PRISONERS IN A SITUATION OF VULNERABILITY

A Handbook for National Preventive Mechanisms

BULGARIAN
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COMMITTEE

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Prisoners in a situation of vulnerability

-A Handbook for National Preventive Mechanisms-

AUTHORS

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It was developed in the framework of the EU Project "Improving judicial cooperation across the EU through harmonised detention standards - the role of National Preventive Mechanisms", implemented by the Ludwig Boltzmann Institute of Fundamental and Human Rights (Austria) in cooperation with the Hungarian Helsinki Committee (Hungary), the Bulgarian Helsinki Committee (Bulgaria) and the Associazione Antigone (Italy).

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EXECUTIVE SUMMARY

This handbook aims at supporting the work of national preventive mechanisms (NPM) in the European Union (EU) in monitoring the rights of persons and groups in a situation of vulnerability.

Article 1 of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), the treaty on the basis of which the NPMs function, provides for the establishment of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The effective prevention of such practices presupposes targeting them through visits to places where they are most likely to occur, and among detainees whom they are most likely to affect.

As the European Court of Human Rights (ECtHR) has held in a number of judgments, prisoners, just as any person in the custody of the state, are persons in a vulnerable situation, and the authorities are under a duty to protect them. There are however also among prisoners groups in a situation of specific vulnerability. The existing international standards have recognized as such *inter alia* women, children, foreigners, persons with disabilities, lesbian, gay, bisexual, transgender, intersex and queer persons (LGBTIQ), ethnic and racial minorities and indigenous peoples. As a rule, the situation of vulnerable groups in prison, including the specific groups, the attitudes towards persons

in a situation of vulnerability and the degrees of vulnerability, mirror those within general society. But in some countries, vulnerability may stem also from the specificities of the organisation of imprisonment as a punishment in general, and of the regime of imprisonment in particular.

Anti-discrimination and anti-torture provisions of the *Charter of Fundamental Rights of the European Union* (hereafter, the Charter) and of t*he European Convention of Human Rights* (ECHR), as well as those of the United Nations (UN) treaties, are applicable also in prisons. Several of the roadmap directives of the EU may be beneficial to different groups of prisoners in a situation of vulnerability, especially foreigners, prisoners from ethnic minorities and indigenous prisoners. A number of "soft law" documents at the UN and the Council of Europe (CoE) level provide standards for the treatment of specific groups in a particularly vulnerable position in prisons and other places of detention.

Specific provisions on some such groups exist in the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (SMR) and in the *European Prison Rules* (EPR). There are also a number of documents dedicated to some groups in particular. The "soft law" standards however differ in scope and detail with respect to the different groups. They are more detailed and wider in scope on women and children, and are quite deficient regarding some other vulnerable groups, e.g. the LGBTIQ prisoners. Some NPMs have developed their own lists of vulnerable groups of prisoners.

A number of European NPMs have focused on specific groups in a situation of vulnerability in prisons and have reported on them in their general reports and in special reports. The groups covered in the NPM reports however are limited in number. They include children and young adults, prisoners with disabilities, women and, to a lesser extent, foreign prisoners. There are few reports, which go in detail and deal with the whole variety of vulnerable groups based on international standards. Sometimes some groups in a situation of vulnerability are only mentioned and other such groups are not subject to monitoring and recommendations at all.

Some explanations of these gaps may stem from the fact that in different European countries, there are differences in the recognition and

approach to vulnerability in places of detention. Many legal systems lack definitions of vulnerability. EU member states themselves do not collect or publish data on all groups in a situation of vulnerability and their share of the total number of prisoners. Some NPMs try to define vulnerability on the basis of the circumstances arising within the specific national context. This is a healthy approach, which should be encouraged.

Monitoring the rights of detainees in a situation of vulnerability poses a variety of challenges. The OPCAT takes into account such challenges by providing for some specific powers of the NPMs in Article 20 and by shielding those who supply information to them from repression in Article 21. Without doubt, monitoring should be based on the established principles and methods of social research. The leading principle among these is the "Do No Harm" principle.

Other principles include accuracy, impartiality, confidentiality, transparency and addressing vulnerability. So far, detention monitors at the international and at the national level used mostly qualitative methods in their monitoring work, including observation, interviewing, analysis of complaints and case studies. Quantitative methods (statistical analysis, correlational research, cluster analysis, surveys) are much less common.

However, in order to explore the root causes of the problems which the affected individuals and groups face, there is often a need to use both qualitative and quantitative methods. NPMs are in a good position to combine both methods and adopt a systemic approach to their monitoring activities and their follow-up. Interviewing persons in a situation of vulnerability in detention requires specific approaches and skills. NPMs should make use of the best practices of interviewing groups in a situation of vulnerability in social research, taking into consideration their continuous vulnerability and the need to ensure their safety. There should be no compromise with the imperatives of personal security of the detainees, even at the expense of the quality of the research.

"NPMs can be a key player in upholding and harmonising EU standards on detention conditions"

INTRODUCTION

Project background

This Handbook has been written in the framework of the EU Project "Improving judicial cooperation across the EU through harmonised detention standards - the role of National Preventive Mechanisms", implemented by the Ludwig Boltzmann Institute of Fundamental and Human Rights, and in cooperation with the Hungarian Helsinki Committee, the Bulgarian Helsinki Committee and the Associazione Antigone.

The latest case-law of the European Court of Human Rights (ECtHR) as well as recommendations by international and national torture prevention bodies show that no European Union (EU) Member State has eradicated the problem of ill-treatment in prisons, and that there are significant disparities between penal systems within the EU.[1] This raises a major challenge for EU cross border cooperation. Judges must verify that fundamental rights, especially the prohibition of torture and ill-treatment, are respected before they can implement mutual recognition instruments.[2] The latest available statistics concerning the European Arrest Warrant (EAW) are exemplary: EU Member States have refused execution on grounds of fundamental rights issues in

1. See ECtHR, The European Court of Human Rights in Facts and Figures: 2019 (2020), https://www.echr.coe.int/Documents/Facts_Figures_2019_ENG.pdf, pp. 10-11. There are 180 cases of violations of Art 3 ECHR in the Council of Europe Member States, 70 of which (as correctly stated in the text) concern EU countries. Those 70 cases translate into 55 direct cases of torture or ill-treatment (under Art 3), 10 cases where states have not conducted effective investigations (under Art 3) and 5 cases where a conditional violation was found (under Art 2/3).

2. Relevant EU instruments are: the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures (2002/584/JHA), Recital 12; and the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Recital 13 and Art 3. See also CJEU, *Aranyosi and Căldăraru*; Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016; CJEU, ML, C-220/18 PPU, 25 July 2018; CJEU, Dumitru-Tudor Dorobantu. C-128/18, 15 October 2019; and for a more detailed overview *EUROJUST*, 'Case law by the Court of Justice of the European Union on the European Arrest Warrant' (2020) < https://www.eurojust.europa.eu/sites/default/files/2020-09/2020-03_Case-law-by-CJEU-on-EAW_EN.pdf>.

close to two hundred cases throughout 2017-18 alone.[3] The compatibility of prison conditions with fundamental human rights is thus a problem that goes beyond national contexts, and has practical relevance for the EU.

EU binding minimum standards for detention conditions are urgently needed. However, as the political will to implement such change is currently lacking, this Project looks at alternative paths for facilitating the consolidation and harmonisation of detention standards, at least to the extent it is realistically possible without actions from the EU. The Project thus explores the role of NPMs in improving detention conditions across the EU, departing from the assumption that improving detention conditions "at home" can contributes to increased mutual trust between the Member States (MSs).

NPMs are in an ideal position to observe the implementation of international standards that support and reinforce the prohibition of torture and ill-treatment. Their role is all the more important because with their strong powers to access places, documentations, and persons, NPMs are able to assess if these standards are met in law and practice.[4]

Further, according to the SPT "*the prevention of torture and ill-treatment embraces – or should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires ... that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.*"[5] This means that NPMs have a broad mandate that allows them to identify all factors that may be relevant for the prevention of torture and ill-treatment in concrete cases and, thus, have all it takes to investigate the root causes of the problems.

For these reasons, NPMs can and should go beyond mere inspection and monitoring of compliance. Rather they should offer recommendations on

3. European Commission, 'Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant – Year 2018', SWD(2020) 127 final, July 2020, § 6.
4. Subcommittee on Prevention of Torture (SPT), 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2010), CAT/OP/12/6, § 4.
5. Ibid, § 3.

how to reduce the likelihood or risk of torture or ill-treatment that aim to support the State in the identification of forward-looking solutions and achieving change. As a result, NPMs can be a key player in upholding and harmonising EU standards on detention conditions.

Project objectives

To facilitate their work, this Project produced a series of Handbooks for NPMs. These Handbooks collect relevant international standards and provide guidance on monitoring detention conditions. They are intended as a practical tool for NPMs to get a better understanding on:

- The thematic issues and risks for the prevention of torture and ill-treatment connected to them
- The existing international standards on selected thematic issues
- How to apply these international standards in practice and monitor selected thematic issues

Overall, the Project aims to support NPMs in putting forward recommendations on how to reduce the likelihood or risk of torture or ill-treatment and, ultimately, contribute to prison conditions in full compliance with fundamental rights in the EU.

Project methodology

The EU-funded Project began in January 2019 and covered four thematic issues, identified on the basis of results from previous projects and in direct consultations with EU NPMs. Under the overall coordination of the Ludwig Boltzmann Institute of Fundamental and Human Rights, each Project Partner was responsible for research on one particular thematic issue, namely: the Ludwig Boltzmann Institute of Fundamental and Human Rights for prison violence; the Hungarian Helsinki Committee for requests and complaints; the Bulgarian Helsinki Committee for persons in a situation of vulnerability; and the Associazione Antigone for solitary confinement.

The Project started with a desk research phase on existing international standards related to the four thematic issues, as well as on how EU NPMs monitor and contribute to the development of the standards in these

thematic areas.[6] The research began after a brief initial consultation with NPMs to refine the project focus.[7] Within the framework of the Project, several consultations took place. Representatives of NPMs and other experts exchanged experiences and best practices at four workshops - one per each thematic issue - as well as in a final conference, which took place on 3 and 4 November 2020.[8] In addition, each Project Partner conducted several bilateral interviews with representative of NPMs, as well as other national or international experts and practitioners.

The Project findings resulted in four thematic Handbooks. While there are strong interlinkages between them, the Consortium found it necessary to have four separate Handbooks in order to address the specific international standards and monitoring challenges for each thematic issue in depth. Accordingly, each Handbook was authored by the staff of the respective Project Partner.

Introduction to the Handbook

This handbook aims at supporting the work of the national preventive mechanisms (NPM) in the European Union (EU) in monitoring the rights of persons and groups in a situation of vulnerability. Article 1 of the Optional Protocol to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), the treaty on the basis of which the NPMs were established, provides for the establishment of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Effective prevention of such practices presupposes targeting them through visits to places where they are most likely to occur

6. The Project covered 22 EU Member States. 4 EU Member States (Belgium, Ireland, Latvia and Slovakia) were not covered because they have not yet ratified the OPCAT; 2 EU Member States (Denmark and the United Kingdom) were not covered because they do not to participate in the European Commission Justice Programme. It is also worth noting that the United Kingdom withdrew from the EU on 31 January 2020 and therefore since 1 February 2020 is no longer an EU Member State.
7. The online survey was conducted in March 2019. 14 out of 22 NPMs participated.
8. The first Workshop "Treatment of certain groups of prisoners in a situation of vulnerability" took pace in Sofia on 18 – 19 November 2019; the second Workshop "Isolation and solitary confinement in prison" took place in Rome on 27 – 28 January 2020; the third Workshop "Requests, complaint procedures and the right to information in prisons" took place online due to the Covid-19 pandemic on 27 – 30 April 2020; the fourth Workshop "Preventive Monitoring of Violence in Prisons" took place also online on 20, 27 May and 3 June 2020. Moreover in July 2020 an online consultation on the Systemic Approach to NPM work was held.

and among detainees whom they are most likely to affect.

In a number of judgments against different Council of Europe member states, the European Court of Human Rights (ECtHR) held that prisoners are persons in a vulnerable situation and that the authorities are under a duty to protect them.[9] Prisoners are vulnerable because they are isolated from society and from their networks of support, and are in the hands of the authorities who can exercise a significant amount of control on them in their daily lives. Their access to legal assistance is limited, as is their right to recourse to an independent authority to adjudicate their complaints. They are in a disadvantaged position in judicial proceedings in which they, unlike the prosecution, have very limited ability to collect and present evidence. In the June 2020 *EU Strategy on victims' rights (2020-2025)*, victims of crime committed in detention are referred to as a group in a situation of particular vulnerability.[10]

Even though prisoners are themselves a group in a situation of vulnerability, international standards refer to groups among prisoners who are in specifically vulnerable situations and provide for their special treatment to meet their specific needs. Rule 2 of the *UN Standard Minimum Rules for the Treatment of Prisoners* (SMR, Nelson Mandela Rules) states that "prison authorities shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory".[11]

We can define **prisoners in a situation of vulnerability as those who, due to their characteristics, real or attributed, social attitudes and the conditions of their detention, are at a higher risk than ordinary prisoners**

9. See e.g.: ECtHR, *Trubnikov v. Russia*, no. 49790/99, Judgment of 5 July 2005, § 68. See also: CEDH, *Berktay c. Turquie*, no. 22493/93, Arrêt du 1 mars 2001, § 167; CEDH, Algür c. Turquie, no. 32574/96, Arrêt du 22 octobre 2002, § 44; CEDH, *Mikadze c. Russie*, no. 52697/99, Arrêt du 7 June 2007, § 109; ECtHR, Renolde v. France, no. 5608/05, Judgment of 16 October 2008, § 83; CEDH, *Aliev c. Géorgie*, no. 522/04, Arrêt du 13 janvier 2009, § 97.

10. European Commission, *EU Strategy on victims' rights (2020-2025)*, COM(2020) 258, Brussels, 24.6.2020, p. 14.

11. *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Resolution adopted by the General Assembly on 17 December 2015.

of having their basic human rights violated. Prisoners in a situation of vulnerability require positive measures and particular services on part of the authorities to meet their special needs and/or to ensure their protection. Some persons are vulnerable in prison for the same reason for which they are vulnerable outside prison. But in many other cases certain factors may render – depending on the contexts of the imprisonment – some groups of prisoners specifically vulnerable. Thus, it is advised to use a broad and open concept of vulnerability. Various personal, environmental or socio-cultural factors could cause a specific vulnerability in individual prisoners. There are vulnerabilities of more permanent chronic character and those that are more temporary. A combination of several risk factors may lead to multiple or intersectional vulnerabilities, which requires authorities to pay special attention, given the multiple risks someone might be exposed to. Exploring the risk factors for vulnerability should be one of the primary tasks of the prison management already from the first day of detention and should continue throughout the period of imprisonment.

The purpose of this handbook is to explore in-depth the challenges with the treatment of the prisoners in a situation of vulnerability and the approaches to address them through preventive monitoring. We analyse the situation at the EU level, the existing international standards related to groups in a vulnerable situation in prisons and the approaches of the NPMs to promote the rights of these groups in the exercise of their preventive functions. The handbook also offers practical guidance to monitoring of the rights of groups and persons in a situation of vulnerability in detention.

> *"Vulnerable groups of prisoners exist in all EU member states"*

1. PRISONERS IN A SITUATION OF VULNERABILITY IN THE EU

Vulnerable groups of prisoners exist in all EU and Council of Europe member states. The latter however do not collect statistics on all of them on a systematic basis.

According to the most recent SPACE I publication of the Council of Europe, the average share of **female prisoners** in the CoE member states on 31 January 2019 was 5.3%. In most of the EU member states this share is higher. In several (the Czech Republic, Hungary, Latvia, the Slovak Republic and Spain) it exceeded 7%. The respective shares of **children** are less. In the CoE member states the average on 31 January 2019 was 0.6% of the male prison population. Among the EU member states, it exceeded 1.5% of the male prisoners only in Poland. The proportion of foreigners vary greatly among member states. While their average share in the CoE member states among the male prison population on 31 January 2019 was 21.6%, in the Western European EU member states in some cases it exceeds 45% (Austria, Cyprus, Greece, Luxemburg). On the other hand, some Eastern European member states had very few foreigners among their male prisoners. These include Bulgaria (3%), Latvia (2.4%), Lithuania (2%), Poland (1.4%), Romania (1.2%), and the Slovak Republic (2.1%).[12]

According to the recent SPACE I statistics, there were 5,658 **prisoners sentenced to life imprisonment** in the EU member states on 31 January 2019. Among the member states with relatively higher shares of life

12. Aebi, M., M. Tiago, SPACE I – 2019: *Prison Populations*, CoE: Strasbourg, 2020, pp. 43-44.

prisoners were Finland (8.6%) and Ireland (11.8%).[13] Regimes for life prisoners differ from one member state to another as do the possibilities for early release. These differences impact the degree of vulnerability of the life prisoners in different member states.

The data on other vulnerable groups is less certain. A recent study on the HIV prevalence in prisons estimated that there are approximately 3% of **prisoners with HIV**.[14] This estimate however seems to be based on old data from the time when HIV spread was more difficult to control in general. Other studies indicate that European governments do not collect statistical data on the number of LGBTIQ prisoners and prisoners with disabilities, whereas statistics for prisoners with mental healthcare needs and older prisoners is collected on an unsystematic basis.[15]

13. Ibid., pp. 51-52.
14. Sayyah, M. et al., "Global View of HIV Prevalence in Prisons: A Systematic Review and Meta-Analysis", *Iran J Public Health*, Vol. 48, No.2, Feb 2019, p. 221.
15. CSD et al., *Vulnerable Groups of Prisoners: A Handbook*, Sofia, 2015, p. 9.

> *"The international standards do not represent a coherent approach to vulnerability in detention"*

2. INTERNATIONAL STANDARDS

2.1. General principles

A number of international documents, both legally binding treaties and "soft law", provide standards for the treatment of vulnerable groups in prisons and other places of detention. The two key soft law documents at the UN and at the CoE level, the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (SMR, the Nelson Mandela Rules)[16] and the *European Prison Rules* (EPR) contain provisions on some vulnerable groups.[17] For some categories of vulnerable prisoners, the UN and the Council of Europe have adopted separate documents. The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) refer to women prisoners who "belong to one of the vulnerable groups that have specific needs and requirements".[18]

The Bangkok Rules provide for a whole range of measures to address the specific vulnerability of women in custody. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) of 1990 provide for similar measures regarding children deprived of their liberty. The CoE Committee of Ministers' Commentary on the European Prison Rules (EPR) talks about children as "an exceptionally vulnerable group". The Nelson Mandela Rules and the EPR themselves dedicate provisions to some specific groups of prisoners on the presumption that they are vulnerable.

16. The Nelson Mandela Rules, available with other related documents at: https://www.un.org/en/events/mandeladay/mandela_rules.shtml, accessed 5 October 2020.
17. Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809ee581, accessed 5 October 2020.
18. *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, A/RES/65/229, 16 March 2011, at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf, accessed 5 October 2020.

In its 2009 handbook on prisoners with special needs, the UN Office on Drugs and Crime (UNODC) identifies eight groups of prisoners with special needs due to their vulnerability: prisoners with mental health care needs; prisoners with disabilities; ethnic and racial minorities and indigenous peoples; foreign national prisoners; LGBTIQ prisoners; older prisoners; prisoners with terminal illness and prisoners under sentence of death. It may seem curious that women and children are not listed. This is due to the fact that, as mentioned in the publication, the UNODC had produced special handbooks on these categories of prisoners. The publication refers also to other prisoners with special needs and refers to the UNODC publications on prisoners with drug dependence and prisoners with HIV/AIDS.[19]

The international standards do not present a coherent approach to vulnerability in detention. This is quite clear already from the fact that some groups can benefit from rather elaborate standards, whereas there are almost none that deal with the situation of other groups. The available standards for the different groups differ in scope and in depth. Even though standards for treatment of some vulnerable groups in detention (e.g. women, juveniles) have been in existence at the international level for decades, the focus of preventive monitoring on groups of prisoners in a situation of vulnerability is a relatively new approach. NPMs have a lot to contribute in its development and consolidation.

There are different provisions in international treaties to which EU member states or the EU itself are parties that protect persons in a situation of vulnerability. This includes, in the first place, the absolute prohibition of torture and ill-treatment, but also a number of other human rights obligations. A number of provisions of the *Charter of Fundamental Rights of the European Union* (Charter) and of the *European Convention of Human Rights* (ECHR) guarantee rights that are relevant to the situation of vulnerable groups. These include:

- Article 4 of the Charter and Article 3 of the ECHR, which prohibit torture, inhuman or degrading treatment or punishment;

19. UNDOC, *Handbook on prisoners with special needs*, UN Office on Drugs and Crime, Vienna, 2009.

- Article 6 of the Charter and Article 5 of the ECHR, which guarantee the right to liberty and security of person;
- Article 7 of the Charter and Article 8 of the ECHR, which guarantee respect for private and family life;
- Article 20 of the Charter, which guarantees equality before the law;
- Article 21 of the Charter, which contains a general prohibition of discrimination on a number of grounds, among them sex, race, colour, ethnic origin, membership of a national minority, disability, age or sexual orientation;
- Article 23 of the Charter, which provides for the equality between men and women in all areas;
- Article 47 of the Charter and Article 13 of the ECHR, which provide for the right to an effective remedy in cases of violation of the rights and freedoms;
- Article 48 of the Charter and Article 6 of the ECHR, which provide for the presumption of innocence and the rights of the defence.

The primary law of the European Union (EU), including the Charter, apply to the institutions and bodies of the European Union and to the member states when they are implementing the Union law with due regard to the principles of subsidiarity. ECHR law is of general application.

The EU has not developed its own comprehensive standards on the deprivation of liberty and on persons in a situation of vulnerability. This is a weakness of EU law, which, along with some serious discrepancies between the existing international standards and the situation in a number of member states, prevents mutual trust and judicial cooperation in general. The European Parliament has called for developing of minimum standards for prison and detention conditions and a common set of prisoners' rights in the EU.[20] In 2017, it adopted another resolution on prison systems and conditions, in which it reiterated its call.[21] In this document, the European Parliament identifies as vulnerable detainees a number of groups, including the mentally ill, the elderly, the disabled,

20. European Parliament, *Resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen – Stockholm Programme*, P7_TA(2009)0090.
21. European Parliament, *Prison systems and conditions, Resolution of 5 October 2017 on prison systems and conditions* (2015/2016(INI)), P8TA(2017)0385.

LGBTIQ, women and juveniles.[22] The development of standards related to detention, imprisonment and vulnerability of persons deprived of their liberty only became possible after the introduction and the establishment of "justice and home affairs" as one of the three pillars of the EU with the Maastricht Treaty in 1992. Commitments in that sphere were reiterated in Title V of the Treaty on the Functioning of the European Union, which regulates the "Area of freedom, security and justice". The secondary EU law started developing after the Tampere (1999-04), the Hague (2004-09) and the Stockholm (2010-14) programs. Effective police and judicial cooperation required that the state parties facilitate mutual recognition of their judgments in criminal matters, as well as cross-border judicial surrender procedures. *The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* was adopted in 2002 and became operational in 2004.[23]

In November 2008 the *Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union* was adopted.[24] Its stated purpose is to establish the rules under which a member state, with a view to facilitating the social rehabilitation of the sentenced person, is to recognize a judgment and enforce the sentence.

Police and judicial cooperation between member states is based on the mutual confidence in their criminal justice systems relating to the requisite procedural guarantees for fairness of criminal proceedings, to the adequate conditions of detention and safeguards against torture, inhuman and degrading treatment, as well as against discrimination on the basis of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. Both the *Framework Decision on the European arrest warrant and the Framework Decision on mutual recognition of judgments in criminal matters* specify that member states should not be obliged to

22. *Ibid.*, paras 22, 23, 24, 25, 26, 30, 34, 40, 57.
23. *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 2002/584/JHA, OJ L 190, 18.7.2002.
24. *Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union*, 2008/909/JHA, OJ L 327/27, 5.12.2008.

cooperate in cross-border judicial surrender or in the recognition of judgments if this is going to result in violations of the affected persons' fundamental rights.[25]

In April 2016, the Court of Justice of the European Union (CJEU) issued its judgment on the cases of *Aranyosi and Căldăraru,* which concerns a request for extradition from Germany of two persons sought by Hungary and Romania, for the purposes of prosecution and for serving effective prison sentences. There have been reasonable doubts that in both cases, the persons sought may be subjected to conditions of detention in breach of Article 3 of the ECHR. The Court ruled that the *Framework Decision on the European arrest warrant* should be interpreted that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant will be subjected to inhuman and degrading treatment. In such cases member states must postpone or even decline surrender if they are not satisfied that the conditions of detention do not present such a risk.[26]

The situation and the needs of detainees in a situation of vulnerability are addressed also in the framework of the *Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings* (Roadmap), adopted by Council resolution on 30 November 2009. In December 2009, the European Council included the Roadmap in the Stockholm Program "An open and secure Europe serving and protecting citizens".[27] The Roadmap formulates several measures, which the EU subsequently adopted, intending to strengthen procedural rights of suspected and accused persons in criminal proceedings. Most of them

25. See Recitals 12 and 13 of the Framework Decision on the European arrest warrant and Recitals 13 and 14 of the Framework Decision on mutual recognition of judgments in criminal matters.
26. Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.
27. *European Council, Stockholm Programme "An open and secure Europe serving and protecting citizens"*, 2010/C 115/01, 4 May 2010.

were implemented through directives of the European Parliament and of the Council. These concern the right to translation and interpretation (Measure A);[28] the right to information on rights and information about the charges (Measure B);[29] the right of access to a lawyer and to legal aid (Measure C); the right to communication with relatives, employers and consular authorities (Measure D);[30] special safeguards for suspected and accused persons who are vulnerable (Measure E);[31] and a Green Paper on pre-trial detention.[32]

Directive (EU) 2016/800 on procedural safeguards for children (Children's Directive) and the recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings have been developed specifically for persons in a situation of vulnerability. The Children's Directive aims at establishing common minimum rules for the protection of procedural rights of children, as well as common standards on detention.[33]

The recommendation on vulnerable persons focuses on suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to their age, their mental or physical condition or disabilities. Article 14 recommends that member states take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate, and taking place under conditions suited to their needs. It mentions specifically the need to take appropriate measures in order to ensure that vulnerable persons have

28. *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, OJ L 280, 26.10.2010.
29. *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*, OJ L 142, 1.6.2012.
30. *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, OJ L 294, 6.11.2013; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016.
31. *Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, OJ L 132, 21.5.2016; *Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, OJ C 378, 24.12.2013.
32. Strengthening mutual trust in the European judicial area – *A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327, 14.06.2011.
33. See 2.2.2 below for more on the Children's Directive.

access to reasonable accommodations when they are deprived of liberty.

2.2 Standards related to some vulnerable groups

2.2.1. *Women prisoners*

There are a number of documents focusing on the treatment of women prisoners adopted by UN and CoE bodies. The most comprehensive of these are the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules) adopted by the UN General Assembly in December 2010.[34] In addition, at the Council of Europe level of specific importance are the CPT standards on women deprived of their liberty in the 10th General Report of the Committee of 2000, as well as its factsheet on women in prison of 2018.[35]

The point of departure for treatment of women prisoners is ensuring equality and non-discrimination, as well as accommodation of their specific needs. Adaption of the prison regimes and the rules of allocation, accommodation and activities to ensure equal treatment of men and women in detention is specifically stressed in the 2018 CPT factsheet on women in prison. In its 2016 opinion on prevention of torture and ill-treatment of women deprived of their liberty, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) underlines the link between gender-based discrimination and violence, which women experience at all stages of criminal procedure.[36]

The Bangkok Rules recognize the specific vulnerability of women due to prevailing gender stereotypes and isolation.[37] Because there are fewer women prisoners, it is less likely that women will be accommodated in proximity to their families.[38] This, as well as the prevalence of gender stereotypes, leads to faster break-up of their families and greater social

34. See: *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary*, A/RES/65/229, 16 March 2011, available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdfq, accessed 7 October 2020.
35. CPT, *Women in prison*, Factsheet, CPT/Inf(2018)5, January 2018, available at: https://rm.coe.int/168077ff14, accessed 7 October 2020.
36. SPT, *Prevention of torture and ill-treatment of women deprived of their liberty*, CAT/OP/27/1, 18 January 2016.
37. The Bangkok Rules, Commentary to rules 45-47.
38. SPT, *Prevention of torture and ill-treatment of women deprived of their liberty*, § 35.

ostracism.[39] In addition, women prisoners suffer from failures of the prisons to meet their specific needs. The Bangkok Rules require allocation of women prisoners close to their homes, special role of female staff in the prisons at both managerial levels and in the exercise of daily tasks, such as searches.[40] They prohibit discrimination and require the taking of positive measures to address existing inequalities, including in spheres such as access to vocational training, health care and contact with families. The Bangkok Rules provide for gender-specific hygiene and health care for women prisoners, equivalent to that in the community.[41] This includes access to washing facilities and to specific hygiene items provided by the state if needed, as well as gynaecological health care and access to specific medication and contraceptives. Separate sets of standards deal with pregnancy, antenatal and post-natal care. They require providing for an appropriate diet for pregnant women, appropriate medical care during pregnancy and after birth and ensuring of adequate contacts with their children after birth, taking into account also the best interest of the child in assessing their duration.[42]

The vulnerability of women prisoners is recognized also in the specific rules related to disciplinary punishments and the use of force. The Bangkok Rules prohibit close confinement or disciplinary segregation of pregnant women, women with infants and breastfeeding mothers.[43] They also prohibit imposing of disciplinary sanctions on women, which include prohibition of family contacts, especially with children. Rule 24 prohibits the use of instruments of restraint during labour, during birth and immediately after birth.

In January 2017, the ECtHR Grand Chamber announced its judgment in

39. UNODC, *Handbook on Women and Imprisonment*, 2nd ed., New York, 2014, p. 17.
40. The Bangkok Rules, rules 4, 10, 11, 19. The 2018 CTP factsheet on women in prison goes one step ahead in proposing that "in women's prisons or prison units, the preponderance of staff in contact with prisoners should be female".
41. The Bangkok Rules, Rule 10; See also: European Parliament, *Prison systems and conditions*, para 25. The 2016 SPT opinion underlines specifically the need of women prisoners to access to a female doctor (SPT, *Prevention of torture and ill-treatment of women deprived of their liberty*, § 28).
42. The Bangkok Rules, rules 42, 48, 49. The 2018 CTP factsheet on women in prison suggest that "it could be considered as inhuman and degrading for a child to be removed immediately from a mother after birth". The European Parliament resolution on prison systems and conditions takes the same approach (§ 26). In both the factsheet and the Bangkok Rules it is recognized that the decision on when the child can be separated from his/her imprisoned mother is difficult and that the guiding principle in this regard should be the best interest of the child.
43. The Bangkok Rules, Rule 22.

the case of *Khamtokhu and Aksenchik v. Russia*. It concerns the alleged discrimination in the possibilities for imposition of life imprisonment on women, on older men and on children compared to adult men by the Russian criminal justice system (see text box).[44] In the case of *Korneykova and Korneykov v. Ukraine*, the ECtHR found several violations of Article 3 of the Convention on account of the detention conditions, and the treatment of a mother and her new-born baby. The violations were found because of the shackling of the mother in the maternity hospital while giving birth, due to the bad material conditions of detention in the pre-trial detention centre, in respect of the medical care provided to the baby during his stay with the mother in the pre-trial detention centre and on account of the mother's placement in a metal cage during court hearings.[45]

ECtHR, *Khamtokhu and Aksenchik v. Russia*, 2017: The applicants in this case alleged that, as adult males serving life sentences for a number of serious criminal offences, they had been discriminated against as compared to other categories of convicts – women, persons under 18 when their offence had been committed, or over 65 when the verdict had been delivered – who were exempt from life imprisonment by operation of the law. The ECtHR found that the justification for the difference in treatment between the applicants and certain other categories of offenders, namely to promote principles of justice and humanity, had been legitimate. It was also satisfied that exempting certain categories of offenders from life imprisonment had been a proportionate means to achieving those principles. In coming to that conclusion, it bore in mind the practical operation of life imprisonment in Russia, both as to the manner of its imposition and to the possibility of subsequent review. In particular, the life sentences imposed on the applicants themselves had not been arbitrary or unreasonable and would be reviewed after 25 years. Moreover, the ECtHR also took account of the considerable room for maneuver given to contracting States to decide on such matters as penal policy, given the lack of any European consensus on life sentencing apart from as concerned juvenile offenders, who were exempt from life imprisonment in all Contracting States without exception.

44. ECtHR, *Khamtokhu and Aksenchik v. Russia*, No. 60367/08, Grand Chamber judgment of 24 January 2017.
45. ECtHR, *Korneykova and Korneykov*, No. 56660/12, Judgment of 24 March 2016.

Specific standards:[46]

- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)
- Convention on the Elimination of All Forms of Discrimination against Women
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons, A/HRC/31/57, 5 January 2016
- Pathways to, conditions and consequences of incarceration for women, Special Rapporteur on violence against women, its causes and consequences, A/68/340, 21 August 2013
- Women deprived of their liberty, Extract from the 10th General Report of the CPT, published in 2000, CPT/Inf(2000)13-part
- Women in prison, Factsheet 2018, CPT/Inf(2018)5, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, Council of Europe, 4 April 2018
- Prevention of torture and ill-treatment of women deprived of their liberty, CAT/OP/27/1, SPT, 18 January 2016
- Prison systems and conditions, European Parliament Resolution of 5 October 2017 on prison systems and conditions (2015/2016(INI)), P8TA(2017)0385
- Women deprived of liberty; Report of the Working Group on the issue of discrimination against women in law and in practice, 15 May 2019, A/HRC/41/33

Additional reading/sources:

- Gender Perspectives on Torture: Law and Practice, Center for Human Rights and Humanitarian Law, Anti-Torture

46. For the texts of the relevant parts of the documents cited below see: https://apt.ch/detention-focus/en/vulnerable_groups/1/?related_standards, accessed 1 October 2020.

Initiative, Washington University, Washington College of Law
- Women in detention: a guide to gender-sensitive monitoring, APT/PRI, 2013
- International Committee of the Red Cross, Women in detention, International Review of the Red Cross, Volume 92 Number 877, March 2010

2.2.2. *Juvenile prisoners*

As in the case of women prisoners, there are many international documents recognizing the specific vulnerability of juveniles deprived of their liberty and focusing on their treatment. The most important of these documents are the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the Havana Rules) at the *UN level and Recommendation CM/Rec*(2008)*11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions and measures* at the Council of Europe level. An important source of specific recommendations to member states are the concluding observations of the UN Committee on the Rights of the Child after periodic reviews of state parties' reports, as well as its general comments.

The principle underlining all international documents containing standards on children deprived of their liberty is that detention of children must always be a measure of last resort and as short as possible. All such documents also recognize the specific vulnerability of children in detention because of their lack of understanding of the law and prison order, difficulty accessing legal aid and venues to complain, lack of means to provide for additional food and supplies where needed, deprivation of needed family support, and physical weakness and lack of means to defend against official abuse, etc. To address these vulnerabilities, international standards stress on states' positive obligations to ensure contact of children deprived of their liberty with their family, including notification of family members about detention, visits, regular and unrestricted communication, and the possibility of family members to accompany

their children in criminal proceedings.[47] In addition to contacts with the family, international standards also provide, uniquely, for the right of the children to be visited and assisted by outside organizations.[48] No such standard exists for any other vulnerable group. Another important group of standards on the treatment of children deprived of their liberty relates to education and training. In the case of school-age children, ensuring education, preferably in community schools, is obligatory. It should have priority over work and should serve personal development purposes. Diplomas should not indicate institutionalization.[49]

Disciplinary proceedings and the use of force is another area where standards take into consideration the specific vulnerability of children in detention. The standards prohibit closed or solitary confinement of children, as well as deprivation of access to family members for punishment.[50] They provide for a recourse to a competent "impartial authority", and to legal assistance in disciplinary proceedings.[51] Carrying and use of weapons in institutions for deprivation of liberty of children is also prohibited.[52] Prison guards and other personnel should receive additional training in child psychology, child welfare and rights of the child.

In a number of cases the ECtHR found violations of Article 3 of the ECHR in cases where conditions of imprisonment did not take into consideration the specific vulnerability of children. Thus, in the case of *Blokhin v. Russia* the Grand Chamber held that there had been a violation of Article 3 due to the lack of adequate medical care for the child during his detention (see text box).[53] Similarly, in the case of *Güveç v. Turkey* the ECtHR found a violation of Article 3 on account of the pre-trial detention of the applicant, a minor at the material time, in an adult prison without adequate medical care, which was the reason for his psychological problems and for his

47. See e.g.: Directive (EU) 2016/800 *of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; see also European Parliament, Prison systems and conditions*, para 34.
48. The Havana Rules, paras 62, 78; The European Rules, para 83.
49. The Havana Rules, paras 38, 40; The European Rules, paras 78.1, 78.2.
50. The Havana Rules, para 67; The European Rules, para 95.3; European Parliament, *Prison systems and conditions*, para 40.
51. The European Rules, para 94.4.
52. The Havana Rules, para 65.
53. ECtHR, *Blokhin v. Russia*, No. 47152/06, Grand Chamber judgment of 23 March 2016.

repeated suicide attempts.[54] In the case of *Kuptsov and Kuptsova v. Russia* the ECtHR found a violation of Article 3 of the Convention due to the applicant's conditions of detention with adults in a police station where the cell lacked the basic amenities indispensable for extended detention. It did not have a window and offered no access to natural light or air. It was not equipped with bunks and bedding was not provided. There was no toilet or sink. Prisoners were not given any food.[55] In a number of cases against Bulgaria, Turkey, France and other member states the ECtHR found violations of Article 3 due to physical ill-treatment of children in detention and the lack of proper investigation. The Court took account of the specific vulnerability of the applicants when assessing the nature and the intensity of the ill-treatment. In several cases against Turkey the ECtHR found violations of Article 5 of the Convention due to the excessive length of pre-trial detention of children.[56] In *Zherdev v. Ukraine* the ECtHR found that the applicant's placement with adult detainees, along with other conditions of his pre-trial detention, amounted to degrading treatment in violation of Article 3 of the ECHR.[57]

ECtHR, *Blokhin v. Russia*, 2016: The case concerned the detention for 30 days of a 12-year old boy, who was suffering from a mental and neuro-behavioural disorder, in a temporary detention centre for juvenile offenders. The Court found that about one month before being placed in detention, he had been examined by specialists who had prescribed him medication and regular consultation by a neurologist and psychiatrist, and that immediately following his release he had been hospitalised for treatment for three weeks. Moreover, his grandfather had informed the authorities of the child's condition at the detention hearing; there was therefore sufficient evidence that the authorities had been aware of that medical condition. The Government had failed to show that during his stay at the centre for 30 days – entirely under the control of the authorities, who had been

54. ECtHR, *Güveç v. Turkey*, No. 70337/01, Judgment of 20 January 2009.
55. ECtHR, *Kuptsov and Kuptsova*, No. 6110/03, Judgment of 3 March 2011.
56. See ECtHR, *Selçuk v. Turkey*, No. 21768/02, Judgment of 10 January 2006; ECtHR, *Koşti and Others v. Turkey*, No. 74321/01, Judgment of 3 May 2007; ECtHR, *Nart v. Turkey*, No. 20817/04, Judgment of 6 May 2008.
57. ECtHR, *Zherdev v. Ukraine*, No. 34015/07, Judgment of 27 April 2017.

under an obligation to safeguard his dignity and well-being – Mr Blokhin had received the medical care required by his condition. This is why the Court found a violation of Article 3 of the Convention.

Directive (EU) 2016/800 on procedural safeguards for children (Children's Directive) aims at establishing common minimum rules on the protection of the procedural rights of children who are suspected or accused in criminal proceedings, taking into account their specific vulnerability[58], as well as common standards for imposing detention on children and for specific treatment of children deprived of their liberty. Article 10 obliges member states to ensure that deprivation of liberty of a child at any stage of the proceedings is limited to the shortest appropriate period of time. Article 12 requires that when detaining children, the member states must ensure and preserve their health and physical and mental development, their right to education and training (including where the children have physical, sensory or learning disabilities), the effective and regular exercise of their right to family life, their access to programmes that foster their development and their reintegration into society, and the respect for their freedom of religion or belief, etc.

Specific standards:[59]

- United Nations' Convention on the Rights of the Child, September 1990
- UN Standard Minimum Rules for the Administration of Juvenile Justice: the "Beijing Rules", November 1985
- UN Rules for the Protection of Juveniles Deprived of their Liberty: the "Havana Rules", December 1990
- UN Guidelines for the Prevention of Juvenile Delinquency: the "Riyadh Guidelines"
- Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

58. Recital 45 specifically recognizes that "children are in a particularly vulnerable position when they are deprived of liberty".
59. Based on the APT summary where there is an important omission of the European Rules for juvenile offenders subject to sanctions and measures and of Directive (EU) 2016/800. Hyperlinks to these documents is added. For the texts of the relevant parts of the documents cited below see: https://apt.ch/detention-focus/en/vulnerable_groups/5/?related_standards, accessed 8 October 2020.

- Prison systems and conditions, European Parliament Resolution of 5 October 2017 on prison systems and conditions (2015/2016(INI)), P8TA(2017)0385
- United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, A/C.3/69/L.5, 25 September 2014
- Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures
- 24th General Report of the European Committee for the prevention of torture, 1st August 2013 - 31 December 2014
- Juveniles deprived of their liberty under criminal legislation, Extract from the 24th General Report of the CPT, published in 2015, CPT/Inf(2015)1-part
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, A/HRC/28/68, 5 March 2015
- Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, Council of Europe, 4 April 2018

Additional reading/sources:

- *Protecting children's rights in criminal justice systems, Penal Reform International (PRI), 2013*
- *Neglected needs: Girls in the criminal justice system, Penal Reform International (PRI) and Interagency Panel on Juvenile Justice (IPJJ), 2014*
- *Prevention and Responses to Violence against Children, joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary- General, UN Doc. A/HRC/21/25, 27 June 2012*
- *Safeguarding the rights of girls in the criminal justice system. Preventing violence, stigmatization and deprivation of liberty, 2015, Special Representative of the Secretary- General on Violence against Children*

- *Juvenile Justice and Human Rights in the Americas, 2011, Inter-American Commission on Human Rights*
- *The impact of distance from home on children in custody, Thematic report by HM Inspectorate of Prisons, October 2016*
- *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem, Center for Human Rights & Humanitarian Law & Anti-torture Initiative, May 2017*
- *An analysis of 12–18-year-olds' perceptions of their experiences in secure training centres and young offender institutions, HM Inspectorate of Prisons, Youth Justice Board, Children in Custody 2017-18, UK, 2019*

2.2.3. *Foreign prisoners*

Standards related to foreign prisoners exist in several important "soft law" documents of the Council of Europe, including the European Prison Rules (Rules 37.1-37.5) and *Recommendation CM/Rec*(2008)11 of the *Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures* (§§ 104.1-105.4). The document with the most comprehensive compilation of standards in this regard is *Recommendation CM/Rec*(2012)12 of *the Committee of Ministers to member States concerning foreign prisoners* of October 2012. In addition, several binding international treaties provide for standards of treatment of some groups of foreigners, which have to be applied also in detention.

The international standards recognize the specific vulnerability of foreign prisoners due to their social isolation, differences in language, culture, customs and religion, lack of family ties and contacts with the outside world.[60] In addition, some of them may be victims of torture in their countries of origin. As such, victims of torture, cruel, inhuman and degrading treatment or punishment, no matter whether they are foreigners or nationals, should be recognized as persons in a situation of particular vulnerability and should be offered all needed legal, medical and social assistance as required by international standards in this area.
Most documents dealing with the treatment of foreign prisoners focus on

the possibility for their transfer in their countries of origin for execution of their sentences.[61] This is an essential requirement for their social integration and for the exercise of their right to family life. They also stress on non-discrimination in the imposition of remand measures, sentencing, treatment and possibilities for early release, as well as in providing work and education.

Another group of standards focuses on contact with the outside world. Foreign prisoners should have prompt access to their diplomatic agents and those who are refugees – to UN and other bodies for their protection.[62] Foreign prisoners should be allowed extended visits and other contacts with family and closed persons. National authorities should facilitate such contacts through provision of information and through assistance with costs of communicating with the outside world.[63] Special measures should be taken to facilitate contact of foreign prisoners with their children.

To address the cultural and religious needs of the foreign prisoners, a number of standards require taking into consideration of their preferences in providing accommodation, hygiene, clothing, nutrition and health care in the prisons.[64] Their linguistic needs should be addressed by providing information and interpretation in criminal, administrative and disciplinary proceedings.[65] We can add – this must also be applied in relation to health services. Foreign prisoners should be allowed access to print and electronic media in their language. At the same time, they should be encouraged to learn the local language and to study the local culture and traditions.[66]

Unlike the "soft law" standards, the ECtHR took a rather restrictive approach to the international transfer of foreign prisoners. In the case of Palfreeman v. Bulgaria of 2017, it took the view that states have no obligation to consider international transfer in light of Article 8 of the ECHR. It also held that the ECHR does not grant prisoners the right to

61. See e.g.: European Prison Rules, Rule 37.5; Recommendation CM/Rec(2012)12, para 15.3.
62. European Prison Rules, rules 37.1, 37.2.
63. Recommendation CM/Rec(2012)12, Section 22.
64. Ibid., sections 17, 18, 19, 20, 31.
65. Ibid., para 8.
66. Ibid., para 29.1.

choose their place of detention and that "separation of the applicant prisoner from his family and being kept at a distance from them are regarded as inevitable consequences of detention following the exercise by the domestic authorities of their prerogatives in the area of criminal sanctions".[67] Thus, in the view of the ECtHR, state parties' "prerogatives in the area of criminal detention" take absolute precedence over prisoners' Article 8 rights in cases of international transfer, with no possibility for balancing after an assessment of the specific circumstances of the case.

Specific standards:[68]

- Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990
- Convention relating to the Status of Stateless Persons, 28 September 1954
- Convention on the Transfer of Sentenced Persons, 21 March 1983
- Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules
- Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures
- Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners, Council of Europe, October 2012
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

Additional Readings:

- *Monitoring Immigration Detention: A Practical Manual, United Nations High Commissioner for Refugees (UNHCR),*

67. ECtHR, *Palfreeman v. Bulgaria*, No. 59779/14, Decision of 16 May 2017, § 36. This approach of the Court differs from its approach to placement of prisoners closer to their homes and families within the national jurisdiction, which it found to fall within Article 8 of the Convention in a number of cases. See e.g.: ECtHR, *Khodorkovskiy and Lebedev v. Russia*, Nos. 11082/06 and 13772/05, Judgment of 25 July 2013; ECtHR, *Vintman v. Ukraine*, No. 28403/05, Judgment of 23 October 2014; ECtHR, *Rodzevillo v. Ukraine*, No. 38771/05, Judgment of 14 January 2016.

68. For the texts of the relevant parts of some of the documents cited below see: https://www.apt.ch/detention-focus/en/vulnerable_groups/2/, accessed 1 October 2020.

the Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), 2014

- *Good Practice Manual for Working with Foreign Nationals, EUROPRIS, June 2018*

2.2.4. *Prisoners with disabilities*

According to the World Health Organization (WHO), 'disabilities' is an umbrella term covering impairments (a problem in body function or structure), activity limitations (a difficulty encountered by an individual in executing a task or action), and participation restrictions (a problem experienced by an individual in involvement in life situations). Disability is not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which they live.[69]

Part of the reasons why prisoners with disabilities are vulnerable in detention are the same as those grounding their vulnerability in the community. Persons with physical disabilities may have serious problems with reasonable accommodation of the physical environment and with their access to the necessary tools.[70] Persons with disabilities face stigma, lack of appropriate medical treatment and rehabilitation, and are sometimes subjected to violence and harassment. These factors are almost always exacerbated in detention. The physical environment of prisons is usually not suitable for persons with physical disabilities. Access to tools is usually more difficult in the prison, and the treatment of persons with mental disabilities is - as a rule - much harsher in detention. Overall, the prison environment usually exacerbates poor health conditions and disabilities.

The *UN Convention on the Rights of Persons with Disabilities* (CRPD) applies in full to prisoners. It guarantees the fundamental rights of persons with disabilities on a non-discriminatory basis. This requires positive state action in every sphere of social life where persons with disabilities may be disadvantaged. This includes reasonable accommodation of

69. WHO, *Disabilities*, available at: https://www.afro.who.int/health-topics/disabilities, accessed 3 October 2020.
70. Cf. also European Parliament, *Prison systems and conditions*, para 23.

physical environments, and assistance in the exercise of daily functions and rehabilitation. Article 14 CRPD, prohibiting arbitrary and unlawful deprivation of liberty of persons with disabilities, Article 15, prohibiting torture, inhuman and degrading treatment and Article 16, providing for the freedom from exploitation, violence and abuse, are particularly relevant to prisoners. So is Article 13 providing for the access to justice. In its guidelines on Article 14 (right to liberty and security of person), the CRPD Committee has stated that deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.

The 2018 resolution of the Parliamentary Assembly of the Council of Europe goes an important step further in standard-setting by providing for adjustment of prison sentences or alternatives to imprisonment based on the defendant's disability, in order to prevent imprisonment of persons whose condition is incompatible with detention.[71] In such cases member states should consider systematically non-custodial pre-trial measures and sentences or compassionate release for disabled persons where relevant.

The SMR contain specific rules on prisoners with mental disabilities and/or health conditions.[72] They provide that prisoners who suffer from such conditions and for whom staying in prison would exacerbate their conditions, shall not be detained in prison. They also provide for adequate treatment and care for such prisoners in specialized facilities.

The ECtHR has considered a number of cases of prisoners with disabilities and has found violations of the ECHR where they were or were in danger of being treated contrary to Article 3. Thus, in one of its early judgments in the case of Price v. the UK the ECtHR found a violation of Article 3 for holding a person with a serious physical disability in detention, albeit for a short period of time (see text box).[73] Accessibility of the physical environment in the prison seems to be a serious factor, which the ECtHR

71. Parliamentary Assembly of the Council of Europe, Detainees with disabilities in Europe, Resolution 2223 (2018)
72. Nelson Mandela Rules, rules 109-110.
73. ECtHR, *Price v. the United Kingdom*, No. 33394/96, Judgment of 10 July 2001. See also: D.G. v. Poland, No. 45705/07, Judgment of 12 February 2013.

takes into consideration in finding a violation of Article 3 in cases of disabled applicants.[74] It considers that where the authorities decide to place and keep a disabled person in continued detention, they should demonstrate special care in guaranteeing that such conditions correspond to the special needs resulting from the disability. The ECtHR also found violations of Article 3 in cases where prisoners with disabilities were left at the mercy of their cellmates in receiving assistance to relieve themselves, bathe, and get dressed or undressed.[75]

The ECtHR found violations of Articles 2 and 3 of the ECHR also in a number of cases of persons with mental disabilities. Lack of appropriate treatment, combined with harsh conditions of detention, led the Court to find a violation of Article 3 in the case of *Dybeku v. Albania* dealing with the imprisonment of a person suffering from a chronic mental disorder, which involved psychotic episodes and feelings of paranoia.[76] In several cases, the ECtHR found that the failure of the government to offer appropriate treatment regimes to prisoners with mental disabilities amounts to inhuman and degrading treatment.[77] The ECtHR also found violations of Article 3 in cases of ill-treatment of prisoners with mental disabilities by the prison staff (handcuffing, solitary confinement, prolonged immobilization)[78], as well as where the prison authorities did not take appropriate measures to prevent the suicide of prisoners either because of their indifference to the prisoners' psychological problems or because they imposed disciplinary punishments on them.[79]

> **ECtHR, *Price v. the United Kingdom*, 2001:** The case concerns a British national who is four-limb deficient as a result of phocomelia due to Thalidomide. She also suffers from problems with her kidneys. She

74. ECtHR, *Grimailovs v. Latvia*, No. 6087/03, Judgment of 26 June 2013; ECtHR, Arutyunyan v. Russia, No. 48977/09, Judgment of 10 January 2012.
75. CEDH, *Vincent c. France*, no. 6253/03, Arrêt du 24 octobre 2006; ECtHR, *Engel v. Hungary*, No. 46857/06, Judgment of 20 May 2010.
76. ECtHR, *Dybeku v. Albania*, No. 41153/06, Judgment of 18 December 2007. See also for a violation of Article 3 in similar circumstances: CEDH, *Ţicu c. Roumanie*, no. 24575/10, Arrêt du 1 octobre 2013.
77. ECtHR, *Z.H. v. Hungary*, No. 28973/11, Judgment of 8 November 2011; ECtHR, *G. v. France*, No. 27244/09, Judgment of 23 February 2012; ECtHR, *Murray v. the Netherlands*, No. 10511/10, Grand Chamber judgment of 26 April 2016.
78. ECtHR, *Kucheruk v. Ukraine*, No. 2570/04, Judgment of 6 September 2007; CEDH, *Dimcho Dimov c. Bulgarie*, no. 57123/08, Arrêt du 16 décembre 2014.
79. ECtHR, *Renolde v. France*, no. 5608/05, Judgment of 16 October 2008; CEDH, Ketreb c. France, no. 38447/09, Arrêt du 19 juillet 2012; ECtHR, *Çoşelav v. Turkey*, No. 1413/07, Judgment of 9 October 2012;

was committed to prison for seven days because she refused to answer questions put to her concerning her financial situation. Because her case had been heard during the afternoon, it was not possible to take her to prison until the next day and she spent the night in a cell in a police station. The cell, which contained a wooden bed and a mattress, was not specially adapted for a disabled person. The applicant alleged that she was forced to sleep in her wheelchair; that the emergency buttons and light switches were out of her reach; and that she was unable to use the toilet since it was higher than her wheelchair and therefore inaccessible. During her detention in the police cell, the custody record showed that she was complaining of the cold. No action was taken by the police officers responsible for the applicant's custody to ensure that she was removed to a more suitable place of detention or released. Instead, she had to remain in the cell all night, although the doctor did wrap her in a space blanket and give her some painkillers. The ECtHR considered that the detainment of a severely disabled person in conditions where she was dangerously cold, increased the risk of developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty. As such, this constituted degrading treatment contrary to Article 3 ECHR.

The EU recommendation on vulnerable persons[80] focuses on suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, mental or physical conditions or disabilities. Article 14 of the Charter recommends that member states take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate, and taking place under conditions suited to their needs. It mentions specifically the need to take appropriate measures in order to ensure that vulnerable persons have access to reasonable accommodations when deprived of liberty.[81]

80. Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013.

81. For more information on the implementation of the recommendation in several member states see: BIM, *Dignity at Trial: Enhancing procedural safeguards for suspects with intellectual and psychosocial disabilities*, project documents available at: https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security-projects-development-cooperation-and-business/dignity-trial-enhancing-procedural-safeguards-suspects-intellectual-and-psychosocial-disabilities, accessed 1 October 2020.

Specific standards:

- Convention on the Rights of Persons with Disabilities
- Committee on the Rights of Persons with Disabilities, Guidelines on article 14, The right to liberty and security of persons with disabilities, Adopted during the Committee's 14th session, September 2015
- Detainees with disabilities in Europe, Parliamentary Assembly of the Council of Europe, Resolution 2223 (2018)
- Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24.12.2013
- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015
- Prison systems and conditions, European Parliament Resolution of 5 October 2017 on prison systems and conditions (2015/2016(INI)), P8TA(2017)0385

Additional readings:

- *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, 28 July 2008*
- *Mental health in prison: a short guide for prison staff, Penal Reform International, April 2018*
- *Mental Health and Prisons: Information Sheet, World Health Organization/ICRC, October 2005*
- *Prison and health, World Health Organisation, 2014*
- *Detention and mental health, ECtHR, March 2020*
- *Prisoners' health-related rights, ECtHR, July 2020*

2.2.5. LGBTIQ prisoners

LGBTIQ persons in places of detention are particularly, and in some jurisdictions, extremely vulnerable. Centuries of stigmatization, discrimination and abuse against these groups are exacerbated in the conditions where, unlike in the

community, it is much more difficult to avoid them through escape. LGBTIQ people are disproportionally incarcerated, which can be ascribed to stigma, rigidly-ascribed gender norms, and the consequences of rejection and abuse of this group in all societies.[82] They are also more likely to be ill-treated and placed in inhuman and degrading material conditions of detention. They suffer disproportionally from both staff-prisoner and inter-prisoner violence.[83]The international standards on the protection of LGBTIQ prisoners are in a rudimentary stage of development, probably due to the prevailing attitude towards this group at the national level.

The main tool for the protection of LGBTIQ people in detention are the non-discrimination provisions of international treaties at the global and regional level. Although - with few exceptions - they do not mention sexual orientation and gender identity as prohibited grounds for discrimination, the jurisprudence and authoritative interpretations of a number of international bodies have included them among "other status". Thus, the ECtHR stressed that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".[84] The European Parliament resolution on prison systems and conditions also emphasizes the protection from discrimination in the treatment of prisoners on grounds of sexual orientation and gender identity.[85]

Rule 7 of the Nelson Mandela Rules provides that no prisoner shall be received in prison without a valid commitment order. According to this rule, the information, entered in the prisoner file management system upon admission of every prisoner should include "precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender".[86] The aim of this measure is to enable the prison authorities to ensure the safety of the prisoners, based on their self-expressed identities, as well as to provide for their specific needs.

In its ninth annual report, the SPT included a small section on the

82. APT, *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide, Geneva*, December 2018, p. 21.
83. *Ibid.*, pp. 21-22; Robinson, R. "Masculinity as Prison: Sexual Identity, Race, and Incarceration", 99 Cal. L. Rev. 1309 (2011), pp. 1386, 1405.
84. ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, Judgment of 9 February 2012, § 55.
85. European Parliament, *Prison systems and conditions*, para 24.
86. The Nelson Mandela Rules, Rule 7a.

prevention of torture and other cruel, inhuman or degrading treatment or punishment of LGBTI.[87] In it, the SPT underlines the link between criminalization relating to sexual orientation and gender identity, and the promotion of torture and ill-treatment in detention towards these groups. It also underlines the role of prejudice at all levels of the criminal justice system, which facilitates a variety of abusive practices. The SPT highlights the need to collect statistical data of this type of bias motivating crimes in detention facilities.

The main international document on the protection of LGBTIQ persons are the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.[88] Unfortunately, to this day the Yogyakarta Principles remain a document endorsed by prominent international experts in the field of human rights, but not by international organizations. For the most part, they reiterate the applicability of basic human rights (e.g. prohibition of torture, inhuman and degrading treatment, freedom from arbitrary detention, and the right to humane treatment while in detention) to LGBTIQ people.

Since 2011, when the UN Human Rights Council adopted for the first time a resolution on human rights, sexual orientation and gender identity, the OHCHR collects systematically information on discrimination and abuses against members of this group and provides it to treaty bodies during their periodic reviews, as well as to other human rights mechanisms. In 2016 the Human Rights Council established a thematic mandate of an independent expert on protection against violence and discrimination based on sexual orientation and gender identity.

At the CoE level, of key importance is *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* of March 2010. Some of its provisions are directly relevant to the situation of LGBTIQ persons deprived of their liberty. Thus, § 4 of the Recommendation requires that member

87. SPT, Prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons, excerpt from the SPT ninth annual report, CAT/OP/C/57/4, 22 March 2016.
88. The revised "Yogyakarta Principles plus 10" of 2017 are available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf, accessed 3 October 2020.

states take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons and in particular take protective measures against physical assault, rape and other forms of sexual abuse. § 19 requires that member states ensure that personal data referring to a person's sexual orientation or gender identity are not collected, stored or otherwise used by public institutions - including in particular within law enforcement structures - except where necessary. § 45 recommends that member states ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity.

The ECtHR found violations of Articles 3 (prohibition of ill-treatment) and 14 (prohibition of discrimination) in the case of *X. v. Turkey* of 2012. The applicant was initially placed in a shared cell with heterosexual prisoners. He asked the prison administration to transfer him, for his own safety, to a shared cell with homosexual prisoners. He explained that he had been intimidated and bullied by his cell-mates. He was immediately placed in an individual cell, which was small and dirty. He was deprived of any contact with other prisoners, or social activity. According to the ECtHR, the fears of the authorities that he would be abused could not be said to be totally unfounded. However, even if they made it necessary to take certain security measures to protect the applicant, they do not suffice to justify a measure totally isolating the applicant from the other prisoners.[89]

Specific standards:

- Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity
- Prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons, excerpt from the SPT ninth annual report, SPT, CAT/OP/C/57/4, 22 March 2016
- Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 2010
- Prison systems and conditions, European Parliament

89. ECtHR, X. v. Turkey, No. 24626/09, Judgment of 9 October 2012, § 42.

Resolution of 5 October 2017 on prison systems and conditions (2015/2016(INI)), P8TA(2017)0385

- Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, African Commission on Human and Peoples' Rights, April-May 2014

Additional readings:

- *Towards the Effective Protection of LGBTI Persons Deprived of Liberty: A Monitoring Guide, Association for the Prevention of Torture, Geneva, December 2018*
- *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 11 May 2018, A/HRC/38/43*
- *Gender Perspectives on Torture: Law and Practice, Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, Washington University, Washington College of Law*
- *LGBTI persons deprived of their liberty: a framework for preventive monitoring, APT/PRI, 2013*
- *Handbook in prisoners with special needs, UNODC, New York, 2009*
- *"Masculinity as Prison: Sexual Identity, Race, and Incarceration", Russell K. Robinson, 99 Cal. L. Rev. 1309 (2011)*
- *Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2, 26 March 2015, pp. 12-14*
- *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "V. Substantive issues: prevention of torture and other cruel, inhuman or degrading treatment or punishment of lesbian, gay, bisexual, transgender and intersex persons", 22 March 2016, CAT/C/57/4*
- *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons, A/HRC/31/57, 5 January 2016*
- *Addressing situations of vulnerability of LGBT persons in detention*

- *Jean-Jacques Gautier NPM Symposium 2015 Outcome Report*
- *Out on the Inside. The Rights, Experiences and Needs of LGBT People in Prison, Irish Penal Reform Trust, February 2016*
- *Learning lessons bulletin, PPO investigations, Prison and Probation Ombudsman (UK), Issue 3, January 2017*

2.2.6. *Ethnic minorities and indigenous prisoners*

Some ethnic minorities and indigenous prisoners may be vulnerable in detention because of their social status, prejudices and stereotypes they face in society. These are often exacerbated in the criminal justice system. Thus, ethnic minorities and indigenous persons may be overrepresented as criminal defendants, as well as in prisons. This is due to a variety of factors – their social status and related behaviour subject to formal social control, prejudices among the police, prosecutors and judges, their selective targeting by the criminal justice system, lack of translation and interpretation, and poor quality of the legal assistance they receive. Thus, e.g. in Bulgaria, while ethnic minorities represent around 17% of the persons who are arrested by the police according to the official statistics, they constitute more than 50% of the prison population.

Like in the case of other vulnerable groups, ethnic minorities and indigenous prisoners should benefit from anti-discrimination provisions at the national and at the international level. Without exception, these provisions include race, ethnicity or affiliation with a national minority as protected grounds. Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the provisions of the Council of Europe Framework Convention for the Protection of National Minorities guarantee the rights of ethnic minorities and indigenous people in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language, including where appropriate in interaction with administrative and judicial authorities.

Several "soft law" documents of the CoE contain specific standards for treatment of ethnic and linguistic minorities in prisons. They focus on the accommodation of their cultural practices and linguistic needs. Rule 38.3 of the EPR requires that the state use competent interpreters and

provide written materials in the range of languages used in a particular prison. These standards are reiterated in the European rules for juvenile offenders subject to sanctions or measures. In addition, they provide for special steps to be taken to offer language courses to juveniles who are not proficient in the official language.

In the case of Rooman v. Belgium, the Grand Chamber of the ECtHR found that although the ECHR did not guarantee a detainee the right to treatment in his or her own language, as regarding psychiatric treatment, the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment. This is why the ECtHR found a number of violations due to the lack of such treatment in the applicant's own language.[90]

Specific standards:

- ILO Convention N°169, articles 8, 9, 10
- United Nations Declaration on the Rights on Indigenous Peoples, articles 5, 8.1, 34, 35
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- Framework Convention for the Protection of National Minorities, Council of Europe

Additional readings:

- *Minority Rights: International Standards and Guidance for Implementation, HCDH*
- *Annual report 2004, Special Rapporteur on the rights of indigenous peoples, E/CN.4/2004/80*
- *Sixth Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/50/2, 23 Apr. 2013*
- *Report by the United Nations Independent Expert on Minority Issues, A/HRC/22/49/Add.1, 2012*
- *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Special Rapporteur on minority issues, A/70/212, 30 July 2015

90. ECtHR, *Rooman v. Belgium*, No. 18052/11, Grand Chamber judgment of 31 January 2019.

> *"The NPMs should learn monitoring skills and should apply them systematically and cautiously in their work"*

3.MONITORING THE RIGHTS OF PERSONS IN A SITUATION OF VULNERABILITY IN PRISONS

Looking at the systematic causes for the problems of the prisoners in a situation of vulnerability, we can divide them into two groups. The first is associated with general social attitudes, which are transferred and even amplified in the prison. Stereotypes, prejudices, attitudes of social distance towards certain groups in society are often instrumentalized into discriminatory behaviour on part of both the prison staff and the prisoners. The environment in a closed institution is conducive to such instrumentalization.

The second group concerns prison environment. The overwhelming majority of prisons are built and organized without regard to the specific needs of vulnerable groups, e.g. due to the lower level of criminality among women and juveniles, in many countries women and juvenile offenders are imprisoned away from their families. Few prisons can accommodate persons with physical disabilities, and fewer still offer appropriate environments for persons with mental disorders. Prison staff in prisons accommodating big numbers of foreigners are rarely equipped to deal with the linguistic diversity and address the religious needs of all prisoners. Accommodation in many prisons presents serious safety threats to LGBTIQ and other stigmatized groups of prisoners.

Prisoners and groups of prisoners in a situation of vulnerability face serious challenges before the prison staff. Their situation often generates human rights violations and undermines the quality of life in prison. This creates or contributes to the creation of a tense atmosphere and undermines relationships of trust between staff and prisoners. Such an atmosphere on its part contributes to further abuses. It is also a serious obstacle to prison monitoring.

3.1. The approaches of the national preventive mechanisms

A number of European NPMs have addressed in their reports the problems of the prisoners in a situation of vulnerability in different detention settings, including prisons. The review of the NPM reports shows that their focus on vulnerability goes hand in hand with their experience and general capacity to monitor places for deprivation of liberty. Those that operate in member states that have stronger traditions of detention monitoring through independent visitors and have acquired more experience in monitoring, tend to pay more attention to the situation of vulnerable groups. The review also indicates that very few of the NPMs (Luxemburg being a positive exception) have focused on all vulnerable groups found in the places of detention, which they visit. Those of the NPMs that have dealt with the issue most often focused on those groups that are frequently identified as vulnerable in international standards - women, juvenile prisoners, prisoners with disabilities, and foreign prisoners.

The review also shows that in some cases the NPMs successfully identify vulnerability with a view of the specific contexts of the places of detention in their own countries. They manage to formulate concepts that sometimes combine several specific vulnerabilities.

> In 2016, the Czech Public Defender of Rights in her general report for 2016 determined "permanently unemployed prisoners" as defined by the Czech law as vulnerable. These includes those who have reached the age of 65 unless they apply for a job, those who are recognized as disabled unless they apply for a job and are able to work, or those for whom permanent employment is impossible due to their state of health. This category therefore may include prisoners with reduced mobility, but also persons with mental illness or healthy old prisoners. Their specific vulnerability in the prison is due to the fact that "they are at the centre of a number of shortcomings I found, specifically in the area of material conditions of imprisonment and conditions for personal hygiene, the activities of the "carers" on the part of other convicts, the availability of rehabilitation care and provision of the necessary medical aids". (Public Defender

of Rights of the Czech Republic, Report on Systematic Visits Carried Out by the Public Defender of Rights – 2016, Brno, 2016, p. 32, available at: https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/ZARIZENI/Veznice/2016_prisons.pdf, accessed 7 October 2020.

In March 2019, researchers from the Ludwig Boltzmann Institute, a leading project partner, conducted an online survey among members of European NPMs which includes questions related to vulnerable groups in prisons. From the responses, it became clear that the NMPs assessed the situation of the prisoners with disabilities as the most problematic, followed by that of foreigners. In addition to these vulnerable groups, juveniles and young adults, women, ethnic minorities, persons with addictions and LGBTIQ persons were also mentioned. According to the answers in the online survey, NPM's observations and recommendations regarding vulnerable prisoners included one or more special reports on a vulnerable group (12 NPMs), training and capacity development (5 NPMs), and public outreach (4 NPMs). One NPM conducted a survey.

The review of the NPM reports published on their websites reveals that a number of them have produced special reports or chapters in their annual reports dedicated to different categories of prisoners in a situation of vulnerability. But a significant number of NPMs have not paid attention to such groups. Some explanations of these gaps may stem from the fact that in different European countries there are differences in the recognition and in the approach to vulnerability in places of detention. Many legal systems lack definitions of vulnerability. Member states themselves do not collect or publish data on all vulnerable groups and their share of the total number of prisoners.

Trying to define vulnerability on the basis of the circumstances arising within the specific national context is a healthy approach that should be encouraged. The international standards on vulnerable groups in prison are a valuable source of general standards. But they may also be a poor guide to the NMPs for a number of reasons: they are in a rudimentary stage of development; they are more elaborate on some (women and juveniles) and almost non-existent on other (LGBTIQ) prisoners; they also do not take

into account the specific circumstances in the member states. It should, in fact, be the major task of NPMs to define and address vulnerability in their jurisdiction on the basis of the specific circumstances. Moreover, it may be counterproductive to focus at the national level on those vulnerable groups on which the international standards focus too, disregarding the need to address the situation of other, more vulnerable groups. This is reflected in the insufficient attention to LGBTIQ and Roma prisoners in the reports of even those NPMs who have published on vulnerable groups.

3.2. Monitoring the rights of persons and groups in a situation of vulnerability in prisons: importance and challenges

Monitoring the rights of prisoners in a situation of vulnerability has both general and specific importance for the EU member states and their NPMs. The general importance is obvious – the NPMs are national bodies tasked with prevention and eradication of torture, inhuman and degrading treatment. In some member states they are tasked also with prevention of other human rights violations. To fulfil these tasks, NPMs have to firstly target with their monitoring activities groups and situations where human rights violations are prevalent, serious and difficult to uncover and to eradicate. Prisoners in a situation of vulnerability are victims of a wide range of human rights violations, including both their civil and political, as well as their economic, social and cultural rights. Prisons and other places of detention are not designed to accommodate vulnerability. The life in these institutions exposes different categories of detainees to different violations – some become victims of physical and sexual abuse, others to extreme forms of restrictions of their mobility, still others to a dangerous lack of needed medical care.

The specific importance of the monitoring of the rights of prisoners in a situation of vulnerability relates to police and judicial cooperation between EU member states. As provided in a number of EU documents,[91] the latter is based on mutual trust in their criminal justice systems. The risk for exposure of prisoners to serious human rights violations would certainly undermine this trust and block cooperation. Member states are responsible for exposing persons in their jurisdictions to such violations

91. See above at 2.1.

not only where they themselves practice or condone them, but also when they transfer prisoners to other jurisdictions without ensuring that their human rights will not be violated.

Important as it is, monitoring the rights of prisoners in situations of vulnerability is a serious challenge. Some persons and groups in a situation of vulnerability are difficult to identify in the course of the monitoring and to talk to, because of the stigma associated with their identity (e.g. LGBTIQ persons or some ethnic minorities) or with their crime (e.g. sex offenders). The stigma, which is often internalized, prevents vulnerable prisoners to share experiences and to talk about the root causes of their problems. This is particularly the case where the monitor visits rarely and is perceived as a "foreigner" to the system by the prisoners. The NPM monitors are sometimes perceived as government officials and this creates mistrust and suspicion, especially among vulnerable individuals who perceive representatives of the government as sources of their problems, or as accomplices of abuses of non-state actors. In some cases, the difficulty stems from the lack of appropriate expertise with in the monitoring team, especially where it has to assess the treatment of persons with specific conditions (e.g. mental or psycho-social disabilities). Monitoring the treatment of foreign prisoners, whose number has grown in EU member states, poses communication challenges, and associated problems with establishing trust and rapport with these extremely vulnerable individuals. Monitoring the rights of women and juvenile prisoners is another challenge due to the need of specific expertise and perspective in the monitoring team.

3.3. Monitoring in practice

Monitoring of the rights of persons in a situation of vulnerability in prisons has a long history in Europe. At present, it is carried out by different monitoring bodies. We can distinguish three types of groups: official inspection and investigative bodies, national human rights institutions and non-governmental organizations. Each one of them adopts a specific approach. The latter depends on a variety of factors, including the aims, the monitors' powers and their perception by the detainees. Each approach has its strengths and its weaknesses. The strength of official bodies is in

their ability to obtain any type of documents, to organize high quality expert queries, to compel witnesses both inside and outside detention facility to testify and to issue obligatory orders or recommendations. But often they are unable to gain the trust of the detainees and in particular the trust of the victims, which is of a key importance for the effective monitoring, especially in the case of persons in a situation of vulnerability in detention. The situation with the NGO monitoring is often the opposite. They are usually able to gain the trust and to establish rapport with the victims, but their monitoring powers are often limited. In some cases, they are not even allowed to talk with some prisoners, e.g. with those detained on remand.

NPMs are in a good position to benefit from the strengths of both official and the non-governmental monitoring approaches. Their mandate is established by law and the OPCAT provides for a comprehensive list of powers, which member states must confer to the NPMs. In Europe they are usually part of or national human rights institutions themselves, which, according to the Paris Principles, are supposed to enjoy independence from any governmental authority. As such, they should not be viewed by the detainees as involved in or complicit to their criminal prosecution, or as agents of governmental control and thus untrustworthy. Article 21 of the OPCAT provides for immunity from sanctions against any person or organization for having communicated to the NPM any information, whereas Article 22 provides for a duty of engagement of national authorities with NPM recommendations.

3.3.1. Choice of groups and identification of standards

The focus of monitoring the rights of groups of detainees in a situation of vulnerability has to be based on a variety of criteria, both universally valid and country-specific. Certain groups are probably vulnerable in every system of criminal detention, because of the prevailing negative stereotypes towards them in society, their specific needs which the prison system cannot meet, as well as their physical weakness and/ or disability. These are factors of general vulnerability. The European systems of criminal detention differ in their ability to take account of and accommodate different vulnerabilities. Thus, some are better equipped

than others to accommodate detainees with physical disabilities. While in some women and children are accommodated in separate facilities, away from their relatives and friends, others take into account, at least to some degree, their needs to keep close to their social networks. These systems also differ in the extent to which they are able to protect certain individuals and groups against violence.

There are also vulnerabilities specific to the national context. In some states, certain groups and individuals in detention become vulnerable because of their political activity (e.g. separatists), ethnic belonging, religious affiliation or social status. These are country-specific vulnerabilities, which should also be taken into account when choosing the focus. In any case, the NPM should be able to justify its choice based on both general and country-specific criteria (see text box).

> In 2017, the Danish Ombudsman, acting as the NPM, published a thematic report on young people in secure care residential institutions and local and state prisons. The Ombudsman justified this focus by both general and country-specific criteria. The Ombudsman's monitoring activities are aimed at the most vulnerable citizens. "Characteristic of these vulnerable citizens are, among other things, that they have very few resources and that their rights can easily come under pressure. This can also apply to young people in secure care residential institutions, and in local and state prisons." In addition, the specificities of the regime in these institutions as defined by Danish law, which is particularly strict, served as an additional justification of the Ombudsman's focus on young people in secure care residential institutions and local and state prisons. (Folketingets Ombudsmand, Thematic report 2017: Young people in secure care residential institutions and local and state prisons, 2017, p. 7, available at: https://en.ombudsmanden.dk/publications/thematic_reports/thematic_report_2017/, accessed 9 October 2020.

Every EU member state is bound by both national and the international standards for human rights protection. The latter are legally binding standards of international law, standards of law of the European Union and "soft" standards, developed at the UN, Council of Europe and

Organization for Security and Cooperation in Europe (OSCE) level. The golden rule of detention monitoring is that monitors should base their work on such standards, which are the most protective. It would be in fact unlawful for a national human rights institution to do otherwise, in so far as the legally binding instruments at the national and at the international level are concerned. Where national standards are higher than those of the international law, they would normally provide the basis of monitoring work of NPMs and international law would not only allow but would also encourage this. Where international legal standards are more protective, the national constitutional framework would usually require that international law prevails. Moreover, in the majority of European states, international legal standards are directly applicable into the national system, also where they contradict national law.

With regards to international "soft" standards, they of course cannot be cited as legally binding norms. But nothing should prevent NPMs to adopt them as a basis of their work and of their recommendations to the national authorities. NPMs and national human rights institutions in general are expected to lead in implementing ever more progressive standards of human rights protection. This should be their role in every European country. NPMs are expected not only to assess how the reality of detention complies with the law, but to also recommend changes of the law in order to achieve better protection in a constantly and progressively evolving system.

HM Inspectorate of Prisons, acting as the NPM in the United Kingdom, developed criteria for assessing the treatment of children and conditions in prisons. These are regularly updated. The document formulates standards in four spheres embracing all aspects of imprisonment starting with the travel from the courtroom and ending with the release. These include: safety, care, purposeful activity, and resettlement. In each of these spheres the document states the expectations of monitors and indicators which should be fulfilled in order to meet these expectations. These indicators are based on a wide variety of standards – the norms of national law, as well as the standards of the ECHR, ICCPR, CRC,

ERJO, CPT, SMR and others (HMIP, Expectations: Criteria for assessing the treatment of children and conditions in prisons, Version 4, 2018, available at:https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/02/Childrens-Expectations-FINAL-Dec-2019.pdf, accessed 9 October 2020.

3.3.2. Sources of information and preparation for the monitoring visit

Human rights monitoring in general and detention monitoring in particular should use as many sources as possible to fulfil its tasks. Of course, the major source of information is the visit to the detention facility, but also collecting information on the specific institution, on criminal detention in general, and on the groups and individuals in a situation of vulnerability in detention, which starts long before the visit. It is in fact an essential component for preparation for the visit, and has a significant bearing on its quality.

What sources of information can we check while preparing for the visit? It would certainly be of help to collect in advance basic **background information** about the detention facility – its capacity, the most recent number of detainees held, the level of overcrowding, the number of staff and its type, recent renovations, new programmes introduced, etc. The NPM should be able to obtain such information officially.

Another important source are **existing reports** on the specific detention facility and on similar detention facilities prepared by local and international monitors with a similar mandate (the CPT, the SPT, NGOs). Where possible, the monitoring team should meet with the delegations which took part in the visits and prepared the report, in order to inquire for more information. Such meetings can direct the team to vulnerable groups and persons whose situation had not been presented in sufficient detail in the report.

It should be a must for the NPM team to check in advance of the visit all **complaints** of prisoners from the detention facility they plan to visit and to check additional information to which the complaints may direct. Such complaints, especially when they originate from persons in a situation

of vulnerability, are an important source of information not only on the specific situation of the complainant, but often also on structural problems with vulnerability. In addition to the complaints, it is usually informative to check the case-law where available, in particular cases concerning the use of preventive or compensatory remedy against inhuman and degrading treatment by the detainees of the respective institution.

Meeting or otherwise receiving information from **other stakeholders,** even where their interest is not specifically the rights of the detainees, may prove beneficial. These include relatives who visit their imprisoned family members, lawyers, representatives of religious denominations, service providers and employers. Media reports should also be taken into consideration.

Non-governmental organizations committed to the rights of vulnerable groups may be very useful to consult before the visit, even if they do not collect information on such groups and individuals in detention. They are an invaluable source of information on the specific vulnerability of such persons, and on the social attitudes which may be instrumentalized in abusive behaviour. In some cases, e.g. with persons suffering from different forms of disability, such NGOs may provide information on the appropriate accommodation and rehabilitation of such detainees.

3.3.3. Monitoring principles

Monitoring principles are fundamental value statements, which guide the behaviour of the monitoring team by underlying its strategy of action and its approach to fact-finding. Different authors propose a different number of principles, ranging from 4[92] to 17.[93] Here we can restrict ourselves to six.

1. **Do no harm.** This is perhaps the most important of all monitoring principles. In essence, it means that human rights monitoring should not aggravate the condition of the victims in any way. Information-gathering for monitoring purposes can never outweigh the victim's safety. Therefore, the monitors should take all precautionary measures to ensure that their work in its entirety does not cause further damage to the victims.

92. Amnesty International and CODESRIA, *UKWELI: Monitoring and Documenting Human Rights Violations in Africa*, Dakar, 2000, pp. 29-46.
93. The Advocates for Human Rights, *A Practitioner's Guide to Human Rights Monitoring, Documentation and Advocacy*, Minneapolis: AHR, 2011, pp. 15-17.

2. **Accuracy**. The principle of accuracy requires that the monitor checks the information received with as many sources as possible before assessing the evidence and deciding which one he/she wants to include in the report or the recommendation. It also requires that the monitor always prefers first-hand information, rather than hearsay. The monitor should be aware of the biases of his/her sources, as well as their own. In the unfortunate case where an error is uncovered in the monitoring report or in other public statements, it is always preferable to recognize it.

3. **Impartiality.** The key requirement of the principle of impartiality is sticking to one's institutional mandate. In a detention, as well as in other contexts, it also means talking to all sides and being even-handed in addressing the responsibility for human rights violations of different parties. NPMs should develop a policy of impartiality, part of which should be ensuring political, ethnic, religious and gender diversity in the composition of monitoring teams. It is a good practice among some NPMs to involve persons who belong to vulnerable groups as members of the monitoring team. Developing country-specific concepts and approaches to vulnerability by NPMs are also aspects of impartiality.

4. **Confidentiality.** The principle of confidentiality is based on two rationales – the protection of the private life of everybody targeted by the research, and the protection of the safety of the vulnerable sources of information. It requires constant assessment of whether and why the monitor needs to cite names and details of the personal circumstances of the individuals involved in the research, ensuring that the source (whose safety may be compromised) is not traceable by the authorities, keeping contacts with vulnerable sources of information after the publication of the findings, and establishing a system to store confidential information in one's office. It is always a good practice to discuss confidentiality with other members of the monitoring team, and get a second opinion.

5. **Transparency.** This principle is somewhat opposite to confidentiality. It is based on different presumptions, the major one of which is that the researcher's approach to information-gathering should avail itself to public scrutiny. Methodological transparency underlines every social research initiative, but in monitoring closed institutions and the situation of groups and persons in a situation of vulnerability, it has limited application as it may expose them to danger. Yet, clarifying entirely the monitor's goals and methods should be a must even in such circumstances. Whenever possible and harmless, he/she should cite sources, and explain in some detail the reasons why this may not be possible in certain circumstances. Offering peer-assessment of

transparency should become a standard in NPM practice in general.

6. **Addressing vulnerability.** Sensitivity to different vulnerable groups in detention should not guide the monitor's work only when working on a "project" of monitoring the rights of persons in a situation of vulnerability. A number of NPMs shared - both in the framework of this project, as well as in their publications - that addressing vulnerability should be inherent in every monitoring activity. This principle also requires that the NPM makes a sound assessment of which are the groups, and who are the individuals in a situation of vulnerability in each detention facility. Identification of such groups and individuals leads to appropriate arrangements regarding the composition of the monitoring team, identification of the specific monitoring methods, and determining the precautionary measures in order to ensure the detainees' safety.

3.3.4. Monitoring methods, their choice and their application to persons and groups in a situation of vulnerability

Human rights monitoring in general and monitoring places for deprivation of liberty in particular should use, where appropriate and feasible, all the methods used in social research, and should abide by the rules governing their application. This, along with the proper application of monitoring principles, is a guarantee for obtaining credible information, and for preserving the integrity of the monitoring institution. NPMs should include among their staff persons who are experienced in the application of social research methods. They should also train their monitors in the latter and should offer their research plans to experts in social research for evaluation.

Social research uses two types of methods – qualitative (observation, interviews, analysis of complaints, case studies, etc.) and quantitative (statistical analysis, correlational research, cluster analysis, surveys, etc.). Both types are applicable in monitoring the rights of persons in a situation of vulnerability in detention, although so far the preference of NPMs and of international torture-prevention bodies has been overwhelmingly to qualitative methods. Part of the reasons for this preference lies in the specific modalities of detention monitoring carried out by international bodies, the CPT and the SPT – their relatively short country visits in the course of which their delegations visit as many places for deprivation of liberty as possible. The NPMs however seem to be in a better situation to

combine both types of methods in their monitoring.

The advantages of the quantitative methods are in the possibility to obtain statistical and representative information from a larger number of detainees, and to better ensure the anonymity of the respondents. Their disadvantages are in the very basic and general type of the information obtained, and the reduced likelihood of going into details of the particular circumstances of the individual respondent. Qualitative methods allow much better possibility to dig deep into the circumstances of each case. However, in order to explore the root causes of the problems which the affected individuals and groups face, there is often a need to use both qualitative and quantitative methods. Quantitative methods seem to be underused by NPMs nowadays and there are no good reasons for this. Nothing should prevent an NPM to conduct a representative survey in a specific detention facility, or in the system of the criminal detention as a whole. The experience of those organizations who have carried out such surveys in the past are very positive and the results have proven extremely valuable.

In 2016-2017, the Bulgarian Helsinki Committee carried out a survey among 1,357 convicted prisoners in all the prisons of Bulgaria, whose pre-trial proceedings had started after 1 January 2015. According to the survey findings, every third person (34%) surveyed reported being physically ill-treated either upon police arrest or in police custody. Those claiming use of physical force within police custody were more (24%) than those who reported violence upon arrest (19.4%). The number of inmates claiming physical ill-treatment at investigation detention facilities was significantly lower – 6.2% of those who had been detained at such facilities. In general, the survey did not reveal any positive dynamics in the trends, and even estimated a slight increase of the use of unlawful physical force over the past several years. The survey results revealed that two groups are particularly in a situation of vulnerability vis-à-vis physical abuse by the police – Roma and juvenile prisoners. The share of Roma (28.3%) who reported being victims of physical abuse by police officers was twice as high as that of Bulgarians (14.5%).

66.6% of all juveniles interviewed reported being physically abused by police officers during police custody (Bulgarian Helsinki Committee, Alternative Report on the Implementation of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Bulgaria, Sofia, July 2017, pp. 19-20, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BGR/INT_CAT_CSS_BGR_29219_E.pdf, accessed 10 October 2020).

Currently, the organizations involved in detention monitoring, including NPMs, rely on three methods – observation, interviewing and analysis of documents. In terms of reliability of the information obtained, of course **observation** scores high. It provides first-hand information on the detention conditions. The monitor feels them not only with his/her eyes, but also with his/her nose and ears. Observation allows for measurement of spaces, temperature, lightening, or noise levels. On the other hand, we always observe changing conditions at a certain moment. And, of course, monitors would normally not be in a position to observe ill-treatment or other forms of abuse of detainees.

Analysis of documents is an important source of information to which the researcher may turn at any point after the visit to a detention facility. It is stable and may be relied on for a variety of purposes – reports, recommendations and even legal action. But in a detention facility, documents are usually produced by the authorities and are rarely self-incriminating. NPMs, unlike international bodies, are in a good position to solicit documents from independent sources at the national level from different types of experts and institutions – medical, sanitary, building, social, labour, etc., and should use this opportunity whenever possible. NPMs are also well-positioned to receive complaints from prisoners. When the particular NPM is under the umbrella of the equality body (e.g. the ombudsperson), complaints of discrimination coming from places for deprivation of liberty may be particularly informative about the treatment of groups and individuals in a situation of vulnerability there.

Interviewing is the most common method used by the NPMs. When used properly, it provides a lot of advantages – first-hand information from

a victim, the possibility to dig deep into the causes of the violations, the possibility to explore temporal dynamics of violations, and the possibility to look into the behavioural patterns of other stakeholders (administrators, guards, lawyers, medical professionals, and relatives) etc. In the course of the interview, the respondent can direct to other evidence – detention conditions to observe, victims to interview, documents to see etc. We will deal separately with interviewing detainees in a situation of vulnerability in Section 3.3.5 below. Before that, it is important to underline that NPMs are able to interview a much broader pool of stakeholders, who can provide specific and valuable information on the treatment of the detainees. These include, in addition to the detainees themselves and the staff of the institution, also lawyers, service providers, representatives of religious denominations, relatives of detainees and non-governmental organizations dedicated to the rights of specific vulnerable groups.

The choice of the appropriate method to monitor the treatment of people in a situation of vulnerability in detention depends on the specific circumstances of each group. Factors such as placement arrangements (separate or mixed institutions or facilities), the social stigma attached to the particular group, official recognition of the specific vulnerability, access to treatment and services, religious affiliation of the detainees, and the possibility to establish proper communication with them should all be taken into consideration in choosing the method. In any case, the monitoring team should use **triangulation**, i.e. it should ensure validation of the data collected through cross verification from two or more sources, and by using a variety of research methods. While no monitoring method should be a priori excluded as inappropriate, interviews with prospective victims should be a must with all groups and persons in a situation of vulnerability.

NPMs should apply a **systemic approach** to monitoring vulnerability in detention. This approach takes into account factors influencing human rights developments as a whole, and integrates multiple perspectives in the assessment of the specific situation. It tries to establish patterns and look at systematic failures, not just at the conduct of specific persons. When it tries to explore the root causes of human rights violations, the systemic approach looks not only at deficits, but also at the resources. It

diversifies its approach to interventions trying to make use of its different levels and dimensions.[94]

3.3.5. Interviewing detainees in a situation of vulnerability

3.3.5.1. The role of the interview in fact-finding and some ethical considerations

For the specific purposes of detention monitoring, the interview remains the key fact-finding method, and one that is used predominantly by both the international and the NPM monitors. It is particularly useful because of the flexibility which its application allows in fact-finding related to the rights of persons in a situation of vulnerability. Through the interview, the monitor aims firstly at establishing new facts. But there are also secondary aims – corroborating information received from other sources, identifying other possible sources of information and, where appropriate, establishing long-term relations with the particular respondent. At all times the monitor interviewing a person in a vulnerable situation must keep in mind the three dimensions of interviewing: epistemological (aiming at establishing or corroborating facts), ethical (involvement of the respondent in the monitor's work as fact-finder) and safety (exposing the respondent to different risks).

There are different formats of the interview (individual and group, in public and in private, confronting different stakeholders, etc.), each having its strengths and weaknesses. Article 20 of the OPCAT specifically provides for one of the formats – the "private interviews with the persons deprived of their liberty without witnesses". This provision takes account of the particular importance of such an interview, and aims at ensuring that the authorities do not create any obstacles for it. The private interview is particularly appropriate for studying the rights of persons and groups in a situation of vulnerability as it provides for better opportunities for establishing rapport, and better ensures the respondent's confidentiality, as well as his/her safety.

The interview research usually includes several stages:[95]

94. See in more detail: Birk, M., W. Suntinger, "A systemic approach to human rights practice", In: Hladschik, P. and F. Steinert (eds.), *Making Human Rights Work: Festschrift für Manfred Nowak und Hannes Tretter*, Neuer Wissenschaftlicher Verlag, Wien/Graz, 2019.
95. For more detail see: Kvale, S., S. Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing*, Sage, Los Angeles, etc., 2009.

- **Thematising –** Formulating the purpose of the interview
- **Designing** – Preparation of questions, planning the concrete steps and considering the ethical implications of the inquiry
- **Interviewing** – Conducting the interview with control over knowledge and ethics[96]
- **Transcribing** – Full transcription or otherwise transferring of the oral speech to written text
- **Analysing** – Deciding on the basis of the goal and the quality of the interview how exactly it contributes to the inquiry
- **Verifying** – Ascertaining the validity and reliability of the findings
- **Reporting** – Communicating the findings and the methods applied

Each of these stages involves ethical issues. In addition, there are some ethical imperatives at the start of the interview which must be considered in each case. These include a clear statement of the mandate of the monitor and its limitations, a statement of the purpose of the interview, information about the extent to which information will remain confidential, obtaining informed consent, and reminders that the respondent may skip a question they do not want to answer or withdraw from the interview at any time.

At the stages of **thematising** and **designing**, the key ethical issue to be considered are the consequences for the respondents for participating in the entire exercise. At the stage of **interviewing**, the main ethical considerations should be reassuring and providing an empathetic approach at all times, avoiding behaviour which is demanding, insincere and patronizing, and consideration of how critically the respondent may be questioned in view of the goals of the interview on the one hand, and his/her vulnerability on the other. At the stage of **transcribing** and **analysing**, the main concern should be the extent to which the text and the analysis remain loyal to the respondent's oral statements. At the stage of reporting, consideration should be given to respecting the confidentiality of the source and the vulnerable group to which he/she belongs.

Recording the interview with a person in a situation of vulnerability in detention may pose a specific challenge. The interest of the interviewer is

96. See next subsection for more details on the practice of interviewing.

always to have the interview documented through means which preserve the most of it, preferably through video or audio recording. With the smartphone technology nowadays, this is easy to do. But many detainees feel uncomfortable, especially in the beginning of the interview, and do not agree to video or audio recording. Moreover, even if they do (sometimes as a courtesy to the interviewer), during the interview they would not share as much sensitive information as they would if the interview is not recorded. What remains for the interviewer in this case are written notes. Other detainees however would readily agree to being recorded, and some would even insist on this if they see such a possibility. The interviewer should therefore assess in what way he/she documents the interview depending on the context. Whatever the case, he/she should carefully explain to the respondent how the information will be stored and used.

3.3.5.2. Interviewing in practice

Interviewing vulnerable respondents requires careful preparation, engagement and empathy, as well as consideration of the possible effects of the exercise in the course of the interview.[97] With regards to the place, there is a bright-line rule – it should be conducted at the location in which the respondent feels most at ease. This is usually in his/her cell, the activities room, the kitchen - but, as a rule, never the office of the prison governor or other official settings. For preparation the interviewer should read background material about the specific conditions of the group of detainees to which the respondent belongs. It is important to consider possible barriers for interviewing in advance – barriers of the environment, physical and psychological barriers, as well as the socio-cultural barriers. There should also be a careful preliminary assessment of possible risks. At the preparation/planning stage, it is necessary to consider issues related to the composition of the monitoring team, such as the number, gender and training of the interviewers, and arrangements for interpretation, if necessary.

In the course of the interview, the interviewer should aim at establishing rapport with the detainee. This is his/her main tool and one that makes the

97. For a good account for interviewing victims of trafficking, which may be used for other vulnerable groups see: UNDOC, *Anti-human trafficking manual for criminal justice practitioners*, New York, UN, 2009, Module 8.

research/monitoring interview different from the interrogation of a suspect in criminal proceedings. There are many factors which may contribute to the successful establishment of a rapport. Some general rules of behaviour at the beginning of the interview can be summarized as follows:

- Showing that your mandate and research do not intend to bring negative consequences for the respondent;
- Showing that you have experience and expertise;
- Explaining the purpose of the interview and the roles of the others present if there are any;
- Explaining that respondents should feel free to stop talking and terminate the interview at any time;
- Asking about the safety of the respondent;
- Ensuring confidentiality and discussing confidentiality issues with the respondent;
- Starting with small talk if needed.

Achieving and maintaining rapport is by no means a task only at the start. When the monitor begins the interview with explaining the mandate of the monitoring mission and the purpose of the interview, it would then be good to allow the interviewee a possibility to tell his/her account of the subject-matter without asking questions. At the point of the dialogue, each interview acquires its own dynamic, but generally it is a good idea to begin with open questions, gradually moving to closed ones. It is also a good idea to discuss less contentious issues in the beginning (food, outdoor exercise, library) and gradually moving to more sensitive ones (ill-treatment, sexual abuse, etc.).[98] As some respondents are unhappy to be assigned a subordinate role, it is sometimes appropriate to give the interviewee a possibility to also control the conversation. Often this is at the expense of embarking into themes, which are of no interest to the interviewer (such as the details of the prisoner's criminal prosecution). But the interviewer has to listen, at least for some time, as this is the inevitable side-effect of establishing rapport.[99]

98. Some manuals recommend discussing neutral topics in the beginning to establish rapport: UK Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*, March 2011, p. 70. available at: https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf, accessed 9 October 2020.
99. *Ibid.*, p. 74.

While interviewing persons in a situation of vulnerability, it is particularly counterproductive for the interviewer to display signs of unease, anxiety and embarrassment. He/she should maintain composure if the interviewee becomes emotional or upset. He/she should also never imitate situations of abuse as this may cause emotional breakdown in the respondent. Moreover, if possible, the interviewer should avoid loaded terms, such as "abuse", "rape" or "violence". It should be made clear to the interviewee that he/she can ask for a break at any time. These may be required more frequently in the case of detainees in a situation of vulnerability.[100]

As the main aim of the interview is to obtain the respondent's account of the events and circumstances, the interviewer needs to rely on some means of encouragement. One such means is probing. There are several techniques of probing: silent expectation, open encouragement ("yes, yes", "aha"), requests for details and elaborations ("Did anything else happen?"; "Is there more on this you can tell me?"), and repetition of respondent's statements etc. Some interviewers use the so-called "cognitive interviewing procedures" (CI) for recall of the events. These include mental context reinstatement (i.e. putting someone back into the context where the event occurred), changing the order of recall, and changing perspective (imagining viewing the events from a different perspective)[101] and others. These are useful techniques, which however require extensive training of the interviewers.

The detention monitor should be conscious at all times that the interview is a unique and one-off event, and that there will normally be no possibility to return to the same respondent. This is why all details of names, places and time should be very carefully clarified and properly recorded.

Upon closing the interview, the interviewer usually asks whether the respondent has anything else to add and, if appropriate, provides contacts in case the respondent wants to communicate in the future. The interviewer should ensure that the respondent is not distressed and is in a positive state of mind. Thus, even if the interview was not very informative, the interviewer should not show disappointment.

100. *Ibid.*, p. 71. The authors of this useful manual recommend using a "touch card", i.e. a card placed beside the interviewees, which they can touch when they want a break.
101. See for more detail: Miller, K. et al., *Cognitive Interviewing Methodology*, New Jersey, Wiley, 2014.

3.3.6. Ensuring detainees' safety

Anybody who speaks with a detainee for the purposes of collecting information on how he/she or his/her fellow detainees are treated, must keep in mind the possibility for undermining his/her safety. How can detainees' safety be compromised? Even though Article 21 of the OPCAT specifically prohibits any sanction against any person for having communicated to the NPM any information, in a detention context, retaliation against detainees who have done this can take place in a variety of ways: through direct physical attacks or threats, through formal or informal punishments, by withdrawing their formal and informal privileges, through instigating inter-prisoner violence, by submitting negative opinion in early release proceedings, by refusing work, by targeting relatives and friends during visits, etc. The legal framework under which detention facilities operate throughout Europe still bears marks from the past when putting somebody in detention amounted to total submission to detention authority, and no rights and no safeguards against abuse of power. This makes prisoners extremely vulnerable. This is of course much more so in the case of prisoners in a situation of vulnerability.

How to prevent such retaliation? How to ensure that the "do no harm" principle is fully respected? The key to addressing such safety concerns is paying constant attention to them before, during and after the visit.

Before the visit the delegation can collect information about safety conditions in the particular detention facility from its previous reports, from NGO reports, media, former prisoners and international reports. It should discuss safety and include safety measures in planning the visit, and should train members of the monitoring team on how to implement them. Although it may not be easy, especially where the monitoring team visits the detention facility for the first time, it should try to come up with a preliminary assessment of the safety risks, however rough.
The key to ensuring detainees' safety is the monitor's behaviour during the visit. Here the experience suggests some bright-line rules, which must apply in high risk situations:

- When selecting individual detainees for interviews, choose within large groups on a random basis;

- Aim at private interviews, especially on sensitive issues, and with persons in a situation of vulnerability;
- Never discuss staff violence in group interviews; prevent detainees in talking about this in public;
- During interviews, don't ask about names and other details with no cogent reasons;
- Avoid concrete recommendations to the staff concerning specific detainees after the visit;
- Offer your address, phone number and other contacts to detainees who may be threatened.

The safety concern does not end with the visit. **After the visit**, when preparing the report or recommendations, the monitoring team should consider carefully what details and names it includes within them, and should never do this unless it is safe for the detainees. When needed, it should carry out follow up visits to check safety concerns. Where the safety of a detainee is compromised, the NPM should never hesitate to complain officially.

> *''The NPMs focus on vulnerability in detention should become an integral part of their work''*

4. CONCLUSION

Since their establishment, a number of national preventive mechanisms in Europe have embarked into monitoring the rights of detainees in a situation of vulnerability. Their approaches vary – while some have focused on specific groups and undertaken substantial monitoring work and produced special reports, others have included this theme in their general monitoring work and reports. Still others have not yet dealt with the issue in any way. The NPM focus on vulnerability in detention should become an integral part of their work, as it constitutes an essential aspect of their mandate to prevent torture, inhuman and degrading treatment.

The standards for treatment of vulnerable groups in detention at the international level are incoherent. The UN and CoE bodies have produced elaborate standards for some, but have paid little or no attention to other vulnerable groups. The EU has not developed its own comprehensive standards on deprivation of liberty or on the situation of vulnerable groups. This is a weakness of EU law, which, along with some serious discrepancies between the existing international standards and the situation in a number of member states, prevents mutual trust and judicial cooperation in general. Some NPMs have tried to determine vulnerability in detention in accordance with the specific circumstances of their national context. This is a healthy approach that should be encouraged.

Although monitoring the rights of groups and individuals in a situation of vulnerability has a long history in Europe, NPMs need to further develop approaches and skills in this regard and expand their reach to groups that have not received sufficient attention so far. NPMs are in a good position to benefit from the strengths of both official and non-governmental monitoring approaches, as well as from a combination of qualitative and quantitative methods in their monitoring work.

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