The European Court of Human Rights and the Protection of Prisoners' Rights

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The origins of European protection for human rights date back to the diplomatic aftermath of the Second World War when there was an attempt to strengthen democratic gains and promote individual freedoms. This protection principally took the form of the creation of the Council of Europe, which transformed the approach to supranational protection of human rights. The Statute of the Council of Europe was adopted in London on May 5, 1949. The founding member states' objective was to support their commitment to respecting human rights and fundamental freedoms. Emphasis was placed on "the principles of the rule of law and of the enjoyment by all persons within its [each member state's] jurisdiction of human rights and fundamental freedoms."

The intention behind the European Convention for the Protection of Human Rights of November 4, 1950, was to expand the statutory foundations of the Council of Europe (which comprises 47 member states today). It entered into force on September 3, 1953. Interpretation of this convention was entrusted to the European Court of Human Rights (ECtHR). In 1998, this court became permanent. It offers a right of individual petition to >800 million Europeans.

However, European human rights law is not limited to the single shield provided by the ECtHR. On February 1, 1989, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force. The Committee for the Prevention of Torture (CPT) was given the responsibility of turning the spirit of the convention into practical action. It is different from the ECtHR in that it lacks jurisdictional authority. It should be viewed as a mechanism for preventing mistreatment. It cannot be likened to a judicial body in any respect.[1]

In addition, the Council of Europe's policy on prison matters is expressed through a set of recommendations. The most important of these are undoubtedly the European Prison Rules. On January 11, 2006, the Committee of Ministers of the Council of Europe revised the European Prison Rules. These dated back to

1 V.J. Murdoch. 2006, *The Treatment of Prisoners: European Standards*, Strasbourg: Council of Europe Publications.

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1987 and had their origin in the Standard Minimum Rules for the Treatment of Prisoners from 1973. These rules are the only European text of general scope on prisons. Their general objective is "to embrace the needs and aspirations of prison administrations, prisoners, and prison personnel in a coherent approach to management and treatment that is positive, realistic, and contemporary."[2] As Council of Europe recommendations, they are not binding in any way and are considered a "soft law" text.[3] But the fact remains that they are part of a European aspiration that includes the jurisprudence of the ECtHR and the work of the CPT, which are supplemented by reports from the European commissioner for human rights.

That this a priori nonbinding force is quite relative should not mask another reality: the importance of national law complying with these rules. For several years, the ECtHR has referred in its judgments to the standards laid down by the CPT, which, in turn, gives them certain significance. This observation extends to the European Prison Rules. Since these were revised, the Court has developed jurisprudence that integrates them.[4] It should be noted that, unlike previous versions, these rules will not suffer the ravages of time, as rule 108 provides that "the European Prison Rules shall be updated regularly."[5]The approach of the court's jurisprudence is therefore a comprehensive one. Today, this protective aspiration covers prisoners' substantive rights (I) at the same time supporting their procedural rights (II).

I—PROTECTION OF PRISONERS' SUBSTANTIVE RIGHTS

The protection of prisoners' substantive rights has progressed through the numerous decisions handed down in recent years by the ECtHR, which now encompass many aspects of daily prison life.[6]

2 Commentary on recommendation Rec. 2006, 2 of the Committee of Ministers to member states on the European Prison Rules.

3 J.P. Céré. 2006, "Les Nouvelles Règles Pénitentiaireseuropéennes. Un pas décisif versuneapprocheglobale des droits des détenus," *Revue Pénitentiaire et de droitpénal,* 415.

4 ECtHR. June 12, 2007, *Frerot v France*, JCP 2007, I, 106, chron. F. Sudre; *AJ Pénal*2007, p. 336, obs. M. Herzog-Evans; D. 2007, p. 1016, obs. J.P. Céré; D. 2007, p. 2637, obs. T. Garé; ECtHR May 20, 2008,*Gülmez v Turkey*, app. no. 16330/02.

5 V.P. Darbeda. 2006, "Le Renouveau des Règles Pénitentiaires Européennes," *Revue Pénitentiaire et de droitpénal* 655; J.P. Céré, "Les Nouvellesrèglespénitentiaireseuropéennes. Un pas décisifversune protection globale des droits des détenus," *Revue Pénitentiaire et de droitpénal* 2006: 415; A. Beziz-Ayache, "Les Nouvelles Règles Pénitentiaires Européennes," *AJ Pénal* (2006): 400; P. Poncela, "L'Harmonisation des Normes Pénitentiaires Européennes," *Revue de Science Criminelle* (2007): 126.

6 See in particular F. Tulkens. 2001 "Les Droits de l'homme en détention," *Revue de Science Criminelle* 881; J. Pradel, "La Politique Européenne en Matière Pénitentiaire," in *Politiques Pénitentiaires et Droits des Détenus*, ed. P. Tak, and M. Jendly, (Nijmegen: Wolf Legal Publishers, 2008), 63.

A. Protection of the Right to Life

Article 2 (1) of the European Convention on Human Rights provides that "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally." This article protects the right to life, which appears as the first of the rights protected by the convention. This protection rests on a twofold obligation placed on states, whose responsibility may be engaged because of the death of a person placed under the control of a public authority.

Under this article, a twofold general obligation is imposed on states: to ensure the right to life through penal legislation that deters attacks on persons and to take measures to prevent the occurrence of a certain and immediate risk to life. The obligation appears more clearly still in the court's jurisprudence.[7]

States must therefore make sure that a person does not lose his or her life, including in the event of death by violence between inmates.[8] An instance of negligence on the part of the authorities is not enough to lead to a breach of Article 2. An imminent danger to the life of the person must be known and foreseeable. And even in this case, the obligation cannot be disproportionate or impossible to achieve.

The court has stated on several occasions that in relation to prisons, Article 2 is not only limited to abstaining from acting and intentionally killing but also entails a positive obligation to take the necessary steps to safeguard this right. However, true to its general jurisprudence, the observation of a simple instance of negligence may not bring about a violation of Article 2.

For example, a violation of Article 2 was not found by the court in the case of the suicide of an inmate identified as having suicidal tendencies, because the authorities had made "a reasonable response" to the situation: daily medical visits and monitoring of the cell every 15 min by the prison guards.[9] However, the jurisprudence can lead to a finding against the state in the event of duly established failings.[10]Furthermore, on the procedural side, it is necessary to point out that the state is obliged to initiate an efficient investigation to identify the causes of death. If this obligation is not met and is indeed the only failure found, then upon the death of an inmate, a breach of this article will be deemed to have taken place.[11]

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7 See J.F. Renucci, "Traité de Droit Européen des Droits de L'Homme," *LGDG*. 2007: 84 and after.

8 ECtHR January 25, 2011, *Lorga v Romania*, no. 26246.

9 ECtHR April 3, 2001, *Keenan v United Kingdom*, D. 2002, p. 118, obs. J.P. Céré.

10 ECtHR October 16, 2008, *Renolde v France*, app. no. 5608/65. The court observed that, unlike in *Kennan*, the claimant was suffering from acute psychotic disorders, daily monitoring of his treatment was defective (he had not taken his medication 2 to 3 days prior to his suicide), and he was subjected to the most severe disciplinary measure (45 days' solitary confinement), even though a disciplinary investigation highlighted the prisoner's "very disturbed" state. See also ECtHR February 4, 2016, *Isenc v France*, app. no. 58828 (prisoner who committed suicide at the beginning of his incarceration when he had not been given a medical appointment).

11 For example, ECtHR December 9, 2014, *Mc Donnell v United Kingdom*, app. no. 19563/11 (inquest

B. Protection against Acts of Torture and Inhuman and Degrading Treatment

1. Specific Protection for Prisoners

It would be difficult for all acts committed on people to enter into the scope of Article 3, which prohibits acts of torture and inhuman and degrading treatment. There would be a risk of trivializing this article and, consequently, weakening it. In a decision that can be seen as providing a principle, the court arrived at criteria with regard to intensity of suffering, whereby not all forms of brutality may enter the field of protection covered by Article 3. "Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3."[12] To amount to a breach of Article 3, mistreatment needs to exceed a threshold beyond which an act is considered as torture or inhuman or degrading treatment. The court has found, for example, that simply "unpleasant" treatment[13] or extradition to the United States and detention in a "supermax" prison, in which the complainants were facing life imprisonment,[14] fell short of the required threshold, whereas the "death row phenomenon" went beyond the set limit and engaged Article 3.[15]

Because the situation of persons deprived of their liberty is highly particular, the court began to deploy a more pragmatic jurisprudence during the first decade of the twenty-first century.

First of all, with regard to evidence of abuse, the court brought in the particularly vulnerable condition of persons deprived of their liberty and decided that the burden is on the respondent government to disprove allegations of mistreatment during detention.[16] If the individual is in good health "but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."

Moreover, at all the times when a violation of Article 3 seems plausible, the respondent state is obliged to carry out an official investigation in order to identify and punish those responsible for the mistreatment. This obligation amounts to offering the alleged victim an "effective remedy" within the meaning of Article 13 of the convention. In addition, the burden of proof of mistreatment falls on the

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opened 7 years after the death).

12 ECtHR January 18, 1978, *Ireland v United Kingdom* at 162, series A, no. 25.

13 Temporary detention of an individual in a rundown building located on an isolated island that was one hour by boat from Sardinia; ECtHR November 6, 1980, *Guzzardi v Italy* at 107, series A, no. 39.

14 ECtHR April 10, 2012, *Babar Ahmad and Others v United Kingdom*, app. nos. 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09.

15 The court considered that the length of average detention on death row (6 to 8 years) required the prisoner to live in anguish and in the "ever-present shadow of death"; ECtHR, July 7, 1989, *Soering v United Kingdom* at 106 and 111; RGID Publ. 1990, p. 103, note F. Sudre; Rev. sc. crim. 1989, p. 786, obs. L.E. Pettiti; AFD int. 1991, p. 583, obs. V. Coussirat-Coustère.

16 ECtHR September 22, 1993, *Klaas v Germany*, app. no. 15473/89.

state. There is a requirement to explain the cause of the victim's injuries or wounds. The victim does not have to demonstrate the existence of a link between his or her injuries and the conditions in which he or she was held.

This jurisprudence, having emerged initially in relation to acts committed in police custody, can incontestably be invoked with regard to prison.[17] It is accepted that the ECtHR strongly protects the rights of persons deprived of their liberty against any form of mistreatment, it being understood that the concept of mistreatment has been interpreted by the court in an evolving manner and in the direction of a progressive elevation of its protection standards.[18]

Finally, it should be noted that a state may be found guilty of mistreatment that was not carried out by the authorities themselves but by a third party, namely a fellow inmate. The court compels the public authorities to take all preventive measures necessary to protect the physical integrity and health of persons deprived of their liberty, though without imposing excessive requirements.[19]

2. The Implementation of Prisoner Protection

a) Protection against Mistreatment

1) Solitary confinement of prisoners. Solitary confinement must have several effects to lead to a breach of Article 3. According to a longstanding and constant jurisprudence, the court considers that such a measure should not "lead to absolute social and sensory isolation that may cause personality disintegration and constitute a form of treatment that cannot be justified by the requirements of security, the prohibition of torture, or inhuman treatment enshrined in Article 3 being absolute." It is also considered that isolation should be assessed in relation to its rigor, its duration, its objective, and its effects on the person concerned.[20] The application of these criteria rarely leads the court to making a conviction, because isolation is rarely total[21] and a very long period of isolation does not, on its own, surpass the threshold of seriousness required. So, in the absence of any effects on the individual, a terrorist's solitary confinement for 8 years cannot amount to

17 ECtHR April 6, 2000, *Labita v Italy*: prisoner beatings; body searches in the shower; races on slippery ground with prisoners who fell receiving baton blows; transfers to a ship's hold without water, light, or food. See also ECtHR October 10, 2000, *Satik v Turkey*.

18 ECtHR July 24, 2008, *Vladimir Romanov v Russia*, app. no. 41461/02 (finding of torture after guards hit a prisoner with rubber batons in order to force him to leave his cell. The blows continued outside the cell and the inmate had to undergo surgery after sustaining a ruptured spleen). Additionally, ECtHR May 15, 2008, *Dedovski v Russia*, app. no. 7179/03.

19 ECtHR June 3, 2003, *Pantea v. Romania*, app. no. 33343/96 (bruising, fracture of the nasal pyramid and a rib inflicted by a fellow prisoner; the victim had been placed in a cell of dangerous prisoners and after the incident had been left immobilized by the guards, in the same cell as his attackers).

20 For example, ECtHR December 8, 1999, *Messina v Italy*, app. no. 25498/94.

21 ECtHR May 25, 2000, *Legret v France*, app. no. 425553/98, D. 2002, p. 118, obs. J.P. Céré.

inhuman and degrading treatment.[22] However, in the absence of special precautions, a state can be found to have committed a violation if solitary confinement affects a prisoner's mental or physical health, including if he or she is considered a danger to others[23] or if isolation is based solely on a general legal obligation without an evaluation of the prisoner's personal circumstances.[24]

2) Disciplinary sanctions. It is accepted that in prison, as in any other institution, disciplinary sanctions applied to an individual who fails to comply with the lawful orders of prison personnel do not, in principle, surpass the threshold beyond which Article 3 applies. This is obviously not a fortiori the case of outdated punishments such as forcibly shaving a prisoner's head. The court treats such a sanction as degrading treatment because it "contained in itself an arbitrary punitive element and was therefore likely to appear ... to be aimed at debasing and/or subduing him."[25] A violation of Article 3 will also be found when the disciplinary sanction is considered to be unsuitable for the prisoner's personality and state of health.[26]

3) Searches. The principle of body searches in detention, including invasive ones, does not in itself constitute a violation of Article 3 of the convention. The court considers that such searches may be necessary for security—including that of the inmate—and it has revealed itself to be particularly strict when it comes to prisoners placed in the so-called high-security units. It is necessary for the parties concerned to establish proof that these searches do not respect certain procedures that overcome the level of suffering and humiliation inherent in this practice.[27] Nevertheless, a breach arises when searches are not based on a credible security imperative and are applied variably depending on the institution.[28]

4) The right to health. There are multiple requirements with regard to the

22 ECtHR January 27, 2005, *Ramirez Sanchez v France*, AJDA 2005, p. 1388, note D. Costa; D. 2005, p. 1272, note J.P. Céré.

23 ECtHR September 29, 2005, *Mathew v Netherlands*, app. no. 24919/03.

24 ECtHR March 6, 2014, *Gorbulya v Russia*, app. no. 31535/09 (solitary confinement for almost 2 years).

25 ECtHR December 11, 2003, *Yankov v Bulgaria*, app. no. 39084/97.

26 ECtHR October 16, 2008, *Renolde v France* (placement of a prisoner with psychiatric problems in a punishment cell) D. 2009, p. 1382, note J.P. Céré; Rev. sc. crim. 2009, p. 173, obs. J.P. Marguenaud. See also ECtHR January 20, 2011, *Payet v France*, D. 2011, p. 643, note J.P. Céré; AJ pénal 2011, p. 88, obs. M. Herzog-Evans.

27 ECtHR March 4, 2008, *Cavallo v Italy*, app. no. 9786/03; ECtHR March 27, 2008, *Guidiv Italy,* app. no. 28320/02: finding of nonviolation of Article 3 for repeated searches over ten (*Cavallo*) and 17 years *(Guidi*).

28 ECtHR June 12 2007, *Frerot v France*, JCP 2007, I, 106, chron. F. Sudre. The court found an arbitrary measure that, combined with a situation of inferiority (in this case, the "obligation to get undressed in front of others and to submit to a visual anal inspection") implied a "degree of humiliation going beyond that which anybody search inevitably produces" (at 47). The court concluded in this case that these searches constituted degrading treatment. See also ECtHR January 20, 2011, *El Schennawy v France*, app. no. 51246/08.

protection of prisoners' right to health. A twofold condition is traditionally imposed on the prison authorities. Subject to clarification that there is no general obligation to release a prisoner for health reasons, the prison administration must provide care appropriate to the state of health of inmates within the prison. This should result in the organization of medical monitoring and provision of the care necessitated by a prisoner's illness.[29]

Evidently, the constraints imposed on the prison administration are simply a reflection of the general obligations deriving from Article 3. In this regard, the prisoner's own attitude does not play a neutral role. In the case that an inmate refuses treatment, the state will not be found to have committed a breach, unless such a refusal was ordered by the prison or police authorities.[30] It will be the police or prison administration's responsibility to ensure that the prisoner is sent to a hospital if it is unable to provide appropriate care. When this twofold condition is met, the provisions of Article 3 have been considered to have been respected, even in cases of elderly parties.[31] Beyond these obligations, since *Mouisel* the court has required "specific measures" to be taken. These can take the form in particular of "transferring him to any other institution where he could be monitored and kept under supervision, particularly at night." The inmate must also have a right to a remedy that allows him or her to challenge any possible failures on the part of the authorities in safeguarding his or her right to health.[32]

The increasing degree of protection of prisoners' rights by the European Court has been solidified by the extension of its jurisprudence to the more specific case of prisoners with psychiatric disorders or disabilities. An inmate with a psychiatric condition may claim a breach of Article 3, even in the presence of regular medical monitoring.[33] In *Renolde*, which has already been discussed from the perspective of the right to life, the court also found that France had violated Article 3 on the ground that a sentence of 47 days in a punishment cell "is not compatible with the standard of treatment required in respect of a mentally ill person" and that this punishment therefore, in this particular case, "constitutes inhuman and

29 For example, ECtHR June 12, 2008, *Kotsafis v Greece,* app. no. 39780/06 (finding of inhuman and degrading treatment due to a lack in particular of a suitable diet and pharmaceutical treatment for an inmate suffering from cirrhosis resulting from hepatitis B; he was also placed in a cell where he had only 2.4 square meters of personal space); ECtHR April 2008, *Petreav Romania,* app. no. 4792/03 (finding of inhumane and degrading treatment because of the lack of medical treatment from a doctor from outside the prison for an inmate suffering from venous insufficiency and mental-health problems; he was confined to a dormitory with 53 other prisoners).

30 ECtHR November 14, 2002, *Mouisel v France*, RTDH 2003, p. 999, note J.P. Céré.

31 ECtHR June 7, 2001, *Papon v France*, D. 2001, p. 2335, note J.P. Céré.

32 ECtHR, *Mouisel v France*, RTDH 2003, note previously cited.

33 ECtHR July 11, 2006, *Rivière v France*, RDTH 2007, p. 261, note J.P. Céré (inhuman and degrading treatment found in an illness that appeared during detention; medical advice stated that continuing imprisonment might put the prisoner's life in danger owing to a definite risk of suicide); see also ECtHR December 18, 2007, *Dybekuv Albania*, app. no. 41153/06.

degrading treatment and punishment."[34] With regard to disabilities, the imprisonment of a person with a disability in a facility where he or she could not move around and leave his or her cell unaided has been regarded as degrading treatment under Article 3.[35]

The keeping of a nonsmoking prisoner in a cell occupied by fellow inmates who are smokers is an important issue, given the harmful effects of passive smoking. The court has been required to rule on this matter. On the basis of a right to health, the ECtHR considered that not complying with an asthma sufferer's request to be transferred to a cell with nonsmokers was a violation of Article 3.[36]

b) Extending Protection to Poor Conditions of Detention

Following an evolution of its jurisprudence, the ECtHR has brought the general conditions of detention within the protective scope of Article 3 of the convention.[37] The European Prison Rules and the CPT have always advocated that deprivation of liberty should take place in favorable material and moral conditions that ensure respect for human dignity. But it was not until *Kudla v Poland* that this principle was included in the court's jurisprudence.[38] Although in that case Article 3 had not been violated, this decision provided the court with an opportunity to state for the first time that completion of a prison sentence should not "subject [the prisoner] to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention" (at 94). This means that relief under Article 3 is now not limited only to physical acts of mistreatment. It also covers the objective conditions of life in prison. The right of any prisoner to imprisonment conditions that comply with human dignity has been established with regard to the prison.[39] In recent years, the court's jurisprudence has expanded and findings of violations have become more numerous where the prisoner's personal living space has been restricted to a collective cell[40] and when the conditions of hygiene have largely

34 ECtHR October 16, 2008, previously cited, at 129.

35 ECtHR October 24, 2006, AJ Pénal 2006, p. 500, note J.P. Céré; see also ECtHR June 10, 2008, *Scoppola v Italy*, app. no. 50550/06 (violation found for not having immediately transferred a prisoner in a wheelchair to a suitable structure or having suspended the prisoner's deprivation of liberty).

36 ECtHR September 13, 2005, *Ostrovar v Moldova*, AJP 2005, p. 421, obs. J.P. Céré.

37 B. Ecochard, "L'Émergence d'un Droit à des Conditions de détentiondécentegarantieparl' Article 3 de la Convention Européenne des Droits de L'homme," *RFDA* (2003): 99.

38 ECtHR grand chamber, October 26, 2000, app. no. 30210/96.

39 ECtHR April 19, 2001, *Peers v Greece*, app. no. 28524/95.

40 For example, ECtHR October 25, *Yakovenko v Ukraine,* app. no. *15825/06*, at 83(1.5 square meters); ECtHR February 14, 2008, *Dorokhov v Russia*, app. no. 66802/01, at 57 (2 square meters); ECtHR March 27, 2008, *Sukhovoy v Russia*, app. no. 63955/00, at 28 (1.28–2.45 square meters); ECtHR March 27, 2008, *Korobov and Others v Russia*, app. no. 67086/01, at 23 (2.2 square meters).

been deficient.[41] Nevertheless, it should be noted that the court may temper its jurisprudence if the conditions of life in a cell are combined with adequate freedom of movement during the day.[42]

The court has turned to the recommendations made by the CPT during a tour of the facility in which the applicant was incarcerated. This assimilation of standards created by the CPT has evolved over time. There have now been countless findings of violations based on the work of the committee.[43]

The protection of Article 3 in relation to detention conditions occurs independently of any intention to humiliate the inmate. A finding of deficient living conditions is enough to produce a breach of Article 3. This principally comes about in cases of chronic overpopulation and lapses with regard to respect for hygiene rules.[44] With regard to the courts' decisions, it is possible to specify that protection extends to all places of detention. So, for example, it was held that Article 3 could be invoked by inmates held in a high-security unit[45] or on a death row.[46] With respect to the duration of the poor material conditions of detention, a few weeks may be sufficient to produce a breach of Article 3.[47]

Faced with an increasing number of applications from countries affected by prison overcrowding, the court has more recently been led to use the pilot judgment procedure, which can be applied in the event of structural or systemic problems—i.e., when a growing number of people are affected and applications could give rise to many findings of breaches. Under this procedure, the court may instruct states to undertake a certain number of provisions or specific actions to address overcrowding, generally in the form of providing effective domestic remedies (both preventive and compensatory ones). Several countries were affected by a pilot judgment related to prison overcrowding.[48] For example, the court

41 ECtHR March 7, 2008, *Kostadinov v Bulgaria*, app. no. 55712/00 (inadequate hygiene, absence of natural light and air, presence of parasites and rodents); ECtHR, March 6, 2008, *Gavazov v Bulgaria*, app. no. 54659/00 (limited physical exercise, unhealthy food, no contact with the outside world).

42 This is not the case if it is one hour (*Dorokhov*, previously cited, at 57; *Korobov*, previously cited, at 24) or 2 hours (*Sukhovoy*, previously cited, at 29) of walking time per day accompanied by access to one shower per week (*Korobov*, at 24; *Sukhovoy*, at 29).

43 For example, ECtHR November 14, 2002, *Mouisel v France*, RTDH 2003, p. 999, note J.P. Céré.

44 For example, ECtHR July 15, 2002, *Kalachnikov v Russia*, Rec. 2002-VI; ECtHR September 13, 2005, *Ostrovar v Moldova*, AJP 2005. 421, obs. J.P. Céré.

45 ECtHR February 4, 2003, *Lorsé and Others v Netherlands* and ECtHR February 4, 2003, *Van der Ven v Netherlands*, JCP 2003. I. 160, no. 2, obs. F. Sudre; Rev. Sc. Crim. 2004. 441, obs. F. Massias.

46 ECtHR July 8, 2004, *Ilascu and Others v Moldova and Russia*, app. no. 48787/99.

47 For an individual in custody who was not sufficiently fed, slept on the ground without a pillow, sheets, or blankets, and had no chance to exercise outside a cell whose windows were obstructed by metal plates, see ECtHR October 4, 2005, *Becciev v Moldova*, app. no. 3456/05.

48 ECtHR March 10, 2015, *Varga and Others v Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13,and 64586/13; ECtHR January 27, 2015, *Neshkov and Others v Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12, and 9717/13 (time frame of eighteen months to remedy the problems identified); ECtHR January 8, 2013, *Torreggiani and Others v Italy*, no. 43517/09 (time

asked Italian authorities to set up within a period of 1 year a remedy or combination of remedies to guarantee compensation for convention breaches caused by overcrowding.[49]

C. Protection against Violations to Private and Family Life, the Home, and Correspondence.

Article 8 of the European Convention on Human Rights protects all individuals' private and family life. This protection also extends to the home and correspondence. The text of Article 8 is split into two paragraphs. Article 8 begins by asserting an inviolable right in relation to the state based on a traditional interpretation of human rights. It is a duty of abstention on the part of the state that in this case involves not entering the individual's private sphere. However, Article 8 (2) justifies restrictions placed on this right. Permissible interference takes the form of a constraint on the person. In other words, an obstacle to the exercise of a right has the nature of a form of interference. But for Article 8 not to be violated, the interference must comply with several conditions: being prescribed by law, pursuing a legitimate purpose, and being necessary in a democratic society.

1. The Applicability of Article 8 to Prisoners

As is the case for any citizen, a prisoner's private and family life as well as his or her correspondence is protected by Article 8 of the European Convention on Human Rights.[50] Protection of these rights can be subject to some mitigating factors, though only within the conditions laid down by Article 8 (2). This is not the case when the restrictions imposed on prisoners have as their source the prison's unpublished and nonaccessible[51] domestic instructions, or when the text in question gives the authorities too much latitude and simply identifies "the category of persons whose correspondence may be subject to control, and the competent jurisdiction does not take into account the duration of the measure or the reasons to justify it."[52] In any case, controls must pursue a legitimate aim, in this case the maintenance of order in prison, and they must be "necessary in a democratic society." It is hardly surprising that the court is scrupulous in verifying the condi-

frame of twelve months); ECtHR January 10, 2012, *Ananyev and Others v Russia*, nos. 42525/07 and 60800/08 (time frame of 12 months).

49 ECtHR January 8, 2013, *Torreggiani and Others v Italy*, no. 43517/09. For another use of a pilot judgment, see also ECtHR June 22, 2004, *Broniowski v Poland,* no. 31443/96; D. 2004, p. 2542, obs. C. Bîrsan.

50 ECtHR February 21, 1975, *Golder v United Kingdom*, series A, no. 18.

51 For example, ECtHR April 29, 2003, *Aliev v Ukraine*, app. no. 41220/98.

52 See other decisions concerning Italian law: ECtHR January 11, 2005, *Musumeci v Italy*, app. no. 33695/96.

tions under which restrictions on mail exchanges may be applied, on the understanding that confidentiality must prevail with respect to certain people or certain authorities.

Restrictions placed on prisoners' correspondence governed by domestic instructions that are unpublished and not accessible to the public[53] or by memoranda[54] cannot be considered to be "prescribed by law," and so Article 8 of the convention would be breached.

The European Court sees memoranda as "services instructions directed, under its hierarchical power, by an administrative authority superior to subordinate agents." As a result, these texts cannot correspond "to the exercise of a legislative power" or to a "law" within the meaning of Article 8.

2. The Application of Article 8 to Prisoners

With regard to correspondence, the court considers that the implementation of controls may not in itself breach the convention,[55] provided that paragraph 2 of Article 8 is respected. It is essential that there is a textual basis for interference with prisoners' correspondence and that it is sufficiently "accessible" and "foreseeable." This is not the case when the restrictions imposed on prisoners have as their source the prison's unpublished and nonaccessible[56] domestic instructions, or when the text in question gives the authorities too much latitude and simply identifies "the category of persons whose correspondence may be subject to control and the competent jurisdiction does not take into account the duration of the measure or the reasons to justify it."[57]

In any case, controls must pursue a legitimate aim, in this case the maintenance of order in prison, and they must be "necessary in a democratic society." It is hardly surprising that the court is scrupulous in verifying the conditions under which restrictions on mail exchanges may be applied on the understanding that confidentiality must prevail with respect to certain people or certain authorities. This is the case for correspondence between a prisoner and his or her lawyer. The prison authorities can only open such correspondence in the presence of the inmate and if there is plausible reason to believe that it contains an illicit element.[58]

53 ECtHR, April 24, 2003, *Poltoratskiy v Ukraine*, app. no. 38812/97; *Kuznetsov v Ukraine*, app. no. 39042/97; *Nazarenko v Ukraine*, app. no. 39483/98; *Dankevich v Ukraine*, app. no. 40679/98; *Aliev v Ukraine*, app. no. 41220/98; *Khokhlich v Ukraine*, app. no. 41707/98.

54 ECtHR June 12, 2007, *Frerot v France*, JCP 2007, I, 182, chron. F. Sudre.

55 ECtHR March 25, 1983, *Silver and Others v United Kingdom*, series A, no. 61.

56 For example, ECtHR April 29, 2003*, Aliev v Ukraine*, app. no. 41220/98.

57 See other decisions concerning Italian law: ECtHR January 11, 2005, *Musumeci v Italy*, app. no. 33695/96.

58 ECtHR March 25, 1992, *Campbell and Fell v United Kingdom*, series A, no. 233; ECtHR May 22, 2008, *Petrov v Bulgaria*, app. no. 15197/02 (mail can only be opened if there is suspicion that its content is illicit. It can only be opened in the prisoner's presence. Moreover, it can only be read in

There cannot therefore be systematic monitoring of the exchange of correspondence between a prisoner and his or her lawyer.

The same solution is required for correspondence with the European institutions, even if a one-off accidental opening is not likely to lead to a violation of Article 8 (opening 1 letter out of 40 between a prisoner and the court).[59]

Similar to the protection of Article 8 relating to correspondence, links between the prisoner and his or her counsel are particularly subject to safeguarding. There can be no question of preventing an interview without witnesses, even though security reasons are nevertheless likely to justify occasional restrictions on lawyer–inmate relations. For example, the presence of glass separating a dangerous inmate from his or her lawyer does not necessarily constitute a violation of Article 8 because it does not prevent the conducting of an effective defense.[60]

And such conditions are certainly acceptable during visits by the prisoner's family in particular cases. This was considered to be the case for imprisoned Mafia members for whom the number of monthly visits was limited,[61] or for restrictions imposed for >8 years from the moment when an inmate's dangerousness was taken into consideration in every decision on extending restrictions.[62]

However, since the twenty-first century began, the principle of prisoners' right to respect for private and family life has explicitly been the subject of ECtHR inquiry for the first time, and prison authorities are required to provide assistance to inmates to maintain effective contacts with their family members. Furthermore, the ECtHR is increasingly vigilant with regard to the effects of restrictions imposed on prisoners, at least when they are not considered dangerous. An accumulation of disciplinary sanctions resulting in a prisoner's being deprived of family visits for 1 year constitutes interference in the prisoner's private life,[63] as do restrictions on visits by members of the family that do not have a domestic legal basis.[64]

II —PROTECTION OF PRISONERS' PROCEDURAL RIGHTS

The confinement of individuals generates serious difficulties when it comes to the assertion of their rights as individuals involved in legal proceedings. However, it is now largely accepted that an inmate remains a citizen, notwithstanding his or her loss of liberty. The ECtHR's interpretation plays an

exceptional circumstances, when the authorities reasonably suspect an abuse of secrecy).

59 ECtHR October 3, 2000, *Touroude v France*, app. no. 35502/97.

60 ECtHR October 4, 2005, *Sarban v Moldova*, app. no. 3456/05.

61 ECtHR September 28, 2000, *Messina v Italy*, JCP 2001. I. 291, obs. F. Sudre; ECtHR June 28, 2005, *Gallico v Italy*, app. no. 53723/00.

62 ECtHR January 15, 2008, *Bagarella v Italy,* app. no. 15625/04.

63 ECtHR May 20, 2008, *Gülmez v Turkey*, app. no. 16330/02,at 50.

64 ECtHR June 5, 2014, *Tereshchenko v Russia*, app. no. 33761/05.

essential role in the strengthening of prisoners' rights, and particularly the right to a fair trial and the assurance of a right of action.

A. The Right to a Fair Trial

1. General Conditions for the Application of Article 6

A "criminal charge" that gives rise to protection from Article 6 of the European Convention on Human Rights is a concept that is independently interpreted by the court. It does not depend on the classification used by the domestic law.[65] To find out if behavior punished by a state falls within the scope of the concept of a criminal charge, the court takes three criteria into consideration.

The first criterion relates to the legal technique used in the respondent State. First of all, the court examines the whole of the state's legal system to establish if the national texts shall identify the offense within the field of criminal law—e.g., the punishment may be described by the domestic law as having a disciplinary nature. The court will examine if the text or texts that define the offense that the individual has been charged with, according to the legal technique of the respondent state, belong to criminal law, disciplinary law, or both at once.

The court then examines the application of the proceedings described as being of a disciplinary nature to determine whether sanctions can be considered criminal within the meaning of Article 6 of the convention. If the proceedings referred to have similarities with ones from criminal law, there will be doubt over whether the respondent state is not seeking to hide criminal proceedings under disciplinary law. If the similarities are too strong between criminal law and what is described as disciplinary law, "the question of the applicability of the guarantees of a fair trial can be raised."

In any event, the so-called criteria for the respondent state's legal technique is examined first, though "it is only a starting point that has a relative value," whereas analysis of the other criteria is of a more decisive nature.

The second criterion relates to the nature of the offense. Article 6 protection is engaged in accordance with the nature of the questionable act or behavior. To reach a decision, the court will certainly use evidence provided by the member state, but it may also evaluate solutions adopted in other countries. The nature of the offense is still assessed by reference to the population targeted by the incrimination. Whether it is aimed at members of a particular group (e.g., military personnel, prisoners, members of a profession) or at the population as a whole may distinguish disciplinary law from criminal law.

The third criterion depends on the purpose and the degree of severity of the penalty. A penalty may have different objectives. When it is only a question

65 V.J. Pradel, G. Cortens, and G. Vermeulen, *Droit Pénal Européen* (Paris: Dalloz, 2009), 378.

of repairing the disorder caused by the offense, the penalty will not be within the criminal field. This is not the case when it has both a preventive purpose and repressive one—i.e., when it has a deterrent effect intended to avert a repeat infraction by the perpetrator of the offense or to prevent another person adopting a similar behavior.[66] The European institutions go about determining the nature of the sanction by considering both the applicable penalty and the one actually handed down. The court sometimes even incorporates into its analysis elements stemming from the punishment applied (a proportion or all of the penalties served).

2. The Application of Article 6 to Prisoners

Article 6 has applied for a long time. The court has had the opportunity to deliver judgment on several occasions that rules governing a fair trial should apply to parole (primarily in relation to Great Britain). For example, it was held that a competent minister cannot be likened to an "independent and impartial tribunal." Such an authority inevitably has ties to the executive, which for the court is one of the signs of a lack of impartiality.[67]

Article 6 may also be invoked for sentence reductions. In a case in 1984, a prisoner successfully argued before the European Court that a loss of reduced sentence as a disciplinary punishment was a criminal matter within the meaning of the convention. He was therefore able to claim a failure to comply with the requirements of a fair trial laid down in Article 6.[68] This jurisprudence has since been extended to smaller sentence reductions.[69] In a case where one prisoner received a punishment of 40 days and another was given seven additional days of detention, the court clearly stated that Article 6 should apply and therefore that parties should receive a fair trial within the meaning of this article.[70]

The applicability criterion for Article 6 and the right to a fair trial that follows is based on loss of sentence reduction leading to detention being prolonged beyond the foreseen term. It goes without saying that the body for disciplinary judgment cannot be regarded as independent and impartial when all stages of

66 ECtHR February 21, 1984, *Oztürk v Federal Republic of Germany,* app. no. 22479/93.

67 For example, ECtHR December 16, 1999, *T. v United Kingdom* and *V. v United Kingdom*, app. nos. 24888/94 and 24724/94.

68 ECtHR June 28, 1984, *Campbell and Fell v United Kingdom,* series A, no. 80: the inmate had participated in a mutiny and wounded a guard with a broom handle. After being found guilty, he was sentenced by the disciplinary bodies to a loss of 450 and 120 days of sentence reduction, of 56 and 36 days of privilege, exclusion from joint work, termination of earnings, and cell confinement (i.e., a loss of 570 days of sentence reduction and 91 days of privileges).

69 ECtHR grand chamber, October 9, 2003, *Ezeh and Connors v United Kingdom*, Dr. pén. juin 2004, p. 6 note E. Vergès; AJP 2004, p. 36, obs. J.P. Céré.

70 The Applicability of Article 6 was therefore Recognized; J.F. Renucci, "Droit Européen des Droits de L'Homme," *LGDJ* (2015): 397.

the procedure are based on a single member of prison staff.[71] Beyond the doubts that may persist with regard to respect for the rights of the defense in prison disciplinary proceedings, an inconsistency with the requirements of Article 6 of the European Convention on Human Rights must be acknowledged.[72]

B. The Right to a Real and Effective Remedy

Article 13 of the European Convention on Human Rights protects all individuals against the breaches of the rights and freedoms recognized in the convention by imposing an effective remedy before a national authority, even if such a breach was committed by persons acting in the exercise of their official duties. This article clearly covers prisoners.

However, to begin with, the protection of Article 13 only came into play if the applicant was able to demonstrate a breach of another convention article. The court then made Article 13 more autonomous by accepting cases of breaches of the convention established on the basis of noncompliance with Article 13 alone. In the process, recent jurisprudence has contributed to making this article autonomous and invocable without the support of another convention article.

Accordingly, an inmate was able to make a successful case against France based on the fact that before 2003, placement in solitary confinement was not subject to a review by a court, even though the court did not find a violation of Article 3, as the applicant argued.[73] The main purpose of Article 13 is to remedy the source of a convention breach. A state must have its own domestic review mechanism, and the remedy must be an effective one in order to allow the individual to challenge the alleged violation specifically.

In terms of disciplinary sanctions, ECtHR judges have proven to be particularly vigilant. An absence of the possibility of a speedy challenge is likely to breach Article 13. This was the case with regard to a prisoner who committed suicide in a punishment cell when the relevant domestic law allowed a disciplinary sanction to be challenged in <6 weeks on average.[74] Moreover, the court considered that to be described as a "real and effective" remedy, it must necessarily be exercised before "a judicial body."[75]

This noticeable strengthening of prisoners' right to a remedy reflects a strong general trend. The jurisprudence of the ECtHR s has become essential, and

71 ECtHR April 12, 2005, *Whitfield and Others v United Kingdom*, app. no. 46387/99.

72 See J.P. Céré, "L'Article 6 de la Convention Européenne des Droits de L'Homme et le Procès Disciplinaire en Prison," *JCP* (2001): I. 316; J.P. Céré, "Le Droit Disciplinaire Pénitentiaire entre Jurisprudence Interne et Européenne," *AJ Pénal* (2005): 393.

73 ECtHR January 27, 2005, *Ramirez Sanchez v France*, previously cited.

74 ECtHR April 3, 2001, *Keenan v United Kingdom*, D. 2002, p. 118, obs. J.P. Céré.

75 ECtHR January 20, 2011, *Payet v France*, previously cited; ECtHR November 3, 2011, *Cocaign v France*, no. 32010/07.

its influence enlightens national courts with increasing frequency to produce a better protection of prisoners' rights.