Is there an acceptance of a gradual implementation of freedom from torture, inhuman or degrading treatment under the European Convention on Human Rights?

Case Study on the implementation of Article 3 of the European Convention on Human Rights in places of detention in the Republic of Moldova

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Abbreviations

CAT
Committee Against Torture

CPT
European Committee for the Prevention of Torture

DIP
Department of Penitentiary Institutions

EAs
Economic Agents

ECHR

ECPT
European Convention for the Prevention of Torture

GRECO
Council of Europe Group of States Against Corruption

ICCPR
International Covenant on Civil and Political Rights

ICECSR
International Covenant on Economic, Social and Cultural Rights

IMF
International Monetary Fund

LPAA
Local Public Administration Authorities

MEd
Ministry of education

MF
Ministry of Finance

MJ
Ministry of Justice

MH
Ministry of Health

MI
Ministry of Industry

MLSP
Ministry of Labour and Social Protection

NGO
Non-governmental Organisation

OSCE
Organization for Security and Co-operation in Europe

UDHR
Universal Declaration on Human Rights

UN
United Nations

UNDP
United Nations Development Programme
1 Introduction

1.1 Background

Created by the Council of Europe, the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms\(^1\) (hereinafter referred to as the European Convention or the Convention) is the oldest legally binding international system for protection of human rights. For over 50 years the organs that were created to supervise the Convention, the Committee of Ministers, the European Commission and, above all, the European Court of Human Rights\(^2\) (hereinafter referred to as “the European Court” or “the Court”) have interpreted the generally concise articles in the Convention and effectively contributed to the development of international human rights law. Member states are now in many cases, especially regarding the prohibition of torture, inhuman or degrading treatment or punishment in Article 3, obliged to take effective action to abide by their obligations under the Convention.

Parallel to the development of human rights law Europe has undergone a considerable development. After the collapse of the Soviet Union and the disintegration of the former Republic of Yugoslavia the map of Europe has been re-drawn and a large number of “new” states have emerged. Despite the eagerness of the new countries to show that they are democratic states that place importance on respect for human rights, many are still developing countries.


\(^2\) With the adoption of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, European Treaty Series No. 155, Strasbourg (5 November) 1994, the Commission was abolished and the original Court was replaced with a single court, the European Court of today. The Committee of Ministers still plays an important role monitoring the execution of the Court’s judgments.
struggling with political, legal and economical reforms. The Council of Europe has grown from 6 to 47 states and all of them have ratified the European Convention.

The continuous human rights law development through the Court’s jurisprudence, which is placing more and more obligations on the convention states to assure the rights in the Convention together with the increased number of member states and their different levels of economic development and cultural backgrounds raises the issue of the possibility of an immediate implementation of the Convention in these states. Like most of the civil and political rights treaties no allowance is made for a gradual implementation in the Convention. Once a state has ratified the Convention, the state has an obligation to “secure to everyone within their jurisdiction the rights and freedoms” of the Convention. To immediately live up to this obligation is a difficult if not impossible task especially for the new developing countries of Europe because it often requires political and legal reforms and not least financial funding.

In autumn 2005 I got the opportunity to do a field study in one of the “new” developing states, the Republic of Moldova. Moldova is not only considered to be the poorest country in Europe, it also struggles with enormous internal, political, legal and economical issues that originate from the break-away from the Soviet Union. The aim of my 3-month visit was to study the implementation of the Convention by visiting places of detention. I thereby specifically focused on the implementation of the right not to be subjected to torture, inhuman or degrading treatment or punishment. I discovered that the penitentiary institutions in general consisted of old buildings unsuitable as penitentiaries because there was a lack of basic facilities such as

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3 According to the latest List of ODA Recipients of Development Co-operation Directorate of the OECD 12 of the current state parties to the convention are considered to be developing countries. The list is available at http://www.oecd.org/dataoecd/43/51/35832713.pdf.

4 Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia”, Turkey, Ukraine and United Kingdom.

5 Article 1 of the Convention.

6 See Chapter 4.2 below.
ventilation, heating, water, medical assistance, accurate cell space etc. Needless to say the gap between the treaty norms and the state behaviour of Moldova was very wide and everywhere I went I was told that the conditions were not so much a result of lack of appropriate legislation or ignorance (though in my opinion there is a need for some changes in those areas too) but rather a result of the economical and political crisis of the country.

In the light of what has been mentioned above concerning the development of the Convention and the development in Europe there is a need to question whether a too wide a gap has been created between treaty norms and actual state behaviour around Europe. And if this is the case, can it also be argued that the gap has lead to an acceptance of a gradual implementation of civil and political rights and especially concerning Article 3 of the ECHR in developing countries like Moldova and thus the creation of a less effective system for protection of human rights with rights turning into merely ideals and goals?

1.2 Purpose and delimitations

The purpose of this thesis is first and foremost to analyse whether or not there is any circumstance where an acceptance of a gradual implementation of the prohibition of torture inhuman or degrading treatment in Article 3 of the European Convention on Human Rights with regard to developing countries like Moldova exists.

The focus of the thesis is on the implementation of the prohibition of torture, inhuman and degrading treatment or punishment. Special attention has been placed on the classifications of conditions of detention as violation of Article 3. The most important reason for this limitation has its basis in the circumstances of my case study in Moldova. During my visit in Moldova, I did an internship at the Moldovan Helsinki Committee for human rights. The project that I was involved in “Promotion of Rule of Law in the Penitentiary System of Moldova via monitoring of implementation of European Standards” was particularly focused on the problem of the deploring conditions in the country’s penitentiaries.

Regrettably, the case study does not cover Moldova’s entire territory. The self-proclaimed area of Transdniestria which claims its independence is not included, since Moldova does not have
effective control over the territory.\textsuperscript{7} Thus no visits to the places of detention were allowed in this area by the separatist authorities.

1.3 Method and material

This thesis is the result of a combination of my own empirical experiences from my field study that was conducted in Moldova from October to November 2005. The most important source for the understanding of the human rights situation in the places of detention in Moldova was my own on site visits to the penitentiaries. These experiences are complemented by information that I collected while I was in the country, such as reports from NGOs, statements made by governmental officials, national legislation etc.

In addition to my findings in Moldova, this thesis is based on various written sources such as international treaties and resolutions or recommendations as well as books, articles, reports etc on human rights and the European Convention. References to the case law of the European Court are made throughout the thesis.

\textsuperscript{7} The responsibility of the human rights violations in this area is shared by Moldova and Russia, See Ilaşcu and Others v. Moldova and Russia, (App. 48787/99), Judgment of 8 July 2004.
2 The European Convention system

2.1 The Council of Europe and its expansion after the Cold War

At the end of the Second World War, millions of refugees were homeless, the European economy had collapsed and fundamental human rights and freedoms were threatened. Europe was divided in East and West and the spread of the Soviet-style Communism in the East was by many seen as a threat to the liberal ideas in the West. As response, movements arose throughout the European democracies. One of the most important ones became the European Movement.

In 1949 the European Movement established the Council of Europe. The international situation is clearly reflected in the Statute of the new organisation. According to Article 1 of the Statute the aim of the organisation is “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.” Further, the aim of the Council should be pursued “in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.”

The statute was signed on 5 May 1949 by 10 countries: Belgium, France, Luxembourg, the Netherlands and the United Kingdom, Ireland, Italy, Denmark, Norway and Sweden. Over the years the number of members increased to include all Western European states. In the East the countries that had fallen under the Soviet system, which profoundly differed from the West in terms of democracy, human rights and the organisation of the judicial system, had established their own regional organisation, the Warsaw Pact. In the late 1980s it was therefore believed that the Council, with 23 member states, could not grow any more. This was proven wrong

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9 Article 1(b) of the Statute of the Council of Europe.

though. With the disintegration of Yugoslavia and the collapse of the Soviet Union, the “new” states that were created in Eastern and Central Europe were eager to develop their democratic credentials and to join the Council of Europe. However as one author stated:

“Four decades of Communist rule (and more than seven for most states of the former Soviet Union) had not exactly prepared these countries to qualify for admission to the Council of Europe with its strong requirements in the realm of human rights, political pluralism and rule of law. In all cases, democratic states, institutions and behaviours had to be rebuilt from scratch.”

Many of the new states could not convincingly show that human rights were effectively protected, leaving the Council of Europe with two choices. It could either refuse the Central and Eastern European states membership until each country had attained the necessary standards to qualify for admission or it could so to speak let them in and then provide assistance to the states in their transition to democracy. The Council chose the latter alternative. The Council now sees one of its major goals as the spreading of democratic values and practices to Central and Eastern Europe.

11 The Parliamentary Assembly of the Council of Europe was welcoming and granted Special Guest Status to several of the governments in central and Eastern Europe as early as 1989. See the Resolution 917 (1989) on a special guest status with the Parliamentary Assembly. Available at http://assembly.coe.int/Documents/AdoptedText/ta89/eres917.htm (Accessed April 20, 2007)


2.2 The European Convention

One of the most important fields of co-operation for the Council of Europe was and still is the protection of human rights. As a response to the horrific atrocities that were committed by the Nazis during the Second World War and to secure the liberal ideas in the West in order to protect states from communist subversion, the founding states of the Council soon after its creation started to work on the drafting of a regional catalogue of human rights and freedoms.\textsuperscript{15} On the 4th of November 1950 the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms was opened for signature and on 3 September 1953 the Convention entered into force.

The Universal Declaration on Human Rights, adopted by the United Nations General Assembly in 1948\textsuperscript{16}, had served as the basis for the drafters. But while the UDHR in itself is not a legally binding document, the founders of the Convention had already from the beginning the intention of creating an international legally binding document for the protection of civil and political rights and freedoms in Europe.\textsuperscript{17} The Convention was however not designed to create new substantive rights, but rather to create an effective international control mechanism for the implementation of the basic rights and freedoms that, according to the drafters, were already defined and accepted by the member states of the Council.\textsuperscript{18} Today, more than 50 years later it can be concluded that the Convention has proved to be much more than what the drafters ever could have imagined.\textsuperscript{19}

The ratification of the Convention is now required by all new states of the Council of Europe and with the adoption of Protocol 11, the right to individual application to the Court of Human Rights.


\textsuperscript{16} GA Resolution 217(A)III, 1948.


\textsuperscript{19} For the role of the Court in the protection of human rights, see Chapter 2.3.
Rights (Article 34 of the Convention) is automatically recognised. All 47 member states have thus ratified the Convention with the result that over 800 million people are protected by the European Convention system. The creation of the European Convention is often seen as the greatest achievement of the Council of Europe.

2.2.1 The rights guaranteed by the Convention

The rights that are guaranteed by the Convention include: the right to life (Article 2), freedom from torture and other inhuman, or degrading treatment or punishment (Article 3), freedom from slavery and forced or compulsory labour (Article 4), right to liberty and security of person (Article 5), right to a fair trial (Article 6), prohibition on retroactive penal legislation (Article 7), right to private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to marry and found a family (Article 12), right to an effective remedy for a violation of the rights (Article 13), and freedom from discrimination in respect of the specific rights and freedoms (Article 14). In addition several protocols have been adopted broadening the scope of the Convention.

2.2.1.1 Comparison between civil and political rights and economic, social and cultural rights

In the European system for protection of human rights, civil and political rights are protected under the European Convention while economic, social and cultural rights are protected by the European Social Charter. There might be many reasons for this but only the most important ones will be mentioned here.

Civil and political rights are characterised by their aim to protect the individual from interference from the state (or other individuals). They are therefore often referred to as negative rights.

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23 A few economic, social and cultural rights are however protected under the Convention. These include the right to private property and the right to education (Article 1 and 2 of Protocol I).
Economic, social and cultural rights on the other hand are for their realisation in general dependent on the state to act and they are thus referred to as positive rights. While civil and political rights are usually considered to be immediate, precise, and non-political, economic, social and cultural rights are usually considered to be progressive, vague, and political. Accordingly, the European Social Charter does not impose any immediate, legally binding obligations on the state parties to secure the rights of the Charter. The Convention on the other hand requires an immediate protection of the rights and freedoms included. 

2.3 The European Court

The original European Court for Human rights was established in 1959 “[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols”. It only worked part-time and was complemented by the Commission and the Committee of Ministers. By the adoption of protocol 11 the Commission and the “old Court” was substituted with a full-time single Court. The Committee of Ministers still play an important role, especially concerning the supervision of the execution of the Court’s judgments.

The Court consists of a number of judges equal to that of the Contracting States. When considering cases brought before it, the Court may sit in Committees of three judges, in Chambers of seven judges or in a Grand Chamber of seventeen judges. Cases may only be tried by the Grand Chamber if a serious question affecting the interpretation of the Convention or the Protocols is raised or when a resolution of a question might lead to a result inconsistent with a judgment previously delivered by the Court.


25 On the immediate implementation under the Convention, see Chapter 2.4.

26 Article 19 of the Convention.

27 The Committee of ministers still has an important role in this regard, especially concerning the supervision of the execution of the Court’s judgments.

28 Article 20 of the Convention.

29 Article 27 of the Convention.

30 Article 30 of the Convention
The Court’s competence is defined in Article 33 which allows states to refer cases of alleged violations by other member states. More importantly, it assures the right of individuals, NGOs, or group of individuals claiming to have had their rights violated to address the Court. A condition for the Court to try a case of alleged violation is that domestic remedies have been exhausted.\(^{31}\) Thus, the Court is primarily a supervisory body that is subsidiary to the national system for protection of human right.\(^{32}\)

The judgements of the Court are legally binding, but only on the parties of each case.\(^{33}\) Regardless of this limitation, each decision must be regarded as a contribution to the jurisprudence of the Convention.\(^{34}\) The importance of the Court’s jurisprudence was expressed in the case of Ireland v. the United Kingdom: “The Court’s judgements in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties…”\(^{35}\)

In dealing with thousands of applications from primarily individuals who alleged that their rights protected by the Convention had been violated, the Court has elaborated in detail on the scope of the protection provided by the Convention, and what state parties must do to comply with the guarantees of fundamental rights that are afforded by the Convention.\(^{36}\)

Since the European Court has the authority to make legally binding decisions that have large effects on national jurisdiction and state practise it has been argued that the Court needs to be

\(^{31}\) Article 35(1) of the Convention.


\(^{33}\) Article 53 of the Convention.


\(^{35}\) Ireland v. the United Kingdom, (App. 5310/71), Judgment of 8 January 1978, para. 154.

very cautious in interpreting the rights and freedoms, particularly regarding provisions where the meaning of it is unclear and where an extensive interpretation might have the effect of imposing obligations on states that they perhaps did not mean to assume when ratifying the Convention.  

That this view is not shared by the Court is shown by the judgement in the case of *Wemhoff v Germany*. The Court stated that it was necessary “to seek the interpretation that is the most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties” In other words, the provisions of the Convention must be interpreted and applied to assure an effective protection.

Over the years, the Court has continued on this path of evolution arguing that the Convention “is a living instrument” and its contents, within the limits of each right or freedom, must thus reflect the changes and developments in the societies of the member states.

2.4 States’ obligations under the Convention

Article 1 of the Convention states:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

This short provision determines the obligations of the member states when it comes to assuring the substantial rights and freedoms included in Section II of the Convention.

Firstly it can be noted that the primary responsibility to protect the rights and freedoms lies with “the High Contracting Parties”. This is an expression of the principle of subsidiarity that the

37 Merrills, J. G., *The development of international law by the European Court of Human Rights*, Manchester University Press, 1988, p. 70


Convention system is based on. As already mentioned the Court may only deal with an allegation of a violation after all domestic remedies have been exhausted.  

Secondly, the wording “shall secure” reflects the intention of the drafters of the Convention to create a legally binding human rights charter. Since the rights and freedoms of the Convention were limited to rights that were already acknowledged by the drafters and also included in the states’ national legislation, no allowance for a gradual implementation was included. Accordingly, the states are under an immediate obligation from the day of ratification to make sure that the rights and freedoms are respected. Thus every state that ratifies the Convention is required to undertake certain measures such as amending existing national legislation or adopt new ones “to ensure that the domestic legislation is compatible with the Convention.” However, simply adopting superficial laws and regulations is not enough. The states have an obligation to effectively secure the rights and freedoms. Accordingly, states can also be liable for violations of the Convention that result from acts of all public authorities.

Because of the Court’s continuing development of the scope of the rights and freedoms through its jurisprudence the state obligation is considered to be a continuing one. In the more recent case-law, the Court has widened the states’ obligation even more and introduced the concept of positive obligations. The extent of the states’ positive obligations varies from Article to Article. In cases of torture and inhuman treatment such positive obligations include duties to investigate, especially in the case of disappeared persons, and to provide for effective remedies.

41 Article 35 of the Convention.


43 See motion (proposed by Mr. Teitgen, Sir David Maxwell-Fyfe and other representative) at the plenary sitting on 19 of August 1949. Available at http://www.echr.coe.int/Library/COLENTravauxprep.html. (Accessed April 5, 2007).


45 The concept of positive obligations is briefly addressed below in Chapter 3.

46 See Chapter 3 below.
2.4.1 Testing the fulfillment of the states obligations under the Convention

Whether or not the states have succeeded to live up to their obligations to “secure” the rights and freedoms of the Convention is tested if a case is brought to the European Court. If the Court finds that the state has violated the Convention, the state is required to execute the judgment since it is legally binding.\footnote{Article 46 of the Convention.} The execution of the judgment is controlled by the Committee of Ministers. Generally it can be stated that there are three obligations to undertake under Article 1:

1. To put an end to the violation
2. To make a reparation (to eliminate the consequences of the violating act)
3. To avoid similar violations.\footnote{Lambert-Abdelgawad, Elisabeth, \textit{The Execution of Judgments of the European Court of Human Rights}, Council of Europe publishing, 2002, p. 10.}

In 1995 11,200 applications were lodged in Strasbourg. At the end of 2006 the numbers had increased to 50,500. At the end of 2006, approximately 90,000 individual applications were pending before the Court.\footnote{Survey of activities 2006, Registry of the European Court of Human Rights, Strasbourg, 2007. Available at \url{http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf}. (Accessed May 5, 2007).} According to the Parliamentary Assembly, the growing number of applications to the Court reveals a need for a more general improvement of implementation of the ECHR in member states.
3 The prohibition of torture, inhuman or degrading treatment or punishment under the ECHR

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. (Article 3 of the Convention)

The prohibition of torture in Article 3 of the ECHR is one of the shortest but most crucial provisions in the Convention. As the European Court has stated on many occasions, “Article 3 enshrines one of the most fundamental values of democratic societies”.

In the case of Ireland v. United Kingdom the Court declared:

“The Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment, irrespective of the victim’s conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefore even in the event of a public emergency threatening the life of the nation.”

The prohibition of torture is not just a provision in the Convention, it is also part of customary law because freedom from torture, inhuman or degrading treatment or punishment are amongst the most fundamental of all human rights and freedoms. The prohibition of torture has also been considered to be jus cogens.

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Article 3 is formulated as a negative right. Accordingly, the ground rule is that states are required to refrain from committing acts of torture, inhuman or degrading treatment of punishment. The state is thus responsible for all actions committed by state agencies, such as the police, security forces and other law enforcement officials that are violating Article 3.

Article 3 does also under certain circumstances impose positive obligations on the state to protect individuals from being subjected to torture, inhuman and degrading treatment or punishment by other individuals. The Court has particularly required states to take positive measures when vulnerable persons are at risk. In order to fulfil this obligation, states must take “measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals”.

In order to fully comply with Article 3, the state must take action in order to sanction violators. If an individual raises an arguable claim that he or she has been subjected to ill-treatment contrary to Article 3, the state has a “procedural” obligation to investigate, prosecute and to bring those to trial that are responsible and if they are found guilty, to punish them for their acts in accordance with the law. The Court has made clear that the safeguards against torture in Article 3 would be ineffective if claims of torture were not properly investigated by the authorities. In the long run, this means that the state must provide for an effective criminal justice system.

3.1.1 Definition of the terms in Article 3

For conduct to be embraced by Article 3 it needs to “attain a minimum level of severity”. When deciding whether the minimum level of severity has been attained in a case the Court generally takes note of the duration of the treatment, its physical and mental effects and the age, sex and stage of health of the victim.

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Since the Convention must be interpreted as a living instrument the threshold is not static. Conduct that was not considered to infringe the provision in earlier case law might very well be considered to do so in the future.58 This has for instance been the case with conditions of detention.59

In the case-law there has been a differentiation between the areas of prohibition (torture, inhuman and degrading treatment) based upon the level of severity in the case.60 The statement of the Commission in the Greek case shows the “hierarchy” of the terms:

“It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.”61

Exactly where the point of transition between torture, inhuman or degrading treatment should be drawn has however turned out to be rather difficult to determine.62

3.1.1.1 Torture

One of the earliest cases dealing with torture is the Greek case where the Commission stated that “The word ‘torture’ is often used to describe inhuman treatment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment.”63 This can be said to reflect the classical understanding of torture where for example a police officer is inflicting bodily harm on a suspect in order to


59 See Chapter 3.1.2 below.


make him or her confess an alleged crime. In the subsequent case law, the purposive requisite has lost some of it importance in favor of using a scale of severity as the main instrument of definition.

In the case of Ireland v. the United Kingdom, the Court tried whether the use of five methods of interrogation (sleep depravation, depravation of food and drinks, stress positions and the subjection to noise and hooding) was in breach of Article 3. When elaborating on the distinction of the terms in Article 3 the Court argued that “a special stigma” was attached to torture and concluded that the treatment must cause “serious and cruel suffering”. The Court classified the actions as inhuman treatment arguing that they “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood”.

This judgment became a precedent on distinguishing between the terms based on the level of severity in each case.

In the case of Aksoy v. Turkey the victim was stripped naked with his arms tied together behind his back; an act which is called “Palestinian hanging”. The Court stated that it was a treatment that could only have been deliberately inflicted and that the act could only be described as torture.

Examples of other acts that alone or in combination have been described as torture by the court are rape, force-feeding, beatings with sticks and rifle butts, the use of electrical chocks, hot and cold water treatment, blows to the head and psychological pressure etc.

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65 Ibid.


3.1.1.2 Inhuman treatment or punishment

An act that does not have sufficient intensity or purpose to be classified as torture can instead constitute inhuman treatment or punishment. Unlike acts of torture, there is no demand that an act be deliberate in order to classify it as inhuman treatment even though that is often the case.\textsuperscript{72} Instead, inhuman as well as degrading treatment can result from a failure to take steps.

The notion of inhuman treatment or punishment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. In addition treatment has been held by the Court to be “inhuman” because it was premeditated, applied for hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering.

Most cases of violations of Article 3 occur in the context of detention but it can also happen in other places. The Court has for instance found that the destruction of homes by security forces was inhuman treatment.\textsuperscript{73}

Other examples of situations that have been considered to amount to inhuman treatment are ill-treatment in detention\textsuperscript{74}, conditions of detention\textsuperscript{75}, deportation or extradition when there is a risk of inhuman treatment in the country of destination\textsuperscript{76} and fear and anxiety as a result of forced disappearance\textsuperscript{77}

3.1.1.3 Degrading treatment or punishment

The Court has concluded that degrading treatment or punishment is that which is said to “arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them

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\textsuperscript{72} \textit{Labita v. Italy} (App. 26772/95), Judgment of 6 of April 2000, para. 120.
\textsuperscript{73} \textit{Selçuk and Asker v. Turkey}, (App. 23184/94), Judgment of 24 April 1998, para. 78.
\textsuperscript{74} \textit{Tomasi v. France}, (App. 12850/87), Judgment of 27 of August 1992.
\textsuperscript{75} See Chapter 3.1.2.
\textsuperscript{77} \textit{Bazorkina v. Russia}, (App. 69481/01), Judgment of 27 July 2006.
\end{flushright}
and possibly breaking their physical or moral resistance.” These requisites have been used in an number of cases since then.

In more recent cases the Court has ruled that a situation can amount to degrading treatment despite a lack of intention to humiliate the victim.

Examples of situations that have been considered to amount to degrading treatment include: conditions of detention, handcuffing, insufficient medical care and strip searches of detainees,

3.1.2 Conditions of detention

Violations of Article 3 are most likely to occur in places of detention with respect to the treatment of detainees. This is perhaps not surprising since detainees are a very vulnerable and marginalized group of society. In addition almost all of their aspects of daily life are regulated, which increases the risk for unlawful interference and restriction by authorities.

The most evident situation of ill-treatment in places of detention is probably the use of physical force by officials. According to the case-law of the Court, the use of physical force is in principle an infringement of Article 3 if it is not strictly necessary because of the detainees’ own conduct.

Traditionally the Court has been rather reluctant to find conditions of detention amounting to inhuman or degrading treatment. Jim Murdoch provides the following explanation for the narrow approach to conditions of detention than for instance the CPT:


81 Conditions of detention as a violation of Article 3 is addressed below in Chapter 3.1.2.


“The absolute and legal nature of the prohibition against torture, inhuman and degrading treatment imposes a demanding threshold test before an Article 3 violation can be established. Further, in discussion of material conditions of detention, Commission and Court competencies are not unlimited: judicial bodies have substantial hurdles to face in moving from the arena of civil and political liberties into that of economic and social when shaping relief.” Further “the ECHR is concerned primarily with civil and political rights; where economic and social rights are recognized by the treaty, Commission and Court tend to allow a rather wider “margin of appreciation” or discretion to state authorities. Holding conditions (overcrowded and unhygienic accommodation, lack of worthwhile activities, poor health care, etc) fall within this latter category.”

However, in a case on legal aid in lawsuits the Court stated that “the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention”.

Though the minimum severity threshold remains rather high concerning conditions of detention, there has been a tendency by the Court to become a bit more willing to find that conditions per se constitute a violation of Article 3. The increasing practise of adopting recommendations, such


87 Ibid. p. 125-126.

as the European Prison Rules and the work of the CPT and NGOs have and probably will serve as important incentives to further development in this area.

It is clear that imprisonment as such can not be considered to infringe Article 3. Still, the state has an obligation under Article 3 to “ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person’s health and well-being are adequately secured.”

For the case that a detainee has special needs, a failure to tend to them might constitute a violation of Article 3. In the case of Price v. the United Kingdom the applicant, a four-limb-deficient thalidomide victim with numerous health problems including defective kidneys, was detained in conditions where the authorities could not adequately cope with the applicants special needs. The Court held “to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.

In the case of Dougouz v. Greece the Court held that the conditions in which the applicant was held, in particular the serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3. 


In the case of Peers v. Greece a detainee had to spend most part of the day in a cell. Although the cell was designed for one person, the applicant had to share it with another inmate. There was no window and no ventilation in the cell so it would sometimes become very hot. When using the toilet in the cell, no privacy was provided. The Court found that “the prison conditions complained of diminished the applicant’s human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant’s detention … amounted to degrading treatment within the meaning of Article 3 of the Convention.”94

In the last years the applications alleging violations of Article 3 have been submitted by individuals residing in the states of the former Soviet Union. Two of these cases are of particular interest, namely, Kalashnikov v. Russia95 and Poltoratskiy v. Ukraine96. In both cases the physical conditions of detention constituted a violation of Article 3 and both the states’ socio-economic situations were discussed as a reason and excuse for their violations.

In Kalashnikov v. Russia the government stated that “[t]he conditions did not differ from, or at least were no worse than those of most detainees in Russia. Overcrowding was a problem in pre-trial detention facilities in general.” It was further acknowledged that “for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia. They had adopted a number of task programmes aimed at the construction of new pre-trial detention facilities, the re-construction of the existing ones and the elimination of tuberculosis and other infectious diseases in prisons.” As a response the Court recalled “Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour.97


97 Para. 95 of the judgment.
In Poltoratskiy v. Ukraine the court made the following statement: “The Court has also borne in mind, when considering the material conditions in which the applicant was detained and the activities offered to him, that Ukraine encountered serious socio-economic problems in the course of its systemic transition and that prior to the summer of 1998 the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations. However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention…”98

It is clear that lack of resources can not justify conditions of detention that infringes Article 3.99

This can also be derived from the following statement:

“[A]ll persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”100

98 Para. 148 of the judgment.
100 OHCHR, General Comment No. 21, 1992, para. 4.
4 Case study on the implementation on Article 3 of the ECHR in the Republic of Moldova

4.1 Introduction

From October to December 2005 I visited Moldova to do a minor field study on the human rights situation in places of detention. The field study was carried out within a project of the Moldovan Helsinki Committee for Human Rights called “Promotion of Rule of Law in the Penitentiary System of Moldova via monitoring of implementation of European Standards”. During my stay in Moldova I visited penitentiaries and interviewed detainees, staff, chiefs of penitentiaries, lawyers, prosecutors, the Ombudsman for human rights and several NGO:s, in order to try to understand the outline of the penitentiary system of Moldova, to assess the compliance with international human rights norms in places of detention and to get an idea of the level of respect for fundamental human rights and freedoms in Moldova as a whole. In addition I attended several meetings and seminars where the protection of human rights in Moldova was discussed.

This chapter includes an overview of Moldova’s modern history and the developments that followed after the collapse of the Soviet Union. Moldova’s international commitments in the field of human rights are also presented as are some of the most important national efforts that Moldova has made to implement and assure international human rights norms. The focus is placed primarily on Moldova’s obligations under the European Convention, particularly on the implementation of Article 3. Both my own documentation and other relevant information, such as statements and reports are presented.
4.2 Country facts

Below, some statistics are presented concerning the Republic of Moldova. The intention of this short list is to give the reader a very basic introduction to Moldova.

- Area: 33.843 sq km
- Capital: Chisinau
- Population: 4.455.421 (July 2005 est.)
- Population Growth Rate: 0.22 percent (2005 est.)
- Life Expectancy: Male 61.12 yrs., Female 69.43 yrs. (2005 est.)
- Infant Mortality: 40.42 deaths/1,000 live births (2005 est.)
- Ethnic groups: Moldovan (83.7%), Ukrainian (6.6%), Russian (1.7%), Gagauz(4.5%), Bulgarian (1.7%), Romanian(1.4%), other (0.4%)
- Gross Domestic Product (GDP): $8.581 billion (2004 est.)
- GDP Per Capita Income: $1.729 (2004 est.)
- GDP Per Capita /annual growth 1990-2004: -5.3 %
- Ranking in Human Development Report 2006: 114 (of 177 countries)

4.3 Historical background and developments after independence

The Republic of Moldova is situated in Eastern Europe and occupies most of the area that is known as Bessarabia. To the north, east and south it borders to Ukraine and to the east, the Prut River constitutes the border to Romania. For most of its history, Moldova has been occupied or belonged to other countries and empires such as the Mongol empire, the Ottoman empire and Russia. Before World War II Moldova belonged to Romania but in 1940 Soviet annexed Moldova and Russians and Ukrainians settled in the industrial region east of the Dniester (known

as Transdniestria). In 1991 the Soviet Union collapsed and on August 27, 1991 Moldova declared its independence.¹⁰²

With the collapse of the Soviet Union, Moldova began the transformation process from being a small cogwheel in a giant economy into a small independent state eager to seek economic prosperity, political freedom and closeness with the West.¹⁰³ However the road to transition has turned out to be a rather difficult one for Moldova. The process of becoming a truly independent democracy has seriously been slowed down by a number of factors. To begin with the economy of Moldova virtually collapsed after the break-away¹⁰⁴. Before the dissolution of the Soviet Union, Moldova was ranked in level with Latvia in terms of its economy.¹⁰⁵ Today, Moldova has become the poorest country in Europe.¹⁰⁶ It has even been argued that Moldova, since its declaration of independence probably has undergone the most devastating decline in economic performance and living standards of any country in modern times.¹⁰⁷ In terms of corruption, Moldova ranks 79th of 163 on the Transparency International scale.¹⁰⁸ In 2003, the Council of Europe Group of States Against Corruption (GRECO) concluded that “the Republic of Moldova is without any doubt one of the countries deeply affected by corruption”.¹⁰⁹


¹⁰³ Ronnås, Per, Orlova, Nina, Moldova’s Transition to Destitution, Sida Studies No. 1, 2000.

¹⁰⁴ During the first decade the GDP of Moldova fell by over 70 percent (See Ronnås, Per, Orlova, Nina, Moldova’s Transition to Destitution, Sida Studies No. 1, 2000).


¹⁰⁷ Ronnås, Per, Orlova, Nina, Moldova’s Transition to Destitution, Sida Studies No. 1, 2000.


Parallel with the economic struggle, Moldova faced a huge task building democratic institutions, reforming the legislation of the country and reaching political stability. In addition a civil war broke out in 1991 after the secession of the industrial region of Transdniestria in 1991.

Despite the troublesome start, Moldova has undergone a tremendous change and progress has been made in a number of fields essential for the functioning of an independent democracy. Moldova has for instance obtained multi-party elections, free press, emerging civil society institutions and a much greater respect for human rights and freedoms, which I will come back to in the following chapter. Moldova’s transition to become a stable independent human rights friendly democracy is a continuing one and large reforms are still taking place often in the framework of different programmes constructed in co-operation with international and regional organisations. Since its declaration of independence Moldova has become a member of international organisations such as the UN, the Organization for Security and Co-operation in Europe (hereinafter referred to as “the OSCE”), the Council of Europe, the NATO’s Partnership for Peace, the North Atlantic Cooperation Council, the International Monetary Fund (hereinafter referred to as “the IMF”).

4.4 Human rights in Moldova in general

“In its quality as a SOVEREIGN AND INDEPENDENT STATE, THE REPUBLIC OF MOLDOVA, hereby guarantees the exercise of social, economic, cultural and political rights for all citizens of the Republic of Moldova…”\(^{110}\)

As the excerpt from Moldova’s declaration of independence implies, the protection of human rights is something that has been high on the agenda of Moldova since it gained independence.\(^{111}\) Eager to prove to the world its seriousness when it comes to assurance of human rights and its ambition to move closer to the West, Moldova has ratified almost all the international human

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\(^{111}\) The placement of social, economic and cultural rights in the declaration is likely to have its basis in the tradition of Communist regimes to favour these kinds of rights over civil and political rights.
rights instrument. Accordingly, Moldova is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and not least the European Convention on Human Rights, the European Convention for the Prevention of Torture and the European Social Charter. In addition a large number of the conventions of the International Labour Organization (ILO) has been ratified by Moldova.

One of the most important steps that Moldova has taken for the protection and promotion of human rights was when it became a member of the Council of Europe in 1995 and thereby joined the European Convention on Human Rights. In so doing, the citizens of Moldova obtained the right to apply to the European Court on Human Rights in cases of human rights violations.

Furthermore, Moldova abolished the death penalty in 1997, when it ratified Protocol 6 to the European Convention on Human Rights and has signed but not ratified the Rome statute for the establishment of an International Criminal Court.

Moldova has and is making efforts to implement the international standards and norms that are included in the legally binding as well as non-legally binding documents adopted by the UN, the Council of Europe, the OSCE and the ILO. Many of these documents set forth a procedure of submitting periodic reports of the member states on their compliance with the commitments undertaken by ratification. Even though the Government of Moldova allegedly sees the procedure of submitting reports as an effective tool for the promotion of human rights in Moldova, so far its record of submitting the periodic reports remains poor.\textsuperscript{112}

\textsuperscript{112} For instance, Moldova's initial report on its compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was due to be submitted on December 27, 1996 but the submission was done as late as September 17, 2001. The second report was supposed to have been submitted on December 27, 2004 but it has still not been presented to the UN High Commissioner for Human rights. For an overview of the reporting status within the UN, visit http://www.ohchr.org. (Accessed May 2, 2007).
Moldova’s international human rights obligations are affirmed in the Constitution of Moldova\textsuperscript{113}.

Article 4 of the Constitution states:

(1) Constitutional provisions for human rights and freedoms shall be understood and implemented in accordance with the Universal Declaration of Human Rights, and with other conventions and treaties endorsed by the Republic of Moldova.

(2) Wherever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations.\textsuperscript{114}

Further, the Constitution includes the assurance of a large variety of rights and freedoms that are recognized by the international community such as the right to life, physical and psychical integrity\textsuperscript{115}, freedom of opinion and expression\textsuperscript{116}, the right to access to information\textsuperscript{117}, freedom of assembly\textsuperscript{118}, the right to free access to justice\textsuperscript{119}, the right to property\textsuperscript{120} and private and family life\textsuperscript{121}, the right to social protection\textsuperscript{122}, the right to education\textsuperscript{123} etc.


\textsuperscript{114} The formulation in Article 4 (2) implies that, in court, judges can apply the provisions of international law directly.

\textsuperscript{115} Article 24.

\textsuperscript{116} Article 32.

\textsuperscript{117} Article 34.

\textsuperscript{118} Article 40.

\textsuperscript{119} Article 20.

\textsuperscript{120} Article 46.

\textsuperscript{121} Article 28.

\textsuperscript{122} Article 47.

\textsuperscript{123} Article 35.
Gradually, the national legislation is becoming consistent with international human rights standards. A new criminal code and code of criminal procedure, adopted in 2003, as well as the code of execution of criminal sanctions, the civil code, the family code, the labour code and the code of administration all entail provisions that guarantee the protection of fundamental human rights.

In addition, an Ombudsman institution – the Center for Human Rights of Moldova - has been established with three parliamentary advocates that are elected for a five-year term by the parliament. The parliament advocates shall contribute to the effective observance and protection of human rights through, amongst others, complaints examinations, the investigation of cases of human rights violations and appeals to the courts and the constitutional court.

4.4.1 The implementation of human rights in Moldova

Based on the current legislation, Moldova has a fairly advanced system of protection of human rights. In reality, though, all these fine provisions are far from always effectively implemented. According to the parliamentary advocates the most frequently infringed rights are the social rights, property rights, right to human protection, free access to justice, and the right to an equitable law suit. In 2006 over 50 % of the complaints of human rights violations that were addressed to the parliamentary advocates at the Centre for Human Rights of Moldova were submitted by detainees.

The reason why many of the basic human rights standards have not truly become reality in Moldovan society are many. One must remember that Moldova is still in the process of democratization which sometimes has the effect that the observance of declared human rights are obstructed or slowed down by certain historical, social, economic and political barriers. For

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126 Ibid, p.65.

example, Moldova does not really have a history of protection of human rights, on the contrary, the people of Moldova has been under a totalitarian regime where fundamental human rights and freedoms were not guaranteed other than on the paper. Further, Moldova’s terrible economic developments have also not only had consequences on people’s standard of living but also on the promotion of human rights. Finally, due to the widespread corruption, the independence of the judiciary must be questioned and there is a general mistrust in the ability of the state to protect their rights (for the people that actually know their rights).

In order to improve the implementation of human rights in Moldova a number of different human rights projects are present. At the end of 2003, Moldova adopted a Human Rights Action Plan for the period 2004 - 2008. The document, developed in collaboration with the United Nations Development Programme (UNDP), and subsequently approved by the Moldovan Parliament, contains recommendations and identifies practical steps on how to improve the human rights situation. The EU-Moldova ENP Action Plan was adopted on 22 February 2005 for a period of three years. The Partnership and Cooperation Agreement (PCA), which forms the legal basis of EU-Moldova relations, was signed in November 1994 and entered into force in July 1998.

The EU and the Council of Europe have also undertaken joint programmes to promote Human Rights and the rule of law in Moldova. Moldova is, because of its failure to live up to its obligations in its accession agreement monitored by the Committee on the Honouring of Obligations and commitments by member states of the Council of Europe.

4.5 Freedom from torture, inhuman or degrading treatment or punishment in Moldova

As with the case of the protection of human rights in general, Moldova has ratified a number of international treaties prohibiting torture, such as the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

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128 Ibid.


In order to live up to its obligation under Article 1 of the European Convention to ensure the freedoms in Article 3 (and its commitments under the other treaties) a number of legislative acts have been adopted and amended in Moldova. Extensive reforms of the judiciary and the reform of the penal system and its institutions have contributed to create the framework necessary to define, criminalise and prevent torture, inhumane and degrading treatment and punishments.

The most prominent prohibition of torture is found in the Constitution of Moldova. Article 24 declares that:

\begin{quote}
“(1) The State guarantees everybody the right to life, and to physical and mental integrity.

(2) No one may be subjected to torture or to cruel, inhuman or degrading punishment or treatment.”
\end{quote}

In addition there are a number of laws that prohibit torture, stipulate the rights of persons deprived of their liberty as well as granting persons whose rights have been violated compensation, for example the criminal procedural code, the enforcement code, the law on penitentiaries, the law on pre-trial detention, law on remand custody and the code of administrative offences\textsuperscript{131}. A crucial provision has been included in the criminal code which bans the use of torture, inhuman or degrading treatments or punishments, guarantees the protection of human beings against such kinds of actions on the part of law enforcement authorities\textsuperscript{132} and imposes sanctions against representatives of the law enforcement agencies committing acts contrary to the prohibition\textsuperscript{133}.

\textsuperscript{130}Moldova has also ratified the Optional Protocol to the Convention on Torture and Other Punishment or Cruel, Inhuman or Degrading Treatment.

\textsuperscript{131}National legislation is available at www.parliament.md but in Romanian only. Unfortunately there is very difficult to find correct English translations in Moldova.

\textsuperscript{132}Article 137.

\textsuperscript{133}Article 309.
The enforcement code is of particular importance when it comes to protecting the rights of detainees. It regulates amongst others the right of the detainee to challenge disciplinary decisions, the personal security of the detainee, the right to medical assistance and minimum standards of physical conditions of detentions such as the requirement of minimum 4-square-meter space/detainee.

In order to make sure that Moldova’s obligations to prevent and prohibit torture, inhuman and degrading treatment and punishment are correctly and efficiently implemented in national legislation and to undertake the reforms necessary to change the actual state behaviour, Moldova has engaged in a number of projects within the framework of the Council of Europe, the UN, the OSCE. The above-mentioned National Human Rights Action Plan includes for instance a whole chapter on concerted actions to ensure the rights of detainees (See Appendix I) and one of the priorities in the EU-Moldova Action Plan is the eradication of ill-treatment and torture.

4.5.1 Freedom from torture, inhuman or degrading treatment or punishment in Moldova in reality

“When I continued to deny that I had committed the crime the policemen were accusing me of, they handcuffed me, put a gasmask over my face and directed blows at my kidneys and head. As I continued to deny, wires were connected to my fingers and I was electrocuted. After they had pulled down my pants and threatened to rape me – I agreed to sign all the papers.”

134 Article 249.
135 Article 244(2).
136 For a comment on the implementation of the plan, see the statement made by the Parliamentary Commission for Human Rights of Moldova and the Deputy Minister of Justice below in Chapter 5.5.1.2.
138 The quotation is an excerpt from one of the many letters that have been sent to the Moldovan Helsinki Committee for Human rights from persons deprived of their liberty in Moldova in the course of 2005 when I did an internship there within the framework of my field study.
Despite the fact that Moldova is a party to the European Convention (as well as all of the other international treaties prohibiting torture that are presented in Chapter 5.4) and have made a number of national reforms to eradicate the existence of torture, the passage above suggests that torture in its gravest form is still committed by the authorities of Moldova.

NGOs are continually publishing credible reports on the existence of torture. In 2003 the Institute for Penal Reform even argued that “committing acts of torture, inhuman and degrading treatment is a well-known situation in the Republic of Moldova. At the same time, public authorities refuse to admit directly this fact and the direct and indirect victims of torture frequently refuse to make public the real cases, in order to avoid further persecution.” However, on April 2006, the European Court of Human Rights in the case of 

Corsacov v. Moldova,

unanimously voted in favour of Mihai Corsacov who accused two police officers of torture. This was the first such ECHR ruling on torture committed by the police in Moldova and more are likely to follow. In 2003 the Committee Against Torture (CAT) expressed concern about “[t]he numerous and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment of detainees in police custody”. The Committee for the Prevention of Torture (CPT) of the Council of Europe, have undertaken eight visits to Moldova (including Transdniestria). During its visits, the CPT has received allegations of ill-treatment of persons deprived of their liberty by police departments.


140 Institute for Penal Reform, Comments on the Report of the Republic of Moldova concerning the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, April 2003, p. 2.


142 See also the recent case of Pruneanu v. Moldova, (Application no. 6888/03), Judgment of 16 January 2007. (Observe that the judgment was not final at the time of writing).


144 All CPT documentation on its visits to Moldova are available at http://cpt.coe.int. (Accessed May 6, 2007).
The practice of the type of torture demonstrated above is most likely to be committed by the police at police stations or at remand prisons as a way of pressuring the suspects to make confessions than in penitentiary institutions where already convicted detainees are kept. My field study in Moldova was mainly focused on making spot visits to penitentiaries, where convicted persons were detained. In addition there were always guards present during my visits to the penitentiaries, making it almost impossible for me to talk to the detainees about the existence of torture, without risking that they would be put in an uncomfortable or even dangerous situation. Thus, in the following, focus will be placed on one of the most frequent and also acknowledged forms of human rights violations in Moldova, namely the existence of conditions of detention that amount to inhuman or degrading treatment or punishment and thus are contrary to Article 3 of the Convention.

4.5.1.1 The conditions in places of detention – personal experiences

“We have nothing to hide - poverty is poverty and this is the poverty of the country”\textsuperscript{145}

During my stay in Moldova I had the opportunity to visit the penitentiaries in Chisinau, Leova and Soroca. This section commences with summaries of my observations and experiences from the respective institutions.

Penitentiary No. 13 in Chisinau

I visited Penitentiary no. 13 on two different occasions: October 13 and December 12, 2005. The penitentiary in Chisinau is the largest and probably oldest penitentiary institution in Moldova.\textsuperscript{146} According to official statistics from the Department of Penitentiary Institutions, 1,547 persons were detained there on 1 of December 2005. The penitentiary hosts different categories of persons deprived of their liberty; persons convicted serving their sentence, persons that are awaiting trial as well as persons waiting to be transferred to other penitentiary institutions. Less than 100 persons (all men) were serving their sentence at the penitentiary. Men, women and juveniles were detained at the penitentiary. At the time of my second visit 80 women and 60-70 juveniles (including four girls) were detained. The women were kept in a separate building. The juveniles were kept in separate cells (boys from girls) but not in separate sections.

\textsuperscript{145} Comment made by Valutza Valeria, Chief of Penitentiary no 6 in Soroca, during the introductory talk during the visit at the penitenciary on December 1, 2005.

\textsuperscript{146} The penitentiary that was built in the 1840’s was originally a castle.
The conditions of the cells very much varied throughout the establishment. The men that were serving their sentences slept in dorms; 18 persons on approximately 25 square meters and 24 persons on 60 square meters. The detainees that were waiting for trial were placed in cells. The size of the cell, the number of detainees in each cell varied as well as the standard. While the standard was deploring in most cells, one cell was equipped with a new toilet and shower, a TV and a microwave. Allegedly, this “luxury” was paid for by the detainees kept in that cell. The worst cells were the ones in the basement of the penitentiary. Up to seven persons were kept in cells no larger than 10 square meters. In each cell the toilet was nothing but a hole in the floor that was separated from the rest of the cell by a filthy curtain. Not all cells had windows and those who had, had bars and no glass. There was no heating or functioning ventilation in the basement.

During an interview, one of the detainees claimed that he had been beaten and threatened by the guards in order to make him stop complaining about the conditions of detention. He also claimed that the detainees that had money got better treatment such as longer walks. He even argued that it was possible to get an earlier release from the penitentiary for detainees that had money.

At the time of the visits there was a lack of medical personnel as well as medication at the penitentiary. According to the medic that was present only 5% of the needed medication was actually supplied. Tuberculosis was a major health problem at the penitentiary.

The convicted persons were working during the day and were therefore not locked up. The non-convicted persons were allowed to have a one-hour walk a day, the juveniles – two hours. The convicted persons were allowed to have 3-4 hour visits, the non-convicts – one hour. No long term visits were allowed. The reason for this was lack of facilities according to the chief of the penitentiary.

*Penitentiary No. 3 in Leova*

I visited Penitentiary no. 3 in Leova on October 25 and November 9, 2005. The penitentiary consists of two parts; one open, for female prisoners and one closed, for male prisoners. Both visits were concentrated to the closed section. 469 persons were detained at the penitentiary in
Leova on December 1, 2005, according to the official data delivered by the Department of Penitentiary Institutions.

During the Soviet period, the penitentiary was allegedly a rehabilitation centre for people suffering from alcohol addiction. According to the chief of the penitentiary no funds were granted by the state to undertake the renovations necessary to put the penitentiary in order.

The detainees were organised in different groups. The trouble makers and the detainees that did not work were placed in groups 1 and 2. The detainees in these two groups had more restrictions than those in the other groups, according to the chief of the penitentiary.

All detainees were placed in quarantine during the first week of their arrival for medical reasons. At the time of the visit six detainees were placed in quarantine. The location consisted of one small and dark room with eight or nine bulk beds. The access to natural light was poor, the air rank and there did not seem to be any heating on. The bedding was very poor. Next to the entrance of the room there was a very filthy Asian style toilet with a curtain as the only assurance of privacy.

The cells of the penitentiary were more like large dormitories. Each room was cramped with bulk beds and about 80 detainees were sleeping in each room, offering a floor space that was less than one square meter per person. Due to poor ventilation and natural light, limited access to water and cleaning products the air in the dormitories was very rank and it was dark.

Throughout the closed section of the penitentiary there was a clear lack of sanitary facilities and those who existed were in terrible condition. The worst conditions were in the cell block of group one and two. The detainees in this building had very limited access to showers and toilets. Only one shower and two Asian style toilets were provide for 80 detainees. No privacy was allowed. At the time of visit no running water had been provided for the last 11 days. Instead water was brought from the well in the courtyard.

The medical section was empty at the time of the visits despite the existence of tuberculosis and hair lice in the penitentiary. The medical equipment was old and out of function.
The kitchen and eating area was located on the ground floor of the building housing group 1 and 2. During the visits complaints were made over the conditions in the eating area. Apparently, there was a leak in the corner of the room from the sanitary facilities upstairs. The kitchen was dark, murky and infested with flies. According to the chief of the penitentiary the food was of normal standard. According to the detainees the food was very bad. According to the chief of the penitentiary, 3.75 Lei (~€ 0.20) per detainee and day was received from the state to provide for the food.

The penitentiary offered opportunities to work with production of shoes and building material. According to the chief of the penitentiary more than 200 detainees were working. The amount of detainees working was limited due to the lack of enough work. The detainees received salary for working but no satisfactory answer was given on the question of the size of the payment. The chief declared that a total of 380.000 lei (~€ 22,800) had been paid to the detainees since 1 January 2005. One detainee claimed that he had received 8 lei (~€0.50) for two full-time working days.

The penitentiary offered no possibility of education, arguing that there were no juveniles detained and therefore no education was needed.

The chief of the penitentiary agreed that the conditions of detention were not in accordance with European standards. He was of the view that the number of detainees had to be lowered to 200 in order to be in compliance with the code of execution of Moldova.

Lastly, I would like to mention one of the reasons for my first visit to Leova. The Moldovan Helsinki Committee for human rights had received a complaint that one of the detainees in Leova penitentiary was not released despite the existence of a court order. At the beginning of the visit we enquired about the case but the chief of the penitentiary said that the detainee had already been released. A while later we were encountered by the detainee inside the prison. He was released the same day.

Penitentiary No. 6 in Soroca

I visited penitentiary no. 6 in Soroca on December 1, 2005. The Soroca Penitentiary was built in 1904 and in 1978 new buildings were constructed and added. The penitentiary is a closed penitentiary for male convicts sentenced for severe criminal offences. There were however no
detainees sentenced to life in prison at Soroca penitentiary. 1180 persons were detained at the penitentiary in Soroca on December 1, 2005, according to the official data delivered by the Department of Penitentiary Institutions.

In section 13, 58 detainees were placed during their initial stage of imprisonment, which normally lasts for up to 9 months. The cells varied from 2 to 16 beds. All cells had windows that could be opened and an Asian style toilet. The toilet was only secluded from the rest of the room with curtains, offering little privacy and an unsatisfactory level of hygiene. The living space can be considered satisfactory in the cells only hosting two detainees but in the cells accommodating sixteen detainees the area of living was less than 2 square meters. Due to lack of ventilation and the overpopulation the air in the room was rank and one can only imagine the situation during winter when the windows are closed. The beds were metal bulk beds and though poorly equipped each detainee seemed to have their own bed with a thin mattress and some blankets.

There was no ventilation system in the penitentiary, making the air in the cells rank. This was particularly the case in the overcrowded cells in section 13 and in the quarantine. There was no hot water in the taps. When pointing this out I was told that the guards themselves did not have hot water at home. A coal oven was heating the water to the shower room.

The Soroca penitentiary was in total fairly clean. It is however necessary to comment on the toilets throughout the institution. These were without exception of Asian style without running water and rather filthy and smelly. In none of the buildings visited was enough privacy assured. At the most some curtains were used to seclude the toilets from the living area. The detainees were allowed to take showers once a week. In section 13, six showers located in a big shower room were provided for 58 detainees.

4.5.1.2 Other views on the human rights situation in places of detention in Moldova

The UN Human Rights Committee report in July 2002 stated: “Conditions of detention in police offices and temporary detention isolators do not comply with international norms. This is determined by the miserable budget of the Ministry of Internal Affairs”. 147 In 2003 the

Committee Against Torture (CAT) expressed concern about “[t]he poor material conditions prevailing in police detention facilities and prisons, and the lack of independent inspections of such places”. The CPT has received allegations of ill-treatment of persons deprived of their liberty by police departments and it expresses concern about the poor conditions in prisons.

In the CPT's report on the visit to Moldova in 2001 it is stated:

“The visited penitentiary establishments were severely affected by the country's economic situation. The budget ceiling for spending on the prison service under the 2001 Finance Act had been set at 48.7 million Lei (approximately 4.2 million Euros) or 38.9% of the resources needed per year. As a result, prisons suffered from severe shortages from every standpoint. For example, the daily budget for feeding a prisoner was 2.16 Lei, just 38.8% of the current statutory norm. Prisons also suffered from cuts in electricity, water and heating, not to mention the unavailability of medicines necessary for treating prisoners.”

The lack of sufficient funding has continued to be one of the reasons why the rights of the detainees are continuously being violated. In 2005 the Parliamentary Commission for human rights of Moldova, obliged the Ministry of Justice to create acceptable conditions and reduce the number of detainees in places of detention since it constituted a violation of the rights of the detainees. The Parliamentary Commission for Human Rights further urged the Ministry of Health and Social Protection to improve the treatment conditions for detainees suffering from tuberculosis. Deputy Minister of Justice Nicolae Esanu then stated that “none of the eight objectives on insurance of rights of detainees, stipulated by PNADO [National Action Plan on Human Rights] was entirely fulfilled because of the lack of funding.”


149 All CPT documentation on its visits to Moldova are available at http://cpt.coe.int. (Last visited on May 6, 2007).

150 Para. 69 of the Report.

151 See Annex I.
4.5.1.3 Case law of the European Court on the implementation of Article 3 in Moldova

The question whether Moldova is living up to its obligation to the secure the freedoms in Article 3 of the ECHR has been tried in a number of cases by the European Court. In the case of *Bechiev v. Moldova*, the Court considered that “the harsh conditions in the cell, the lack of outdoor exercise, the inadequate provision of food and the fact that the applicant was detained in these conditions for thirty-seven days…went beyond the unavoidable level inherent in detention and reached the threshold of severity contrary to Article 3 of the Convention”\(^{153}\). Similar conclusions were reached in the case of *Ostrovar v. Moldova*\(^{154}\) In the case of *Sarban v. Moldova*, the Court found that “the failure to provide basic medical assistance to the applicant when he clearly needed and had requested it, as well as the refusal to allow independent specialised medical assistance…amounted to degrading treatment within the meaning of Article 3 of the Convention”\(^{155}\).

Many, but certainly not all, of the circumstances that individually or collectively has been considered to amount to inhuman or degrading treatment contrary to Article 3 of the Convention can be explained by the economic situation in Moldova. The buildings of most penitentiaries in Moldova are, as have been presented under Chapter 4.5.1.1, in urgent need of reconstruction to improve ventilation, heating, sanitary facilities, medical units etc. In addition inadequate provision of food, hygiene products and medicine are a constant problem in the penitentiary institutions. To secure that the conditions of detention in Moldova does not constitute a breach against freedom from torture, inhuman or degrading treatment, it is not enough for Moldova to adopt laws, like the Code of Execution, other measures that will require large financial funding will be needed.

\(^{152}\) Parliamentary Commission for Human Rights obliges Justice Ministry to create normal conditions on penitentiaries, Basa Press, 22 of November 2005.


In the case-law of the Court on cases where conditions of detention in Moldova have been alleged to violate Article 3, little importance have been placed on the economic situation of Moldova. Before the Court, the government of Moldova has only briefly mentioned that lack of sufficient funding could be one of the reasons for the violation of Article 3. One example is however found in the already mentioned case of Ostrovar v. Moldova where the government argued that “[b]ecause of insufficient funding, the provision of meat, fish and dairy products was not always possible.” In the same case the Court referred to a part of CPT’s report (quoted above under Chapter 4.5.1.2) concerning the visit to Moldova between 10 and 22 June 2001 which underlines the effects that the country’s economic situation have had on the penitentiaries in Moldova. However, no comment on Moldova’s economic situation was made in the Court’s assessment. The conditions of detention of the applicant were held by the Court to be contrary to Article 3 of the Convention.

The Court’s reluctance to make any exceptions from the state’s immediate obligation under Article 1 of the Convention to protect individuals from torture, inhuman or degrading treatment regardless of any circumstances in a country and the government of Moldova’s reluctance to argue that the country’s economic situation should admit such an exception when it comes to assuring that the conditions of detention are not contrary of Article 3, could serve as an indication that both the Court and the government in Moldova considers that not only freedom from torture but also freedom from inhuman or degrading treatment are fundamental and can never can be set aside or only be assured gradually. This view is at least when it comes to the Court’s standpoint supported by the cases of Kalashnikov v. Russia157 and Poltoratskiy v. Ukraine158.

5  Conclusions

More than half a century ago the Council of Europe was created in order “to achieve unity between its members”. With the horrible atrocities from the war in mind and with a growing fear for the spread of communism, the Council of Europe drafted a legally binding charter to assure the most fundamental human rights in all the member states regardless of the event of political changes. At the time, establishment of an international legally binding charter on human rights was something unique but to create a supranational court as the ultimate arbiter was even more controversial. The role of the Court in protecting human rights can not be overestimated. In thousands of cases the Court has held states responsible for human rights violations and granted individuals compensation. By using dynamic interpretation methods and treating the Convention as a living instrument, the scope of the articles continues to evolve. As stated in the case Selmouni v. France: “certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future.”

At the end of the 1980s all the Western European states were members of the Council of Europe as well as parties to the Convention and it was believed that the Council of Europe could not grow any more. But then the collapse of the Soviet Union and the disintegration of Yugoslavia occurred. An opportunity to include the whole continent in the Council of Europe opened. The “new” independent states were eager to prove themselves as true democracies and human rights friendly and the Council of Europe opened the door, despite the fact that the admission criteria in most cases were not fulfilled, arguing the already started process of transition and effective human rights protection would be less problematic with its assistance. Along with the membership followed the adherence to the European Convention.

In describing the problems of transition I have used Moldova as an example. Even though every state of course has its own history and development, the countries of the former Soviet Union still have a lot of similarities that date back from at least the Second World War. Moldova’s break away from the Soviet Union was anything but easy. While struggling to build an independent democracy based with well functioning state agencies, including an independent judiciary, the process was severely hindered by a deep economic crisis, political instability and the outbreak of a

civil war. The admission to the Council of Europe and becoming a party are important milestones in Moldova’s history of human rights.

By ratifying the Convention Moldova came under an immediate obligation to effectively protect the rights of the individuals within its jurisdiction. As we have seen this obligation is a continuing one requiring the states to execute the judgments of the Court when a violation has been held.

In order to fulfil its obligations under the Convention Moldova has adopted new laws, engaged in a number of projects within the framework of the Council of Europe as well as the UN. Despite all the efforts, human rights violations, including torture, inhuman or degrading treatment or punishment are still existent in Moldova. One explanation for this that the Government and law enforcement officers tend to give is the lack of economic resources. This argument is frequently used to explain the deplorable conditions of detention throughout the country. However, as stated in the case of *Poltoratskiy v. Ukraine* the “lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention.”\(^{160}\) Thus, the economic situation in Moldova can perhaps explain some of the violations of Article 3 that takes place, but it can certainly not justify them. Any other conclusion does also seem too far reaching with regard to the fact that freedom from torture, inhuman or degrading treatment is considered to be one of the most fundamental rights, which is absolute and considered to be *jus cogens*.

Regardless the specific position that freedom from torture, inhuman or degrading treatment has in international human rights law, the economic and social reality in states like Moldova is such that it is difficult to expect anything but a gradual implementation of Article 3 of the Convention, at least when it comes to assure acceptable conditions of detention. The gap between human rights standards and state practise is thus likely to be wider in a developing country like Moldova than in Sweden for instance. Steiner states: “The existence of human rights and their violations implicate a state’s political and social structure and culture.” I can only agree with this but I would like to add economic situation as well.

Concluding that a gradual realisation of human rights in general and the prohibition of torture in particular, is the sad reality in Moldova today, the question that follows is: Can it be accepted?

The case-law of the European Court does not open for such an interpretation of Article 1 in combination with Article 3 and the following statement made in March this year by the Parliamentary Assembly indicates a similar answer to the question:

“Much progress has been made by the member states. However the gap between standards on paper and the actual situation in Europe is striking. Human rights violations, including the most serious ones, such as enforced disappearances, extrajudicial killings, secret detentions, torture and inhuman treatment, still take place on our continent….It is now time to end hypocrisy and turn words to deeds. The most effective method of preventing human rights violations is by adopting a zero-tolerance approach.”

One could argue that because of the perhaps premature admittance of the “new” states in the 1990s a silent acceptance could have existed within the Council of Europe. However more or less a decade has passed and the statement by the Parliamentary Assembly indicates that if an acceptance has existed before, this is not the case any more.

Clearly, the existence of a gap between treaty norms and state practice is a problem within the European Convention system. A too wide a gap can of course have effects on the credibility of the system and the early admittance of some of the countries of Central and Eastern Europe like Moldova might have contributed to a weakening of the trust in the system due to their problems of securing the rights and freedoms of the Convention. However, including these states in the system gives the individuals in these countries the right to bring cases of alleged violations to a supranational organ, the Court, which is vested with the mandate to hold states accountable for their human rights violations though legally binding decisions. This important role of the Court is also the main safeguard to prevent the rights and freedoms of the Convention from turning into merely ideals and goals. It can even be argued that by the ratification of the Convention by almost all European states what used to be merely ideals and goals in some countries now truly have become legally binding rights and freedoms.


#### Chapter 14: The ensuring of the rights of detainees

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<tr>
<th>No.</th>
<th>Objective</th>
<th>Action</th>
<th>Period</th>
<th>Executors</th>
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| 1   | Ensure adequate detention conditions for detainees, according to the provisions of the minimal detention standards | a). Ensure adequate detention conditions for prisoners and persons under investigation, in conformity with the Minimal Detention Standards  
b). Carry out sanitary and hygienic measures, modernize the heating, lighting, conditioning, sewerage and canalization systems | 2004 – 2008 | MJ, Department of Penitentiary Institutions (DPI), MH | NGOs | MF, SB, extrabudgetary funds, donations |
| 2   | Reduce the overpopulation of the penal investigation detention facilities, preventive arrest facilities and penitentiary institutions | a). Liberalize penalties  
b). Build a facility for the detention of persons under investigation in Chisinau  
c). Finish the building of the facility for the detention of persons under investigation in Balti  
d). Renovate the building for detention at prison 17 in Rezina  
| 3   | Improve the conditions for the treatment of the detainees suffering from tuberculosis and other diseases at penitentiary institutions | a). Ensure the obligatory state medical insurance of the detainees  
b). Improve the epidemiological situation related to tuberculosis at prisons by implementing the DOTS and DOTS„+” strategies  
c). Undertake measures to prevent the contamination of the staff and prisoners with tuberculosis  
d). Finish the building of the tuberculosis clinic in Rezina | 2004 – 2008 | MJ, DPI | EAs, NGOs | SB, donations |
<p>| 4   | Improve the system of detainee | a). Set up the production system within the penitentiary system | 2004 – 2007 | MJ, DPI, EAs | MLSP, MI | SB, donations |</p>
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<td>employment</td>
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<td>b). Ensure the placement of state orders at penitentiary institutions</td>
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<td>c). Support employment schemes for the vocational training of prisoners</td>
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<td>5</td>
<td>Increase the security of detainees and staff</td>
<td>a). Re-build partially the facilities to allow for cell detention: prison No. 6, Soroca; prison No. 4, Cricova; prison No. 15, Taraclia; prison No. 9, Pruncul</td>
<td>2004 - 2008</td>
<td>MJ, DPI</td>
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<td>6</td>
<td>Ensure the social reintegration of detainees</td>
<td>a). Employ a sufficient number of social assistants and psychologists at prisons</td>
<td>2004</td>
<td>MJ, DPI, MLSP</td>
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<td>b). Ensure the right to education of the detainees by setting up secondary schools at penitentiary institutions</td>
<td>2004</td>
<td>MEd</td>
<td>LPA budgets, donations</td>
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<td>c). Ensure the right to information by setting up radio networks at penitentiary institutions, providing newspapers and magazines for prison libraries</td>
<td>2004 - 2005</td>
<td>MJ, DPI</td>
<td>NGOs</td>
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<td></td>
<td>d). Set up a common efficient system for the social adjustment of former prisoners (including the establishment of social adjustment centers for former detainees)</td>
<td>2004</td>
<td>MJ, DPI, MLSP</td>
<td>NGOs, religious societies, territorial employment agencies, LPA</td>
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<td>7</td>
<td>Increase the responsibility and qualifications of the DPI staff</td>
<td>a). Carry out human rights training for the staff of the Department of Penitentiary Institutions</td>
<td>2004 - 2007</td>
<td>MJ, DPI</td>
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<td>8</td>
<td>Ensure special rights for female and infant detainees</td>
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<tr>
<td>a). Set up hygienic care rooms for female prisoners at penal investigation detention facilities and at prison No. 7 in Rusca</td>
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<td>b). Ensure adequate conditions for the physical development and good health of infant detainees</td>
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<td>c). Provide education to girls at Rusca Prison</td>
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<td>d). Provide distance learning opportunities for infant prisoners who want to continue education or get vocational training in fields not covered at the penitentiary institution</td>
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<td>e). Train and employ social assistants at the penitentiary institutions for infant prisoners</td>
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<td>f). Make a complaint system available to infant prisoners</td>
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<td>g). Encourage the involvement of the civil society in the activities at penitentiary institutions</td>
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2004 - 2005
MJ, DPI
NGOs
SB, donations
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