16, para 50. http://hudoc.cpt.coe.int/eng?i=p-mne-20130213-en-16

[155] *Bulatovic* v. *Montenegro*, Judgment of 22 July 2014, application no. 67320/10, para. 122, http://hudoc.echr.coe.int/eng?i=001-145705

[156] *Ibid*, paras. 122 and 124.

[157] See *Dyebeku* v. *Albania*, Judgment of 18 December 2007, Application no. 41153/06, para. 51: http://hudoc.echr.coe.int/eng?i=001-84028.

[158] See *Amirov* v. *Russia*, Judgment of 27 November 2014, application no. 51857/13, para. 93. http://hudoc.echr.coe.int/eng?i=001-148225.

[159] 'Juveniles deprived of their liberty under criminal legislation', 24th General Report of the CPT, CPT/Inf(2015)1-part, para. 107. For other standards concerning juveniles in detention see the rest of the document. For women in detention, see relevant substantial section of 10th General Report of the CPT, CPT/Inf(2000)12 available on http://www.coe.int/en/web/cpt/standards.

[160] Judgment of 20 January 2001, application no 70337/01, paras. 88-91. http://hudoc.echr.coe.int/eng?i=001-90700.

examined only once during more than a month by a psychiatrist before he had ended up assaulting an inmate, the Court's found that it could not be considered to be adequate.[161]

In addition – but by no means in every case – other factors not directly related to the conditions are taken into account by the CPT when assessing a particular situation. They include proportionality of the sanction (disciplinary) imposed,[162] deprivation of contacts with relatives for several years or even related violation of the right to liberty and security. Thus, in *Trepashkin* v. *Russia* the ECtHR has observed that in addition to the inadequate conditions, during the period under consideration the applicant's detention was unlawful, a fact which exacerbated his mental anguish.[163]

Trepashkin is of particular interest due to the analysis of interrelation between the living space and duration of subjecting an inmate to inadequate conditions and other factors that is a good illustration of the discussed rationale of the relative approach, cumulative effect applied by the ECtHR and developed by the CPT and international human rights law in general.[164] In particular, it specified that

> *" . . . in the Peers case a cell of seven square metres for two inmates was noted as a relevant aspect in its finding of a violation of Article 3, although in that case the space factor was coupled with an established lack of ventilation and lighting (see* Peers*, cited above, §§ 70-72). In Peers the applicant was kept in such conditions for at least 60 days. The Court reached a similar conclusion in the* Labzov *case, where the applicant was afforded less than 1 square metre of personal space during his detention for 35 days (see* Labzov*, cited above, §§ 41-49), and in the* Mayzit *case, where the applicant was afforded less than two square metres while detained for over nine months (see* Mayzit*, cited above, § 40). In* Kadiķis *v.* Latvia *(cited above, §§ 20 and 52) the applicant was held for fifteen days in a cell where he had as little as 1.2-1.5 square metres of personal space. The Court held that such a degree of overcrowding in itself raised an issue under Article 3 of the Convention, although its finding of a violation was based on a combination of factors. Finally, in the recent case of* Fedotov *v.* Russia *(no. 5140/02, § 68, 25 October 2005) the Court found a violation of Article 3 of the Convention on account of a 22-hour stay in an "administrative detention cell" without food or drink or unrestricted access to a toilet."*[165]

2.3. Medical treatment[166]

Lack of appropriate medical care and, more generally, the detention in inappropriate conditions

[161] *Kucheruk* v. *Ukraine*, Judgment of 6 September 2007, application no 2570/04, paras. 151-2 http://hudoc.echr.coe.int/eng?i=003-2079173-2239633

[162] See above comments on *Ramishvili and Kokhreidze* v. *Georgia* and supra note 145.

[163] *Trepashkin* v. *Russia*, Judgment of 19 July 2007, application no 36898/03, para. 94, http://hudoc.echr.coe.int/eng?i=001-81801

[164] See above Section 2.1 of the current text.

[165] *Trepashkin* v. *Russia*, Judgment of 19 July 2007, application no 36898/03, para. 93, http://hudoc.echr.coe.int/eng?i=001-81801.

[166] Access to a doctor as a safeguard against ill-treatment by police or otherwise attributable to the state concerned is covered by Module III of the current course.

of a person who is ill may in principle amount to treatment contrary to Article 3 of the ECHR.[167] Accordingly, the overall requirement that if a person is deprived of his or her liberty by a state it is under an obligation to ensure that the detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, equally, if not particularly, extends over the inmate's health and provision of the requisite medical assistance and treatment.

Both the CPT and ECtHR systematically tackle the issues of medical treatment of persons deprived of their liberty and address them in their standards and case-law. It is not a coincidence that one of the first set of general comments and standard-setting documents developed by the CPT concerned health care in prisons. In the substantial section of its 3rd Annual Report it outlined the general principle that prisoners are entitled to the same level of medical care as persons living in the community at large.[168] Due to its preventive mandate the CPT standards primarily concern institutional and other organisational recommendations aiming at establishing an appropriate health care system in prisons and other closed institutions. The individual-oriented standards, which are more relevant for discharging judicial supervision over execution of detention, are better formulated in the well-established case law of the Strasbourg Court.

The ECtHR always reiterates that Article 3 of the Convention cannot be interpreted as laying down a general obligation to release a detainee on health grounds. Moreover, it maintains that Article 3 of the ECHR cannot be interpreted as securing to every detained person medical assistance of the same level as "in the best civilian clinics", but should be equivalent to a civilian hospital of average standard.[169] At the same time, it implies that those on remand could be expected to benefit from more advanced levels of medical care.[170]

When assessing appropriateness of health care available to persons deprived of their liberty, it departs from the general condition that keeping of ill persons in detention should be compatible with respect for human dignity and general medical treatment of prisoners should be adequate. It highlights that the adequacy of the medical assistance is always the most difficult element to determine. In this task, it suggests to reserve, in general, sufficient flexibility, defining the required standard of health care, which must accommodate the legitimate demands of imprisonment but remain compatible with human dignity, on a case-by-case basis. In any case, the appropriateness of the medical care in terms of the prohibition of ill-treatment depends on answering the question whether the resultant suffering, be it physical or mental, has exceeded the minimum level of severity.

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[167] *Verbint* v. *Romania*, Judgment of 3 July 2012, application no 7842/04, para. 65, http://hudoc.echr.coe.int/eng?i=001-110183.

[168] 'Health Care in Prisons', 3rd General Report of the CPT, CPT/Inf(83)12-part, para. 31, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ce943

[169] *Gogniashvili* v. *Georgia*, Judgment of 4 October 2011, application no 47729/08, para. 75. http://hudoc.echr.coe.int/eng?i=001-106587

[170] *Aleksanyan* v. *Russia*, Judgment of 22 December 2008, application no 46468/06, paras. 133-140. http://hudoc.echr.coe.int/eng?i=001-90390

In *Bulatovic* v. *Montenegro*, when assessing the adequacy of medical treatment provided to the applicant, the ECtHR found that the applicant was examined a number of times by various specialists and duly received the necessary treatment. As to the failure of the authorities to provide for a further medical examination on one occasion, it did not attain a sufficient level of severity to entail a violation of Article 3 of the Convention.[171]

The human dignity and minimum level of severity criteria are still very demanding also in terms of the medical treatment to be provided to inmates with health problems. This includes timely examination, diagnostics, adequate preventive, therapeutic care, and other necessary interventions. This leads to a considerable number of adverse judgments under Article 3 of the ECHR that concern inadequate medical treatment of persons deprived of their liberty. One of illustrative cases is *Wenerski* v. *Poland*, where it was necessary to perform an operation on the applicant's right eye socket confirmed by several specialists, who further stressed the urgent nature of the treatment. The applicant had pain suffered as a consequence of the surgery not being performed. The Court did not accept the Government's argument that the deterioration in the applicant's medical condition could be attributed solely to the applicant's own action, since he refused hospitalisation on one occasion. In total, the surgery had been delayed for six years. In this connection the Court stressed that both convicted and remand prisoners are in a very vulnerable position in terms of their access to medical assistance, and it is the authorities' special duty to provide them with adequate and necessary treatment, in particular when it has been established that such treatment is urgent, regardless of the circumstances. The Court accepted that having surgery performed in an external hospital on the detainee could present a security risk and therefore involve a certain degree of associated operational problems and lead to some delays. However, as appeared from the medical records submitted, at least two hospitals agreed to have the operation performed "under escort" with special security measures put in place. The ECtHR concluded that the custodial authorities acted in breach of their obligations to provide effective medical treatment and that the applicant was subjected to inhuman and degrading treatment in violation of Article 3 of the Convention.[172]

Even when the risk posed is not so serious it is the strong sense of insecurity that can exacerbate physical suffering and amount to degrading treatment. Thus, it was the essence of the ECtHR in a case concerning the lack of adequate medical treatment of epileptic prisoner in Russia.[173]

When states rely on the absence of a general obligation to release a detainee on health grounds, they are required to ensure that the inmate concerned is provided with adequate medical treatment and conditions, which are compatible with respect for human dignity, so

[171] *Bulatovic* v. *Montenegro*, Judgment of 22 July 2014, application no. 67320/10, paras. 132-136, http://hudoc.echr.coe.int/eng?i=001-145705.
[172] *Wenerski* v. *Poland*, Judgment of 20 January 2009, application no. 44369/02, paras. 56-66. http://hudoc.echr.coe.int/eng?i=001-90722
[173] *Khudobin* v. *Russia*, Judgment of 26 October 2006, application no. 59696/00, paragraph 96. http://hudoc.echr.coe.int/eng?i=001-77692.

that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. There are at least three specific elements to be considered in relation to the compatibility of a detainee's health with his/her stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant.

Apart from the discussed criteria of adequacy of the medical treatment, the ECtHR suggests that this is a due diligence test, since the State's obligation to cure a seriously ill detainee is one of means, not of result. Notably, the mere fact of a deterioration of the applicant's state of health, albeit capable of raising, at an initial stage, certain doubts concerning the adequacy of the treatment in prison, could not suffice, as such, for a finding of a violation of the State's positive obligations under Article 3 of the Convention, if, on the other hand, it can be established that the relevant domestic authorities have in timely fashion resorted to all reasonably possible medical measures in a conscientious effort to hinder development of the disease in question. In *Gogniashvili v. Georgia*, the Court noted that the prison authority first took charge of the applicant's health problems by transferring him to the prison hospital, that is only two days after the authority had learnt, on the basis of the results of the relevant laboratory test, of the relevant medical risks. The applicant then stayed in the prison hospital, receiving comprehensive in-patient treatment for his nephrology/urology problems (which included various laboratory tests, repeated consultations with medical specialists and so on) for almost four months, until a qualified doctor opined that the patient's improved condition would permit him to be discharged back into the ordinary prison. The two subsequent medical check-ups confirmed that the applicant's condition remained stable and that he could continue receiving the relevant treatment on an out-patient basis with the State bearing the cost. Moreover, the domestic authorities did not hesitate to resort to the services of specialised medical facilities in the civilian sector. The ECtHR concluded that the prison authority has been able to cope with the applicant's serious renal disorders by having him treated in the prison hospital, thus rendering the question of his early release redundant.[174]

Thus, the compatibility of a detainee's state of health with his or her continued detention, even if he or she is seriously ill, is contingent on the State's ability to provide relevant treatment of the requisite quality in prison. In some instances, the prisoner's health condition and lack of relevant capacities to adequately treat him in compliance with human dignity considerations imply that he or she should be released due to an unavoidable breach of Article 3 of the ECHR. In *Aleksanyan* v. *Russia*, where the medical condition required the applicant's transfer to a hospital specialised in the treatment of AIDS the national authorities had failed to take sufficient care until his transfer to an external hospital. This had undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a

[174] *Gogniashvili* v. *Georgia*, Judgment of 4 October 2011, application no 47729/08, paras. 72-81. http://hudoc.echr.coe.int/eng?i=001-106587.

prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment.[175]

2.4. Conclusion

The ECtHR and CPT have serious misgivings about the efficiency of the judicial supervision of treatment of prisoners carried out under Article 185 of the CPC in Montenegro in particular due to the visits to prison establishments by judges being rather infrequent and limited in scope and absence of a complaints procedure – before a court or an administrative authority – which would satisfy the effectiveness requirement.[176] Accordingly, as well as in view of the expected intensification of civil procedure tools for addressing the shortcomings of the treatment of persons deprived of their liberty,[177] it is of crucial importance that the members of judiciary in Montenegro comprehend international standards developed under the prohibition of torture and other forms of ill-treatment as to prison conditions and treatment of prisoners in the context of ordinary imprisonment. They are supposed to directly or through relevant interpretation of domestic legal framework apply the requirements concerning living, sanitary and other conditions of imprisonment, regime, as well as overall level of medical care of prisoners and their cumulative assessment.

[175] *Aleksanyan* v. *Russia*, Judgment of 22 December 2008, application no 46468/06, paras. 133-140. http://hudoc.echr.coe.int/eng?i=001-90390

[176] *Bulatovic* v. *Montenegro*, Judgment of 22 July 2014, application no. 67320/10, para. 107, http://hudoc.echr.coe.int/eng?i=001-145705

[177] See also Module III of the current course.

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Module III
Prohibition of ill-treatment and additional judicial responsibilities

- **Extra-territorial effect**
- **Inadmissibility of evidence obtained in violation of Article 3**
- **Civil law remedies**

3.1 Extra-territorial effect

The extra-territorial effect of the ECHR is to be distinguished from its extra-territoriality, i.e. its formal application beyond the territory of a contracting state or extending its responsibility outside the territorial jurisdiction, which occurs in case of effective control of or actions carried out on the territory of other states. There are numerous ECtHR judgments and decisions tackling the latter, where like in *Ilascu and Others* v. *Moldova and Russia* that concerned torture and ill-treatment of the applicants on the territory (Transdnestrian region) that is under an effective control of a state different from the one, within internationally recognised territory and formal jurisdiction of which it belongs to. The ECtHR confirmed that, this kind of territories remain under certain responsibility of both the latter and the former (Moldova and Russia in this case).[178] In *Al-Skeini and Others* v. *the United Kingdom*, the Strasbourg Court established that the UK through its soldiers engaged in security operations in Iraq exercised authority and control over individuals killed in the course of security operations that provided a sufficient jurisdictional link for engaging its responsibility.[179]

The extra-territorial effect of the ECHR, including in relation to Article 3, concerns situations where a physical person remains within the jurisdiction of a State, but could be or is to be transferred to the jurisdiction or actual control of another state. The issue whether the requesting or receiving state is a party to the ECHR or not is not decisive, since it is still to be ascertained whether there is a risk for the person concerned to be subjected to ill-treatment. This kind of transfer can occur under formal procedures and frameworks of extradition,

[178] *Ilascu and Others* v. *Moldova and Russia*, Judgment of 18 January 1978, application no. 48787/99, paras. 444-447, http://hudoc.echr.coe.int/eng?i=001-61886. For the substantial findings as to Article 3 violations in this case see also Module I of the current course.
[179] *Al-Skeini and Others* v. *the United Kingdom* Judgment [GC] of 7 July 2011, application no.55721/07 http://hudoc.echr.coe.int/eng?i=001-105606.

deportation, expulsion, or informal, sometimes covert operations, e.g. extraordinary rendition.[180]

The guiding principle of *non-refoulment*, which is usually referred to in French, prohibits a forcible transfer of people under the jurisdiction of State, where there are substantial grounds for believing they would be at risk of torture or other serious human rights violations. It is Article 1 of the ECHR, according to which the state-parties shall secure to everyone within their jurisdiction the rights and freedoms envisaged by it, that provides the basis for following this principle under its framework. It is to be noted that according to the literal meaning of this provision it is applicable to any person irrespective of the legitimacy of his or her presence on their territory.

When developing its case law the ECtHR took into account Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that *"no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture"*.[181] If it would be allowed to deport, extradite or otherwise transfer people to other countries where they might be subjected to ill-treatment, this would make it possible to circumvent the absolute nature of the relevant prohibition accordingly.

To put it simply, a transfer of a person under jurisdiction of any other state should not lead to significant deterioration of guarantees of observance of the corresponding rights and freedoms. There are several authorities that have established the relevant case law on this issue. One of the most significant is *Soering* v. *the United Kingdom*. The applicant was wanted for a murder in the United States, namely in Virginia, whose legislation provided for the death penalty for this type of crime. He was arrested in the UK and detained pending extradition. At that time, the United Kingdom had not yet joined the Sixth Protocol of the ECHR, which provides for the abolition of the death penalty. Thus, the main purpose of the European Court's deliberations was not the capital punishment itself, but the "death row phenomenon". It noted that a delay between imposition and execution of the sentence and the experience of severe stress are inevitable, in particular in conditions of strict incarceration. The ECtHR concluded that in view of the very long period of time usually spent by those convicted on death row in extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and due to the personal circumstances of the applicant, especially his young age (18 years old) and mental state at the time of the offence, his extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 of the ECHR.[182]

[180] See *El Masri* v *the former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, paras. 180-223: http://hudoc.echr.coe.int/eng?i=001-157670. Also see above in Module I.
[181] *Soering* v. *The United Kingdom*, Judgment of 7 July 1989, application no. 14038/88, para 88, http://hudoc.echr.coe.int/eng?i=001-57619.
[182] *Ibid*, paras. 100-111.

This approach is applicable even in cases when persons are endangering the national security of the expelling country. In *Chahal v. The United Kingdom*, the applicant was a Sikh separatist suspected in financing and organizing the supply of military equipment to terrorists in Punjab, planning and directing terrorist attacks in India. The European Court did not make any exceptions in his case either.[183]

However, the circumstances to be taken into account are not limited to legal or political risks only. In the case of *D. v. The United Kingdom*,[184] the Strasbourg Court found a threat of ill-treatment in the inadequacy of moral and financial support, as well as the poor quality of medical care in the country where the applicant, suffering of AIDS in its terminal stage, was supposed to be sent to. In general, it is to be noted that for the countries that have joined Protocol 6 to the ECHR or otherwise abolished the death penalty, i.e. all Council of Europe member states, the same principles apply in case of risks for the transferred person of being subjected to it in the requesting state. Moreover, a risk of a flagrant denial of justice (violation of Article 6) is also relevant for applying it.[185]

At the same time, the ECtHR emphasizes that this approach does not mean providing automatic protection to all persons claiming such risks. The interests of international assistance in combating crime, including terrorism, are also taken into account. Against this background, the Strasbourg Court is consistent in terms of the need to prove the reality of the risk of being subjected to ill-treatment or other relevant human rights violations. But it need not meet the standard of "high probability".

In determining whether it has been shown that the applicant runs a real risk, if expelled, there is a need to assess, if necessary *proprio motu*, the foreseeable consequences of sending the applicant to the receiving country, bearing in mind not only the general situation, but also the personal circumstances. As regards the general situation in a particular country, the ECtHR has often attached importance to the information contained in recent reports from international monitoring mechanisms, including the CPT, SPT, as well as independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department.[186] However, the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3. Specific allegations in a particular case, require corroboration by other evidence in terms of being personal and present. This could be a membership of a group (national, gender, political etc.) systematically exposed to a practice of ill-treatment or specific individual threats and circumstances.

[183] *Chahal v. The United Kingdom*, Judgment [GC] of 15 November 1996, application no. 22414/93, paras. 87-107. http://hudoc.echr.coe.int/eng?i=001-58004.
[184] (Application no. 30240/96) Judgment of 2 May 1997: http://hudoc.echr.coe.int/eng?i=001-58035.
[185] *Mamatkulov and Askarov v. Turkey*, Judgment [GC] of 4 February 2005, application no. 22414/93, paras. 88-91. http://hudoc.echr.coe.int/eng?i=001-68183.
[186] *Mamatkulov and Askarov v. Turkey*, Judgment [GC] of 4 February 2005, application no. 22414/93, paras. 72-73. http://hudoc.echr.coe.int/eng?i=001-68183.

Thus, in *Mamatkulov and Askarov v. Turkey* that concerned the extradition of the applicants wanted for homicide, causing injuries through the explosion of a bomb to Uzbekistan, the ECtHR took note of the reports of international human rights organisations, denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents, and the Uzbek regime's repressive policy towards such dissidents, but indicated that they did not support the specific (personal) allegations made by the applicants in the instant case. Accordingly, it did not find a violation of Article 3 with regard to their extradition.[187]

With the aim of facilitating related procedures, there is an increasing practice of using so-called "diplomatic assurances", when the competent authorities of the requesting countries present written commitments that either the death penalty will not be applied to specific persons or they will be appropriately treated and so on. The ECtHR and the CPT has developed their standards as to acceptability of such assurances.[188] In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor to be considered. However, assurances are not in themselves sufficient to ensure adequate protection against the risks in issue. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time. It will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances. Thus, it is necessary to assess the quality of assurances given and, whether, in light of the receiving State's practices they can be relied upon. In doing so, the following factors are to be taken into account:

(i) whether the terms of the assurances have been disclosed to the Court

(ii) whether the assurances are specific or are general and vague

(iii) who has given the assurances and whether that person can bind the receiving State

(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them

(v) whether the assurances concerns treatment which is legal or illegal in the receiving State

(vi) whether they have been given by a Contracting State

(vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances

(viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible

[187] *Ibid.*

[188] See 15th General Report on the CPT's Activities (2004-2005); CPT/Inf (2005) 17; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680696a81.

(x) whether the applicant has previously been ill-treated in the receiving State.[189]

There is a mechanism used by the ECtHR for ensuring that this obligation is met at the earliest stages. Rule 39 of the Rules of ECtHR empowers a Chamber or, where appropriate, its President, to indicate interim measures. The grounds on which Rule 39 may be applied are not set out in the Rules of Court, but have been determined by the Court through its case-law. In practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings. They could be indicated by phone, followed by fax and subsequently in writing. In *Mamatkulov and Askarov* v. *Turkey* the Turkish Government did not comply with the interim measure and extradited the wanted persons to Uzbekistan. As discussed earlier in this section, the ECtHR did not find a violation of Article 3 (since there were no evidence of that presented), but established a violation of Article 34 of the ECHR. It reiterated that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.[190]

Thus, where substantial grounds have been shown or the judicial or other competent authorities establish on their own initiative for believing that the person concerned faces a real risk of being subjected to treatment contrary to Article 3 or any other serious human rights violation, it implies an obligation not to transfer the person in question to that country.[191]

3.2 Inadmissibility of evidence obtained in violation of Article 3

Paragraph 2 of Article 17 of the CPC of Montenegro echoes the well-established case law of the ECtHR as to admissibility of evidence and states that:

> *"judgments may not be founded on evidence that have been obtained by violating human rights and fundamental freedoms guaranteed by the Constitution or by ratified international treaties or on evidence obtained by violating the criminal proceedings provisions as well as other evidence obtained therefrom, nor may such evidence be used in the proceedings."*

The Strasbourg Court used to be reluctant to deal with the issue of admissibility of evidence and, until recently, would often reiterate the wording that:

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[189] *Othman (Abu Qatada)* v. *the United Kingdom*, Judgment of 17 January 2012, application no. 8139/09, para. 185: http://hudoc.echr.coe.int/eng?i=001-108629.

[190] Mamatkulov and Askarov v. Turkey, Judgment [GC] of 4 February 2005, application no. 22414/93, paras. 108-128. http://hudoc.echr.coe.int/eng?i=001-68183.

[191] *Ibid*, para. 189.

"while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law"; and
"it is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not."[192]

However, since it is increasingly coming across errors of fact or law committed by national courts in combination with infringements of rights and freedoms protected by the Convention, it has to tackle these issues, including the admissibility of evidence. As a result, there is already an array of cases where it answers the question, whether the way in which the evidence had been obtained, undermined fairness of procedures. To put it differently, the ECtHR ascertains whether use evidence recovered by means of violation of a substantial right, e.g. specific fair trail guarantees in criminal cases provided for by paragraphs 2 and 3 of Article 6, or infringement of some other substantial articles of the ECHR, resulted in a violation of the general principle of fairness enshrined in paragraph 1 of its Article 6.[193]

Since recovery of evidence in breach of the prohibition of ill-treatment is one of the most frequent contexts in which suspects or other participants of the criminal proceedings are subjected to it, the ECtHR is accordingly very often engaged in deciding on fairness of the admissibility of such evidence. Although this issue falls under paragraph 1 of Article 6 of the ECHR and it is outside the scope of Article 3, the course still extends over it due to the close link between them and importance for developing relevant domestic practices accordingly.

Unlike recovery of evidence in violation of other rights that do not immediately render the procedures unfair and there are conditions and counterbalancing factors under which they still can be used without undermining the principle of fairness and violating paragraph 1 of Article 6 of the ECHR,[194] ill-treatment automatically excludes such a possibility. Use of evidence tainted by ill-treatment for rendering a guilty verdict makes the process incompatible with the principle of fairness and besides breaching Article 3 leads to a violation of paragraph 1 of Article 6 of the ECHR.

The prohibition on using unauthorised force or other methods amounting to ill-treatment for obtaining evidence is a direct consequence of the absolute character of Article 3 of the ECHR. The ECtHR would unequivocally state that incriminating evidence – *whether in the form of a confession or material evidence* – obtained as a result of acts of violence or brutality or other forms of treatment, which can be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of

[192] *Baran and Hun* v. *Turkey*, Judgment of 20 May 2010, application no. 30685/05, paras. 65-66. http://hudoc.echr.coe.int/eng?i=001-98664.
[193] *Gafgen* v. *Germany*, Judgment [GC] of 1 June 2010, application no. 22978/05, paras. 162-168. http://hudoc.echr.coe.int/eng?i=001-99015.
[194] See *Al-Khawaja and Tahery* v. *the United Kingdom*, Judgment [GC] of 15 December 2011, applications nos. 26766/05 22228/06, paras. 118-165. http://hudoc.echr.coe.int/eng?i=001-108072

the Convention sought to proscribe or, in other words, to *"afford brutality the cloak of law"*.[195] In *Harutyunyan* v. *Armenia*, where the applicant was convicted for a murder based on a whole set of evidence, which, however, included his confession and witness statements obtained by means of torture that had been, among other proofs, relied on by the domestic courts, the ECtHR established violation of paragraph 1 of Article 6 of the ECHR.

In *Jalloh* v. *Germany*, the applicant suspected of drug dealing swallowed a tiny plastic bag, when approached by the police and the competent public prosecutor ordered that he be given an emetic to force him to regurgitate it. As he refused to take medication to induce vomiting, four police officers held him down while a doctor inserted a tube through his nose and administered certain emetic by force. The doctor also injected him with some medicine. As a result, the applicant regurgitated a small bag containing 0.2182 g of cocaine. About two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence. The applicant was convicted for drug-related offences in the ensued proceedings. When considering the case, the ECtHR was not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. It indicated that the prosecuting authorities could simply have waited for the drugs to pass out of the applicant's system naturally, that being the method used by many other member States of the Council of Europe to investigate drugs offences. As to the manner in which the emetics were administered, the Court noted that it has caused him pain and anxiety. The Court noted that, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence was nevertheless obtained by a measure which breached the prohibition of ill-treatment, undermined his right not to incriminate himself and, therefore, rendered his trial as a whole unfair.[196]

The Grand Chamber judgment in *Gafgen* v. *Germany* is sometimes interpreted as suggesting that this approach is fully applicable to extracting confessions, statements or information, but could be softened with regard to real (material) evidence, even if it is obtained in breach of Article 3 of the ECHR. The applicant was threatened with ill-treatment by the police in order to make him confess to the whereabouts of J., the youngest son of an abducted well-known banking family in Frankfurt am Main. In the course of domestic procedures it has been established that one of the police officers responsible for questioning him, on the instructions of the Deputy Chief of Frankfurt Police, threatened him with intolerable pain that would be inflicted without any traces by a police officer specially trained for that purpose. As a result of those threats, the applicant disclosed the pond where he had hidden the child's body. Following that confession, the police drove to the pond together with the applicant and secured further evidence, notably the tyre tracks of the applicant's car at the pond and the corpse. The applicant was sentenced to life imprisonment for the abduction and murder. The ECtHR accepted that the police officers had been motivated by the attempt to save a child, believed to

[195] *Baran and Hun* v. *Turkey*, Judgment of 20 May 2010, application no. 30685/05, para. 69. http://hudoc.echr.coe.int/eng?i=001-98664. *Harutyunyan* v. *Armenia*, Judgment of 28 June 2007, application no. 36549/03, para. 63, emphasis added. http://hudoc.echr.coe.int/eng?i=001-81352

[196] *Jalloh* v. *the Germany*, Judgment [GC] of 11 July 2006, application no. 54810/00, paras. 103-123 http://hudoc.echr.coe.int/eng?i=001-76307.

be alive by that time. However, the ECtHR emphasised that the prohibition of ill-treatment applied irrespective of the conduct of the victim or the motivation of the authorities and it allowed no exception, not even where the life of an individual was at risk. As to the evidence obtained by threats of ill-treatment, i.e. in breach of Article 3 of the ECHR, the domestic courts excluded the initial confession of the applicant, but still referred to the autopsy of the corps and other real evidence recovered after his resultant indications. The ECtHR maintained that the initial confession had no bearing on the applicant's subsequent confession made during the trial, which was relied on. As to the failure of the domestic courts to exclude the impugned evidence, secured following a statement extracted by means of inhuman treatment, had not had a bearing on the applicant's conviction and sentence. In particular, additional evidence admitted at the trial was not used by the domestic courts against the applicant to prove his guilt, but only to test the veracity of his confession. This evidence included the results of the autopsy as to the cause of J.'s death and the tyre tracks left by the applicant's car near the pond. As the applicant's defence rights had been respected, his trial as a whole had to be considered to have been fair.

Thus, the context and case-specific deliberations suggest that it did not introduce different approach with regard to real evidence obtained with ill-treatment. It is indicative that since then, the ECtHR has not maintained the same in any other judgment. Thus, it is to be concluded that the rule of the 'fruits of a poisoned tree' is valid still and neither statements nor any other, including real, evidence obtained by means of ill-treatment, in breach of Article 3 of the ECHR, should not been admitted for substantiating or establishing a guilty verdict.

3.3 Civil law remedies against ill-treatment

In addition to the obligation of effective investigation and combating impunity for ill-treatment which are seen as falling within the ambit of Article 3 of ECHR,[197] there are standards concerning efficiency of other domestic remedies that should be available to (alleged) victims of ill-treatment. They derive from a combination of the prohibition of ill-treatment and Article 13 of the ECHR that envisages that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Thus, as it was the case with the inadmissibility of evidence,[198] the course is extended over it due to the close link between these obligations with the prohibition under consideration and relevant importance of developing domestic practices.

According to the ECtHR case law the "authority" referred to in Article 13 does not necessarily have to be a judicial one.[199] However, if it is not, its powers and the guarantees which it, or

[197] See Modules V and VI of the current course.
[198] See the preceding section of the current text.
[199] *Kudla* v. *Poland*, ECtHR judgment [GC] of 14 January 2016, application no. 30210/96, para. 157. http://hudoc.echr.coe.int/eng?i=001-58920.

their framework afford are to be relevant.[200] The remedies should provide timely preventive and adequate compensatory redress.[201] The ECtHR case law on the right to effective remedy is particularly developed with regard to the prohibition of ill-treatment, detention conditions and medical assistance available to persons deprived of their liberty. However, the same principles apply to all other contexts where violations of Article 3 occur.

Since mere indirect or partial protection of the rights guaranteed in Article 3 of the Convention do not suffice, it appears that the most appropriate domestic remedies with regard to violations of Article 3 of the ECHR should provide an alleged victim with an accessible avenue for raising a complaint before domestic courts. Thus, while some of remedies, such as inspections or administrative complaints could be effective in terms of preventing or discontinuing further violations in future, it is civil procedure or similar frameworks that are normally required for providing a mechanism for establishing any liability of State officials or bodies for that breach and appropriate relief, meeting the standards, including in terms of compensation. [202]

Effectiveness requirements with regard to judicial remedies presuppose that besides meeting the basic fair trial, including reasonable time standard adjusted to the situation to be remedied, where the expediency matters, it is of crucial importance that there is a meaningful perspective in using them in terms of courts' capacity of making an independent assessment of the facts and decisions without an excessive weight attached to a preceding criminal inquiry or other procedures. Thus, in *Menesheva* v. *Russia* that concerned torture by the police of a young 19 years old female, who during an illegal overnight arrest at a police station was throttled and beaten with sticks by several police officers, allegedly insulted and threatened with rape and violence against her family, the domestic civil courts did not make an independent assessment of the facts and simply endorsed the prosecutor's opinion that the applicant's claim was unmeritorious and relied on the outcome of a preceding inquiry carried out under the criminal procedural framework.[203]

The action for damages, relevant judicial avenues should not be only a theoretical and illusory remedy, not capable of affording redress also in terms of prospect of success based on a well-established court practice for addressing them. In *Petukhov* v. *Ukraine*, where the applicant serving a life sentence was suffering from tuberculosis and a multiple fracture of his left thigh caused by a gunshot wound complained about inadequate medical care in detention, the ECtHR once more noted the absence of examples from domestic case-law to show that civil and/or administrative proceedings instituted by a prisoner would have stood any prospect of success.

[200] *Conka* v. *Belgium*, ECtHR judgment of 5 February 2002, application no 51564/99, para. 75. http://hudoc.echr.coe.int/eng?i=001-60026.
[201] *Rodzevillo* v. *Ukraine*, ECtHR judgment of 14 January 2016, application no 38771/05, para. 70: http://hudoc.echr.coe.int/eng?i=001-159791.
[202] *Menesheva* v. *Russia*, ECtHR judgment of 9 March 2006, application no 59261/00, para. 74. http://hudoc.echr.coe.int/eng?i=001-72700.
[203] *Ibid*, para. 76.

Thus, It had not been sufficiently established that recourse to the judicial remedies would have been capable of affording redress to the applicant in relation to his complaints.[204]

The same case, as well as many other cases illustrate the specifics of the deficiencies that amount to or constitute violations of Article 3 in terms of conditions of detention and inadequate medical treatment, which often are of structural nature, do not concern a specific person (applicant) only and cannot be fully addressed by the existing administrative, hierarchical or other remedies. These considerations are relevant for considering a need in formal exhaustion of domestic remedies before the ECtHR.[205] However, they are indicative of the expected relief that can be provided to an alleged victim of treatment contrary to Article 3 of the ECHR on the domestic level. Besides overall measures aiming at improving the general conditions or medical treatment, or meeting other obligations in different contexts concerned by the prohibition of ill-treatment, they suggest that the individual preventive remedies (improvement individual conditions, provision of necessary medical treatment etc.) should be coupled with compensatory redress, including payment of pecuniary and non-pecuniary damages.

While pecuniary damages are subject to substantiation by means of relevant proofs of expenses and other evidence, as required by the civil law procedures, in terms of amounts of non-pecuniary damages, all jurisdictions are supposed to keep in mind the general and country-specific levels of compensations awarded by the ECtHR. If the compensation is significantly lower, the Strasbourg Court is assessing its adequacy and in spite of partial redress establishes a violation of the ECHR and awards the applicants additional compensation. Thus, in *Ciorap 2 v. Moldova*,[206] where the applicant had been awarded by the domestic courts compensation amounting to 6 Euros by the court of the first instance, increased to 600 Euros by the Supreme Court for two weeks in substandard conditions of detention and denial of hospital treatment of post-surgery wounds (after draining fluid from his liver) for eight days, which aggravated his pre-existing medical condition, the ECtHR found it beyond the level of compensations awarded by it. It granted the applicant 4000 euros for non-pecuniary damages. When identifying it the ECtHR referred to the specifics of the applicant's situation and its other judgment against the same country on similar matters. In particular, it indicated that even taking into account the relatively short period of detention in inhuman conditions, this is considerably below the minimum generally awarded by the Court in cases in which it has found a violation of Article 3. For a recent example see *Gavrilovici v. Moldova*,[207] where the Court awarded the applicant EUR 6,000 in respect of five days' detention in inhuman conditions following an unwarranted criminal conviction in violation of Article 10 of the Convention. See also *Istratii and Others v. Moldova*,[208] where the Court awarded EUR 6,000 to Mr Istratii, who had been held for

[204] *Petukhov v. Ukraine*, Judgment of 21 October 2010, application no 43374/02, paras. 74-79, http://hudoc.echr.coe.int/eng?i=001-101173.
[205] *Ibid*, para. 78.
[206] Judgement of 20 July 2010, application no 7481/06, para. 24: http://hudoc.echr.coe.int/eng?i=001-99996
[207] (Application no. 25464/05) Judgment of 15 December 2009: http://hudoc.echr.coe.int/eng?i=001-96179.
[208] (Application nos. 8721/05, 8705/05 and 8742/05) Judgment of 27 March 2007: http://hudoc.echr.coe.int/eng?i=001-79910.

approximately two months in inhuman conditions of detention and who had suffered a delay of three hours in the provision of emergency medical treatment).

3.4 Conclusions

The international standards, in particular ECHR as interpreted by the ECtHR in its case law, require that domestic judges and prosecutors, judicial proceedings and overall legal framework are specifically mindful of the obligations concerning extra-territorial effects in terms of assessment of risks faced by persons to be transferred under jurisdiction of other countries, inadmissibility of evidence obtained in breach of its Article 3, as well as secure effectiveness of domestic civil law and other remedies available to alleged victims of ill-treatment. They are supposed to directly or through relevant interpretation of domestic legal framework apply the requirements concerning these requirements.

Prepared by E. Svanidze

Module IV Part I
Procedural safeguards

- **General introduction**
- **Access to a lawyer**
- **Access to a doctor**
- **Notification of custody**
- **Information on rights**

4.1 General introduction

The rationale, concept of safeguards, guarantees against ill-treatment are closely linked to the vulnerability of detainees and other potential victims of ill-treatment, including those engaged or concerned by policing, other law-enforcement or similar activities. The European Court of Human Rights has noted in this regard that:

> *"„. allegations of torture in police custody are extremely difficult for the victim to substantiate if he or she has been isolated from the outside world, without access to doctors, lawyers, family or friends who could provide support and assemble the necessary evidence."*[209]

Different jurisdictions and international human rights law have developed them not only for ensuring effective avenues through which allegations and evidence of ill-treatment can be communicated to 'outside world', competent authorities and investigated, but also addressing another element of the two-fold objective of the safeguards that is about dissuading "those minded to ill-treat' from doing so. They are to be seen as specific responsive measures taken in view of indications that ill-treatment has been committed and preventive arrangements for averting them in general

Within the Council of Europe the rationale and concept of safeguards against ill-treatment have been primarily advanced by the workings of the Committee for the Prevention of Torture. In accordance with its primarily preventive mandate, the Committee started to do that from the relevant angle. However, in the course of its further activities it took into account the remedial or investigative aspect of the safeguards too.

[209] *Mammadov (Jalaloglu)* v. *Azerbaijan*, Judgment of 11 January 2007, application no. 34445/04, para. 74. http://hudoc.echr.coe.int/eng?i=001-78978

Already in the first annual report the CPT has singled out the safeguards against ill-treatment as a set of issues falling within the ambit of its preventive functions. It has specified that alongside the conditions of detention the CPT *"pays close attention to the extent to which certain basic safeguards against ill-treatment exist in the country visited e.g. notification of police custody; access to a lawyer; access to a medical doctor; the possibilities of lodging complaints about ill-treatment."*[210]

The basics of this concept has been formally introduced as a core of the CPT's jurisprudence in its second annual report. The substantial section of that report deals with the standards of treatment of persons taken into police custody. Without spelling out the preventive rationale or expected effects, which are obviously presumed in view of the essence of the mechanism, the CPT puts emphasis on the most relevant three rights of notification of custody, access to a lawyer, and access to a doctor. This trinity of the entitlements has been supported by the obligation to inform persons taken into custody about these rights, as well as specific rules applicable to interrogations and safeguarding elements of their proper, including electronic, recording, custody records and independent complaints mechanisms.[211]

In a couple of years the CPT decided to come back to the safeguards and upgrade the standards in line with its evolving experience and state of affairs observed in different countries. In its Sixth general report the CPT advances its reasoning with regard to the responsive role of the safeguards. By that time this facet had been deduced with regard to one of the three fundamental safeguards, namely the right of access to a lawyer.[212] Consequently, in addition to explaining the preventive role of the safeguard, the CPT enriched its standard wording with relevant explicatory component. It has appeared at the very end of the following paragraph:

> *"The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to* take appropriate action if ill-treatment actually occurs*."*[213]

Thus, it provided a balanced outline of the safeguard by pointing out its both the preventive and responsive, actually investigative, importance. It demonstrates the link between these two values of the safeguard that has been missing so far in its deliberations.

The CPT's Twelfth General Report provides for advanced standards on the already recognised safeguards and other measures that had, in the CPT's view, proved to be of the same category.

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[210] The CPT's 1st General Report [CPT/Inf (91) 3], para. 48. http://www.cpt.coe.int/en/annual/rep-01.htm.
[211] *See* the CPT's 2nd General Report [CPT/Inf (92) 3], paras. 36-41. http://www.cpt.coe.int/en/annual/rep-02.htm
[212] *See* the CPT's Report on the visit to Germany from 14 to 26 April 1996, CPT/Inf (97) 9, para. 31. http://www.cpt.coe.int/documents/deu/1997-09-inf-eng-1.htm.
[213] CPT's 6th General Report, CPT/Inf (96) 21, para. 15 (emphasis added). http://www.cpt.coe.int/en/annual/rep-06.htm.

The latter group has included specific rules concerning the role of judicial and prosecuting authorities with regard to allegations and other indications of ill-treatment of persons brought before them.[214] The CPT's Fourteenth general report partially pointed to their responsive, i.e. investigative value as well. Its standards on combating impunity have incorporated specific comments on the relevant role of judges and prosecutors as well as that of access to forensic doctors.[215]

Like other instruments of more general character and those from early stages of development of international human rights thinking and law, neither its drafting process nor the text of the ECHR have involved any special reference to a concept of safeguards against ill-treatment or any specific measure of this kind. As for the Strasbourg Court, it is dealing with the measures now regarded as safeguarding guarantees against ill-treatment since the early stages of its work. Up to now the ECtHR has been asked to and considered them from different angles, all of which in contrast to the prevailing preventive inclinations of the international standards primarily address the responsive and remedial importance of the safeguards.[216]

The outlined developments within the Council of Europe had been preceded by, or took place in parallel with and fed, in their turn, the UN instruments and workings in this regard. One of the stages of development of international standards on the prohibition of ill-treatment that contributed to further configuration of the safeguards against it included the groundwork, drafting and adoption of the UN Declaration on Torture and UN Convention Against Torture. It involved the Secretary General's Analytical Summary and Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment.[217] These texts incorporated a catalogue of specific rights and measures primarily designed for combating ill-treatment. Both documents contained separate blocks defining the rights of detainees and prisoners supposed to safeguard them against it, as well as sections providing for the measures protecting against improper methods of interrogation. They comprised the rights to lawyer, 'to communicate with family and friends', to medical examination, to be informed about the rights and clauses dealing with the supervision of prison and complaints.[218] The Analytical Summary incorporated the following assertions:

> *"The right to legal assistance, available immediately on arrest and throughout detention is generally considered as one of the basic* safeguards against *illegal investigation and* torture and other cruel, inhuman or degrading treatment. *Without the assistance of a competent and independent counsel the individual remains at a great disadvantage faced with the*

[214] CPT's 12th General Report, CPT/Inf (2002) 15, para. 45. http://www.cpt.coe.int/en/annual/rep-12.htm
[215] See relevant section below.
[216] See the subsequent sections of the current text accordingly.
[217] *See* Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, Analytical Summary by the Secretary General, and its Addendum (Report), U.N. Doc. A/10158 and A/10158/Add.1.
https://www.asc41.com/UN_Congress/5th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/A-10158-EN.pdf
https://www.asc41.com/UN_Congress/5th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/A-10158-Add-1-EN.pdf
[218] *Ibid*, paras. 23-66, 94-107. *See* also the Report, UN Doc. A/10158/Add.1, paras. 19-41, 59-79.

whole machinery of the prosecution, and he cannot effectively prevent *the occurrence of abuses*."[219]

"The right of the arrested or detained person to communicate with his family and friends is also one of effective measures to prevent indirectly torture and ill-treatment. *The family and friends of the detained, after communicating with him, may lodge appeals against the order of detention on his behalf, retain a counsel for him and take other* effective actions to terminate the illegal detention and the ill-treatment."[220]

The highlighted line was reinforced by singling out special chapters on remedies and sanctions for violation of detainees and prisoners' rights. This, in fact, embodied the responsive and remedial aspects of the safeguards. [221] At the same time, the Declaration on Torture just distantly covers the majority of safeguards in its Article 6 and states:

"Each State shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment."

Another general clause that could also be seen as relevant is the second sentence of Article 5:

"This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons."

The same approach was subsequently replicated in the drafting process of the UN Convention Against Torture (UNCAT). It also avoided a structured consideration of this concept. It is to be mentioned that the development of the standards on safeguards against ill-treatment had been equally affected by the drift towards preventive nature of the obligations. It has incorporated a general clause analogous to the cited Articles 5 and 6 of the Declaration on Torture in its Articles 10 and 11 accordingly.

In its concluding observations on country reports the UN Committee Against Torture (CAT) continues to treat this matter as a predominantly safeguarding measure.[222] It was only in one of the recent concluding observations, where the CAT extended the discussion and recommendation concerning the role of medical professionals over their duty to report on

[219] The Summary, UN. Doc. A/10158, para. 44 (Emphasis added).
[220] *Ibid*., para. 52 (Emphasis added).
[221] *Ibid*., paras. 108-133. *See* also the Report, UN Doc. A/10158/Add.1, paras. 80-93.
[222] *E. g.*, concluding observations on the reports submitted by Estonia, CAT/C/EST/CO/4 (CAT, 2008), para. 9; http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsue7mb0oJe4FSOZoWyNZ26azjwvzdD3jHtiZo3IebDI5EswePOEuWLhELUNqY4O0A%2BnXEHNFihfyOa4AO0IJumUgWjos%2FKPmC74ckCn7vkyh

findings of ill-treatment.[223] As far as its jurisprudence is concerned, the CAT has neither viewed nor established a violation of the UNCAT with respect to a failure to apply the safeguards in practice.

The UN Sub-committee for the Prevention of Torture (SPT) advances its approach. It has right away recognised that deterrent and preventive effects of the safeguards would be only reinforced if specified as to their responsive and remedial importance. The SPT appears to be committed to a complex and multifaceted understanding of preventive effects of the safeguards against ill-treatment. This can be explained by its open-ended and holistic approach to the rationale of its prevention officially proclaimed in its annual and visit reports. The stance has been reinforced by the most recent concept paper dwelling on this idea. The SPT suggests, *inter alia,* that:

> *". . . the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific."*[224]

Hence, it is not a coincidence that the SPT's reflections on the scope of estimated effects of safeguards and corresponding details of its country reports have included conceptual deliberations and indications as to their investigative aspects and importance for combating impunity in general. More importantly, the SPT does not only demonstrate the idea of responsive facets of safeguards, but elaborates on related requirements that are supposed to secure them.

The standard-setting passages of the SPT's visit reports provide a number of such explanations of the logic and corresponding stipulations, as well as their interrelation with the preventive purposes. The visit reports include indicative standard-setting passages. Thus, the sections dealing with an access to a lawyer are, as a rule, furnished with the following considerations:

> *"From a preventive point of view, access to a lawyer is an important safeguard against ill-treatment which is a* broader concept *than providing legal assistance solely for conducting one's defence. The presence of a lawyer in the police questioning may* not only deter *the police from resorting to ill-treatment or other abuses during questioning but it may also work as a protection for police officers in case they face unfounded allegations of ill-treatment, both of which situations undermine mutual trust. In addition, the lawyer is the*

[223] *See* concluding observations on the reports submitted by Honduras, Cat/C/HND/CO/1 (CAT 2009), para. 9. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FHND%2FCO%2F1&Lang=en

[224] The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN. Doc. CAT/OP/12/6, para. 3. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/6&Lang=en.

key person in assisting the person deprived of liberty in exercising his or her rights, including access to complaints mechanisms."[225]

As to the grouping of the safeguards, the training module suggests to differentiate between the set of fundamental safeguards that are to be envisaged by and applied during the procedures aiming at apprehension and further deprivation of liberty of a person and essentially comprise the specific rights they are entitled to invoke and benefit from. The fundamental (procedural) safeguards against ill treatment include:

- the right of access to a lawyer
- the right to have the fact of their detention notified to a close relative or third party of their choice
- the right of access to a doctor
- the right to be informed on rights

In view of its specifics, the right to complain could be considered as belonging to this category of safeguards. However, taking into account its more general character and applicability outside any formal procedures, it is reviewed under the second group of guarantees.

Unlike the procedural safeguards, which are to be available and applied upon a request or initiative of the person concerned, organisational safeguards against ill treatment are supposed to be operated automatically, without being requested by him (her). They include:

- keeping of custody records
- obligations of prosecutors/judges in the course of administration of justice
- role of prison services
- the right to complain
- monitoring and inspections.

4.1 Procedural Safeguards

4.1.1 Overview

The prohibition of ill-treatment is closely related to the right to liberty and security and fair trial, particularly in the sphere of unacknowledged detention. Consequently, the international standards on some of the safeguards are developed under the heading of these rights. This does not detract, however, from the centrality of these components to the prohibition of ill-treatment.

As for the CPT, the fundamental safeguards described above are also key:

[225] Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, UN. Doc. CAT/OP/SWE/1, para. 61 (emphasis added). http://www.un.org/ga/search/view_doc.asp?symbol=CAT/OP/SWE/1

> *"The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities)."*[226]

As a general requirement, it is important to note that these rights should apply from the very outset of deprivation of liberty. Legitimate interests of the police investigation may exceptionally require that a notification of the detention to a third party or the detainee's access to the lawyer of his choice are delayed for a limited period. These restrictions should be clearly defined and accompanied by further appropriate guarantees.

The CPT has underlined these "three rights" as pre-requisites to compliance with the guarantees against ill-treatment, and emphasised that "should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc)"[227] The Strasbourg Court and overall standards mirror this approach and will often not tolerate even short delays.[228]

Equally, however, the CPT stresses that the three rights should be secured without unduly impeding the police in the proper exercise of their duties:

> *"The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged."*[229]
>
> *"[S]uch exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefore, and to require the approval of a senior police officer unconnected with the case or a prosecutor)."*[230]

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[226] This right has subsequently been reformulated as the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities), 2nd General Report on the CPT's activities, CPT/Inf (92) 3, para. 36. http://www.cpt.coe.int/en/annual/rep-02.htm

[227] *Ibid*.

[228] *Yüksel* v. *Turkey*, Judgment of 20 July 2004, application no. 40154/98, para. 27. http://hudoc.echr.coe.int/eng?i=001-61923.

[229] 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 41. http://www.cpt.coe.int/en/annual/rep-12.htm

[230] *Ibid*, para 43; see also *Mammadov (Jalaloglu)* v. *Azerbaijan*, ECtHR judgment of 11 January 2007, application no. 34445/04, para. 74; http://hudoc.echr.coe.int/eng?i=001-78978.
Yüksel v. *Turkey*, ECtHR judgment of 20 July 2004, application no. 40154/98, para. 27. http://hudoc.echr.coe.int/eng?i=001-61923.

Yet, the CPT does not refer to any such exceptions to the right of access to a doctor, short of accepting that it may be necessary for the examination by a doctor of the detainee's choice to be carried out in the presence of a doctor appointed by the competent authority.

4.1.2 Notification of Custody

The key elements of the right of notification of custody are well outlined in Principle 16 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or imprisonment.[231] It envisages that promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

The general rule is supplemented with additional provisions concerning specific categories of detainees. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

The scope of the persons a detainee has the right to notify is wide and just illustratively mentions family members or relatives (in the CPT wording). The actual formulation extends to any third party on his/her choice. This circle can be temporarily restricted based on the principles discussed further in this chapter.

The most recent public report on the CPT's visits to Montenegro suggests the following findings, starting at Paragraph 26:

> *"As regards notification of custody, Article 29 of the Constitution entitles persons deprived of liberty to have a person of their choice informed "immediately" of their situation.*

[231] A/RES/43/173 http://www.un.org/documents/ga/res/43/a43r173.htm.

"Most detained persons interviewed by the delegation confirmed that they had been offered the possibility to notify a third person of their detention shortly after their apprehension. However, a few persons claimed that the notification had been delayed for several hours.

"The CPT is pleased to note that the relevant custody register form ("record of a detention of a person deprived of his/her liberty") now devotes a specific section to the notification of custody to a third party, but the precise timing of the notification was not given. ***The CPT recommends that custody registers include a reference to the exact timing of the notification of custody to a third party; further, detained persons should be provided with feedback on whether it has been possible to make the notification.***

27. The CPT is concerned to note that notwithstanding the explicit provision in the Constitution that persons deprived of their liberty have the right to notify a third party immediately of their situation, Article 180 of the CCP states that notification of custody must be given at the latest within 24 hours from the moment of deprivation of liberty. ***The CPT would like to receive the Montenegrin authorities' observations on this discrepancy between the provisions of the Constitution and those of the CCP."***[232]

The importance of this safeguard is suggested by the jurisprudence of UN mechanisms, including in the wider context of incommunicado detention.[233]

Also in the context of the right to fair trial, the Strasbourg Court has advanced the standard and put the burden of proof with respect to securing the right of notification of custody on states:

"First, in the absence of any proof to the contrary, the Court accords weight to the applicant's argument that he was not allowed to contact his next of kin after the arrest. There is no evidence showing that the investigator immediately informed the family of the applicant's arrest or that the applicant asked him not to do so. The Court considers that affording a detainee a possibility to make his family aware of his or her arrest is an important safeguard against arbitrary detention and is intended to facilitate his or her decision concerning the exercise of the right to legal assistance, as well as the privilege against self-incrimination and right to remain silent (see also paragraphs 61 and 62 above)."[234]

To put it differently, the international instruments and relevant derivative standards dictate that the detaining authorities, their officials are obliged to record the fact and details of notification and have a relevant proof of that (e.g. a countersignature of the detained person). It can be done in person or via different rapid and expedient means of communication.

At the same time, it is to be highlighted once more that international standards do provide for a possibility to reconcile the rights and effectiveness of human rights protection with interests of

[232]The CPT's Report on the visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 16, paras. 26-27. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.htm#_Toc363549473

[233]See Views of the Human Rights Committee in El Hassy v. The Libyan Arab Jamahiriya, para. 6.2. http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/libya_t5_iccpr_1422_2005

[234]*Pavlenko* v. *Russia*, Judgment of 1 April 2010, application no. 42371/02, para. 74; http://hudoc.echr.coe.int/eng?i=001-98050.

combating crime and other legitimate purposes. Thus, it may exceptionally be necessary to delay for a certain period (up to 48 hours) to apply exceptions to the right to have the fact of detention notified to a third party.[235] It is to be done (decision adopted) in writing, notified to the detainee. The legal framework is to be furnished with clear swift legal avenues for challenging a restriction.

4.1.3 Access to a lawyer

The safeguard of an access to a lawyer is similarly in details outlined in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[236] Its principles 17 and 18 suggest the essence and specific components of the right in issue. According to the former a detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay. The latter further specifies that a detained or imprisoned person shall be entitled to communicate and consult with his legal counsel and allowed adequate time and facilities for consultations with him/her.

There are specific and exceptional restrictions that can be to the right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality with his/her legal counsel. It may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. Furthermore, interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

The European approaches and requirements are similar to the universal ones and add some specific emphasis and facets. The standards on access to a lawyer (in terms of a safeguard against ill-treatment) are designed to secure the communication of information regarding ill-treatment from detainee to lawyer. They include the rights to talk in private, to have the lawyer present during police interrogation and the right to legal aid, where necessary,[237] as well as a private meeting with a lawyer before the first interrogation, without permission of the investigator, prosecutor, court, and after the first interview – the same meetings without limitation in number and duration, under conditions that preclude listening or eavesdropping.

[235] See the preceding section of this presentation.
[236] A/RES/43/173. http://www.un.org/documents/ga/res/43/a43r173.htm
[237] 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 41. http://www.cpt.coe.int/en/annual/rep-02.htm

At the same time, it is important to emphasise that the right includes an access not to any lawyer, but to one of the detainee's choice. It is not enough to provide him or her with any other lawyer without giving a chance to engage a lawyer of his/her choosing in the absence of good legitimate reasons for that (e.g. unavailability of the chosen one for urgent procedures).[238]

This right is to be applicable regardless the specific legal (procedural) status of a person. Thus, in many jurisdictions it is extended to witnesses and all other relevant participants of criminal or similar procedures.

The most recent public report on the CPT's visits to Montenegro suggests the following findings (starting at Paragraph 28):

> *"The right of persons deprived of their liberty to have access to a lawyer (including of one's choice) is also guaranteed by the Constitution and Article 12 of the CCP. In particular, Article 261, paragraph 4, of the CCP states that if a detained person's own lawyer does not appear within four hours, the police and prosecutor will facilitate contact with an* ex officio *counsel.*
>
> *"As regards persons summoned by the police for the purpose of collecting information, Article 259, paragraph 4, stipulates that if the person concerned arrives with a lawyer, the police shall allow the lawyer to remain.*
>
> *"29. The possibility for criminal suspects to contact a lawyer, including of their own choice, was confirmed in the relevant custody registers countersigned by the detained person. In practice, it would appear that most detained persons chose to be assisted by an* ex officio *lawyer. However, many persons met by the delegation stated that they had only met the* ex officio *lawyer for the first time just before the initial hearing in front of the investigative judge.*
>
> ***The CPT recommends that further efforts be invested by the Montenegrin authorities - in consultation with the Bar Association - in order to ensure that* ex officio *lawyers perform their functions in a diligent and, more specifically, timely manner. It is particularly important that the lawyer meets the detained person in private at an early stage of the procedure and is present during questioning of the person concerned."***[239]

4.1.4 Access to a doctor

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment is more reserved with regard to the right of access to a doctor. It provides for a second medical opinion or examination.[240]

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[238] See *Pavlenko* v. *Russia*, Judgment of 1 April 2010, application no. 42371/02, para. 74 with further references. http://hudoc.echr.coe.int/eng?i=001-98050.

[239] The CPT's Report on the visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 16, paras. 28-29. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.htm#_Toc363549473

[240] A/RES/43/173, principle 25. http://www.un.org/documents/ga/res/43/a43r173.htm

The most advanced and contemporary standards in this regard are suggested by the CPT jurisprudence. According to it, right to access to a doctor must include the corollary right to have medical examinations conducted out of earshot and (unless the doctor expressly requests otherwise) out of sight of police and other non-medical staff. In addition to any medical examination carried out by a doctor called by the detaining authorities it involves the right to be examined by a medical professional of the detainee's choice. Results of medical examinations should be properly recorded and made available to the detainee and his or her lawyer.

The standards on access to a doctor serve two main purposes: (i) they secure avenues for the communication of information regarding ill-treatment from the detainee to the doctor, and (ii) they are key to gathering evidence. The CPT is clear that requests by detainees to see a doctor should always be granted, that detainees taken into custody should receive an examination by a doctor of their own choice, and that all medical examinations should be conducted out of earshot and out of sight of police, unless the doctor requests otherwise. It stresses that results of examinations should be made available to the detainee and his lawyer and that medical data must be kept confidential.[241]

The Court has endorsed the CPT standards in this area, as well as some of the stipulations of the Istanbul Protocol, as important elements in fulfilling the obligation to effectively investigate, particularly from the perspective of gathering evidence.[242]

Moreover, medical professionals owe obligations both to the persons they treat or examine and to society at large, which has an interest in ensuring that justice is done and that perpetrators of abuse are brought to justice. Medical professionals must balance their responsibilities towards their patients with those they bear to society at large. This may result in dilemmas, for example, where the victim has not requested or consented to the reporting of evidence of ill-treatment. The Istanbul Protocol acknowledges this problem. It underlines the need for a case-by-case approach. The protocol advises that allegations could be reported in a non-identifiable manner or remitted to a responsible body outside the immediate jurisdiction."[243]

Equally, the Istanbul Protocol has recognised that medical personnel:

> *". . . may discover evidence of unacceptable violence, which prisoners themselves are not in a realistic position to denounce. In such situations, doctors must bear in mind the best interests of the patient and their duties of confidentiality to that person, but the moral arguments for the doctor to denounce evident maltreatment are strong, since prisoners themselves are often unable to do so effectively. Where prisoners agree to disclosure, no*

[241] CPT's Report on the visit to Azerbaijan carried out from 24 November to 6 December 2002, CPT/Inf (2004) 36, para. 36. http://www.cpt.coe.int/documents/aze/2004-36-inf-eng.htm
[242] *Mehmet Eren* v. *Turkey*, Judgment of 14 October 2010, application no. 32347/02., paras. 37-40; 53-56. http://hudoc.echr.coe.int/eng?i=001-88895
[243] See paras. 68-70, 72-73 of the Istanbul Protocol. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf

conflict arises and the moral obligation is clear. If a prisoner refuses to allow disclosure, doctors must weigh the risk and potential danger to that individual patient against the benefits to the general prison population and the interests of society in preventing the perpetuation of abuse."[244]

The CPT has recently put forward a solution to these dilemmas. In its 23rd General Report it has proposed a new standard according to which:

"…the principle of confidentiality must not become an obstacle to the reporting of medical evidence indicative of ill-treatment which health-care professionals gather in a given case. To allow this to happen would run counter to the legitimate interests of detained persons in general and to society as a whole. . . . The CPT is therefore in favour of an automatic reporting obligation for health-care professionals working in prisons or other places of deprivation of liberty when they gather such information. In fact, such an obligation already exists under the law of many States visited by the CPT, but is often not fully respected in practice.

"In several recent visit reports, the CPT has recommended that existing procedures be reviewed in order to ensure that whenever injuries are recorded by a health-care professional which are consistent with allegations of ill-treatment made by a detained person, that information is immediately and systematically brought to the attention of the relevant authority, regardless of the wishes of the person concerned. If a detained person is found to bear injuries which are clearly indicative of ill-treatment (e.g. extensive bruising of the soles of the feet) but refuses to reveal their cause or gives a reason unrelated to ill-treatment, his/her statement should be accurately documented and reported to the authority concerned together with a full account of the objective medical findings."[245]

As discussed,[246] there are no limitations to this right. In case of legitimate reasons (e.g. indications as to involvement in the incident, crime concerned or any other illegitimate interest) the examination by a doctor of the detainee's choice can be conditioned and carried out in the presence of a doctor appointed by the competent authority.

The most recent public report on the CPT's visits to Montenegro suggests the following findings (at Paragraph 30):

"With regard to the right of access to a doctor, Article 25 of the Law on Internal Affairs stipulates that police officers will facilitate medical assistance to the persons requiring it, through referral to a medical institution. The information sheet distributed to detained persons in police establishments also refers to the right of detained persons to request medical care from a doctor (including of one's choice).

"The practice observed by the delegation confirmed that those detained persons who requested medical assistance were generally brought to the hospital by the police or were visited by doctors employed by the Ministry of the Interior. Nevertheless, some persons who alleged physical ill-treatment by the police claimed that their requests for medical

[244] *Ibid*, para. 73.
[245] CPT's 23rd General Report [CPT/Inf (2013) 29], para. 77. http://www.cpt.coe.int/en/annual/rep-23.pdf
[246] See 2.2.1 above.

assistance had been denied, police officers stating that they would receive a medical check-up upon admission to the remand prison.

"The CPT notes the adoption of legal provisions (Article 268, paragraph 6, of the CCP) on the possibility for criminal suspects, legal counsel or family members to request a medical examination in front of the State Prosecutor. However, persons may be detained for up to 12 hours before being brought before the prosecutor.

"The CPT reiterates once again its recommendation that persons deprived of their liberty by the police be expressly guaranteed the right of access to a doctor (including a doctor of their own choice, it being understood that an examination by such a doctor may be carried out at the detained person's own expense) from the very outset of their deprivation of liberty. The relevant provision should make clear that a request by a detained person to see a doctor should always be granted; it is not for police officers, nor for any other authority, to filter such requests."[247]

4.1.5 Notification of (explaining) rights

Effective implementation of these safeguards that, as discussed, represent the set of rights that a detainee or any other person concerned by law enforcement or other actions similarly restricting their liberty and security relies upon detainees being informed of their rights.

According to the international standards, it is "imperative" that this obligation is fulfilled without delay. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment envisage that they are to be provided with information on and an explanation of his rights and how to avail himself of such rights.[248]

The CPT has gone further and specified that a standard form containing these rights should be given to everyone who enters custody, and that detainees should be asked to sign a form confirming that they have been informed of their rights.[249]

The most recent public report on the CPT's visits to Montenegro suggests the following findings (at Paragraph 31):

"As regards information on rights, information sheets in several languages containing reference to all the above-mentioned safeguards against ill-treatment had been introduced. However, several persons interviewed by the delegation claimed that they had either not been provided with the information sheet or had only received it when placed in a detention cell (i.e. after their appearance in front of the State Prosecutor), which might be up to 12 hours after their actual deprivation of liberty. The CPT calls upon the Montenegrin authorities to take steps to ensure without further delay that all persons detained by the

[247] The CPT's Report on the visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 16, para. 30. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.htm#_Toc363549473
[248] A/RES/43/173; http://www.un.org/documents/ga/res/43/a43r173.htm
[249] 12th General Report on the CPT's activities, CPT/Inf (2002) 15, para. 44. http://www.cpt.coe.int/en/annual/rep-02.htm

police - for whatever reason - are fully informed of their rights as from the very outset of deprivation of liberty (that is, from the moment when they are obliged to remain with the police). This should be ensured by provision of clear verbal information at the very outset, to be supplemented at the earliest opportunity (that is, immediately upon arrival at police premises) by provision of the above-mentioned information sheet."[250]

4.1.6 Conclusion

Thus, the minimum essential safeguards against ill-treatment are special measures and procedures that are attributed corresponding preventive and responsive value due to their potential to secure evidence or disclose ill-treatment with implied perspectives of triggering or direct engagement of relevant investigative or other remedial mechanisms.

There are fundamental safeguards that are to be envisaged by and applied during the procedures aiming at apprehension and further deprivation of liberty of a person and essentially comprise the specific rights they are entitled to invoke and benefit from.

[250] The CPT's Report on the visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 16, para. 31. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.htm#_Toc363549473

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Module 4 Part II
Organisational safeguards

- **Custody records**
- **Obligations on prosecutors and judges**
- **Responsibilities of prison service staff**
- **Complaints**
  - **Police complaints system**
  - **Prison complaints system**
- **Inspection and monitoring**
  - **National Preventative Mechanism**
  - **Committee for the Prevention of Torture (CPT)**
  - **Other international monitoring**

4.2.1 Custody records

The risk of ill-treatment is particularly high at the point of arrest and during the early stages of detention. According to Amnesty International, *"In most reported cases, torture and other ill-treatment is inflicted on people who have been deprived of their liberty by law enforcement officials or other state agents."*[251] This is a period of time when police exercise their powers with the greatest degree of discretion and minimal supervision by superior officers. A full and accurate record giving details of the arrest of a suspect and their detention while in police custody is, therefore, an important safeguard against the risk of ill-treatment. The requirement on police to record an arrest and open a custody record for the purposes of establishing the lawfulness of an interference with the right to liberty is under Article 5.1(c) of the ECHR.

> "*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:.. (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"* [252]

The *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* set out the requirement to record an arrest and detention as follows:

[251] *Combating Torture and Other Ill-treatment: A Manual for Action*, 2016, Amnesty International: Page 126. https://www.amnesty.org/en/documents/pol30/4036/2016/en/.
[252] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Rome, 4.XI.1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

> *"States should take effective measures to safeguard against the risk of serious human rights violations by the keeping of records concerning the date, time and location of persons deprived of their liberty, as well as other relevant information concerning the deprivation of liberty."*[253]

For the purpose of safeguarding against ill-treatment, the *CPT Standards* stress the importance of completing a *"single and comprehensive custody record"* for each person detained which records all aspects of custody. The record should be countersigned by the detainee and disclosed to their lawyer. The CPT advises the custody record should include the following:

- when deprived of liberty and reasons for that measure;
- when told of rights;
- signs of injury, mental illness, etc;
- when next of kin/consulate and lawyer contacted and when visited by them;
- when offered food;
- when interrogated;
- when transferred or released, etc; and
- items in the detainee's possession.[254]

The *Istanbul Protocol*[255] and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[256] also set out standards for recording the details of persons held in custody. In reports of country visits the CPT notes examples of best practice and compliance with standards. The CPT's *Report* of the 2013 visit to Montenegro noted that although a section on notification of detention was included, the time of notification was absent (see also above section on notification of custody in Module 4(1).[257] On a related matter the CPT noted that under Article 259 (1) of the Montenegrin Criminal Code of Procedure and Article 50 of the Law on Internal Affairs the police may issue a summons for a witness to attend a police station for the purpose of collecting information for a period of up to six hours, and the witness is free to leave the police station if they refuse to provide information. The CPT recommended in regard to this practice:

> *"in order to ensure that persons summoned by the police for the purpose of collecting information are fully aware of their rights, the CPT recommends that they be expressly informed in the summons, as well as at the very outset of the process of collecting information at the police premises, that they may leave the police station at any time if they do not wish - or no longer wish - to provide information. In addition, a special register*

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[253] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177.

[254] *Extract from the 2nd General Report of the CPT*, CPT/Inf(92)3-part1 | Section: 1/1 | Date: 13/04/1992 Police custody: Paragraph 40. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-1992-3-part1-en-1.

[255] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Office of the High Commissioner for Human Rights (OHCHR), 2004, HR/P/PT/8/Rev.1: Paragraph 10(e). http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[256] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, United Nations General Assembly, 9 December 1988, A/RES/43/173: Principle 12. http://www.un.org/documents/ga/res/43/a43r173.htm.

[257] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 26. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756.

should be opened in every police station in which all cases of persons entering the station following a summons are recorded."[258]

The ECtHR has been forthright in affirming the importance of record keeping to the lawfulness of detention in the Article 5 case law.[259] Examples of practices censured by the Court for failure to adequately record detention details and which were relevant to allegations of torture and ill-treatment include the following:

- Police not opening a custody record on grounds that the detainee had not been arrested as a suspect and was a witness helping with enquiries (this directly relates to the CPT's request to the Montenegrin Government noted in the preceding paragraph that a register is created for all persons summonsed to attend a police station);[260]
- The absence of a custody record as a safeguard against the risk of disappearance;[261] and
- Forged entry in a police detention register.[262]

4.2.2 Obligations on prosecutors and judges

The *CPT Standards,*[263] United Nations *Istanbul Protocol*,[264] *Basic Principles on the Independence of the Judiciary,*[265] *Guidelines on the Role of Prosecutors*[266] and the *Body of Principles for the*

[258] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 12. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17; Page 3. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

[259] See, for instance, *Barakhoyev* v *Russia* (Application no. 8516/08) Judgment of 17 January 2017: Paragraph 51. http://hudoc.echr.coe.int/eng?i=001-170353.

[260] *Uğur* v *Turkey* (Application no. 37308/05) Judgment of 13 January 2015: Paragraph 128. http://hudoc.echr.coe.int/eng?i=001-150229.

[261] *Orhan* v *Turkey* (Application no. 25656/94) Judgment of 18 June 2006: Paragraph 372. http://hudoc.echr.coe.int/eng?i=001-60509; see also *Er and Others* v *Turkey* (Application no. 23016/04) Judgment of 31 July 2012: Paragraph 69. http://hudoc.echr.coe.int/eng?i=001-112586.

[262] *Anguelova* v *Bulgaria* (Application no. 38361/97) judgment of 13 June 2002: Paragraph 156. http://hudoc.echr.coe.int/eng?i=001-60505.

[263] *Extract from the 12th General Report of the CPT*, CPT/Inf(2002)15-part | Section: 1/1 | Date: 03/09/2002 Developments concerning CPT standards in respect of police custody: Paragraph 45. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2002-15-part-en-1.

[264] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Office of the High Commissioner for Human Rights (OHCHR), 2004, HR/P/PT/8/Rev.1: Paragraph 49. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[265] *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985: Principle 6. http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx

[266] Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: Article 15. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf;

Protection of All Persons under Any Form of Detention or Imprisonment,[267] set out the duties and responsibilities of judicial and prosecutorial authorities for maintaining effective safeguards against torture and ill-treatment when detainees are brought before them (for the responsibilities of judges see Modules 2 and 3).

According to the *CPT Standards,* presentation before a prosecutorial or judicial authority provides a detainee with the opportunity to indicate that they have been ill-treated. In the absence of a complaint by the detainee, a prosecutor or judge will be in a position to notice and take action in good time if ill-treatment may have occurred. The CPT alerts to the fact that during country visits reports have been received from detainees of inaction following complaints of ill-treatment, even when suffering from visible injuries. On occasion the CPT has been able to confirm such inaction. Furthermore, the *CPT Standards* caution that persons have been frightened to complain about ill-treatment on account of the close presence of the law enforcement officials responsible when appearing before a prosecutor or judge, or because they had been discouraged from complaining. For these reasons the CPT stress that prosecutorial and judicial authorities take resolute action when receiving any information that is indicative of ill-treatment and they conduct proceedings in a way that allows persons to feel able to complain.[268]

The ECtHR has held that where an applicant has not made a formal complaint the prosecuting authorities are not released from their duty to investigate an allegation of ill-treatment, and in so doing safeguard against ill-treatment in the future (see also the procedural obligation to conduct an effective investigation in Module 5). In *Georgiev v "The Former Yugoslav Republic of Macedonia"* the Court noted when finding a breach of the procedural obligation to conduct an investigation:

> *"the applicant's omission in this respect* [to make a complaint] *did not release the State from the duty to carry out "an official investigation", as required under Article 3 of the Convention. In this connection the Court reiterates that the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the individual either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."*[269]

The CPT's *Report* of the 2013 visit to Montenegro noted allegations of inactivity by prosecutors and judges when persons brought before them complained about ill-treatment by the police

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[267] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, A/RES/43/173: Principle 37. http://www.un.org/documents/ga/res/43/a43r173.htm.

[268] *Extract from the 12th General Report of the CPT*, CPT/Inf(2002)15-part | Section: 1/1 | Date: 03/09/2002 Developments concerning CPT standards in respect of police custody: Paragraph 45. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2002-15-part-en-1.

[269] *Georgiev v "The Former Yugoslav Republic of Macedonia"* (Application no. 26984/05) Judgment of 19 April 2012: Paragraph 64. http://hudoc.echr.coe.int/eng?i=001-110541.

(see also the case of *Siništaj & Others* v *Montenegro,*[270] which is discussed further below when addressing the police complaints system and again in Module 5).

> *"Many persons interviewed by the delegation stated that they had complained about ill-treatment by the police to the prosecutor or to the judge before whom they were brought, but this had met with no response. Apparently, even when a detained person displayed visible injuries, there was usually no follow-up by the prosecutor or judge. Others stated that they were intimidated by the accompanying police officers not to complain to the prosecutor or judge.*
>
> *"The CPT wishes to reiterate that if the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. Therefore, it is self-evident that prosecutors and judges should take appropriate action when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before prosecutorial or judicial authorities allege ill-treatment, those allegations should be recorded in writing, a forensic medical examination should be immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the prosecutor/judge should adopt a proactive approach; for example, whenever there are other grounds to believe that a person brought before him/her could have been the victim of ill-treatment, a forensic medical examination should be requested.*
>
> *"All these points were made in the report on the 2008 visit, but met with no response from the Montenegrin authorities.*
>
> *"The CPT recommends that the Chief State Prosecutor and the President of the Supreme Court of Montenegro recall firmly, through appropriate channels, that prosecutors and judges should act in accordance with the above principles."*[271]

Examples of the Court noting the failure of the authorities to respond appropriately to evidence of possible ill-treatment include the following:

- Failure of competent officials to refer a case to prosecution officials for investigation where injuries were clearly visible.[272]

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[270] *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015: http://hudoc.echr.coe.int/eng?i=001-158885.

[271] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16, paragraph 22. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

[272] *Taraburca* v *Moldova* (Application no. 18919/10) Judgment of 6 December 2011: Paragraph 56. http://hudoc.echr.coe.int/eng?i=001-107669.

- Failure of a prosecutor to refer for investigation in spite of his being in possession of a case file documenting injuries suffered by persons when they appeared before him, and knowing that others had been transferred to hospital when in custody.[273]
- Dismissal of complaints as a 'defence tactic', and corresponding failure of the competent authorities, including Gendarme regional commander, public prosecutors and investigating judge, to take the necessary steps to initiate an investigation into torture and ill-treatment.[274]

4.2.3 Responsibilities of prison service staff

Public officials (including police and prison officers) working in detention facilities have a duty of care to detainees and convicted prisoners. This includes the duty to report complaints and indications of ill-treatment to a superior officer and the competent authority. The *CPT Standards* unequivocally establish the duty to report as a fundamental safeguard against torture and ill-treatment and as a means of combating impunity. The CPT stress that a suitable legal framework is insufficient on its own to ensure that appropriate action will be taken against ill-treatment. Significance attaches to training and the promotion of a culture of professionalism and zero-tolerance of ill-treatment. Culpability for ill-treatment should also attach to those that know of ill-treatment and do not report to a superior officer or the competent authority, and measures should be in place to protect whistle-blowers.[275]

The duty to report is particularly relevant for medical practitioners working in prison and detention facilities. A prison health-care practitioner may be the first independent professional unconnected with the administration of justice to come into contact with a detainee that has suffered ill-treatment while in the custody of the police. A medical examination on their arrival at a detention facility is fundamental to the assessment of a detainee's health and fitness. The examination report may be of major importance for establishing how a prisoner was treated prior to arrival, and subsequently during their detention. Special significance therefore attaches to the safeguarding responsibilities of health-care practitioners working in detention facilities (the right of a detainee or prisoner to see a doctor has been described above in Module 4.1).

The CPT's *Report* of the 2013 visit to Montenegro noted inadequacies with staffing levels at the Health Care Centre at the Spuž Prison Complex and the relevance for the authorities' safeguarding duties.

> *"The personnel of the Health Care Centre comprised the Head Doctor (a specialist in internal medicine), one full-time general practitioner and 9 nurses. (In addition, a general practitioner visited Bjelo Polije Prison.) Two nurses were present, on 24-hour shifts, at all times in the Remand Prison and the KPD.. This is insufficient for an inmate population of*

[273] *Ahmet Özkan and Others* v *Turkey* (Application no. 21689/93) Judgment of 6 April 2004: Paragraphs 356/359. *http://hudoc.echr.coe.int/eng?i=001-61696*

[274] *Elçi and Others* v *Turkey* (Application no. 23145/94) Judgment of 13 November 2003: Paragraph 645. http://hudoc.echr.coe.int/eng?i=001-61442.

[275] *Extract from the 14th General Report of the CPT*, CPT/Inf(2004)28-part | Section: 1/1 | Date: 21/09/2004 Combating impunity: Paragraphs 25-28. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1.

more than 1,300. It is noteworthy that given the demands placed on them, the nurses were obliged to work a considerable amount of overtime. There was a full-time dentist at the Health Care Centre and other staff included a dental nurse, one physiotherapy nurse and several technicians (two laboratories, one pharmacy and one radiology). However, psychiatric resources were clearly inadequate; one external psychiatrist was visiting the Prison Complex twice a week on a voluntary basis." [276]

Noting Article 18 of the Rulebook on the Enforcement of Pre-trial Detention, the CPT *Report* of the 2013 visit to Montenegro recommended that the Montenegrin authorities address delays to the medical screening of newly arrived prisoners.

"According to law, medical screening of newly arrived prisoners shall be performed immediately upon their admission. However, the delegation found that in practice it often took place only several days after the time of admission. For example, out of the 26 inmates already admitted to the Remand Prison in the course of 2013, only five had been screened within 24 hours of their admission.

"No specific guidelines were in place as regards screening of prisoners for transmissible diseases; testing for such diseases was, as a rule, conducted on a case-by-case basis. The CPT recommends that such guidelines be adopted and implemented at the level of the Sector for the Execution of Criminal Sanctions (ZIKS). Medical screening of newly arrived prisoners is essential, in particular to prevent the spread of transmissible diseases, detect inmates who may constitute a suicide risk and ensure the recording in good time of any injuries. Consequently, every newly admitted prisoner should be properly interviewed and physically examined by a medical doctor as soon as possible after his/her admission; save for exceptional circumstances, the interview/examination should be carried out on the day of admission. The medical screening could also be performed by a fully qualified nurse reporting to a doctor.

"The CPT welcomes the fact that following its visit, a new instruction was issued stipulating that newly-arrived prisoners have to be medically examined within 24 hours of their admission."[277]

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[276] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 57 (see also Paragraph 61 on the quality of medical recording; and Paragraphs 64 and 65 regarding the provision of psychiatric care). For the response of the Montenegrin authorities to the CPT's recommendations see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17; Pages 8-12, 16-17. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756.

[277] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 59. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17: Pages 8-12, 16-17. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

The CPT delegation also reported their concerns with the confidentiality of medical examinations and reports.

> *"As regards confidentiality of medical consultations, according to the internal house rules, custodial staff should only be present during such consultations if this was assessed as necessary by the health-care personnel. However, the delegation found that a prison officer was systematically present in the course of medical examinations of inmates. The CPT reiterates its recommendation that all medical examinations of prisoners be conducted out of the hearing and – unless the health-care staff member concerned requests otherwise in a particular case – out of the sight of prison officers.*
>
> *"The confidentiality of medical records was not always respected. The personal medical documentation concerning inmates was at times being shared with the prison director upon his request. Doctors acknowledged that such a practice was well established but appeared not to be aware that they were infringing the rights of their patients (prisoners). Further, the delegation observed that personal medical files of sentenced female prisoners were kept on the shelves of the consultation room of pavilion F of the KPD and were potentially accessible to custodial staff.*
>
> *"The confidentiality of medical documentation should be observed in prisons in the same way as in the community at large. Particular reference should be made to Recommendation R (98) 7 of the Council of Europe's Committee of Ministers to member States concerning the ethical and organisational aspects of health care in prison, according to which medical confidentiality should be guaranteed and respected with the same rigour as in the population as a whole24. The CPT would like to stress that respect for confidentiality is essential to the atmosphere of trust which is a necessary part of the doctor/patient relationship. The CPT recommends that the Montenegrin authorities put in place a clear policy for the confidentiality of medical records in prison in light of the above observations."* [278]

The ECtHR has established the importance of medical examination for safeguarding against ill-treatment and regularly addresses the subject in the case law on Article 3 (see also Module 5 on the obligation of the State to effectively investigate an allegation of ill-treatment). The Court has established that a medical examination before a person is placed in detention is fundamental to the State's responsibility to provide a plausible explanation for the cause of any injuries sustained before or during their detention in custody.[279] The Court has also set out that

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[278] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraphs 62/63. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17: Pages 8-12, 16. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

[279] *Korobov v Ukraine* (Application no. 39598) Judgment of 21 July 2011: Paragraph 70. http://hudoc.echr.coe.int/eng?i=001-105748.

a medical examination must be independent, and include in the examination report the degree of consistency with the allegation of torture.[280]

Examples of the ECtHR noting inadequate medical examination include:

- Failure of the authorities to conduct medical examinations after a special forces operation resulted in injuries to detainees in a remand prison;[281]
- Refusal of the authorities to conduct a medical examination, lack of timely and adequate medical assistance and treatment.[282]
- Police officers alleged to have ill-treated the applicant were present at his medical examination.[283]

4.2.4 Complaints

Effective police and prison complaints mechanisms are fundamental safeguards against torture and ill-treatment. For complaints that include allegations that a criminal offence may have been committed by a police or prison officer, as in alleged cases of torture or ill-treatment, the existence of an effective independent or external investigation mechanism is necessary (see Module V below). For complaints that allege a disciplinary offence may have been committed by a police or prison officer, as may also arise in cases of alleged torture of ill-treatment, an officer's marginal involvement perhaps (failure to promptly report, for example), the existence of an effective internal investigation mechanism is necessary. Thus, for both police and prison services the complaints systems that operate must combine two mechanisms that have the capacity to bring proceedings before the criminal courts and internal disciplinary tribunals. In addition, there is an expectation that investigators responsible for both mechanisms communicate with each other. This applies to individual investigations, in cases for example where there is uncertainty in regard to whether the evidence meets the criminal or disciplinary standard. It also applies generally in the interest of lesson learning. It is important that the knowledge of criminal and discipline investigators is shared for the purpose of identifying and preventing patterns of behaviour that may result in criminal offences, misconduct or unprofessional behaviour that are damaging to the reputation of the police or prison service and undermine public confidence in the criminal justice system more broadly.

Having identified common purposes and principles of the police and prison complaints mechanisms, it is also evident that different types of mechanism operate for both services. The general duties of the police to serve and protect the public, which includes the prevention of crime and disorder in addition to the apprehension and detention of suspected offenders,

[280] *Ochelkov* v *Russia* (Application no. 17828/05) Judgment of 11 April 2013: Paragraph 103. http://hudoc.echr.coe.int/eng?i=001-118385.
[281] *Dedovskiy and Others* v *Russia* (application no. 7178/03) Judgment of 15 May 2009: Paragraph 89. http://hudoc.echr.coe.int/eng?i=001-86218.
[282] *Grori* v *Albania* (Application no. 25336/04) Judgment of 7 July 2009: Paragraph 122. http://hudoc.echr.coe.int/eng?i=001-93410.
[283] *Colibaba* v *Moldova* (Application no. 29089/06) Judgment of 23 October 2007: Paragraph 49. http://hudoc.echr.coe.int/eng?i=001-82877.

requires a complaints system that is public facing and accessible to the entire population. The right of an individual to complain about any aspect of policing, the ease with which they may do so and the effectiveness of procedures, reflect public trust and confidence in the police as a whole. A police complaints system must include procedures which address complaints by individuals, including persons that have not been taken into custody, that they have been subjected to ill-treatment by police officers. The prison complaints system, in contrast, operates in the context of a closed estate where limitations are imposed on the rights of prisoners to communicate and associate with others. Accordingly, different procedures are available to prisoners, their families and associates who wish to register a grievance, including an allegation of ill-treatment, with the prison authorities. Despite these differences, both complaints systems serve to safeguard against torture and ill-treatment and international standards apply (Article 13 of the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;[284] Article 2 of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;[285] and Paragraph 79 of the *Istanbul Protocol*[286])

Police complaints system

The *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*[287] sets out detailed guidance on police complaints mechanisms. In the Commissioner's *Opinion* the operation of an independent police complaints body is held to most effectively facilitate adherence to the obligation to conduct an effective investigation into alleged violations of Articles 2 and 3 of the ECHR (see Module 5).[288] The *Opinion* provides helpful guidance on the purposes of a police complaints system:

> *"The principal purposes of a police complaints system are to:*
>
> *"- address the grievances of complainants;*
>
> *"- identify police misconduct and, where appropriate, provide evidence in support of*
>
> *i. criminal proceedings,*

[284] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. http://www.un.org/documents/ga/res/39/a39r046.htm.
[285] Recommended by General Assembly resolution 55/89 of 4 December 2000. http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx.
[286] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Office of the High Commissioner for Human Rights (OHCHR), 2004, HR/P/PT/8/Rev.1. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.
[287] Council of Europe, CommDH(2009)4. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.
[288] *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4: Paragraph 33. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54. See also, the United Nations Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum : Study on police oversight mechanisms*, 28 May 2010, A/HRC/14/24/Add.8, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add8.pdf).

ii. disciplinary proceedings, or

iii. other management measures;

"- provide the police with feedback from members of the public who have direct experience of police practice;

"- facilitate access to the right to an effective remedy for a breach of an ECHR right as required under Article 13 of the ECHR;

"- prevent police ill-treatment and misconduct;

"- in association with the police and other regulatory bodies, set, monitor and enforce policing standards; and

"- learn lessons about police policy and practice." [289]

The *Opinion* advises that members of the public should be able to make a complaint in person at a police station, or in writing, by telephone or electronic communication, or to an authorised independent body. Good practice in regard to the visibility and accessibility of complaints mechanisms set out in the *Opinion* includes:

"- provision of information about complaints on police publicity materials;

"- prominent display of complaints information in all police premises, particularly in custody areas;

"- all persons detained in police premises to be informed in writing of how to make a complaint on their release;

"- when on duty police officers to carry 'complaints information cards' that may be given to members of the public who express dissatisfaction with the police;

"- display of police complaints information in public spaces controlled by criminal justice agencies, including prosecution, probation, prison and court services; and

"- display of police complaints information in public spaces that do not come under the umbrella of the criminal justice system, including community, advice and welfare organisations." [290]

In addition, the *Opinion* provides guidance on operational procedures, including sections on notification, recording and allocation; mediation; investigation; and resolution and review.[291]

[289] *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4: Paragraph 22. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.
[290] *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraph 43. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.
[291] *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4: Paragraphs 48-57. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.

The *CPT Standards* also set out the requirements for independent investigation of complaints and warn against the risk to effective investigation where law enforcement officials are responsible for the day to day handling of complaints against colleagues (see also Module V). Particular stress is placed on the requirement that human and material resources must be available for the effective investigation of complaints.[292] Article 61 and the explanatory memorandum of the *European Code of Police Ethics,*[293] and Article 23 of the United Nations *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[294] also lay down requirements for the independent investigation of complaints against the police.

The CPT's *Report* of the 2013 visit to Montenegro noted the then existing police complaints procedures without comment or recommendation:

> *"the Internal Control Department (ICD) of the Police operates, as of July 2012, under the direct authority of the Minister of Interior and is formally autonomous from the Police Directorate. According to Article 16 of the Law on Internal Affairs, citizens can address complaints to the ICD within 30 days of the event and the ICD has to deliver a decision within 30 days which can be appealed to the Minister. The ICD is currently composed of 15 police officers operating nationwide as focal points in different police departments. In parallel citizens can also address complaints about police ill-treatment directly to the prosecutor or to the five-member Parliamentary Council of Civic Control over Police Activities. (The members represent the Bar Association, the Medical Chamber, the Association of Lawyers, the Law Faculty of Podgorica University and the NGO sector. They are elected by the Parliament for a period of five years and generally hold monthly sessions)."*[295]

Judgment in the case of *Siništaj & Others* v *Montenegro* was after publication of the CPT's 2014 *Report* and involved allegations by seven applicants of ill-treatment on their arrest in 2006 and during the early period of detention. The Court noted that both the investigating judge and a prison doctor noted injuries to the third applicant, and that the applicant lodged a complaint. However, the only action taken was an investigation by the Internal Control Department (ICD) and the report of their investigation made no reference to the third applicant or the injuries

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[292] *Extract from the 14th General Report of the CPT*, CPT/Inf(2004)28-part | Section: 1/1 | Date: 21/09/2004 Combating impunity: Paragraphs 31-32. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1.

[293] Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001. http://polis.osce.org/library/f/2687/500/CoE-FRA-RPT-2687-EN-500;

[294] Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

[295] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 33. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013*, CPT/Inf (2014) 17: Page 5. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

noted by the investigating judge and prison doctor. In addition to finding that here had been a substantive violation of Article 3 in regard to the third applicant, the Court found that there had also been a violation of the procedural limb for failure to conduct an effective investigation on grounds that the ICD investigation was neither independent nor thorough (see also Module V).[296]

The reforms described by the CPT in their 2014 *Report* were introduced after the incident leading to the *Siništaj & Others* judgment. In light of the Court's jurisprudence on the obligation of the State to conduct an effective investigation into suspected ill-treatment, the police complaints system of Montenegro is vulnerable to further challenge. Six cross-cutting effective investigation standards are evident in the Court's jurisprudence – adequacy, thoroughness, independence and impartiality, promptness, public scrutiny and victim involvement – each of which is relevant to police complaints policy and operations. The standards are extensively examined in Module V.

Prison complaints system

The *CPT Standards* establish the importance of avenues for prisoners to complain as a fundamental safeguard against ill-treatment.

> *"Effective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (eg. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can* inter alia *play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general."*[297]

Principle 33 of the United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[298] also sets out standards relevant to the right of a prisoner to complain.[299] The *CPT Standards* separately specify that complaint procedures for young people detained in juvenile detention centres should be child-friendly and accessible to parent/carers.[300]

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[296] *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, Paragraphs 146-149: http://hudoc.echr.coe.int/eng?i=001-158885.

[297] *Extract from the 2nd General Report of the CPT*, CPT/Inf(92)3-part2 | Section: 1/1 | Date: 13/04/1992 Imprisonment: Paragraphs 54/55 (as reformulated). http://hudoc.cpt.coe.int/eng?i=p-standards-inf-1992-3-part2-en-1.

[298] United Nations General Assembly, 9 December 1988, A/RES/43/173. http://www.un.org/documents/ga/res/43/a43r173.htm.

[299] See the Court's observation that Montenegrin legislation did not provide for a prison complaints system *"which would satisfy the effectiveness requirement in respect of the applicant's complaints"* in *Bulatović* v *Montenegro* (Application no. 67320/10) Judgment of 22 July 2014, Paragraph 107: http://hudoc.echr.coe.int/eng?i=001-145705.

[300] Extract from the 24th General Report of the CPT, CPT/Inf(2015)1-part | Section: 11/11 | Date: 21/01/2015,

The right to respect for correspondence is protected under Article 8 of the ECHR and the ECtHR has held that interference with a prisoner's correspondence with a prosecutor and the Ombudsman in regard to allegations of ill-treatment was in violation of Article 8.[301] The Court has also held there to have been a violation of Article 8 in regard to interference by the prison authorities with a prisoner's correspondence with the Court.[302] The Court has also found that interference with a prisoner's correspondence with the Court to be in breach of both Article 8 and Article 34 of the ECHR, which prohibits states from hindering individual applications to the Court,[303] although it is commonplace for such cases to be considered solely under Article 34.[304] In *Hilal Mammadov* v *Azerbaijan* the Court held that there was a breach of Article 34 after the prison authorities refused the applicant's representative permission to meet him in prison for the purpose of discussing his application to the Court. In the judgment, the Court stressed the vulnerability of a person in custody.[305]

The CPT's *Report* of the 2013 visit to Montenegro expressed concern that prisoners complained that they had been verbally threatened by custodial staff when using boxes provided by the authorities for complaining to the Ombudsman.

> *The delegation observed that boxes for addressing complaints to the Ombudsman had been placed in all sections of the Institution for Sentenced Prisoners as well as at the Remand Prison. The Ombudsman told the delegation that complaints were collected on a regular basis by his staff and processed according to their subject matter. However, several prisoners at both establishments complained to the delegation that they had been verbally threatened by custodial staff for inserting written complaints in the boxes.*
>
> *The Committee recommends that the Montenegrin authorities send a clear message to staff that any intimidatory action against prisoners who address complaints to external bodies will be punished accordingly.*[306]

Juveniles deprived of their liberty under criminal legislation / 3. Detention centres for juveniles / i. complaints and inspection procedures: Paragraph 131. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2015-1-part-en-11.

[301] *Niedbala* v *Poland* (application no. 27915/95) Judgment of 4 July 2000: Paragraph 82. http://hudoc.echr.coe.int/eng?i=001-58739.

[302] See, for instance, *Mirosław Zieliński* v *Poland* (Application no. 3390/05) Judgment of 20 September 2011: Paragraph 88. http://hudoc.echr.coe.int/eng?i=001-106257.

[303] *Drozdowski* v *Poland* (Application no. 20841/02) Judgment of 6 December 2005: Paragraph 31. http://hudoc.echr.coe.int/eng?i=001-71461.

[304] *Enache* v *Romania* (Application no. 10662/06) Judgment of 1 April 2014: Paragraph 71. http://hudoc.echr.coe.int/eng?i=001-142073

[305] *Hilal Mammadov* v *Azerbaijan* (Application no. 81553/12) Judgment of 4 February 2016: Paragraphs 116/117, http://hudoc.echr.coe.int/eng?i=001-160318; see also, *Rasul Jafarov* v *Azerbaijan* (Application no. 69981/14) Judgment of 17 March 2016: Paragraph 187, http://hudoc.echr.coe.int/eng?i=001-161416.

[306] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 85. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading*

Judgment in the case of *Milić and Nikezić* v *Montenegro* was after publication of the CPT's 2014 *Report* and involved complaints by the two applicants that they had been ill-treated by prison guards in 2009. After finding that there had been a substantive violation of Article 3 in respect of both applicants, the Court turned to the effectiveness of the investigation into the alleged ill-treatment. Concluding that there had also been a procedural violation, the Court noted, *inter alia*, that the State Prosecutor did not take the Ombudsman's findings of fact into account when discontinuing criminal proceedings (see also Module V).[307]

4.2.5 Inspection and monitoring

National and international inspections of detention facilities – including police custody suites, remand centres, prisons, juvenile detention centres, medical and psychiatric establishments – and monitoring of operational law enforcement, are fundamental safeguards against ill-treatment.

Article 1 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*[308] (ECPT) created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[309] Since 1990 the CPT has regularly visited Council of Europe Member States and inspected places of detention for the purpose of safeguarding against torture and ill-treatment. CPT delegations report their findings and recommendations to national governments,[310] which agree to the CPT publishing their reports and government responses.[311]

Article 1 of the United Nations *Optional Protocol to the Convention against Torture* (OPCAT) established *"a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."*[312] The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee

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Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 17: Pages 12 & 19. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

[307] *Milić and Nikezić* v *Montenegro* (Application nos. 54999/10 and 10609/11) Judgment of 28 April 2015, Paragraph 99: http://hudoc.echr.coe.int/eng?i=001-154149.

[308] Council of Europe, ETS No. 126, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806dbaa3.

[309] The url of the CPT webpage is http://www.coe.int/en/web/cpt.

[310] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Council of Europe ETS No. 126: Article 10(1). http://www.cpt.coe.int/en/documents/ecpt.htm.

[310] http://www.cpt.coe.int/en/.

[311] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Council of Europe ETS No. 126: Article 11(2). http://www.cpt.coe.int/en/documents/ecpt.htm.

[312] Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

against Torture (SPT)[313] was established under Article 2(1) of OPCAT[314] for the purpose of conducting visits by international delegations; and *Guidelines on visits to state parties* are published by the SPT.[315] Article 3 of OPCAT provides for a National Preventive Mechanism (NPM) to conduct visits by at least one national body;[316] and *Guidelines on national preventive mechanisms* are published by the SPT.[317]

National Preventive Mechanism

Montenegro ratified the OPCAT in March 2009 and, following amendment of the Law on the Ombudsman, designated the Ombudsman as responsible for the NPM in August 2011.[318] Responsibility for the NPM is delegated to the Deputy Ombudsman, assisted by an Expert Advisory Body and supported by designated staff of the Office of the Ombudsman.[319]

The activities of the NPM, including inspection visits and thematic inspections, are recorded in reports published by, among others, the Ombudsman,[320] CPT,[321] European Commission[322] and the US Department of State.[323]

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[313] The url of the SPT webpage is http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx.
[314] Optional Protocol to the Convention against Torture, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.
[315] Subcommittee on Prevention of Torture, *Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol*, CAT/OP/5. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/5&Lang=en.
[316] Optional Protocol to the Convention against Torture, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.
[317] SPT, *Guidelines on National Preventive Mechanisms*, CAT/OP/12/5. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en.
[318] Article 24 of the Law on the Protector of Human Rights and Freedoms. http://www.apt.ch/content/files/npm/eca/Montenegro_Law_Ombudsman%20with%20NPM%20amendments.pdf.
[319] See, *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16, paragraphs 9/10. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.pdf, and 'Response of the Ombudsman' pages 20/21, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013, Council of Europe*, CPT/Inf (2014) 17. http://www.cpt.coe.int/documents/mne/2014-17-inf-eng.pdf.
[320] See, for example, Montenegro Protector of Human Rights and Freedoms, *2014 Work Report*, pages 37-39. http://www.apt.ch/content/files/npm/eca/Montenegro_Annual_Report_2014_NPM%20section.pdf.
[321] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16, paragraphs 9, 10, 32 and 86. http://www.cpt.coe.int/documents/mne/2014-16-inf-eng.pdf.
[322] See, for example, European Commission Staff Working Document, *Montenegro 2016 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy {COM(2016) 715 final}*, European Commission, SWD(2016) 360 final, pages 18 and 62. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_montenegro.pdf.
[323] United States Department of State Bureau of Democracy, Human Rights and Labor, *Montenegro 2015 Human Rights Report*, US Dept of State, 2016, pages 2-4, 22. https://www.state.gov/documents/organization/253093.pdf.

Detention facilities in Montenegro are also independently monitored by NGOs and investigating judges (see above, Modules II and III).[324]

Committee for the Prevention of Torture (CPT)

The many references to the CPT in this Module on safeguards against torture and ill-treatment reflect the important role played by the CPT for upholding and strengthening the prohibition on torture and ill-treatment. CPT country visit reports and the *CPT Standards* are regularly noted in ECtHR judgments: *Bulatović v Montenegro*[325] and *Siništaj & Others v Montenegro,*[326] for example. The CPT conducted visits to Montenegro in 2008 and 2013, and another visit is planned for 2017.[327]

In addition to inspecting and monitoring places of detention, including interviewing detainees and convicted prisoners, the CPT also monitors the effectiveness of national inspection and monitoring measures. On the activities of the Montenegrin NPM, the CPT's *Report* of the 2013 visit to Montenegro noted:

> *"the Montenegrin Ombudsman's office, in its capacity as National Preventive Mechanism, undertakes the monitoring of police detention facilities. Unannounced visits to police detention facilities are carried out once a month and a report with recommendations was published in 2011; and its conclusions were the subject of a debate before Parliament in June 2012.*
>
> *"However, the delegation gained the impression that this monitoring activity mainly focused on the material conditions of police custody. The Committee trusts that in future the NPM will explore in greater depth the manner in which persons are treated when apprehended and questioned by police officers. This will require,* inter alia, *detailed examination of the application in practice of safeguards against ill-treatment as well as confidential interviews with persons remanded in prison who have recently been in police custody."*[328]

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[324] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 86. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. and *Montenegro 2015 Human Rights Report*, US Dept of State, 2016: Page 4. https://www.state.gov/documents/organization/253093.pdf.

[325] (Application no. 67320/10) Judgment of 22 July 2014, paragraphs 88-93. http://hudoc.echr.coe.int/eng?i=001-145705.

[326] *Siništaj & Others v Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015: Paragraphs 99-103. http://hudoc.echr.coe.int/eng?i=001-158885.

[327] CPT News Flash, *Council of Europe anti-torture Committee announces visits to ten states in 2017*. http://www.cpt.coe.int/en/visits/2016-04-14-eng.htm.

[328] *Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 20 February 2013*, CPT/Inf (2014) 16: Paragraph 32. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697756. For the response of the Montenegrin authorities to the CPT's recommendation see, *Response of the Government of Montenegro to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading*

Other international monitoring

In addition to the SPT[329] and CPT, a range of international bodies monitor compliance with international human rights standards. The European Commission, for example, publishes annual reports on countries which seek to become a member of the European Union, which includes assessment of existing conditions and practices, and recommendations. The Commission's *Montenegro 2016 Report* stated:

> *"As regards prevention of torture and ill-treatment, Montenegro has continued to work towards fully implementing recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). The National Preventive Mechanism continued to work as a separate department under the Ombudsman. Its capacity has improved; however, its independence needs to be strengthened. The Ministry of Justice needs to prescribe precise rules on the use of restraints as a means of coercion, in line with international standards. Contingency plans need to be developed to better handle emergency situations in prisons, such as incidents involving verbal and physical violence. The episodes of violence that took place during protests by some of the opposition parties, in autumn 2015, and the delays in the progress of related investigations and prosecutions, show the difficulties of eradicating ill-treatment and establishing a record of deterrent sanctions. This also applies to cases of violence in prisons in the course of 2015. Small-scale refurbishment improved detention conditions; however, the treatment of convicts and detainees still needs to be brought into line with international standards, as does the screening and reporting capacity of prison medical services and their cooperation with judicial authorities."* [330]

4.2.6 Conclusion

In this second part of Module 4 the organisational safeguards that are fundamental to the prevention of torture and ill-treatment have been examined. In addition to laying down standards that protect against the possibility of ill-treatment taking place, the organisational safeguards play a crucial part in ensuring that a) records are maintained regarding the circumstances of persons detained in custody that are vulnerable to ill-treatment, and b) effective mechanisms are in place to effectively investigate suspected ill-treatment.

Treatment or Punishment (CPT) on its visit to Montenegro from 13 to 20 February 2013, CPT/Inf (2014) 17. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680697757.

[329] Which has not visited Montenegro.

[330] European Commission Staff Working Document, *Montenegro 2016 Report*, *Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy {COM(2016) 715 final}*, European Commission, SWD(2016) 360 final: Page 62. https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_montenegro.pdf.

Prepared by G. Smith

Module 5
Positive (procedural) obligation to conduct an effective investigation into an alleged violation of Article 3

- **Introduction**
- **The obligation to conduct an effective investigation**
- **ECHR Effective investigation standards**
  - **Adequacy**
  - **Independence and impartiality**
  - **Thoroughness**
  - **Promptness**
  - **Public scrutiny**
  - **Victim involvement**
- **Conclusion**

5.1 Introduction

In Modules I and IV the positive obligations on the State to protect human rights were introduced. To recap, negative obligations refer to the requirement that a State does not interfere with human rights as set out in the ECHR, and positive obligations require that a State takes positive steps or measures to protect human rights.[331]

Whereas negative obligations apply to the acts of State agents or persons acting in an official capacity, positive obligations refer to the duties imposed on a State to prevent human rights abuses whether a State or non-state actor, or private individual, is or was the alleged perpetrator of abuse.

Positive obligations are premised, firstly, on the obligation under Article 1 of the ECHR[332] that a State secures ECHR rights to everyone within their jurisdiction. Secondly, that ECHR rights must be practical and effective and not 'theoretical and illusory'.[333] And, thirdly, the principle under

[331] For helpful background see Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Human Rights Handbook, No 7 (2007) Council of Europe. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d.

[332] "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*." http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[333] See, for instance, *El Masri* v *The Former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, paragraph 134. http://hudoc.echr.coe.int/eng?i=001-157670.

Article 13 of the ECHR[334] that States provide an effective remedy for an arguable breach of ECHR rights.

This and subsequent Modules cover the procedural and related positive obligation to effectively investigate an alleged deliberate violation of Article 3. The obligation was first introduced in principle for the purpose of protecting the right to life under Article 2 of the ECHR.[335] In the 1998 landmark ill-treatment judgment of *Assenov and Others v Bulgaria*[336] the same was applied to Article 3: and the Court keeps a record of lack of effective investigation Article 2 and 3 judgments in its annual reports. Table 5.1, below, shows the frequency of violations since the Court started publishing statistics in 2003.

Table 5.1. Violations of Articles 2 and 3 of the ECHR for lack of an effective investigation: 2003–2016[337]

	Article 2 lack of an effective investigation	Article 3 lack of an effective investigation	Total
2003	3	7	10
2004	21	7	28
2005	33	3	36
2006	33	13	46
2007	36	37	73
2008	63	55	118
2009	81	64	145
2010	64	74	138
2011	90	89	179
2012	42	99	141
2013	51	67	118
2014	44	55	99
2015	58	88	146
2016	55	71	126
Total	**674**	**729**	**1403**

5.2 The obligation to conduct an effective investigation

Under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT)[338] the obligations on a State to criminalise torture and investigate torture and ill-treatment are set out. Article 4 requires that acts of torture, including attempts to torture and complicity or participation in acts of torture are offences and appropriately

[334] "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*." http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[335] *McCann v The United Kingdom* (Application no. 18984/91), Judgment 27 September 1995, paragraph 161. http://hudoc.echr.coe.int/eng?i=001-57943.
[336] (Application no. 24760/94) Judgment of 28 October 1998, paragraph 102. http://hudoc.echr.coe.int/eng?i=001-58261.
[337] Source: ECtHR Annual Reports. http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c.
[338] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984: http://www.un.org/documents/ga/res/39/a39r046.htm.

punished under national criminal law. Under Article 12 national authorities are required to conduct a prompt and impartial investigation where there are reasonable grounds to believe that an act of torture has been committed. Article 13 establishes the right of an individual to complain, and for the State to protect the complainant and witnesses. Article 16 sets out the State's duty to prevent other acts of Ill-treatment which do not meet the torture threshold, that is acts that are not intentionally inflected on a person for a purpose as set out in Article 1 of UNCAT. The Article also establishes the same obligations on the State to investigate ill-treatment and facilitate complaints as required for torture.

In accordance with the UNCAT, offences of ill-treatment and torture are set out under Articles 166a and 167 of the Criminal Code of Montenegro.[339] Article 166a(1) establishes that any person who ill-treats or offends the human dignity of another shall be punished by a prison term of up to one year, and Paragraph 2 establishes that the sentence for a public official shall be between three months and three years. Article 167(1) lays down that any person who inflicts severe pain or heavy suffering for the purpose of obtaining a confession or information, or to unlawfully punish or intimate, or to exert pressure, or other reasons based on intimidation shall be punished by a prison term of between six months and five years. Under Paragraph 2 it is established that involvement of a public official in an act of torture is punishable by a prison term of between one and eight years.[340]

The six articles of the United Nations *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[341] set out an overarching framework for governing torture and ill-treatment investigations. Article 1 lays down that the purposes of an investigation are threefold. Firstly, to clarify the facts and establish and acknowledge individual and State responsibility; secondly, to identify preventative measures; and, thirdly, to facilitate prosecution or disciplinary sanctions and State reparation and redress, including financial compensation, medical care and rehabilitation. Article 2 sets out the obligation of the State to promptly, effectively, independently, impartially and competently investigate reports of torture and ill-treatment, regardless of whether a complaint has been made. Article 3 establishes that investigators must have the authority, powers and resources necessary to conduct an effective investigation; that victims, investigators and their families shall be protected from violence or threats arising from the investigation, and persons implicated in torture or ill-treatment shall be removed from any position of control or power over complainants, witnesses, family members or persons responsible for investigation. Article 4 requires that victims of torture or ill-treatment and their legal representatives have access to the investigation process. Where established investigation procedures are inadequate, Article 5 provides for the creation of an independent, impartial and competent commission of inquiry with authority and powers to conduct an investigation, which will publish a comprehensive

[339] Official Gazette of the RoM Nos. 70/2003, 13/2003, 47/2006 and the Official Gazette of MNE Nos. 40/2008, 25/2010, 32/2011, 64/11, 40/13, 56/13 and 42/15

[340] For ECtHR standards as to substantial criminal legislation on ill-treatment see Module VI of the current course.

[341] Recommended by General Assembly resolution 55/89 of 4 December 2000. http://www.ohchr.org/EN/ProfessionalInterest/Pages/EffectiveInvestigationAndDocumentationOfTorture.aspx.

written report to which the State shall respond. Article 6 sets out the standards required of medical practitioners in the conduct and reporting of investigations.

The *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Istanbul Protocol) supplements the UN Principles described in the paragraph above. The purpose of the Manual is to serve as international guidelines for the assessment, investigation and reporting of findings of allegations of torture and ill-treatment.[342]

The obligations on the State to effectively investigate allegations of serious human rights abuse are set out in other United Nations instruments as well. Articles 22, 23 and 24 of the United Nations *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*[343] require that incidents of death and serious injury resulting from the use of force by law enforcement officials are reported and effectively reviewed; affected persons and their legal representatives shall have access to an independent review process; and measures to hold superior officers accountable shall be in place. Article 9 of the United Nations *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* requires the State to conduct a thorough, prompt and impartial investigation of all suspected violations of the right to life.[344]

Article 3 of the ECHR is simply worded (see Module 1) and does not set out provisions for the criminalisation and investigation of torture and ill-treatment. The Strasbourg jurisprudence on the obligations on the State to effectively investigate serious human rights abuse has been developed in the case law on the right to life, prohibition of torture and ill-treatment and right to privacy and family life: Articles 2, 3 and 8 of the ECHR, respectively. Importance attaches to Article 8 in cases where the level of severity of the treatment complained of does not reach the Article 3 threshold, but has an adverse effect on the person's physical and moral integrity that engages Article 8.[345] The effective investigation jurisprudence was first developed in the 1995 *McCann* v *The United Kingdom* judgment, in which the Court referred to the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and *Principles on the Effective*

[342] UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, pages 1/2. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[343] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

[344] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 1. http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf. The Principles are accompanied by the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol), U.N. Doc. E/ST/CSDHA/.12 (1991) (https://www.un.org/ruleoflaw/files/UN_Manual_on_the_Effective_Prevention_and_Investigation[1].pdf) which is currently under revision (http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx).

[345] *R. B.* v *Hungary* (Application no. 64602/12) Judgment of 12 April 2016, paragraph 79. http://hudoc.echr.coe.int/eng?i=001-161983.

Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. Reading the obligation on a member State to respect human rights, under Article 1, into the right to life under Article 2, the Court noted that an 'effective official investigation' should be conducted into an allegation that a State official violated the right to life.[346]

In the above mentioned judgment of *Assenov and Others* v *Bulgaria*[347] the Court aligned its jurisprudence on Article 2 and 3 effective investigations. Having determined that the injuries suffered by the principal applicant, a 14 year old boy at the time and alleged victim of ill-treatment at the hands of the police, reached the Article 3 threshold[348] the Court was unable to conclude on the evidence that police were responsible.[349] The evidence gave rise, however, to a reasonable suspicion that the injuries were caused by police and the Court established that there should be an "effective official investigation" capable of leading to the identification and punishment of the police officers responsible for the ill-treatment.[350]

The Strasbourg Court has clarified the expectation that the State will prosecute and punish willful ill-treatment on the part of State agents in the interest of combating impunity and practical compliance with the prohibition of torture and ill-treatment.[351]

The obligation to ensure that individuals are not subjected to ill-treatment, including effective investigation, extends beyond allegations against State agents and includes incidents involving private individuals.[352] In *Amadayev* v *Russia*, for example, the Court found that the respondent State was in breach of the positive obligation under Article 3 to conduct an effective investigation into violent assaults by several private individuals.[353] In the leading judgment of *M. C.* v *Bulgaria* the Court explained that its task was to examine whether legislation on rape and alleged shortcomings in the investigation of the applicant's complaint of rape was in breach of Articles 3 and 8. The Court concluded that the approach taken by investigator and prosecutors fell short of the required standard and there had been a violation of the State's positive obligation to establish and effectively apply a criminal-law system punishing all forms of sexual abuse.[354]

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[346] *McCann* v *The United Kingdom* (Application no. 18984/91), Judgment 27 September 1995, paragraph 161. http://hudoc.echr.coe.int/eng?i=001-57943.
[347] (Application no. 24760/94) Judgment of 28 October 1998. http://hudoc.echr.coe.int/eng?i=001-58261.
[348] *Assenov and Others* v *Bulgaria* (Application no. 24760/94) Judgment of 28 October 1998, paragraph 95. http://hudoc.echr.coe.int/eng?i=001-58261.
[349] *Ibid*., paragraphs 99/100.
[350] *Ibid*., paragraph 102.
[351] See, for instance, *Gäfgen* v *Germany* (Application no. 22978/05) Judgment of 1 June 2010, paragraph 119. http://hudoc.echr.coe.int/eng?i=001-99015.
[352] See, for instance, *Biser Kostov* v *Bulgaria* (Application no. 32662/06) Judgment of 10 January 2012, paragraph 77. http://hudoc.echr.coe.int/eng?i=001-108423.
[353] *Amadayev* v *Russia* (Application no.18114/06) Judgment of 3 July 2014, paragraph http://hudoc.echr.coe.int/eng?i=001-145227.
[354] *M. C.* v *Bulgaria* (Application no. 39272/98) Judgment of 4 December 2003, paragraphs 169-187. http://hudoc.echr.coe.int/eng?i=001-61521.

The Court has considered the positive obligations on the State to prevent violence by private individuals motivated by hatred and to investigate discriminatory motives under Article 3 both on its own and together with Article 14, the prohibition of discrimination. In *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v *Georgia,* a case involving religious discrimination by private individuals, the Court found that the State was in breach of the duty to conduct an effective investigation contrary to Article 3; and Articles 3 and 9 (Freedom of thought, conscience and religion) together with Article 14.[355] In *M. C. and A. C.* v *Romania* the Court found that failure to effectively investigate allegations of homophobic violence by private individuals was in violation of Article 3 with Article 14.[356]

5.3 ECHR effective investigation standards

A series of cross-cutting standards on the procedural obligation to conduct an effective investigation, which must be conducted on the own motion of the State once it has been brought to the attention of the authorities,[357] have been set out in the Court's jurisprudence.[358] Variously referred to in Council of Europe literature as standards,[359] principles[360] and criteria[361] the ECHR effective investigation standards are:

- Adequacy;
- Thoroughness;
- Independence and impartiality;
- Promptness;
- Public scrutiny; and
- Victim involvement.

The obligation to conduct an effective investigation into alleged violations of Article 3 of the ECHR is a continually developing area of law. The six standards identified above are not

[355] *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v *Georgia* (Application no. 71156/01) Judgment of 3 May 2007. http://hudoc.echr.coe.int/eng?i=001-80395.
[356] *M. C. and A. C.* v *Romania* (Application no. 12060/12) Judgment of 12 April 2016, paragraphs 120-125. http://hudoc.echr.coe.int/eng?i=001-161982.
[357] See, for instance, *Georgiev* v *"The Former Yugoslav Republic of Macedonia"* (Application no. 26984/05) Judgment of 19 April 2012, paragraph 64. http://hudoc.echr.coe.int/eng?i=001-110541.
[358] The origins of what have become widely known as the ECHR effective investigation standards were set out in *Jordan* v *the United Kingdom* (Application no. 24746/94) Judgment of 4 May 2001, paragraphs 106-109. http://hudoc.echr.coe.int/eng?i=001-59450. See also, Svanidze, E, *Effective investigation of ill-treatment: Guidelines on European Standards*, Second Edition, 2014, Council of Europe. http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/EffectiveInvestigationIllTreatment_2014_WEB_A5.pdf.
[359] 'Combating impunity', Chapter VIII of the *CPT Standards*: *"Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, pages 102-107. http://www.cpt.coe.int/en/documents/eng-standards.pdf.
[360] Council of Europe, *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*, CommDH(2009)4. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.
[361] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177.

precisely or discretely defined in the case law. Public scrutiny and victim involvement, for example, are often referred to jointly. Each standard comprises policy and operational imperatives, and are of importance for institutional and capacity building as well as for due process requirements relevant to the fair and effective administration of justice. Each is examined in some detail below, and in keeping with the Court's jurisprudence references will be made to Article 2 case law where relevant.

Adequacy

The adequacy standard is set out in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* as follows:

> *"The investigation must be capable of leading to the identification and punishment of those responsible. This does not create an obligation on States to ensure that the investigation leads to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident."*[362]

Referred to as an obligation of means,[363] the adequacy standard pertains to the overarching objective of securing and obtaining evidence. In the case of an investigation into a criminal offence the purpose of an investigation is to secure evidence that will bring the offender to justice. In the case of an alleged disciplinary offence, the purpose of the investigation is to ensure the issue of an appropriate sanction. Further, general purposes of criminal and disciplinary proceedings are to deter offending, protect the public and learn lessons to prevent offending in the future. The same applies to investigations into allegations of serious human rights abuse that are codified as criminal offences: as required for torture under Article 4 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[364] The UNCAT does not require criminalisation of other forms of ill-treatment, but it is not expressly ruled out.[365] In *M. C.* v *Bulgaria* the ECtHR found that the positive

[362] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraph 31. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraphs 67-69. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 77 . http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[363] See, for instance, *Archip* v *Romania* (Application no. 49608/08) Judgment of 27 September 2011, paragraph 61. http://hudoc.echr.coe.int/eng?i=001-106436.

[364] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984: http://www.un.org/documents/ga/res/39/a39r046.htm.

[365] See Amnesty International, *Combating Torture and Other Ill-treatment: A manual for action*, page 268, 2016, Amnesty International, https://www.amnesty.org/en/documents/pol30/4036/2016/en/.

obligation on the State to *"enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution"* is inherent in Article 3, and Article 8 also.[366] In *Amadayev v Russia* the Court found incomprehensible that a thorough investigation had not been conducted into a violent confrontation involving dozens of persons and considered it *"a breach of the State's positive obligation to protect individuals from ill-treatment by third parties because of a failure to effectively enforce the existing criminal law mechanisms."*[367]

In *Milić and Nikezić v Montenegro* the Court expressly stated that the State had not established that the State Prosecutor's decision to discontinue criminal proceedings against prison guards suspected of the ill-treatment suffered by the applicants 'were based on adequate assessment of all the relevant' facts.[368]

Self-evidently, the threshold requiring that the Article 3 effective investigation obligation is met is not as high as the test for establishing that there has been a substantive violation. In *Stefan Iliev v Bulgaria* the Court concluded that police use of force to effect the arrest of the applicant did not meet the Article 3 minimum level of severity. The Court went on to find a procedural violation on grounds that the authorities were obliged to conduct an effective investigation where the medical evidence raised a reasonable suspicion that police caused the injuries suffered by the applicant in contravention of the domestic Criminal Code.[369]

In the 2015 case of *Cestaro v Italy* the Court set out at length the general principles on procedural obligations under Article 3 relating to the adequacy standard. Major importance attaches to the outcome of the investigation and criminal or disciplinary proceedings, including the severity of the sanction imposed in the event of a finding of liability. This is because of the deterrent effect of both criminal and disciplinary proceedings on police conduct and their more general purpose of preventing violations of the prohibition of ill-treatment.[370] It is essential for maintaining public confidence in law enforcement, and adherence to the rule of law, that during proceedings, including the trial stage, assaults against the physical and moral integrity of the individual are not allowed to go unpunished (this includes cases where the level of severity reaches the Article 8 but not the Article 3 threshold). Otherwise, it may appear that there is public tolerance or collusion in unlawful conduct on the part of State agents. A prerequisite for effective investigation are criminal law provisions that penalise ill-treatment that is contrary to Article 3. Without criminal legislation of this type, including provisions for adequate punishment, protection against torture and ill-treatment that are of fundamental value to democratic society will be undermined. In respect of disciplinary proceedings against a State

[366] *M. C. v Bulgaria* (Application no. 39272/98) Judgment of 4 December 2003, paragraph 153. http://hudoc.echr.coe.int/eng?i=001-61521.
[367] *Amadayev v Russia* (Application no.18114/06) Judgment of 3 July 2014, paragraph http://hudoc.echr.coe.int/eng?i=001-145227.
[368] *Milić and Nikezić v Montenegro* (Application nos. 54999/10 and 10609/11) Judgment of 28 April 2015, paragraph 81. http://hudoc.echr.coe.int/eng?i=001-154149.
[369] *Stefan Iliev v Bulgaria* (Application no. 53121/99) Judgment of 10 May 2007, paragraph 47. http://hudoc.echr.coe.int/eng?i=001-80484.
[370] On the obligation to deter see also Module VI.

agent charged with a criminal offence of ill-treatment, it is expected that he or she will be suspended from duty throughout proceedings and, if convicted, dismissed from service.[371]

Applying the general principles outlined above the Court listed three concerns in *Cestaro* v *Italy* regarding the obligation on the State to "*identify and, if appropriate, adequately penalise the perpetrators of acts contrary to Article 3."* Firstly, the failure to identify police officers responsible for the ill-treatment complained of. Secondly, statute-barring of offences and partial remission of sentence following conviction. And, thirdly, doubts as to the disciplinary measures taken against those responsible for the impugned ill-treatment.[372]

The Court was critical of the fact that police officers were able to refuse, with impunity, to provide the prosecuting authorities with the co-operation required to identify officers that may have been involved in the assault on the applicant.[373] The Court also pointed to the importance of ensuring that police officers engaged in an operation should be identifiable, otherwise there was a risk of breaching the obligation to conduct an effective investigation. [374]

The Court observed that under the law of the respondent State the offences committed against the applicant were statute barred before the appellate stages of criminal proceedings had been completed. The Court concluded that the Italian criminal legislation was inadequate in terms of the requirement to punish acts of torture and devoid of any deterrent effect capable of preventing similar future violations of Article 3.[375]

The Court also noted that it did not appear that police officers implicated in the acts of torture suffered by the applicant and other offences arising from the same police operation were suspended from duty during criminal proceedings. It was critical of the lack of information from the respondent State on the career development of the officers during the criminal proceedings or whether they faced disciplinary proceedings.[376]

Thoroughness

The thoroughness standard is set out in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* as follows:

> *"The investigation should be comprehensive in scope and address all of the relevant background circumstances, including any racist or other discriminatory motivation. It should be capable of identifying any systematic failures that led to the violation. This requires the taking of all reasonable steps to secure relevant evidence, such as identifying and interviewing the alleged victims, suspects and eyewitnesses; examination of the scene of the alleged violation for material evidence; and the gathering of forensic and medical evidence*

[371] *Cestaro* v *Italy* (Application no.6884/11) Judgment of 7 April 2015: paragraphs 205-210, http://hudoc.echr.coe.int/eng?i=001-153901.
[372] *Ibid*., paragraph 213.
[373] *Ibid*., paragraphs 214-216.
[374] *Ibid*., paragraph 217.
[375] *Ibid*., paragraph 225.
[376] *Ibid*., paragraphs 226/227.

by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner."[377]

Whereas the adequacy standard essentially relates to the purpose of the investigation, and is of major significance for policy, the thoroughness standard relates to operational matters and the way in which the investigation should be conducted. In *Ciorap v The Republic of Moldova (No. 5)*[378] the Court noted that there must be a serious attempt to discover what happened and reliance on hasty or ill-founded conclusions should be avoided: "*Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of those responsible for them will risk falling foul of this standard."*[379]

In *Milić and Nikezić v Montenegro*[380] the Court's finding of a procedural violation of Article 3 was based on the applicants' allegation, not disputed by the Government, that the State Prosecutor did not obtain all relevant video-recordings of the prison corridor and did not take the Ombudsman's findings of fact into account when discontinuing criminal proceedings.

In *Siništaj & Others v Montenegro* the Court found that the investigation into the injuries suffered by the third applicant was not thorough. The Court observed that the applicant and injuries to him noted by the investigating judge and a prison doctor were ignored by the Internal Control Department in their investigation into complaints of ill-treatment made by all seven applicants.[381]

When observing the lack of thoroughness in investigations the Court has set out a broad range of operational measures that are required for an investigation to comply with Article 3. There is not an exhaustive list, and some examples of what is expected at the various stages of the investigation process are given here.

The making of a formal complaint often serves to trigger an investigation. In regard to the statement of the complainant, it is necessary to take a full and accurate statement covering all

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[377] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraphs 33/34. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraph 69. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 80. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[378] (Application no. 7232/07) Judgment of 15 March 2016. http://hudoc.echr.coe.int/eng?i=001-161373.

[379] *Ciorap v The Republic of Moldova (No. 5)* (Application no. 7232/07) Judgment of 15 March 2016, paragraph 60. http://hudoc.echr.coe.int/eng?i=001-161373.

[380] (Application nos. 549910/10 and 10609/11) Judgment of 28 April 2015, paragraph 99. http://hudoc.echr.coe.int/eng?i=001-154149.

[381] *Siništaj & Others v Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, Paragraph 148: http://hudoc.echr.coe.int/eng?i=001-158885.

of the circumstances of their complaint,[382] and make a careful objective assessment of their complaint.[383]

The evidence of witnesses is crucial to a thorough investigation and establishing the facts. There is an expectation that reasonable efforts will be made to trace witnesses, including members of the public[384] and police or prison officers,[385] for the purpose of obtaining full and accurate statements.[386]

In Article 3 investigations, the position of State agents with powers to resort to coercive force may prove to be problematic. This is particularly the case in regard to whether they are interviewed as witnesses or suspects. In the interest of conducting a thorough investigation the Court is unequivocal in requiring that where issues of criminal culpability may arise, interviewing police officers accused or suspected of wrongdoing as a suspect entitled to due process safeguards,[387] and not allowing them to confer with colleagues before providing an account.[388]
The gathering of the available evidence by use of non-interrogative methods is crucial to thoroughness, and reasonable efforts must be made to secure, gather and analyse all of the forensic,[389] medical[390] and video evidence.[391]

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[382] See, for instance, *Cobzaru* v *Romania* (Application no. 48254/99), Judgment 26 July 2007, paragraph 71. http://hudoc.echr.coe.int/eng?i=001-81904; *J. D.* v *Croatia* (Application no. 42418/10) Judgment of 24 July 2012, paragraph 90. http://hudoc.echr.coe.int/eng?i=001-112321; *El Masri* v *The Former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, paragraph 187. http://hudoc.echr.coe.int/eng?i=001-157670. .

[383] See, for instance, *Bouyid* v *Belgium* (Application no.23380/09) Judgment of 28 September 2015, paragraph 130: http://hudoc.echr.coe.int/eng?i=001-157670.

[384] See, for instance, *Ognyanova and Choban* v *Bulgaria* (Application no. 46317/99), Judgment 23 February 2006, paragraph 110. http://hudoc.echr.coe.int/eng?i=001-72549.

[385] See, for instance, *Artyomov* v *Russia* (Application no. 14146/02) Judgment of 27 May 2010, paragraph 180. http://hudoc.echr.coe.int/eng?i=001-98717; *Ciorap* v *The Republic of Moldova (No. 5)* (Application no. 7232/07) Judgment of 15 March 2016, paragraph 64. http://hudoc.echr.coe.int/eng?i=001-161373.

[386] See, for instance, *Assenov and Others* v *Bulgaria* (Application no. 24760/94) Judgment of 28 October 1998, paragraph 103. http://hudoc.echr.coe.int/eng?i=001-58261; *El Masri* v *The Former Yugoslav Republic of Macedonia* (Application no. 39630/09), Judgment of 13 December 2012, paragraph 187. http://hudoc.echr.coe.int/eng?i=001-157670.

[387] See, for instance, *Ramsahai* v *The Netherlands* (Application no. 52391/99), Judgment 15 May 2007, paragraph 330; http://hudoc.echr.coe.int/eng?i=001-80563.

[388] See, for instance, *Virabyan* v *Armenia* (application no. 40094/05) Judgment of 2 October 2012, paragraph 175. http://hudoc.echr.coe.int/eng?i=001-113302.

[389] See, for instance, *Tangiyev v Russia* (Application no. 27610/05) Judgment of 11 December 2012, paragraph 53. http://hudoc.echr.coe.int/eng?i=001-115209; *Naboyshchikov* v *Russia* (Application no. 21240/05) Judgment of 27 October 2010, paragraphs 70/71. http://hudoc.echr.coe.int/eng?i=001-107167.

[390] See, for instance, *Aksoy* v *Turkey* (Application no. 21987/93) Judgment of 18 December 1996, paragraph 56. *http://hudoc.echr.coe.int/eng?i=001-58003; J. D.* v *Croatia* (Application no. 42418/10) Judgment of 24 July 2012, paragraph 90. http://hudoc.echr.coe.int/eng?i=001-112321; *Dedovskiy and Others* v *Russia* (Application no. 7178/03) Judgment of 15 May 2009, paragraph 89. http://hudoc.echr.coe.int/eng?i=001-86218.

[391] See, for instance, *Ciorap* v *The Republic of Moldova (No. 5)* (Application no. 7232/07) Judgment of 15 March 2016, paragraph 66. http://hudoc.echr.coe.int/eng?i=001-161373.

In regard to the rigour required when gathering evidence several principles have been laid down by the Court that relate to thoroughness. It is necessary to pursue lines of inquiry on grounds of reasonable suspicion and not to disregard evidence in support of a complaint.[392] This means not uncritically accepting evidence, particularly where police testimonies are concerned;[393] or where the evidence is against a complaint.[394] Furthermore, where there is conflicting evidence, attempts to reconcile contradictory evidence or discard evidence that supports the applicant's allegation should be avoided.[395]

In recognition of the difficulties involved in proving discrimination in violation of Article 14 of the ECHR, an additional duty is imposed on investigators to thoroughly examine all of the facts to uncover any possible discriminatory motives for alleged violations of Article 3 on grounds of race,[396] political,[397] religious,[398] or sexual orientation[399] bias, for example.

Independence and impartiality

The independence and impartiality standard is set out in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* as follows:

> *"Persons responsible for carrying out the investigation must be impartial and independent from those implicated in the events. This requires that the authorities who are implicated in the events can neither lead the taking of evidence nor the preliminary investigation; in particular, the investigators cannot be part of the same unit as the officials who are the subject of the investigation."*[400]

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[392] See, for instance, *Aydin v Turkey* (Application no. 23178/94) Judgment of 25 September 1997, paragraph 98. http://hudoc.echr.coe.int/eng?i=001-58138.

[393] See, for instance, *Virabyan* v *Armenia* (application no. 40094/05) Judgment of 2 October 2012, paragraph 167. http://hudoc.echr.coe.int/eng?i=001-113302.

[394] See, for instance, *Cobzaru* v *Romania* (Application no. 48254/99), Judgment 26 July 2007, paragraph 72. http://hudoc.echr.coe.int/eng?i=001-81904;

[395] See, for instance, *Mikhail Nikolayev* v *Russia* (Application no. 40192/06) Judgment of 6 December 2016, paragraph 100. http://hudoc.echr.coe.int/eng?i=001-169199.

[396] See, for instance, *Nachova and Others* v *Bulgaria* (Application nos. 43577/98 and 43579/98), Judgment 6 July 2005, paragraphs 160-164; *B. S.* v *Spain* (Application no. 47159/08), Judgment 24 July 2012, paragraph 62. http://hudoc.echr.coe.int/eng?i=001-112459.

[397] See, for instance, *Virabyan* v *Armenia* (application no. 40094/05) Judgment of 2 October 2012, paragraph 224. http://hudoc.echr.coe.int/eng?i=001-113302.

[398] See, for instance, *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v *Georgia* (Application no. 71156/01) Judgment of 3 May 2007. http://hudoc.echr.coe.int/eng?i=001-80395.

[399] See, for instance, *M. C. and A. C.* v *Romania* (Application no.12060/12) Judgment of 12 April 2016. http://hudoc.echr.coe.int/eng?i=001-161982.

[400] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraph 32. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*Council of Europe, CommDH(2009)4, paragraphs 63-66. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54;

The independence and impartiality standard relates to the persons that are responsible for conducting the investigation, including the direction, management and the carrying out of the investigation, and the exercise of their professional judgment and application of investigative expertise. In *Siništaj & Others* v *Montenegro* the Court noted that the investigation into the injuries suffered by the third applicant was not independent:

> *"The only action undertaken .. was apparently the investigation of the Internal Police Control, which can be neither considered independent, given that it was done by the police themselves."*[401]

Questions concerning the independence of investigations into allegations of torture and ill-treatment, as well as other alleged violations of personal integrity under Articles 2, 4 and 8 of the ECHR have been prominent in the Court's jurisprudence and Council of Europe guidance on effective investigations.[402] In regard to the independence of an investigation into an allegation that a fatal police shooting was in violation of Article 2 the Court observed: *"What is at stake here is nothing less than public confidence in the State's monopoly on the use of force."* [403]

It is generally held that the most effective investigations into allegations of serious human rights abuse by State agents should be directed, managed and carried out by investigators that are members of an agency that is separate and unconnected to the agency that the State agents implicated in the events are members of.[404]

UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 79. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[401] *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, paragraph 148. http://hudoc.echr.coe.int/eng?i=001-158885.

[402] *CPT Standards*, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, pages 102-107. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*, Council of Europe, CommDH(2009)4. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54: *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177.

[403] *Ramsahai* v *the Netherlands* (Application no. 52391/99) Judgment of 15 May 2007, paragraph 325. http://hudoc.echr.coe.int/eng?i=001-80563.

[404] *"Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated." CPT Standards*, page 105, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, pages 102-107. http://www.cpt.coe.int/en/documents/eng-standards.pdf. See also, paragraph 32 of the *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*, *"The existence of an Independent Police Complaints Body with comprehensive responsibilities for oversight of the entire police complaints system makes an important contribution to the independence principle. IPCB responsibility for recording and allocation of the procedure for handling a complaint is fully compliant with the expectation that in addition to practical independence there should be a lack of institutional or hierarchical connection between investigators and the officer complained against."*
Council of Europe, CommDH(2009)4.
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54.

Some examples of cases where the Court has noted deficiencies with the independence of investigations into alleged violations of Article 3 include the following.

- Where an investigation was carried out by colleagues of the police officer alleged to have ill-treated the applicant;[405]
- Where the investigation was conducted entirely within the chain of command of the same police unit which had been implicated in the incident;[406]
- Where the same investigator was responsible for the investigation of a criminal allegation against the applicant as the applicant's allegation of ill-treatment arising from the same incident;[407]
- Where the prosecuting authority responsible for initiating an investigation into the applicant's allegation of ill-treatment while detained by police refers the complaint back to the same police unit where he was detained;[408]
- The presence of a police officer during an applicant's medical examination, which the Court observed would have caused the applicant to refrain from showing more of his injuries for fear of further ill-treatment;[409]
- Ineffective judicial control over investigating bodies;[410] and
- Concern with the 'formal and *de facto* independence' of the forensic doctor responsible for the examination of the applicant, particularly in regard to the recording of the possible origin of injuries.[411]

The independence and impartiality standard is pivotal to the effectiveness of an investigation and overlaps with the operational imperatives associated with the thoroughness standard. In *Mikhail Nikolayev v Russia*, for example, the Court found that the *"investigating authority's conclusions were not based on a thorough, objective and impartial analysis of all the relevant elements."*[412] In addition to serving as a policy imperative, namely ensuring that there is a 'lack of hierarchical and institutional connection', the independence and impartiality standard also has an operational imperative, namely requiring that investigators apply their independent and

[405] See, for instance, *Najafli v Azerbaijan* (application no. 2594/07) Judgment of 2 October 2012, paragraph 52. http://hudoc.echr.coe.int/eng?i=001-113299.
[406] See, for instance, *Mafalani v Croatia* (Application no. 32325/13) Judgment of 9 July 2015, paragraph 99. http://hudoc.echr.coe.int/eng?i=001-155826
[407] See, for instance, *Timofejevi v Latvia* (Application no. 45393/04) Judgment of 11 December 2012, paragraph 98. http://hudoc.echr.coe.int/eng?i=001-140238.
[408] See, for instance, *Vovruško v Latvia* (Application no. 11065/02) Judgment of 11 December 2012, aragraph 50. http://hudoc.echr.coe.int/eng?i=001-115204.
[409] See, for instance, *Buhaniac v the Republic of Moldova* (Application no. 560740/10) Judgment of 28 January 2014, paragraph 39. http://hudoc.echr.coe.int/eng?i=001-140238.
[410] See, for instance, *Sochichiu v Moldova* (application no. 28698/09) Judgment of 15 May 2012, paragraph 41. http://hudoc.echr.coe.int/eng?i=001-110913.
[411] See, for instance, *Ochelkov v Russia* (Application no. 17828/05) Judgment of 11 April 2013, paragraph 103. http://hudoc.echr.coe.int/eng?i=001-118385.
[412] See, for instance, *Mikhail Nikolayev v Russia* (Application no. 40192/06) Judgment of 6 December 2016, paragraph 101. http://hudoc.echr.coe.int/eng?i=001-169199.

impartial judgment to the evidence, described by the Court in the *Mikhail Nikolayev* case as 'a thorough, objective and impartial analysis'.[413]

The current leading judgment in the Strasbourg jurisprudence in this area is the Article 2 case of *Mustafa Tunç and Fecire Tunç* v *Turkey.* In this case the Court examined the meaning of independence in the context of the thoroughness of the investigation into the fatal shooting of a conscript soldier.[414] The Court considered the independence and impartiality of the investigation in terms of the statutory independence of the authorities responsible for the investigation, relationships between individual members of those authorities and the person implicated in events and the manner in which the investigation was handled. The Court concluded that the investigation was sufficiently independent within the meaning of Article 2 despite the fact that statutory independence of the investigating authorities was lacking. The Court took into account that there was no direct connection between investigators and the potential suspect and the way in which the investigation was handled did not reflect a lack of independence and impartiality.[415] *Tunç* v *Turkey* is important for clarifying that the independence and impartiality standard is not restricted to institutional arrangements, and also pertains to the operational aspects of an investigation.

The investigation responsibilities of police officers has proven to be particularly problematic in regard to compliance with the independence and impartiality standard, and has resulted in the Court finding the respondent State to be in breach of the procedural obligation on many occasions: Montenegro, for example, in *Siništaj & Others* v *Montenegro.*[416] For this reason, the independence and impartiality standard has been to the fore of institutional and capacity building across Europe, and the Council of Europe supports police and criminal justice reform programmes in several member States.

A margin of appreciation is available to the State to determine how to comply with the independence and impartiality standard within the parameters set by the Court. In some States, separate jurisdictions that make up the United Kingdom (England and Wales, Scotland and Northern Ireland), Denmark and Ireland for example, independent police complaints bodies have been created. These independent bodies have statutory powers to investigate police officers and oversee the conduct of internal police investigations into allegations of criminal and disciplinary offences. Standard practice in the United Kingdom, for example, is for the independent body to investigate all cases where the ECHR obligation to conduct an effective investigation is engaged. The existence of an independent body with powers to investigate

[413] See also, the Court noting 'subjective' assessments by the prosecution in *Artyomov* v *Russia* (Application no. 14146/02) Judgment of 27 May 2010, paragraph 181. http://hudoc.echr.coe.int/eng?i=001-98717; and, further, the Court's observations on the self-acknowledged lack of impartiality of the police investigator in *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v *Georgia* (Application no. 71156/01) Judgment of 3 May 2007, paragraphs 117/118. http://hudoc.echr.coe.int/eng?i=001-80395.

[414] *Mustafa Tunç and Fecire Tunç* v *Turkey* (Application no. 24014/05) Judgment of 14 April 2015, paragraphs 217-256. http://hudoc.echr.coe.int/eng?i=001-154007.

[415] *Ibid*., paragraph 254.

[416] *Siništaj & Others* v *Montenegro* (Application nos. 1451/10, 7260/10 and 7382/10) Judgment of 24 November 2015, paragraph 148. http://hudoc.echr.coe.int/eng?i=001-158885.

criminal justice agents, whether police, prison or prosecution officials, does not guarantee compliance with the procedural obligation to investigate. This may be on grounds that independence and impartiality has been compromised, and failure to independently and impartially examine the evidence (as alerted to in *Mustafa Tunç and Fecire Tunç v Turkey*[417]) as a consequence of historical or continuing connections between investigators and potential suspects, collusion between investigators and the criminal justice agency which the potential suspect is a member of, or institutional capture of the independent body by the criminal justice agency.

The independence models developed in the United Kingdom operate in criminal justice systems where the police have responsibility for the conduct of criminal investigations. In jurisdictions where the prosecution authority has responsibility for criminal investigations, in some countries with the involvement of an investigating magistrate also, like Montenegro, the conduct of the preliminary investigation and the carrying out of investigative tasks by police officers is problematic. Although a prosecutor may have responsibility for the investigation and direct police officers, the fact that police officers carry out the investigation is a cause for concern. Problems may also arise as a result of the close working relationship between prosecutors and police when working on standard criminal cases and the risk of collusion when investigating allegations of human rights abuse. In Scandinavian countries, Norway for example, an independent and separate unit within the prosecution authority with sole responsibility for investigating criminal allegations and prosecuting police officers was created for the purpose of addressing this problem. In Moldova, by way of contrast, an independent unit within the prosecution service was created to investigate allegations of serious human rights abuse. In Slovenia a specialist unit of the Public Prosecutor's Office has responsibility for investigating criminal allegations against police officers and an external oversight mechanism is in operation. A similar model is currently under development in the former Yugoslav Republic of Macedonia. An external oversight mechanism in the form of a newly created independent body, including representatives of civil society, will have powers to review investigations conducted by the specialist prosecutor and serve as an appellate authority.[418]

Procedures for investigating torture and ill-treatment currently operating in Montenegro would appear to be vulnerable to further challenge for failure to comply with the thoroughness and independence and impartiality standards. Set out in the Criminal Procedure Code (CPC),[419] the police are required to inform the State prosecutor of a suspected criminal offence and take the necessary measures to secure evidence either at the direction of the State Prosecutor or their own initiative. The Internal Control Department (ICD) is a separate department in the Ministry of Internal affairs which has responsibility for investigating the police.[420] ICD investigators are

[417] *Mustafa Tunç and Fecire Tunç v Turkey* (Application no. 24014/05) Judgment of 14 April 2015, paragraph 254. http://hudoc.echr.coe.int/eng?i=001-154007.
[418] Council of Europe, *Support to the Establishment of an External Oversight Mechanism in "the former Yugoslav Republic of Macedonia"*. http://www.coe.int/en/web/criminal-law-coop/home-fyrom-oversight.
[419] See Articles 257, 258, 261, 263 and 264; Official Gazette of the RoM Nos. 70/2003, 13/2003, 47/2006 and the Official Gazette of MNE Nos. 40/2008, 25/2010, 32/2011, 64/11, 40/13, 56/13 and 42/15
[420] See Articles 114-119 of the law on Internal Affairs; Official Gazette of MNE Nos 44/2012, 36/2013 and 1/2015.

police officers recruited from the Ministry of Internal Affairs. When investigating suspected offences committed by police officers, including ill-treatment and torture,[421] they are e regulated by the standard CPC investigation provisions. The meetings held with key stakeholders in Montenegro during the preparatory work by the CoE consultants indicate that even after criminal proceedings have been initiated the prosecution still relies on the support of, and actively engages with, police structures or the ICD and other subdivisions of the Ministry of Internal Affairs when handling investigative activities and assembling evidence.

The Action Plan submitted by the State Agent of Montenegro to address the ECtHR's finding in *Siništaj & Others*[422] sets out the general measures taken by the authorities to prevent ill-treatment in police detention, including measures aimed at ensuring the effective investigation of complaints of ill-treatment. The Action Plan emphasises the importance of training, and details the training programmes arranged for and completed by police and prosecutors. The Action Plan does not address the ICD or the concerns expressed by the Court in *Siništaj & Others* in regard to the Department's independence and impartiality.[423]

Promptness

The promptness standard is set out in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* as follows:

> *"The investigation must be commenced with sufficient promptness in order to obtain the best possible amount and quality of evidence available. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The investigation must be completed within a reasonable time and, in all cases, be conducted with all necessary diligence."*[424]

Promptness and timeliness are essential operational components of an effective investigation. This is particularly the case at the outset, the period that criminal investigators commonly refer to as the 'Golden Hour' when there is a need to secure the scene or ensure crucial evidence is

[421] Articles 166a and 167 of the Criminal Code (Official Gazette of the RoM Nos. 70/2003, 13/2003, 47/2006 and the Official Gazette of MNE Nos. 40/2008, 25/2010 and 3 2/2011)

[422] Action Plan (07/12/2016) Communication from Montenegro concerning the case of Siništaj against Montenegro (Application No. 1451/10): http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1404E.

[423] See above relevant comments suggested in Section 4.2.4 of the current course.

[424] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraph 35. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraphs 70-73. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 79. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

not lost. Examples of investigatory practices where the Court has found that the promptness standard has not been met include cases where there the opening of an investigation was delayed. Almost two years after events, for example, 'when the chance of collecting any evidence of alleged ill-treatment was almost illusory',[425] and failure of the authorities to explain the length of proceedings.[426] Once opened, the Court has been critical of delays identifying, tracing and interviewing a suspect;[427] conducting a medical examination;[428] forensic analysis;[429] and tracing and taking a statement from an independent witness.[430] Further, the Court has raised concerns where, following timely initiation, the investigation became protracted.[431]

In addition to serving as an operational imperative, the promptness standard serves policy imperatives of maintaining public confidence in the rule of law and preventing the appearance of collusion or tolerance of unlawful acts.

In *Afet Süreyya Eren v Turkey* the Court turned to the procedural limb of Article 3 after finding that the applicant had been tortured when questioned by police officers about her membership of a prohibited political party. A number of shortcomings were noted by the Court, including a decision not to bring criminal proceedings after the initial investigation; substantial delays in subsequent proceedings and their discontinuation after seven years and eight months due to prescription; and no indication that the accused police officers were suspended during proceedings. Finding that there had been a violation of the procedural obligation to conduct an effective remedy and, after stressing the substantial delay in the conduct of proceedings, the Court stated *"the perpetrators of acts of violence enjoyed virtual impunity, despite the evidence at hand."*[432]

In *Bouyid* v *Belgium* the Court pointed out that the investigating authorities failed to devote the 'requisite attention' to the applicants' allegations, which involved a law enforcement officer slapping an individual who was completely under his control, and where their complaints took

[425] *Preminy* v *Russia* (Application no. 44973) Judgment of 10 February 2011, paragraph 109; http://hudoc.echr.coe.int/eng?i=001-90413; see also, *Ciorap* v *The Republic of Moldova (No. 5)* (Application no. 7232/07) Judgment of 15 March 2016, paragraph 62. http://hudoc.echr.coe.int/eng?i=001-161373.
[426] *Preminy* v *Russia* (Application no. 44973) Judgment of 10 February 2011, paragraph 113; http://hudoc.echr.coe.int/eng?i=001-90413.
[427] See, for instance, *Basenko* v *Ukraine* (application no. 24213/08) Judgment of 26 November 2015, paragraph 64. http://hudoc.echr.coe.int/eng?i=001-158881;
[428] See, for instance, *Ochelkov* v *Russia* (Application no. 17828/05) Judgment of 11 April 2013, paragraph 103. http://hudoc.echr.coe.int/eng?i=001-118385; *Valeriu and Nicolae Rosca* v *Moldova* (application no. 41704/02) Judgment of 20 October 2009, paragraph 67. http://hudoc.echr.coe.int/eng?i=001-95259.
[429] See, for instance, *Kirpichenko* v *Ukraine* (Application no. 38833/03) Judgment of 2 April 2015, paragraph 86. http://hudoc.echr.coe.int/eng?i=001-153351.
[430] See, for instance, *Ochelkov* v *Russia* (Application no. 17828/05) Judgment of 11 April 2013, paragraph 105. http://hudoc.echr.coe.int/eng?i=001-118385.
[431] See, for instance, *Belousov* v *Russia* (Application no. 1748/02) Judgment of 2 October 2008, paragraph 53. http://hudoc.echr.coe.int/eng?i=001-88663; *Angelova and Iliev* v *Bulgaria* (Application no. 55523/00) Judgment of 26 July 2007, paragraph 101. http://hudoc.echr.coe.int/eng?i=001-81906.
[432] *Afet Süreyya Eren v Turkey* (Application no. 36617/07) Judgment of 20 October 2015, paragraph 46. http://hudoc.echr.coe.int/eng?i=001-158025; see also, *Mezut Deniz* v *Turkey* (Application no. 36716/07) Judgment of 5 November 2013, paragraph 55. http://hudoc.echr.coe.int/eng?i=001-127613.

nearly five years and four years and eight months, respectively, to come to trial. [433] In *N. D. v Slovenia* the Court did not accept the Government's argument that delays to criminal proceedings were the result of a backlog of cases, and noted that hardly any procedural work was undertaken between the time the prosecutor lodged the indictment and nearly six years later when the rape case came to trial.[434]

Public Scrutiny

The public scrutiny standard is set out in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations* as follows:

> *"There should be a sufficient element of public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts. Public scrutiny should not endanger the aims of the investigation and the fundamental rights of the parties."*[435]

Openness and transparency are core features of a democratic society. Like the promptness standard, the public scrutiny standard relates to public confidence and the importance of protecting against the perception of collusion or tolerance of unlawful conduct. The origins of the public scrutiny effective investigation standard may be found in the *McCann v the United Kingdom* judgment. Establishing that all of the circumstances surrounding the deprivation of life must be subjected to careful scrutiny,[436] the Court determined that the actions of the State were subjected to 'extensive, independent and highly public scrutiny' in open court (inquest proceedings to establish the cause of death) and were sufficient to meet the procedural requirement under Article 2.[437] In the 2001 *Jordan v the United Kingdom* decision, another Article 2 case connected to a counter-terrorism operation by security forces in Northern Ireland, the Court cautioned that the level of public scrutiny should not be regarded as an automatic requirement and must be decided on a case by case basis. This was on grounds that

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[433] *Bouyid v Belgium* (Application no.23380/09) Judgment of 28 September 2015, paragraphs 131/132: http://hudoc.echr.coe.int/eng?i=001-157670.

[434] *N D v Slovenia* (Application no. 16605/09) Judgment of 15 January 2015, paragraph 60. http://hudoc.echr.coe.int/eng?i=001-150310.

[435] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraph 36. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraphs 74-76. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 79. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[436] *McCann v the United Kingdom* (Application no. 18984/91), Judgment 27 September 1995, paragraph 161. http://hudoc.echr.coe.int/eng?i=001-57943.

[437] *Ibid.*, paragraph 161.

the disclosure or publication of official documents may involve sensitive issues, including the importance of protecting the interests of private individuals and security operations.[438]

In the extraordinary rendition case of *El Masri* v *"the former Yugoslav Republic of Macedonia"* the Court addressed the importance of public scrutiny in terms of the 'right to the truth'.[439] In this regard the Court contributed to the growing international jurisprudence on the issue and followed interventions in the case by the United Nations Office of the High Commissioner for Human Rights (OHCHR); Redress; Amnesty International and the International Commission of Jurists.[440] The OHCHR promotes the right to the truth as a stand-alone right that should not be subject to limitations, and stresses that the right is closely connected to the obligation on the State to effectively investigate gross human rights violations and guarantee effective remedies and reparation.[441]

In the *El Masri* judgment the inadequacy of the investigation into the applicant's allegations of rendition, torture and ill-treatment is addressed in terms of its impact on the right to truth. The Court asserted that the right to know what happened in a case of 'extraordinary rendition', which attracted much attention around the world and was subjected to investigation by international bodies, as well as being of importance to the applicant and his family was also of significance to victims of similar crimes and the general public. The Court expressed concern that the concept of 'state secrets' serves to obstruct the search for truth, and a Council of Europe investigation into the instant case found that the respondent State hid the truth and gave an obviously false account of the actions of national authorities and the Central Intelligence Agency of the USA.[442]

Victim involvement

The requirement for the involvement of victims in the investigation and proceedings is set out separately to the above five standards in a stand-alone section in the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*. The standard is set out as follows:

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[438] *Jordan* v *the United Kingdom* (Application no. 24746/94) Judgment of 4 May 2001, paragraph 121. http://hudoc.echr.coe.int/eng?i=001-59450.

[439] *El Masri* v "*the former Yugoslav Republic of Macedonia*" (Application no. 39630/09), Judgment of 13 December 2012, paragraph 192. http://hudoc.echr.coe.int/eng?i=001-115621. See also, *Husayn (Abu Zubaydah)* v *Poland* (Application no. 7511/13) Judgment of 24 July 2014, paragraphs 489/490. http://hudoc.echr.coe.int/eng?i=001-146047; *Al Nashiri* v *Poland* (Application no. 28761/11) Judgment of 24 July 2014, paragraphs 495/496. http://hudoc.echr.coe.int/eng?i=001-146044.

[440] *El Masri* v "*the former Yugoslav Republic of Macedonia*" (Application no. 39630/09), Judgment of 13 December 2012, paragraphs 175-179. http://hudoc.echr.coe.int/eng?i=001-115621.

[441] *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, UN Commission on Human Rights, 2006, E/CN.4/2006/91, paragraph 56. http://www.refworld.org/docid/46822b6c2.html.

[442] *El Masri* v "*the former Yugoslav Republic of Macedonia*" (Application no. 39630/09), Judgment of 13 December 2012, paragraphs 191/192. http://hudoc.echr.coe.int/eng?i=001-115621.

"1. States should ensure that victims may participate in the investigation and the proceedings to the extent necessary to safeguard their legitimate interests through relevant procedures under national law.

"2. States have to ensure that victims may, to the extent necessary to safeguard their legitimate interests, receive information regarding the progress, follow-up and outcome of their complaints, the progress of the investigation and the prosecution, the execution of judicial decisions and all measures taken concerning reparation for damage caused to the victims.

"3. In cases of suspicious death or enforced disappearances, States must, to the extent possible, provide information regarding the fate of the person concerned to his or her family.

"4. Victims may be given the opportunity to indicate that they do not wish to receive such information.

"5. Where participation in proceedings as parties is provided for in domestic law, States should ensure that appropriate public legal assistance and advice be provided to victims, as far as necessary for their participation in the proceedings.

"6. States should ensure that, at all stages of the proceedings when necessary, protection measures are put in place for the physical and psychological integrity of victims and witnesses. States should ensure that victims and witnesses are not intimidated, subject to reprisals or dissuaded by other means from complaining or pursuing their complaints or participating in the proceedings. These measures may include particular means of investigation, protection and assistance before, during or after the investigation process, in order to guarantee the security and dignity of the persons concerned."[443]

The victim involvement standard ensures that the complainant has access to the investigation process for the purpose of safeguarding their legitimate interests. In a number of cases the Court has expressly referred to the failure of the authorities to involve victims in investigation and criminal proceedings including, for example:

- Refusal of the authorities to formally grant victim status to applicants;[444]
- Denial of access to materials,[445] including non-disclosure of forensic reports;[446]

[443] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations.* Council of Europe, H/Inf (2011) 7, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1769177. See also, 'Combating impunity', Chapter VIII of the *CPT standards: "Substantive" sections of the CPT's General Reports*, Council of Europe, CPT/Inf/E (2002) 1 - Rev. 2015, paragraph 36. http://www.cpt.coe.int/en/documents/eng-standards.pdf; *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police* Council of Europe, CommDH(2009)4, paragraphs 77-79. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806daa54; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1, paragraph 81. http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[444] *Begheluri and Others* v *Georgia* (Application no. 28490/02) Judgment of 7 October 2014, paragraph 140. http://hudoc.echr.coe.int/eng?i=001-146769.

[445] *Kolpak* v *Russia* (application no. 41408/04) Judgment of 13 March 2012, paragraph 68. http://hudoc.echr.coe.int/eng?i=001-109518.

- Not promptly informing applicants of developments in proceedings; [447]
- Prosecutor ignoring legal representations made on behalf of clients;[448] and
- Denial of opportunities to challenge delays to proceedings.[449]

The Court developed its jurisprudence on the right to the truth (see above) in the extraordinary rendition case of *Husayn (Abu Zubaydah)* v *Poland*. The Court noted that, in spite of the 'official secrecy' arguments put forward by the Government (to the victim and the European Court of Human Rights in the course of proceedings), the public interest had been partly met with the publication of details of criminal proceedings in the national press. The Court found that non-disclosure of the full case file by the authorities to the applicant's counsel hindered his capacity to properly represent his client during domestic proceedings and subsequently in proceedings before the ECtHR.[450]

5.4 Conclusion

In this Module the set of predominantly operational requirements under the positive procedural obligation to conduct an effective investigation into an alleged violation of Article 3 has been examined in detail.[451] The obligation to investigate serious human rights abuse is laid down in United Nations treaties and practical guidance is provided in a range of United Nations instruments. The obligation has also been developed in the Strasbourg jurisprudence on Articles 2, 3 and 8 of the ECHR.

Primary importance attaches to the cross-cutting ECHR effective investigation standards, which have been referred to by a variety of names, for understanding how the authorities in Council of Europe member States may meet the investigative obligation. In this module, six standards have been referenced in the Council of Europe literature and the Strasbourg jurisprudence: adequacy; thoroughness; independence and impartiality; promptness; public scrutiny; and victim involvement. Failure of a competent investigation authority to comply with these standards when responding to a complaint of torture or ill-treatment leaves the State vulnerable to a finding by the European Court of Human Rights of breach of their procedural obligation under Article 3.

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[446] *Hilal Mammadov* v *Azerbaijan* (Application no. 81553/12) Judgment of 4 February 2016, paragraph 97. http://hudoc.echr.coe.int/eng?i=001-160318.
[447] *Paduret* v *Moldova* (Application no. 33134/03) Judgment of 5 January 2010, paragraph 66. http://hudoc.echr.coe.int/eng?i=001-96440; *Ognyanova and Choban* v *Bulgaria* (Application no. 46317/99), Judgment 23 February 2006, paragraph 115. http://hudoc.echr.coe.int/eng?i=001-72549..
[448] *Ghiurău* v *Romania* (Application no. 55421/10) Judgment of 20 November 2012, paragraph 67. http://hudoc.echr.coe.int/eng?i=001-114665.
[449] *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v *Georgia* (Application no. 71156/01) Judgment of 3 May 2007, paragraphs 117/118. http://hudoc.echr.coe.int/eng?i=001-80395.
[450] *Husayn (Abu Zubaydah)* v *Poland* (Application no. 28761/11) Judgment of 24 July 2014, paragraphs 495/496. http://hudoc.echr.coe.int/eng?i=001-146044; see also, (Application no. 7511/13) Judgment of 24 July 2014, paragraphs 489/490. http://hudoc.echr.coe.int/eng?i=001-146047
[451] For further related standards please consult Module VI of the current course.

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Module VI
Procedural Obligations

- **Combating impunity**
- **Initiation of investigation**
- **Judicial deterrence/general prevention**
  - **Substantive criminal legislation (classification in law)**
  - **Adequacy of sanctions/punishment**
- **Role of different legal professions**

6.1 Procedural obligation and combating impunity

As discussed in Module V, despite the lack of express wording, Article 3 of the ECHR has been read as also placing a legal obligation upon member states to take positive action in order to prevent ill-treatment and remedy it, if it occurs. It has been devolved as a combination of its substantial articles with the Article 1 duty to secure the rights and freedoms enshrined in the Convention. The word "secure" raises the inference of the existence of positive obligations to take measures to ensure that rights are adequately protected both in law and in practice.

The essence and overarching goal of the procedural duty to carry out effective investigations into indications of deliberate ill-treatment and bring perpetrators to justice comprises maintaining public confidence in authorities' adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[452] As a sequence, it serves the purpose of enforcing the absolute nature of the prohibition of deliberate ill-treatment and is to ensure deterrent effect to prevent it in future. Thus, the fight against an impunity for deliberate ill-treatment and other serious human rights violations beyond the individual interests of the single victim is of particular importance for the rule of law.It is an overarching goal of the set of requirements and standards under consideration.

The CPT guidance is instructive on this matter and can be illustrated by the 14th General report, which is understood as the imperative that as a result of taking investigative and other procedural steps and related measures: 'No one must be left in any doubt concerning the commitment of the State authorities to combating impunity. This will underpin the action being taken at all other levels. The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not

[452] See *mutatis mutandis*, *Amine Güzel* v. *Turkey*, Judgment of 17 September 2013, application no. 41844/09, para. 39. http://hudoc.echr.coe.int/eng?i=001-71594.

followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity.

The obligation to eradicate impunity for serious human rights violations has been substantiated by the Guidelines of the Committee of Ministers of the Council of Europe of 30 March 2011. According to them the need to combat impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account. When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations. In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings. 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.

6.2 Initiation of investigation

The international standards assist in immediate recognition of the grounds for starting pre-trial procedures with regard to indications of possible violations of the prohibition of torture and ill-treatment. This is the first stage to be followed by investigation and prosecution of relevant cases, where appropriate.

There are detailed international standards that answer the question: 'When is an investigation required with regard to ill-treatment?' It is answered by Article 12 of the UN Convention Against Torture, which stipulates: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is *reasonable ground to believe that an act of torture has been committed."*[453]

The essence of this standard can be explained by the developments in the approach of the Strasbourg court. Until recently it considered the existence of an 'arguable claim' as a pre-requisite of the responsibility to investigate ill-treatment to be engaged.[454] Initially it was expected that an alleged victim had to complain in order for the obligation to investigate to occur. However, having been presented with wide variety of different circumstances, it tightened its standards, requiring an investigation even in the absence of an articulated claim (complaint). The obligation to initiate an investigation into torture or other forms of deliberate ill-treatment now exists where there are 'sufficiently clear indications' that ill-treatment 'might have occurred'.[455]

[453] Emphasis added.
[454] See *Kuznetsov* v. *Ukraine*, Judgment of 29 April 2003, application no. 39042/97, para. 105. http://hudoc.echr.coe.int/eng?i=001-61060.
İpek v. *Turkey*, Judgment of 17 February 2004, application no. 25760/94, paras. 187, 198, and 199. http://hudoc.echr.coe.int/eng?i=001-61636.
[455] *Bati and Others* v. *Turkey*, Judgment of 3 June 2004, applications nos. 33097/96 and 57834/00, para. 100.

This approach is in line with the Istanbul Principles[456] and supported by the CPT standards.[457] The Strasbourg Court endorsed Principle 2 of the former which provides that '[e]ven in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred.'[458] In other words, the obligation to investigate arises even in the absence of an express complaint when other sufficiently clear indications of such ill-treatment are evident.[459] However, it does not exist if the allegation or indications are inherently implausible. Credible accounts of excessive use of force or of physical or psychological abuse during detention thus call for investigation,[460] as do allegations that the use of physical force by police officers was not warranted in the circumstances.[461]

This clearly has implications for prosecutors (and judges), as noted by the CPT:

> *". . . the CPT has found that, in certain countries, prosecutorial authorities have considerable discretion with regard to the opening of a preliminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a legal obligation to undertake an investigation whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred."*[462]

Enquiries must therefore be undertaken where possible ill-treatment is indicated by visible injuries, a person's general appearance or demeanour, and other relevant indications.[463] So, the wordings 'plausible allegations *or other indications of ill-treatment*' or 'credible accounts of ill-treatment' are those that secure prospects and avenues for the initiation of investigations.

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http://hudoc.echr.coe.int/eng?i=001-61805; *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v. *Georgia*, Judgment of 3 May 2007, application no. 71156/01, para. 97. http://hudoc.echr.coe.int/eng?i=001-80395.

[456] Istanbul Principles, para. 2.

[457] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1

[458] Istanbul Principles, para. 2.

[459] *Ilhan* v. *Turkey*, Judgment of 27 June 2000, application no. 22277/93, para. 63. http://hudoc.echr.coe.int/eng?i=001-58734.
Ipek v. *Turkey* 2004-II, para 169 (the authoritiesmust act of their own motion, once the matter has come to their attention). http://hudoc.echr.coe.int/eng?i=001-61636.
See also *Aksoy v Turkey* 1996-VI, para 59 (visible evidence of bruising ignored by the prosecutor 'tantamount to undermining the effectiveness of any other remedies that may have existed. http://hudoc.echr.coe.int/eng?i=001-58003.

[460] *Maslova and Nalbandov v Russia*, Judgment of 24 January 2008, application no. 839/02 para 91. http://hudoc.echr.coe.int/eng?i=001-84670.

[461] *Kaya v Turkey*, Judgment of 19 February 1998, application no. 22729/93, para 87. http://hudoc.echr.coe.int/eng?i=001-58138.

[462] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1

[463] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 28. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1

At the initial stages of determination of relevant accounts, it is difficult to decide on the definitional thresholds and differences between torture and other forms of ill-treatment.[464] It is not only a high degree of physical or psychological harm that matters in this regard and engages the obligation to investigate. So, it is sometimes not so clear whether there are all elements of the crime of torture or deliberate ill-treatment. That is why there exists no exhaustive list of situations and indications giving rise to this duty. In view of the potential variables that might exist from one case to the next, the Court operates for this purpose with the term 'seriousness' of ill-treatment. At the same time, the case law of the Strasbourg Court is illustrative of the main scenarios that lead to the obligation to investigate.[465]

In terms of procedural formats of an investigation to be carried out, the international standards imply that they should be sufficient for ensuring its effectiveness. In combination with the standards on classification in law[466] it means that for incidents indicative of torture or other deliberate ill-treatment, it should be carried out within a fully-fledged criminal investigations (a format of pre-trial inquiries or other less advanced investigative frameworks do not suffice). Thus, the ECtHR has identified it as a systemic deficiency *"refusals to investigate on the basis of the separate procedure provided for under . . . the Code of Criminal Procedure."*[467] Accordingly, whenever the competent authorities face sufficiently clear indications of a deliberate ill-treatment they should initiate criminal procedures and investigate them in this format.

International standards equally require that all the aspects or ill-treatment-related incidents are investigated and tackled. It applies to other less serious violations. They should at least lead to disciplinary, administrative or civil responsibility in accordance with domestic law and procedure, and no ill-treatment should go unpunished.[468] The ECtHR is indeed attentive towards the disciplinary procedures and responsibility of those implicated in ill-treatment. It has stressed that the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as any disciplinary measures taken are considered decisive.[469] The CPT emphasises the important role of disciplinary procedures in the investigative system. It has emphasised that disciplinary proceedings provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context;

[464] See General Comment N2, CAT/C/GC/2, para. 3.
http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/GC/2
[465] For the set of factual circumstances that trigger the obligation to investigate, see Module V.
[466] See relevant section of the current presentation below.
[467] Kaverzin v *Ukraine*, Judgment of 15 May 2012, application no. 23893/03, para. 177.
http://hudoc.echr.coe.int/eng?i=001-110895
[468] See for example the Court's Judgment in *Zelilof* v. *Greece*, Judgment of 24 May 2004, application no. 17060/03, para. 58; http://hudoc.echr.coe.int/eng?i=001-80623. see also *Menesheva* v. *Russia*, Judgment of 9 March 2006, application no. 59261/00, para. 68. http://hudoc.echr.coe.int/eng?i=001-72700.
[469] See *Cestaro* v *Italy*, Judgment of 7 April 2015, application no.6884/11, paras. 205-210
http://hudoc.echr.coe.int/eng?i=001-153901. See also Module V of the current course.

for example, adjudication panels for police disciplinary proceedings should include at least one independent member.[470]

It should be noted that where judicial procedures result only in the payment of compensation, which is an important part of remedies, and not in the punishment of those responsible for ill-treatment, they, nevertheless, cannot be considered part of a system for the effective investigation of ill-treatment.[471] It is clear from the case law, that the ECtHR views compensation for damages through civil and administrative avenues as falling squarely outside the procedural head of Article 3. They are considered as a separate remedy covered by the obligations under Article 13 of the ECHR. Its effectiveness as a remedy may depend, however, on the results of the investigation. For example, in *Cobzaru* v. *Romania* that concerned the failure of the authorities to carry out an effective investigation into the applicant's allegation that he was ill-treated by the police, when he had gone to the local police station following an incident at his girlfriend's flat, as well as the refusal by the authorities to carry out a prompt, impartial and effective investigation into his allegations due to discriminatory reasons related to his Roma origin. The ECtHR has found that any other remedy available to the applicant, including a claim for damages, had limited chances of success and could be considered as theoretical and illusory, and not capable of affording redress to the applicant. While the civil courts have the capacity to make an independent assessment of fact, in practice the weight attached to a preceding criminal inquiry is so important that even the most convincing evidence to the contrary furnished by a plaintiff would often be discarded and such a remedy would prove to be only theoretical and illusory.[472]

6.3 Combating impunity/judicial deterrence

There was a comparatively recent development in the ECtHR case law that crystallises the simple logic of prevention of ill-treatment through combating impunity. It has completed a 'loop' of interrelation between the substantial standards and procedural aspect of the prohibition of ill-treatment. The Strasbourg Court has emphasized that the obligation to combat impunity is an indispensable prerequisite of its prevention. In *Valeriu and Nicolae Rosca* v *Moldova* the Strasbourg Court stressed that an appropriate punishment in terms of both adequacy of the sanction imposed and the specific classification of the wrongdoing as ill-treatment are indispensable for combating it.

It is to be noted in this regard that the relevant section of the judgment is entitled "Preventive effect of the prohibition of ill-treatment". With this the Court has spelled out that the existence

[470] 14th General Report on the CPT's activities, CPT/Inf (2004) 28, para. 27. http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2004-28-part-en-1

[471] *Krastanov* v. *Bulgaria*, Judgment of 30 September 2004, application no. 50222/99, para. 60. http://hudoc.echr.coe.int/eng?i=001-66796.

[472] *Cobzaru* v. *Romania*, Judgment of 26 July 2007, application no. 48254/99, para. 83; http://hudoc.echr.coe.int/eng?i=001-81904.

of relevant substantial criminal law framework and its appropriate application constitute part of the obligation to prevent ill-treatment. [473]

Thus, the international standards stipulate that a prevention of torture and other deliberate ill-treatment should comprise, firstly, domestic legislation explicitly providing for criminal responsibility for it. Secondly, these provisions should be effectively applied in practice and those guilty of torture or deliberate ill-treatment are appropriately punished. Through this, the individual prevention (i.e. those who committed torture/deliberate ill-treatment are not allowed to do that anymore) and, importantly, general prevention (i.e. when those minded to ill-treat are dissuaded from it) are ensured.

Substantive criminal legislation (classification in law)

The key UN anti-torture instrument, the Convention against Torture, directly obliges the state parties to implement and envisage in their legislation a crime of torture in line with the definition suggested in its Article 1. Moreover, Article 4 requires that each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. According to Article 16 of the same Convention they should prevent other acts of cruel, inhuman or degrading treatment or punishment, 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.[474]

Under the European framework, the parameters of the substantial legislation are being defined from the angle of the need to deter the would-be perpetrators of ill-treatment. Both the Court and the CPT underscore the importance of legal certainty in terms of how ill-treatment will be punished and under what provisions.

The rationale of the relevant move and direction in which the case law of the Strasbourg Court is moving can be further illustrated by the following deliberations from its judgment in *Paduret* v. *Moldova*. The Court criticized the domestic legislation where torture was considered an "average-level crime" and thus warranting reduced sentences. It stressed that such a position is absolutely incompatible with the obligations resulting from Article 3 of the Convention, given the extreme seriousness of the crime of torture. This was considered to be a failure to fully denounce the practice of ill-treatment by the law-enforcement agencies and that the legislation adopted to prevent and punish acts of ill-treatment was not given full preventive effect.[475]

Thus, the UN and European human rights law dictate that domestic legal frameworks, criminal legislation should provide for special *corpus delicti* establishing responsibility for torture and deliberate ill-treatment that fall short of it, but constitute (other cruel) inhuman or degrading

[473] *Valeriu and Nicolae Rosca* v. *Moldova*, judgment of 20 October 2009, paras. 71-75, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95259.
[474] See Module I of the course.
[475] *Paduret v. Moldova*, ECtHR judgment of 5 January 2010, para.77, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96440.

treatment or punishment. Abuse of power or other more general *corpus delicti* do not suffice since they blur the focus necessary for having targeted preventive effect with regard torture and other forms of deliberate ill-treatment.[476]

The CPT has also highlighted, that it is essential that the appropriate charge be brought against persons suspected of ill-treatment. It has criticised practices when action taken by prosecutors is limited to bringing a case for 'arbitrary acts'.[477]

Furthermore, the Strasbourg Court assesses the adequacy of the range of punishments in relation to the types of culpability involved, particularly where a combination of criminal and disciplinary sanctions is expected to follow. It has stressed that even assuming that perpetrators were suspended, it remains the fact that no disciplinary proceedings were ever taken against the officers or disciplinary penalties imposed on them, although the sentences pronounced against them comprised not only imprisonment but also disciplinary measures of suspension from duty.[478]

As discussed,[479] the CPT also strongly criticises failures to apply disciplinary measures when relevant violations are established. Thus, it disapproved the situations, where despite the fact that the alleged ill-treatment was confirmed by the prosecutor, no disciplinary measures were taken to assess the role of the police officers present during the incident (for example, none of the police officers present had reported the ill-treatment to the competent prosecutor, although they had been under a legal obligation to do so).[480]

There is also a need to differentiate between ill-treatment attributable to the state (state agents) and private individuals. However, as to the obligation to investigate ill-treatment by the latter category of perpetrators, it maintains that the procedural obligation in issue also applies to the incidents concerning vulnerable categories of victims, including the context of discrimination and related persecution.[481]

Adequacy of punishment

In order to deter state authorities and their representatives from mistreating those in their control, there must be serious consequences for perpetrators in terms of punishments. The international standards do not contain any formal scales in this regard. The UN Convention

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[476] For the outline of substantial criminal legislation in Montenegro see Module V of the current course.
[477] CPT's Report on the visit to Albania from 23 May to 3 June 2005, CPT/Inf (2006) 24, para. 54. http://www.cpt.coe.int/documents/alb/2006-24-inf-eng.htm.
[478] *Okkali* v. *Turkey*, Judgment of 16 October 2006, application no. 52067/99, para. 71 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77522.
[479] See the preceding section of the current Module.
[480] CPT's Report on the visit to Albania carried out from 13 to 18 July 2003, CPT/Inf (2006) 22, para. 38. http://www.cpt.coe.int/documents/alb/2006-22-inf-eng.htm
[481] *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others* v. *Georgia*, Judgment of 3 May 2007, application no. 71156/01, paras. 96 and 97, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80395 . See also Module V of the current course.

against Torture in para. 2 of its Article 4 just indicates that ill-treatment related offences are to be punishable by appropriate penalties which take into account their grave nature.

With respect to the proportionality of actual punishments applied to the perpetrators the Strasbourg Court has held that although it should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment, it must still intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.[482] The nuanced approach developed by the Court in this regard can be illustrated by the following deliberations:

> *". . . in the present case the three officers convicted of ill-treating the applicants were sentenced to three years' imprisonment and disqualification from working in a law-enforcement agency for two years. That term of imprisonment was the minimum penalty allowed by law (see paragraph 37 above). It is for the domestic courts passing sentence to set the penalty which they consider is most appropriate to ensure the educational and preventive effect of the conviction. The courts did so in the present case, and explained the reason for the leniency of the sentence by reference to the accused's relatively young age, lack of previous convictions, and the fact that they had families and were viewed positively in society (see paragraph 32 above). Under the domestic law the courts had to take into account both mitigating and aggravating circumstances. However, the courts were silent about a number of apparently applicable aggravating circumstances (expressly mentioned in Article 38 of the Criminal Code – see paragraph 37 above). In particular, none of the officers showed any signs of remorse, having denied throughout the proceedings any ill-treatment on their part.*
>
> *"The Court also notes that even the minimum sentence imposed on the officers was suspended with one year's probation, so that the officers did not spend any time in prison. Moreover, they were not suspended from their positions during the investigation (contrary to the recommendations of the Istanbul Protocol – see paragraph 43 above)."*[483]

The CPT, in its turn, suggests that it is axiomatic that no matter how effective an investigation may be, it will be of little avail if the sanctions imposed for ill-treatment are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity. The intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.[484]

Furthermore, international standards instruct that amnesties, pardons, other measures of clemency or impediments which preclude or indicate unwillingness to provide prompt and fair

[482] *Ali and Ayşe Duran* v. *Turkey*, Judgment of 8 April 2008, application no. 42942/02, para. 66, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85767.
[483] *Valeriu and Nicolae Rosca* v. *Moldova*, judgment of 20 October 2009, paras. 72-73, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95259.
[484] CPT Standards. CPT/Inf/E (2002) 1, page 104, para. 41, http://www.cpt.coe.int/en/documents/eng-standards.pdf.

prosecution and punishment of perpetrators, including full exemption from criminal or other responsibility due to favourable provisions of legislation on disclosure or repentance, frustrate the aims of effective investigation and combating impunity and should be avoided.

The restrictions on use of measures of clemency towards perpetrators of ill-treatment and other serious human rights violations is based on the indications suggested in a number of UN documents and Strasbourg Court judgments. The CAT has stated that amnesties and pardons "violate the principle of non-derogability".[485] The Human Rights Commission advanced the set of relevant standards by spelling out that the fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility. The disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.[486]

The Court has also taken a view that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.[487]

This view has been reaffirmed in a more recent judgment that concerned the right to life. With a reference to the abovementioned assertion, the Court made it clear that it:

> *". . .considers that when an agent of the State, in particular a law-enforcement officer, is convicted of a crime that violates Article 2 of the Convention, the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment (see, mutatis mutandis, Okkalı, cited above, § 76, and Abdülsamet Yaman v. Turkey, no. 32446/96, § 55, 2 November 2004). On the contrary, the Court expects States to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life-endangering crimes than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity the offenders may consider they enjoy by virtue of their very office and to maintain public confidence in and respect for the law-enforcement system (see, mutatis mutandis, Nikolova and Velichkova, cited above, § 63). In this regard, the Court considers that, as a matter of principle, it would be wholly inappropriate and would send a wrong signal to the public if the perpetrators of the very serious crime in question maintained eligibility for holding public office in the future (see Türkmen v. Turkey, no. 43124/98, § 53, 19 December 2006, and Abdülsamet Yaman, cited above, § 55)."*[488]

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[485] General Comment N2, CAT/C/GC/2, para.5. http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/GC/2

[486] United Nations, Econ. & Soc. Council, Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005). https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement

[487] *Abdülsamet Yaman* v. *Turkey*, Judgment of 2 November 2004, application no. 32446/96, para. 55, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67228.

[488] *Enukidze and Girgvliani* v. *Georgia*, Judgment of 26 April 2011, application no. 25091/07, para. 274

6.4 Role of different legal professions

International law and standards directly apply to states and only by implication concern and are addressed to specific authorities, bodies, officials, as well as other actors. It is up to the states to ensure that the responsibilities are distributed and channeled to those, who are in charge or implementing them in practice.

Thus, any failure in meeting the procedural obligations established by international instruments concern states. However, due to the nature of the obligations under consideration, which presuppose coordinated action and performance of the whole range of officials, institutions, representatives of different professions (legal and medical), even an isolated, but irreparable omission or failure to follow the requirements can undermine all the efforts and relevant framework introduced on the domestic level.

That is why in addition to introducing an appropriate system of investigation of ill-treatment and other serious human rights violations, an independent and effective police complaints body, guaranteeing effectiveness by means of providing them with adequate financial and technical resources and appropriately trained legal, medical and other specialists, it is crucial to identify and comprehend the roles of those who are police (law-enforcement) officers, investigators. prosecutors, investigative and trial judges, regular and free legal aid lawyers, as well as medical professionals involved.

Besides the overall negative obligation of refraining of ill-treatment, their expected input in ensuring an appropriate discharge of the procedural obligations can be summarized as follows:

- police (law-enforcement) officers are under the duty to report and record (if applicable) any indication of ill-treatment, as well as, where concerned, ensure proper implementation of the safeguards;
- investigators (besides the abovementioned obligations that apply to all law-enforcement officers), when carrying out an investigation of ill-treatment are to ensure that the requirements of independence (including in terms of ensuring immediate involvement of the competent body, if they do not meet the standard in issue) and other criteria of effectiveness of investigation are met;
- prosecutors have a special duty in terms of reacting to any indicia of ill-treatment that they come across in the course of administration of justice; they have special role in ensuring protection of persons deprived of their liberty and proper observation of all other safeguards against ill-treatment; when guiding investigations and prosecuting cases of ill-treatment they are to ensure, in their turn, that the requirements of independence (including in terms of ensuring immediate involvement of the competent body, if they do not meet the standard in issue) and other criteria of effectiveness of investigation are met; they are key actors in discharging the obligation of combating impunity, including in

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104636.

terms of required classification in law of the crimes comprising deliberate ill-treatment and ensuring adequacy of punishments imposed;

- judges are primarily concerned by the duty of reacting to any indicia of ill-treatment that they come across in the course of administration of justice, but have to ensure corresponding standards when handling procedures within framework of criminal cases of deliberate ill-treatment; they are also are primarily concerned by the duty of reacting to any indicia of ill-treatment that they come across in the course of trials, as well as implementation of the specific rules of admissibility of evidence tainted by ill-treatment; with regard to handling trials against those charged with the crimes concerning ill-treatment they are immediately responsible for meeting judiciary-related requirements of effectiveness of the criminal procedures and combating impunity, including adequacy of classification in law and punishment;
- medics' role with regard to ensuring effective investigation is mostly limited to the relevant safeguards and should meet the requirements of independence and thoroughness; and
- regular and free legal aid lawyers are to use all legal avenues for ensuring that all abovementioned and some other possible actors (monitoring and other bodies) discharge their duties and functions so that interests of (alleged) victims of ill-treatment are protected and recovered accordingly.

6.5 Conclusions

Without a positive obligation to investigate allegations or other indications of ill-treatment, the prohibition would be rendered theoretical and illusory, thus allowing state authorities and their agents to act with impunity. The duty to investigate serious (deliberate) ill-treatment as well as other serious human rights violations has an absolute character.

The existence of relevant substantial criminal law framework and its appropriate application constitute part of the obligation to prevent ill-treatment. States should enact substantial criminal and other legislation specifically criminalizing serious ill-treatment and establishing other responsibility for related violations. The legislation adopted to prevent and punish acts of ill-treatment is to be given full preventive effect by determining appropriate gravity and range of sanctions consistent with the seriousness of relevant violations.

Findings of serious ill-treatment should be classified in accordance with the specifically enacted legislation and should lead to appropriate criminal, administrative, and disciplinary penalties provided by law, which are proportionate to the gravity of the ill-treatment involved.

Training agenda

DAY I		
9.00 – 9.45	Interactive introduction to human rights and the prohibition of torture and ill-treatment	
9.45 – 10.30	Definitions of torture, inhuman and degrading treatment and punishment	Module I
10.30 – 10.45	Break	
10.45 – 11.30	Conditions of and health care in detention and judicial responsibilities	Module II
11.30 – 12.15	Additional judicial responsibilities • Inadmissibility of evidence • Extra Territoriality • Civil claims	Module III
12.15 – 12.45	Break	
12.45 – 14.15	Safeguards • Procedural • Organisational	Module IV
14.15 – 14.30	Break	
14.30 – 15.15	Exercises on Modules I-IV	
DAY II		
9.00 – 9.30	Interactive recap	
9.30 – 10.15	Effective investigation standards	Module V
10.15 – 10.30	Break	
10.30 – 11.15	Effective investigation standards	Module V
11.15 – 12.00	Exercises on the effective investigation standards	
12.00 – 12.30	Break	
12.30 – 13.30	Initiation of investigations, procedural obligations and combating impunity	Module VI
13.30 – 14.15	Exercises on initiation	
14.15 – 14.30	Break	
14.30 – 15.15	General discussion on combating impunity	
15.15	Concluding remarks	