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Reinforcing the Fight Against Ill-treatment and Impunity

Council of Europe and European Union Joint Programme

THE HANDLING OF COMPLAINTS ABOUT ILL-TREATMENT IN THE PENITENTIARY SYSTEM OF THE REPUBLIC OF MOLDOVA

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Summary

This assessment report is conceived as part of the Council of Europe (CoE) and European Union (EU) Joint Programme 'Reinforcing the fight against ill-treatment and impunity', which was launched on 01/07/2011. The scope of the research done in the framework this assessment is limited to the presence/ absence of effective institutional and procedural instruments for investigation of ill-treatment and the availability of an effective complaints mechanism in the Moldovan penitentiary system. This assessment has been carried out by studying the applicable international and national legal documents, guidelines and protocols, reports from international and national governmental and non-governmental monitoring bodies, case law of the European Court of Human Rights (ECtHR), consulting scientific publications, statistical information, interviewing representatives of key stakeholders and by paying a visit to prison No 13 in Chisinau. The preliminary findings of the assessment have been discussed at a round table in Chisinau on 3 December 2013 and the results of that meeting have been incorporated in this report.

Before dealing with the question whether there is a problem with the handling of *complaints* about ill-treatment in the penitentiary system, the question has to be answered whether there is any problem with ill-treatment in prisons at all. Indications for the incidence and character of ill-treatment in (remand)[2] prisons were found in the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visits to Moldova, judgments of the ECtHR on alleged violations of article 3 of the European Convention on Human Rights (ECHR), data on complaints about alleged ill-treatment provided by the Department of Penitentiary Institutions (DPI) and data provided by the National Preventive Mechanism (NPM)[3]/Ombudsman and the NGO's.

The sources that were consulted for this assessment gave no reason to assume that *torture* is a distinctive characteristic of the treatment of prisoners. But, be it that torture of prisoners is not so much an issue that needs to be 'combated', this does not imply that other forms of ill-treatment of prisoners wouldn't need due attention. Three threats of ill-treatment of prisoners deserve special consideration: 1) unwarranted or excessive use of force and 'special means', 2) substandard living conditions and 3) inter-prisoner oppression and violence as part of a prisoners' subculture.

[2] See the definitions under p. 2.4 below

[3] Established under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

Taken together the Criminal Code, the Criminal Procedure Code and the Enforcement Code offer sufficient legal possibilities for detecting (signs of) severe ill-treatment prisoners and for initiating criminal investigations that can lead to the identification, prosecution and punishment of the offenders concerned. However, the 'law in the books' is no guarantee for a good practice. Much depends on the presence and dissemination of by-laws, instructions and protocols that prescribe in detail how the law shall be implemented, as well as on the education, internal conviction of those responsible, or interpretation and practical implementation by them of the rules.

Where it takes already a big effort to identify cases of torture or other forms of serious ill-treatment by police and bring the alleged perpetrators to justice, it seems even more difficult to detect and counter the seemingly 'hidden' forms of ill-treatment in penitentiary institutions. The specific penitentiary setting of these problems calls for other solutions like enhanced monitoring and the enforcement of an effective complaints handling system.

All sources consulted acknowledge that the present prisoners' subculture - a heritage from soviet times – fosters a negative symbiosis between the informal prisoner 'bosses' and the official prison management. If this does not change, any attempts at legal and practical reform of the prison life seem bound to fail. Instead of relying on initiation of *criminal* investigations to 'combat' ill-treatment of prisoners it seems also important to start a *criminological* research project that would aim at analysing the present prisoners' subculture and its relation to prison management and would suggest to policy makers and legislators how to replace the present oppressive and violent living conditions of prisoners with a fair and just regime. It would be advisable to extend such a research project to all European former communist states because one can expect those states to cope to a smaller or greater degree with similar problems inherent to the prisoners' subculture.

In the meantime several legal and practical measures could be taken to minimize the risk of physical ill-treatment of prisoners and maximize the chance that cases of ill-treatment are detected timely and properly dealt with. These measures are formulated as recommendations in the 9th chapter of this report and regard *inter alia* the responsibilities of the medical staff, the regulation of the use of force, the function of the prison prosecutor, the role of civil monitoring commissions and the introduction of an effective complaints system for prisoners.

1 Introduction

1.1 CoE/EU Joint Programme 'Reinforcing the fight against ill-treatment and impunity'

This assessment report is conceived as part of the CoE/EU Joint Programme "Reinforcing the fight against ill-treatment and impunity", which was launched on 01/07/2011.[4] The overall objective of this programme is 'To develop national capacities for combating ill-treatment by law enforcement agencies and investigative institutions, including strengthening the effectiveness of investigations of allegations of ill-treatment.' One of the objectives of this programme is 'improving legislation/sub-legislation and reinforcing the institutional system and operational capacity for effective investigation of complaints of ill-treatment in line with applicable European and international human rights standards, including the CPT recommendations, the case law of the ECtHR and the Istanbul Protocol[5], leading to imposition of sanctions when appropriate.'

1.2 The scope of this assessment

The scope of the research done in the framework this assessment is limited to the presence/ absence of effective institutional and procedural instruments for investigation of ill-treatment and the availability of an efficient complaints mechanism in the Moldovan *penitentiary system*. In his *Country report on Moldova* of 2009 Eric Svanidze already has addressed quite comprehensively the problems connected with the fight against ill-treatment and impunity in. Where he has focused mainly on ill-treatment of suspects in police custody this report addresses police custody only where problems related to the transfer of suspects or accused persons from police cells to and from prisons are discussed.[6]

1.3 Research method and sources of information

This assessment has been carried out by studying the applicable international and national legal documents, guidelines and protocols, reports from international and national governmental and non-governmental monitoring bodies, case law of the ECtHR, by consulting scientific publications, statistical information, by interviewing

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[4] A short description of this programme can be retrieved on the internet: http://www.jp.coe.int/cead/jp/default.asp?TransID=212 (accessed 10/10/2013)

[5] Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, New York and Geneva, 2004. Annexes II (Anatomical drawings for documentation of torture and ill-treatment and) and III (Guidelines for the medical evaluation of torture and ill-treatment) of this Protocol just need to be copy-pasted.

[6] E. Svanisze's *Country report on Moldova "Combating ill-treatment and impunity and efficient investigation of ill-treatment"*, Chisinau 2009, p. 60. From the same author "*Stock-taking analysis of the implementation of the recommendations of the 2009 Country Report on Moldova*", [Strasbourg] April 2012.

representatives of key target groups[7] and by paying a visit to prison No 13 in Chisinau. The preliminary findings of the assessment have been discussed at a 'round table' conference in Chisinau on 3 December 2013 and the results of that meeting have been incorporated in this assessment report.

During the two day fact-finding visit there was no opportunity to carry out an in-depth study of all relevant documents. It would have contributed much to the value of the assessment if a random sample of medical files of prisoners could have been checked on reporting of injuries and their possible cause. It also would have been very useful if registers concerning the use of force and complaints registers - in as far as such registers are kept by penitentiary institutions and/or the DPI - could have been checked on indications of possible ill-treatment. Therefore further research is recommendable.

2 Some definitions and elucidations

2.1 Ill-treatment

In his brochure '*Combating ill-treatment and impunity*'[8] Mr Svanidze reminds us that: 'The European Convention on Human Rights and other European instruments do not offer definitions of torture, inhuman or degrading treatment or punishment.' 'However', goes on Mr Svanidze, 'there is an immediate answer to the question that is provided by common sense and the contemporary understanding of these words. It normally allows an ordinary person to identify torture or to presume that a particular treatment is inhuman or degrading and is, therefore, unacceptable.'

Ill-treatment in terms of this assessment encompasses torture, as well as inhuman and degrading treatment. Where torture is commonly understood as the intentional application of physical and/or psychological force to attain certain goals, like obtaining confessions, other forms of ill-treatment include not only intentional behaviour but also causing of suffering as a result of culpable negligence or the (cumulative) effect of sub-standard living conditions in prisons.

2.2 Impunity

[7] During a fact-finding visit from 24-25 October 2013 to Chisinau interviews were held with representatives of the Department of Penitentiary Institutions, the Prosecutions Service, the Centre for Human Rights, the Centre of Forensic Medicine, the National Legal Aid Council, the Supreme Court of Justice, the General Police Inspectorate, representatives of NGO's (the Human Rights Embassy and the Centre for Rehabilitation of Victims of Torture), criminal lawyers and with the Governmental Agent to the ECtHR.

[8] E. Svanidze, *Combating ill-treatment and impunity - Rights of detainees and obligations of law-enforcement officials: 11 key questions and answers*, Council of Europe/ European Union, Strasbourg 2010, p. 7-8.

Amnesty International has defined impunity as 'the failure to bring perpetrators of human rights violations to justice. It denies the victims their right to justice and redress.'[9] In terms of the *Guidelines of the Council of Europe on eradicating impunity for serious human rights violations* of 2011 'Impunity arises where those responsible for acts that amount to serious human rights violations are not brought to account.'[10]

Impunity implies that suspects of (serious)[11] human rights violations are not prosecuted or put on trial at all. Bit when human rights violators have been convicted and sentenced for their crimes, but are given lenient sanctions, pardoned or granted amnesty, this also amounts to (de facto) impunity. When 'only' disciplinary sanctions (like suspension or dismissal) are given to human rights violators and they are not prosecuted and tried for their deeds one still can speak of impunity. [12]

2.3 Effective remedies – effective investigations

Article 13 of the ECHR obliges states-parties to guarantee that everyone, whose rights and freedoms set forward in this convention are violated, shall have 'an effective remedy before a national authority' at his disposal. What should be understood by '*an effective remedy*' can be derived from the case-law of the ECtHR.[13] These criteria are spelled out in the *Guidelines of the Council of Europe on eradicating impunity for serious human rights violations*, mentioned above. They are:

Adequacy
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

[9] http://amnesty.ie/our-work/end-impunity-human-rights-violations (accessed 17/12/2013)
[10] *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011, Part I, § 1.
[11] It is open for debate under what circumstances a violation of a human right can or should be considered as 'serious'. The case law of the ECtHR offers guidance here, but its jurisprudence on this subject is developing continuously.
[12] In *Savin v. Ukraine* (16/02/2012, Appl. No. 34725/08) the ECtHR reiterated that when an agent of the State is accused of crimes involving torture or ill-treatment the granting of an amnesty or pardon should not be permitted and that it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted .
[13] See for instance ECtHR 12/2/2013, *Eduard Popa v. the Republic of Moldova*, appl. no. 17008/07, §§ 46-48.

to a particular result, but the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident.

Thoroughness
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 by competent specialists. The evidence should be assessed in a thorough, consistent and objective manner.

Impartiality and independence
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.

Promptness
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.

Public scrutiny
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."

The relevant international standards emphasise the need for victim involvement, particularly from the standpoint of the public scrutiny requirement. Thus, the CPT has endorsed the case law of the ECtHR in stating that:

> '36. In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the

case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'[14]

Important is that these guidelines state that combating impunity requires that there *must* be carried out an effective investigation in cases of serious human rights violations and that this duty has an absolute character. This implies that the investigating authorities shall not wait until an allegation of ill-treatment has been submitted by the victim, but shall act of their own motion, once the matter has come to their attention, even when a formal complaint has not been or probably will not be lodged by the victim.

Where grievance and inspection procedures yield information that is indicative of ill-treatment and when this 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. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.' The last two quotes above stem from the *14th General Report of the Committee for the Prevention of Torture* (CPT) that devotes special attention to combating impunity of officials that are responsible for torture and other forms of ill-treatment of persons deprived of their liberty.[15]

The CPT furthermore notes in § 27 of this report that in certain countries (like in Moldova; *GdJ*), 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. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.'

For the Moldovan legal practice it is relevant what the Supreme Court of Moldova stated about effective remedies in terms of the ECHR in an 'instructive' the judgment of 19 June 2000. The Plenary of the Supreme Court of Moldova said there that it is

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[14] *14th General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004* Strasbourg, 21 September 2004, (CPT/Inf (2004) 28), § 36.
[15] *Ibid*, §§ 25-42.

primarily for the domestic courts to apply the Convention and that they were obliged to be guided by the interpretations of the Convention given by the ECtHR: 'Where the national law does not provide for the right to an effective remedy in respect of a specific right under the Convention, the court shall receive that complaint and examine the case under civil or criminal proceedings, applying the provisions set forth in the ECHR directly.'[16]

2.4 Penitentiary institutions - prisoners

Penitentiary institutions in terms of this report are *remand prisons*[17] where not finally sentenced persons are detained and *prisons* where custodial sentences are executed.

For convenience in this report the word 'prison' includes the remand prison and the word 'prisoner' includes the pre-trial or remand prisoner, unless the use of the specific term is necessary. The term 'detainee' is used, in particular due to its presence in the available Moldova legislation translated into English, with the meaning of pre-trial or remand prisoner.

2.5 Complaints and complaints mechanisms

In the framework of this report a prisoners' complaint is defined as an oral or written objection to an act or decision of the director or other staff and employees of penitentiary establishments. Refusing or failing to act or to take a decision can also be the subject of a complaint.

Complaints are to be distinguished from requests for favours, privileges or information and from 'petitions' that refer to the general constitutional right of citizens to file petitions to administrative authorities.

In the context of this report a complaints mechanism is a procedural means for handling complaints of prisoners by the prison director or any other competent authority.[18]

3 Custodial measures and sentences - penitentiary institutions

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[16] Legal Resources Centre from Moldova, *Execution of Judgments of the European Court of Human Rights by the Republic of Moldova 1997-2012,* [Chisinau] 2012, 196 p. English version and 195 p. the Romanian version, p. 45.

[17] Other terms that are used for remand prisons are remand institutions, remand centres, pre-trial detention centers, investigatory isolators or SIZO's. In this report only the term 'remand prison' will be used.

[18] See Rules 70.1 and 70.3 of the European Prison Rules.

For the reader who is not familiar with the Moldovan penal and penitentiary system it seems useful to sketch out the main features of this system and its population, starting with a summary overview of the custodial measures and sanctions that are enforced in the institutions falling under the responsibility of the Department of Penitentiary Institutions, which is an independent sub-division of the Ministry of Justice.[19]

3.1 Types of custodial measures and punishments

The *Criminal Procedure Code* (CPC) provides for 2 types of custodial measures: the arrest (police custody) of suspects up to 72 hours (articles 11 § 4 and 165 CPC) and detention on remand of accused persons (articles 175 § 3 (11) and 185 CPC). The measure of arrest (police custody) is enforced in an 'arrest house' (art. 7 § 2g of the Law on the Penitentiary System). Detention on remand (pre-trial detention) is enforced in a 'isolator' (remand prison) as is stated in article 7 § 2 of the Law on the Penitentiary system.[20]

The *Criminal Code* (CC) provides for 3 types of custodial punishments for *adult offenders*: imprisonment from 3-20 years or maximum 3 years in case of a cumulation of crimes or substitution of life imprisonment by a milder punishment (art. 62 § 1f and 70 CC) and life imprisonment (art. 62 § 1g and art. 70 CC). The third type of punishment is administrative arrest for up to 90 days that can be applied to persons who are exempted from criminal liability[21] (art. 55 § 2, (b) CC)

Imprisonment of male adults is enforced in closed, semi open or open penitentiary institutions (prisons). Women and juveniles are placed in separate institutions (art. 6 § 2 Law on the Penitentiary system). Administrative arrest is executed in 'arrest houses' (art. 6 § 6 Law on the Penitentiary System).

For persons who at the date of the commission of the crime were under 18 years of age the maximum term of imprisonment is reduced by half but in case of a cumulation of crimes the maximum for juveniles is 12 years and 6 months (art. 70 § 3

[19] Art. 6 § 1 of the Law on the Penitentiary System.

[20] The semi-custodial preventive measure of house arrest (art. 175 § 3 (10) CCP) will be left aside in this report.

[21] Article 53 CC: (Exemption from Criminal Liability): 'A person who committed an act characterized by evidence of a criminal component may be exempted from criminal liability by a prosecutor during a criminal investigation or by a court during a case hearing in the following cases: a) juveniles; b) administrative liability; c) voluntary abandonment of a crime; d) active repentance; e) situation change; f) probation; g) criminal liability limitation period.

and 4 CC). This means that minors in Moldova face exceeding long maximum sentences, compared to other countries.[22]

Life sentences cannot be imposed on juveniles or women (art. 71 § 3 CC)

Next to these custodial punishments the CC provides for the following custodial measures that can be imposed (on adults as well as minors) instead of imprisonment or as an additional sanction: hospitalisation into a mental institution (art. 100 CC) and institutions for compulsory treatment of alcohol- or drug addicts (art. 103 CC). These measures are enforced in (usually) closed units of civil establishments. The enforcement of the medical coercive measures mentioned in art. 99 CC takes place in civil mental institutions under ordinary (civil) supervision.

3.2 The population of prisons[23]

The Moldovan prison population (including pre-trial detainees) amounted in 01/10/ 2013 to 6.666 persons, who were held in 17 establishments. 18.9 % of them were pre-trial prisoners. 6.2% (on 1/9/2011) of the total prison population was female, 0.1% were juveniles (on 01/10/2013) and only 1.6% (on 1/9/2011) was of foreign origin. The occupancy level of the cell/ dormitories (based on an official capacity of 7,844)[24] was on 01/10/2013 of 85%.[25] So officially there is no situation of overcrowding. It is not known whether some dormitories are overcrowded and others are 'under-populated', for instance to house privileged, powerful inmates (the 'bosses') in more comfortable circumstances.[26]

4 The incidence of ill-treatment in penitentiary institutions

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[22] For instance: the maximum term of imprisonment for juveniles in The Netherlands is 12 months for minors who were 12-16 years at the time of the crime or 24 months for those who were 16-18 years at the time of the crime. Juveniles who were 16-18 at the time of the crime can be sentenced as adults when they committed a very serious crime. Like in Moldova a life sentence is not applicable to minors.

[23] Source: the International Centre for Prison Studies of the University of Essex, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=155 (accessed 19/11/2013). For the original data go to:
http://www.penitenciar.gov.md/upload/f4%20la%2001-04-13_30_24.doc

[24] The legal norm of living space for prisoners in Moldova is 'at least 4 m2' (Art. 244 § 2 Enforcement Code). This is the norm for prisons. Whether this counts for remand centres is unclear.

[25] Source: International Centre For Prison Studies, http://www.prisonstudies.org/country/moldova-republic (accessed 18/12/2013)

[26] As noticed by an adviser of the OSCE during a visit in a prison in Transnistria (communicated to the author)

Before dealing with the question whether there is a problem with the handling of *complaints* about ill-treatment in the penitentiary system, the question has to be answered whether there is any problem with ill-treatment in prisons at all. Indications for the incidence of ill-treatment can be found in the reports of the CPT, judgments of the ECtHR, data on complaints about alleged ill-treatment provided by the Penitentiary Administration, data provided by the NPM/Ombudsman and by NGO's.

4.1 Findings of the CPT

The report of the CPT on its first visit to Moldova in 1998[27] makes mention of many allegations of physical ill-treatment of inmates by a *special intervention unit* of the DPI. Also *guards* would use physical force against inmates. The CPT vented its concern about the *intimidation and violence between prisoners* and strongly advised the government to develop a strategy to fight this phenomenon. The CPT described the detention conditions as inhuman and degrading. The Committee heard prisoners say that the lodging of complaints made no sense because complaining never led to anything. The CPT, underlining the important preventive value of monitoring prisons, saw that the prosecution service, that has by law the task of monitoring all penitentiary establishments, visited prisons only once a month. Allegations of physical ill-treatment of prisoners in penitentiary establishments in the Transnistrian region were noted in the report of the CPT on its visit to that region in 2000.[28] During the visit to Moldova in 2001 the CPT again heard of allegations of physical ill-treatment of prisoners by guards and again showed its concern about intimidation and violence among inmates. Interviews with guard and prisoners revealed *the presence of an organised hierarchy among the inmates*, based on a caste-system. The Moldovan government was advised again to develop a strategy to fight this phenomenon.[29] This recommendation has been repeated (evidently to little avail) in reports on subsequent visits.[30] Prison staff even told the CPT delegation that the

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[27] *Rapport au Gouvernement de la République de Moldova relatif à la visite en Moldova effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 11 au 21 octobre 1998*, Strasbourg, 14 décembre 2000, CPT/Inf (2000) 20, §§ 68-75 and 126-128.

[28] *Report on the visit to the Transnistrian region of the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 30 November 2000*, Strasbourg 2002, CPT/Inf (2002) 35, §§ 44-45.

[29] *Rapport au Gouvernement de la République de Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)du 10 au 22 juin 2001*, Strasbourg 26 juin 2002, CPT/Inf (2002) 11, §§ 76-77.

[30] *Rapport au Gouvernement de la République de Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 au 25 novembre 2005*, Strasbourg 4 décembre 2008, CPT/Inf (2008) 35, § 19.

internal hierarchy of prisoners was indispensable to administer the penitentiary establishments properly.[31]

The problems caused by the persistent prisoners' subculture were discussed once more in CPT's report on its visit to Moldova in 2010.[32] It still existed in one of the penitentiary institutions that were visited then, but seemed no longer dominating the relations between prisoners and guards in the other penal institution visited by the Committee, thanks to long-time efforts of personnel to counteract the prisoners' hierarchy. The CPT advised the Moldovan authorities to pursue their efforts to fight violence and intimidation between inmates. The Committee furthermore pointed at the role of the medical staff in combating inter-prisoner violence. It recommended the Moldovan authorities to draft strict directives that are to be followed by the medical staff when they examine prisoners after violent incidents. Such directives should indicate clearly that the results of such examinations (verbal statements of the prisoner and the conclusions of the medical doctor included) shall be added to the medical file and also be handed to the prisoners involved, who should have access to a forensic doctor for further examination. When the results of the medical examination give rise to the suspicion that the prisoner could be the victim of ill-treatment (who-ever the inflictor might be) this should be brought to the knowledge of the prison inspectorate and the prosecution service, that should investigate the case with due diligence and should see that effective preventive measures are being taken. Dixit CPT.

During its visit to Moldova in 2011[33] most cases of torture and other forms of ill-treatment the CPT heard of concerned the treatment of suspects by police in police premises. The ill-treatment of detainees and prisoners in the establishments that were visited by the CPT delegation was of a different, more structural nature, like have to live in dormitories with insufficient floor space and being subjected to the oppressive subculture, leading to the oppression, beatings and exploitation of vulnerable prisoners. Certain inmates were labelled as 'querulous', because they irritated the staff by lodging complaints or threatening to do so. Other prisoners, the 'humiliated', form the lowest group in the informal hierarchy and are ill-treated by everybody else. The CPT thinks it is worrying that all this is happening with full the knowledge, even the approval or cooperation of the staff. That is why the CPT urges

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[31] *Rapport au Gouvernement de la République de Moldova relatif à la visite* effectue*e en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 20 au 30 septembre 2004*, Strasbourg 16 février 2006, § 65.

[32] *Rapport au Gouvernement de la Moldova relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Moldova du 21 au 27 juillet 2010,* Strasbourg, le 3 mars 2011, CPT/Inf (2011) 8, §§ 9-11.

[33] *Rapport au Gouvernement de la Moldova relatif à la visite effectuée en Moldova par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 1er au 10 juin 2011*, CPT/Inf (2012) 3

the Moldovan authorities to develop constructive relations between personnel and inmates, based in the concept of 'dynamic security'.

The foregoing suggests that ill-treatment of detainees and prisoners is mainly an issue among themselves and that (physical) ill-treatment of prisoners by staff is not the most important aspect. Still the CPT heard in the two penitentiary establishment it has visited in 2011 allegations of the use of excessive force by *the special intervention unit 'Pantera'*, the members of which operates wearing balaclavas but are identifiable by the badges on their (black) clothing. Complaints were also heard about the use of '*special means'* (means of restraint like handcuffs) and *random beatings* during walks in the free air. It is disquieting that the CPT could not find any written reports about the necessity of the use of force or 'special means'.[34]

4.2 The ECtHR on ill-treatment of prisoners in Moldova

Taking into account that the circumstances in the penal institutions where the complaints about ill-treatment have originated may have improved substantially over the last years, an analysis of judgments of the ECtHR of cases concerning alleged ill-treatment shows that complaints concern often poor detention conditions as a consequence of overcrowding and usually are qualified as violations of art. 3 of the Convention.[35] Torture and other forms of physical ill-treatment of prisoners do not figure in the judgements of the Court over the last two years. Apparently, only one case concerning alleged physical ill-treatment in a remand centre would be pending.[36]

The majority of complaints to the Court about sub-standard detention conditions refer to the conditions in prison nr. 13 in Chisinau. The (cumulative) effects of the living conditions there have been denounced by the Court repeatedly ever since its judgment in the case of *Ostrovar v. Moldova*.[37] The complaints concern mainly the cramped conditions in cells and dormitories, the quality of food, sanitary conditions and medical care. In some cases the applicants stated that they had lodged complaints about their living conditions but got no or unsatisfactory replies from the addressees of the complaints.

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[34] Report on CPT's visit to Moldova in 2011, footnote 40.

[35] *Hadji v. Moldova*, 14/02/2012, Appl. Nos. 32844/07 and 41378/07; *Arseniev v. Moldova*, 20/03/2012, Appl. Nos. 10614/06 10620/06; *Culev v. Moldova*, 17/04/2012, Appl. No. 60179/09; *Plotnicova v. Moldova*, 15/05/2012, Appl. No. 38623/05; *Constantin Modarca v. The Republic Of Moldova*, 13/11/2012, Appl. No. 37829/08; *Ciorap c. République De Moldova* (N° 3), 04/12/2012, Appl. No. 32896/07; *Mitrofan v. The Republic Of Moldova*, 15/01/2013, Appl. No. 50054/07 and *Segheti V. The Republic Of Moldova*, 15/10/2013, Appl. No. 39584/07.

[36] As stated by the Agent of the Republic of Moldova to the ECtHR during an interview on 26/10/13.

[37] 13 September 2005, Appl. No. 35207/03, § 80,

4.3 The Department of Penitentiary Institutions (DPI)

Interviewed representatives of the DPI did not make mention of special problems regarding the ill-treatment of prisoners. They assured that prisoners were free to complain to the relevant authorities about the way they were treated and that at their admission to a penitentiary institution they were informed about their rights and obligations. Confidentiality was assured because written complaints addressed to the administration and the others (e.g. relatives, Ombudsman, prosecutor, the President of the Republic, etc.) could be posted in a letterbox of which each penitentiary institution would have one on every floor. These letterboxes would be surveyed by video cameras lest nobody would tamper with them. However, detainees would prefer handing their written complaints over to the prison administration through the prison guards. In prison no. 13 it was said that usually prisoners made their 'petitions' orally known to the staff during the daily roll calls (headcounts). All complaints would be registered by the unit-heads of the prisons.

Complainants could also use a 'hot' (telephone) line', that connects the caller to the 'security unit' of the DPI. These calls are not registered yet but in the future they will be. In additions to these avenues for lodging complaints it was said that each prison has appointed staff as 'tutors' who hold office hours for inmates 2-3 times a month as to offer prisoners the opportunity to discuss their grievances.

The DPI presented the following aggregated data on complaints. In 2011 4.000 complaints had been registered; in 2012 3.600 and in the first 9 months of 2013 2.235. 68% of these 'petitions' (like complaints were called by the DPI representatives) were submitted by prisoners, the rest by 'civilians'. Since new legislation is in place more petitions are being submitted. Prisoners were said to be less afraid than before (! *GdJ*) to lodge complaints about their treatment. Sometimes they even submitted joint petitions. For instance: all 'lifers' have jointly had requested to be granted longer family visits.
Some complaints had been forwarded to the prosecutor for investigation. In 2009 this had happened 10 times. It was not said what the character of those complaints was nor what had been the outcome of the investigations.

Prevention of ill-treatment would get the necessary attention of the DPI: at admission and at release all prisoners are medically examined. To combat ill-treatment, the personnel is instructed how to act when traces of ill-treatment are detected

Asked about the effects of the 'prisoners' subculture' our interlocutors acknowledged that there was 'a form of co-operation between prisoners and staff' stemming from Soviet times. What this co-operation entailed was not specified. This phenomenon

would be enhanced by the fact that inmates have to live together in large dormitories. 'If we had smaller cells the problems would be less', it was said.

The complaints procedure, the Department said, is under review in the framework of the Strategy of the Justice Sector Reform for 2011-2016.

4.4 Findings of the Ombudsman

One of the agencies that are available to inmates to complain about alleged ill-treatment and other grievances is the Ombudsman (the Centre for Human Rights of the Republic of Moldova) who deals with all sorts of complaints. The staff of the Ombudsman can freely visit prisons and have access to all materials they wish to consult. Since the Ombudsman operates also as a National Preventive Mechanism (NPM) in terms of the OPCAT[38] the amount of complaints has risen significantly. Complaints often are submitted while members of the Ombudsman's staff are visiting a penal institution.

According to the report on its activities in 2012[39] the Ombudsman, received during that year 1.766 complaints, from which 31% came from prisoners and detainees. Relatively often the complaints of detainees and prisoners concern *insufficient access to medical care*. Staff-members of the Ombudsman's office said that many convicted inmates are afraid to complain because the informal leaders forbid them to do so. Most inmates would not like their fellow-prisoners to lodge complaints because this would cause 'trouble' and would interfere with the 'normal' prison life (that is to say: with the prisoners' subculture). Prison governors would make use of informal leaders to maintain discipline. Prisoners who want to lodge a complaint are discouraged to do so by the prison administration ('How do you think to live here the next years?').

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[38] The modalities for the creation and functioning of the NPM of Moldova were determined by the Law no. 200-XVI from 26 July 2007 and the Decision of the Moldovan Parliament no. 201- XVI from 26 July 2007, which modified the Regulations concerning the Centre for Human Rights. On 8 February 2008, the Subcommittee was officially notified on the designation of the Centre for Human Rights (the National Human Rights Institution), in combination with the Consultative Council, as a NPM of Moldova. Source: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Moldova*
*Report for the national preventive mechanism**,CA T/OP/MDA/R.1, 9 January 2013.

[39] Source: http://www.ombudsman.md/sites/default/files/rapoarte/raport2012-final.pdf, accessed 27/11/2013. page. 433

Pre-trial prisoners would be less afraid to lodge complaints about their treatment because normally they stay not very long in a remand centre and thus have less to fear from possible reprisals by staff and fellow detainees. To the knowledge of the Ombudsman's representatives in prisons torture happens rarely. According to them the violence between prisoners is a far more serious problem.

The Ombudsman does not only deal with cases of alleged ill-treatment but with all sorts of complaints about violations of prisoner's rights. If a complaint concerns ill-treatment it is forwarded to the prosecutor in order to initiate a 'criminal case'. The Ombudsman is entitled to request the prosecutor to start criminal proceedings. The Ombudsman can request to start disciplinary procedures as well and can notify the Constitutional Court if necessary. Prison prosecutors are - in the view of the Ombudsman – too reluctant to investigate cases of ill-treatment as they should. The prosecutors fear 'an avalanche of petitions', if it would be known that they investigate *all* cases submitted to them, our interlocutors said.

The improvement of the conditions of imprisonment until now is limited. Only some refurbishing has been done. Especially the situation of life sentence prisoners is worrying: they lack a programme of meaningful activities and the visits to them are restricted. Of the three-tiered regime that consists of an initial phase, a 'common' phase and a re-socialisation phase only the first two parts are applicable to lifers.

In its annual report on 2012[40] the Ombudsman writes having made 60 visits to 15 penitentiaries, leading to recommendations concerning the conditions of detention, overcrowded dormitories, medical assistance, relations between convicts and the administration and the material equipment of the penitentiaries. The Ombudsman concludes that many of the problems signalled in its reports remain unsolved. The Ombudsman addressed the issue of irregular relations between prisoners also, especially the awkward position of the group of so-called 'humiliated' prisoners. The Ombudsman notes that in the majority of prisons the inmates live in 'barracks' (dormitories) with a capacity of 20-30 beds, which creates the preconditions for hierarchical relations among them. At the bottom of this hierarchy are the afore-mentioned 'humiliated' prisoners, who are separated from the others. They would get the worst food and have no access to showers like other convicts and no access to activities. Food parcels sent to them by relatives would be stolen by fellow prisoners. According to the Ombudsman, the administration of penitentiaries resort to the separation of the so-called 'humiliated' prisoners to be able to maintain the discipline in prisons, without making extra effort to eradicate the phenomenon of criminal subculture.[41] Penitentiary authorities would receive information and bribes from

[40] Centre for Human Rights of Moldova, *Report on the observance of human rights in the Republic Moldova*, Chisinau, 2013, Chapter II.2 – *Institutions under the Ministry of Justice*.
[41] Centre for Human Rights of Moldova, op. cit., p. 369

prisoners in exchange for certain favours. Superior penitentiary officials would tolerate this practice.

The Ombudsman further notes that complaints received by the DPI about unjustified application of 'special means' (handcuffs, etc.), searches and the use of force during transport of prisoners to its knowledge had not led to any investigations. On the other hand, in 2012, 13 cases were initiated against employees of the penitentiary system concerning abuse of power and 7 cases concerning alleged torture. One employee had been sentenced to one year of imprisonment. Several other employees would face disciplinary sanctions.

The Ombudsman reports that the 'hot line' for reporting cases of ill-treatment to the DPI would be functioning well (21 calls in 2012, one case under examination). There would be a decrease of complaints about the application of physical force and 'special means' as well as of the number of self-mutilations of prisoners and of bodily injuries afflicted by penitentiary personnel.

Prisoners complain mainly – the Ombudsman states – about the detention conditions, the quality of medical care, the quality and quantity of the food and, what the Ombudsman calls 'social protection measures'.

4.5 NGO's and lawyers

Discussing the avenues for complaints about ill-treatment available to prisoners, representatives of NGOs and lawyers showed themselves not satisfied with the present prisoners' complaints handling system and wondered, in particular, whether initiating civil proceedings (not tried until now) would prove a more effective tool to improve sub-standard detention conditions. They saw a definite task for the Bar here, but said also that most colleagues were not familiar with, or even interested in, the minimum standards for the treatment of prisoners or in prisoners' rights at all. The interviewees agreed with the idea that convicted prisoners should have ample access to free legal aid to defend their rights whenever necessary.

As the most pressing problems concerning ill-treatment they pointed at the inhuman living conditions of life sentenced prisoners and the frequent incidence of inter prisoner violence, the administration would do nothing against. Another highlighted problem was the ill-treatment of detainees and prisoners during transport, where they often would not be provided with food or drink.

The lawyers mentioned the many applications of arrestees, detainees and prisoners to the ECtHR, often concerning ill-treatment. They were worried about the tendency that in those cases the Moldovan government preferred to achieve 'friendly settlements' with the victims above judgements. This would have for a consequence

that the alleged offenders were not prosecuted or punished for their criminal behaviour.

5 Ill-treatment in penitentiary institutions – an interim assessment

When discussing the problem of torture and other forms of ill-treatment, most sources point at the police resorting repeatedly to physical ill-treatment of suspects as a means to extract confessions and other forms of co-operation with police investigations. Ill-treatment in penitentiary establishments seems of a different character and to have different causes than ill-treatment in police premises.

Ill-treatment during police custody is relevant in the context of penitentiary institutions when, during the medical check at admission, bodily injuries are found, possibly accompanied by a statement of the detainee how these were incurred. It is the responsibility of the medical staff of the prison to document such findings and to report them without delay to authorities that are empowered to investigate the cause of the injuries. This is not only in the interest of the alleged victim but also of the prison itself, were it would avoid being held responsible for injuries sustained before admission to the penal institution. This requires the presence and correct implementation of a protocol for medical examination, based on the guidelines that are to be found in the Istanbul Protocol.

The ongoing discussion about the fight against torture and lesser forms off ill-treatment occurring in police custody seems to overshadow the issue of possible ill-treatment of prisoners. Where outright torture (in terms of article 1 of the UN Convention Against Torture) is said to be applied frequently by police, the sources consulted for this assessment give no reason to assume that torture is a distinctive characteristic of the treatment of prisoners. But if *torture* of prisoners is not anymore an issue that needs to be 'combated', this does not imply that other forms of ill-treatment of prisoners wouldn't need attention. On the contrary, the following threats of ill-treatment of prisoners deserve special consideration:

- ***unwarranted or excessive use of force and 'special means'***

The use of force and of special devices to restrain prisoners or keep them from fleeing is not prohibited by any international document. The minimum standards to be taken into account when resorting to the use of (armed) force and special instruments of restraint against prisoners are stated in Rules 64-69 of the *European Prison Rules (EPR)*[42]. These Rules require among other things that detailed

[42] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers of the Council of Europe on 11 January 2006, https://wcd.coe.int/ViewDoc.jsp?id=955747

procedures about the use of force shall be in place and reports to the appropriate authorities shall be completed once force has been used.

- ***substandard living conditions***

The sources used for this assessment give reasons to qualify the living conditions of most prisoners, and especially those of life-sentenced prisoners, generally inhuman and degrading, as a continuous violation of article 3 ECHR. This – taking into account the slow progress of reforms – seems to be accepted by the government.

- ***inter-prisoner oppression and violence***

Perhaps the most worrying aspect of prison life in Moldova is the oppressive and violent power structure of a prisoners' hierarchy that leads to the humiliation, extortion and manhandling of vulnerable prisoners by their fellow inmates. Many sources claim this prisoners' subculture has the tacit approval of management and staff that would profit from this situation because the 'bosses' among the prisoners will maintain the order in the prisons in return for certain privileges. It goes without saying that where and as long as such a 'negative symbiosis' between administration and prisoners exists reform programmes are bound to fail.

6 Legal and practical means to prevent and combat ill-treatment of prisoners

In this chapter will be undertaken to assess how the threats of ill-treatment of prisoners as depicted in the previous chapter are or can be counteracted. The first question is whether the present criminal legislation offers sufficient opportunities to investigate 'criminal' cases of alleged ill-treatment of prisoners effectively and to bring perpetrators to justice. Then will be examined what monitoring mechanisms are in place to prevent the incidence of ill-treatment in penitentiary institutions. Lastly, it will be seen what are the main prerequisites for the legal protection of prisoners against violations of their physical integrity.

6.1 The prohibition of torture and inhuman or degrading treatment and the regulation of the use of force

The short answer to the question whether the present Moldovan criminal legislation offers sufficient basis for the prosecution of ill-treatment of prisoners is 'yes'.

In line with the requirements of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT)[43] and art. 3 of the *European Convention on Human Rights,* the Moldovan *Criminal Code* (CC) defines ill-treatment

[43] Accessed by the Republic of Moldova in 1995.

as a criminal offence. The basic principle is worded in art. 4 § 2 CC, that says: 'Criminal law does not aim to cause physical suffering or to infringe on human dignity. No person can be subjected to torture or to cruel, inhumane, or degrading punishment or treatment.' The main *corpus delicti*, introduced in the CC by an amendment of 21/12/2012, is article 166[1] CC that qualifies various forms of ill-treatment 'by or at the instigation of or with the consent or acquiescence of a public official or another person acting in an official capacity, or by a person exercising de facto public authority' as punishable offences.'[44] This is not the place to debate the juridical intricacies of this provision; for the purpose of this assessment it is enough to conclude that credible allegations of torture or other forms of ill-treatment of prisoners can lead to criminal investigations on the basis of art. 166[1] CC. It is important that persons that are convicted for torture or inhuman or degrading punishment as defined in art. 166[1] CC will be deprived of the right to hold certain positions or practice certain activities for a period of time specified in the verdict. This additional punishment is in keeping with the case law of the ECtHR where is stipulates that, where a State agent has been charged with crimes involving torture or ill-treatment, he or she should be dismissed if convicted.[45]

It must be kept in mind that even when certain forms of alleged ill-treatment of prisoners cannot be qualified in terms of art. 166[1] CC, the Criminal Code contains enough other *corpora delicti* (like the crimes against the health and life of a person, enumerated in Chapter II) that can serve very well as a legal basis for initiating criminal investigations and the prosecution of the suspects.

The Moldovan *Criminal Procedure Code* (CPC) addresses the issue of ill-treatment where it states in article 10 § 3: 'During criminal proceedings, no person shall be subject to torture or to cruel, inhuman or degrading treatments [or] shall (…) be detained in humiliating conditions (…). The art. 10 §3[1] adds to this: 'The burden of proof of non-application of tortures and other cruel, inhuman and degrading treatments or punishments shall lie with the authority in which custody was the detained person who was placed there on the basis of an order of a state authority or its indication, or with its agreement or tacit consent.'

Art. 58 § 4 CPC, as amended on 21/12 2012, provides for the following safeguard for victims of serious ill-treatment: 'The victim of an extremely serious or exceptionally serious crime against the person, *the victim of the torture, inhuman or degrading treatment* (amendment emphasized) notwithstanding whether he/she is or not acknowledged as injured or civil party shall be entitled:

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[44] In several other *corpora delicti* 'torture' is only an aggravating circumstance, which is somewhat strange because torture is a criminal offence on its own accord.

[45] ECtHR 16/02/2012, *Savin v. Ukraine*, appl. no. 34725/08, § 68.

1) to be advised by a defender during the entire duration of criminal proceedings, similarly to other parties to proceedings;
2) to be assisted by a lawyer who renders state guaranteed legal assistance if he has no financial means to pay one;
3) to be accompanied by a reliable person, by his defender, during all investigation actions, including closed hearings;
4) to receive a court judgment on the pecuniary reparation of the damage caused by a crime.

Other provisions related to ill-treatment added to the Criminal Procedure Code in 2012 are:

The addition to art. 147 ('Complex expert examination') of a new paragraph (1^1), stating that 'in cases, concerning torture, the complex expertise, and the involvement of the forensic, psychological or other type of examinations is mandatory.'

For medical staff that examine detainees that are transferred from police premises to a remand centre it is important to know that § 1 of article 167 CPC (Procedure to arrest a person) §1, as amended in 2012, reads since: 'The criminal investigating authority shall draw up a report on every case of arrest of a person suspected of committing a crime in a term of three hours from the moment the person was brought in custody, the report shall indicate the grounds, reasons, place, year, month, day and time of the arrest, the physical condition of the detained person, the complaints regarding his health condition, clothing, explanations, objections, requests of the detained person, the request to have access to a medical examination, including the one at his own expenses, the deed committed by the respective person, results of corporal search of the arrested person, and the date and time when the report was drawn up. The report shall be brought to the attention of the arrested person, at the same time he is given a copy of the rights provided for in Article 64, including the right to keep silent, the right not to testify against oneself, to give explanations to be included in the report, to have a defender and to make declarations in his presence, circumstance stated in the arrest report. The arrest report shall be signed by the person who drew it up and by the arrested person. During 3 hours from the moment of the arrest, the person that drew up the report shall submit to the prosecutor a written communication about the arrest within the period of 12 hours, except the case when the detained person is a minor, the detained person shall be handed a copy of the detention protocol;'

A new § 6 has been added in 2012 to art. 167, stating: 'If, upon detention, the presence of some body damages or injuries is established at the detained person, the person in charge of the criminal investigation shall notify the prosecutor immediately, who shall request a forensic examination, and where appropriate, a

forensic expertise in order to establish the origin and the nature of the damages or lesions.'

It is important that the medical staff of remand prisons check at admission of new detainees whether the medical reports mentioned in art. 167 CPC are present and complete and whether the prosecutor is notified when bodily damages or injuries were documented.

Furthermore art. 187 CPC obliges the administration of prisons:

1) to assure the security of the detained persons, to offer them protection and the necessary help;
2) to secure the access of detained persons to an independent medical examination;
3) to hand to the detained persons copies of the received procedural documents;
4) to register the complaints and other requests of the detained persons;
5) to send on the same day complaints and requests of the detained addressed to the court, the prosecutor and other officers of the criminal investigating authorities, without verifying or censoring them.

(…)

A new § 3^1, added in 2012 to art. 274 CPC (Initiation criminal investigation) obliges the prosecutor to order a criminal investigation when he gets knowledge of an alleged act of torture, inhuman or degrading treatment within 15 days."

Article 169 § 1b of the *Enforcement Code* grants the convicts 'the right to protection and observance by the institution or body that ensures the punishment enforcement of the dignity, rights and freedoms that he/she has, including not being subject to torture and cruel, inhuman or degrading sentences or treatment, as well as, irrespective of his/her ascent, to a medical or scientific experience that endangers his/her life or health, as well as benefiting, if necessary, of protection measures on behalf of the state;'

Article 175^1 § "(2) of this Code demands that: 'The person detained (…) is to be subjected to immediate medical examination upon entering and exiting the detention place, also upon his request, throughout the period of detention. The medical examination shall be performed in conditions of confidentiality. (…). Article 232 § 3 of the Enforcement Code says furthermore: 'The doctor that carries out health care check is obliged to inform the public prosecutor and Parliamentary advocate (Ombudsman; *GdJ*) when he/she established that the convict was subjected to torture, cruel, inhuman or degrading treatment or to other ill-treatment, as well as the obligation to register in the sick-list the recorded information and declarations of the convict as a result of this.' Article 232 § 7 adds to this: 'In the case of a serious disease

or conclusion that the convict was subjected to torture, cruel, inhuman or degradation treatments or to other bad treatments, the administration of the prison provides immediate familiarization, through the telegraph or in another way, of the family, other close persons to the convict of this fact.'

Article 242 of the *Enforcement Code* allows for *the use of force* against prisoners, stating:
'(1) In case of convicts' resistance, disobedience to the legal and justified requirements of the penitentiary system staff, participation in mass disorders, taking of hostages, assault of other persons or commitment of other socially dangerous actions, in case of escape or detention of the prisoners who have escaped, as well as in order to prevent damages to others or to themselves, physical force, special means, and fire arms can be applied.
(2) The co-workers of the penitentiary system have the right to apply physical force, special means, and fire arm according to the standard acts.'

It must be assumed that in bylaws, instructions and protocols is indicated who is authorised to order the use of force, who is entitled to carry out orders to use force and how the use of force shall be reported and to which authority. It would be better to regulate this all in the Enforcement Code itself.

Taken together, the Criminal Code, the Criminal Procedure Code and the Enforcement Code seem to offer sufficient possibilities for detecting (signs of) severe ill-treatment of prisoners and to initiate criminal investigations that can lead to the identification, prosecution and punishment of the offenders concerned. However, the 'law in the books' is no guarantee for a good practice. Much depends on the presence and dissemination of bylaws, instructions and protocols that prescribe in detail how the law shall be implemented.

While there is no evidence that torture is an overriding issue in the penitentiary context, other forms of ill-treatment certainly are, like the use of excessive force and 'special means' and inter-prisoner violence. Where it takes already a big effort to identify cases of torture, other forms of serious ill-treatment, and bring the perpetrators to justice, it seems the more difficult to detect and counter the seemingly 'hidden' ill-treatment in penitentiary institutions. The specific penitentiary setting of these problems calls for other solutions then prosecuting. Enhancing the monitoring of penitentiary institutions and the setting up of a complaints handling system could well be more effective to protect prisoners for ill-treatment.

6.2 Inspection and monitoring - privileged visitors

An important tool for the prevention of ill-treatment is the presence of an effective governmental inspectorate and of independent monitoring agencies. Thorough regular inspections and monitoring of penitentiary institutions can also produce

evidence that can contribute to effective investigation of alleged cases of ill-treatment. The main forms of inspection and monitoring are 1) paying regular visits to penitentiary institutions to check all aspects of the treatment of the population, resulting in recommendations to the authorities responsible for these institutions; 2) paying follow up visits to check the follow up of the recommendations made; 3) paying ad hoc visits to investigate the cause of (serious) incidents and 4) paying *thematic* visits to (all) penitentiary institutions to check a specific aspect of treatment of prisoner. The findings of the inspecting and monitoring agencies shall be recorded and reported in detail and be brought to the attention of the Parliament and the responsible authorities and shall be fully accessible for the general public.

The EPR give guidance to the set up and operation of proper governmental inspectorates and independent monitoring agencies. Rule 9 of the EPR says about this: 'All prisons shall be subject to regular government inspection and independent monitoring.' The term 'prisons' in the EPR implies remand prisons. This principle is elaborated in Part VI of the EPR, which goes as follows:

Inspection and monitoring

Governmental inspection

92. Prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, and the provisions of these rules.

Independent monitoring

93.1 The conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public.

93.2 Such independent monitoring body or bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons.

The Commentary to these Rules says:

'Reports by national and international NGOs, the findings of the CPT and various decisions of the ECtHR show that, even in countries with well-developed and relatively transparent prison systems, independent monitoring of conditions of detention and treatment of prisoners is essential to prevent inhuman and unjust treatment of prisoners and to enhance the quality of detention and of prison management. The establishment of independent national monitoring bodies in addition to a government-run inspectorate should not be seen as an expression of distrust of the quality of governmental control but as an essential additional guarantee for the prevention of maltreatment of prisoners.'

Five forms of 'control' over Moldovan penitentiary establishments

The Moldovan Enforcement Code distinguishes in Chapter XVII five forms of 'control' over the legality of the treatment of prisoners: 1) by the courts, granting prisoners the right to litigate violations of their legal rights and interests; 2) by prosecutors; 3) administrative control; 4) control carried out by national and international organizations and 5) civil control.

- *Control by the courts*

Data on litigation of penitentiary authorities by (ex) prisoners were not available at the time of this assessment. Some of the lawyers interviewed during the exercise recognised that initiating civil proceedings might prove an effective tool to improve sub-standard detention conditions but this avenue has not been explored so far.

- *Control by the prosecution service*

Information about the controlling task of the prosecution service was found in article 15 § 1 of the *Law on the Public Prosecutors' Office* that specifies this task role as follows: 'In accordance with the procedure established by the law, the prosecutor shall exercise control over the law and order of confinement of persons in detention facilities, and in institutions applying coercive measures, including hospitals in the event of providing psychiatric treatment without the person's free consent.'[46]

During an interview with representatives of the prosecution service it was said that prosecutors monitor 16 prisons, of which 5 are remand prisons. Discussing the prevention of ill-treatment, it was assured that at admission of a prisoner a mandatory medical examination is carried out. If injuries are detected the doctor shall register that in his file and shall inform the director about it. The director must forward this information to the prison prosecutor. Prison doctors should – in the view of the prosecutors - be independent, which they are not. Medical staff is subordinated to the director. Medical records are the property of the prison and must be endorsed by the director. The prosecutor periodically checks the medical records. Every morning the prison prosecutor is briefed about any possible incidents that might have taken place. Many of such 'incidents' concern hunger strikes that – in the words of the prosecutors – are started for 'almost any reason', for instance to attract the attention of the prison prosecutor or to enforce a transfer to another unit or prison.

[46] The way the prison prosecutor shall carry out his control in practice probably is specified in sub-legislation or special protocols, but these were not available to the author at the time of this assessment.

For the investigation of complaints about torture a *special unit* of the prosecution service has been set up.[47] In 2012 the prosecution service received 970 complaints about alleged ill-treatment / torture of which 126 complaints concerned personnel of penitentiary institutions. These 970 complaints resulted in 140 criminal investigations, of which 46 were sent to court for trial, resulting in 35 convictions, implying in total 60 persons. In 2 cases the convicts were sentenced to unconditional imprisonment. 28 offenders received suspended sentences and 3 were fined. In 11 cases the prosecution was stopped; 16 suspects were acquitted. In the first 6 months of 2013, 394 complaints about alleged torture were registered, of which 43 from penitentiary institutions. The co-operation with the DPI was seen as not satisfactory because the Department would not provide regularly and all the information that the special unit of the prosecution service needed in order to do its job properly. It was mentioned that the DPI is first investigating all complaints of prisoners about ill-treatment itself and only informs the prosecution service about the outcome of its investigations, often only after 30 days, when traces of ill-treatment often are not visible any more.

The prison prosecutors said they received many complaints of prisoners about medical issues, but they could do little about those complaints because of the scarce financial resources of the government. Very few complaints about ill-treatment are received directly from prisoners. The prosecutors suspected that lawyers whose clients claimed to be ill-treated prefer to keep this information to themselves, in order to use that at the trial as an argument to plead for a lesser sentence than demanded by the prosecution.

A success claimed by the prison prosecutors was that, thanks to their intervention, members of the special intervention unit of the DPI – though still wearing balaclavas while operating - were identifiable now because they are obliged wear badges with a personal identification number.

All in all only a sketchy picture could be obtained of the way the prison prosecutors carried out their legal duties.

- *Control carried out by national and international organizations*

On the international level this form of monitoring is carried out by the CPT and the United Nations Subcommittee on Prevention of Torture (SPT). On the national level the Ombudsman/NPM plays this role. *The Law on Parliamentary Advocates* of 1997 (as amended since) grants to the Parliamentary Advocates and designated staff of the Centre for Human Rights (Ombudsman Institution) free access to all penitentiary

[47] This is the Section for torture combating of the General Prosecutors' Office, headed by Mr Ion Caracuian

institutions, access to all relevant files and allows them to talk in private with detainees and prisoners. Prisoners can lodge complaints to the Ombudsman in writing or verbally during the visits to prisons. The Parliamentary Advocates cannot hand down legally binding decisions but, when a violation of the rights of a petitioner is confirmed, they can send a 'notice' with recommendations to the agencies that are responsible for the violation and/or to the investigating authorities. Of the 77 'notices' submitted in 2012, 13 were sent to penitentiary institutions with recommendations for the improvement of detention conditions.[48]

- *Administrative control*

At the time of this assessment no data on the form and content of inspections of the penitentiary establishments by DPI were available. It is important that the normative framework and mode of departmental inspections are laid down in law, instructions and protocols and that inspection reports are made public.

- *Civil control*

Article 180 of the *Enforcement Code* allows for 'civil control' of penitentiary institutions, stating:

(1) Monitoring commissions, which are permanent bodies, without statute of legal entity, shall carry out the civil control (monitoring) over observance of human rights in the institutions, which ensure the persons' detention.
(2) Manner of formation of commissions for monitoring the activity of institutions which ensure the detention, their tasks and basic competencies shall be regulated by the Law no. 235-XVI of 13 November 2008 on the civil control over observance of human rights in the places of detention.

These provisions where further developed by adoption of the Law no 235-XVI from 13.11.2008 on the civil control on the respect of human rights in institutions which ensure the detention of persons. Apparently, at the time of this assessment only in up to 8 regions such commissions were set up.[49] No information about the practical functioning of these new civil monitoring commissions was available. The set-up of these commissions is promising, provided they have the full support of the DPI and the administration of the prisons they are attached to. It is important that these commissions can operate independently and that 'non-DPI' authorities appoint their members.

[48] Centre for Human Rights of Moldova, *Report on the observance of human rights in the Republic of Moldova in 201*2, Chisinau 2013, p. 412-416.
[49] Information supplied by Ion Guzun. The exact powers of these commissions is to be verified yet.

'Privileged' visitors

Next to these monitoring commissions, other authorities and officials have free access to penitentiary institutions. These 'privileged visitors' are enumerated in article 181 of the Enforcement Code:

Visiting the institutions in charge of detaining persons

(1) During the fulfilment of their duties the following persons have the right to visit the institutions in charge of detaining persons, without special authorization:

a) The Chairman of the Parliament of the Republic of Moldova;
b) The President of the Republic of Moldova;
c) The Prime minister of the Republic of Moldova;
d) the Members of Parliament;
e) the Parliamentary advocate (Ombudsman; *GdJ*), members of the consultative council and other persons who accompany them;
f) the General Prosecutor of the Republic of Moldova, the prosecutor that carries out the control over the enforcement of decisions on criminal cases in the territory in question;
g) the competent person with responsible office of the superior body of the institution or body in charge of the criminal punishment enforcement;
h) the judge who examined and is examining the criminal cases, according to the territorial mandate;
i) the international organization representative that has this right pursuant to the national and/or international acts to which the Republic of Moldova is party;
j) the members of the monitoring commissions.

The second paragraph of art. 181 empowers the administration of the penitentiary institutions to authorize 'other' persons to visit prisons:

(2) The institutions in charge of the detention of persons can be visited by other persons with the special authorization of the administration[50] of these institutions or of persons with responsible office from the superior bodies or on the basis of the court decision, and in case of accused persons – also on the basis of the decisions of the criminal investigation body or of the court, in whose procedure is the criminal case.
(…)

Whether these 'other' persons can have confidential contacts with prisoners is not clear.

[50] Whether this is the director or the DPI remains unclear.

All provisions concerning inspection and monitoring cited above, each for itself and taken together, can contribute to the transparency of the penitentiary institutions and thus to the protection of prisoners against ill-treatment.

Presently, taking into account his *Report on the observance of human rights in the Republic Moldova in 2012* the most active monitoring body is the Ombudsman that in 2012 made 60 visits to penitentiaries.[51]

7 Complaining about alleged ill-treatment in the penitentiary context

It is clear from the legal texts discussed above that indications of and complaints about ill-treatment that can be qualified as 'criminal' in terms of the CC always should lead to criminal investigations and – when sufficient evidence is obtained - to the prosecution and punishments of the wrongdoers. However, compared to complaints about torture/ ill-treatment allegedly inflicted by police, very few complaints about ill-treatment of prisoners come to the knowledge of the prosecution service and only a tiny fraction of *all* cases of alleged ill-treatment lead to a conviction of the offenders. More potential 'criminal' cases probably could be detected if the medical staff of penitentiary institutions would be more attentive to signs of possible ill-treatment of prisoners and would register better what the victims have to say about the causes of the physical harm they have sustained. Also more often criminal investigations concerning ill-treatment would be initiated if prison prosecutors would intensify their monitoring of prisons and listen better to what prisoners have to say about their treatment. Even more cases of ill-treatment could come to light if prisoners would dispose of effective avenues of complaint.

While – like all relevant international and domestic documents demand - it is urgent to bring torturers and those who inflict other forms of 'criminal' ill-treatment to justice, there are important indications that there exist a 'grey area' where violation of prisoners' basic rights (e.g. to safety, health care, proper living conditions, protection against violence) can be interpreted as (serious) ill-treatment. The combating of these types of ill-treatment should not so much be sought in the prosecution of alleged offenders as in solving the structural causes of that forms of ill-treatment. 'Combating impunity' is not the real issue here. For instance: when an individual prisoner must wait a fortnight before he gets access to a doctor and complains about this fact, it will not lead to a criminal investigation of the medical service for criminal neglect. If all prisoners in a certain penitentiary have similar problems because there is a lack of medical staff, this can be qualified as a structural form of ill-treatment, but still this will not lead to a criminal investigation because it

[51] Centre for Human Rights of Moldova, op. cit., p. 357 (NB: the table concerned contains a typo: where it suggest that only 6 institutions subordinate to the MJ were visited one should read 60)

is difficult to pinpoint an official (the governor? the director of the DPI?) who is *criminally* responsible for this situation. These are only some examples of many forms of ill-treatment that stay 'under the radar' of the prosecution service and, as a consequence, will not lead to a *criminal* investigation nor to any other action of the prosecutor. In situations like this the creation of an effective complaints system, leading to *enforceable decisions of independent bodies*, could offer a better chance to solve the underlying problems.

Now, what can be considered to be an effective complaints mechanism? What criteria should that meet? To be of any use, a complaints regulation should define clearly who is entitled to complain and about what matters complaints can be lodged. It also should specify which authority or authorities are empowered to handle complaints in first instance and in appeal, what kind of decisions these authorities can take and what legal force those decisions have. Other preconditions for a fair and effective complaints mechanism are that the complaints procedure is adversarial and is transparent for all parties involved. Legal assistance must be available for complainants. Decisions on complaints must be given timely, be well reasoned and should be published.

In the present situation a prisoner will be in doubt about the most effective way to seek redress for alleged ill-treatment or for other infringements on his rights: should he/she follow an internal grievance procedure first by lodging the complaint with the governor or send it to the DPI? Should he address his complaint to the prison prosecutor, to the Ombudsman, the President of the Republic, to an NGO, the press, to another entity or to all these bodies or authorities at the same time? Whom is he to address when the contested behaviour of prison personnel seems to amount to a crime, like torture, the use of excessive force, abuse of power or corruption?

In many jurisdictions the handling of complaints is entrusted to independent complaints committees[52] or to a judicial authority.[53] In most former Soviet states, like Moldova, no such independent bodies or authorities presently exist or – like the Moldovan Ombudsman – can receive and investigate complaints, make recommendations but are 'toothless' because they have no power to hand down enforceable decisions.

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[52] Like in The Netherlands where *complaints committees* ('*beklagcommissies'*), composed of members of *monitoring committees*, are attached to all (remand) prisons. A judge chairs all complaints committees. Decisions of the complaints committees can be appealed. A central appeals committee handles the appeals. Its decisions are final and binding.

[53] Like in France the *juge d'applications de peine* (judge for the enforcement of criminal sanctions) and in Germany the *Strafvollstreckungskammer'* (special chamber of the court for the enforcement of criminal sanctions)?

The next paragraph gives an overview of the international standards that provide guidance for introducing effective complaints mechanisms in a penitentiary context.

7.1 International standards for effective complaints mechanisms

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states in article 13:

'Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) sets standards for the establishment of National Preventive Mechanisms (NPM). An NPM shall be provided the opportunity to have *private interviews* with the persons deprived of their liberty without witnesses (art. 20 d), which gives detainees and prisoners the chance to voice complaints during visits of representatives of the NPM. However, the OPCAT is silent on how an NPM should process such complaints and leaves it to the NPM whether or not to use a complaint as the basis for a recommendation to the competent authorities; recommendations to which these authorities are supposed to respond but to which they are not bound.

The European Prison Rules (EPR) offer more specific guidance on how to arrange a proper complaints mechanism in a penitentiary setting. Rule 70 (Requests and complaints) says about this:

70.1 Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority.

70.2 If mediation seems appropriate this should be tried first.

70.3 If a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority.

70.4 Prisoners shall not be punished because of having made a request or lodged a complaint.

70.5 The competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner's rights have been violated.

70.6 No complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought.

70.7 Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) writes in its publication '*CPT Standards'* that '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 (e.g. 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.'

The European Court of Human Rights repeatedly has found *a* lack of effective remedies for Moldovan prisoners who claim to be treated inhumanely and degrading. In the case of *Segheti v. Moldova*[54] it observed: '22. The Court reiterates that it has examined on numerous occasions the issue of domestic remedies in respect of poor conditions of detention in Moldova (…), and has concluded on each occasion that the remedies suggested by the Government were ineffective in respect of individuals currently held in detention. (…)'

An example of a judgement where the ECtHR called a remedy *effective* in terms of art. 13 of the ECHR is that in the case of *Lorsé and others v. The Netherlands*: '96. Given that the word "remedy" within the meaning of Article 13 does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint (…), the Court considers that the proceedings before the Appeals Board[55] and the possibility of interim injunction proceedings taken together provided the applicants with an effective remedy (…).[56]

[54] ECtHR, 15/10/2013, Segheti v. The Republic of Moldova, Appl. No. 39584/07

[55] An independent body that decides in last instance on prisoners complaints and whose decisions are binding (Penitentiare beginselen wet (Dutch Prison Act), artt 69-73).

[56] ECtHR, 04/02/2003, *Lorsé and Others v. The Netherlands,* Appl. No. 52750/99.

One may note that the penitentiary remedy in combinations with a *civil* remedy passed the test of the Court.

In the following paragraph will be checked what avenues the present Moldovan legislation offers to prisoners-complainants.

7.2 Legal avenues for lodging complaints by prisoners

The Criminal Procedure Code

Article 36 CPC seems to attribute the district court the power to examine complaints of detainees and prisoners stating:

'District courts shall examine the merits of criminal cases on the crimes provided for in the Special Part of the Criminal Code, save for the cases within the jurisdiction of other courts under the law, and the requests and complaints addressed against the decisions and actions of the criminal investigating authorities, shall examine the issues related to the execution of the sentence and other matters within its jurisdiction under the law.'

Ill-treatment of prisoners can be seen as being 'related to the execution of the sentence' and ill-treatment of pre-trial detainees can be labelled as 'other matter' within the jurisdiction of the court. It is unclear, however whether in practice this article 36 has any significance as a complaints mechanism for prisoners.

Of greater importance seems to be article 274 § 3^1 CPC which reads: 'Any declaration, complaint or any other circumstance that gives reasons to assume that the person was subject to actions provided in art. 166^1 of the Criminal Code[57], shall be examined by the prosecutor accordingly on para, 1 of the present article, within not more than 15 days.'

But here also are no data available on the application of this provision.

The Enforcement Code

Strangely enough the Enforcement Code, which enumerates (some) rights and obligations of pre-trial detainees in Chapter XXI and the rights and obligations of prisoners in Chapters XXIV and XXV does not provide for any complaints mechanism other than the appeal procedure against the imposition of disciplinary sanctions. This law only allows prisoners to make some requests. Article 206 of the Enforcement Code allows the prisoner 'to address a request on ensuring of the personal security to any of the decision-making people from the prison.' 'In this

[57] Art. 166^1 CC contains the *corpus delicti* of torture, inhuman or degrading treatment.

case', this articles says, 'the official shall undertake immediately measures to ensure the personal security of the convict and, when necessary, protection measures applied by the state.' This Code is silent on the question what the prisoner can do when his/her request is denied or is being ignored. The other legal possibility to make a request is embodied in article 214 that allows convicts with the status of refugees or stateless persons, as well as the convicts who have another citizenship than the one of the Republic of Moldova, whose state does not have a consular or diplomatic office in the Republic, to request the administration of the prison to contact the competent internal or international authority. Also here is unclear what action the convict can undertake when his/her request is turned down or not reacted on.

The Law on Parliamentary advocate / Ombudsman

Presently the most comprehensive mechanism to handle complaints about alleged violations of fundamental rights and freedoms by public authorities and other entities seems to be embodied in the *Law on the Parliamentary advocates* of 1997. This law is not written specially for prisoners but applies to all citizens. Nevertheless, as pointed out above, the Ombudsman is not empowered to hand down binding decisions.

The Law on the Prosecutors Service

An official to be encountered in most post-communist criminal justice systems is the so-called 'prison prosecutor'. His function is described as follows in art. 5 *i* of the Law on the Prosecutors Service: [to] 'exercise control over the observance of laws in the preliminary detention facilities and in the penitentiaries'. How the prosecutor shall perform this task is not spelled out in this law. In practice he receives complaints but how he shall deal with those seems not to be regulated anywhere.

The conclusion must be that prisoners in Moldova presently have no appropriate avenues for complaints that can lead to decisions that are binding for the penitentiary authorities. This can be considered as a major gap in the legal protection of prisoners against ill-treatment and other infringements on their (basic) rights and should be remedied as soon as possible by amending the Enforcement Code accordingly.

8 Assessment

Torture and others forms of ill-treatment of prisoners by prison personnel seem not so much of a problem as the continuous inhuman and degrading treatment of prisoners that is inherent to the substandard living conditions still prevailing in the Moldovan penitentiary institutions. The main problem most probably is the ill-

treatment of vulnerable prisoners by other prisoners who in the present (and persistent) prisoners' subculture are higher placed in the informal hierarchy. This hierarchy is a kind of a shadow prison management that seems to be accepted by the administration of most prisons and until now is not successfully subdued by the Department of Penitentiary Institutions. Other forms of ill-treatment, like auto-mutilation and hunger strikes**,** prisoners inflict on themselves. Self-harm is to be to be taken seriously as an expression of ultimate despair, of seeing no other way to attract the attention of the authorities to their problems.

It must be clear that the specific character of ill-treatment of prisoners cannot be countered by initiating 'criminal' investigations leading to the identification and punishment of individual offenders as described in par. 2.3 above. Where the present prisoners' subculture - a heritage from soviet times – keeps intact a negative symbiosis between the informal 'bosses' and the official management of the prisons, any attempts at legal and practical reform of prison life seems bound to fail. Instead of initiating *criminal* investigations to 'combat' ill-treatment in the classical sense, it seems more fruitful to start a *criminological research* project that aims at analysing the present prisoners' subculture and its relation to prison management and that can show policy makers and legislators how to replace the present oppressive and violent living conditions of prisoners with a fair and just regime. It would be advisable to extend such a research project to all European former communist states because one can expect those states to cope to a smaller or greater degree with similar problems concerning an informal prisoners' hierarchy.[58]

In the meantime several legal and practical measures could be taken to minimize the risk of physical ill-treatment of prisoners and maximize the chance that cases of ill-treatment are detected timely and properly dealt with.

Where one of the threats faced by prisoners is the use of excessive force and the unnecessary use of special means of restraint, the Enforcement Code should be completed with provisions that spell out precisely who is entitled to order the use of what kind of force in what kind of situations and how the use of force is to be reported.

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[58] Researchers could profit from prior studies of Anton Oleinik, Тюремная субкультура в России: от повседневноǐ жизни до государственноǐ власти, Москва: Инфра М, 2001. 418 pp. (Russian prison subculture: in everyday life and power relationships; in Russian) and of Youri Vavokhine, La sous-culture carcérale (post)soviétique face à l'utilisation par l'administration pénitentiaire des doctrines d'autogestion [Texte intégral] - The (post)-soviet prison subculture faced with the use of self-management doctrines by the corrections administration, *Champ Pénal/ Penal Field*, Vol. I, 2004 (accessible via http://champpenal.revues.org/84)

The medical staff of prisons plays an important role here, because they are the first to be confronted, at admission and afterwards, with possible signs of ill-treatment. By law the medical staff has to report 'cases' of alleged ill-treatment to the prosecution service but whether this is done systematically is questionable. The quality of medical examinations could be enhanced by introducing a strict protocol (or redrafting the present one, if there is one) for medical examinations and the (detailed) registration thereof. It goes without saying that the *Istanbul Protocol* should be fully taken into account.

It is essential that the DPI and the prison prosecutor check the medical files/registers regularly, on content and accuracy and take adequate action when indications of ill-treatment are detected. It would be advisable that also the inspectorate of the Ministry of Health would check the way the medical teams in prison operate. It is even advisable to consider subordinating the medical staff of prisons to the Ministry of Health, to guarantee their independent operation.

In theory the prosecutor who is in charge of controlling the observance of laws in the penitentiary facilities should be a prominent defender of human rights in prison. How the 'prison prosecutors' operate in practice is not documented. Do they dispose of sufficient time and resources to carry out their task in full? What is their attitude towards prisoners? It is recommended that the prosecution service publish reports about the controlling activities of prison prosecutors and the outcome thereof.

When prison prosecutors would want to know what is going on in prisons in reality they should not restrict visits to be briefed by the management and staff only but also would have talks with inmates, for instance by holding fixed office hours. A problem with that is, however, that prosecutors will not easily be trusted by prisoners because prosecutors have not only to control the legality of the treatment of prisoners but also are empowered to prosecute them. This *double face* may prevent prisoners to talk openly with prison prosecutors and provide them with relevant information about the problems they encounter in daily life.

A promising development is the setting up of *civil monitoring commissions* on the basis of the Law no 235-XVI of 13.11.2008. Monitoring of prisons by independent commissions whose members are independent from the prison administration – next to the activities of the Ombudsman/NPM – offers additional protection against ill-treatment of prisoners, provided such commissions have sufficient powers and means to monitor the establishments properly and have sufficient standing to have detected wrongs corrected. It is recommendable that such commissions – if evaluated positively – are attached to every prison. Overlap with the activities of the Ombudsman/NPM should be avoided, which can be arranged by making practical working agreements.

It is remarkable that neither the Enforcement Code nor any other Code provides for a complaints procedure for prisoners. It is strongly advised to amend this Code in this respect. The main conditions a proper complaints procedure should meet lest it be considered as an effective remedy against perceived unjust treatment are described in par. 7.1 above. Various models are conceivable: internal, external or even mixed. The main thing is that in the end a binding decision of an independent (appeals) authority can be obtained. The presence of a complaints mechanism that is trusted by prisoners *and staff as well* is a main pillar of a fair and just prison regime and a guarantee against ill-treatment. Complainants should have access to legal assistance provided by the National Legal Aid Council.

As it makes little sense to introduce a complaints procedure without at the same time taking care that prisoners are informed about their rights, prisoners should have easy access to information about these rights in writing and in a language they understand.

9 Recommendations

1. High priority should be given to initiation of a **criminological research** into the present prisoners' subculture and its relation to the administration of penitentiary institutions. The aim of that research should be to verify or falsify assumptions concerning the presence and effects of a prisoners' power structure and allegations of corrupt relations between prisoners, staff and management, and to recommend solutions for the problems encountered. Such a research project should cover all European post-communist countries, preferably as a joint EU/CoE research project.

2. The provision on **the application of physical force, special means and fire arms** in the Enforcement Code should be supplemented with details concerning: a) the authorities that are empowered to order the use of (armed) force and means of restraint; b) personnel that is entitled carry out orders to use force or means of restraint; c) in which situation what kind of force can be used; d) how the use of force or means of restraint is to be reported and to whom.

3. For the **medical staff** of prisons strict instructions for carrying out medical examinations of prisoners - on and regularly after admission - should be drafted, based on the Istanbul Protocol. The DPI and the prison prosecutors should check the medical files/registers regularly, on content and accuracy.

4. The inspectorate of the **Ministry of Health** should check the way the medical staff of prisons operates. It should be considered to subordinate the medical staff in prisons to this Ministry of Health to guarantee their independent operation.

5. The Prosecution Service should consider publishing annual reports on the way **prison prosecutors** exercise control over the observance of laws in penitentiary institutions. It could be considered to enhance the controlling task of the prison procurators by encouraging them to arrange regular office hours (audiences) for prisoners.

6. The operation of the new **civil monitoring commissions** should be evaluated. If the outcome of such an evaluation is positive such commissions should be attached to every single prison. These commissions should be vested with sufficient powers and means to monitor the establishments properly and have sufficient standing to have detected wrongs corrected. Overlap with the activities of the Ombudsman/NPM should be avoided.

7 The present Enforcement Code should be amended by introducing therein an effective **complaints procedure**, taking due account of Rule 70 of the European Prison Rules. The complaints procedure should apply to untried and sentenced prisoners alike. This procedure should be detailed, especially concerning the time limits, the right to be heard in person, the right to a reasoned decision, the right to (free) legal aid and the right to appeal. Final decisions on complaints should be binding and enforceable. If a complaint is upheld the law shall specify how the complainant can be compensated.

8. If a **complaint** concerns or is indicative of **ill-treatment** it shall be forwarded immediately to the prosecution service for investigation and (possible) prosecution.

9. At admission, each prisoner should receive a **brochure** with a clear and comprehensive description (in a language he/she understands) of his rights and obligations and a model complaints form. Such a brochure should be drafted in consultation with the Ombudsman, the DPI and relevant NGO's and should be updated regularly.

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