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# 'Complaints'

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## Assessing Prison Complaints Mechanisms in CEE and FSU Regions

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*Hungarian Helsinki Committee*



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## Executive Summary

Chapter 1 provides the reader with some background information on the field of research dealing with the necessity of monitoring and inspections in 'closed environments' such as detention centres. Research in this field has highlighted the link between closed environments in which people are deprived of their liberty, and the risk that detainees run of physical and mental abuse by both the authorities in such institutions and fellow inmates.

The chapter provides some legal background on the international legal obligations of states in this field and stresses the importance of independent monitoring mechanisms. Distinctions are drawn between internal governmental inspection, independent national monitoring, and international monitoring by bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

An overview is provided of the European standards and international legal obligations, with particular attention paid to the European Prison Rules. The chapter presents a typology of European supervisory mechanisms (distinguishing between lay independent monitoring boards, ombudspersons, administrative judges, etc), and gives a breakdown of European models from the organisational standpoint, by describing several models of institutional solutions throughout the region.

Finally, Chapter 1 concludes by outlining developments that have occurred in this field over the last decade, focusing on both achievements and problems, and provides examples of good practice throughout the region.

Internal prison complaints mechanisms are discussed in Chapter 2. This chapter focuses on the right of prisoners to have access to an effective and fair internal complaints mechanism. It includes introductory information concerning complaints: the reasons why prisoners make complaints, who is entitled to make a complaint, and also who investigates and adjudicates these complaints. The second section of this chapter goes on to deal with the formal requirements for fulfilling a complaint, both on the part of the detainee (regarding time limits, procedural requirements, etc.) and on the part of the authorities (concerning the confidentiality of complaints, etc), taking into consideration international legal obligations.

The various ways in which prison complaints are dealt with across the region are examined, with a focus on different aspects such as the availability of free legal aid for the complainant and the duration of the complaints procedure. Finally, the chapter considers the outcome of such procedures and the possibility of appeal. Included in this chapter are six detailed tables summarising this material, and providing thorough statistical data. Based on these findings, the author offers detailed recommendations for the formulation of law in this field.

Chapter 3 largely follows the same pattern as the previous chapter, but with a focus on external complaints mechanisms. The information provided is based on questionnaires drawn up the Hungarian Helsinki Committee and completed by local experts across the CEE-FSU region. These experts provided information on many aspects of the external complaints procedures in their respective countries. Information was also provided on the opinion of these experts on the effectiveness of the system, with rather negative results. This Chapter includes detailed tables displaying all the information received. Based on the responses to the questionnaires, the author offers detailed recommendations regarding the right of detainees in the operation of external complaints mechanisms.

Chapter 4 considers the role of NGOs in the monitoring of prison conditions. Background information is provided on the necessity of ensuring the independent investigation of such facilities, and it is emphasized that control mechanisms promote human rights, help limit the risk of ill-treatment and regulate any excessive measures taken against those deprived of their liberty. The chapter goes on to provide an overview of the law regulating the ability of NGOs to monitor prisons. The issue of prior notification is

also examined, with the author considering the effect of such notification on the short term operation of the prison. Detailed tables summarizing the law concerning NGO monitoring across the region and provided and the author draws up several recommendations for future practice in this area.

Chapter 5 of this report provides an analysis of the applicable standards of the European Court of Human Rights concerning the standards of detention. In the vast majority of cases where a detainee complains to the Court of an alleged infringement of their rights as secured by the European Convention on Human Rights, Article 3 is invoked. Article 3 stipulates that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” An overview of the jurisprudence of the Court concerning the conditions of detention is provided, demonstrating that conditions of detention which fall below a certain standard can indeed amount to what the Court considers to be inhuman and degrading treatment. Issues arising in such cases include unsatisfactory cell sizes and insanitary living conditions.

This chapter also focuses on the treatment of vulnerable persons in prison, looking in particular at prisoners suffering from mental and physical illnesses, persons of old age, and those suffering from an addiction. The Court has concluded that prison authorities must take into account the individual circumstances of vulnerable detainees when determining what amounts to appropriate conditions of detention for such individuals. Attention is paid to the role of the Committee for the prevention of Torture in the Court’s jurisprudence, and use of the Committee’s reports in the Court’s assessment of prison conditions in the country under consideration.

While the Chapter deals primarily with Articles 3 jurisprudence, it also looks at that of Article 6 – the right to a fair trial – dealing particularly with the modalities of ensuring the independence of mechanisms dealing with the inmates’ complaints. Consideration is also given to Article 13, which deals with the issue of availability at the national level of a remedy to enforce the substance of Convention rights and freedoms. Finally, this chapter focuses on the standards set by the Court regarding the independence of the body overseeing prisoner complaints.

# 1. Inspection and monitoring in closed environments

## 1.1. Why control prisons? – The necessity of an effective complaint and monitoring mechanism

### 1.1.1. Effective control: a human need

The current widespread acknowledgement of the necessity of effective complaints mechanisms and independent prison monitoring systems is a result of long historical development. John Howard, the sheriff of Bedfordshire, visited many prisons in the 18th century and through his work demonstrated the need for oversight in the functioning of prisons. As a result of his work, prison reforms were initiated in order to humanise prison conditions as early as the third part of the 18th century.<sup>1</sup> Later on, research in the fields of psychology and sociology proved that prison complaints procedures and monitoring bodies are absolutely necessary and indispensable.

The experiments of Milgram and Zimbardo have demonstrated the risk factors related to dependency, with Zimbardo's work in particular focused on the prison environment. Without external control over closed environments, the exercise of power can lead to abuse and detainees may run a serious risk of being subjected to torture or other inhuman or degrading treatment. As previous mid-20<sup>th</sup> century research has proven, prison as a total institution with its 'pains of imprisonment' means a deprivation of liberty, goods and services, heterosexual relationships, autonomy and security. According to Sykes, imprisonment inflicts serious harm on the personality of inmates.<sup>2</sup> Those harms are an immanent result of the deprivation of liberty but they must be minimalised through normalisation and independent monitoring. There is a potential risk of injury to detainees arising from an abuse of power on the part of members of staff, and also from fellow detainees. Separate to the formal structures instituted by the prison administration, there exists an informal structure among inmates, which also has serious effects on the lives of detainees.

It is widely known that in closed environments almost all aspects of the detainee's life are heavily regulated by the authorities. Those authorities make thousands of decisions every day which affect the fundamental rights of detainees. 'Routine daily activities, such as whether prisoners can contact family and friends, whether and how they can practice their religion or access medical services, and when they can eat and sleep, are all regulated by correctional authorities. Without recognition that the business of corrections is all about promoting and monitoring respect for human rights, preventing human rights violations, and detecting and remedying human rights violations, systemic abuses of power are inevitable.'<sup>3</sup>

### 1.1.2. Effective control: a legal obligation

As van Zyl Smit and Snacken sum up, 'in Europe, the realization of the endemic risk of abuse in situations of deprivation of liberty was one of the factors that led to the creation of the CPT<sup>4</sup>, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which 'shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.'<sup>5</sup>

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<sup>1</sup> J. Howard: *The State of Prisons in England and Wales*. London: Warrington, 1777.

<sup>2</sup> G. Sykes: *The Society of Captives: A Study of a Maximum-Security Prison*. Princeton: Princeton University Press, 1958.

<sup>3</sup> I. Zinger: *Human Rights Compliance and the Role of External Prison Oversight*. in: *Canadian Journal of Criminology and Criminal Justice*, Vol. 48, No. 2, April 2006, p. 128.

<sup>4</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 116.

<sup>5</sup> Article 1, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Another important tool of independent international non-governmental monitoring is the mechanism of the Optional Protocol to the Convention against Torture (OPCAT). The objective of the Optional Protocol to the Convention Against Torture of the United Nations ‘is to establish 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.’<sup>6</sup> OPCAT is an instrument designed to assist states in preventing incidences of torture and other cruel, inhuman or degrading treatment or punishment. It is based on the premise that the more open and transparent places of detention are the less abuse will take place. It stresses the importance of prevention: seeing problems in advance and addressing them.’ This description is taken from a document of the Association of the Prevention of Torture proposing a National Preventive Mechanism for Georgia.<sup>7</sup>

The importance of non-governmental monitors is also recognised by other organisations such as Human Rights Watch. In its Global Report on Prisons it stated: ‘unannounced, periodic visits are obviously the most effective, but even an announced inspection by outsiders has its value.’<sup>8</sup> Following visits to as many as 20 countries, including 4 CEU-FSU countries, the organization found that prisoner’s contact with the outside world is among the chief safeguards for preventing or minimizing human rights abuses inside prisons.<sup>9</sup>

### 1.1.3. Effective control: the accountability perspective

Controlling closed environments has other aspects from the management point of view. The importance of accountability should not only be seen from the perspective of a prison governor, or even from that of the responsible ministry or the government whose basic interest is that the facilities are governed carefully and properly. From the broader perspective, it is also in the interest of society at large that closed institutions are administrated properly: with respect to the human rights of the citizens in closed environments.<sup>10</sup>

### 1.1.4. Effective control: criminological aspects

‘The best argument for observing human rights standards is not merely that they are required by international or domestic law but that they actually work better than any known alternative – for offenders, for correction staff, and for society at large. Compliance with human rights obligations increases, though it does not guarantee, the odds of releasing a more responsible citizen. In essence, a prison environment respectful of human rights is conducive to positive change, whereas an environment of abuse, disrespect, and discrimination has the opposite effect: Treating prisoners with humanity actually enhances public safety. Moreover through respecting the human rights of prisoners, society conveys a strong message that everyone, regardless of their circumstance, race, social status, gender, religion, and so on, is to be treated with inherent respect and dignity.’<sup>11</sup>

## 1.2. What to control and how?

Persons are under control in many aspects and in many places. In this research we focus on closed environments. Closed environments are places where persons are, or may be, deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other public order. This definition is based on UN-norms.

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<sup>6</sup> Article 1, Optional Protocol to the Convention Against Torture.

<sup>7</sup> Association for the Prevention of Torture: *Optional Protocol to the Convention Against Torture – A proposed National Prevention Mechanism Model for Georgia*. <http://www.apr.ch/npm/eca/Georgia2.pdf>.

<sup>8</sup> Human Rights Watch (1993): *The Human Rights Watch Global Report on Prison*. New York: Human Rights Watch, p. 109.

<sup>9</sup> Human Rights Watch (1993): *The Human Rights Watch Global Report on Prison*. New York: Human Rights Watch p. 109.

<sup>10</sup>For further information on grievance and prison inspections as an accountability mechanism: M. Maguire, J. Vagg, R. Morgan (eds.): *Accountability and Prisons: Opening up a Closed World*. London: Tavistock, 1985.

<sup>11</sup> I. Zinger: Human Rights Compliance and the Role of External Prison Oversight. in: *Canadian Journal of Criminology and Criminal Justice*, Vol. 48, No. 2, April 2006, p. 128

Closed environments are also controlled in other ways. On the one hand, prisoners should have the opportunity to make requests or complaints. On the other hand, agencies or bodies should also have the opportunity to have control over the prison.

Prisoner complaints and requests can be sent either to the prison director (or to the staff of the prison) or to the prison administration. They can also be sent to bodies which do not belong to the prison administration. This is also possible at the second instance of the grievance procedure. The body (prison or other) which deals with the complaint is not necessarily important, far more important is that the procedures are „effective” as set out in the 2nd General Report of the CPT (Art. 54). This implies that the authorities have an obligation to respond seriously to complaints and requests.

Control over prisons involves both inspection and monitoring. Inspection refers to an activity which occurs in the bureaucratic operation of the prison system or the government and is undertaken by a government agency.<sup>12</sup> By contrast, monitoring is undertaken independently of the operation of the prison system.<sup>13</sup>

In their work van Zyl Smit and Snacken distinguish between internal governmental inspection, independent national monitoring and international monitoring under the chapter ‘Independent inspection and monitoring’ the terminology of which ‘may be somewhat confusing’, as HM’s Inspector of Prisons for England and Wales ‘monitors’ rather than ‘inspects’.<sup>14</sup> They argue that the independence described by Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules<sup>15</sup> (hereafter: European Prison Rules) is what is important, not the terminology.

In this research, an internal complaints mechanism is a mechanism which functions inside the prison administration at the first and second instance. Only external complaints mechanisms are seen as independent. External bodies are courts, prosecutors, ombudsperson or other independent bodies (e.g. visitors board or monitoring board).

### 1.3. What European standards exist?

The importance of both appropriate complaints mechanisms and independent inspections and monitoring are reiterated in countless international and domestic legal provisions, as well as by experts and in recommendations by national and international organisations. One of the most important references is in the European Prison Rules in which it is a key provision. Rule 9 of the Basic Principle states that ‘all prisons shall be subject to regular government inspection and independent monitoring.’

In Part VI of the European Prison Rules titled ‘Inspection and Monitoring’ further details are included. Under governmental inspection the Recommendation defines a regular inspection by a governmental agency as undertaken ‘in order to assess whether they are administered in accordance with the requirements of national and international law’, and the provisions of the European Prison Rules. Monitoring is a differing activity from inspection. Monitoring is undertaken by independent bodies whose findings are made public. These bodies monitor the conditions of detention and the treatment of prisoners. So, in contrast to inspection, monitoring is conducted independently from the bureaucratic operation of the prison system according to these rules. ‘Such independence is the key European principle in this regard’.<sup>16</sup> According to the European Prison Rules, such independent monitoring bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons.

The core provision on requests and complaints is Rule 70.1 of the European Prison Rules. This states that ‘Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the

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<sup>12</sup> European Prison Rules 92.

<sup>13</sup> European Prison Rules 93.

<sup>14</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 116.

<sup>15</sup> *Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.*

<sup>16</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 118.

director of the prison or to any other competent authority.’ Rules 70.2 to 70.7 give further detail on the law in this area, e.g. the rules prohibit the punishment of a prisoner as a consequence of that prisoner making a request or lodging a complaint. Two of the most important of these rules are the obligation on prison authorities to justify the denial of a request or the rejection of a complaint and the right of prisoners to appeal the decision to an independent authority. The rules on requests and complaints are included in the section of the European Prison Rules titled ‘Good order’ which demonstrates that effective procedures and complaint mechanisms are a part of the dynamic security approach which aims to eliminate the perception on the part of the authorities of a prison or detention facility as a total institution.<sup>17</sup> In this respect, effective grievance procedures, and the requirement for justification and explanation of decisions by staff are just measures, and justice is a key element in the concept of good order.<sup>18</sup>

In the nineties in Europe the link was drawn between complaints and inspections. In its Second General Report in 1991 the CPT made this connection when it explained that ‘effective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (e.g. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general.’<sup>19</sup> The importance was not just stated regarding imprisonment but also police custody it was said to be an ‘essential safeguard’.<sup>20</sup>

## 1.4. What European models exist?

### 1.4.1. Typology of European models of control

The reason that the European Prison Rules are ‘conspicuously silent on how or by whom any mediation or appellate process should be conducted and the extent to which the prison authorities are bound by the outcome of such processes’<sup>21</sup> is the range of different supervisory mechanisms found across Europe. Some useful ‘tools’ could be drawn from a list of best practices for CEU-FSU countries. According to van Zyl Smit and Snacken, the supervisory mechanisms are as follows:

- a) One such mechanism is the use of lay independent monitoring boards, also called board of visitors, to act as a first filter for unresolved complaints or requests. The members – who can be reached by the prisoners also informally – often attempt to resolve disputes by mediation. In Germany (Anstaltsbeirat) or England (Independent Monitoring Board) these boards can advise the authorities on how to deal with complaints but cannot take binding decisions on them. The publicity of their reports and the obligation of the Ministry of Justice to answer them properly makes such advice efficient.<sup>22</sup>
- b) A second mechanism often applied to prisons is that of an ombudsman for complaints and requests. Such an ombudsman may be a specialist in prisons (as the Prisons and Probation Ombudsman in England) or the prison aspect may be part of the wider activities of a national ombudsman (as in Albania, Hungary or Poland). In many jurisdictions the powers of an ombudsman are limited to investigations and recommendations, although even in the absence of

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<sup>17</sup> E. Goffmann: ‘The Characteristics of Total Institutions’. In: *Asylums*. Harmondsworth: Penguin, 1961. pp. 1-124.

<sup>18</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 305.

<sup>19</sup> CPT 2nd General Report 54. <http://www.cpt.coe.int/en/annual/rep-02.htm>.

<sup>20</sup> CPT 2nd Report 41.

<sup>21</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 308.

<sup>22</sup> Based on research of D. Vig at the National Institute of Criminology in Budapest. These reports can be viewed at : <http://www.imb.gov.uk/reports/146.htm>.

formal-decision-making powers, in Central-European countries<sup>23</sup> and elsewhere, their recommendations may be highly persuasive.<sup>24</sup>

- c) An important variation is to be found in the Netherlands and more recently in modified form in Belgium,<sup>25</sup> where the decision of local complaints committees, which are subcommittees of larger local supervisory bodies, are binding but subject to appeal by both the prisoner and the head of the prison to a central administrative organ which too has decision making power. The result of this two-stage process with its quasi-judicial elements is that ‘an immense amount of jurisprudence has been generated that has exerted a positive influence in a situation where prisoners, initially, had barely any rights.’<sup>26</sup>
- d) Judges and courts specialised in prison matters play a varying role in relation to prisoners’ requests and complaints. In countries like France or Italy, where an administrative judge is present in prisons, one may expect judges to play a key role in this regard. But they are concerned mostly with deciding external issues (e.g. how long the prisoner must serve before the possibility of conditional release) and their close involvement with the prison administration poses a threat to their independence to the limited extent that they have a reviewing role over the decisions of prison authorities.<sup>27</sup> In partial contrast, in Germany the specialist judges are not involved directly in the prison but in specialist chambers of the ordinary courts (Strafvollstreckungskammern).<sup>28</sup>
- e) In many countries there are no specialist courts dealing with prison matters, but, in theory at least, prisoners can avail of the general remedies available to the ordinary citizen for the enforcement of their rights.

#### 1.4.2. Typology from an organisational point of view

It is also possible to categorize the national agencies or bodies from an organisational point of view by describing typical institutional solutions.<sup>29</sup> By examining typical solutions in national jurisdictions concerning the lawfulness of enforcement from the prosecutor’s point of view, we may construct the following categories.

(1) In countries where, as is typical for the former soviet system, the prosecution is independent from the government, the prosecutor is responsible for monitoring the lawfulness of detention. (2) In other countries courts play also a role in the enforcement’s control through decisions on appeal. (3) There are countries where these powers are otherwise shared between the prosecutor and the courts. (4) Some other

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<sup>23</sup> K Gönczöl: ‘Protecting prisoners’ rights in the new democracies of Central Europe’. in: Penal Reform International: *Monitoring Prison Conditions in Europe: Report of a European Seminar*, Paris: Penal Reform International, 1997, pp.55-60., cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 309.

<sup>24</sup> To illustrate how effective this could be, we recall the recommendations of the Hungarian Ombudsman to close down the prison in the city of Veszprem, which in 1997 still had cells underground without daylight with a saturation of 300%. As a result of the recommendations of the Ombudsman the prison was shut down and a new prison was built in 2003. See case (OBH 8631/1997). K. Gönczöl: *Beszámoló az 1998. évi tevékenységről*. Budapest: Országgyűlési Biztos Hivatala, 1999.

<sup>25</sup> S. Snacken: ‘Belgium’. in: D. van Zyl Smit and F. Dünkel: *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions*. Deventer: Kluwer Law International p. 51-54. 2001, cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 309.

<sup>26</sup> C. Kelk: ‘The Netherlands’. in: D. van Zyl Smit and F. Dünkel: *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions*. Deventer: Kluwer Law International, p. 483-488, 2001, cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 309.

<sup>27</sup> M. Herzog-Evans: *Judicial Oversight on prison sentences*. in: Penal Reform International: *Monitoring Prison Conditions in Europe: Report of a European Seminar*, Paris: Penal Reform International, 1997, p. 55-60. cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 309.

<sup>28</sup> F. Dünkel: ‘Germany’. in: D. van Zyl Smit and F. Dünkel: *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions*. Deventer: Kluwer Law International, p. 316, 2001, cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009, p. 309.

<sup>29</sup> For a summary see: I. Lajtár: *Jogállami biztositások a hazai büntetés-rehabilitációban, a garancia- és kontrollrendszer komplexitása és fejlesztésének lehetőségei irányai*, PhD-thesis, 2008.  
[http://193.224.191.196:8080/phd/Lajtar\\_Istvan.phd.pdf](http://193.224.191.196:8080/phd/Lajtar_Istvan.phd.pdf).

solutions for legal control are: parliamentary commissioner or a mixed committee of prosecutors, judges, teachers, psychologists, doctors or others.<sup>30</sup>

There are three models of penitentiary judges.<sup>31</sup> Firstly the traditional model in which the penitentiary judge has control over the so-called ‘treatment procedure’ in prison, i.e. where the role of the sentencing judge is separate from the judge deciding on enforcement issues. Since the rehabilitation ideology has lost its importance in the practice of law enforcement, this role of the penitentiary judge has subsided somewhat but the judge still has power in legal matters under the enforcement or in community sentences.

Secondly, in other European countries, the judge is not involved in treatment-issues, because the judge has a formal-protective function. In this model the judge decides solely on the dispute between the law enforcement as public administration and the prisoner. Kabódi states by way of example that the judge may take legal actions or even sue the prison administration if the actions taken or omitted violated the rights of the prisoner.

And finally in the third model the role of the penitentiary judge is purely to determine some concrete issues which were not determined by the sentencing court. It may also modify or review matters during the enforcement period.

The role of the ombudsman is different from those bodies described above, since it is widely seen as a human-rights forum rather than a tool for legal control.<sup>32</sup> In the literature the ombudsman is usually seen as an effective preventive mechanism, but almost never as an appropriate tool for investigation or inspection. In some countries – as mentioned above – an ombudsman may be a specialist in prison matters or the prison aspect may be part of the wider activities of a national ombudsman for the protection of human rights generally. The Prison and Probations Ombudsman in England is a body which is rather effective in the investigation of deaths in closed environments. This necessitates a staff of approximately 100.<sup>33</sup>

The NGOs may have two different roles: (1) limited control over enforcement or (2) the patronage of prisoners. The first role, which was first developed as early as 1797 in Pennsylvania, recognises the importance of the protection of prisoners’ rights and the need for society to have oversight in the running of detention institutions.<sup>34</sup>

## 1.5. Previous research on CEE-FSU countries

Significant comparative research has been previously undertaken by Roy Walmsley at Heuni. His typology shows the steps taken in prison systems in the region, and in his 1996 book he deals with ‘information, complaints and contact with the outside world’ in one chapter, which evolved to 2003 to include a subchapter on ‘prisoners’ rights to make complaints’ and another on ‘inspection, monitoring and the availability of international standards’.

### 1.5.1. Developments and problems in the 90s

#### 1.5.1.1. *Complaints procedures in the region*

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<sup>30</sup> Gy.Vókó: A büntetés-végrehajtás törvényességi felügyeletének fontossága, módszerei és eszközei in: *Ügyészégi Értesítő*, No.1., 1990. p. 3-4. cited by I. Lajtár: *Jogállami biztosítékok a hazai büntetés-végrehajtásban, a garancia- és kontrollrendszer komplexitása és fejlesztésének lehetséges irányai*, PhD-thesis, 2008.

<sup>31</sup> L. Csernyánszky, T. Horváth, K. Heylmann, Cs. Kabódi, J. Lőrincz, F. Nagy: *Büntetés-végrehajtási jog*, Budapest: Rejtjel, 2008.

<sup>32</sup> Gy. Vókó: *Büntetés-végrehajtási jog*, Pécs: Dialóg Campus, 2008, p. 73.

<sup>33</sup> For detailed information on methodology please consult the PPO website at: <http://www.ppo.gov.uk/prison-investigations.html>.

<sup>34</sup> J. Lőrincz: A büntetés-végrehajtás civil kontrollja in: *Belügyi Szemle* No.2-3, 2002. p. 167-184. and Cs. Kabódi: A büntetés-végrehajtás társadalmi ellenőrzése, in: *Büntetés-végrehajtási jog*, Budapest:Rejtjel, 2001.

According to Walmsley's research during the mid-90s,<sup>35</sup> the opportunities to make complaints have multiplied in the region since the political changes of 1989-1991. As a result of this, the atmosphere has improved in many institutions according to reports by both governmental and non-governmental experts. Even if the precise rules of the European Prison Rules (Rule 42 of the European Prison Rules at the time of his research) were not always complied with in every country, the progress that has been made was described as 'enormous'.<sup>36</sup>

Walmsley's research contains concrete information on some CEU-countries and Russia. In Bulgaria prisoners can make complaints both to internal and external bodies (such as the prosecutor, President of the Republic, the Parliamentary Committee for Human Rights). According to Walmsley it was reported that complaints are rarely about matters for which the prison service is responsible, rather they concern the miscalculation of prison sentences. The prosecution office in Bulgaria reported that if they receive a complaint from a prisoner 'not infrequently they send someone to investigate the matter'. Letters sent to the president are collected in a locked box in the prison, and are later collected by an official of the Office of the president.

In the Czech Republic prisoners may complain to the director of the institution, to the national prison administration, to the Ministry of Justice, to the Helsinki Committee and the President. At the time of Walmsley's research, the President had no jurisdiction, and the Office of the President therefore asked a competent authority, e.g. the Ministry of Justice to deal with the complaint. According to the data, only a few prisoners complained about security staff or about conditions (food, bad treatment, overcrowding). Walmsley collected good practices from the Czech Republic such as the conclusions of the Ministry of Justice, that 'sometimes a complaint from an individual concerns a problem which affects many' and that there is a great 'importance of letting every prisoner know that his or her complaint was dealt with, what the response was and, if it was considered justified, that action is being taken to rectify the problem'.<sup>37</sup>

In Hungary about 10% of the complaints sent to the Prosecution Service concerned the prison service, e.g. food, rudeness, or assault by a member of staff. Complaints about the prison staff were also dealt with in the Ministry of Justice.

In Poland, the Ombudsman was a unique body amongst CEU-countries at that time. Complaints to such 'outside bodies' as the Ombudsman or prosecutor or the President could leave the institution without having been opened or read by the prison staff. In 1993 the Ombudsman received almost 4,500 letters from the prisoners or their families (who were also eligible to complain), from which less than 5% were judged to be justified, with the majority of complains concerning matters falling outside the responsibility of the prison service. Periodically notices were posted in the institutions on how to complain to the ombudsman's office, and unsurprisingly these were followed by an 'increase in the level of complaints.'

In Romania the local Helsinki Committee reported that the lack of paper in the institutions and prisoner's scepticism about confidentiality makes it more difficult to make a complaint but by the time of the report they were receiving complaints. The number of complaints increased following their television broadcasts. Another organisation, the SIRDO (Romanian Independent Organisation of Human Rights), reported that their activities such as investigations into complaints had led to prosecutorial decisions.

In Russia prisoners were reportedly able to complain to the director, to the prison administration, to the prosecutor and to the courts. The national prison administration headquarters reported that complaint letters were not read by the staff. On the other hand in an institution visited by the research team a special department was established to 'see that letters of complaint are sent to the appropriate destination (e.g. the prosecutor)'. The deputy governor of this institution said that one person in the department 'puts the letters into envelopes; and it seemed that at least the staff of this department are able to read the letters of complaint'.<sup>38</sup>

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<sup>35</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 101.

<sup>36</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 101.

<sup>37</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, pp. 101-102.

<sup>38</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 103.

### 1.5.1.2. Inspection and monitoring

The rules on inspection were of great importance in the European Prison Rules in force prior to 2006. In basic rules 4 and 5 particular mention was given to the task of inspections, which should not be undertaken by the prison administration. Walmsley reported as early as 1996 that the importance of inspections was fully accepted by prison administrations in the CEU-region and ‘a wide range of inspection occurred’.<sup>39</sup>

According to Walmsley (1996), the arrangements for inspection vary from country to country and often include several types of inspection by different bodies. ‘The national prison administration normally conducts its own inspections to ensure that official policy is implemented but in many countries the responsible Ministry also conducts inspections. The degree of independence of the inspecting body clearly affects the credibility of the inspection in the eyes of the observers who are not themselves in any way responsible for the penal institutions; independent inspections are sometimes conducted by official bodies such as the prosecutor’s office or a parliamentary body.’<sup>40</sup> Sometimes private bodies such as NGOs or academic experts conducted independent inspections. The following table sums up the state of affairs in 1996 (according to Walmsley’s data).

*Table 1 – Inspection of penitentiaries in 1996*

	<b>Prison administration</b>	<b>Ministry responsible</b>	<b>Independent official body</b>
<b>Albania</b>	Yes	Yes	Yes
<b>Belarus</b>	Yes	Yes	Yes
<b>Bulgaria</b>	Yes	Yes	Yes
<b>Croatia</b>	Yes	Yes	Yes
<b>Czech Republic</b>	Yes	Yes	No
<b>Hungary</b>	Yes	Yes	Yes
<b>Latvia</b>	No	No	Yes
<b>Lithuania</b>	Yes	Yes	Yes
<b>Moldova</b>	Yes	No	Yes
<b>Poland</b>	Yes	No	Yes
<b>Romania</b>	Yes	Yes	Yes
<b>Russia</b>	Yes	No	Yes
<b>Slovakia</b>	Yes	Yes	Yes
<b>Slovenia</b>	No	Yes	No

While in almost all countries both the prison administration and the responsible Ministry conduct inspections, there are – unlike in the internal inspection – fundamental differences in the ministerial inspection activity. For example, while in Hungary a small department of six members at the Ministry of Justice was responsible for ministerial inspection, other countries such as Bulgaria operated in a more sophisticated manner. The Bulgarian Ministry of Justice held a so-called ‘Open Day’ when members of the public could call in to raise points which were then taken up by the inspection team if such a course of action appeared to be justified.<sup>41</sup>

As the chart demonstrates, inspections by an independent official body had been undertaken in most countries of the region, and – as a result of legal tradition – almost always by the prosecutor’s office. In some countries the inspections seemed to focus almost exclusively on checking that prisoners were held under proper authority and for the length of time sanctioned by the law, ‘while in other countries they are concerned also with broader aspects of the management of prisons and the treatment of prisoners.’<sup>42</sup>

<sup>39</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 48.

<sup>40</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 49.

<sup>41</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 50.

<sup>42</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 51.

There was much discussion in the nineties, discussion which continues in some countries today, as to whether this inspection function should remain with a body whose core role is to prosecute the accused and which is often responsible for the investigation of the crime. Following reform in the Czech Republic the prosecution no longer holds a role in investigations or dealing with prisoners' complaints. By way of contrast, in Hungary prosecutors carry out the inspectoral role 'with much regard of the prisoner's human rights.' As in other countries of the region, the prosecutor has the right to enter a prison at any time and interview any prisoner. If a prisoner is being held in the facility without legal basis, the prosecutor releases the prisoner immediately. In the mid-90s other inspections by independent official bodies were generally ad hoc investigations by parliamentary committees. Such bodies were established by the Russian Duma, the Polish Senate, and also in Moldova.

Independent inspection by so-called private bodies, such as NGOs were a 'rarer occurrence and usually did not amount to a formal inspection.'<sup>43</sup> Increasingly, NGOs and academic experts were granted access to penal institutions. The role of NGOs was effectively taken into consideration in Romania, the Czech Republic, Poland and Hungary.

It is very important that the results of, and the recommendations arising from, the inspection are implemented regardless of which body undertook the inspection. As Walmsley reports, in several countries (including Poland, Bulgaria or Romania), formal procedures were developed to ensure that recommendations were implemented wherever possible and not simply ignored. This is undoubtedly good practice. For instance in Poland the director of the institution is required to inform the inspection department in writing as to how far the recommendations have been carried out. It is also desirable that a plan be drawn up for the implementation of the recommendations and that a time limit is given suitable to the nature of the recommendations.

## **1.5.2. Developments, achievements and problems in the 2000s**

### *1.5.2.1. Complaints*

In 2001, Heuni updated the research in this field and collected data in many countries of the region. His report states that 'much progress has been made in developing complaints machinery in central and eastern European prison systems.'<sup>44</sup> Overall it reports that at the time of research it was already possible for prisoners to make formal complaints to 'many bodies, from the prison director and the head of the prison administration to, in some countries, the Ministry of Justice, the Ombudsman and the President. Prisoners may also approach the CPT.'<sup>45</sup> (Walmsley) In many countries the address of the CPT is widely publicised in prisons in order to facilitate communication between prisoners and the CPT. 'In the region, concerns about the complaints mechanisms centre on confidentiality and the seriousness with which the complaints are treated'. As Walmsley states: 'the extent to which complaints are in sealed envelopes, which arrive unopened at the desk of the person to whom they are addressed, is variable, but seems to be improving steadily.'

Furthermore additional detailed data on complaints was included in the report.

In Albania there was a justice Ombudsman, called 'the People's Advocate' who in 2001 dealt with 163 written complaints, 75 oral complaints from prisoners and pre-trial detainees. 40% of the complaints were upheld that year.<sup>45</sup> As of 2009, around 70 post-boxes were installed in all detention facilities in Albania to ensure the privacy of the written complaints. The keys of those boxes are kept by the staff of the so-called Torture Prevention Unit.<sup>46</sup> In 2006, the Ombudsman had initiated 22 cases ex-officio and had dealt with

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<sup>43</sup> R. Walmsley: *Prison Systems in Central and Eastern Europe*. Helsinki: Heuni, 1996, p. 52.

<sup>44</sup> R. Walmsley: *Further Developments in the Prison Systems of Central and Eastern Europe*. Helsinki: Heuni 2003, p. 91.

<sup>45</sup> R. Walmsley: *Further Developments in the Prison Systems of Central and Eastern Europe*. Helsinki: Heuni 2003, p. 125. In the previous 10 years, between 2826 and 4240 complaints were received annually by the Ombudsman all together.

<http://www.avokatipopullit.gov.al/English/AP2009En.pdf>

<sup>46</sup>Dobjani, Ermir: *People's Advocate in Albania – 10 Years Activity*. Tirana: Avokati I Popullit, 2009.

<http://www.avokatipopullit.gov.al/English/AP2009En.pdf>

98 cases concerning detentions or prisons under the Ministry of Justice.<sup>47</sup> The so-called Open Days were a very useful tool to gain information on human rights violations in closed environments and this good practice should continue to be carried out in the coming years.<sup>48</sup>

According to the report, in Croatia prisoners can make a complaint to the director of the prison and to the prison administration, the penitentiary judge, the Helsinki Committee and the European Court of Human Rights (hereafter: ECHR). The Helsinki Committee and ECHR were considered to be ‘outside bodies’. The complaints sent to those bodies were previously sent via the prison administration and therefore the administration was able to monitor them. This was no longer the situation at the time of research. In 2001 there was no central monitoring of the outcome of complaints to the prison administration and if the prison administration received a complaint from a prisoner, they also collected comments from the prison staff on the substance of the complaint.<sup>49</sup>

In Slovakia, a complaint could be sent to the director of the prison and the prison administration, to the prosecutor general, the Ministry of Justice, and the President of the Republic. The confidentiality of complaint sent from Serbia to the CPT is ensured through the use of a special box with highly restricted access. The Ministry of Justice and the prosecutor general were said to consult with the Inspection Department in the prison administration concerning complaints they had received. Another example of good practice is when the prison administration monitors the outcome of complaints and presents the results in its annual reports. According to Walmsley, between 1996 and 2001, about 20 complaints were substantiated annually out of a total of approximately 350.

In Slovenia, there is a Human Rights Ombudsman. Complaints to the Ombudsman and to other bodies are made in the form of a confidential letter.

The role of NGOs was significantly more important in 2001 than it had been 10 years previously. In each of the 22 prison systems included in the Heuni-research, NGOs were said to play a positive role. In Albania, Azerbaijan, Bosnia and Herzegovina, Croatia, Czech Republic, Georgia, Hungary, Latvia, Macedonia, Moldova, Poland, Romania and Serbia their role and purpose in monitoring complaints or human rights violations in prisons was significant, which was considered important to the improvement of overall human rights conditions in prisons.

#### 1.5.2.2. *Inspection and monitoring*

In 2003 more detailed data were published and particular attention was given to the differences between internal inspections and independent inspections. According to Walmsley, the work of the prison administration and the ministry responsible falls into the category of internal inspections. The prosecutor, the court, other official bodies and NGOs were considered to be independent bodies. The table sums up the data on the inspection of penal institutions.

*Table 2 – Inspection of penitentiaries in 2003*

	Internal inspections		Independent inspections		
	Prison administration	Ministry responsible	Prosecutor, court	Other official body	NGO
<b>Albania</b>	Yes	No	Yes	Ombudsman	No
<b>Armenia</b>	Yes	No	Yes	HR Commission	No
<b>Azerbaijan</b>	Yes	No	Yes	Ombudsman	No

<sup>47</sup> Dobjani, Ermir *Annual Report on the Activity of the People’s Advocate 1 January –31 December*, Tirana: Avokati I Popullit, 2008, pp. 8-9.

<http://www.avokatipopullit.gov.al/English/Reports/Report%202007.pdf>

<sup>48</sup> Dobjani, Ermir *Annual Report on the Activity of the People’s Advocate 1 January –31 December*, Tirana: Avokati I Popullit, 2008, pp. 15.

<http://www.avokatipopullit.gov.al/English/Reports/Report%202007.pdf>

<sup>49</sup> R. Walmsley: *Further Developments in the Prison Systems of Central and Eastern Europe*. Helsinki: Heuni 2003, p. 91.

<b>Belarus</b>	Yes	Yes	Yes	Yes	No
<b>Bosnia-Herzegovina</b>	No admin.	Yes	Yes	OHR <sup>50</sup> , UN <sup>51</sup> , OSCE <sup>52</sup> , IPTF <sup>53</sup>	ICRC <sup>54</sup>
<b>Bosnia-Rep. Srpska</b>	No admin.	Yes	Yes	OHR, UN, OSCE, IPTF	ICRC
<b>Bulgaria</b>	Yes	Yes	Yes	Parl. C'tee for HR	Yes
<b>Croatia</b>	Yes	No	No	No	No
<b>Czech Republic</b>	Yes	No	Yes	Office of the President	Helsinki Committee
<b>Estonia</b>	No	Yes	Yes	No	No
<b>Georgia</b>	No	Yes	Yes	Parl. C'tee for HR	Yes
<b>Hungary</b>	Yes	No	Yes	Ombudsman	Helsinki Committee
<b>Latvia</b>	Yes	Yes	Yes	No	No
<b>Lithuania</b>	No	Yes	Yes	Ombudsman	No
<b>Macedonia</b>	Yes	Yes	Yes	Ombudsman	No
<b>Moldova</b>	Yes	Yes	Yes	Ombudsman	Helsinki Committee
<b>Poland</b>	Yes	No	No	Ombudsman	Helsinki Committee
<b>Romania</b>	Yes	Yes	Yes	Ombudsman	Yes: several
<b>Russian Federation</b>	No	Yes	Yes	Ombudsman	No
<b>Slovakia</b>	Yes	No	Yes	No	No
<b>Slovenia</b>	Yes	Yes	Yes	Ombudsman	ICRC
<b>Ukraine</b>	Not known	Not known	Yes	Ombudsman	No
<b>Yugoslavia: Montenegro</b>	No	Yes	No	No	No
<b>Yugoslavia: Serbia</b>	No	Yes	No	No	Yes

Based primarily on Walmsley's data, the following good practices can be identified for the region and particularly the countries included in the report.

In Azerbaijan the relationship between NGOs and the prison administration was reported to be very positive. There was a meeting at least every six months between the head of the prison administration and NGOs active in prison matters (Walsmley, 2003, 152.p.).<sup>55</sup> The Government of the Republic of Azerbaijan signed an Agreement with the International Committee of the Red Cross (ICRC) in 2000 and the force of this document has been prolonged several times. In accordance with this Agreement the ICRC representatives make periodic visits to prison facilities without restriction and hold confidential meetings with sentenced persons. Appropriate treatment of TB prisoners is also being organised. The necessary measures are taken in respect of reports made by ICRC.<sup>56</sup> According to ICRC information,

<sup>50</sup> Office of the High Representative in Bosnia and Herzegovina.

<sup>51</sup> United Nations.

<sup>52</sup> Organisation for Security and Co-operation in Europe.

<sup>53</sup> International Police Force within the United Nations Mission in Bosnia and Herzegovina.

<sup>54</sup> International Committee of the Red Cross.

<sup>55</sup> The Ministry of Justice website reports that the Human Rights Division in the Ministry operates in close cooperation with non-governmental human rights organizations. [http://www.justice.gov.az/eng\\_cat1.html](http://www.justice.gov.az/eng_cat1.html).

<sup>56</sup> Ministry of Justice of Azerbaijan information [http://www.justice.gov.az/eng\\_cat1.html](http://www.justice.gov.az/eng_cat1.html).

13,881 detainees were visited in Azerbaijan in 2009, 135 of them individually, with 76 visits to 33 institutions.<sup>57</sup>

As a result of inspections in Bosnia and Herzegovina, meetings were held with particular categories of staff.

In Croatia, a formal inspection is followed up with a written report setting a time limit for the implementation of its recommendations. Furthermore, checks are undertaken to ensure that the recommendations are indeed carried out in time, and if the implementation of the recommendations require resources that are not available to the director, the prison administration accepts responsibility for providing these.

In the Czech Republic, each prison undergoes a full inspection every three years, with specific thematic inspections occurring more frequently.

In Hungary, the prison administration organises three kinds of inspection: (1) involving all departments and sections of an establishment affecting one third of the institutions each year, (2) thematic reviews, such as on health care, (3) target control, to check whether recommendations were set.

In Latvia every prison was fully inspected on a two-yearly basis.

In Poland ordinary systematic inspections are carried out. Furthermore, unannounced inspections were also carried out. Inspections occurred in three parts: (1) all parts of the prison where activities occur are visited, (2) separate meetings are held with prisoners where they can make complaints or requests, (3) a general note is made of the overall atmosphere of the prison following conversation with the prisoners. After this the investigation team meets also with staff confidentially where they may make complaints.

As Walmsley summed up: ‘while the best internal inspections are thorough and rigorous and perform a valuable role, there is scope for more structured and comprehensive inspections by independent bodies. Ideally there should be an independent inspectorate, reporting directly to the Ministry of Justice and publishing its reports.’<sup>58</sup>

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<sup>57</sup> ICRC: *ICRC Annual Report – Azerbaijan – 2009*. [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/azerbaijan-icrc-annual-report-2009/\\$File/icrc-annual-report-2009-azerbaijan.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/azerbaijan-icrc-annual-report-2009/$File/icrc-annual-report-2009-azerbaijan.pdf)

<sup>58</sup> R. Walmsley: *Further Developments in the Prison Systems of Central and Eastern Europe*. Helsinki: Heuni 2003, p. 86.

## 2. Internal prison complaints mechanisms

Access to an effective and fair complaints mechanism must be regarded as a fundamental right of persons deprived of their liberty and, from a practical point of view, as a key element of order in prisons. An effective grievance procedure may justify and explain decisions of prison staff, and making requests and complaints is a way in which ‘prisoners engage with prison life’.<sup>59</sup> Thus, internal complaints mechanisms serve as a special means of communication between the detainee and the prison staff, and, in a broader sense, between the detainee and the prison administration as a whole. It should be noted that the term ‘internal complaints mechanism’ is used in the current survey report to mean complaints dealt with within the system of prison administration and decided on by the prison staff, the head of the penitentiary or the central prison administration.

### 2.1. Basic information on internal complaint mechanisms

#### 2.1.1. Reasons for filing a complaint

The requirement of effective procedures shall also be taken into consideration when determining the reasons (grounds) for filing an internal complaint. Accordingly, the reasons and grounds for submitting a complaint shall be defined in a way which enables detainees to enforce their right to complain regarding every aspect of prison life.

Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>60</sup> (hereafter: CAT) obliges State Parties to ensure that any individual who alleges he/she has been subjected to torture in any territory under its jurisdiction has the right to complain. According to Principle 33 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>61</sup> (hereafter: UN Body of Principles) a detainee shall have the right to make a request or complaint regarding his treatment, in particular in the case of torture or other cruel, inhuman or degrading treatment. Thus, according to the UN Body of Principles, detainees shall have the right to file a complaint regarding practically any aspect of their treatment in the penitentiary, and it goes without saying that the right to file a complaint concerning torture or other cruel, inhuman or degrading treatment is of special importance. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) also stressed that ‘[e]ffective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons’, thus, prisoners ‘shall have avenues of complaint open to them both within and outside the context of the prison system’.<sup>62</sup> For the CPT, the importance of effective grievance and inspection procedures in penitentiary institutions is ‘a recurrent theme, and one found in its earliest reports’.<sup>63</sup>

Information provided shows that ill-treatment by prison staff is a ground for filing a complaint in all of the responding countries, in compliance with the provisions of the CAT. Infringement of the provisions of the internal regulation of the penitentiary and physical conditions present in the penitentiary may also serve as a basis for complaint in all of the countries approached, an exception being Tajikistan. Disciplinary measures also constitute a ground for a complaint in Bulgaria, Lithuania and Moldova. Health care may give rise to a complaint in Kosovo and Moldova. In Bulgaria, the transfer or the refusal of a transfer to another penitentiary, and the imposition of financial liability and administrative decisions concerning the regime and daily life are also grounds for filing a complaint. A change in the regime may give rise to a complaint in Kosovo. Detainees held in the penitentiaries of Georgia may also file a

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<sup>59</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 305.

<sup>60</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

<sup>61</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988.

<sup>62</sup> 2<sup>nd</sup> General Report on the CPT's activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, 54.

<sup>63</sup> J. Murdoch: *The treatment of prisoners. European standards*. Council of Europe Publishing, 2006. p. 257.

complaint concerning the change of the regime under which they are detained or their transfer to another penitentiary. Decisions concerning conditional release may constitute a basis for complaints both in Georgia and in Kosovo. In Romania, complaints may additionally be filed in response to the infringement of the respective legal provisions. Detainees in Azerbaijan may address prison staff in the event of a threat to their life or health, an attempt on their life, or in case of the perpetration of a crime, and in these instances prison staff are obliged to make arrangements to transfer the detainee to a safer place.

It must be mentioned at this point that the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules<sup>64</sup> (hereafter: European Prison Rules) requires under 53.7 that any prisoner subjected to special high security or safety measures shall have a right of complaint. According to the data given, there are only a few countries complying with this provision.

Even though the reasons listed above cover a considerable part of prison life, it must be highlighted that the most desirable system for filing a complaint is that represented by the relevant provisions of the Czech Republic, Hungary, Poland and Ukraine. In these countries legal provisions set out that complaints may be filed on any ground concerning the detention of the inmate, thus, detainees in these countries may file a complaint concerning any aspect of their prison life, at least theoretically, which complies with Principle 33 of the UN Body of Principles. (According to the legal provisions of the Czech Republic, inmates may file complaints in order to “exercise or protect their rights and legitimate interests”.) To demonstrate the range of possible grounds, let us refer to the data published on the website of the Ministry of Justice of Poland, according to which complaints received covered, among other things, treatment by prison officers and employees, health care, living conditions, handling complaints and requests, transport, visits and phone calls, handling requests, deposits, employment, disciplinary measures, cultural and educational activities, packages and treatment by other inmates. Examples from Ukraine include disciplinary measures, restrictions concerning visits and refusals to release prisoners on parole.

It must be stressed that information on the rules and regulations applied, including information on the way of filing complaints, is essential in order to enable detainees to have arguable claims. The European Prison Rules set out in this regard that at admission, and as often as necessary afterwards, all prisoners shall be informed in writing and orally in a language they understand of the regulations governing prison discipline and of their rights and duties in prison.<sup>65</sup> (According to 30.2 of the European Prison Rules, prisoners shall be allowed to keep in their possession a written version of the information they are given.) Visit reports of the CPT also emphasize the importance of information, and the European Court of Human Rights (hereafter: ECtHR) has also recognized that failure to provide prisoners with information on the internal prison rules that may be vital to protecting a prisoner’s rights under Article 3 or Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR) may be taken into account when dealing with complaints under those articles.<sup>66</sup>

#### **Recommendations:**

- ***Detainees should have the right to file a complaint on any ground concerning their treatment and conditions in the penitentiary institution, including treatment, physical conditions, measures, decisions, omissions and internal regulation of the penitentiary.***
- ***Detainees should have adequate and up to date information on the rules governing prison discipline and their rights and duties in prison.***

#### **2.1.2. Who is entitled to file a complaint?**

According to Paragraph 1 of Principle 33 of the UN Body of Principles, a detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his/her treatment. The European Prison Rules set out under 70.1 that prisoners shall have ample opportunity to make requests or complaints to the director of the prison individually or as a group. It is also established under 70.6 of

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<sup>64</sup> Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.

<sup>65</sup> European Prison Rules, 30.1.

<sup>66</sup> D.van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. pp. 306–307.

European Prison Rules that no complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought.

Furthermore, Paragraph 2 of Principle 33 sets out that in those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under Paragraph 1, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights. As to 70.5 of the European Prison Rules, the competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner's rights have been violated. It shall be born in mind in this respect that for example where the issue concerns communication with the prisoners, both the detainees and those to whom they may have access will have an interest in the matter. In these cases 'the authorities may rightly focus on the interest of those seeking access, even though the matter may be inextricably intertwined with the rights of the prisoners concerned'.<sup>67</sup> It has been recognized by the ECtHR that relatives shall have the right to question the medical treatment (or lack thereof) that may have contributed to a prisoner's eventual death<sup>68</sup> or the managerial decisions concerning the allocation of detainees.<sup>69</sup>

As to practice, it may be stated in general that the relevant legal provisions of most responding countries do not comply with the aforementioned requirements. As a main rule, the detainee affected and his/her legal representative may file a complaint on the appropriate grounds, but, as to the law, legal representatives are not entitled to file a complaint in Albania, Georgia and in Serbia. Family members have a right to file a complaint in the following eight countries: Armenia, Kazakhstan, Kosovo, Kyrgyzstan, Lithuania, Moldova, Tajikistan and Ukraine. (It must be added that in practice both legal representatives and family members of detainees affected may file a complaint in Albania and in Serbia.) Detainees who are not affected are usually not in the position to file a complaint, but there are certain exceptions to be mentioned: detainees who are not personally affected may file a complaint in Armenia, Kazakhstan, Kosovo and Ukraine, but in Kazakhstan this is only the case if the detainee affected is illiterate or unable to file the complaint him/herself for any other reason.

In some of the responding countries NGOs are also entitled to file a complaint. According to the law, NGOs may file a complaint in Armenia, Bulgaria, Kazakhstan (if approached), Kosovo, Kyrgyzstan, Lithuania, Russia and Ukraine. (In Kyrgyzstan the so-called human rights defenders in general have the right to file a complaint which includes NGOs defending human rights.) In practice NGOs may also file a complaint in Serbia and in Albania. Romanian NGOs may write supporting letters regarding a complaint or to request information concerning a specific case.

According to the data presented by the Polish Ministry of Justice, complaints are also filed by social organizations, the Ombudsman, the Prime Minister's Office and MPs. The reason for the wide range of actors filing a complaint is that there is no precise legal provision in this respect. According to the law, complaints may be filed out of personal interest and in the interest of the public or another person, provided that the person affected agrees. This approach to the definition of those entitled to file a complaint may be regarded as good practice.

### **Recommendations:**

- ***Legal representatives and family members of the detainee affected and any other person who has knowledge of the case should have the right to file a complaint in the interest of the detainee affected.***
- ***NGOs should have the right to file an internal complaint as an individual complaint on behalf of a particular detainee with his/her consent and as an actio popularis claim.***

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<sup>67</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. pp. 313–314 .

<sup>68</sup> See: Keenan v the United Kingdom (Application no. 27229/95, Judgment of 3 April 2001) and Tarariyeva v Russia (Application no. 4353/03, Judgment of 14 December 2006). Cited by: D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 313.

<sup>69</sup> In the ECHR case Edwards v the United Kingdom (Application no. 46477/99, Judgment of 14 March 2002) relatives could query the decision that a young detainee was housed with someone known to be dangerous, who eventually killed him. Cited by D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 313.

### 2.1.3. Who investigates and adjudicates the complaint?

As far as internal complaints are concerned, the United Nations Standard Minimum Rules for the Treatment of Prisoners<sup>70</sup> (hereafter: UN Standard Minimum Rules) state that every prisoner shall have the opportunity each week day to make requests or complaints to the director of the institution or the officer authorized to represent him.<sup>71</sup> According to the UN Standard Minimum Rules, prisoners shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, among others.<sup>72</sup> Principle 33 of the UN Body of Principles establishes that complaints shall be filed with the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, with appropriate authorities vested with reviewing or remedial powers, while the European Prison Rules set out that there should be a possibility to file a complaint with the director of the prison (or with any other competent authority).<sup>73</sup>

According to the data received, in the countries examined detainees have the right to file a complaint with the head of the penitentiary, the only exception being Bulgaria, where according to the respondent complaints shall be addressed to the central prison administration. Except Azerbaijan, Macedonia, Russia and Ukraine, it was submitted that detainees also have the right to file an initial complaint with the central prison administration, being either an independent authority or a department of a ministry (usually the Ministry of Justice). In Hungary and in Russia heads of the competent units of the penitentiary are also entitled to investigate and adjudicate complaints, while in Albania the head of the penitentiary may authorize a member of the prison staff to deal with a complaint.

As far as investigation is concerned, some countries reported that investigation is not conducted by those adjudicating it. In Lithuania, if the head of the penitentiary is to make the decision, investigation is conducted by a person appointed by the head of penitentiary, and the head of the penitentiary may also authorize a staff member to conduct the investigation in a given case in Serbia. In Romania complaints are investigated by the member of the prison staff receiving the complaint, and the respective staff member makes a proposal to the head of the penitentiary concerning the final decision.

#### **Recommendation:**

- ***Detainees should have the right to file initial complaints with the prison staff, and, furthermore, directly with the head of the penitentiary and with the central prison administration.***

*Table 1 – Basic information on internal complaint mechanisms*

	<b>What are the grounds for a complaint?</b>	<b>Who is entitled to file a complaint?</b>	<b>Who investigates and adjudicates the complaint?</b>
<b>Albania</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> </ul> <p>In practice the detainee affected may file complaints via his/her family members, legal representative or NGOs.</p>	<ul style="list-style-type: none"> <li>• head of the penitentiary who may authorize a member of the prison staff to deal with a complaint</li> <li>• central prison administration</li> </ul>
<b>Armenia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> <li>• penitentiary department of the</li> </ul>

<sup>70</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>71</sup> UN Standard Minimum Rules, 36. (1).

<sup>72</sup> UN Standard Minimum, 36. (3).

<sup>73</sup> European Prison Rules, 70.1.

	<p>the internal regulation</p> <ul style="list-style-type: none"> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• legal representative</li> <li>• other detainees</li> <li>• NGOs, if approached by the detainee affected</li> </ul>	Ministry of Justice
<b>Azerbaijan</b>	<p>In case of a threat to their life or health, an attempt on their life, or in case of the perpetration of a crime, detainees may address prison staff in order to secure their own safety. In these cases prison staff are obliged to make arrangements to transfer the detainee to a safer place.</p>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• officers of the penitentiary</li> </ul>
<b>Bulgaria</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• disciplinary measures</li> <li>• decisions of the commission for prisons</li> <li>• orders or refusals regarding transfer to another prison or prison type</li> <li>• imposition of financial liability</li> <li>• administrative decisions concerning the regime and daily life</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> <li>• NGOs</li> </ul>	<ul style="list-style-type: none"> <li>• central prison administration (the General Directorate, being an administrative unit of the Ministry of Justice)</li> </ul>
<b>Czech Republic</b>	<p>Complaints may be filed on any grounds concerning the detention of the inmate (in order to exercise or protect their rights and legitimate interests).</p> <ul style="list-style-type: none"> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> <li>• central prison administration</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• decisions concerning conditional release</li> <li>• changing regime and transfer to another penitentiary</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> <li>• head of the penitentiary department of the respective ministry</li> </ul>
<b>Hungary</b>	<p>Complaints may be filed on any grounds concerning the detention of the inmate, including disciplinary measures.</p>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary's competent unit</li> <li>• head of the penitentiary</li> <li>• central prison administration</li> </ul>
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions and any other</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• other detainees, if the detainee</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> <li>• head of the central prison administration at the regional or national level</li> </ul>

	ground concerning the conditions in prison	affected is illiterate or unable to file the complaint him/herself for any other reason <ul style="list-style-type: none"> <li>• NGOs, if approached by the detainee affected</li> </ul>	
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• medical treatment, lack of providing medical drugs</li> <li>• decision concerning conditional release</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• other detainees</li> <li>• NGOs</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary, who may authorize a member of the prison staff to deal with a complaint</li> </ul>
<b>Kyrgyzstan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• human rights defenders, including NGOs</li> </ul>	N/A
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• disciplinary measures</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• NGOs</li> </ul>	Complaints are adjudicated by: <ul style="list-style-type: none"> <li>• head of the penitentiary (investigation is conducted by a staff member appointed by the head of the penitentiary institution),</li> <li>• director (or deputy director) of the Prison Department of the Ministry of Justice (in this case investigation is conducted by the representative(s) of unit(s) appointed by the director of the Prison Department).</li> </ul>
<b>Macedonia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> </ul>
<b>Moldova</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• health care</li> <li>• requests to be transferred to another penitentiary</li> <li>• disciplinary measures and other personal security matters</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> </ul>	N/A
<b>Poland</b>	Complaints may be filed that are concerned with the execution of the deprivation of liberty and the activities of units of the prison administration.	Complaints may be filed out of personal interest and in the interest of the public or other persons, provided that the person affected agrees.	<ul style="list-style-type: none"> <li>• head of the penitentiary, if a complaint is addressed to him/her and does not refer to the direct or indirect activity of his/her deputy and his/her decisions, except in situations when this is found to be justified</li> <li>• district head of the prison</li> </ul>

			<p>administration, if a complaint refers to activities of a penitentiary supervised by him/her and was not handled by the manager of the penitentiary</p> <ul style="list-style-type: none"> <li>• the Director General of the central prison administration or the person designated by him, if a complaint concerns the activities of the district inspectorate of the prison administration and was not handled by the manager of the organizational unit</li> <li>• Minister of Justice or a person designated by him/her, if a complaint concerns the activities of the Central Board of the prison administration and was not handled by the manager of the organizational unit</li> </ul> <p>Complaints against prison officers' conduct must not be examined by the person to whom it refers to (or his/her subordinate).</p>
<b>Romania</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> <li>• infringement of the provisions of the respective law</li> <li>• any other problem (e.g. requesting a visit to another inmate)</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• Complaints are adjudicated by the head of the penitentiary.</li> <li>• Complaints are investigated by the member of the prison staff (manager) receiving the complaint. The respective staff member makes a proposal to the head of the penitentiary concerning the final decision.</li> </ul>
<b>Russia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> <li>• NGOs</li> </ul>	<ul style="list-style-type: none"> <li>• Complaints are reported to the head of the penitentiary institution or organ (or to one of their deputies) and forwarded to the head of the competent unit of the penitentiary.</li> <li>• Complaints may also be adjudicated by the head of the penitentiary.</li> </ul>
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of the provisions of the internal regulation</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> </ul> <p>In practice family members, legal representatives or NGOs may also file complaints.</p>	<p>Complaints are adjudicated by:</p> <ul style="list-style-type: none"> <li>• head of the penitentiary (in this case investigation may also be conducted by a person authorized by the head of the</li> </ul>

			penitentiary), <ul style="list-style-type: none"> <li>• director of the Penal Sanctions Enforcement Directorate of the Ministry of Justice if the complaint is filed against the head of the penitentiary (in this case the investigation is conducted by a person authorized by the director).</li> </ul>
<b>Tajikistan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> </ul>	N/A
<b>Ukraine</b>	Complaints may be filed on any ground, such as: <ul style="list-style-type: none"> <li>• ill-treatment by prison staff,</li> <li>• infringement of the provisions of the internal regulation,</li> <li>• physical conditions,</li> <li>• disciplinary measures,</li> <li>• restriction concerning visits,</li> <li>• refusal to release on parole.</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• other detainees</li> <li>• NGOs</li> </ul>	<ul style="list-style-type: none"> <li>• head of the penitentiary</li> </ul>

## 2.2. Investigating an internal complaint

### 2.2.1. Formal requirements and time limit for filing a complaint, suspending effect

Most respondents submitted that there are no specific formal requirements to be fulfilled when filing a complaint. According to the information received, complaints may be filed both in written form and orally in Albania, Azerbaijan, the Czech Republic, Kosovo, Kyrgyzstan, Poland, Russia and Tajikistan. In Poland, complaints may also be filed via telegraph, fax and e-mail. Complaints must be submitted on an official form in Albania, Kosovo and Romania. As to further formal requirements, anonymous complaints are not investigated in Kazakhstan, while written complaints in Russia must include data on the institution or official addressed, contact details of the complainant (full name, postal address) and signature. In Hungary the complaint may be dismissed without an examination of its merits if the same complaint was filed in the previous three months and does not contain any new fact or data compared to the previous one (except if the complaint concerns medical treatment or the detainee's child).

As to the language of the complaint, it must be mentioned as good practice that in certain countries legal provisions ensure detainees' right to use their native language when filing a complaint. In Kyrgyzstan complaints may be filed in the detainees' native language or any other language they speak (translation is provided). Russian legal provision also sets out that inmates may file complaints in their native language or in any other language they speak and are entitled to an interpreter should they need one. The response should be in the same language as the complaint or, if this is not possible, in the official language of the Russian Federation, and the penitentiary institution should have it translated into the language used by the complainant. These provisions ensure the accessibility of the complaints procedure with regard to foreign nationals, which is an aspect of the complaint procedure to be monitored according to the Association for the Prevention of Torture (APT).<sup>74</sup>

A time limit for submitting a complaint is rarely set out by the relevant legal provisions. In the Czech Republic, the time limit is generally not set, but in certain cases it is prescribed by law. For example the

<sup>74</sup> *Monitoring places of detention. A practical guide.* Association for the Prevention of Torture, Geneva, 2004. p. 130.

time limit is 3 days if the complaint is made against a decision imposing a disciplinary measure. Detainees in Bulgaria have 7 days to file a complaint against a decision. In Lithuania, the time limit is 5 days in case of disciplinary measures due to infringement of the provisions of the internal regulation and 1 month in the event of ill-treatment by prison staff. The time limit to file a complaint is 8 days in Macedonia, and 30 days in Moldova. Various time limits are established in Romania, depending on the type of the complaint, while in Russia the time limit varies from 1 to 6 months for alleged disciplinary offences (depending e.g. on the circumstances of the offence) to several years for alleged criminal offences.

Complaints usually do not have suspending effect in the countries examined, even though it is obvious that in certain cases, such as disciplinary measures, the lack of a suspending effect eliminates the efficiency of the complaint procedure and the remedy provided. There are only a few countries that provide a good example in this regard: in the Czech Republic, in Kyrgyzstan, in Hungary and in Romania filing a complaint has a suspending effect regarding certain decisions, such as the execution of solitary confinement in Romania, or the execution of certain disciplinary sanctions in the Czech Republic and Romania. Furthermore, it was submitted that in Georgia filing a complaint has a suspending effect in all cases.

#### **Recommendations:**

- *Detainees should have the right to use their national, regional or minority language when filing a complaint.*
- *Filing a complaint should have a suspending effect regarding decisions with an irrevocable effect, such as disciplinary measures.*

#### **2.2.2. Investigative measures and procedural rights**

Principle 7 of the UN Body of Principles establishes the obligation to conduct impartial investigations into complaints, and Article 13 of the CAT also provides for an impartial examination of the case. The requirement of an effective procedure was also emphasized by the CPT,<sup>75</sup> and entails an effective and serious investigation of the case. The ECtHR has also stressed the importance of investigating cases vigorously. In *Labita v. Italy*<sup>76</sup> the ECtHR stated for example that '[a]s with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity.'<sup>77</sup> It has to be pointed out that in the *Labita v. Italy* case the lack of a thorough and effective investigation into the allegations regarding ill-treatment made by the detainee concerned amounted in itself to a violation of Article 3 of the ECHR.

The impartial and effective investigation as set out above would require a range of procedural rights on behalf of the complainant and adequate investigative measures in order to reveal the facts concerned. However, it has to be noted that it is hard to find a responding country where meaningful procedural rights are guaranteed and the provisions on investigative measures also leave much to be desired.

Inmates filing a complaint in Azerbaijan, Bulgaria, Georgia, Hungary, Macedonia, Poland, Serbia, Tajikistan and Ukraine do not have any procedural rights as to the law. In the Czech Republic detainees do not have the right to request any kind of investigative measure to be carried out; and procedural rights exist only formally in Armenia. In the case of Albania it is up to the internal regulations to set up rules for the investigation of complaints (including investigative measures and procedural rights), while in Romania the relevant rules are not accessible. In Kazakhstan and in Lithuania detainees may submit motions for different investigative measures to be carried out, however, it is not compulsory to comply with these requests. Access to case files is ensured in Hungary, Kazakhstan, Kosovo, Russia and Serbia. Detainees in

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<sup>75</sup> 2<sup>nd</sup> General Report on the CPT's activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, 54.

<sup>76</sup> Application no. 26772/95, Judgment of 6 April 2000.

<sup>77</sup> *Labita v Italy*, § 131.

Russia may submit additional documents or request that they be provided, and they may also request the termination of the complaints procedure.

Investigative measures applied in the responding countries include reviewing documents (case files), hearing witnesses, prison staff, and medical and other experts, medical examination, confrontation, requesting explanation and relevant documents from the prison administration and from other government or local authorities. A hearing of the complainant is ensured in Georgia, Kazakhstan, Kosovo, Serbia and Ukraine. All possible and necessary investigative measures may be applied in internal prison complaint procedures in the Czech Republic, Macedonia, Moldova and Poland. Investigative measures remain of a formal character in Armenia, while the Bulgarian respondent submitted that the prison administration decides in its sole discretion what measures to take to establish the truth and testimonies of prison staff members unofficially take precedence over those of prisoners.

Good practices include site visits in Russia carried out by the head of the appropriate penitentiary institution or organ (or their representative) in order to review the situation, should it require immediate intervention.

### 2.2.3. Confidentiality

Confidentiality and the protection of the detainee submitting a complaint are also referred to in the respective international documents. Article 13 of CAT establishes that steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given, while Paragraph 4 of Principle 33 of the UN Body of Principles sets out that neither the detained or imprisoned person nor any complainant under Paragraph 1 of Principle 33 of the present principle shall suffer prejudice for making a request or complaint. Furthermore, as to Paragraph 3 of Principle 33, confidentiality concerning the request or complaint shall be maintained if so requested by the complainant. The UN Standard Minimum Rules set out that every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, among others, through approved channels,<sup>78</sup> while in the European Prison Rules it is also established that prisoners shall not be punished due to having made a request or lodged a complaint.<sup>79</sup> Furthermore, the CPT has also underlined the importance of confidential access to an appropriate authority,<sup>80</sup> and it is also mentioned by the APT as one of the aspects of the complaint mechanism to be monitored.<sup>81</sup>

Despite the relevant international provisions, it seems that confidentiality is not ensured in a considerable number of countries such as Armenia, Azerbaijan, Bulgaria, Russia and Serbia.

As to Armenia, it was submitted that complaining detainees may experience more problems after filing their complaint. According to the information received, virtually all complaints are public in Bulgaria and it was submitted that there are many cases in which sanctions were imposed on prisoners who filed complaints against the prison. (Grounds in such cases were defamation, violating the prestige of the institution and refusal of injunction.) It has to be regarded as a serious violation of the requirement of confidentiality that in Russia complaints submitted orally to the head of the penitentiary institution are recorded and this record book is accessible not only to the head of the penitentiary, but to other prison staff members as well. Furthermore, postal letters sent to the territorial or federal penitentiary services are registered by the penitentiary, thus, the prison staff members are always aware of the fact that an inmate has submitted a complaint or request to a higher authority within the penitentiary system. (It has to be added that this kind of correspondence may or may not be subject to censorship and review.)

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<sup>78</sup> UN Standard Minimum Rules, 36. (3).

<sup>79</sup> European Prison Rules, 70.4.

<sup>80</sup> 'Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority.' See: *2<sup>nd</sup> General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT/Inf (92) 3, 54.

<sup>81</sup> *Monitoring places of detention. A practical guide*. Association for the Prevention of Torture, Geneva, 2004. p. 129.

In general, the lack of confidentiality is also a problem in Serbia as complaints must be submitted in three copies and one copy has to be kept in the database of the penitentiary (these databases are usually easily accessible to prison staff, including guards). One copy has to be sent to the authority in charge of resolving complaints, and one has to be stamped and dated and then returned to the complainant

However, there are also legal provisions aimed at ensuring confidentiality. In Albania, Georgia, Hungary, Lithuania, Poland and Ukraine, detainees have the option to submit their complaint directly and personally to the head of the penitentiary. In Albania and in Hungary detainees may also have a personal meeting with the responsible members of the prison staff or the head of the relevant unit, respectively. In Serbia detainees, in exceptional cases, may also request to speak directly to the head of the penitentiary without any previous explanation, but as it was submitted, in practice this rarely happens, especially in larger prisons, where the most serious human rights violations take place. In Georgia, letters sent to the penitentiary department of the respective ministry or to the detainee's lawyer may not be monitored. It was submitted that in the Czech Republic complaints are usually filed in a written form and they are placed into a locked box in an envelope, which may be considered a good practice. Boxes designed for complaints also exist in penitentiaries in Kazakhstan and Kosovo. However, in Kosovo it was submitted that even though there are boxes for complaints in most of the pre-trial detention centres, there are no clear provisions on opening these boxes and dealing with complaints. Furthermore, there are no such boxes in the biggest penitentiary of Kosovo, in the Dubrava Prison.

**Recommendation:**

- ***Detainees should have the right to confidentiality when filing a complaint and in the course of the complaint procedure.***

*Table 2 – Investigating an internal complaint*

	<b>Formal requirements and time limit for filing a complaint, suspending effect</b>	<b>Investigative measures and procedural rights</b>	<b>Procedural rights and confidentiality</b>
<b>Albania</b>	<ul style="list-style-type: none"> <li>• Complaints may be filed in writing (on a form) or orally.</li> <li>• There is no time limit.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• There are no relevant legal provisions, complaint procedures may be regulated by internal regulations.</li> </ul>	<ul style="list-style-type: none"> <li>• Detainees have the option to meet the head of the penitentiary or the responsible staff member personally.</li> </ul>
<b>Armenia</b>	<ul style="list-style-type: none"> <li>• Formal requirements exist.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Existing investigative measures are of a formal character.</li> <li>• Procedural rights exist formally, but the mechanisms for ensuring rights are ineffective. Complainants do not participate in the investigation process.</li> </ul>	<ul style="list-style-type: none"> <li>• Confidentiality is not ensured.</li> </ul>
<b>Azerbaijan</b>	<ul style="list-style-type: none"> <li>• There are no relevant legal provisions. However, it is set out that in the case of a threat to their life or health, an attempt on their life, or in case of the perpetration of a crime, detainees may address prison staff both in a written form or orally.</li> </ul>	<ul style="list-style-type: none"> <li>• There are no relevant legal provisions.</li> </ul>	<ul style="list-style-type: none"> <li>• There are no relevant legal provisions.</li> </ul>
<b>Bulgaria</b>	<ul style="list-style-type: none"> <li>• No formal requirements exist.</li> <li>• Time limit: 7 days in case of decisions</li> <li>• Complaints do not have suspending</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures: hearing of witnesses, hearing of medical and other experts, confrontation</li> </ul>	<ul style="list-style-type: none"> <li>• Confidentiality is not ensured, virtually all complaints are public.</li> </ul>

	effect.	<ul style="list-style-type: none"> <li>• Detainees may not participate in the procedure, thus they do not have procedural rights.</li> </ul>	
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>• Complaints may be filed in writing or orally. In general, time limit is not set out, but in certain cases it is prescribed by law, e.g. the time limit is 3 days if the complaint is made against a decision imposing a disciplinary measure. Complaints generally do not have suspending effect, only if expressly provided by law (in case of a complaint against a decision imposing forfeiture or seizure as a disciplinary punishment).</li> </ul>	<ul style="list-style-type: none"> <li>• All possible investigative measures may be applied, such as a hearing of witnesses and a hearing of experts.</li> <li>• Detainees do not have the right to request a hearing of witnesses, hearing of experts, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• The head of the penitentiary shall appoint staff members receiving and registering complaints and shall create the conditions to ensure that complaints are not accessible to non-authorized persons.</li> <li>• Complaints may be placed in locked boxes.</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>• There are no legal provisions concerning the formal requirements.</li> <li>• Filing a complaint has a suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures: hearing of the parties.</li> <li>• There are no relevant legal provisions on the procedural rights of detainees in complaint procedures.</li> </ul>	<ul style="list-style-type: none"> <li>• Detainees have the right to submit complaints confidentially; letters sent to the Penitentiary Department and the detainee's lawyer may not be monitored.</li> <li>• Detainees may request a private hearing from the head of the penitentiary in order to present their complaints orally.</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• There are no specific formal requirements.</li> <li>• A complaint may be refused without examining its merits if the same complaint was filed in the past three months and it does not contain any new fact or data compared to the previous one (except if the complaint concerns medical treatment or the detainee's child).</li> <li>• In general, complaints do not have a suspending effect, the exception being complaints against solitary confinement.</li> </ul>	<ul style="list-style-type: none"> <li>• In disciplinary procedures the detainee and witnesses may be heard, evidence may be acquired, and a site inspection may be held, but as to other procedures there are no relevant legal provisions.</li> <li>• Detainees may have access to case files, but only after the investigation is over.</li> </ul>	<ul style="list-style-type: none"> <li>• Detainees may request a personal hearing from the head of the unit or the head of the institution (it is also possible to make the request in written form, without submitting the subject of the complaint to be made).</li> </ul>
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• There is no special or statutory form.</li> <li>• Name and complying issue shall be specified, anonymous complaints are not investigated.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures: personal meeting with the complainant, requiring explanation from the prison's administration, reviewing documents, etc.</li> <li>• Detainees may request investigative measures to be carried out. However, it is not compulsory to comply with these requests.</li> <li>• Detainees shall have access to</li> </ul>	<ul style="list-style-type: none"> <li>• Detainees may file complaints in a sealed envelope.</li> <li>• Complaints may be placed in locked boxes.</li> </ul>

		documents regarding the investigation of their complaints.	
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>Complaints may be filed in writing or orally; written complaints shall be filed on official forms.</li> <li>Complaints shall be submitted first to the head of the respective prison unit. If the head of the unit is not in the position to deal with the complaint, the detainee shall file his/her complaint in writing (on a statutory form) to the management of the penitentiary.</li> <li>Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>Investigative measures: hearing of the complainant and other detainees, hearing of prison staff and experts, collecting reports or statements of prison staff, confrontation.</li> <li>Deatinees shall be notified on the decision and have access to the documentation of the complaint procedure.</li> </ul>	<ul style="list-style-type: none"> <li><u>Complaints may be placed in boxes in pre-trial detention centres and in the female prison. However, there is a lack of legal procedures for opening these boxes and dealing with compalints. Furthermore, there are no boxes in the biggest penitentiary in Kosovo (Dubrava Prison) and complaints are usually submitted without an envelope.</u></li> </ul>
<b>Kyrgyzstan</b>	<ul style="list-style-type: none"> <li>Complaints may be filed in writing or orally.</li> <li>Complaints may be filed in the detainees' native language or any other language they speak (translation is provided).</li> <li>Complaints sometimes have a suspending effect.</li> </ul>	N/A	N/A
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>Time limit: 5 days in case of disciplinary measures due to infringement of the provisions of the internal regulation, 1 month in case of ill-treatment by prison staff</li> <li>Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>Investigative measures: compilation and analysis of documents, hearings (the latter is used very seldom).</li> <li>Detainees may request all kinds of investigative measures to be carried out. However, it is not compulsory to comply with these requests.</li> </ul>	<ul style="list-style-type: none"> <li>Complaints may be submitted personally to the head of the penitentiary. If the complaint is filed via a prison officer, which is usually the case, the officer registers the fact of filing but the content of the complaint remains unrevealed.</li> </ul>
<b>Macedonia</b>	<ul style="list-style-type: none"> <li>Complaints may be filed in writing or orally. In case of illiteracy, complaints may be filed via an official record.</li> <li>Time limit: 8 days</li> <li>Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>There are no exact legal provisions; however, applying analogy, all kinds of investigative measures may be taken, such as the hearing of witnesses and access to case files.</li> <li>Detainees do not have procedural rights.</li> </ul>	<ul style="list-style-type: none"> <li>Confidentiality is not ensured.</li> </ul>
<b>Moldova</b>	<ul style="list-style-type: none"> <li>Complaints may be filed in written or electronic form. Written complaints shall contain name, address and signature, while e-mails shall contain name, address and e-mail address.</li> <li>Complaints may be filed in languages spoken in Moldova.</li> <li>Time limit: 30 days</li> </ul>	<ul style="list-style-type: none"> <li>Investigative measures deemed necessary</li> </ul>	<ul style="list-style-type: none"> <li>The detainees' personal data may be disclosed only if they agree, while data violating legitimate rights and interests of the detainees may not be disclosed at all.</li> </ul>
<b>Poland</b>	<ul style="list-style-type: none"> <li>Complaints may be filed orally, in writing, via telegraph, fax and e-mail.</li> </ul>	<ul style="list-style-type: none"> <li>There is no precise catalogue of investigative measures. As to the law, evidence and</li> </ul>	<ul style="list-style-type: none"> <li>Detainees have the option of submitting their complaints orally, directly to the head of</li> </ul>

	<ul style="list-style-type: none"> <li>Complaints do not have suspending effect.</li> </ul>	<p>information may be collected, an investigative procedure may be conducted, and files may be examined.</p> <ul style="list-style-type: none"> <li>There are no relevant legal provisions concerning procedural rights of detainees.</li> </ul>	<p>the penitentiary and they have the right to file a complaint in the absence of others.</p>
<b>Romania</b>	<ul style="list-style-type: none"> <li>Complaints shall be submitted first to the head of the respective section. If the head of the section is not in a position to deal with the complaint, the detainee shall file his/her complaint in writing (on a statutory form) to the management.</li> <li>Various time limits are established, depending on the type of the complaint.</li> <li>In general, complaints do not have a suspending effect, but there are exceptions (e.g. complaint against solitary confinement).</li> </ul>	<ul style="list-style-type: none"> <li>Relevant provisions concerning investigative measures are not public.</li> <li>Procedural rights allegedly depend on the content of the complaint, relevant provisions are not public.</li> </ul>	<ul style="list-style-type: none"> <li>Confidentiality is not ensured.</li> </ul>
<b>Russia</b>	<ul style="list-style-type: none"> <li>Complaints may be submitted orally to prison officers or to the head of the penitentiary institution during a personal appointment. Complaints may also be submitted in writing. A written complaint shall include (i) data of the institution/official it is addressed, (ii) contact details of the complainant (full name, postal address), (iii) signature of the detainee.</li> <li>Alien inmates may file complaints in their native language or in any other language they speak and are entitled to interpreter should they need one. The response should be in the same language as the complaint or, if it is not possible, in the official language of the Russian Federation and the penitentiary institution should have it translated into the language used in the complaint.</li> <li>Time limit varies from 1 to 6 months for alleged disciplinary offences (depending on the circumstances of the offence, etc.) to several years for alleged criminal offences.</li> <li>Complaints do not have suspending effect.</li> </ul>	<p>Investigative measures:</p> <ul style="list-style-type: none"> <li>review of the complaint and the documents attached,</li> <li>requesting documents needed from other government and local administrative organs and other authorities, except courts and investigative bodies,</li> <li>site visit by the head of the penitentiary institution or organ (or their representative).</li> </ul> <p>Detainees may</p> <ul style="list-style-type: none"> <li>submit additional documents or request them to be provided;</li> <li>access to documents related to the complaint as long as it does not affect the rights, liberties and legitimate interests of others and as long as such documents do not contain secret information protected by the federal legislation;</li> <li>receive a written response on the substance of the questions raised in the complaint (with a few exceptions) and be notified if the complaint has been forwarded to another authority, official or local administrative organ competent to resolve the matters raised in the complaint;</li> <li>request termination of the</li> </ul>	<p>Confidentiality is not ensured.</p> <ul style="list-style-type: none"> <li>Complaints submitted orally to the head of the penitentiary institution are recorded and minutes are accessible for the prison staff.</li> <li>Postal letters sent to the territorial or federal penitentiary services are registered.</li> </ul>

		complaint procedure.	
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• There are no specific formal requirements.</li> <li>• Time limit is not defined.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures: hearing of the complainant, hearing of witnesses and prison staff, hearing of medical and other experts, reviewing documents.</li> <li>• Procedural rights are not defined by law. In practice, inmates exceptionally may have access to case files and other relevant documents, but may not request any investigative measures or access to case files.</li> </ul>	<ul style="list-style-type: none"> <li>• In general, confidentiality is not ensured since complaints shall be submitted in three copies and one copy has to be kept in the database of the penitentiary (these databases are usually easily accessible to prison staff, including guards). One copy has to be sent to the authority in charge of resolving complaints, and one has to be stamped and dated and then returned to the complainant. In exceptional cases, detainees may request to speak directly with the head of the penitentiary without any previous explanation, but in practice this rarely happens.</li> </ul>
<b>Tajikistan</b>	<ul style="list-style-type: none"> <li>• Complaints may be filed orally or in writing.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures: requesting explanation from and hearing of the person whom the complaint was filed against, hearing of those who may give an explanation concerning the facts stated in the complaint.</li> <li>• Detainees are only informed about the decision regarding their complaint.</li> </ul>	<ul style="list-style-type: none"> <li>• Complaints are registered.</li> </ul>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>• There are no specific formal requirements.</li> <li>• There is no time limit.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<ul style="list-style-type: none"> <li>• Investigative measures hearing of the complainant, hearing of witnesses, medical examination</li> <li>• Detainees do not have any particular procedural rights.</li> </ul>	<ul style="list-style-type: none"> <li>• Detainees have the option to file a complaint with the head of penitentiary at a personal meeting, though the head of the penitentiary is not obliged to treat the content of the complaint as confidential.</li> </ul>

#### 2.2.4. Legal representation and legal aid

According to the European Prison Rules, prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require it.<sup>82</sup> The decision of the ECtHR in *Campbell and Fell v. the United Kingdom*<sup>83</sup> should be also mentioned in this regard, since it has established the rights of detainees to be represented by lawyers when being tried for disciplinary offences. This decision ‘formed the basis for an increasing recognition of the procedural rights of prisoners in prison disciplinary matters’<sup>84</sup> and may be referred to when arguing in favour of the right of legal representation in disciplinary procedures and complaint procedures initiated against disciplinary decisions. Furthermore, it should be emphasized that even though the European Prison Rules do not specify it, ‘there is considerable merit in providing such legal advice free of charge to the majority of prisoners who cannot afford to pay for their own lawyers. This applies also to the more demanding forms

<sup>82</sup> European Prison Rules, 70.7.

<sup>83</sup> Application nos 7819/77 and 7878/77, Judgment of 28 June 1984.

<sup>84</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 12.

of legal assistance which the interests of justice require in any complaint-related procedures that raise issues of any complexity.<sup>85</sup>

Legal representation is permitted in almost all of the countries, thus, in this respect national legal provisions comply with the European Prison Rules, even though representation is not compulsory in any of the states. (It must be added that e.g. in Russia legal representation refers solely the filing of complaints, since the complaint procedure does not involve hearings, thus, further legal representation is not required.) Lawyers or attorneys at law usually may provide legal representation, but in a number of countries, such as Albania, Armenia, Bulgaria, Georgia, Kosovo and Lithuania, NGOs may also represent detainees in internal complaint procedures.

Free legal aid is granted to detainees in Albania, Azerbaijan, Bulgaria, Hungary, Kazakhstan, Kosovo, Lithuania, Macedonia, Poland, Serbia and Tajikistan, thus, in more than half of the countries examined. In Albania (where it was reported that the relevant legal provisions have not been implemented effectively), Hungary and Lithuania, entitlement to free legal aid depends on the financial situation of the detainee. However, certain states ensure free legal aid to detainees automatically, thus, solely on the basis of the fact that they are deprived of their liberty. The legal system of three countries has to be mentioned in this regard as potential good practice, namely the system of Kazakhstan, Macedonia and Serbia, even though the actual practice may leave much to be desired in these cases as well. In Kazakhstan there is a special jurist in each penitentiary entitled to provide legal advice for free, but it was submitted that the qualifications of these jurists are usually poor. In Macedonia it is also the penitentiary which is obliged to provide free legal assistance and information. However, it was submitted that the system functions in a contradictory manner, as the same authority shall provide legal assistance and decide on the complaint. In Serbia every prisoner has the right to free legal aid if the matter concerned is related to serving his/her sentence and the penitentiary is obliged to provide legal aid. It was submitted however that in practice there are problems with providing legal aid, due to the fact that some penitentiaries do not have lawyers among their staff members.

In Kosovo, free legal assistance is usually provided by social workers, and it was noted that detainees are usually not satisfied with the quality of their support. It was noted that in Poland the Helsinki Foundation for Human Rights conducted an educational program called ‘Clinic 42’, in the framework of which students acted in accordance with a legal provision providing NGOs with the possibility to proceed in internal complaint procedures. Students filed motions, requests and complaints to the court on behalf of the represented detainees.

Only a few respondents were in the position to submit any information on legal representation in practice. According to the estimations and unofficial information provided, legal representation in the course of internal complaint procedures is very rare in Lithuania, Poland, Serbia and Ukraine.

**Recommendations:**

- ***Detainees should have the right to be represented in the course of an internal complaint procedure.***
- ***Detainees should be entitled to free legal aid with regard to internal complaint procedures.***

*Table 3 – Legal representation and legal aid in internal complaint procedures*

	<b>Is legal representation permitted?</b>	<b>Who is entitled to provide legal representation?</b>	<b>Are detainees entitled to free legal aid? If yes, under what conditions?</b>
<b>Albania</b>	Yes.  The right to be represented is not explicitly provided, but it is	<ul style="list-style-type: none"> <li>• lawyers</li> <li>• NGOs</li> </ul>	Yes.  Condition: indigent persons as to financial situation and beneficiaries of

<sup>85</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 312.

	not excluded either. (It is set out that legal aid includes representation of parties in the trial phase of civil and administrative cases, in arbitration and other state and administrative issues.) In practice, there were instances when the detainee was represented by a lawyer in the penitentiary's internal procedures.		social protection systems.
<b>Armenia</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>NGOs</li> </ul>	N/A
<b>Azerbaijan</b>	Yes.	N/A	Yes.
<b>Bulgaria</b>	Yes.	<ul style="list-style-type: none"> <li>authorized attorneys</li> <li>authorized NGOs</li> </ul>	Yes.
<b>Czech Republic</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> </ul>	N/A
<b>Georgia</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>NGOs</li> </ul>	No.
<b>Hungary</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>public notaries</li> <li>NGOs</li> </ul> <p>Those providing free legal aid shall be subscribed to the register of legal aid providers.</p>	<p>Yes.</p> <p>Condition: the detainee's net monthly income does not exceed the current minimum amount of the retirement pension established on the basis of employment's period.</p>
<b>Kazakhstan</b>	Yes.	<ul style="list-style-type: none"> <li>any legal or private entity</li> </ul>	<p>Yes.</p> <p>There is a special jurist in each penitentiary entitled to provide legal advice for free.</p>
<b>Kosovo</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>NGOs and other institutions following an agreement with the respective ministry</li> </ul>	<p>Yes.</p> <p>Usually social workers are entitled to provide free legal assistance.</p>
<b>Kyrgyzstan</b>	Yes.	N/A	N/A
<b>Lithuania</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>NGOs</li> <li>municipal entities</li> <li>services established by the Ministry of Justice</li> </ul>	<p>Yes.</p> <p>Condition: the wealth and income level of the detainee shall be below the level determined by the Government.</p>
<b>Macedonia</b>	Yes.	<ul style="list-style-type: none"> <li>attorneys at law</li> <li>NGOs – indirectly, through lawyers engaged by them</li> </ul>	<p>Yes.</p> <p>Formally, the penitentiary is obliged to provide free legal assistance and information.</p>
<b>Moldova</b>	N/A	N/A	N/A
<b>Poland</b>	Yes.	<ul style="list-style-type: none"> <li>Detainees may appoint a</li> </ul>	Yes.

	There are no special provisions concerning representation in internal complaint procedures. However, legal provisions do not limit entitlements of the defense counsel to the proceedings before the court.	trustworthy person as their representative, if this person agrees, especially out of the members of certain associations, foundations and institutions.	
<b>Romania</b>	Yes.	N/A	No.
<b>Russia</b>	Yes. Legal representatives may file complaints, but since the complaint procedure does not involve hearings, further legal representation is not required.	<ul style="list-style-type: none"> <li>attorneys at law</li> </ul>	No.
<b>Serbia</b>	Yes.	<ul style="list-style-type: none"> <li>persons graduated in law</li> </ul>	Yes. Every prisoner has a right to free legal aid if it is related to serving his/her sentence and the penitentiary is obliged to provide legal aid.
<b>Tajikistan</b>	Yes.	<ul style="list-style-type: none"> <li>lawyers</li> </ul>	Yes.
<b>Ukraine</b>	Yes.	<ul style="list-style-type: none"> <li>lawyers</li> <li>other persons under a power of attorney</li> </ul>	No.

### 2.2.5. Duration of procedures

As far as duration of the procedure is concerned, the UN Standard Minimum Rules set out that unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.<sup>86</sup> According to Paragraph 1 of Principle 33 of the UN Body of Principles, every request or complaint shall be promptly dealt with and replied to without undue delay. The ECtHR has also emphasized the importance of promptness, along with efficacy;<sup>87</sup> and a timely response addressing the substance of the complaint and the time-frame for handling complaints are listed by the APT as aspects of the internal complaints mechanism to be monitored.<sup>88</sup>

In order to enforce the requirement of promptness, the maximum length of the internal complaints procedures should be set out, establishing a legal framework in which complaints shall be dealt with without any undue delay. In the responding countries the maximum length of the procedure set out by the law ranges between 5 and 30 days, even though it seems that deadlines are not always fully respected in practice.

*Table 4 – Lengths of internal complaints procedures*

	Maximum length of procedures as to the law (without judicial review)	Average length of procedures in practice
<b>Albania</b>	<ul style="list-style-type: none"> <li>15 days</li> </ul>	<ul style="list-style-type: none"> <li>procedure without judicial review: from 48 hours to 10 days.</li> </ul>

<sup>86</sup> UN Standard Minimum Rules, 36. (4).

<sup>87</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 308.

<sup>88</sup> *Monitoring places of detention. A practical guide*. Association for the Prevention of Torture, Geneva, 2004. p. 130.

<b>Armenia</b>	<ul style="list-style-type: none"> <li>• 5 -15 days, depending on the content of the complaint</li> </ul>	N/A
<b>Azerbaijan</b>	N/A	N/A
<b>Bulgaria</b>	<ul style="list-style-type: none"> <li>• 1 month</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: from 2 weeks to 1 month</li> <li>• judicial review: from 24 hours to 1 months</li> </ul>
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>• There is no time limit.</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 30 days</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>• minimum 5 days and maximum 1 month</li> </ul>	N/A
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• 30 days, except in urgent cases (may be prolonged by 30 days)</li> <li>• disciplinary procedure: 5 working days</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 1–3 months</li> </ul>
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• 15 days (if no information is needed from other entities or no expertise is needed) or 30 days (may be prolonged by another 30 days if the case is difficult)</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without a judicial review: from one week to 1 month</li> <li>• judicial review: 15–30 days</li> </ul>
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• first instance: 1 day</li> <li>• second instance: 5 working days</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 10 days at both instances</li> </ul>
<b>Kyrgyzstan</b>	N/A	N/A
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>• 20 working days, no longer than 30 days</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 14 days</li> <li>• judicial review: 3–4 months (estimated)</li> </ul>
<b>Macedonia</b>	<ul style="list-style-type: none"> <li>• 8 days</li> </ul>	N/A
<b>Moldova</b>	<ul style="list-style-type: none"> <li>• 15 or 30 days (may be prolonged by 1 month)</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 15–20 days</li> </ul>
<b>Poland</b>	<ul style="list-style-type: none"> <li>• 14 days (may be prolonged by the time necessary for further investigation)</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: prolongation means usually 1 month</li> </ul>
<b>Romania</b>	<ul style="list-style-type: none"> <li>• There is no time limit.</li> </ul>	N/A
<b>Russia</b>	<ul style="list-style-type: none"> <li>• 30 days from the registration of the complaint (may be prolonged by 30 days under exceptional circumstances)</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: 10–15 days</li> </ul>
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• 15 days in case of complaints filed with the head of the penitentiary</li> <li>• 30 days in case of complaint filed with the director of the Penal Sanctions Enforcement Directorate under the Ministry of Justice</li> </ul>	<ul style="list-style-type: none"> <li>• There were only 4 appeals to the director of the Penal Sanctions Enforcement Directorate because the head of the penitentiary did not decide on complaint in 15 days.</li> </ul>
<b>Tajikistan</b>	<ul style="list-style-type: none"> <li>• 30 days (may be prolonged by 30 days)</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: from 2 weeks up to a few months</li> </ul>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>• if the complaint contains information on a criminal offence: 10 days</li> <li>• in other cases: 30 days</li> </ul>	<ul style="list-style-type: none"> <li>• procedure without judicial review: from approximately several days to 1 month</li> <li>• judicial review: months or years</li> </ul>

## 2.3. Outcome and appeal

### 2.3.1. Outcome

Paragraph 1 of Principle 7 of the UN Body of Principles sets out the requirement of effective sanctions by asserting that states should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints. Furthermore, the requirement of efficiency emphasized by a number of international

documents and organizations includes the obligation to apply effective sanctions and take necessary measures as a result of the internal complaint mechanisms.

As a result of the internal complaints procedure, disciplinary procedures may be initiated and measures may be applied against prison staff in a considerable number of countries examined, namely in Albania, Armenia, Bulgaria, the Czech Republic, Kazakhstan, Lithuania, Macedonia, Poland, Russia, Serbia and Ukraine. (It was submitted e.g. concerning Macedonia that the outcome of disciplinary proceedings is symbolic and insignificant.) In Bulgaria, Kazakhstan, Hungary, Moldova and Poland decisions, measures and orders against which the complaint was filed may be repealed. Disciplinary measures complained against may be repealed in Bulgaria and Lithuania, while the Hungarian internal procedure may result in the termination of the disciplinary procedure or the ordering of a less severe disciplinary punishment. Tajikistan, Hungary and Moldova are the only countries with regard to which damages or compensation paid to the detainees were mentioned, and with respect to Tajikistan it was submitted that in practice this remedy is not available.

**2.3.2. Appeal and judicial review**

According to 70.3 of the European Prison Rules, if a request is denied or a complaint is rejected, reasons shall be provided to the prisoner and the prisoner shall have the right to appeal to an independent authority. Thus, the possibility to have a remedy against the decision on the complaint filed shall be ensured. However, the European Prison Rules are ‘conspicuously silent on the question of how or by whom any [...] appellate processes shall be conducted [...]’ The reason for this is undoubtedly the range of different supervisory mechanisms found across Europe.<sup>89</sup>

The countries examined also show a great variety as far as avenues of appeal and judicial review are concerned, but it may be concluded that almost all of the countries ensure both the right to appeal to higher instances within the penitentiary system, and the right to judicial review of decisions delivered by the prison administration. However, it was submitted that appeal is not available in Bulgaria and in Romania. Furthermore, with regard to Bulgaria it was submitted that in most cases judicial review of administrative acts is ‘impossible’, and that an appeal does not have a suspending effect. The Armenian respondent has submitted that in practice it is almost impossible to file an appeal against a decision in higher instances, and judicial review is not available in practice either. In Hungary the possibility of judicial review is only provided in relation to solitary confinement imposed as a disciplinary sanction. According to the law, administrative courts may review decisions of the Prison Service in the Czech Republic. An exception is set by Czech legal provisions for decisions in disciplinary proceedings, where judicial review is usually not possible. However, provisions on this latter exception will be valid only until 30<sup>th</sup> June 2011 because the Czech Constitutional Court found them unconstitutional. It was submitted that in practice access to courts is very difficult for the detainees.

**Recommendations:**

- *Detainees should have the right to appeal against initial decisions on complaints.*
- *Detainees should have access to an independent authority reviewing decisions of the prison administration.*

*Table 5 – Outcome of internal complaints procedures; appeal and judicial review*

	Possible outcomes	Is there a possibility to file an appeal?	Is judicial review available?
Albania	<ul style="list-style-type: none"> <li>• disciplinary measures against prison staff: (i) written warning (ii) warning notice (iii) suspension without the right to be paid from one to</li> </ul>	<p>Yes.</p> <p>Detainees have the right to appeal to higher instances of the penitentiary system, except concerning disciplinary policies</p>	<p>Yes.</p> <ul style="list-style-type: none"> <li>• Decisions on disciplinary policies applied by the prison staff (decisions of the</li> </ul>

<sup>89</sup> D. van Zyl Smit – S. Snacken: *Principles of European Prison Law and Policy*. Oxford: Oxford University Press, 2009. p. 308.

	three months, (iv) reduction in grade or function, (v) removal	applied by the prison staff.	Disciplinary Commission of a penitentiary institution) shall be taken directly to the court. • Decisions may also be altered by the court.
<b>Armenia</b>	• disciplinary procedure against prison staff	Yes.  Detainees may appeal to higher instances within the penitentiary system.	Yes.
<b>Azerbaijan</b>	There are no relevant legal provisions.	There are no relevant legal provisions.	There are no relevant legal provisions.
<b>Bulgaria</b>	• repealing order • repealing disciplinary punishment • disciplinary procedure against prison staff	No.	Yes.  Only the ordering of solitary confinement is subject to judicial review. In this case the court may also alter the decision.
<b>Czech Republic</b>	• disciplinary measures against prison staff, etc.	Yes.	Yes. (Exception until 30 <sup>th</sup> June 2011: decisions in disciplinary proceedings)
<b>Georgia</b>	N/A	Yes.	Yes.
<b>Hungary</b>	Damages may be paid to the detainees.  Possible outcomes in the case of a complaint against a disciplinary decision: • approving the decision, • ordering less severe punishment, • terminating the disciplinary procedure, • repealing the decision and ordering a new procedure.	In certain cases.  E.g. against certain disciplinary sanctions.	Only against solitary confinement imposed as a disciplinary sanction.
<b>Kazakhstan</b>	• repealing measures • disciplinary measures against prison staff	Yes.  Appeals may be filed • at the regional department of the Criminal Executive Committee under the Ministry of Justice, • the head of the Criminal Executive Committee if the complaint concerns measures of the regional department.	Yes.  Both the prosecutor supervising the penitentiary system and the detainee may request a judicial review.
<b>Kosovo</b>	Disciplinary measures against prison staff: • oral warning • written warning notice • suspension (from one to three months, without payment)	Yes.  Appeals may be filed to the central prison administration which functions under the Ministry of Justice.	Yes.  A decision may be reviewed if the disciplinary measure in question breaches the internal regulation of the prison.

	<ul style="list-style-type: none"> <li>reduction in rank or in function, dismissal</li> </ul>		
<b>Kyrgyzstan</b>	N/A	N/A	N/A
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>repealing the decision on a disciplinary punishment</li> <li>disciplinary procedure and punishment against prison staff: (i) admonition, (ii) caution, (iii) reprimand, (iv) marching orders</li> </ul>	<p>Yes.</p> <p>Appeals may be filed against the decision of the penitentiary to the Prison Department under the Ministry of Justice.</p>	<p>Yes.</p> <ul style="list-style-type: none"> <li>Judicial review may be requested with regard to the decisions of the Prison Department under the Ministry of Justice.</li> <li>Decisions may also be altered by the court.</li> </ul>
<b>Macedonia</b>	<ul style="list-style-type: none"> <li>disciplinary procedures against prison staff</li> </ul>	N/A	<p>Yes.</p> <p>Decisions may also be altered by the court.</p>
<b>Moldova</b>	<ul style="list-style-type: none"> <li>rejecting the complaint</li> <li>accepting the complaint submitted in whole or in part</li> <li>annulling the respective decision (administrative act) in whole or in part</li> <li>restoration of the rights violated and damage caused</li> </ul>	<p>Yes.</p> <p>Appeals may be filed</p> <ul style="list-style-type: none"> <li>to the Department of Penitentiary Institutions under the Ministry of Justice (against the decisions of the prison),</li> <li>to the Ministry of Justice (against the decisions of the Department of Penitentiary Institutions).</li> </ul>	<p>Yes.</p> <p>The court may</p> <ul style="list-style-type: none"> <li>repeal the administrative act in whole or in part,</li> <li>order the prison administration to issue the administrative act required by the complainant or to issue a certificate or any other document,</li> <li>order the prison administration to remedy the violations they have committed.</li> </ul>
<b>Poland</b>	<ul style="list-style-type: none"> <li>repealing or altering the decision</li> <li>issuing a new decision</li> <li>disciplinary procedure against prison staff</li> </ul>	Yes.	<p>Yes.</p> <p>Detainees may also turn to the court against the decisions of the head of the penitentiary.</p>
<b>Romania</b>	<ul style="list-style-type: none"> <li>No information is available.</li> </ul>	No.	<p>Yes.</p> <p>There is no means to enforce the penitentiary to implement a judicial decision.</p>
<b>Russia</b>	<ul style="list-style-type: none"> <li>rejecting the complaint due to the absence of the alleged violation</li> <li>measures in order to redress the detainee's rights that have been violated</li> <li>disciplinary procedure against prison staff</li> <li>the complaint may be forwarded to the investigative division of the prosecutor's</li> </ul>	<p>Yes.</p> <ul style="list-style-type: none"> <li>It may be appealed to the higher instance of the prison administration and to the prosecutor's office.</li> <li>In case of an appeal within the prison administration, first instance decision (i) may be upheld or (ii) may be deemed as unlawful and the penitentiary is ordered to conduct a new procedure.</li> <li>The prosecutor may (ii) uphold the</li> </ul>	<p>Yes.</p> <p>The court may:</p> <ul style="list-style-type: none"> <li>reach a substantive decision, leading to restoration of the inmate's rights,</li> <li>uphold the first instance decision,</li> <li>deem the first instance decision as unlawful and order a new internal</li> </ul>

	office to consider criminal proceedings against prison staff	decision delivered in the first instance, (ii) deem the first instance decision as unlawful and order the prison to conduct a new procedure.	investigation into the inmate's original complaint.
<b>Serbia</b>	<ul style="list-style-type: none"> <li>disciplinary procedure against prison staff</li> <li>filing a report to the public prosecutor in order to investigate allegations and decide whether to indict the prison staff</li> </ul>	<p>Yes.</p> <ul style="list-style-type: none"> <li>Detainees may appeal against the decision of the penitentiary to the director of the Penal Sanctions Enforcement Directorate under the Ministry of Justice.</li> <li>First instance decisions may be repealed, altered or approved.</li> </ul>	<p>Yes.</p> <ul style="list-style-type: none"> <li>Detainees may request a judicial review with regard to the decisions of the director of the Penal Sanctions Enforcement Directorate under the Ministry of Justice.</li> <li>Decisions may also be altered by the court.</li> </ul>
<b>Tajikistan</b>	<ul style="list-style-type: none"> <li>compensation</li> <li>initiation of criminal proceedings</li> </ul>	<p>Yes.</p> <p>It may be appealed to the prosecutor's office.</p>	<p>Yes.</p>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>disciplinary proceedings</li> <li>criminal investigation</li> </ul>	<p>Yes.</p> <p>It may be appealed within the prison administration and to the prosecutor's office.</p>	<p>Yes.</p>

Table 6 – Statistical data

	Number of detainees	Number of complaints filed	Number of successful complaints
<b>Bulgaria</b>	<ul style="list-style-type: none"> <li>2008: 9408 inmates + 794 pre-trial detainees</li> <li>2009: 9006 inmates + 890 pre-trial detainees</li> </ul>	N/A	<ul style="list-style-type: none"> <li>500-1000 per year (estimated)</li> </ul>
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>2008: 18100 inmates + 2402 pre-trial detainees</li> <li>2009: 19374 inmates + 2360 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>2008: 1399</li> <li>2009: 1522</li> </ul>	<ul style="list-style-type: none"> <li>2008: 100</li> <li>2009: 114</li> </ul>
<b>Georgia</b>	<ul style="list-style-type: none"> <li>2008: 17 034 inmates + 3099 pre-trial detainees</li> <li>2009: 16 273 inmates + 2569 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>2008: 6292</li> <li>2009: 7114</li> </ul>	N/A
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>2009: 51 930 convicted inmates + 8174 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>2008: 4228 (Correction Committee received 92 451 letters from citizens and legal entities where complaints from inmates consists of 4.64%)</li> <li>2009: 6785 (Correction Committee received 141 088 letters from citizens and legal entities where complaints</li> </ul>	<ul style="list-style-type: none"> <li>2008: 74</li> <li>2009: 137</li> </ul>

		from inmates consists of 4.8%)	
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>• 2008: 6911 inmates + 955 pre-trial detainees</li> <li>• 2009: 7022 inmates + 978 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 2196</li> <li>• 2009: 2070</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 17</li> <li>• 2009: 6</li> </ul>
<b>Macedonia</b>	<ul style="list-style-type: none"> <li>• 2008: 2101 inmates + 673 pre-trial detainees</li> <li>• 2009: 2215 inmates + 955 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>• 2009: 49</li> </ul>	N/A
<b>Moldova</b>	<ul style="list-style-type: none"> <li>• 2008: 6830 detainees (5470 convicted)</li> <li>• 2009: 6535 detainees (5285 convicted)</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 5098 (to the Department of Penitentiary Institutions under the Ministry of Justice)</li> <li>• 2009: 5063 (to the Department of Penitentiary Institutions under the Ministry of Justice)</li> </ul>	N/A
<b>Poland</b>	<ul style="list-style-type: none"> <li>• 2008: 73 859 sentenced prisoners + 367 punished + 8926 pre-trial detainees</li> <li>• 2009: 74 116 sentenced prisoners + 427 punished + 9460 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 23 094</li> <li>• 2009: 27 925</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 310</li> <li>• 2009: 323</li> </ul>
<b>Russia (correctional colony in Krasnoyarsk Krai)</b>	<ul style="list-style-type: none"> <li>• July 2010: 1 854 inmates</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 312</li> <li>• 2009: 294</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 61</li> <li>• 2009: 67</li> </ul>
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• 2008: 6709 inmates + 2373 pre-trial detainees</li> <li>• 2009: 7463 inmates + 2601 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 390</li> <li>• 2009: 387</li> </ul>	<ul style="list-style-type: none"> <li>• 2008: 23 of 314 (76 were not decided until 31 December 2008)</li> <li>• 2009: 27 of 309 (78 were not decided until 31 December 2009)</li> </ul>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>• 2008: 145 715 inmates + 32 110 pre-trial detainees</li> <li>• 2009: 147 716 inmates + 34 148 pre-trial detainees</li> </ul>	<ul style="list-style-type: none"> <li>• 2008 January – March: 476 (only to Central Department)</li> <li>• 2009 January – March: 353 (only to Central Department)</li> </ul>	<ul style="list-style-type: none"> <li>• 2008 January – March: 12</li> <li>• 2009 January – March: 6</li> </ul>

## 2.4. Prisoners' Forum

Rule 50 of the European Prison Rules<sup>90</sup> provides further guidelines in order to avoid unnecessary restrictions on prisoners' rights to communicate. Order in the prison is more likely to be achieved when clear channels of communication exist between all parties. On this basis, provided there are no related security concerns, prisoners should be allowed to discuss issues relating to the general conditions of imprisonment. The Commentary to the European Prison Rules states also that "it is in the interest of prisoners as a whole that prisons should run smoothly and they may well have suggestions to make. For

<sup>90</sup> "Subject to the needs of good order, safety and security, prisoners shall be allowed to discuss matters relating to the general conditions of imprisonment and shall be encouraged to communicate with the prison authorities about these matters."

this and other reasons, they should be given opportunity to pass on their opinions to the prison administration.” The spirit of this rule is focused on seeking every feasible opportunity to increase the contacts that prisoners have with other prisoners, staff and the outside community in order to minimize the inevitable sense of isolation that accompanies imprisonment. Nourishing and encouraging these relationships will lead to a smooth and natural re-socialization at the end of the prisoner’s sentence.

The Commentary clearly encourages the creation of channels of communication and leaves it for national prison administrations to decide on the form that such communication channels will take. Furthermore, rule 70.1 states that “prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of the prison or to any other competent authority.”

Some countries make legislative provisions for prisoner participation in the general management of prisons. Such legislation can be found in Sweden, Finland, Belgium, Denmark, Finland and Germany. However, the provisions of a number of states’ laws are brief, generally worded and may not indicate limitations on the procedures or the prisoners who may take part in consultations.<sup>91</sup>

In order to be in line with the European Prison Rules, the Hungarian Prison Administration introduced an Institutional Order which creates a structure (Prisoners’ Forum) within the Hungarian Prison Administration that allow prisoners to express their views on a wide variety of issues. The Forum also serves as a channel of communication, allowing detainees to voice complaints and comment on prison life and to make suggestions for changes.

The Order states that the warden shall ensure that regular (at least three times a year) consultation takes place with the prisoners. It aims at enhancing the communication between prisoners and prison staff, reducing the frustration of detainees, sharing information and supporting re-socialization and the self esteem of prisoners. It also emphasizes the co-responsibility of prisoners.

The Order does not leave the implementation in the hands of prison wardens but instead sets forth the implementation of the Forum in detail. It describes the form of invitation (it should contain the time and venue, the objective, the application deadline and the way it is distributed to the detainees), the venue (which facility of the institution may serve as a venue of the Forum), the responsibilities and tasks of the departments, the participants (participation is voluntary as far as detainees are concerned, whereas the Order mandates who shall attend on behalf of the prison staff), the rules of moderation and the way minutes shall be taken.

Besides the staff of the penitentiary, other experts may also attend. This includes the prosecutor supervising the penitentiary institution, the representative of the legal aid service, staff of the employment centers and probation officers. Depending on the prison warden’s decision, human rights NGOs may also attend the Forum.

Certain limitations are included in the Order. Participation in the Forum is not automatic for grade IV prisoners<sup>92</sup> and those detainees who are placed at the so-called HSR unit<sup>93</sup>, but it is left to the discretion of the prison management. Furthermore, it is not obligatory to organize Forums in the Juridical and Observational Psychiatric Institute.

According to the Order, the detainees should submit their questions in advance in writing. However, the opportunity should be given to the participating detainees to voice their questions and complaints at the Forum.

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<sup>91</sup> N. Bishop: *Prisoner Participation in Prison Management*.

<sup>92</sup> Grade 4 prisoners are inmates who are regarded extremely dangerous. They suffer severe disadvantages and restrictions even compared to fellow inmates (some of them are held in significant isolation).

<sup>93</sup> HSR Unit is a unit where those sentenced to a long-term imprisonment, exceeding 15 years, and those sentenced to life-long imprisonment may be placed,

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The Forum can be an effective and strategic tool for two-way communication when its outcomes are monitored and followed up systematically. Alternatively, it can be counterproductive if prisoners feel that none of their problems were resolved and none of their questions were answered. A great deal of attention is given to this issue in a separate chapter of the Order. Minutes shall be taken (the format is also set) and the possible channels of problem solving are also determined. Lastly, the Order sets forth which departments and units shall be involved in the information flow.

## 3. External prison complaints mechanisms

In each country examined the right to file a complaint with an external, formally independent body is ensured by the law. However, several aspects of the external complaints mechanism are regulated differently, and the solutions with respect to certain aspects vary to an extremely wide extent.

As the international instruments referred to in Chapter 2, contain standards in relation to both internal and external complaints mechanisms, we do not reiterate them in this chapter.

### 3.1. Basic information on internal complaint mechanisms

#### 3.1.1. Reasons for filing a complaint

Ill-treatment by prison staff, the infringement of internal regulations and poor material conditions may serve as the basis of a complaint in each country involved in the research. However, this might not be sufficient as several other aspects of prison life not covered by these grounds can be detrimental and disproportionately disadvantageous for the detainees. For example, internal regulations themselves may create an institutional environment which is harmful or does not enhance the rehabilitation of detainees. Categorization of detainees by the internal rules can be discriminatory or might even contradict higher level legal norms. The communication style of the prison staff can also give rise to complaints.

As in the case of internal complaints mechanisms, for the right to complain to be effective, it is inevitable that detainees be properly informed about the available forums.

#### *Recommendations:*

- *Detainees should have the right to file a complaint on any ground concerning their treatment and conditions in the penitentiary institution, including treatment, physical conditions, measures, decisions, omissions and internal regulations of the penitentiary.*
- *Detainees should have adequate and up to date information on the available avenues of complaint.*

#### 3.1.2. Who is entitled to file a complaint?

Of the fifteen countries from which we received answers there were two where only detainees are entitled to file a complaint with external bodies (Lithuania and Romania). In all the other states, legal representatives are also entitled to file a complaint on behalf of the inmate, while in addition, in several states, family members and NGOs also have this authorization. Surprising information came from Albania, Serbia and Montenegro where the experts reported that formally – as per prison rules – only the detainee affected may submit a complaint, however in practice complaints from family members, legal representatives and NGOs are also accepted.

From a human rights point of view the more actors that can submit a complaint the better prisoners' rights are guaranteed. Therefore any extension of the entitlement to submit a complaint on behalf of a detainee is to be appreciated. In all these proceedings however it needs to be guaranteed that the final decision on the launching of the respective procedures remains with the detainee, provided that he/she is in the position to express his/her will on the matter.

#### *Recommendations:*

- *Legal representatives and family members of the detainee affected and any other person who has knowledge of the case should have the right to file a complaint in the interest of the detainee affected.*
- *NGOs should have the right to file a complaint as an individual complaint on behalf of a particular detainee with his/her consent and as an actio popularis claim.*

### 3.1.3. Who investigates and adjudicates the complaint?

In this respect we can see that there are almost as many systems as there are countries involved in the research. The most frequently utilized authorities are the court, the prosecutor and the ombudsperson with almost any combination of these. (However, it was submitted that in Georgia external complaints mechanism as such does not exist at all.) Typically, courts and prosecutors are the authorities with the strongest powers, i.e. they may bring legally binding decisions upon the prison administration, while ombudspersons are entitled to make recommendations or initiate proceedings before the courts or the prosecutors' office in case they find any irregularities or violations in the course of investigating prison complaints.

An interesting remark in this aspect was the one made by the Romanian expert who indicated that the new system by which the courts took over the responsibility of overseeing prison sentences from the prosecutors (which used to be the model during and after the communist regime) is more effective. The remark is important as there are strong arguments against the involvement of prosecution in the external control and legal supervision of the operation of the prison system. The principal rationale behind this stance is that prosecutors are not seen by the detainees as an independent organization and are certainly not regarded as an institution that is devoted to protecting their rights, since the prosecutors' office represented the charges during the criminal court proceedings against them. Furthermore, in countries where the prosecution is subordinate to the government, prosecutors' neutrality could also be questioned by detainees – and even if this skepticism might be ill-founded, the effectiveness of the system can be compromised by the widespread distrust in the system.

Table 1 – Basic information on external complaints mechanisms

	What are the grounds for a complaint?	Who is entitled to file a complaint?	Who investigates and adjudicates the complaint?
Albania	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> <li>• considerable part of complaints concern judicial issues (violation of fair trial, alleged corruption of judges, etc)</li> </ul>	According to the law, only the detainee, however in practice his/her relatives, legal representative or human rights NGOs submit complaints as well.	<ul style="list-style-type: none"> <li>• Minister of Justice</li> <li>• Ombudsperson</li> <li>• Prosecutor</li> <li>• Court</li> <li>• Supervisory Commission of the Execution of Penal Decisions</li> </ul>
Armenia	N/A	N/A	<ul style="list-style-type: none"> <li>• court</li> <li>• ombudsperson</li> <li>• prosecutor</li> </ul>
Azerbaijan	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• ombudsperson</li> <li>• other independent body</li> </ul>
Bulgaria	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> <li>• any other circumstance that the detainee is not satisfied with</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• NGOs</li> <li>• legal representatives</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• prosecutor</li> </ul>
Czech	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> </ul>	<ul style="list-style-type: none"> <li>• prosecutor</li> </ul>

<b>Republic</b>	<ul style="list-style-type: none"> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• his/her legal representative</li> <li>• the ombudsperson may decide to start investigation into any case, so theoretically a procedure can start on anyone's initiation</li> </ul>	<ul style="list-style-type: none"> <li>• ombudsperson</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> <li>• appeal against solitary confinement (penitentiary judge)</li> <li>• any other circumstance that the detainee is not satisfied with</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> <li>• others(not specified) to the prosecutor on behalf of the detainee</li> </ul>	<ul style="list-style-type: none"> <li>• court (penitentiary judge)</li> <li>• prosecutor</li> <li>• ombudsperson</li> </ul>
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> <li>• any other circumstance that the detainee is not satisfied with</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• other detainees if the one affected is not able to do so</li> <li>• family members</li> <li>• NGOs</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• prosecutor</li> <li>• ombudsperson</li> </ul>
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> <li>• complaints concerning judicial issues (violation of fair trial etc.)</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• other detainees</li> <li>• family members</li> <li>• NGOs</li> <li>• legal representative</li> <li>• other persons</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• ombudsperson</li> <li>• Ministry of Justice</li> <li>• Committee on Human Rights, Gender Equality, Missing Persons and Petitions, Kosovo Assembly</li> </ul>
<b>Kyrgyzstan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• NGOs</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• ombudsperson</li> <li>• HRDs</li> </ul>
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	Only the detainee affected	<ul style="list-style-type: none"> <li>• court</li> <li>• ombudsperson</li> </ul>
<b>Macedonia</b>	N/A	N/A	N/A
<b>Moldova</b>	Practically all aspects of prison life	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• ombudsperson</li> <li>• prosecutor</li> </ul>
<b>Poland</b>	All aspects of prison life can serve as the basis for a complaint	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• legal representative</li> <li>• statutory representative or custodian (for juveniles and incapacitated persons)</li> </ul>	<ul style="list-style-type: none"> <li>• penitentiary, court and penitentiary judge</li> <li>• ombudsperson</li> </ul>
<b>Romania</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	Only the detainee affected	<ul style="list-style-type: none"> <li>• court</li> </ul>
<b>Russia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• his/her legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• prosecutor</li> <li>• ombudsperson</li> </ul>

		<ul style="list-style-type: none"> <li>• if the subject of the violation amounts to criminal offence, anyone</li> </ul>	
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<i>Formally</i> (as per prison rules) only the detainee affected, but <i>in practice</i> family members, NGOs and legal representatives file complaints.	<ul style="list-style-type: none"> <li>• Ombudsperson</li> </ul>
<b>Tajikistan</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• family members</li> <li>• NGOs</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• court</li> <li>• prosecutor</li> </ul>
<b>Ukraine</b>	<ul style="list-style-type: none"> <li>• ill-treatment by prison staff</li> <li>• infringement of internal regulations</li> <li>• physical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• the detainee affected</li> <li>• other detainees if the one affected is not able to do so</li> <li>• family members</li> <li>• NGOs</li> <li>• legal representative</li> </ul>	<ul style="list-style-type: none"> <li>• prosecutor</li> </ul>

## 3.2. Investigating an external complaint

### 3.2.1. Formal requirements and time limit for filing a complaint, suspending effect

In most of the countries there are no formal requirements for filing a complaint. This means that any communication or written text can be accepted as a complaint by the competent authorities. Even where there are forms developed for the purposes of filing a complaint, none of the experts reported that failing to properly fill out the forms results in the automatic refusal of the complaint. However, many of them stated that anonymous submissions shall be refused without an in-merit investigation into the case.

The time limit for the submission of the complaint varies between seven days and one year following the action or omission complained of, and in some of the countries no deadline is determined at all. In practice, less than 15 days seems to be insufficient for writing a complaint, especially if the involvement of a legal representative is needed, as contacting the representative takes time. It should also be regulated – though this was not indicated in any of the replies as a problem – that the time during which the detainee is not in a position to write or submit a complaint should not be calculated as a part of the period for the submission of the complaint. If someone is in solitary confinement or the hospital it is justifiable that the duration of the confinement or the medical treatment should not constitute a part of the statutory time limit.

In none of the countries analyzed was the complaint indicated to have the effect of suspending the decision or measure it was lodged against.

The duration of the complaint procedure is either not regulated at all or ranges between three days and three months, in certain countries the duration is different for complaints against disciplinary punishments and other decisions or omissions.

The non-regulation of the duration of the complaint procedure clearly does not meet the minimum standards of legal certainty which is a fundamental element of the rule of law. Therefore this aspect of the procedure should be regulated. As to the length of the procedure we can say that the speedier it is the

more effective it can be, however an unrealistically short period might be counter-productive as too short a time allows for only a superficial examination of a complaint.

***Recommendations:***

- *Sufficient time, but not less than 15 days should be provided as the term within which a complaint may be submitted. The period in which the detainee is not in the position to exercise his/her right to file a complaint should not be regarded as part of the period for putting forth the complaint.*
- *Filing a complaint should as a rule have a suspending effect regarding decisions with an irrevocable effect, such as disciplinary measures. Exceptions may be made but only in a restricted circle of cases and with well-founded grounds.*
- *The law should set forth the time period within which complaints shall be adjudicated.*

### **3.2.2. Investigative measures and procedural rights**

The investigative measures that can be used seems to be the most insufficiently regulated aspect of the external complaint procedures. It seems that most of the states find it unnecessary to set forth clear provisions as to the flow of the investigation following the complaints which is highly problematic as in the absence of clear provisions investigative authorities are not legally bound to hear all the actors potentially affected by or involved in the subject matter of the complaint. As a result, the procedure might not meet the minimum standards of a trial. Therefore it is recommended that at least the basic principles of fair procedure apply to the complaints procedure.

Similar critique can be formulated concerning the procedural rights of the complainant. This field is either unregulated or superficially covered by legal norms in many of the countries examined. At a minimum, the right to be heard in the procedure, to bring motions in the procedure, to use general evidentiary means (submit or request an expert opinion or call witnesses), to be represented by an attorney, to have access to the files of the case and the right to interpretation should be ensured in a complaints procedure.

***Recommendation:***

- *The minimum rules of procedure should be set forth in relation to external complaints procedures, with special regards to the procedural rights of the complainants.*

### **3.2.3. Confidentiality**

Regarding confidentiality, in many of the countries anonymous complaints are not accepted, meaning that the name of the complainant must be revealed in the procedure. Some of the experts indicated that in spite of this provision ex officio investigation may be launched into the case if the written complaint otherwise contains enough solid evidence about the case.

As fear of retribution and punishment is an important factor that discourages inmates from filing complaints, it is highly recommended that anonymous complaints are dealt with by the competent authorities, and also that the technical conditions of practicing this right should be guaranteed. This means that a “complaint box” or similar facility should be available for inmates where they can place their complaint without being registered as doing so. Only the person acting on behalf of the authority investigating complaints should have access to the “complaint box”.

***Recommendations:***

- *Detainees should have the right to confidentiality when filing a complaint and in the course of the complaint procedure.*
- *Anonymous complaints also should be dealt with if they contain sufficiently solid evidence about the case.*

Table 2 – Investigating an external complaint

	Formal requirements, time limit, suspending effect, duration	Investigative measures	Procedural rights and confidentiality
<b>Albania</b>	<ul style="list-style-type: none"> <li>• no formal requirements</li> <li>• N/A</li> <li>• no suspending effect</li> <li>• general rule is 30 days</li> </ul>	<p>Penitentiary law does not specify the procedure or the investigative measures that are carried out by an external mechanism in case of a complaint by a person deprived of his/her liberty. It depends on the respective laws or regulations that are in force for each of the external mechanisms</p>	<p>Penitentiary law does not provide information on the rights of inmates in the complaints procedure.</p> <p>The representative of the Supervisory Commission of the Execution of Penal Decisions may verify the complaint without notifying the respective penitentiary and may have a private and confidential meeting with the complainant without the presence of the prison staff.</p> <p>Complaints intended to be submitted to the ombudsman and the National Preventive Mechanism may be placed by the detainees in locked boxes (officials of the institutions above have the keys of the boxes). The independent institutions may be reached also with the help of free of charge phone lines, and confidentiality in case of these calls is also ensured.</p>
<b>Armenia</b>	<ul style="list-style-type: none"> <li>• Duration: 5-15 days depending on the case</li> <li>• N/A about other themes</li> </ul>	N/A	There is no confidentiality; the complainant's name needs to be mentioned.
<b>Azerbaijan</b>	<ul style="list-style-type: none"> <li>• the content of complaints sent to the ombudsperson is regulated. Anonymous complaints shall only be dealt with if the complaint contains sufficient evidentiary facts.</li> <li>• the complaint can be submitted within one year after the action or decision complained of</li> <li>• no suspending effect</li> <li>• the ombudsperson shall proceed in 30 days which can be prolonged by another 30 days</li> </ul>	N/A	<p>According to Article 9 of the Constitutional Law about the Commissioner of Human Rights, upon the basis of applicants request the Commissioner has to keep the information about him/her confidential.</p> <p>According to Article 15 of the Constitutional Law about the Commissioner of Human Rights, dissemination of the applicant's private and family information, which became known to Commissioner during his examination, is not admissible without the</p>

			applicant's agreement.
<b>Bulgaria</b>	<ul style="list-style-type: none"> <li>• No formal requirements</li> <li>• N/A</li> <li>• no suspending effect</li> <li>• no fixed term for duration</li> </ul>	N/A	“Confidentiality is hardly attainable”
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>• Formal requirements <ul style="list-style-type: none"> <li>○ In general, complaints should contain information about the person who files it (name, address), the person or body against whom/which it is filed, the case and what the complainant wants to achieve.</li> <li>○ Complaints submitted to the ombudsman shall include (i) summary of the circumstances of the case, (ii) the body or person against which or whom the complaint is filed; (iii) evidence that the body which the complaint regards did not provide remedy; (iv) name and address of the complainant. If there was any decision in the case, its copy must be attached to the complaint.</li> </ul> </li> <li>• no suspending effect</li> <li>• duration: <ul style="list-style-type: none"> <li>○ prosecutor: 2 months</li> <li>○ ombudsman: no time limit</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• There are almost no relevant legal provisions.</li> <li>• The ombudsman may enter all premises (even without a previous notification), is entitled to examine documents, question prison staff, interview detainees without the presence of any other person, be present at hearings and evidentiary actions and pose questions to the persons present. The ombudsman may also order the affected body to perform certain activities (e.g. to provide the ombudsperson with some information or explanation, to present documents, to collect suggested evidence or take other suggested steps).</li> </ul>	<ul style="list-style-type: none"> <li>• There are no statutory provisions concerning the procedural rights of the complainant.</li> <li>• In general, there are no explicit statutory provisions ensuring confidentiality. However, the ombudsperson is entitled to talk to the detainees without the presence of any other person and he/she is not obliged to reveal the name of the complainant.</li> <li>• Complaints and petitions may be placed in locked boxes.</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• No formal requirements</li> <li>• No suspending effect, except in disciplinary procedures, in which detainees are entitled to appeal to the penitentiary judge against the decision imposing solitary confinement.</li> <li>• duration: <ul style="list-style-type: none"> <li>○ prosecutor: no data (the prosecutor orders measure in 8 days)</li> <li>○ ombudsperson: about 2 months</li> <li>○ penitentiary judge: 5 days</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Penitentiary judge: acquiring evidence, hearing, trial. Unless otherwise provided by the legal regulations, the rules of Act XIX of 1998 on Criminal Proceedings shall be applied</li> <li>• Ombudsman: access to documents, enter any place at any time without notice in advance, hearings, request hearing, written explanation, declaration or opinion from the official in charge</li> <li>• Prosecutor: hearing, access to documents,</li> </ul>	<p>Procedural rights: No data is available in procedures of ombudsperson and of prosecutor. In appeals procedures against solitary confinement, the rules of Act XIX of 1998 on Criminal Proceedings shall be applied.</p> <p>Confidentiality:</p> <ul style="list-style-type: none"> <li>• Penitentiary judge: compulsory to reveal the name of the complainant</li> <li>• Ombudsperson: detainee may ask to remain anonymous</li> <li>• Prosecutor: no data is available</li> </ul>

		launch/initiate inquiry	
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• There is no statutory form of complaint.</li> <li>• N/A</li> <li>• Usually, complaints have no suspending effect.</li> <li>• Duration: 30 calendar days which once can be prolonged with another 30 days</li> </ul>	Usual practice is meeting with inmate who sent a complaint and requiring explanation from prison administration, inspection of documents, etc. In some unique cases hearing of witnesses or confrontation might be conducted.	Anonymous complaints are not considered. Complaints are sent via the prison administration, so it is not possible to hide the name of the complainant, but the content of the complaint might remain hidden as letters are sent in sealed envelope to attorneys and state-run human rights institutions. However complaints sent to NGOs or international organizations can be censored.
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• Only serious complaints shall be submitted on a form, thus there is no formal requirement regarding minor complaints.</li> <li>• Complaints do not have suspending effect.</li> </ul>	<u>Hearings, examining registries and medical files, hearing experts</u>	N/A
<b>Kyrgyzstan</b>	<ul style="list-style-type: none"> <li>• no formal requirements</li> <li>• N/A about other themes</li> </ul>	N/A	N/A
<b>Lithuania</b>	<ul style="list-style-type: none"> <li>• Special form developed by the Ombudspersons Office,<sup>94</sup></li> <li>• the complaint can be submitted within one year after the action or decision complained of (answer is given within three days on starting or refusing investigation)</li> <li>• the complaint has no suspending effect</li> <li>• duration is three months</li> </ul>	All kinds of investigative measures before the ombudsperson (access to information, enter any place at any time without notice in advance, hearings)	It is compulsory to reveal the name of the complainant; witnesses may remain anonymous to the prison staff.
<b>Macedonia</b>	N/A	N/A	N/A
<b>Moldova</b>	<ul style="list-style-type: none"> <li>• no formal requirements but the complainant has to sign the complaint</li> <li>• 30 days for the submission after the action or decision complained of</li> <li>• no suspending effect</li> <li>• duration of the procedure is 30 days</li> </ul>	N/A	N/A
<b>Poland</b>	<ul style="list-style-type: none"> <li>• If the complaint is sent to the penitentiary judge, there are formal requirements as to the content, if it goes to the ombudsperson, no formal requirements are prescribed</li> </ul>	<ul style="list-style-type: none"> <li>• Within the proceedings before the court, on the grounds of Art. 1 § 2 of the Criminal Executive Code, the rules of the Code of Criminal Procedure are</li> </ul>	In judicial proceedings, a sentenced person has rights of a party and rights guaranteed in criminal proceedings. In case of court proceedings

<sup>94</sup> See: <http://www.lrski.lt/index.php?n=304&l=LT>.

	<ul style="list-style-type: none"> <li>• 7 days are open for complaint against a decision, action or omission</li> <li>• no suspending effect</li> <li>• no specific regulation</li> </ul>	<p>applied, as well as provided in the criminal procedure evidence measures.</p> <p>The <b>ombudsman</b> may</p> <ul style="list-style-type: none"> <li>• examine the case on the spot even without any prior notification,</li> <li>• demand explanation or presentation of files of any case handled by superior and central authorities of state administration, government administration agencies, agencies of co-operative, civic, professional or socio-professional organizations, as well as agencies of corporate organizational units, communes and organizational units of local government,</li> <li>• demand information on the status of a case dealt with by the courts, the prosecutor's office or other law enforcement agencies, and to demand that court and prosecutor files be made available to his/her office, as well as files from other law enforcement bodies after proceedings have been completed and judgment issued,</li> <li>• request an expert's opinion.</li> </ul>	<p>or proceedings before organs superior to the prison, it is necessary to present one's name and surname. However, the criminal procedure provides for the possibility of concealing the identity of a witness.</p>
<b>Romania</b>	<ul style="list-style-type: none"> <li>• no formal requirements (the complaint must be written)</li> <li>• the complaint can be submitted within 10 days after the action or decision complained of, in case of complaints against disciplinary measures the time limit is three days</li> <li>• no suspending effect</li> <li>• in case of disciplinary measures-related complaint the duration of the procedure is three days, in other cases ten days</li> </ul>	<p>The delegated judge can hear any person.</p>	<p>The inmate is presented to the delegated judge to state his/her case. The inmate has access to his/her penitentiary file</p> <p>It is difficult to fill a complaint against prison abuse and remain in confidentiality. Inmates can send letters directly to the judge.</p> <p>As regards witnesses unless the judge hears a large number of persons it may be difficult to remain unidentifiable</p>
<b>Russia</b>	<ul style="list-style-type: none"> <li>• formal requirements are the same as for the internal complaints</li> </ul>	<p>At the request of the parties, the <b>court</b> may obtain and examine documents and other</p>	<p>If <b>judicial proceedings</b> are instituted to review the complaint, the inmate has all</p>

	<ul style="list-style-type: none"> <li>• the time a complaint may be submitted after the occurrence of the alleged violation is limited and varies from 1 to 6 months for alleged disciplinary offences (depending on the circumstances of the offence, etc.), to several years for alleged criminal offences.</li> <li>• no suspending effect</li> </ul> <p>Procedure of the ombudsman:</p> <ul style="list-style-type: none"> <li>• Court or administrative procedures concerning the basis of the complaint shall be concluded.</li> <li>• The complaint must be submitted within 12 months from the violation or from the day when the complainant became aware of the violation.</li> <li>• The complaint must include the full name (surname, name and patronymic name) of the complainant, a description of the relevant decision, action or negligence), and copies of the decisions reached in the court or administrative complaint procedure.</li> </ul>	<p>evidence or call witnesses. Previously established facts from the internal investigation may be accepted as evidence, but the court is not obliged to rely on them.</p> <p>The supervising <b>prosecutor</b> reviewing an inmate's complaint may request documents, visit the prison and question officials and detainees. The prosecutor may use the findings of the internal investigation, but is not bound by them.</p> <p>The <b>ombudsman</b> is entitled to visit the facilities, request materials necessary for the investigation, demand explanation from officials and public servants concerned (with the exception of judges), examine the work of state bodies, local authorities and public officials, and initiate expert proceedings. The ombudsman may study criminal, civil and administrative cases, both final decisions, and cases terminated or dismissed.</p>	<p>the rights granted to a party in the proceedings, such as the right to attend hearings, to access the other party's submissions, to bring motions before the court, including motions to call evidence or to hear witnesses, the right to an interpreter, and the right to a copy of the court decision.</p> <p>Where <b>prosecutorial review</b> is instituted, the inmate has the right to receive a response and a copy of the decision taken on the basis of the findings.</p> <p><b>Confidentiality is not guaranteed:</b> inmates file complaints and appeals via the administration of the penitentiary institution. They receive replies via the prison administration as well. <b>A prosecutorial review is mostly confidential.</b> Requests of documents and explanations from officials are known to the parties concerned. The prosecutor may interview inmates in private, but the fact of the interview cannot be confidential in a penitentiary institution.</p> <p><b>Complaints submitted to the ombudsman are not monitored</b> by the prison staff and must be forwarded to the ombudsman within 24 hours.</p>
Serbia	<ul style="list-style-type: none"> <li>• Article 27 of the Law on the Protector of Citizens provides detailed rules on the content of the complaint, which can be submitted in written form or orally.</li> <li>• the complaint can be submitted within one year after the action or decision complained of</li> <li>• no suspending effect</li> <li>• no provision on the length of the procedure</li> </ul>	<p>The administrative authority is required to respond to all requests of the Protector of Citizens (requests for hearing of witnesses, hearing of experts, confrontation, etc) and to provide all requested information and documents within a period set by the Protector of Citizens that may not be shorter than 15 or longer than 60 days.</p>	<p>Inmates' procedural rights are not defined by existing regulations.</p> <p>The Protector of Citizens shall not proceed on anonymous complaints but exceptionally, if an anonymous complaint provides basis for his operation, he may conduct proceedings on his own initiative.</p> <p>The Law on the Protector of Citizens prescribes that</p>

			<p>persons deprived of liberty are entitled to submit their complaints in a sealed envelope. Sentenced prisoners can use a telephone, so they are able to complain that way. They can also contact their attorneys and ask them to file complaint.</p> <p>In justified cases, the Protector of Citizens may decide not to disclose to the administration authority involved the identity of the complainant.</p>
Tajikistan	<ul style="list-style-type: none"> <li>• There are no special statutory formal requirements. Complaints may be filed orally or in writing.</li> <li>• no suspending effect</li> <li>• duration: 1 months, which may be extended to 2 months</li> </ul>	Interviewing the complainant	No procedural rights are ensured.
Ukraine	<ul style="list-style-type: none"> <li>• no formal requirements</li> <li>• no time limit for the submission of the complaint</li> <li>• no suspending effect</li> <li>• 10 days</li> </ul>	Interview of complainant and witnesses, medical examination. The prosecutor is not bound by previous findings but in practice frequently relies on them.	<p>If criminal proceedings are not launched as a result of the complaint, the person concerned has no specified rights.</p> <p>It is not possible to complain anonymously. The witness may be protected under a special decision of the prosecutor.</p>

### 3.2.4. Legal representation and legal aid

In terms of the legal representation of the complainant during the procedure, it is either explicitly permitted or – if not regulated – possible in practice in most countries. The most typical service providers are attorneys, but there are three countries where NGOs may also provide representation for the complainants. However, it needs to be noted that one-third of our experts has not filled out this part of the questionnaire, the reason for which is not known.

It is obvious that inmates are in a multiply disadvantaged position if they wish file a complaint against the institution that is detaining them. Therefore, their legal representation (enhancing their ability to enforce their rights) is of key importance. Even in jurisdictions, which provide this possibility, the indigence of defendants (who often have no income, or only a very low income – e.g. from work performed within the prison) is a severe obstacle in the way of proper legal representation. Consequently, without legal aid, the right to legal representation (and thus indirectly to effective remedy of violations) may be illusory.

#### **Recommendations:**

- *Detainees should have the right to be represented in the course of external complaints procedures.*

- *Detainees should be entitled to free legal aid with regard to external complaints procedures.*

Table 3 – Legal representation and legal aid in internal complaint procedures

	Legal representation	Legal aid
Albania	The law does not explicitly provide for the possibility of representation, at the same time does not even prohibit it. <b>In practice it is possible.</b>	N/A
Armenia	Legal representation is <b>permitted</b> , the representative may be <b>an attorney</b> .	N/A
Azerbaijan	Legal representation is <b>permitted</b> .	Free legal aid is <b>available</b> .
Bulgaria	N/A	N/A
Czech Republic	Legal representation is <b>permitted</b> .	There are no relevant legal provisions on free legal aid in complaint procedures, and in practice it is generally not provided.
Hungary	Legal representation is <b>permitted</b> .	Free legal aid is <b>available</b> (only for legal advice and drafting documents, but not for representation in the proceeding)
Kazakhstan	Legal representation is <b>permitted</b> , the representative may be <b>any person</b> designated by the inmate.	Free legal aid is <b>not available</b> .
Kosovo	Legal representation is <b>permitted</b> . Detainees may be represented by attorneys at law, NGOs and other institutions following an agreement with the respective ministry.	The relevant legal provisions set out that the penitentiary system is obliged to ensure the “optimal conditions” for the detainees to benefit from legal assistance.
Kyrgyzstan	N/A	N/A
Lithuania	N/A	N/A
Macedonia	N/A	N/A
Moldova	Legal representation is <b>permitted</b> , the representative may be <b>an attorney or an NGO</b>	N/A
Poland	Legal representation is <b>permitted</b> , the representative may be <b>an attorney or an NGO</b> . <b>Rarely used</b> .	Free legal is <b>not regulated</b> .
Romania	Legal representation is <b>permitted</b> , the representative may be <b>only an attorney</b> . Inmates are very rarely represented.	Free legal aid is <b>not available</b> .
Russia	Legal representation is <b>permitted</b> , the representative may be <b>only an attorney</b> .	Free legal aid is <b>not available</b> .
Serbia and Montenegro	Legal representation is <b>not regulated, but in practice it is permitted</b> , representation is provided by <b>NGOs and attorneys</b> . The experts experience is that representation is very rare.	Free legal aid is <b>available</b> .
Tajikistan	Legal representation is <b>permitted</b> .	N/A
Ukraine	Legal representation is <b>permitted</b> , the representative may be <b>only an attorney</b> .	Free legal aid is <b>not available</b> .

### 3.2.5. Outcome

The most typical outcome of a complaints procedure – if the complaint is held to be well-founded – is a disciplinary or criminal procedure against the person whose action or omission was challenged by the complaint. The ombudspersons can only issue recommendations, which makes the efficiency of this type of remedy dependent on the institutional culture of the penitentiary system.

The Russian solution seems to be a good example of how outcomes should be regulated: the investigative authority may (i) dismiss the complaint submitted; (ii) accept the complaint submitted in whole or in part; (iii) annul the decision complained of in whole or in part; (iv) restore the rights violated and the damage caused, because in the case of a violation not only the member of the prison will be sanctioned but in addition, the inmate shall be compensated and/or his/her rights shall be restored. The Hungarian solution – that the prosecutor’s first-instance order has suspending effect on the execution of the measure or decision complained of, irrespective of an appeal against it by the prison administration – is also an effective tool against human rights abuses.

**Recommendation:**

- ***The law should clearly outline the consequences of a well-founded complaint, including the restoration of the inmate’s violated rights.***

*Table 4 – Outcome of internal complaints procedures*

	Possible outcome
<b>Albania</b>	<ul style="list-style-type: none"> <li>• criminal investigation</li> <li>• ombudsman: recommendation</li> </ul>
<b>Armenia</b>	In practice, if there are complaints, the complainants are the ones who suffer. The disciplinary procedure against the staff or any other sort of warnings to them are not due to the violations performed against the detainees, but due to wrong supervision or due to their action which has not been agreed beforehand.
<b>Azerbaijan</b>	During the consideration of complaint, if the commissioner finds a violation of human rights, he/she may initiate an action with appropriate bodies for disciplinary responsibility regarding the official's unlawful action (or omission) that violated human rights
<b>Bulgaria</b>	N/A
<b>Czech Republic</b>	<ul style="list-style-type: none"> <li>• In general, there are no exact legal provisions.</li> <li>• In case of violation of law or other mistakes the ombudsman informs the body affected and requests the body to comment on the findings within 30 days. If the body does not adopt sufficient reformatory measures in 30 days, the ombudsman issues a final opinion and sends it to both the complainant and the body affected. This final opinion contains suggestion for reformatory measures (including initiating disciplinary proceedings or criminal proceedings, paying damages or taking other steps).</li> </ul>
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• Penitentiary judge: decides on the complaint (no further provision)</li> <li>• Ombudsperson: (i) mentions case in annual report, (ii) he/she may propose a resolution to the supervisory body of the entity which committed the violation, (iii) may initiate that the public prosecutor file a warning with the concerned authority, (iv) may initiate disciplinary proceedings, (v) may initiate criminal proceedings</li> <li>• Prosecutor: (i) may ask the court for taking measures, (ii) send order or signal, (iii) initiate disciplinary procedure, or (iv) in some cases proceeding for damages</li> </ul>
<b>Kazakhstan</b>	<ul style="list-style-type: none"> <li>• disciplinary procedure</li> <li>• criminal procedure</li> </ul>
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• requests, reports, recommendations issued by the ombudsman</li> <li>• disciplinary procedures against prison staff (warning letter, suspension)</li> </ul>
<b>Kyrgyzstan</b>	N/A
<b>Lithuania</b>	Ombudsperson’s decision is provided in the form of recommendation.
<b>Macedonia</b>	N/A
<b>Moldova</b>	<ul style="list-style-type: none"> <li>• Dismiss the complaint submitted;</li> <li>• Accepting the complaint submitted in whole or in part;</li> <li>• Annul the decision (administrative act), in whole or in part</li> <li>• Restoration of rights violated and recovery of the damage caused.</li> </ul>
<b>Poland</b>	<ul style="list-style-type: none"> <li>• Disciplinary proceedings can be initiated according to the same rules that apply to the internal complaints procedure.</li> </ul>

	<ul style="list-style-type: none"> <li>• The penitentiary judge may repeal unlawful decisions.</li> <li>• The ombudsman may (i) submit a motion to the penitentiary affected, (ii) request the superior body of the institution affected to apply measures provided by law, (iii) demand that proceedings be initiated in civil cases, and participate in any ongoing proceedings with the rights of a prosecutor, (iv) demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted ex officio, (v) ask for initiating administrative proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor, (vi) move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanor, (vii) lodge cassation or extraordinary appeal against each final and valid sentence.</li> <li>• Damages may be awarded only in a separate civil procedure.</li> </ul>
<b>Romania</b>	N/A
<b>Russia</b>	<ul style="list-style-type: none"> <li>• The court may find the measures of the prison administrators unlawful and order the penitentiary to restore the inmate's rights. The court may also award damages to the inmate</li> <li>• A supervising prosecutor may require that measures be taken to correct violation of a detainee's rights; require administrative liability for prison staff, and where measures taken by the penitentiary amount to a criminal offense, the prosecutor would refer the case to criminal investigators with a view to opening criminal proceedings.</li> <li>• The ombudsman submits a report to the penitentiary on his/her findings, including recommendations on the possible and necessary measures. The ombudsman is entitled (i) to file a petition to the court, (ii) to file a motion to the penitentiary, requesting the initiation of a disciplinary, administrative or criminal proceedings; (iii) to request that the court or the prosecutor's office examines the decisions, verdicts, determinations or resolutions of a court or a judge which have entered into force; (iv) to communicate his/her findings to an official who is entitled to lodge protests, as well as to attend the court hearings of the case in a supervising capacity; (v) to file complaints to the Constitutional Court of the Russian Federation in case a law applied or intended to be applied in a particular case violates constitutional rights and freedoms.</li> </ul>
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• Recommendation to initiate disciplinary procedure</li> <li>• Recommendation to the Penal Sanctions Enforcement Directorate to pay damages</li> <li>• Report ill-treatment to the public prosecutor.</li> </ul>
<b>Tajikistan</b>	Compensation for any damage caused
<b>Ukraine</b>	Criminal investigation or disciplinary procedure and sanction

### 3.3. Experts' opinions of the system's effectiveness and basic statistics

Regarding statistical data, only a very small proportion of the experts could share this information: only four of them had any information on the number of complaints and the proportion of successful complaints in 2008 and 2009. The reason for this is presumably the lack of systemic data collection in the countries, which is a significant deficiency, as without this data neither the extent to which the mechanism is used, nor its overall efficiency can be assessed.

The general – and we could also say overwhelming – opinion of the experts was that their system is ineffective. The reasons for that can be enumerated as follows:

- a) inmates are not aware of the complaints possibilities and are not properly informed about them by the prison staff
- b) inmates are afraid of retribution
- c) the monitoring bodies' human and financial resources are insufficient
- d) investigations are superficial

We could also add the further reasons derived from the questionnaires:

- a) lack of clear rules on the procedure, especially lack of procedural rights
- b) confidentiality is not ensured
- c) legal representation is extremely rare
- d) lack of legal aid
- e) lack of available data for the assessment of the system

One case of good was provided by the Russian expert: “A number of Russian regions have developed various practices of legal assistance to prisoners. Krasnoyarsk Krai, for example, has a program providing remote legal assistance supported by the Krasnoyarsk Committee for Human Rights. The organization employs an attorney who maintains correspondence with inmates and prepares accurate and substantive responses to their complaints and requests. Assisted by students from a local Law Clinic, the attorney studies each letter from the penitentiary and prepares a substantive response which may contain legal advice or legal assessment of the situation brought up by the detainee. In addition to the remote legal assistance, staff members of the Committee for Human Rights visit penitentiary colonies to offer inmates legal advice and help them write formal appeals and complaints.

This practice of legal assistance in prisons developed by the Committee has received the support of regional penitentiary authorities. Even before the entry into force of the Federal Law of 10 June 2008 No 76-FZ on Civilian Monitoring of Human Rights in Places of Detention and Assistance to Detainees, staff members of the Committee had already been issued permits enabling them to visit prisons and see inmates.

Since the Law on Civilian Monitoring entered into force, many members of the Committee have joined Civic Monitoring Boards (CMB) set up to exercise civilian monitoring in places of detention. Their status of CMB members allows them to visit penitentiary colonies and other places of detention and deal with complaints from prisoners.”

*Table 5 – Statistical data and opinions of the respective systems*

	Statistical data	Professional opinion of the effectiveness of the system
<b>Albania</b>	<b>Number of complaints</b> submitted to the Ombudsman 2008: 314 2009: 244 No data on number of successful complaints.	The practice shows that <b>there are a lot of problems with</b> regard to the right of prisoners to have an independent prison complaints mechanism. <b>There is a need for legal improvements</b> in this area as well as effective implementation of the existing laws.
<b>Armenia</b>	N/A	N/A
<b>Azerbaijan</b>	N/A	N/A
<b>Bulgaria</b>	N/A	N/A
<b>Czech Republic</b>	<b>Number of complaints submitted to the ombudsman</b> concerning military, police and prisons: 2008: 348 complaints, 2009: 310 complaints. <b>Successful complaints</b> (as far as the ombudsman is concerned): 2008: 26 complaints, 2009: 15 complaints.	The ombudsman is mainly able to focus on systematic visits and system control rather than on individual cases.
<b>Hungary</b>	<b>Number of complaints</b> submitted to the Ombudsman 2008: 99 (against penitentiary	Although the relevant regulations are referring to investigative measures and procedural rights provided to detainees, in practice, these mechanisms are not effective enough.

	institutions), 8 (against national prison headquarters) 2009: 166 No data on number of successful complaints.	To improve the mechanism: <ul style="list-style-type: none"> <li>- investigative measures and procedural rights shall be detailed</li> <li>- detainees' right to access to information shall be provided</li> <li>- free legal representation shall be provided for indigent detainees</li> </ul>
<b>Kazakhstan</b>	N/A	As well as in the case of internal complaints, <b>inmates are afraid</b> to write external complaints related to violations within the prison. Most of the external complaints related to their 'unfair conviction', i.e. stressing disagreement with the conviction itself and court decisions. That is why the <b>most effective way is to set up the position of a prison ombudsman with representatives on the local level.</b>
<b>Kosovo</b>	Number of complaints submitted: 2009: 150 (only 28 of them were resolved)	The ombudsperson is the only external state institution in Kosovo dealing with prison complaints. However, defending detainees' rights is only part of its mandate and due to the lack of the institution's professional resources and capacity it is not able to perform regular visits to detention facilities. Thus, visits are only performed sporadically and effective legal assistance is provided only in a limited number of cases.
<b>Kyrgyzstan</b>	N/A	N/A
<b>Lithuania</b>	N/A	N/A
<b>Macedonia</b>	N/A	N/A
<b>Moldova</b>	N/A	Ineffective.
<b>Poland</b>	<b>Number of complaints</b> 2008: 4,186 2009: 5,398	N/A
<b>Romania</b>	N/A	<b>It is effective compared to the previous law from communist period when the prosecutor was overseeing the prison sentence</b> and he had no effective mechanism to assert his decisions. But the present law leaves room for improvement as regards the power of the judge to impose a decision on or apply sanctions to the prison administration.
<b>Russia</b>	<b>Number of complaints</b> 2008: 216 2009: 202 <b>Successful complaints:</b> 2008: 86 (39.8%) 2009: 71 (35.1%) <b>Average length of detention:</b> 20-30 days.	See in the narrative part of this section.
<b>Serbia</b>	<b>Number of complaints</b> 2008: 76 2009: 83 <b>Successful complaints:</b> 2008: no data 2009: 4	The independent prison complaints mechanism is not effective enough. There are a number of reasons for that. Primarily, a lot of prisoners are <b>not aware of the possibility</b> of filing a complaint to the Protector of Citizens, due to the fact that the Protector of Citizens is a <b>relatively new institution</b> in Serbia (it was established in 2005, but started its work effectively in 2007) and due to the fact that <b>prison staff rarely informs prisoners</b> about that possibility. Besides that, a lot of prisoners do not believe that the Protector of Citizens can help them. Also, some <b>prisoners are afraid</b> they could be ill-treated if they submit a complaint to any independent institution or NGO.

		Finally, one of the main problems in the work of the Protector of Citizens is its lack of capacity. <b>The Protector of Citizens lacks staff and its budget is very limited.</b>
<b>Tajikistan</b>	N/A	N/A
<b>Ukraine</b>	N/A	Totally <b>ineffective</b> . Complaints registered are only a small part of the total number of actual complaints. <b>Inmates are unprotected</b> during the complaints procedure. <b>Investigation is poor and very superficial</b> , practically restricted to a vague interview of the alleged perpetrator.

## 4. The role of NGOs in monitoring prisons

### 4.1. Monitoring by NGO's

Paragraph 93.1 of the European Prison Rules reads as follows:

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

The requirement of independent monitoring of detention conditions is substantiated by various reasons:<sup>95</sup>

- Depriving a person of his or her liberty is a serious coercive act by the State, with the inherent risk of human rights abuse;
- Through the loss of liberty, the detained person comes to depend almost entirely on the authorities and public officials to guarantee his/her protection, rights, and means of existence;
- The possibilities for persons deprived of their liberty to influence their own fate are limited, if not non-existent;
- Places of detention are by definition closed and keep those detained out of the sight of society.

At all times and in all places, **persons deprived of their liberty are vulnerable and at risk** of being mistreated and even tortured. This means that they must be afforded enhanced protection through the monitoring of the conditions of their detention. It should be noted that the integration of monitoring mechanisms into the permanent protection system for persons deprived of their liberty does not necessarily imply that there are serious problems in places of detention, or that there is a widespread lack of confidence in the officials in charge.

It is more a matter of subjecting the huge power gap in detainer-detainee relations to outside scrutiny by a body empowered to intervene in cases of abuse of this power. **These control mechanisms promote human rights, help limit the risk of ill-treatment** and regulate any excessive measures taken against those deprived of their liberty.

They also contribute to the transparency and accountability of places of deprivation of liberty, thus confirming the legitimacy of the prison management and increasing the **public confidence in the institutions**.

According to the questionnaires received, in most countries human rights NGOs are highly concerned with detention conditions and the rights of detainees. Most of the NGOs that completed the questionnaire found regular and periodic visits by NGOs to be central to protecting the rights of detainees, as in the absence of outside pressure, human rights abuses in prisons are allowed to go unchecked. Unfortunately, NGO monitoring remains the only source of independent information on prisons in most of these countries.

There are countries, such as Georgia, Tajikistan or Lithuania where independent organizations are **not allowed** to monitor places of detention. However, in most CEE-FSU countries NGOs are allowed to enter prisons. The basis for entering can be: **legal provisions, cooperation agreements, or individual decision on admission**, or a combination of these. For example, in Russia, the Law on Civilian Monitoring of Human Rights in Places of Detention and Assistance to Detainees<sup>96</sup> sets forth the rules of monitoring. According to that law, Russian NGOs may apply to have a maximum of 2 staff members included in a Civic Monitoring Board (CMB) at the regional level. Whether or not an applicant will be included in a relevant CMB is subject to approval by the Russian Civic Chamber. As of today, CMBs have

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<sup>95</sup> The source of this paragraph is: *Monitoring places of detention – a practical guide*, Association for the Prevention of Torture, Geneva 2004.

<sup>96</sup> *The Federal Law Civilian Monitoring of Human Rights in Places of Detention and Assistance to Detainees*, No 76-FZ, of 10 June 2008, art. 10.

been established and operate in 76 regions. Legal provisions allow NGOs to enter penitentiaries in Kosovo, but a cooperation agreement is also necessary.

In Romania the provisions of the Law 275/2006 makes prison visits by NGOs possible.

In Hungary, Serbia and Montenegro and Kyrgyzstan NGOs may enter prisons based on individual cooperation agreements arranged with the Prison Service, however in some countries the decision to allow NGO visits is still the subject of individual decision (e.g. in Serbia and Montenegro). In Moldova, penitentiary institutions can be visited by professionals who have been granted special permission by the prison administration. The NGO representatives must submit a draft plan of action to the Head of the Prison for approval. In Albania the visit is allowed subject to the approval of the Prison Commander, who gives a justified decision on the admission, against which appeal to the National Commander is possible.

One good example for NGO detention monitoring activities is Russia, where NGOs have traditionally been concerned with the situation of detainees. This work was carried out in a professional manner earlier than most other types of NGO activities, with positive implications for the level of expertise, as well as for the quality and effectiveness of interactions with government and also advocacy efforts. Russian NGOs initiated the development and adoption of the Law on Civilian Monitoring and consistently pushed it forward. But even prior to the adoption of the law, human rights organisations were able to work in places of detention and assist detainees. According to many human rights defenders, the country's penitentiary system is currently evolving more rapidly and is more open to change than most other systems in Russia. Achievements include improved living conditions in prisons and rehabilitation programs for juvenile offenders. Most members of the newly-formed CMBs come from those human rights organisations that had been active in prisons prior to the adoption of the Law on Civilian Monitoring. As Natalia Taubina, the director of the Public Verdict Foundation, states, CMBs have evolved into an independent external mechanism for human rights protection in prisons; they have been given a formal mandate and are recognized by other government authorities. Many CMB members find that, since the Law on Civilian Monitoring was adopted, their monitoring activity has been more effective, and the authorities have had limited opportunity to interfere with independent observers. This has been a positive consequence of the Law on Civilian Monitoring.<sup>97</sup>

#### **Recommendations:**

- ***The monitoring (in the broader sense)<sup>98</sup> of detention facilities provides an opportunity to NGOs to record observations and collect information for immediate action and later use, thus NGOs should include monitoring in their core activities.***
- ***In those countries where NGOs are not allowed to enter detention facilities, NGOs should advocate for permission to enter based either on cooperation agreements or on legal norms.***
- ***Those NGOs that are active in monitoring detention facilities should communicate with the appropriate authorities or other bodies. They should not only observe developments, collect information, and perceive patterns of conduct, but should, as far as their mandate allows and their competence permits, identify problems, diagnose their causes, consider potential solutions, and assist in problem solving. While exercising good judgement at all times, human rights NGOs should take initiative in solving problems and, provided they are acting within their authority and competence, should not wait for specific instruction or express permission before acting.<sup>99</sup>***

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<sup>97</sup> The negative consequence of the Law on Civilian Monitoring is that human rights defenders and independent experts who are not CMB members face strong barriers to entering places of detention, since the authorities now have legal grounds to deny them access. There is a trend leading to civilian monitoring being undertaken exclusively by CMBs, thus limiting the forms and types of such monitoring. Any activity which is not explicitly provided in the law is likely to be resisted by the authorities.

<sup>98</sup> Monitoring is a method of improving the protection of human rights. The principal objective of human rights monitoring is to reinforce State responsibility to protect human rights. When a Government official or other responsible actor is monitored, s/he becomes more careful about her/his conduct - *Training Manual on Human Rights Monitoring* - Chapter V: Basic Principles of Monitoring, Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring*, United Nations New York, 2001.

<sup>99</sup> *Training Manual on Human Rights Monitoring* - Chapter V: Basic Principles of Monitoring Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* United Nations New York, 2001.

Table 1 – Overview of NGOs' authorization to monitor prisons

<b>Are domestic NGOs allowed to monitor prison?</b>	
<b>Albania</b>	Yes, by the decision of the Prison Commander, who gives a justified decision on the admission, against which appeal is possible to the National Commander.
<b>Armenia</b>	Yes
<b>Azerbaijan</b>	Yes
<b>Czech Republic</b>	Yes, individual decision on admission
<b>Georgia</b>	No
<b>Hungary</b>	Yes, based on cooperation agreement
<b>Kazakhstan</b>	In each individual case NGOs may enter the prison if they have received permission. As of 2004, Public Supervising Commissions operate in all 14 regions of Kazakhstan. The commissions consist of 3-9 members. A minimum of two members may visit prisons in certain regions at any time without previous permission. These commissions are not very active.
<b>Kosovo</b>	Yes, based on legal provisions and a cooperation agreement.
<b>Kyrgyzstan</b>	Yes, cooperation agreement
<b>Lithuania</b>	No
<b>Macedonia</b>	The visits are carried out on the basis of a written permit issued by the Department for the Execution of Sanctions, and each visit must be previously announced. This area is not legally regulated in Macedonia.
<b>Moldova</b>	Yes, institutions can be visited by people who have special permission from the administration. NGO representatives shall submit for approval a draft plan of action to be conducted with the detainees, and get it approved in advance with the Head of the Educational, Psychological and Social Welfare Department to avoid conflicts in the program of the detainees.
<b>Poland</b>	Yes, the Helsinki Foundation for Human Rights benefits from individual passes issued for a period of one year, which entitles its representatives to visit prisons and detention centers.
<b>Romania</b>	Yes, Provisions of the Law 275/2006
<b>Russia</b>	According to the Law on Civilian Monitoring of Human Rights in Places of Detention and Assistance to Detainees, the Russian nongovernmental organisations may apply to have a maximum of 2 staff members included in a Civic Monitoring Board (CMB) at the regional level. Whether or not an applicant will be included in a relevant CMB is subject to approval by the Russian Civic Chamber. As of today, CMBs have been established and operate in 76 regions.
<b>Serbia</b>	Yes, cooperation agreement. Nevertheless, NGOs need an individual decision on admission every time it decides to visit a prison.
<b>Tajikistan</b>	No
<b>Ukraine</b>	N/A

## 4.2. Prior notification about the visit

The Association for the Prevention (APT) and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) strongly recommend that the authorization NGOs receive permit visits without prior notification of the detaining authorities. Failing this, access should be given as promptly as possible. Where the authorities require that the NGO inform them in advance of the dates of the visit, the notification period should not exceed several days.<sup>100</sup>

According to the questionnaires, in most countries where NGOs may make monitoring visits, prior notification is required. The only exception is Poland and Romania.

<sup>100</sup> [http://idcoalition.org/wp-content/uploads/2009/06/mpd\\_guide\\_ngo\\_en.pdf](http://idcoalition.org/wp-content/uploads/2009/06/mpd_guide_ngo_en.pdf).

As for the requirement to send prior notification of the visits, we should differentiate between the visits delivered within an established visiting programme and the so called „ad hoc visits”. Most human rights NGOs have an established visiting programme, containing the list of places to visit and the manner (length, team, etc.) of the visits, whereas in certain cases NGOs visit an institution to undertake factfinding in a particular case, or to investigate a particular problem.

In the former case the requirement to notify the institution several days prior to the visit (i.e. two in Romania, three in Hungary) does not severely diminish the effectiveness of the monitoring. In the case of detention facilities of a larger size, it is even essential, as the detainees can be informed as to who will visit the institution and for what reason, and also as to what opportunity they will have to discuss their problems with the visitors. According to the experiences of the Hungarian Helsinki Committee, a notified visit may increase – obviously in the short term – the standard of detention. It is typical that before an announced visit by a domestic or international organization the facilities are thoroughly cleaned up, the widely criticized top level of the three-tiered bunk bed is removed, and the quality of the food is improved, thus the visit has additional (even if sometimes temporary) positive effects.

In the case of the second type of visit however, the requirement to notify the institution prior the visit may endanger the effectiveness of the visit, and the opportunity to visit a prison without prior notification is an important guarantee for human rights NGOs.

**Recommendations:**

- *NGOs allowed to monitor should aspire to include in the cooperation agreement (or advocate for changing the relevant law in this regard) the opportunity to visit institutions without prior notification.*
- *As for visits delivered in the framework of an established visiting program, the requirement to notify the institution 2-7 days before the visit is acceptable, however several weeks of prior notification is unreasonable, and may diminish the effectiveness even of a visiting delivered in the framework of an annual action plan.*

*Table 2 - Overview of notification policies*

	<b>Prior notification required</b>
<b>Albania</b>	No. In practice, monitoring organizations such as AHC send prior notification to all prison governors in the form of a letter listing the specific period in which penal institutions will be monitored and the names of those who will be involved.
<b>Armenia</b>	N/A
<b>Azerbaijan</b>	Yes
<b>Czech Republic</b>	Yes.
<b>Hungary</b>	According to the Hungarian Helsinki Committee’s cooperation agreement, prior notification is required 3 days in advance, which may be disregarded in urgent matters (with the permission of the institution’s governor).
<b>Kazakhstan</b>	Required for all monitors, except for members of Public Commissions.
<b>Kosovo</b>	Prior notifications shall be submitted 24 hours before the visit.
<b>Kyrgyzstan</b>	Depends on the cooperation agreement, but notification is typically required.
<b>Lithuania</b>	N/A
<b>Macedonia</b>	Yes it is obligatory; otherwise one cannot undertake a prison visit. An application must be submitted at least one day in advance of the visit.
<b>Moldova</b>	Prior notice is required for preventive visits.
<b>Poland</b>	No
<b>Romania</b>	APADOR does not send notification. GRADO notifies the institution 2 days prior to the visit.
<b>Russia</b>	Yes.
<b>Serbia</b>	There is no rule, but NGOs usually ask for permission a few days before the planned date, and

	the Penal Sanctions Enforcement Directorate responds within two or three days. In practice, the notification is usually submitted five to ten days before the visit. In some cases, visits were announced only two days beforehand (e.g. requested permission on Monday, got it on Tuesday and visited the prison on Wednesday), but in some cases visits were not allowed.
Tajikistan	N/A
Ukraine	N/A

### 4.3. Rights when visiting and outcome of visits

According to the APT's recommendations,<sup>101</sup> there should be an initial talk between the visiting team and the head of the penitentiary (or the deputy) when a visit to a place of detention takes place.<sup>102</sup> Monitoring bodies should also consult registers concerning categories of detainees, the regime of the prison, disciplinary measures, the medical care and state of detainees, material supplies (e.g. food, clothes, educational, sport and leisure material), etc., and other relevant documents, including the internal regulations of the penitentiary. It is also important for the visitors to visit all areas of the premises, including cells, isolation and disciplinary cells, and the premises for medical care. Furthermore, interviews should be conducted with persons deprived of their liberty, and the possibility to have a private, confidential talk with the detainee is also of crucial importance. Visits should be concluded with a discussion with the head of the penitentiary. As to the outcome of the visits, it must be stressed that '[r]eports are probably the most important of the tools that a visiting body has at its disposal for protecting detainees and improving their situation'.<sup>103</sup> Thus, issuing reports on each visit or global reports is highly recommended.

As to the rights of NGOs undertaking visits to penitentiary institutions, it was reported that in the countries where NGOs have the right to monitor the conditions of detention, they have the right to enter any part of the premises of the given penitentiary. It may be concluded that in general, NGOs are allowed to conduct interviews with inmates, the only exception being Poland. However, it seems that confidential, private talks are not ensured in a number of countries, such as Kazakhstan, Kyrgyzstan and Russia, and pre-trial detainees in Serbia may not be interviewed by monitoring groups. While the answers given with regard to Kazakhstan and Kyrgyzstan simply do not refer to the possibility of confidential interviews, regarding Russia it was explicitly submitted that the members of the monitoring group may have interviews with detainees only if a member of the prison staff is able to supervise (to see and hear) the interview. Access to documents concerning the detention is ensured in all of the responding countries, with the exception of Armenia, Kyrgyzstan and Poland.

It should be noted that in certain countries, such as the Czech Republic, Hungary, Kyrgyzstan, Kazakhstan, and Macedonia, rights of NGOs when visiting depend on the prison administration. For example in the Czech Republic, Hungary and Kyrgyzstan, the rights of the NGOs monitoring the places of detention are established by a cooperation agreement concluded by the prison administration and the respective NGO. As to the practice, it was submitted that if an NGO in Kazakhstan is allowed to enter a penitentiary, it may perform a wide range of monitoring actions. According to the information submitted, Macedonian NGOs' rights when visiting depend on what the given NGO have asked for when requesting a permit to enter into the institution. Furthermore, NGOs have to specify exactly what they intend to do during the visit, and do not have the right to change the agenda.

#### ***Recommendations:***

<sup>101</sup> See: *Monitoring places of detention. A practical guide*. Association for the Prevention of Torture, Geneva, 2004. pp. 74–91.

<sup>102</sup> However, according to the APT's recommendations, after several visits to the same place without encountering any serious difficulties or noting any particular problems regarding the conditions of detention, this initial talk can be limited to its formal or relational aspects.

<sup>103</sup> *Monitoring places of detention. A practical guide*. Association for the Prevention of Torture, Geneva, 2004. p. 85.

- *NGOs should have the right to enter all areas of the penitentiary institution during their visits.*
- *NGOs should have the right to consult registers of the penitentiary and other relevant documents, such as internal regulation of the institution.*
- *NGOs should have the the right to conduct interviews with any person deprived of his/her liberty, and the possibility to have a private, confidential talk with detainees should be also ensured.*
- *NGOs should issue reports concerning their experiences during the visit.*

Table 3 - Overview of rights during and outcome of the visits

	<b>Rights when visiting</b>	<b>Outcome</b>
<b>Albania</b>	The Albanian Helsinki Committee has the right to <ul style="list-style-type: none"> <li>• enter the premises of the penitentiary</li> <li>• undertake interviews with detainees (also unsupervised interviews, when requested),</li> <li>• inspect the necessary documentation.</li> </ul>	<ul style="list-style-type: none"> <li>• report on the situation of human rights in penitentiary institutions</li> <li>• offering free legal aid</li> <li>• verification of different complaints received via e-mail, letters, phone and through family members of detainees</li> <li>• addressing the relevant recommendations to the prison staff (in the case of irregularities) or to other superior institutions that have the penitentiary institutions under their supervision</li> <li>• publicly denouncing flagrant violations of the rights of detainees through print and electronic media</li> </ul>
<b>Azerbaijan</b>	N/A	N/A
<b>Armenia</b>	<ul style="list-style-type: none"> <li>• to enter any part of the penitentiary, enter cells, etc.</li> <li>• to undertake unsupervised interviews with detainees</li> </ul>	The members of the group may submit their observations directly to the head of the institution if there is need for an urgent solution, if there is no answer within three days then they can make public statements, they may also make reports (annual or special).
<b>Czech Republic</b>	Rights when visiting depend on the cooperation agreement concluded between the NGO and the prison administration. NGOs may have access to information on the detainee's behaviour and to access their personal files, if the detainee agrees to it.	Reports
<b>Hungary</b>	Rights when visiting depend on the cooperation agreement concluded between the NGO and the prison administration. The Hungarian Helsinki Committee has the right <ul style="list-style-type: none"> <li>• to enter any part of the penitentiary,</li> <li>• to undertake unsupervised interviews with detainees,</li> <li>• to have access to relevant data and information and to medical documentation.</li> </ul>	<ul style="list-style-type: none"> <li>• publishing reports after the visits (in case of the Hungarian Helsinki Committee, reports are commented on but not censored by the visited penitentiary and the central prison administration)</li> <li>• providing free legal aid to detainees whose rights were allegedly infringed as a result of the conditions of detention</li> <li>• providing psychological and other aid</li> </ul>
<b>Kazakhstan</b>	Members of Public Commissions have the right to <ul style="list-style-type: none"> <li>• visit different parts of the penitentiary, accompanied by prison staff,</li> <li>• undertake interviews with detainees,</li> <li>• access documents.</li> </ul>	Members of commissions may raise issues of concern and send recommendations to prison administrations. They have the right to receive complaints from inmates. NGOs provide information and advocacy campaigns, education seminars for prison staff, legal and social consultations for inmates etc.

	Other NGOs may also monitor conditions of detention, but it depends on the prison administration what kind of rights they have. In practice, if an NGO is allowed to enter a penitentiary, it may perform a wide range of monitoring actions.	
<b>Kosovo</b>	<ul style="list-style-type: none"> <li>• to access all documents and files</li> <li>• to undertake confidential interviews with detainees</li> </ul> <p>The Kosovo Rehabilitation Centre for Torture Victims is entitled to enter and monitor any part of penitentiaries.</p>	<ul style="list-style-type: none"> <li>• publishing annual reports on the situation of human rights in penitentiary institutions</li> <li>• offering free legal aid</li> <li>• verification of different complaints received via e-mail, letters, phone and through family members of detainees</li> <li>• submitting the relevant recommendations to the management of the penitentiary, the central prison administration, the Ministry of Justice and other relevant stakeholders</li> </ul>
<b>Kyrgyzstan</b>	<p>Rights when visiting depend on the cooperation agreement concluded between the NGO and the prison administration.</p> <p>Usually NGOs have the right to</p> <ul style="list-style-type: none"> <li>• undertake interviews with detainees,</li> <li>• make inquiries,</li> <li>• observe the penitentiary.</li> </ul>	Reports
<b>Lithuania</b>	NGOs are not allowed to monitor conditions of detention.	--
<b>Macedonia</b>	Rights when visiting depend on what the given NGO have asked for when requesting a permit to enter the institution. NGOs have to specify exactly what they intend to do during the visit, and do not have the right to change the agenda.	Depending on the mission conducted, a report may be published, a detainee may be represented and so on.
<b>Moldova</b>	N/A	NGOs may express their opinions about the state of the penitentiary institution at the time of the visit. They may express objections and submit proposals that are taken into account. Problems are examined and improved, or, if possible, removed.
<b>Poland</b>	<p>Helsinki Foundation for Human Rights has the right to</p> <ul style="list-style-type: none"> <li>• enter cells of the penitentiary without the presence of the prison staff.</li> </ul>	There is the opportunity to submit conclusions and comments concerning the conducted visitation to the manager of the controlled or a superior unit.
<b>Romania</b>	<ul style="list-style-type: none"> <li>• to enter any part of the penitentiary</li> <li>• to undertake unsupervised interviews with detainees</li> <li>• to have access to the personal file of the inmate if he/she agrees to it</li> </ul>	Monitoring reports, proposals for modifications of the legislation and internal procedures, specialized assistance to individual cases.
<b>Russia</b>	<ul style="list-style-type: none"> <li>• to enter any part of the penitentiary where detainees may be held</li> </ul>	Recommendations and requests which are not binding. <sup>104</sup> Government organs, local self-governments bodies and officials are required to consider opinions,

<sup>104</sup> The Federal Law Civilian Monitoring of Human Rights in Places of Detention and Assistance to Detainees, No 76-FZ, of 10 June 2008, para 1 art. 15.

	<ul style="list-style-type: none"> <li>• to undertake interviews with detainees concerning their rights in detention, provided that a staff member of the detention facility is able to supervise (see and hear) the interview</li> <li>• to receive and process recommendations, applications and complaints from detainees</li> <li>• to request and receive any necessary information or documents from the penitentiary</li> </ul>	recommendations and requests received from the civic monitoring board and inform the board members of any decisions or measures taken.
<b>Serbia</b>	<ul style="list-style-type: none"> <li>• to enter any part of penitentiary</li> <li>• to undertake unsupervised interviews with detainees (except pre-trial detainees, unless the pre-trial detainee requested the visit of the given NGO and the court allowed it)</li> <li>• to have access to all documents (except secret documents)</li> <li>• to talk with prison staff, including guards, medical staff, psychologists, etc.</li> </ul>	Usually, the outcome is a report which contains recommendations to the prison staff and to the Penal Sanctions Enforcement Directorate, and sometimes to the court authorized to supervise the treatment of pre-trial detainees.
<b>Tajikistan</b>	N/A	N/A
<b>Ukraine</b>	NGOs are not allowed to monitor conditions of detention.	---

## 5. Applicable standards of the European Court of Human Rights

### 5.1. Introduction

In this chapter we summarise the decisions of the European Court of Human Rights (ECHR) in cases where detainees complained about the alleged infringement of their rights secured by the European Convention on Human Rights. As the participants at this conference represent either Eastern European countries or countries that used to constitute a part of the former Soviet Union, it was self-evident that we try to focus on cases in which these states were involved. The vast majority of the cases are at least partly concerned with issues related to the alleged violation of Article 3 of the Convention. In some cases the court also determined whether an infringement of Articles 6 or 13 could be established. Since in its rulings the Court assesses the alleged breaches separately in relation to every Article, the Articles themselves serve as a basis for systemisation in this paper.

### 5.2. Article 3

Article 3 of the Convention reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 3 enshrines one of the most fundamental values of democratic society which is reflected in the case law of the ECHR. In *Chahal v United Kingdom*<sup>105</sup> the Court acknowledged the immense difficulties that States face in modern times in protecting their communities from terrorist violence, but stressed that even in these circumstances, the Convention prohibits in **absolute** terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.<sup>106</sup> Thus theoretically once the Court determines that there has been a violation of Article 3, the fact that the victim has broken the law and may pose a risk to society and prison security should be irrelevant.<sup>107</sup>

#### 5.2.1. Torture, inhuman or degrading treatment

First of all it is important to note that the Court tends to divide this provision into two parts which are treated separately: (1) **torture** and (2) **inhuman or degrading treatment**. The relevance of this distinction is that the threshold applied differs considerably, depending on the nature of the alleged ill-treatment<sup>108</sup>. It appears from the ECHR case-law that the decisive question is whether an **intention** to treat the detainee improperly existed or not.<sup>109</sup> If it can be established that the respondent was well aware of the consequences of his conduct and his acts did not serve a lawful aim<sup>110</sup> then the court will consider it to be torture. In the case of alleged degrading or inhuman treatment, on the other hand, the presence of intention is not necessarily an issue. According to the Court's ruling in *Kalashnikov v Russia*<sup>111</sup> “the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.” It is sufficient if a certain type of treatment is **capable** of causing considerable mental suffering to a detainee.<sup>112</sup>

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<sup>105</sup> Application no. 22414/93.

<sup>106</sup> See also *Ireland v. the United Kingdom* (Application no. 5310/71) and *Tomasi v. France* (Application no. 12850/87).

<sup>107</sup> Steve Foster: *Prison Conditions and Human Rights: the development of judicial protection of prisoners' rights* first published in *Web Journal of Current Legal Issues*.

<sup>108</sup> See for instance *Dedovskiy and Others v Russia* (Application no. 7178/03) (torture) and *Khudoyorov v Russia* (Application no. 6847/02) (inhuman conditions).

<sup>109</sup> *Dedovskiy and Others v Russia* (Application no. 7178/03) para. 84 no. 7178/03.

<sup>110</sup> *Ibid.* para. 82.

<sup>111</sup> *Kalashnikov v Russia* (Application no. 47095/99) para. 95.

<sup>112</sup> *Ibid.* para. 101.

According to the ECHR's case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.<sup>113</sup>

### 5.2.2. Detention conditions

The **conditions** of detention or treatment of individuals in a place of detention may amount to inhuman or degrading treatment or both, depending upon the presence of the required suffering or humiliation. In recent years the Court has tended to consider Article 3 issues arising out of detention under degrading rather than inhuman treatment.<sup>114</sup>

Conditions of detention have been found to amount to inhuman or degrading treatment in a variety of contexts. These are mainly cases of detention on remand,<sup>115</sup> or following criminal conviction;<sup>116</sup> they also include cases of detention pending deportation,<sup>117</sup> for civil contempt,<sup>118</sup> and the detention of a mentally disabled person.

Prison conditions have been found to amount to inhuman or degrading treatment in large number of cases. Some examples:

- *Modarca v Moldova*:<sup>119</sup> the applicant was detained for almost nine months "in extremely overcrowded conditions with little access to daylight, limited availability of running water, especially during the night and in the presence of heavy smells from the toilet"
- *Cyprus v Turkey*<sup>120</sup>: the withholding of food, water and medical treatment from detainees was considered inhuman treatment.
- In *Peers v Greece*<sup>121</sup> the Court held that although there was no evidence of a positive intention to humiliate or debase the applicant, the fact that the state authorities had taken no steps to improve the objectively unacceptable conditions of the applicant's detention denoted a lack of respect for the applicant. Taking into account the fact that, for at least two months, the applicant had to spend a considerable part of each day practically confined to his bed in a cell with no ventilation and no window, and had to use the toilet in the presence of another inmate the Court was of the opinion that the conditions gave rise in him feelings of anguish and inferiority capable of humiliating and debasing him.
- In *Kalashnikov v Russia*<sup>122</sup>, where a prisoner complained that the conditions and duration of his detention (almost five years) were in breach of Article 3, the Court held that the duration of the applicant's detention, taken with the cramped and unsanitary conditions in which he had been held, amounted to degrading treatment. In particular, it noted that he had been forced to endure overcrowding and poor sleeping conditions, and as a result he had contracted skin diseases and fungal infections over the period of his detention.
- In *Dougoz v Greece*<sup>123</sup> the Court found that the detention of the applicant in an overcrowded cell with inadequate sanitation and insufficient beds where he was deprived of

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<sup>113</sup> *Peers v Greece* (Application no. 28524/95).

<sup>114</sup> Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, Oxford University Press 2009 p. 93.

<sup>115</sup> *Kalashnikov v Russia* (Application no. 47095/99).

<sup>116</sup> *Ilașcu and others v Moldova and Russia* (Application no. 48787/99).

<sup>117</sup> *Dougoz v. Greece* (Application no. 40907/98).

<sup>118</sup> *Price v the United Kingdom* (Application no. 33394/96).

<sup>119</sup> Application no. 14437/05.

<sup>120</sup> Applications no. 6780/74 and 6950/75.

<sup>121</sup> Application no. 28524/95.

<sup>122</sup> Application no. 47095/99.

<sup>123</sup> Application no. 40907/98.

fresh air, daylight, hot water and exercise, constituted degrading treatment and was thus a violation of Article 3.

- In *Poltoratskiy v Ukraine*<sup>124</sup> it was held that there had been a violation of Article 3 with regard to the conditions of detention suffered by a number of death row prisoners who had been locked up for 24 hours a day in a room with no natural light, with little or no provision for activities or human contact. The Court took into account the Ukraine's socio-economic problems, but held that a lack of resources could not in principle justify prison conditions that were so poor as to constitute inhuman or degrading treatment.

Since the question of **unsatisfactory cell sizes** arises in a number of cases, a summary of this particular type of cases can be useful. The ECHR refers to *Peers v Greece*<sup>125</sup> mentioned above. In that case the Court held that 3.5 m<sup>2</sup>/detainee is inadequate, thus where a person has less space than that, an infringement of Article 3 can be found. It is worth noting however that in this case, the inappropriate cell size was combined with other factors that added to the amount of unnecessary suffering. In the case of *Kalashnikov v Russia*,<sup>126</sup> on the other hand, the Court held that personal space measuring less than 2 m<sup>2</sup> raised in itself an issue under Article 3 of the Convention. The Court applies a more permissive approach in cases where the lack of personal space is compensated by the wide freedom of movement enjoyed by the plaintiff.<sup>127</sup>

### 5.2.3. Vulnerable groups

Certain categories of prisoners are particularly vulnerable: elderly prisoners with chronic illnesses, prisoners with mental or severe physical disabilities.

The lack of **appropriate medical care** may amount to treatment contrary to Article 3<sup>128</sup>. In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.

However the fact that imprisonment is not in the best interests of a prisoner's health is **not of itself sufficient** to require his or her release to avoid liability under Article 3, since imprisonment following, for example, conviction or on remand is obviously permissible.<sup>129</sup> In *Wedler v Poland*<sup>130</sup> the Court noted that 'it cannot be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment'. The Court also noted however 'that lack of medical treatment in prison may raise an issue under Article 3. In such cases, the factors to be considered are the **seriousness** of the applicant's **condition**, the **quality of medical care** he receives and **whether his state of health is compatible with detention**. Also, there remains the State's obligation to maintain a **continuous review** of the detention arrangements employed with a view to ensuring the health and well-being of all prisoners, having due regard to the ordinary and reasonable requirements of imprisonment.

#### 5.2.3.1. Mental illnesses

As the Court held in *Kudla v Poland*<sup>131</sup> Article 3 imposes upon states to 'protect the physical well being of persons deprived of their liberty'. In *Khudobin v Russia*<sup>132</sup> the Court notes that Article 3 imposes an

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<sup>124</sup> Application no. 38812/97.

<sup>125</sup> Application no. 28524/95.

<sup>126</sup> Ibid. para. 96-97.

<sup>127</sup> Op. cit. 6 para. 103.

<sup>128</sup> *Ilhan v Turkey* (Application no. 22277/93) para 87; *Naumenko v Ukraine* (Application no 42023/98) para 112; and *Farbtuhs v Latvia* (Application no. 4672/02) para 51.

<sup>129</sup> Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, Oxford University Press 2009 p. 98.

<sup>130</sup> Application no. 44115/98.

<sup>131</sup> Application no. 30210/96.

<sup>132</sup> Application no. 59696/00.

obligation on the State to **protect the physical well-being of persons deprived of their liberty**. The Court accepted that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance. In *Farbtuhs v Latvia*<sup>133</sup> the Court noted that if the authorities decided to place and maintain a **seriously ill person** in detention, they should demonstrate **special care** in guaranteeing such conditions of detention that correspond to his special needs resulting from his disability.

In *Dybeku v Albania*<sup>134</sup> the applicant had been suffering from **chronic paranoid schizophrenia**, for which he was treated in various psychiatric hospitals when he was sentenced to life imprisonment. He was placed in a normal prison, where he shared cells with inmates who were in good health and where he was treated as an ordinary prisoner. His father and lawyer complained to the authorities that the prison hospital administration had failed to prescribe adequate medical treatment and that Mr Dybeku's health had deteriorated as a result. Their complaints were dismissed. The Court found a violation of Article 3, holding in particular that the nature of Mr Dybeku's **psychological condition made him more vulnerable** than the average detainee and that his detention might have exacerbated his feelings of distress, anguish and fear. The fact that the Albanian Government admitted that he had been treated like the other inmates, notwithstanding his particular state of health, showed a failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses. In *Dybeku v Albania* the Court held that although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State **to protect the physical well-being of persons deprived of their liberty**, for example by providing them with the requisite medical assistance<sup>135</sup>.

#### 5.2.3.2. *Age*

In *Papon v France*<sup>136</sup> Maurice Papon, who was serving a prison sentence for aiding and abetting crimes against humanity, was **90 years old** when he lodged his complaint. He maintained that keeping a man of his age in prison was contrary to Article 3 and that the conditions of detention in the prison where he was kept were not compatible with extreme old age and with his state of health. In this case the Court held that in view of Mr Papon's general state of health and his conditions of detention, his treatment **had not reached the level of severity** required to bring it within the scope of Article 3. While he had heart problems, his overall condition had been described as "good" by an expert report. The Court did not exclude the possibility that **in certain conditions the detention of an elderly person over a lengthy period might raise an issue under Article 3**, but pointed out that regard was to be had to the particular circumstances of each specific case. It also noted that none of the Convention states had an upper age limit for detention.

#### 5.2.3.3. *Health*

According to the case law of ECHR there are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention:

- (a) the medical condition of the prisoner;
- (b) the adequacy of the medical assistance and care provided in detention, and
- (c) the advisability of maintaining the detention measure in view of the state of health of an applicant<sup>137</sup>.

In *Mouisel v France*<sup>138</sup> the applicant was serving a fifteen year prison sentence for armed robbery and was in an advanced stage of **chronic lymphatic leukaemia**. He underwent chemotherapy sessions at hospital

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<sup>133</sup> Application no. 4672/02.

<sup>134</sup> Application no. 41153/06.

<sup>135</sup> *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, Opinion of the Commission, pp. 15-16, para 79.

<sup>136</sup> Application no. 54210/00.

<sup>137</sup> see *Mouisel v France*, and *Melnik v. Ukraine* (Application no. 72286/01) para 94.

<sup>138</sup> Application no. 67263/01.

in the daytime and was put in chains during the journeys to and from the hospital. A medical examiner recommended in June 2000 that Mr. Mouisel be transferred to a specialist unit capable of dealing with his illness. The Court found the applicant's health to be **'increasingly incompatible with detention'**. The prison was not equipped to deal with his illness, and had failed to transfer him to a hospital or to a more suitable institution. The national authorities did not take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention. His continued detention, especially from June 2000 onwards, undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer. The Court held that the **failure to release him from prison amounted to a violation of Article 3**.

#### *5.2.3.4. Physical disabilities*

In the following cases the Court held that prison and police authorities owe an enhanced duty towards detainees with **physical disabilities**.

In *Engel v Hungary*<sup>139</sup>, the applicant was sentenced to life in prison for having shot and killed a police officer and wounded another one after they caught him committing an armed robbery. As a result of the shootout, he is **paralysed** from the waist down, is confined to a **wheelchair** and suffers from incontinence. In detention, Mr Engel could only wash or relieve himself if his cell-mates helped him. He spent very little time in the open air as the courtyard was uneven and unsuitable for his wheelchair. As he was classified as a high security level prisoner, he was transported with his hands handcuffed to his belt, and he was also denied the use of a seatbelt while within a moving vehicle. Mr. Engel was regularly transported by means of being dragged across the floor by his belt. The Court held that Mr Engel had been treated in a degrading manner and found Hungary to be in violation of Article 3 of the Convention.

In *Price v United Kingdom*<sup>140</sup> Adele Price, a **four-limb deficient thalidomide** victim who also suffers from kidney problems, was committed to prison for contempt of court in the course of civil proceedings. She was kept one night in a police cell, where she had to sleep in her wheelchair, as the bed was not specially adapted for a disabled person, and where she complained of the cold. She subsequently spent two days in a normal prison, where she was dependent on the assistance of male prison guards in order to use the toilet. The Court found that to detain a **severely disabled** person in conditions where she was dangerously cold, risked 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, constituted degrading treatment contrary to Article 3.

In these cases the intention to humiliate or debase for treatment to be degrading is not essential. The 'absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.'<sup>141</sup>

#### *5.2.3.5. Drug addicts*

The case *McGlinchey v United Kingdom*<sup>142</sup> involved the death of a prisoner who died from **heroin withdrawal symptoms**. The prisoner, who had a long history of heroin addiction, was sentenced to four months in prison following a conviction for theft. She soon began to suffer heroin withdrawal symptoms – she had frequent vomiting fits and suffered weight loss and dehydration. The prisoner did receive medical attention, but it was administered irregularly. Her condition continued to worsen, and she died in intensive care. The Court noted the failure of the prison to admit the prisoner into hospital or to seek more expert assistance in controlling her vomiting, and found that the prison authorities had failed to comply with their duty to provide her with the requisite medical care resulting in a breach of Article 3.

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<sup>139</sup> Application no. 46857/06

<sup>140</sup> Application no. 33394/96.

<sup>141</sup> Application no. 24888/94.

<sup>142</sup> Application no 50390/99.

#### 5.2.4. Effective investigation

The procedural obligation in Article 3 requires an effective official investigation that will be thorough and ‘capable of leading to the identification and punishment of those responsible’.<sup>143</sup> Such an investigation must be launched **ex officio**, in the absence of a complaint, if there are sufficiently clear indications that torture or other ill-treatment occurred.<sup>144</sup> Effective procedure implicitly includes the right of prisoners to make complaints concerning the infringement of Convention rights and the failure of the State to undertake vigorous investigation of potential violations. The principle was stated clearly in *Labita v Italy*.<sup>145</sup> The Court stated that “where an individual makes a **credible assertion** that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an **effective official investigation**. As with an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible”. The Court added that without effective official investigation the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be **ineffective** in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. In this case the Court noted that despite insufficient evidence that the treatment of *Labita* was in contravention of Article 3, the lack of a thorough and effective investigation into the credible allegation of the applicant was in itself a violation of Article 3.

### 5.3. Modified standards in prison cases

Besides the distinction between torture- and inhuman treatment cases we must also see that there is a difference between principles that apply in prison- and other, ‘ordinary’ cases. Although human rights are universal the Court stresses that detention inevitably affects a person’s everyday life in a way that would be probably held inhuman had the person not been detained.

The Court considers imprisonment to be at least *prima facie* acceptable because it is common among all member states, and it grants the Member States some margin in deciding to what extent acceptable measures of treatment and punishment are applied to a particular person. It is rather obvious that one’s right to his or her family life will be severely restricted while he is in prison. Similarly, suffering, to some extent, is an inherent element of being held in detention. Consequently, the Court constantly reiterates that the **general principles** are somewhat **modified** in prison cases. In the judges’ words: “[Article 3] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour. However, to fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances [...].The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”<sup>146</sup>

#### 5.3.1. Cumulative effects of one’s detention

When deciding whether the circumstances in which the claimant was detained amounted to the violation of Article 3, the Court usually assesses the **cumulative effects** of the conditions in which the plaintiff was detained.<sup>147</sup> The accumulation must take account of (1) the number of factors that the applicant complains about (e.g. cell size, unsatisfactory food etc.),<sup>148</sup> (2) the extremity of the conditions (e.g. severely or

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<sup>143</sup> *Assenov and others v Bulgaria* 90/1997/874/1086.

<sup>144</sup> 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia (Application no. 71156/01).

<sup>145</sup> Application no. 26772/95.

<sup>146</sup> *Khudoyorov v Russia* (Application no. 6847/02) para. 102-103 no. 6847/02.

<sup>147</sup> *Orchowski v Poland* (Application no. 17885/04) para. 121 no.17885/04.

<sup>148</sup> *Ostrovar v Moldova* (Application no. 35207/03) para. 89 no. 35207/03.

modestly overcrowded cells)<sup>149</sup> and (3) the length of the period during which a person is detained in the particular conditions.<sup>150</sup> Nonetheless the absence of one (or even two) of these factors does not necessarily stop the ECHR from holding that a certain treatment gives rise to inhuman and degrading treatment.

### 5.3.2. Standard of proof

After discussing what a claimant should prove, we should turn our attention to the questions relating to the standard of proof, i.e. how a claimant should convince the Court. Providing evidence to the Court can impose great difficulties for an applicant who is held in detention. Having **limited access** to the outside world, being heavily dependent of prison authorities (who are usually the respondents in prison cases) can cause severe hardships for claimants. Although not expressly, the Court seems to take the above mentioned difficulties into consideration, thus allow certain claims that would otherwise (i.e. had the person not been detained) be held manifestly ill-founded. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt”.<sup>151</sup> According to the judges in *Dedovskiy and Others v Russia*<sup>152</sup> “such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact”. In other words, if the claimant can provide statements made by fellow detainees which support his allegations, the Court is likely to accept that as adequate evidence. “Were it otherwise, the authorities would be able to avoid responsibility for ill-treatment by not recording the use of physical force or special means.”<sup>153</sup> The same approach applies in cases where the plaintiff complains about insufficient medical treatment.<sup>154</sup> This is perhaps more surprising and contradictory, since the Court is ready to accept the opinion of laymen despite its heavy reliance on expert evidence in ordinary cases. On the other hand the ECHR’s flexibility has its own limits. If the applicant is unable to provide at least a declaration from his or her inmates to underpin his allegations then the Court will find the claim manifestly ill-founded.<sup>155</sup>

### 5.3.3 Plausible explanation

The issue of using force and/or assault during detention will arise where a Police or Prison Officer uses force in respect of a person in detention. In such cases, the ECHR will consider whether the use of force was in pursuance of a lawful objective and if the force used was proportionate. If it is then no breach of Article 3 will have occurred. Where a person is taken into police (or prison) custody in good health and subsequently sustains or is released with injuries, the State must provide a **plausible explanation** for the cause of those injuries. In the case of *Velikova v. Bulgaria*<sup>156</sup> in which an individual was taken into police custody in good health but was later found dead, it was incumbent on the state to provide a plausible explanation of the events leading to his death. In case of *Tomasi v France*<sup>157</sup> the ECtHR found that the medical evidence of a large number of blows and the absence of an alternative explanation by the Government was sufficient to establish a violation of Article 3 by agents of the State.

## 5.4. Role of the CPT’s observations in the ECHR jurisprudence

The establishment of international bodies responsible for preventing ill treatment in detention has had a great impact on the judicial challenge to unlawful prison conditions. Instruments such as the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and the European Convention for the Prevention of Torture and Inhuman or Degrading

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<sup>149</sup> Op. cit. 10 para. 122.

<sup>150</sup> Op. cit. 4 para. 96.

<sup>151</sup> See for instance *Dedovskiy and Others v Russia* (Application no. 7178/03) para. 74.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid. para. 77.

<sup>154</sup> *Khudobin v Russia* (Application no. 59696/00).

<sup>155</sup> *Mechenkov v Russia* (Application no. 35421/05).

<sup>156</sup> Application no. 41488/98.

<sup>157</sup> Application no. 12850/87.

Treatment or Punishment 1987 (ECPT) established Committees to monitor the prohibition of torture in member states. The ECPT established an independent Committee for the Prevention of Torture (hereafter CPT) which has the power to make visits to places of detention in each Member State and to submit reports of those visits, reporting on any violation of Article 3 and/or the principles contained in the Torture Convention. Although such reports are not strictly enforceable in the Member State, they can inform domestic practice.

Where reports of the CPT are available the ECHR tends to rely on these documents and accept their observations as reliable evidence. Here again, the Court applies a rather flexible approach. First of all, even if the CPT reports are not invoked by any of the parties, the ECHR can still take them into consideration as it has done in a number of cases.<sup>158</sup> In addition the judges can also widen the scope of the reports by applying their findings to facilities which they did not intend to evaluate. According to the Court in *Nevmerzhitsky v Ukraine*: “since the applicant’s submissions correspond *in general* to the inspections of the pre-trial detention centres in Ukraine conducted by the CPT [...] the Court concludes that the applicant was detained in unacceptable conditions.” [emphasis added].<sup>159</sup>

When assessing the conditions, the Court takes into account their cumulative effect as well as particular allegations made by the applicant. It also looks to the length of time during which the conditions prevailed.<sup>160</sup> These considerations were relevant in *Kalashnikov v Russia*<sup>161</sup> in which both the applicant’s prison conditions and the cramped conditions in which he was transported from prison to the court were held to infringe Article 3. The applicant had been detained on remand for nearly five years in a detention facility that was recognized by the Russian government as falling short of European standards. Because of the overcrowding the applicant shared a bed with two other prisoners on an eight hour a day basis and the hygienic conditions did not meet European standards. The Court found that these conditions combined with the length of the period of detention amounted to degrading treatment.

## 5.5. Article 13

Article 13 reads as follows: „Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 13 requires the provision of effective national remedies for the breach of a Convention right. It appears from the Strasbourg case-law that claims relating to Article 6 and 13 usually arise as ancillary issues in prison cases (if they arise at all). In the majority of the cases the applicants seek remedy for their original complaints, which are mainly concerned with torture or inhuman and degrading treatment.

According to the case law of the ECHR everyone who suffers a violation of their rights and freedoms as enshrined in the Convention is entitled to an effective remedy. While such remedies apply only to those requests and complaints by prisoners which arguably involve an infringement of a Convention right, the ECHR has developed clear requirements for prison cases. In *Silver and others v United Kingdom*<sup>162</sup> the Court held the following:

- (a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a **remedy before a national authority** in order both to have his **claim decided** and, if appropriate, to **obtain redress**;

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<sup>158</sup> See for instance *Dankevich v Ukraine* (Application no. 40679/98) para. 127.

<sup>159</sup> (Application no. 54825/00) para. 86 Application no. 54825/00.

<sup>160</sup> see also: Harris, O’Boyle & Warbrick: *Law of the European Convention on Human Rights*, Oxford University Press 2009 p. 93.

<sup>161</sup> Application no. 47095/99.

<sup>162</sup> Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75.

- (b) the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its **powers and the guarantees** which it affords are **relevant** in determining whether the remedy before it is **effective**;
- (c) although no single remedy provided by the UK law could in itself entirely satisfy the requirements of Article 13, the ECHR pointed out that the **aggregate of remedies** provided for under domestic law may do so;
- (d) neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law.

The application of the above test led the ECHR to hold that the Board of Visitors and the Parliamentary Commissioner for Administration<sup>163</sup> did not meet these requirements as they could not make final rulings.<sup>164</sup> Such authorities must be able to produce a binding decision, so an ombudsman lacking this power will not usually suffice.<sup>165</sup>

The Court also dealt with this issue of availability at the national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order in numerous cases:

- In *Rodic and 3 others v Bosnia and Herzegovina*<sup>166</sup> the Court stated that a **petition to a prison inspector attached to the Ministry of Justice** of the Federation of Bosnia and Herzegovina does not constitute an effective remedy for the alleged breaches.
- In *Benediktov v Russia*<sup>167</sup> the Court held that the applicant suffered humiliation and distress because of the degrading conditions of his detention and the **absence of an effective remedy** in respect of his complaints about those conditions. The Court noted that the potential redress provided by a prosecutor, a court or other State agencies is insufficient taking into account that the problems arising from the conditions of the applicant's detention were apparently of a **structural nature** and **did not only concern the applicant's personal situation**. The Government has failed to submit evidence as to the existence of any domestic remedy by which the applicant could have complained about the **general conditions** of his detention, in particular with regard to the structural problem of **overcrowding** in Russian detention facilities.
- Similarly in *Koval v. Ukraine*<sup>168</sup> the Court noted that the problems arising from the **conditions** of the applicant's detention and his alleged lack of **proper medical treatment** were of a **structural** nature and did not only concern his personal situation. The Government did not demonstrate what kind of reasonable redress the domestic courts or other State authorities could have afforded the applicant, given the accepted and undisputed **economic difficulties** faced by the prison authorities.
- In *Hummatov v. Azerbaijan*<sup>169</sup> the Court points out that a **post factum civil action** for damages could not be considered as an effective remedy because it could not restore a detainee's health and lead to the improvement of his deteriorated health condition.

## 5.6. Article 6 (1)

Article 6(1) of the Convention reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order

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<sup>163</sup> Forerunner of the specialized prison ombudsman.

<sup>164</sup> *Silver and others v the United Kingdom*.

<sup>165</sup> *Klass and others v Germany* (Application no. 5029/71).

<sup>166</sup> Application no. 22893/05.

<sup>167</sup> Application no. 106/02.

<sup>168</sup> Application no. 65550/01.

<sup>169</sup> Application no. 9852/03, 13413/04.

or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Although the relevant case law is based on instances in which proceedings were conducted against inmates, some of the conclusions are useful when considering standards for mechanisms dealing with the inmates’ complaints.

### 5.6.1. Independent mechanism

The Court has not imposed standards concerning disciplinary tribunals as stringent as those which might be applied to ordinary ‘classic’ courts of law. This is particularly true of matters such as the duration of the term of office of tribunal members and their protection from outside measures.<sup>170</sup> Independence means being ‘independent of the executive and also of the parties’.<sup>171</sup> As the Court pointed out in case *Bentham v. Netherlands*<sup>172</sup> a government minister is not independent of the executive therefore a decision taken by him does not comply with Article 6(1).

In the case of *Campbell and Fell v UK*<sup>173</sup> the Court – in the special context of Boards of Visitors in the former UK system of prison disciplinary proceedings – defined when a body can be considered to be ‘independent’.

The case originated in two applications lodged by Mr. John Joseph Campbell and Father Patrick Fell. (The Commission ordered the joinder of the applications.) Mr. Campbell was convicted of various offences, including conspiracy to rob and possession of a firearm with intent to commit robbery, and sentenced to ten years’ imprisonment. Father Patrick Fell, after being convicted of conspiracy to commit arson, conspiracy to commit malicious damage, and taking part in the control and management of an organisation using violent means to obtain a political end, was sentenced to twelve years’ imprisonment. The offences of which they were convicted were believed by the authorities to form part of, or to be connected with Irish Republican Army terrorist activities, however both applicants have consistently denied that they were members of the organisation.

Mr. Campbell, Father Fell and four other prisoners engaged in a protest at the treatment of another prisoner by sitting down in a corridor of the prison and refusing to move. They were removed by prison officers after a struggle and in the process injuries were sustained by certain members of staff and by both applicants. The six prisoners involved in the above-mentioned incident were all charged and found guilty by the Prison Board of Visitors. The proceedings in both cases lasted less than fifteen minutes and according to the ECHR the mechanism failed to comply with the requirements of Article 6.

Although this case concerns a procedure initiated against and not by inmates, the Court’s considerations concerning the requirements of such a mechanism are also applicable and relevant in cases where complaints are filed by inmates.

In the *Campbell* case the ECHR pointed out that in determining whether the Court has to have regard to the **manner of appointment** of its members and the **duration of their term** of office, to the **existence of guarantees against outside pressures** and the question as to whether the body presents an **appearance of independence**. Therefore, the Court’s task was to assess whether Boards of Visitors can be considered independent on the basis of these criteria.

A Board of Visitors was a body that was appointed by the Home Secretary for each prison in England and Wales; its members, at least two of whom were justices of the peace, had to hold office for three years or such less period and there was an option of being re-appointed. The members were unpaid but were

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<sup>170</sup> Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights, Oxford University Press 2009 p. 286.

<sup>171</sup> *Ringeisen v Austria* (Application no. 2614/65) para 95.

<sup>172</sup> Application no. 8848/80.

<sup>173</sup> *Campbell and Fell v the United Kingdom* (Application no. 7819/77).

reimbursed their expenses. Most candidates were persons suggested by existing members. A Board was normally appointed for a three-year term; there was no express statutory provision enabling the Home Secretary to dismiss a member and resignation before expiry of a term of office occurred only in the most exceptional circumstances. A Board's duties included, in addition to inquiring into charges of disciplinary offences, inquiring into the administration of the prison and the treatment of inmates, hearing a prisoner's complaints or requests, directing the governor's attention to matters calling for his attention and making reports to the Home Secretary. In cases of urgent necessity, it had the power to suspend any prison officer until the decision of the Home Secretary became known. Its members were required to visit the prison frequently, had a right of access to every part of the prison and to prison records and to interview any prisoner out of the sight and hearing of officers. A Board's adjudicatory functions generally accounted for a small proportion of its overall duties and, of the small percentage of prison disciplinary proceedings which were conducted before Boards.<sup>174</sup>

*- manner of appointment*

The Court pointed out that the fact that the members of the Boards were **appointed** by the Home Secretary did not establish that the members were not independent of the executive (to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not "independent"). The Court also added; 'although it is true that the Home Office may issue Boards with guidelines as to the performance of their functions', they are not subject to its instructions in their adjudicatory role.

*- duration of term of office*

As the Court noted the **term of office** (three years) was admittedly relatively short but the Court also pointed out that there is a very understandable reason: the members are unpaid and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer.

*- existence of guarantees against outside pressures*

The Court noted that 'the **irremovability** of judges by the executive during their term of office must in general be considered as a corollary of their independence [...] however, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present'.

*- appearance of independence.*

The Court assessed the Board's independence having regard to the fact that it had both **adjudicatory and supervisory roles**. The Court noted: "a Board is intended to exercise an independent oversight of the administration of the prison. In the nature of things, supervision must involve a Board in frequent contact with the prison officials and just as much with the inmates themselves; yet this in no way alters the fact that its function, even when discharging its administrative duties, is to "hold the ring" between the parties concerned, independently of both of them. The impression which prisoners may have that Boards are closely associated with the executive and the prison administration is a factor of greater weight, particularly bearing in mind the importance in the context of Article 6 of the maxim "justice must not only be done: it must also be seen to be done". However, the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting, is not sufficient to establish a lack of "independence". This requirement of Article 6 would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was

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<sup>174</sup> The various functions of Boards of Visitors were examined by an independent committee set up by "Justice", the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders. In its report of 1975 ("the Jellicoe report"), this committee noted that "Boards take their duties of adjudication very seriously", but that "in spite of the efforts made to do justice it is doubtful whether it is seen to be done". It concluded that to be involved in the adjudication of serious offences was incompatible with the supervisory body's need to establish conspicuous independence and therefore recommended that "the body responsible for supervision should not have a disciplinary function". Nevertheless, "after careful consideration", the Home Secretary decided in 1976 that "the independence of Boards of Visitors was compatible with their other functions". The status of Boards was also considered by the Court of Appeal, Lord Justice Waller stated that "Boards of visitors hold the balance between the governor and the internal discipline of the prison and the prisoner himself and, when sitting [in an adjudicatory capacity], can be regarded as 'an impartial and independent authority'.

dependent on the latter; however, the Court does not consider that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression.”

The Court found the Board of Visitors objectively independent.

### **5.6.2. A tribunal established by law**

Article 6(1) requires that the tribunal is established by law. The intention is, that with a view to ensuring its independence, ‘the judicial organisation in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament’<sup>175</sup>. Established by law also means ‘established in accordance with law’,<sup>176</sup> so that the requirements is infringed if a tribunal does not function in accordance with the particular rules that govern it.<sup>177</sup>

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<sup>175</sup> *Zand v Austria* (Application no. 7360/76).

<sup>176</sup> Harris, O’Boyle & Warbrick: *Law of the European Convention on Human Rights*, Oxford University Press 2009 p. 298.

<sup>177</sup> *Zand v Austria* (Application no. 7360/76).