Convicts and Human Rights:

A Comparative Study on Prison Treatment in Europe and Canada

By

Adelina Diana Iftene

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ABSTRACT

Prisoners are among the most vulnerable categories of citizens in every country, due to the large amount of control the state has over them. Enforcing Human Rights Law is a challenge in all areas that it covers. However, ensuring human rights for those behind bars sometimes seems nearly impossible because of the isolation, the lack of interest of the outside world and mostly because of the sometimes conflicting goals that Correctional Law and Human Rights Law seem to have.

This is why this thesis focuses on the protection of convicts against torture and ill-treatment. The structure is that of a comparison between the regional protection granted to these people by the European Court of Human Rights and the local avenues granted in Canada, a country that does not benefit from a regional protection for its citizens. The purpose is to analyze how convicts can best fight abuses in a world where their inherent rights are increasingly ignored in the name of security. The parallel between a regional system and a national one will be developed by discussing and comparing the shared human rights framework provided by international instruments, the case law and the evolving principles for convicts’ protection in Europe and Canada, the abuses that take place in both regions under consideration and, finally, how these abuses are addressed and remediated by the authorities.

I conclude by pointing out the importance of developing a strong national correctional system that obeys Human Rights Law and that is permanently under the national courts’ jurisdiction. Nevertheless, based on this analysis, I believe it is crucial that there also be an external monitoring and juridical mechanism that can enforce human rights when the national
authorities deliberately or accidentally ignore them. It is hazardous to leave the protection of human rights, especially of those in an enclosed environment, to the state which sometimes has conflicting interests and which in most cases is the one that trespasses them.
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NOTE

The European Convention on Human Rights refers to “inhuman treatment,” while the Canadian Charter of Rights and Freedoms refers to “inhumane treatment,” even though the meaning of the phrase is the same. To comply with the language used in the official documents, throughout this thesis I have used “inhuman” when referring to situations in Europe and “inhumane” to describe those in Canada.
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LIST OF ABBREVIATIONS

Art - article

CAT – Commission against Torture (in footnotes stands as a short form for the Convention against Torture, when recited)

CE – Council of Europe

CCRA – Corrections and Conditional Release Act

Charter – Canadian Charter of Rights and Freedoms

CPT – Committee for Prevention of Torture

CSC – Correctional Service Canada

ECHR – European Court of Human Rights (in footnotes stands as a short form for the European Convention on Human Rights, when recited)

EU – European Union

HBV – Hepatitis B Virus

HCV – Hepatitis C Virus

HIV – Human Immunodeficiency Virus

HRC – Human Rights Committee

IERT – Institutional Emergency Response Team

ICCPR – International Covenant on Civil and Political Rights

NGO – Nongovernmental Organization

OPCAT – Optional Protocol to the Convention against Torture
**PNSP** – Prison Needle Syringe Program

**S** - section

**SCS** – Supreme Court of Canada

**TB** - Tuberculosis

**UDHR** – Universal Declaration on Human Rights

**UN** – United Nations
"A nation's greatness is measured by how it treats its weakest members." ~ Mahatma Ghandi

"Any society, any nation, is judged on the basis of how it treats its weakest members -- the last, the least, the littlest."

~Cardinal Roger Mahony, In a 1998 letter, Creating a Culture of Life
Chapter 1 Introduction

Since the dawn of time, torture has been one of the primary tools used by humanity to intimidate, punish, extract information and most of all, subjugate another human being and point out his inferiority. Torture has been part of all criminal systems, used and overused for hundreds of years as an institutional tool of state policies. With the evolution of civilization, mankind began to regard torture as degrading not only to the ones to whom is it applied but also to the ones who apply and condone it. The wars of the 20th century brought to light values that had been neglected by the international community up to that time. Societies had experienced firsthand the drama of abuse and violence while life and integrity gained a more important meaning in the new century.

International conventions and national documents promoting these new values and forbidding abuses against individuals increased in number and substance. With the numerous acts of the United Nations for human rights and against torture as a reference, every country and region developed its own legislation. This generally brought a more concrete protection to the universal values accepted as such by the international community. Thus, torture is rarely seen as a system of investigation or punishment in any developed part of the world today. However, that is not to say that it is not used any longer. Despite the common views regarding the pitfalls that violence and degrading treatment have, they are still used especially on vulnerable subjects, and in circumstances where the state control is high and external monitoring is limited. On the other hand, after 9/11 the state conduct once settled as a matter of normative consensus is again in
contention.¹ Justifications of safety are invoked for almost every abuse, and measures that involve torture or other degrading treatment are once again openly applied.

This thesis is meant to look into the problem of torture and unusual punishment or treatment as it is applied in places of confinement. This issue had been raised decades ago, with the European Court of Human Rights, and proved itself to be somewhat of a common problem in all 42 countries members of the Council of Europe. Since the Greek Cases and Ireland v. UK where the issue was still unframed, the discussion took a more focused direction in the European fora, and a more complex interpretation. This led to the conclusion that there is a new article, “3bis article,” hidden in the European Convention.² Due to the great diversity of the members of the Council of Europe the issue of coping with prisoners’ needs is still controversial decades after the issue had been settled by the European Court. New institutions have been created by the Council of Europe to help spread a uniform view on what fair and decent treatment is and what the means of fighting against cruel punishments could be. In this context, the European institutions, and especially the European Court, have proved themselves to be working at a level rarely seen before in an international context and of unseen value in upholding human rights standards at national levels. The capacity of the ECHR to enact compulsory decisions has definitely led to a unitary view in the application of all rights, in particular the civil and political ones which received extra attention. The court’s decisions reflect the changing attitudes of society regarding the treatment applied to incarcerated citizens. What was accepted two decades

²Frederic Sudre is of the opinion that the application of art 3 against torture and inhuman treatment and punishment in prisons has evolved so much and has so many rules of its own based on European case law that we could almost speak of an independent legal norm in this context. See Frederick Sudre, Droit international et européen des droits de l’homme, 5th ed (Paris: Presser Universitaires de France, 2006).
ago is no longer acceptable and the case law is always evolving.\textsuperscript{3} Arguably, art 3 with application to the prisoners is probably one of the most active areas of the convention. Nevertheless, torture and unusual punishment in prison is still a delicate topic today, especially in the context of “the war on terror.” Countries are reluctant to accept interventions in their criminal systems and still try to find reasons to deal with these types of problems according to their own rules (financial, infrastructure, safety etc.). Even the ECHR, known for its firm stance, has started to weaken from arguments related to terrorism. As well, despite its many strong points, the regional protection offered by the ECHR is a bureaucratic one, still in its early stages, still questioned by countries and still limited for the wide population - due to price, time and level of expertise needed.

This is why, considering the importance of the topic in the international community, this thesis analyzes the protection offered by the ECHR as a regional court, its strong points and pitfalls in comparison to the protection granted in the same matter by national authorities in a country that is not part of a regional convention, namely Canada. With a history in human rights protection, Canada reached its peak in 1982 with the Charter of Rights and Freedoms, an act build on the model of the European Convention on Human Rights, only to be applied in a national context. The Charter consolidated the fundamental principles of justice and it was said that it reflects the capacity to embrace new refinements along the interface between state power and the individual’s unencumbered sphere of activity as a member of the community.\textsuperscript{4} The influence the convention had on the charter was considered crucial, especially because of the

similarity between the legal, political and social systems in Canada and Western Europe. In a matter of two decades the Charter found its way into most areas of law, correctional law being no exception. Though there are other acts of major interest in the protection of prisoners’ rights, their effects will always be analyzed against the Charter, as the heart of all human rights protection. Thus, in both Europe and Canada, corrections are filtered through human rights norms. On the other hand, both are developed parts of the world which generally have the resources of assuring high standards for their citizens, whoever and wherever they may be. Last but not least, both the European and the Canadian systems are considered the most efficient in the world – one as a regional, the other as a national system. Nevertheless, the differences between the two types of protection are broad enough to make it worth a comparison and to assess the pluses, the minuses and what can be borrowed from one system by the other. The other western country uninvolved in regional mechanism, is the United States. None of the two countries has accepted the jurisdiction of the Inter-American Court of Human Rights. However, unlike the United States, Canada has a history of applying human rights to corrections. On the other hand, the United States is formed of 50 different states and the state systems differ. This aspect would make a comparison particularly difficult. Nevertheless, the reluctance of the US to be involved in the international community when it comes to human rights is well known, thus any kind of discussion regarding a regional involvement of rights’ protection is useless at this point. For all of these reasons, this thesis is comparing the Canadian national protection offered to prisoners to the European regional protection.

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Both art 3 of the Convention and s 12 of the Charter cover a wide variety of actions that can be counted as torture and inhumane treatment or punishment. However, this thesis will not cover aspects related to sentencing, but only to imprisonment. The focus will be on physical and mental abuse in detention centres, imprisonment conditions and health care, all of which can amount to cruel and unusual treatment or punishment, under certain circumstances.

These aspects are of particular interest and importance, especially given the evolution of concepts and the distinction made by courts and other institutions between torture, degrading treatment and cruel punishment. The standard adopted in the *Greek Cases* and *Ireland v. The United Kingdom* shows the relationship between the three elements. A special stigma is attached to torture as causing very serious and cruel suffering with the purpose of punishing or extracting information. On the other hand, while the inhuman treatment needs to reach a minimum of severity, it need not be deliberate or cause extreme pain. For degrading treatment, pain is less important, the defining feature being the element of humiliation or debasement. Whether physical abuse, prison conditions or health care in prison can fall into one or another of these categories is to be decided on a case to case basis by the Courts, using specific criteria. The issues to be analyzed within this thesis are specific criteria, the legal framework, the inclination of courts to find breaches of human rights in attitudes towards prisoners, grievance systems and remedies. The purpose of the analyses is to establish which elements of each system work best for a fair protection of prisoners’ rights within the standards established by the international community.

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The discussion will focus on different types of detention centres, for example: police custody, remand, deportation centres, depending on where the issues appeared in a leading case. The main focus, however, will be the penitentiaries as they are the places where the general prison population spend most of their time and issues arising from penitentiaries can, in particular, be very harmful to civil rights. The correctional systems in Europe can present many administrative differences and this is not the place where they will be discussed. It is why the European analyses will refer to detention centres in general. Canada on the other hand is divided into a provincial system and a federal one. References will be made to provincial prisons and jails when issues have occurred. However, the discussion will mostly revolve around the penitentiaries as well, which are under the federal administration of the Corrections Services Canada (CSC). None of the analyses will focus on treatment centres or psychiatric facilities as the European and Canadian systems differ drastically on this level.7

The research will explore the international normative context of the issue, the principles deriving from case law in both areas discussed, the avenues prisoners have to claim their rights and the remedies available in both systems. The second chapter is dedicated to the legal framework and it is meant to identify the international context common to both the European region and Canada. Further on, the specific documents and legislation are discussed, as a starting point of both differences and common points to the two regions under discussion. Both Canada and the ECHR have established its guiding principles in the area of corrections and human rights through case law. It is why the third chapter is dedicated to the judicial principles developed in time, by Courts. With this legal and judicial frame as a point of reference, the fourth chapter

7 In Europe, health in detention centres is in most cases under the supervision of the Ministry of Health, while in Canada is the responsibility of the Correction System.
reviews the most important reports and literature, in order to assess how compliant the Correctional Systems in European Countries and Canada are to the human rights principles. Since the conclusion of this chapter points out the numerous abuses that take place in both regions, chapter five focuses on the avenues that prisoners have to complain against violations of their rights and the remedies that can be granted to them. As this thesis is a comparison between the efficiency of a regional system and a national system that is not under regional supervision, this chapter points out the pitfalls, as well as the advantages of each procedural system. Based on the principles developed in Courts, how they are applied in detention centres and how redress can be obtained, the last chapter, the Conclusion, is meant to suggest improvement options for both systems, in this delicate area of human rights.

At the centre of the discussions two cases illustrate the main theme of the thesis – Dougoz and M(T) – as hallmarks of the problems existing in each system, as examples of solutions and starting points for a series of case laws and principles. That is not to say that they are leading cases or unique in anyway. They are extremely common cases, two of the many each system had. That is why I have chosen them – despite the drama and the horrific circumstances in both cases, they are not even emblematic….they are the stereotype of an ongoing issue in advanced legal systems.
Chapter 2 Legal Principles for the Protection of Convicts’ Rights

This chapter will highlight the legal background which requires Canada and the European countries to protect the integrity and dignity of people in custody. It will also demonstrate that, though both regions studied are united by the international documents which attempt to unify the approach applied to torture and cruel punishment, the legal and jurisprudential attitudes towards such violations are not always the same. Though similar up to a degree, the actions interpreted as torture or cruel punishment, and especially the limit from which an act becomes such a crime, differ, often depending upon social and legal experience and background.

Dougoz v Greece (2001)\(^8\)

Dougoz had committed a series of offences regarding national security in Syria. He immigrated to Greece immediately afterwards. He was arrested by Greek authorities for drug related offences, but released upon obtaining refugee status. Two years later he was again found guilty of theft and bearing arms, but released on licence. However, the Chief of Police ordered his expulsion from Greece in the name of the public interest. He was denied a new refugee status and expelled, at his request, to Macedonia. He soon returned illegally, however, to Greece. In 1995 he was again arrested on drug related offences. As he was granted a reprieve in Syria, the Court decided to expel him there and again released him on licence. Nevertheless, he remained in police detention pending his expulsion. The detention took place at Drapetsona Detention Centre, beginning 10\(^{th}\) July 1997.

\(^8\)Dougoz v Greece, No 40907/98 (6 March 2001). [Dougoz]
Dougoz described the centre as having twelve cells, in which at times, up to one hundred people were detained. His cell was often overcrowded, which prohibited the applicant from reading. The number of inmates would increase tenfold during the night depending on the number of detainees. There were no beds in the cells and the detainees had no mattresses, blankets or sheets. Some of the inmates had to sleep in the corridor. Moreover, the sanitary system was extremely dirty and insufficient since it was designed for far fewer people. There was rarely warm water and the cells were without fresh air or natural daylight. There was no yard in which the prisoners could exercise and no recreational activities were provided. The only place where they could walk was the corridor leading to the toilets.

The food was served on a “passable plate” twice a day, but fruits, vegetables or cheese were rarely given. The detainees were not allowed to receive any food from outside. Only family members were allowed to visit, so foreign detainees did not receive any visits. They did not have access to any medical personnel. Moreover, they were not allowed to avail themselves of the social services or the public prosecution. Though there were payphones, access to these services was limited. Cases of ill-treatment by the guards were also very common. In 1998, Dougoz was moved to the Alexandras Avenue Centre, where, according to him, the conditions were similar to the ones described above. He was expelled to Syria on the 3 Dec. 1998. The Greek Government denied every aspect of the complaint stated by the applicant.
The accused, a young offender, was held on the day of his trial in two cells on Jarvis Street in Toronto, Canada. The holding cells consisted of one small cell, 10 feet by 7 feet, and a larger cell, 10 feet by 10 feet. The cells were entirely bare, with concrete walls and floor, having just a wooden bench for three or four detainees. There was a washroom attached to the small cell, but it did not have a latch, cold water, soap, cup, toilet seat, paper towels or toilet papers. If the detainees wanted toilet paper they had to ask for it. There was no fresh air in the cells, as the window could not be opened. So generally, the hot, overcrowded cells were filled with a putrid smell.

If there was a female in custody she would be kept in the small cell, while all males would be held in the large cell. Usually, the large cell held eight or more detainees. Moreover, detainees of all ages were mixed together, regardless of the offence they had committed. The detainees had no access to any reading material. Only the lawyer was allowed to visit, while family, probation officer or children’s aid workers were excluded. The interview with the lawyer took place in the cell. All children, regardless of their age, were handcuffed when leaving the cells.

A psychologist testified that these conditions were terrifying especially for Young Offenders who felt devalued and humiliated by the treatment.

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9 R v M(T) (1991), 4 OR (3d) 203 (Ont Ct Prov Div). [M(T)]
The two cases, judged ten years from each other, are very similar, despite the age difference and circumstances. They focus mainly on detention conditions and how these can amount to cruel or unusual treatment and punishment. Before providing the solutions and the remedies given by the Courts, the legal context in which these and many other similar cases took place will be described. The presentation will begin with the international conventions, accepted as binding by Canada and by all the countries parties to the European Convention\textsuperscript{10} and Council of Europe. Afterwards, the conventions for the European countries which count as domestic law will be presented, ending with the constitutional and federal legislation in Canada.

\textit{a. International materials}

The following materials describe minimum standards of protection against torture and inhuman treatment. The protection is general so that most countries of the world are able to enforce at least these principles. The United Nations has worked on an increasing number of documents that focus on prisoners’ rights through the perspective of conserving physical and mental dignity. They have grown from very basic principles to more concrete standards for cell conditions, mandatory rules for training officers, and different requirements depending on the age and gender of the prisoners. Thus, we end up in 2010 with a series of materials the countries under consideration in this thesis have committed to and generally have implemented. However, these documents need to be completed with national or regional documents which can offer a concrete expression of their principles. The regional or national acts and conventions cannot contradict these conventions by setting a lower standard of protection. The countries are,

\textsuperscript{10}\textit{Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR].}
however, permitted to create laws or join conventions that offer better protection by setting a higher standard.

The Universal Declaration of Human Rights\textsuperscript{11} is a milestone for human rights. Though the principles are general, they constitute the basis of all thorough protection given in time and space to all rights. Article 5 of this document recognizes the individual’s right to be free from torture, cruel, inhuman or degrading treatment or punishment.

These principles were strengthened in 1957 by the “Standard Minimum Rules for the Treatment of Prisoners.”\textsuperscript{12} The signatory states must either implement them or provide higher standards. Though necessary, these conditions are mostly a frame which gives a lot of discretionary power to states. This act clearly delineates the prison conditions that must be attained by all parties. As the preliminary observations state, it is mostly a guide of good prison practice. However, as the following chapters will prove, a denial of these principles has begun to be seen as a form of “cruel and unusual treatment” in most countries. This act or higher standards (such as Minimum Standards set up by the Council of Europe for its parties) has proven to be an indispensable tool for Courts in defining what is considered cruel and unusual treatment. The document sets standards for all aspects of life in prison: registration, accommodation, food, health etc.

Thus, convicts must be separated depending on gender, age, whether they have been tried or not, and whether they are suitable to associate with each other. It is desirable to have

\textsuperscript{11} \textit{Universal Declaration of Human Rights,} GA Res 217 (III), UNCAOR, 3d Sess, Supp no 13, UN Doc A/810, (1948). [\textit{UDHR}]

\textsuperscript{12} \textit{Standard Minimum Rules for the Treatment of Prisoners,} ESC res 663 C (XXIV), 31 July 1957 [\textit{SMRs}].
individual cells or dorms provided so they are not overcrowded. Consideration also needs to be given to the cubic content of air, minimum floor space, lighting, heating and ventilation. Natural light and fresh air is required, even if there is ventilation. Artificial light should also be provided so that the prisoners may read or work. The sanitary facilities must be clean and decent, with access to showers or bathing, and other cleaning facilities. Each convict must have his own bed and bedding. Drinking water must be available at all times, while food must be properly served and prepared, and of sufficient nutritional value. At least one hour per day of outdoor exercise is required, while Young Offenders are to receive recreational training. Also, every institution must have at least one qualified doctor on staff to offer proper treatment for each convict and a psychiatrist to assist in cases of mental health issues. However, when special medical care is necessary, prisoners shall be transferred to special institutions or civil hospitals. It is specifically stated that “corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment for disciplinary offences” are forbidden. As well, the use of handcuffs, straitjackets, irons and chains as punishment is not allowed. Irons and chains are not acceptable even as restraints. Nevertheless, it is stated that each weekday, every convict must be provided with the opportunity to make complaints regarding the conditions and the treatment in prisons to the director of the institution or other appointed person, to the prison inspector during inspections, and to judicial authorities. These complaints must be promptly dealt with. There are also sets of rules regarding the educational, labor and social rights of the prisoners.
The same idea of art 5 of UDHR was reinforced in 1966 in the International Covenant on Civil and Political Rights\textsuperscript{13} using the same wording in article 7. Nevertheless, this article is completed in the same document by art 10 which is to be applied specifically to persons deprived of their liberty. Thus, it states that detainees “shall be treated with humanity and with respect for the inherent dignity of the human person.”\textsuperscript{14} The article continues, stating that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from the adults and be accorded treatment appropriate to their age and legal status.” Moreover, the ICCPR is a convention. Thus, unlike the UDHR, which has more of a moral value, the ICCPR is legally binding for all parties. In addition, the ICCPR created a Human Rights Committee (HRC). The Optional Protocol that accompanied the ICCPR extended the jurisdiction of the HRC to receiving individual complaints. The Protocol was signed by all the European Countries, as well as Canada.\textsuperscript{15}

The issue of torture gained more attention and became the sole focus of UN document in the 1984 “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”\textsuperscript{16} This is the first international document that actually defines “torture.” Torture is seen as “any act by which severe pain or suffering, whether physical or mental is intentionally inflicted, for such purposes as obtaining from him or a third person information or a confession, punishing him for an act […], intimidating or coercing him or a third person, or for any reason

\textsuperscript{13}International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 [ICCPR].
\textsuperscript{14}Ibid, s 10.
\textsuperscript{15}Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200 a (XXI), 16 Dec 1966. Both Canada and the European countries members to the Council of Europe have adopted this protocol (See United Nations Treaty Collection www.treaties.un.org). [OP ICCPR]
\textsuperscript{16}Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, UNCATOR, 1984, UN Treaty Series, vol 1465 at 85 [CAT].
based on discrimination of any kind, when such pain or suffering is inflicted by or at the
instigation of or with the consent or acquiescence of a public official or other person acting in an
official capacity.”17 The convention obliges the states to include education against using torture
in the training of their law enforcement personnel.18 Art 11 maintains that methods, practices and
arrangements as well as treatment of people in custody should be held under observation, with
the express purpose of preventing acts of torture.19 In addition, every complaint of a person who
alleges that she has been tortured must be “promptly and impartially examined by competent
authorities”20 and states must ensure that every victim of torture has an enforced right to fair and
adequate compensation.21 Art 16 points out that acts which do not count as torture can be cruel,
inhuman or degrading treatment or punishment, and are not to be tolerated either.22 It is thus
implied that the difference between torture and these other acts is not so much a matter of quality
but rather of degree. The effects of the two are similar, while the degree of suffering differs.
However, the articles of the convention “shall apply with the substitution for references to torture
to other forms of cruel, inhuman and degrading treatment or punishment.” The application of this
document is monitored by the Committee against Torture (CAT). All states submit reports to the
Committee on how rights are being implemented. Based on these reports, the Committee

17 Ibid, s 1
18 Ibid, s 10
19 Ibid, s 11.
20 Ibid, s 13
21 Ibid, s 14
22 Ibid, s 16.
addresses each state with its concerns and makes recommendations. Sometimes it can also consider individual complaints, undertake inquiries and consider inter-state complaints. An Optional Protocol to this convention has created a Subcommittee against Torture, with a mandate to visit detention centres in the party states and evaluate the treatment provided there. The OPCAT completes the work of CAT by strengthening the monitoring mechanism. Its particularity is that it is both international (the Subcommittee) and national (monitoring is also exercised by designated national authorities in each country that has signed the protocol). A large number of European States have ratified the protocol and implemented the new monitoring mechanisms. However, Canada has still not signed, despite the opinions favorable to it.

Other principles regarding detainees have been developed by the UN in instruments that followed the basic conventions. In 1988 the General Assembly adopted the “Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.” Generally, the principles maintain a detainee’s right to counsel, to be properly informed and to be heard by a judicial authority. It also forbids the use of force during interrogation. As well, principle 24

23Committee against Torture, Monitoring the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, online: Office of the United Nations High Commissioner of Human Rights <http://www2.ohchr.org>
24Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 57/199, UNCATOR, 2003, UN Treaty Series, vol 2375 at 237. [OPCAT]
25Sudre, supra note 2 at 326-327.
26Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Cyprus, Czech republic, Denmark, Estonia, France, Georgia, Germany, Liechtenstein, Macedonia, Malta, Republic of Moldova, Poland, Romania, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine, and the UK. There is also a series of countries that has signed the protocol, but not ratified it yet: Austria, Belgium, Finland, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and Turkey.
recognizes a detainee’s rights to medical care. Principle 23 assures the right of a prisoner to make requests or complaints regarding his treatment, especially in cases of torture or cruel and unusual punishment, to the authorities of the prison and to higher authorities with reviewing or remedial powers. Also, according to principle 34 any death or disappearance that has occurred in custody must be thoroughly investigated.

These resolutions were completed in 1990 by the “Basic Principles for the Treatment of Prisoners” which states in art 5 that except for the limitations implied by the incarceration, no other limitations of the prisoners’ human rights as provided by the UN conventions are acceptable. Also, principle 9 assures that the detainees must have access to medical care without any discrimination due to their legal status.

In addition to these basic documents and in order for rights against torture to be upheld, there are also UN documents to help implement the rights (Principles of Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Code of Conduct for Law Enforcement Officials, Principles of Medical Ethics relevant to the Role of Health Personnel particularly Physicians, in the protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

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30 Principles of Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 55/89, 4 Dec 2000 [Effective Investigation].
32 Principles of Medical Ethics relevant to the Role of Health Personnel particularly Physicians, in the protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 34/194, 18 Dec 1982.
In time, some states have struggled to upgrade these basic rights and to add a more concrete content to them, in order to make application easier, to bring greater respect to these rights, and to sanction conduct that violates them.

b. European materials

As mentioned above, the states parties to the European Convention on Human Rights and Council of Europe will be treated as a whole. They are all under the obligation to internalize the Convention and directly apply the rights it protects. If these rights or the standards added by the Council of Europe are being infringed, states are held responsible before the European Court of Human Rights. As with any international body, states are able to increase the protection given at the national level, but they cannot go below it. Generally however, the European standard is maintained and is hardly ever increased, as most states have enough difficulties in applying it as it is. This is why this section will present the regional documents applying to most European countries, without details regarding the national legislation.

The main legal source in Europe is the European Convention on Human Rights and, in particular, art 3 of this Convention. The article is very similar to article 5 of the UDHR stating that “no one shall be subjected to torture or inhuman treatment or punishment.” This article is the basis for all allegations concerning cruel treatment and punishment in prisons. It is of course, completed by several conventions made to explain the meaning of the notions so that the article is easier to apply, and by some institutions meant to prevent torture and similar treatment.

33 ECHR, supra note 10.
34 Ibid, s 3.
Thus, in 1987 the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.\footnote{European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, 26 Nov 1987.} This act constituted the Committee for the Prevention of Torture, as a response to the limits of CAT.\footnote{Rudolf Schmuck, “The European Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment (CPT) – Fundamentals, Structure, Objectives, Potentialities, Limits,” (2002) 1 JJIS 69 at 73.} The CPT has the mandate to make regular and \textit{ad hoc} visits to all detention institutions and file reports regarding the state of prisons. The reports contain recommendations for improvement and are submitted to the Government and published if it agrees. However, the lack of cooperation on behalf of the Government attracts a CPT public statement. This is the strongest response on behalf of the CPT, whose task is not to condemn but to assist while overriding the consideration that there is an absolute prohibition on using torture or ill treatment, no matter how mild. The CPT also initiates dialogues with the states, on issues which are persistent and makes follow-up visits. The CPT’s activity relies heavily on cooperation with the Government as the CPT’s mission is to prevent, as opposed to the Court’s task to give solutions \textit{post factum}.\footnote{Love Kelberg, “The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,” in Gudmundur Alfredsson, Joans Grimheden, Bertram G. Ramchandran and Alfred de Zayas, International Human Rights Monitoring Mechanisms. Essays in the Honour of Jakob Th. Moller (The Hague: Martinus Nijhoff Publishers, 2000) at 587.}

Nevertheless, the set of regulations and recommendations given, originating from the Council of Europe, is increasing in number every year, in an effort to adapt to the decisions made by the ECHR, to the new circumstances, and the new members of CE. The European Prison Rules, established by the Committee of Ministers in 1987 is meant to guide the state through prison and administration reform. They were not intended to be compulsory, but they are constantly referred to by the ECHR and the CPT which increases their binding value. It is
considered necessary that European citizens must have the same conditions and standard of rights in any European country since freedom of movement is highly enforced.\textsuperscript{38} The European Prison Rules are periodically revised by the Committee of Ministers, the last revision being in 2006 through the “Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules.” The standards are influenced at each revision by the ECHR and the CPT work. The standards recommended refer to the living conditions, recreation, health, abuses - covering all aspects of life in prison.\textsuperscript{39} Having these rules as a starting point, the CPT builds its Minimum Standards on the observed facts, updating them yearly with the Annual General Reports.

The CPT’s evaluations and the interpretations of the Court of Strasbourg are largely based on the Standard Minimum Rules for the Treatment of Prisoners\textsuperscript{40} adopted in 1973 and in force ever since. The document is very similar to the one provided by the UN. However, the activity of the CPT, though beginning with these standards, has increased the level of conditions required. They have become compulsory for the states as the European Court defers to them. The standards were made public in some of the CPT’s Annual General Reports and they are also collected and updated by an internal working group.\textsuperscript{41} Thus, the CPT standards revised in 2010\textsuperscript{42} require acknowledgement that ill treatment can take numerous forms in prisons, and special attention is given not only to the ill treatment caused by staff to prisoners but also to the conditions of detention. The latter may not be deliberate, but can also be a result of

\begin{footnotes}
\footnote{\textsuperscript{38}Council of Europe, Committee of Ministers, \textit{European Prison Rules} (Strasbourg: Council of Europe Publishing, 2006) at 37 [CE, Prison Rules].}
\footnote{\textsuperscript{39}Ibid 39-42.}
\footnote{\textsuperscript{40}Standard Minimum Rules for the Treatment of Prisoners, Council of Europe, Committee of Ministers, 1973.}
\footnote{\textsuperscript{41}Schmuck, supra note 36 at 80.}
\footnote{\textsuperscript{42}The CPT Standards, “Substantive” Sections of the CPT’s General Reports CPT/Inf/E (2002) 1, Rev. 2010. [CPT Standards].}
\end{footnotes}
organizational failures or institutional inadequacies. However, they are not acceptable as the overall quality of life in prison is the focus of the CPT.\textsuperscript{43} In addition to what the international standards already require, the CPT maintains that overcrowding is in itself a degrading treatment, that each prisoner must have the opportunity to have eight hours or more of activities outside their cells, and that all prisoners, without any exception (including those undergoing solitary confinement) must be allowed outdoor exercise daily. The standard regarding personal space has been extracted from the 7\textsuperscript{th} General Report. The requirement states that, in order to avoid all the side effects of a large dormitory, each cell must have at least 7 square meters per person.\textsuperscript{44} As well, the CPT requires either a sanitary annex to the cell or that the prisoners be released without delay from their cells to use the toilet at any time. Not only must the prisoners have access to bathing, but the states should ensure running water in every cell. As well, the CPT requires that all devices blocking the access of fresh air and natural light be removed from all windows and alternative security systems be installed.\textsuperscript{45} Moreover, regardless of the economic conditions of member countries, each prison must screen their prisoners regularly in order to prevent the spread of transmissible diseases and must supply medication and staff to ensure that the convicts take their medication at regular hours. Sick prisoners must receive special care which by no means implies segregation for having HIV or other similar illnesses.\textsuperscript{46} The high risk prisoners are to be given special attention as they are exposed to a greater risk of being treated poorly. It is prohibited to have them completely segregated. Even in high risk units they must be allowed to have contact with their fellow inmates and have a wide choice of activities in order to

\begin{itemize}
\item \textsuperscript{43}Ibid, para 44.
\item \textsuperscript{44}CPT Standards, supra note 42, 7\textsuperscript{th} General Report, CPT/Inf (97) 10, para 12-15.
\item \textsuperscript{45}CPT Standards, supra note 42, 11\textsuperscript{th} General Report, para 30.
\item \textsuperscript{46}Ibid, para 31
\end{itemize}
compensate for the special regime.\textsuperscript{47} Moreover, the CPT stated that each prisoner must have the same access to health care as any person from the community outside prison.\textsuperscript{48} Special care must be given in order to determine which prisoners suffer from mental conditions; the administration has the duty to make adjustments for their condition.\textsuperscript{49} When the condition becomes an illness, the prisoners must be taken to proper psychiatric facilities.\textsuperscript{50}

Though not all countries in Europe or the EU are equally developed and for some it is extremely difficult to implement these standards, the ECHR and CE, supported by the European Council and Commission, made it clear that there are no exceptions where the implementation of rights is required.

c. \textit{Canadian Legislation}

Canada is not part of any regional conventions against torture or that could be applied to torture. There are several Inter-American Conventions (Inter-American Convention to Prevent and Punish Torture\textsuperscript{51}, Inter-American Convention on Human Rights\textsuperscript{52} etc), but Canada has chosen to regulate this matter through national avenues, with the consideration of the International bodies which it recognized as binding.

Canada has a federal legal system. The Constitution Act, 1867\textsuperscript{53} divides the legislative and executive powers between federal and provincial spheres. While criminal law falls under

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{47}]
\item \textit{Ibid.}, para 32
\item \textit{Ibid.}, \textsuperscript{3}\textsuperscript{rd} General Report, [CPT/Inf (93) 12], para 31
\item \textit{Ibid.}, para 43
\item \textit{Ibid.}, para 44. \\
\item \textit{Inter-American Convention to Prevent and Punish Torture}, OAS, 9 Dec 1985.
\end{enumerate}
\end{footnotesize}
federal jurisdiction and it is applied uniformly all over Canada, imprisonment falls under either federal or provincial jurisdiction, depending upon certain criteria. Penitentiaries are under federal authority, they are governed by the Corrections and Conditional Release Act54 and are administered by the Correctional Service Canada (CSC). People receiving two years or more of imprisonment will serve time in a federal institution. However, every province and territory has its own correctional system, created to fit the needs of their offenders and depending completely on the local budget. Prisons, reformatories, local jails and detention centres fall under provincial jurisdiction. Everyone sentenced to less than two years of imprisonment will serve time in a provincial or territorial institution. These facilities are regulated by local legislation.55 Both local and federal institutions must comply with the international standards for conditions in prisons and with the Canadian Constitutional provisions regarding human rights. It is why references will be made to both systems. However, the legal frames under consideration in this thesis will be the federal and constitutional ones, as having the greatest long term impact on prisoners’ rights.

The standard for corrections applied in Canada is the Standard Minimum Rules for the Treatment of Prisoners.56 Canada committed itself to full compliance and domestic

54Corrections and Conditional Release Act, SC 1999, c 20 [CCRA].
56SMRs, supra note 12.
implementation in 1975.\textsuperscript{57} Thus, Canada does not have another act to use to assess if imprisonment conditions amount to cruel treatment.\textsuperscript{58}

The Canadian Bill of Rights,\textsuperscript{59} enacted in 1960 stated in art 2 that no law may “impose or authorize the imposition of cruel and unusual treatment and punishment.” The Bill is still in force today, but the authority in human rights has become the Canadian Charter of Rights and Freedoms,\textsuperscript{60} as part for the Constitution Act. Section 12 of the Charter states, using the same wording as the UDHR and later the European Convention, that “everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”\textsuperscript{61} In many European countries, human rights are part of the Constitution as well. The issue is that being part of the Constitution, the mechanism requires that these provisions can only be invoked when a law is challenged on the ground of unconstitutionality. This is a matter that the Constitutional Courts deal with. Constitutional provisions cannot be invoked by themselves as a ground for alleged violations in most countries. However, in Canada this is not the case. Though part of the Constitution, s 12 can by itself be invoked before national Courts, and if the judges consider it is infringed, a remedy may be granted.

A very important federal document is the Corrections and Conditional Release Act, 1992.\textsuperscript{62} This replaces most of the pre Charter acts (such as the Penitentiary Act and the Parole Act) and reiterates some of the prisoners’ rights. Section 68 acknowledges that no restraints

\textsuperscript{57}50 Years of Human Rights Development in Federal Corrections, online: Corrections Service Canada \textlangle http://www.csc-scc.gc.ca \textrangle [CSC]
\textsuperscript{58}See above p 12.
\textsuperscript{59}Canadian Bill of Rights, SC 1960, c 44, s 2 [Bill].
\textsuperscript{60}Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
\textsuperscript{61}Ibid, s 12.
\textsuperscript{62}CCRA, supra note 54.
should be applied as punishment to prisoners.\textsuperscript{63} As well, no one shall administer, instigate, consent to or knowledge of any cruel, inhumane or degrading treatment or punishment of an offender.\textsuperscript{64} Moreover, section 70 prescribes that “The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthy and free of practices that undermine a person's sense of personal dignity.”\textsuperscript{65} The Act regulates the grievance system procedure, which is extremely important for the enforcement of the prisoners’ rights.\textsuperscript{66}

This Act is also of special importance as it formalizes the Office of the Correctional Investigator, an office created \textit{de facto} in 1973. This is a prison ombudsman, whose function is to investigate the complaints of prisoners and seek a solution. Generally the complaints regard institutional conditions.\textsuperscript{67} The Correctional Investigator has a role similar to the UN sub commissioner or the CE commissioner in torture prevention. He receives complaints, assesses prison conditions and treatments and files reports with recommendations. Though these are not binding, the failure of the institutional system to comply may attract sanctions.\textsuperscript{68}

\textsuperscript{63} \textit{Ibid}, s 68.
\textsuperscript{64} \textit{Ibid}, s 69.
\textsuperscript{65} \textit{Ibid}, s 70.
\textsuperscript{66} See below Chapter 5 for a presentation of the internal grievance procedure.
\textsuperscript{67} See below Chapter 4 for a discussion on the complaints and reports.
\textsuperscript{68} CSC < www.csc-scc.gc.ca.>, \textit{supra note} 57.
Chapter 3 Convicts’ Rights as Interpreted in Case Law

The decisions in the two cases which opened Chapter II of this thesis are the result of the interpretation given to the conventions and laws presented above. They are neither the first nor the last cases resolved by the European and Canadian Courts. However, they are representative of the path courts decided to take in interpreting art 3 of the Convention and s 12 of the Charter. They are the result of many years of the development of human rights and many years of enriching these rights followed these cases.

In *Dougoz v Greece*, 69 The European Court restated several principles already existing in its jurisprudence. The Court recalls that ill-treatment, as well as degrading treatment, in order to violate art 3 of ECHR must reach a minimum level of severity. The assessment of this level is relative; it depends on all circumstances of the case, such as the duration of the treatment, the physical and mental effects, and sometimes the sex, age and state of the victim’s health. 70 The court considered that the circumstances of holding a person for seven months in an overcrowded and dirty cell, with insufficient sanitary facilities, little hot water, poor sleeping conditions, and no fresh air or natural daylight, may amount to inhuman or degrading treatment.

The principles were established in a 1969 case of the former European Commission, “the Greek Case.” 71 In this case, the Commission reached the above conclusion for the first time, regarding overcrowding and inadequate sanitary facilities, heating, sleeping arrangements, food, recreation, and contact with the outside world.

69 *Dougoz, supra note* 8.
70 *Ibid*, para 44.
71 *Greek Case*, 1969, No 3321/67, 12 YB Eur Conv HR. [*Greek Case*]
In *Dougoz*, the Court confirmed the principles stated by the former Commission with the allegations of the applicant and with the 1994 CPT report regarding the police headquarters in Alexandras Avenue. In that report, the CPT described the cell conditions exactly as the applicant did. Though there was no report on Drapetsona Detention Centre in 1994, the Greek Government itself admitted that the conditions there were similar to the ones in Alexandras. However, the CPT visited both centres in 1997 and renewed its visit to both in 1998 and then in 1999 due to the lack of improvement in conditions. The applicant was imprisoned there between 1997 and 1998. On the basis of this corroboration, the Court decided that the overcrowded space and the lack of sleeping conditions, combined with the long time spent there, amounted to degrading treatment contrary to art 3. Thus, the Court reached the conclusion that, in this case, there was a violation of art 3 of the Convention.

In *R v M(T)* the Ontario Court of Justice reached a similar conclusion. However, this section will show that it is rather accidental that the Canadian Courts found violations of s 12 of the Charter because of prison conditions. Considering the fact that this was the first case in which the Court had actually considered these conditions as inhumane, it probably occurred because minors were involved. The Court has actually stated that Young Offenders are to be treated differently than adults and should be accorded treatment appropriate to their age and legal status. It was also stated that special consideration was given to the fact that youth were detained in those cells.\(^{72}\) *Per a contrario*, it can be inferred that were adult offenders detained there, the conditions would not have raised issues.

\(^{72}\) *M(T)*, *supra* note 9.
In reaching its conclusion, the Court set out a number of principles to be considered. In order to determine if there was a breach of s 12, the following factors were taken into consideration: the treatment must not be so excessive as to outrage standards of decency, the treatment must not be unduly degrading or humiliating, the treatment must not be grossly disproportionate to what is required and if other alternatives can be made available that will reach the same end. The emphasis put on the community’s reactions to such conditions (“outrageous conditions”) must be noted.\textsuperscript{73}

In the European case, the conditions were more shocking and the criteria to evaluate them were clearer. The question was whether the allegation was real rather than if these conditions would amount to a violation. Though it was the first case in which the European Court was confronted with such an issue, the experience of the former Commission was important and clear enough that the Court had no problem agreeing that the ill treatment had breached a minimum standard. The consideration the Court seems to give to the CPT reports and standards were also of great help in reaching a decision without any dissent.

For the Canadian Court on the other hand it was not a problem to confirm the allegations. As there were no national concrete precedents and no experience in this matter from other cases, the Court was forced to create the avenues to evaluate the situation. Since it is a national court, it is not unexpected that these avenues are in close connection to the reactions and expectations of the community.

\textsuperscript{73}Ibid.
Thus, the Court considered that “the treatment afforded to the accused was a severe outrage to our sense of decency. It was grossly disproportionate to what was required.”74 The Court found that the youth were subjected to cruel and unusual treatment. Thus, there was a violation of s 12 of the Charter.

In order to make better sense of how prisoners’ rights have evolved and are protected, it is essential to examine the interpretation Courts have given to the principles and regulations presented in the previous chapter. The definition of “cruel and unusual treatment” has broadened over time in both Europe and Canada and this is reflected by the jurisprudence. The reasons the Courts gave the above solutions in Dougoz and M(T) and how the protection of rights developed since then will become clearer once the case law is examined.

a. European Case Law

The issue of art 3 in regard to the prisoners’ rights was first addressed in Europe under the former Commission. However, as this section will demonstrate, very few of the principles developed by the former Commission are still applicable today as the Court has changed its views considerably.

The European Court sees art 3 as imposing two types of obligations upon states: positive obligations and negative obligations.75 States have three duties under positive obligations: to criminalize the violations of human dignity,76 to protect any person under state authority from

74Ibid.
75Radu Chirita, Conventia Europeana a Drepturilor Omului. Comentarii si explicatii, (Bucuresti: CH Beck, 2008) at 103-105.
76This duty mainly refers to the state obligation to incriminate in a clear way crimes against person (like homicide, rape, assault etc). See MC v Bulgaria, No. 39272/98, [2003], XIII Reports of Judgements and Decisions.
violations of one’s right to dignity\textsuperscript{77} and lastly, to make an efficient inquiry for any complaint regarding the violation of art 3 of the Convention.\textsuperscript{78}

Generally, the obligations of the state regarding prisoners in what art 3 is concerned with, are negative obligations. These relate to the fact that the state must restrain from causing, through its agents, treatments contrary to art 3.\textsuperscript{79} The case law principles on how these obligations are to be applied in custody revolve around three negative treatments that will infringe article 3: imprisonment conditions, use of force against convicts and insufficient health care.\textsuperscript{80}

The criteria the court relies on in order to assess which acts or conditions are against art. 3 have been developed in some leading cases in the matter, under the former Commission. They are still in force today. Thus, in \textit{Ireland v UK},\textsuperscript{81} the court stated two criteria. First, there is the need for a minimum level of suffering to be reached in order for the act to count as a violation. It is not enough for the behavior to be illegal or to carry unpleasant aspects but it must have certain physical or mental effects on the victim. Second, the treatment must include some kind of conscience act. An accident cannot count as a violation.

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\textsuperscript{77}This refers to the obligation to protect a person facing a real danger towards his physical integrity, see \textit{Tuncer and Drumus v Turkey}, No 30494/96, [2004].

\textsuperscript{78}This supposes an inquiry for any kind of violation of human dignity, including the ones by non state actors.

\textsuperscript{79}Chirita, \textit{supra note} 75 at 108.

\textsuperscript{80}The Court has also considered other situations that infringe art 3, such as expelling a person in countries where the subject risks death sentence or state abuse (\textit{Cruz Varas and Others v Sweden}, No 15576/89, [1991]). This, however, is not the subject of this thesis.

\textsuperscript{81}\textit{Ireland v. The United Kingdom}, No 5310/71, [1978]. [\textit{Ireland}]
In *B v France*, the Court stated that the degree of suffering and of how degrading the treatment was, will be evaluated on a case-by-case basis. Elements such as sex, age and health condition are always to be taken into account.\(^82\)

Regarding living conditions in prisons that can amount to a violation, the Court refers to the CPT’s reports without any special analysis. It is generally sufficient for the applicant to prove that the standard conditions prescribed by CPT have not been met. From this point of view the former Commission jurisprudence has been completely reversed; the Commission was very generous to the states in applying art 3 for imprisonment conditions and it scarcely found any violations on this ground.\(^83\)

Recently, the Court has become very strict in applying the CPT standards regarding the time spent outside the cell, the square meters each convict has, the sanitary facilities, the food etc. In *Kalashnikov v Russia*,\(^84\) the Court decided that since it was proven that the applicant was detained in a cell of 20 square meters, with 8 beds inhabited by 11 inmates, where the air was full of smoke, where the toilets were not separated from the rest of the cell which was infested with lice and rats, there was a violation of art 3. In sustaining each decision, the Court invoked the minimum standards set up by the CPT. Moreover, the Court upheld the statement from the CPT’s 2\(^{\text{nd}}\) General Report that the ill treatment need not be deliberate when it comes to conditions,\(^85\) once again increasing the former Commission’s standards.

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\(^{82}\) *B v France*, (1992), A232-C, ECHR. [B].

\(^{83}\) See the decisions from 11 July 1977, 13 Oct 1968, 6 Dec 1979, 17 May 1979, *Greek case, supra note 71.*

\(^{84}\) *Kalashnikov v Russia*, No 47095/99, [2002], VI Reports of Judgments and Decisions.

\(^{85}\) CPT/Inf. (92)3
The decisions that followed all found a violation of art 3 in such cases. For example, in *Kehayov v Bulgaria*, the applicant had been held for 6 months in a 10 square meter cell, together with 4 other inmates who spent almost all day in the cell and were allowed to use the toilet only twice per day. In *Mayzit v Russia*, the Court also found a violation as the applicant was detained in a cell where he had only one square meter for himself; the inmates could only sleep in turns because of the dimensions of the cell and they could wash only every ten days. The Court maintained that even if these conditions were not meant to humiliate the applicant, incarcerating him for nine months in such conditions would certainly have had this effect. The Court considered the fact that Russia finds these conditions satisfactory to be more concerning than the conditions themselves. The Court did not accept explanations such as the increase in the crime rate and the economic deficit regarding imprisonment conditions. In *Novoselov v Russia*, it stated that these factors cannot explain why the applicant was kept in an overcrowded cell, full of lice with extremely dirty sanitary facilities, for six months.

However, in cases where the duration of the imprisonment was short, even if the conditions were bad, the Court did not find a violation of art 3. For example, in *Georgiev v Bulgaria*, the applicant had been kept in an eight square meter cell, with no natural light, no permission to leave the cell and little access to sanitary facilities. However, the Court considered

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86 *Kehayov v Bulgaria*, No 41035/98, [2005] [Kehayov].
87 *Mayzit v Russia*, No 63378/00, [2005] [Mayzit].
88 *Novoselov v Russia*, No 66640/01, [2005].
89 Court reached similar decisions in *Labzov v Russia*, No 62208/00 [2005], *Ostrovar v Moldavia*, No 35207/00, [2005], *Cenbaur v Croatia*, No 73786/01, [2006], *Melnik v Ukraine*, No 72286/01, [2006], *Kadiks v Latvia*, No 62393/00, [2006], *Mamedova v Russia*, No 7064/05, [2006], *Popov v Russia*, No 26855/04, [2006], *Kaja v Greece*, No 32927/03, [2006], *Yordanov v Bulgaria*, No 56856/00, [2006], *Dvonykh v Ukraine*, No 72277/01, [2006], *Vincent v France*, No 6253/03, [2006], *Brandase v Romania*, No 6586/03, [2009], *Iskandarov v Russia*, No 17185/05, [2010].
90 *Georgiev v Bulgaria*, No 47823/99, [2006] [Georgiev].
that the minimum of severity had not been reached since the applicant spent a short time there and he was in good health. Nevertheless, even in situations where the time spent experiencing degrading treatment was short, due to its repetition, the Court found a violation of art 3.\textsuperscript{91} Thus, in \textit{Moisejevs v Latvia}, the applicant was receiving almost no food at all in the days when he was taken to trial (a slice of bread with onion for lunch, and another slice of bread for dinner when he was brought back into the penitentiary). Though this was not happening on a daily basis, starvation is considered a very serious degrading treatment, especially when it took place regularly.\textsuperscript{92}

Aside from the living conditions, the Court identified other conditions that can amount to degrading or humiliating treatment. Thus, it asserted that shaving the head of a convict, as a punitive element for insults the applicant allegedly said, and without any hygienic reason, is humiliating and against art 3.\textsuperscript{93} In \textit{Henaf v France},\textsuperscript{94} the Court considered handcuffing a 75 year old extremely ill prisoner in hospital, an inhuman treatment which violated art 3. In reaching this conclusion, the court took into consideration the age of the applicant, his health condition, circumstances that presented him as a low risk convict, and the fact that there were already two officers guarding him in the hospital room.\textsuperscript{95} The Court has been extremely sensitive recently towards the situation of elderly people, since many prisons are not equipped for assuring decent conditions for their state of health.\textsuperscript{96}

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\begin{itemize}
  \item \textsuperscript{91} For a similar solution see also \textit{Ramirez Sanchez v France}, No 59450/00, [2006].
  \item \textsuperscript{92} \textit{Moisejevs v Latvia}, No 64864/01, [2006] [\textit{Moisejevs}].
  \item \textsuperscript{93} \textit{Yankov v Bulgaria}, No 39084/97, [2003] [\textit{Yankov}].
  \item \textsuperscript{94} \textit{Henaf v France}, No 45436/01, [2003].
  \item \textsuperscript{95} For a similar solution see also \textit{Avci and Others v Turkey}, No 40417/01, [2007]
  \item \textsuperscript{96} Cooper, \textit{supra note 3} at 73.
\end{itemize}
Regarding disciplinary methods combined with conditions, the Court stated on several occasions that social segregation for security reasons is not by itself a violation. As long as it is not absolute and it is justified by the gravity of the crimes (such as mafia activity, which can take place even behind bars) there is no breach. However, the isolation must be time-limited (in Sadak v Turkey the Court found that 11 days is a reasonable time period) and social segregation may not be associated with complete sensorial segregation. Nevertheless, if there are no reasonable security reasons, and the isolation is also sensorial (e.g. in dark cells etc), than art 3 is violated.

The Court accepted that there may be situations in which special detention regimes may be necessary. Thus, detention in a high security prison is not by itself a violation of art 3 either. However, the court, as well as the CPT, is especially concerned about these penitentiaries as generally, most abuses occur in such places under the name of security. In Van der Ven v The Netherlands, the applicant, found guilty of murder, was transferred in 1997 to a high security prison after two years in a medium security prison. He was held there until 2001, on the ground that he might have tried to escape the first institution. During this time, he had limited contact with other inmates, his phone calls and letters were under permanent surveillance, he had one...

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97 Bastone v Italy, No 59638/00 [2005], Argenti v Italy, No 56317/00, [2005], Gallico v Italy, No 53723/00, [2005]. Bastone was a white-collar criminal, with strong mafia activity. His contact with the external world, such as visits and phone, though existent, was drastically restricted. He was allowed between 2 and 4 hours/day out of the cell and generally 2 hours outdoors. Though he lived like this for 10 years, he was allowed to have social activities and to work in cell as long as it did not involve using objects that could have been used as arms. The Court considered that these conditions were justified by their purpose and did not reach the minimum of gravity required by art 3; Rohde v Denmark, No 69332/01, [2005], though the applicant did not have contact with other inmates, he had TV, newspapers, took language classes and was allowed regular visits by doctors, therapists, family and friends; Campisi v Italy, No 24358/01, [2006].
98 Sadak v Turkey, No 25142/94, [2004]. See also a similar decision in Yurttas v Tukey, No 25143/94, [2004]
99 GB v Bulgaria, No 42346/98, [2004]; Iorgov v Bulgaria, No 40653/98, [2004]
100 Van der Ven v The Netherlands, No 50901/99, [2003], II ECHR.
hour per week visitation rights from family and he was regularly subjected to cavity searches. In 1997, the CPT filed a report, which later was introduced in the CPT's Minimum Standards, in which it found the conditions in this penitentiary incompatible with human dignity. The Court concluded that this treatment created undue physical and mental suffering for the convict and led to acute depression because of the very restricted contact with his family. The Court considered it all the more aggravating as the time spent in this prison by the applicant was of long duration. Additionally, the Court had doubts regarding the necessity of regular intra corporeal searches. It considered that this treatment led to a feeling of inferiority, which amounted to a humiliation of the individual. For all these reasons, the Court considered that such high risk security treatment is a violation of art 3.

Finally, the issue of close body searching was addressed. It was established that cross gender searching is never permitted as it is highly humiliating. Strip searching a male in front of a female officer, searching his genital organs with the bare hands and afterwards searching his food is not only unhygienic but degrading. As well, every strip search without an apparently compelling reason is a violation of art 3.

The second component of the right to be free from inhuman and degrading treatment in custody refers, according to the Court, to the use of force against the convicts. The main principles were articulated under the former Commission and they have not been changed by the new jurisprudence. As a general rule, the Court stated that these acts of violence are by

102 Cooper, supra note 3 at 86-87.
103 Valasinus v Lithuania, Appl No 44559/98.
themselves contrary to art 3 and the article applies automatically, especially in cases where the victim did not manifest any violent behavior. It is considered that a prison officer who assaults a prisoner commits a breach of trust not only against the prisoner but against society itself. The court stated that, in these cases, the age, the health of the applicant, the number or intensity of strikes and the effects they have on the applicant are all irrelevant. The Commission stated that this is unacceptable in a society built on the respect owed to the human being. Any violence against a convict, therefore, unless strictly necessary, is a violation against his dignity.

A leading case in this matter is Tomasi v France. The Commission established the principle that the state is responsible for all physical traumas a person in custody suffers for which that state does not have a plausible explanation. As a result, this rule has been applied in all similar cases.

Ten years later, the Court took this principle even further in Ayse Tepe v Turkey by stating that even if there is a chance the bruises were not made in custody, but the state failed to apply the CPT recommendation regarding the mandatory individual medical examination before incarceration, there is still the presumption that the applicant was subjected to inhuman treatment.

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105 Cooper, supra note 3 at 77.
106 B, supra note 82.
107 Ribitsch v Austria, (1995), A336, ECHR. [Ribitsch]
108 Tomasi v France (1992), A241-A, ECHR. [Tomasi]
109 See Algur v Turkey, No 32574/96, [2002], Esen v Turkey, No 29484/95, [2003]; Toteva v Bulgaria, No 42027/98, [2004]; Aydin and Yunus v Turkey, No 32572/96, [2004]; Suna v Turkey, No 43198/99, [2005]; Biyan v Turkey, No 56363/00, [2005]; Afnasiev v Ukraine, 38722/00, [2005]; Nazif Yavuz v Turkey, No 69912/01, [2006]
110 Ayse Tepe v Turkey, No 29422/95, [2003].
111 For a similar decision see also Colak and Filizer v Turkey, No 32578/96, [2004]; Balogh v Hungary, No 47940/99, [2004]
Even in situations where the use of force is justified by the violent behavior of the applicant, there may still be a violation of art 3 regarding the intensity of the force used against him. Thus the use of force must be proportional to the necessity. In *Rivas v France*[^112] it was confirmed that the applicant tried to escape the police station where he was detained. In order to stop him, the police hit his testicles so hard that he required surgical intervention afterwards. The court understood the circumstances, but stated that considering that the applicant was a minor, unarmed, in an institution full of police, the intensity of the force used against him had no justification. Thus there was a breach of art 3.

The Court also stated that the use of force does not have to come from the authorities in order to amount to a breach. It is enough for them to instigate or allow or have knowledge of the fact that a convict is being physically abused. When his trauma is also ignored by the authorities afterwards, the violation of art 3 is even greater. In *Pantea v Romania*,[^113] the applicant was incarcerated in the same cell with extremely violent inmates. He was savagely beaten and afterwards tied to the bed for 48 hours. Because he suffered several fractures, he was sent to a penitentiary hospital. The journey was made by train, and it took several days in which the applicant received no medical care. Because of the great number of prisoners on the train he did not have a place to sit. The Court considered it unacceptable that such trauma could take place under the control of the guardians. Moreover, it considered that the fact the applicant was

[^112]: *Rivas v France*, No 59584/00, [2004] [Rivas].
[^113]: *Pantea v Romania*, No 33343/96, [2003], VI ECHR.
handcuffed in the cell and transported in such critical condition added to the gravity of the violation.\textsuperscript{114} 

The Court, however, relies heavily on medical reports. If the applicant did not see a doctor as soon as possible, or if the medical reports note only a few scratches, the Court cannot establish if there was a violation and the presumption does not apply.\textsuperscript{115} 

Finally, the last aspect that can amount to a violation of art 3 is the lack of proper health care in custody. The authorities have the obligation to assure that health care is provided for all detainees. The state must provide medical assistance as soon as requested by the detainee, or when it becomes apparent that the detainee is unwell and where necessary specialist medical experts are involved in the treatment of the detainee.\textsuperscript{116} This issue must be considered through three aspects: the overall imprisonment conditions, the quality of the health care and the need to keep the accused imprisoned.\textsuperscript{117} The Court set up as a rule that the detention of a person who suffers from a serious condition that cannot be treated in prison, is contrary to art 3, especially if the condition is becoming more severe due to the imprisonment.\textsuperscript{118} As such, the incarceration of an 84 year old person, unable to use the toilet by himself or rise from bed violated art 3. Since the prison did not have the personnel or the facilities required to take care of him, the treatment he suffered because of his condition was humiliating and degrading. The Court considered that the applicant should have been released, although he was convicted for crimes against humanity

\textsuperscript{114}For a contrary decision see \textit{Caetano v Portugal}, No 36671/97 [2004]. The court considered that the two hits received by the applicant from the other inmates could have not been prevented by the authorities. 
\textsuperscript{115}\textit{Husniye Tekin v Turkey}, No 50971/99, [2005]; \textit{Soner and Others v Turkey}, No 40986/98, [2006]; \textit{Melinte v Romania}, No 43247/02, [2006].
\textsuperscript{117}\textit{Sakkopoulos v Greece}, No 61828/00, [2004].
\textsuperscript{118}\textit{Tekin Yildiz v Turkey}, No 22913/04, [2005].
and genocide.\textsuperscript{119} Also, the Court considered that an advanced form of leukemia for which chemotherapy is needed is incompatible with detention. Prison hospitals are not specialized and do not have the necessary equipment, so a conditional release is required.\textsuperscript{120} However, a serious condition (such as AIDS) is not by itself a reason for release. If the authorities provide medication, a proper food regime and medical supervision, then the state has not violated art 3.\textsuperscript{121} Nevertheless, the authorities must give extra attention to convicts with vulnerable health and who risk seizures or other aggravations of their condition. Failure to give special consideration to these people by arranging a proper regime and medical consultation is a violation of art 3.\textsuperscript{122}

The Court has addressed the special issue of drug addicts and alcoholics. The leading case on this matter is \textit{McGlinchey and Others v United Kingdom}\textsuperscript{123}. The applicant began having withdrawal symptoms a short while after being imprisoned. She was prescribed medication, but she could not take it or eat or drink anything as she was vomiting. She suffered severe dehydration and died as a result of a heart attack. The Court agreed that the victim was supervised for the entire six days and that some medication was given, however, the treatment was not appropriate. Though her condition grew worse every day, no doctor came to see her again following the first consultation. Obviously, her state of health was due to the imprisonment where she did not receive the treatment she needed, which was part of the authorities’

\textsuperscript{119}\textit{Farbthus v Latvia}, No 4672/02, [2004].
\textsuperscript{120}\textit{Mouisel v France}, No 67263/01, [2002], IX ECHR.
\textsuperscript{121}\textit{I.T. v Romania}. See also \textit{Gelfmann v France}, No 25875/03, [2004]; \textit{Matencio v France}, No 58749/00, [2004]; \textit{Mathew v The Netherlands}, No 24919/03, [2005], IX ECHR.
\textsuperscript{122}\textit{Sarban v Moldova}, No 3456/05, [2005]; Boicenco v Moldova, No 41088/05, [2006]; Holomiov v Modova.
\textsuperscript{123}\textit{McGlinchey and Others v United Kingdom}, No 50390/99 [2003], V ECHR.
obligations. This was evaluated as an inhuman and degrading treatment, thus a violation of art 3 occurred.

The Court maintains the same position in regard to the situation when a convict has or develops a mental illness. This issue was originally analyzed in *Aerts v Belgium*. A violation was found here due to the lack of psychiatric attendance and to the fact that the conditions of imprisonment had contributed to the deterioration of his mental state. The former Commission was however much more tolerant towards the poor level of psychiatric conditions than the Court is today. This was thought to be due to the endemic nature of this deficit in many states and the consequent large financial cost of raising mental health provision standards in such institutions. However, the court is much stricter now. People with suicidal tendencies need permanent supervision and sometimes even therapy. If the state is aware of the depressive nature of a prisoner then the fact that he is being kept in detention and suffers from a serious depressive state imposes a duty of particular diligence upon the prison. These are particularly dangerous situations and appropriate medication and supervision is required, even if the convict refuses. However, if death occurs in custody, there is an immediate need for an investigation. This investigation must be done, especially if the suicide was possibly due to neglect by the personnel of the prison.

These are the main aspects of detention that can be considered in regard to inhuman or degrading treatment. The Court has also considered sentencing problems, stating that sometimes,
the nature or the execution of a sentence may result in a breach of art 3. The cases in this matter are rare, and generally not related to imprisonment.\textsuperscript{129} As for the length of a sentence, the Court considers that this cannot generally constitute an infringement of art 3.\textsuperscript{130}

b. \textit{Canadian Case Law}

In Canada, the interpretations given by the Supreme Court to section 12 of the Charter sometimes confer a different meaning than its European counterpart. The Court addressed the problem under three aspects: sentencing, the use of force against convicts and imprisonment conditions.

The emphasis falls heavily on sentencing. The leading case in this matter is a pre Charter decision given in \textit{Miller}.\textsuperscript{131} It was said that a punishment is cruel and unusual when “it is so excessive as to outrage standards of decency.” The issue raised is mainly whether a punishment is grossly disproportionate to the crime for which it is applied. In order to assess if this is the case, the Supreme Court states that the following factors must be taken into consideration: the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the offence. These are all important in order to decide if the treatment is appropriate to punish, rehabilitate or deter similar behavior in the future.\textsuperscript{132}

\textsuperscript{129}See \textit{e.g.} \textit{Tyrer v United Kingdom} (1978), A26 ECHR.; \textit{Campbell and Cosans v United Kingdom} (1982), A48 ECHR.
\textsuperscript{130}Chirita, \textit{supra note} 75 at 122.
\textsuperscript{131}R v \textit{Miller}, [1977] 2 SCR 680.
\textsuperscript{132}\textit{Ibid.}
The same issue was addressed by the Supreme Court in a post Charter case, Smith,\textsuperscript{133} and it concluded that a punishment must have the following characteristics in order to violate s 12: the character or the duration of the punishment is outrageous to the public or degrading to human dignity; the punishment goes beyond what is necessary for achieving a social aim; the punishment is arbitrary, thus it is not applied on a rational basis with ascertained or ascertainable standards.

Though the issue of sentencing is not of particular interest for the subject of this thesis, the weight this problem has in the Canadian legal system, compared to the jurisprudence of the European Court should be noted. The explanation probably resides in the fact that most European countries are civil law countries. Thus, the discretion of the judge in applying a sentence is much more limited than in Canada. Most countries in Europe have in their Criminal Procedure Codes minimum and maximum limits for every offence and the judge cannot go above or below these limits. Moreover, in order for the limits of the sentence to be legal, they may not be very large. Thus, the length of a sentence is rather a criminal procedure issue that may be nationally discussed in the Constitutional Courts of each country, rather than on a human rights basis at the Court of Strasbourg. Regarding the nature of the punishment, this is also strictly prescribed by law, so the judge does not get to choose what type of punishment she applies (except in situations when she decides whether the sentence will be executed in prison or on conditional release). Moreover, the problem of life in prison is also limited. This is applied in certain limited offences and in most countries life in prison means conditional release after 25-30 years. Indeterminate sentences are generally not applied. In Canada, the indeterminate period of

\textsuperscript{133} R v Smith, [1987] 1 SCR 1045 [Smith].
a sentence, though it was raised, was considered by SCC not contrary to the Charter provisions.\textsuperscript{134}

In Canada, which is a common law country, the discretion of the judge is much greater in applying a sentence. This is why it is more common for the sentence to be challenged. On the other hand, the Charter is part of the Constitution. If a law prescribes a minimum sentence which the claimant considers disproportionate, the constitutionality of that law can be challenged on the basis of the Charter.\textsuperscript{135} As a Charter-based challenge is solved at the national level as a matter of constitutionality, the law in question may be considered independently, without individual facts supporting the claim.\textsuperscript{136} This explains why, on the contrary, this issue is seldom raised before the European Court. The European Court solves each case on the basis of the damage suffered by the applicant, while the constitutional issues are solved at the national level and generally not through the means of human rights protection.

However, under Smith, the protection expanded beyond the limits or the nature of the sentence. It also considered the manner in which the punishment was carried out, which can be seen as similar to the use of force or imprisonment conditions under European jurisprudence. Thus, the Court exemplified situations which could amount to a violation of s 12: the frequency and the conditions for searching prisoners, dietary restrictions as a disciplinary measure, corporal punishment, surgical interventions including lobotomies and castration, denial of contact with others outside prison, as well as placement in prisons far from home, family and friends, which was seen as virtual exile. Just as the European Court had decided earlier regarding the use of

\textsuperscript{134}\textit{R v Lyons}, [1987] 2 SCR 309.
\textsuperscript{135}\textit{Smith}, supra note 133.
\textsuperscript{136}Don Stuart, \textit{Charter Justice in Canadian Criminal Law}, 5\textsuperscript{th} Edition (Toronto: Carswell, 2010) at 478.
force, the SCC stated that some treatments are by themselves violating s 12, without the need to take into consideration any circumstances. These included infliction of corporal punishment, or lobotomization of dangerous prisoners or castration.

However, these specific circumstances have never been applied in a Canadian case since that time.\textsuperscript{137} There have been other situations of unjustified violence that amounted to cruel punishment in the Canadian courts’ opinion. During an altercation between inmates, a convict standing nearby was severely wounded by a guard. When he returned from hospital he was segregated for 100 days. A breach of s 12 was found and damages awarded to the convict.\textsuperscript{138}

With regard to conditions of imprisonment, this issue was raised in a pre Charter case, with s 2(b) of the Bill of Rights being invoked. In \textit{McCann v The Queen},\textsuperscript{139} the detainee was held in segregation for two years in an 11’2” by 6’6” cell, and slept on cement with only a foam mattress on it. The toilet and the wash basin were not separated from the cell. There was no natural light, as the window was tiny (6 inches square) and the artificial light was not strong enough for night reading. Convicts were not allowed outdoors and they were only allowed to leave the cell and walk down the corridor for 40 minutes daily. When the prisoner was picking up food at the end of the corridor he was always threatened with guns. His mental condition suffered severely from these conditions, the convict often suffering hallucinations. In this particular case a violation was found, but it was rather because of the cell conditions and the degradation of the prisoner’s health than the segregation itself. Nevertheless, post Charter, there has not been a large number of challenges to internal conditions of penitentiaries, especially

\textsuperscript{137} \textit{Ibid}, at 481.
\textsuperscript{138} \textit{Abbot v Canada} (1993), 64 FTR 81.
\textsuperscript{139} \textit{McCann v Canada}, [1976] 1 FC 570.
since they involve the costly task of proving facts and engaging expert evidence.\textsuperscript{140} Moreover, even the cases that have challenged prison conditions have largely been unsuccessful.

The issue of segregation was reintroduced later, and as the ECHR considered, segregation by itself is not a violation. In \textit{Olson} it was stated that it was a matter of security and that administrative segregation was the only alternative considering the criminal record of the convict.\textsuperscript{141} However, many prisoners are segregated and labeled as “extreme risk” because of the nature of their crimes. They are incarcerated “for their own safety” and sometimes serve their whole sentence in protective custody.\textsuperscript{142} This is a common situation even in pre-trial detention. In the Edmonton Remand Centre, inmates were put in administrative segregation as they were considered “high profile inmates.” They were locked up for 23 hours, with very limited access to outdoor exercise and were wearing shackles outside their cells and were regularly strip-searched. In assessing this case, the Court considered whether these conditions would have shocked the community conscience. The circumstances failed the test and the Court decided that there was no violation of s 12.\textsuperscript{143}

It was said that s 12 can provide adequate protection against conditions of incarceration. However, in Canada there has been no case dealing with an analysis of the “totality of conditions” as a form of cruel and unusual punishment.\textsuperscript{144} The claim in \textit{Morgan v Winnipeg Remand Centre}\textsuperscript{145} concerned the detention conditions but it was dismissed without an analysis,

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\textsuperscript{140}Manson, “Canada,” \textit{ supra note} 55 at 133.
\textsuperscript{141}\textit{ R v Olson} (1987), 22 OAC 287, 62 OR (2d) 321.
\textsuperscript{143}\textit{Munoz v Alberta} (Director, Edmonton Remand Centre) (2004), 369 AR 35 (Alta QB).
\textsuperscript{144}\textit{Ibid} at 165.
\textsuperscript{145}\textit{Morgan v Winnipeg Remand Centre}, [1983] 3 WWR 542, 36 CPC 266.
\end{flushright}
as the claim was made by a convict who acted as a representative for a number of inmates. The court stated that the effects on each of the people represented cannot be assessed. A similar outcome was in *Re Hussey et al. v Attorney General of Ontario*.\(^{146}\) It was said that these cases are evidence that conditions in prison were still constitutionally suspect.\(^{147}\)

In addition, the Federal Court decided in *Collin v Kaplan*\(^{148}\) that accommodating two convicts in a single person cell is not problematic as there is no evidence of cruel or unusual punishment. The inmates brought an application for an interlocutory injunction to prevent the planned double-bunking of inmates at various penitentiaries. They invoked the UN Minimum Standard Rules, but their claim was dismissed as they could not invoke any Canadian provision to sustain it.\(^{149}\) The same issue was raised one year later in *Piche v Canada*.\(^{150}\) The Court stated that “cruel and unusual” are to be read conjunctively, and accommodating two people in single cells does not amount to that. It is inconvenient but does not lead to serious overcrowding. The Court considered that the above situations were covered by the decision of the Correctional Service of Canada, which was right in deciding to double bunk in cells as there had been significant growth in the prison population. Obviously, the Federal Court considers this a sufficient argument for the failure to reach the minimum standard regarding overcrowding set up in the UN Minimum Standards for Prisons implemented by Canada.

\(^{146}\) *Re Hussey et al. v Attorney General of Ontario* (1984), 46 OR (2\(^{nd}\)) 554, Ontario Divisional Court. [Re Hussey]

\(^{147}\) Paul Rusell, “Cruel and Unusual Treatment or Punishment: the Use of Section 12 in Prison Litigation,” (1985) U Toronto Fac L Rev 185 at 199.


\(^{150}\) *Piche v Canada (Solicitor General)* (1984), 17 CCC (3d) 1.
In *Soenen v. Director of Edmonton Remand Centre*, the defendant claimed that during his incarceration his visits and outdoor exercise time were very limited, and that he was regularly subjected to a visual rectal search and to the application of a pesticide over his body whenever he reentered the prison. He complained of being treated worse than sentenced prisoners. However, his claims were dismissed.

Since then, however, the issue was articulated in a different way in *Smith*. Nevertheless, there were no other similar claims that could change the jurisprudence. There were certain cases when several imprisonment conditions were invoked and some were admitted. Such a case is the above presented *M(T)*. As well, the claims were admitted in *Bergeron v Quebec*. It was considered that segregating a person for such a long time, with almost no human contact was violating s 12. However, in a similar case, the claims were dismissed by the same Court.

The issue of smoking in prison was also addressed. On the one hand, the issue was raised when a smoking ban was introduced in prisons. The Court decided that since the claimant had a reasonable opportunity to smoke every day, his rights were not infringed and this was not a cruel and unusual punishment. On the other hand, when another claimant raised the issue of lack of fresh air due to smoke intoxication, the Court decided that that was not cruel and unusual punishment.

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151 *Soenen v Edmonton Remand Centre* (1984), 35 CR (3d) 206, 8 CCC (3d) 224 (Alta QB).
152 *Bergeron v Quebec* (2006), 47 CR (6th) 177 (Que SC).
153 *Quesnel v Quebec* (2006), 47 CR (6th) 168 (Que SC).
154 *Carlston v New Brunswick (Solicitor General)* (1989), 99 NBR (2d) 41, 250 APR 41; *Vaughn v Ontario* (Minister of Health) (2003), 60 WCB 2(d) 80.
The Canadian Courts have also addressed the issue of health conditions in prisons and imprisoning people with certain illnesses. In *R v Downey*, the accused was in the final stage of AIDS. His illness was known to the authorities prior to imprisonment as he was tested. His health condition deteriorated during detention because of the poor testing and treatment conditions existing in the institution. He had been threatened and abused by guards and kept in strict segregation conditions because of his illness. The accused had not been fed appropriate dietary meals required by his condition. The Court considered that this treatment was unusual and cruel and there was a breach in s 12. Thus, the prisoner was released on his own recognizance. In *Milton Cardinal v The Director of the Edmonton Remand Centre*, it was decided that the prisoners that had received methadone prior to the admission in the institution, must be provided with this treatment during their incarceration. The same situation had taken place earlier in British Columbia in 1996, at Burnaby Correctional Centre for Women, but the applicant was granted methadone treatment before the case got into Court, so she withdrew the application.

However, when a prisoner asked to be released on parole from a life sentence after almost 30 years of imprisonment, as he was 75 and in poor health, he was refused. The Court did not find a violation in this refusal, arguing that since life imprisonment was not cruel and unusual punishment, nor were the circumstances of this case.

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157 *Milton Cardinal v The Director of the Edmonton Remand Centre*, 2005 ABCA 303.
159 *Llewllyn v Mountain Institution*, 2006 BCSC 1094.
c. **Comparative Conclusion**

As discussed in the first chapter, legal provisions vary from Canada to Europe in a formal manner. Since in Canada there is only constitutional protection, the authority is a national charter, combined with a few federal and provincial laws and international instruments recognized by the state. As the European countries are part of the same international conventions, the European authority provisions are very similar to the Canadian ones. The difference resides in the fact that having extensive regional protection in Europe makes it easier to increase the standard of protection with every new body.

However, the interpretation of almost the same words often differs from the European Court and thus, from European countries to the Canadian Courts. Explanations can reside in different backgrounds and different issues the two regions are facing and mostly in the fact that the application of a law in a national Court is by definition different than the one in a regional Court. For example, the European Court cannot apply the community shock test as there are a lot of communities to cover and they all must be treated the same. On the other hand, for Canadian courts the way their decisions are welcomed by the society is extremely important, so this test is no surprise. It was also explained above why sentencing is not an important part of art 3 in the European Court, while it is crucial in the Canadian ones.  

As well, it can easily be remarked that, aside from sentencing, the European Court has covered more matters with its jurisprudence and has created stricter rules to be followed and applied. This may be due to the fact that the Court is faced with very different situations and its

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160 See above p 40-41.
protection must cover evenly the range from prisons in developed countries to the ones in developing states. This very different range of cases has forced it to develop its jurisprudence and broaden the range of protection, according to most circumstances, in the countries that are parties to the Convention. Canadian jurisprudence is far from being as rich or as clear because the circumstances of each case are not that different. Unfortunately, there are important situations that remain uncovered and sometimes are ignored by courts since they are not familiar with them. Additionally, national courts are more likely to be reluctant to broaden the protection of the individual against the state by themselves, especially when dealing with people that may be considered a threat to society. Canada is not an exception in this matter. This is why it is sometimes useful to have an external court treating the violation of rights independently from any other criminal or civil case. On the other hand, national protection is also very important as it can specifically customize the application of the rights as it considers the main issues in national prisons and it can take into account all circumstances, from the creation of the law and its application to individual cases.

d. **Reverse Solutions**

If the main two cases of this thesis had been brought to the other Court in question, would they have been decided in the same manner? It is an interesting exercise to summarize the jurisprudence of the two regions by examining each case using the jurisprudence of the other region.

Would the European Court have found a violation of art 3 had the \( M(T) \) case been filed with it? Obviously, the conditions of the case do not meet any of the Minimum Standards
prescribed by the CPT as they were revised in 2010.\textsuperscript{161} However, although the court is very strict concerning prison conditions and respect for human dignity, its cases have emphasized that the applicant must have experienced a minimum of suffering. Established in Ireland v UK,\textsuperscript{162} this principle was reiterated later and it was pointed out that in assessing suffering, the length of imprisonment is an important factor.\textsuperscript{163} Though there are hundreds of examples where the Court found violations by better conditions than those in M(T),\textsuperscript{164} the Court has made it clear that the minimum of suffering has not been reached if the duration is just a few hours\textsuperscript{165} and the situation does not reoccur regularly.\textsuperscript{166}

Nevertheless, it was stated in other cases that the standard conditions for minors are higher than for adults and minors must be treated with consideration.\textsuperscript{167} However, to my knowledge, there is no case in which the Court assessed conditions for Young Offenders, so the solution in this case is not clear. Based on the direction in which the Court is moving, the large number of cases where it found violations and the high standards for conditions, there is a chance that in M(T) it would have found a breach of art 3 based on the fact M was a minor. Unfortunately, there is no example of such deviation from the minimum suffering level and from the principles the Court has repeatedly stated. Thus, I cannot say for sure that the Court would lean towards finding a violation.

\textsuperscript{161} CPT Standards, supra note 42.
\textsuperscript{162} Ireland, supra note 81.
\textsuperscript{163} Kehayoz, supra note 86; Mayzit, supra note 87.
\textsuperscript{164} See above p 31-33.
\textsuperscript{165} Maisejevs, supra note 92.
\textsuperscript{166} Georgiev, supra note 90.
\textsuperscript{167} Rivas, supra note 112.
As for *Dougoz*, it is to be presumed that any Court would find a violation in such horrific conditions. Obviously, they are far from meeting the UN Standards,\textsuperscript{168} or the principles in the Corrections and Parole Act.\textsuperscript{169} However, the fact that in Canada there is no jurisprudence on this matter cannot be ignored, no matter the reason. As well, it must be considered that the Canadian courts have never addressed the totality of conditions in regard to s 12. Moreover, in particular situations, where the problems are extensive (e.g. overcrowding) the jurisprudence is inconsistent.

Perhaps, if confronted with such an extreme case, the SCC would make a leading case out of it and it would be the first decision to find the totality of conditions violating s 12. However, based on the jurisprudential directions so far, I cannot say for sure that it would.

I find it troubling that after so many decades of experience with human rights on both sides, so many cases, and so many laws and conventions, there is no simple answer for very clear cases. Hopefully, both Courts would reach the same conclusion and would find violations, were they confronted with each other’s cases. There are good chances that they would. But human rights should be more than a hope after such extensive jurisprudence and it should not be an issue of chance when severe violations occur. Unfortunately, as the next chapter will illustrate the lack of answers is not due to the fact that these issues do not exist in one or the other parts of the world. The only other explanation is that the protection given in both regions is not as clear or as strong as it would seem at first sight or as it would be expected to be in such developed regions.

\textsuperscript{168} SMRs, *supra* note 12.
\textsuperscript{169} CCRA, *supra* note 54.
Chapter 4 Prison Practices

The evaluation of practices in prison will be compared using the international standards and the local ones set up by both regions. They will also be compared with each other as, unlike other parts of the world, the two regions recognize the close connection between corrections and human rights. Ultimately, punishments and treatments are always evaluated against human rights norms.\(^{170}\)

It has been said that human rights abuses in prisons are still widespread, with more abuses in developing countries than in developed ones. However, the “terrorist threat” has worsened the corrections system in the West tremendously, making prisoners more vulnerable than they used to be.\(^{171}\)

The findings regarding how countries meet the UN Minimum Standards differ greatly. The latest Country Report on Human Rights Practices made by the US State Department presents among other issues, how prison conditions meet the UN Standards\(^{172}\) based on the national and international reports written by NGOs (Red Cross, Amnesty International, John Howard Society, Elisabeth Fry) and other institutions (the CPT, Office of the Correctional Investigator etc).\(^{173}\) Thus, in 2009 Canada was generally meeting international conditions and health care standards. As well, there were no reports of abuses in pre-trial custody or prison. This

\(^{170}\) Howard Sapers, Correctional Investigator of Canada, Roundtable: “Human Rights and Community Corrections, Academy of Criminal Justice Science,” 48th Annual Meeting, March 51-5, 2011, Toronto, Ontario, Canada. He mentioned that the human rights framework is used by the office to evaluate the decisions or lack of decisions made by the CSC concerning accommodation, inmate allowance, health care, custodial programming, ability to question the decisions, access to federal courts etc.

\(^{171}\) Henry J. Steiner, Philip Alston and Ryan Goodman, supra note 1 at 224-226.

\(^{172}\) SMRs, supra note 12.

is impressive progress since the 2006 Report when some physical abuses were reported especially in pre-trial custody. The situation is comparable with some of the European countries. Out of 47, 24 countries meet or exceed the international standards regarding conditions, health and treatment of prisoners.\textsuperscript{174} Some countries, such as Austria or Malta have good conditions in some institutions but horrific ones in others. As well, there are countries that still only occasionally meet the international standards\textsuperscript{175} or systematically fail to meet them (conditions are considered “life threatening”),\textsuperscript{176} despite the permanent criticism of the CPT and the condemnation of the ECHR. Generally all reports, in both Europe and Canada, record improvements from previous years, the degree depending greatly on the political and economic environment of the country involved.

However, a deeper analysis will prove that there are some key issues affecting the dignity and health of a prisoner that have remained unchanged over the years. Though this study will provide examples of good and improving practices in prisons, there is no country free from individual or systemic abuse. These ongoing abuses prove that none of the systems is flawless. To provide a complete picture of attitudes about prison, three categories will be analyzed: living conditions and routines, physical or mental abuses and health care.

a. \textbf{European Practices}

There is no question regarding the fact that European countries strive to cooperate, to apply the CPT recommendations and so avoid condemnation at the European Court. Reports

\textsuperscript{174}Andorra, Belgium, Cyprus, Czech Republic, Denmark, Hungary, Iceland, Ireland, Italy, Finland, France, Germany, Monaco, Lichtenstein, Luxembourg, The Netherlands, Norway, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

\textsuperscript{175}Albania, Bosnia and Herzegovina, Bulgaria, Greece, Lithuania, Portugal, Romania, Serbia.

\textsuperscript{176}Azerbaijan, Republic of Moldova, Russia, Ukraine, Turkey.
show that improvements are made from one year to another. However, the reality is that prison regimes are often adversely affected by insufficient state funding, poor material conditions, inadequate activity regimes, and overcrowding.\textsuperscript{177} The standard of accommodation has been made central to the overall quality of life in prison, since it influences the behavior of prisoners, the treatment applied to them by staff, the health of the inmates, and the spreading of transmissible diseases. As the latest the CPT reports show, even the countries which exceed the prescribed conditions receive recommendations of improvement according to their high economic possibilities (improvement of staff-prisoner relationship, stimulating environment for detainees etc).

The most accurate evaluation of prison practices around Europe is made by the CPT. Depending on the gravity of the issues found in each country, the follow-up visits are made annually or once in a number of years. There are countries like Monaco that have been only visited twice in two decades, while other countries, like Russia, had over 20 visits during this time.\textsuperscript{178}

**Living Conditions and Regime**

No doubt, there is a strong connection between prison conditions and the economic development of a country. However, there is also a connection to the capacity of a state to manage its criminal system in such a way as to prevent overcrowding. How many people a


\textsuperscript{178} *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, States: Documents and Visits*, online: Council of Europe, <www.coe.int>
system locks up and how it deals with them is very much a political and ideological choice.\textsuperscript{179} Except for the Scandinavian countries, all European states have faced an increase in the number of prisoners over the last two decades.\textsuperscript{180} The only downward trend was seen in Sweden and Finland. It is estimated that the prison population increased by 10% in half of the European countries.\textsuperscript{181} While the lowest rates of imprisonment are between 65 and 75 incarcerated people per 100,000 inhabitants,\textsuperscript{182} there are countries that had 599 prisoners per 100,000 inhabitants (Russia locks up 1 in 80 males) in 2010. However, the average is between 100 and 200 inmates per 100,000 people and the trend is for this rate to increase.\textsuperscript{183} In an effort to reject any kind of excuses, the European Human Rights Commissioner reiterated the ECHR view that the infringement of human rights conditions cannot be justified by the lack of resources. It also urged the countries to solve their systemic overcrowding problem as it generally results in tension, violence, improper accommodation, poor health care and as a result, undermines any attempts at rehabilitation.\textsuperscript{184}

It is true that good practices can be found in Europe more than anywhere in the world, even when it comes to living conditions and regime. In Denmark, the prison guards’ union has imposed a ban on overcrowding in detention centres and on building new ones. Germany has

\textsuperscript{182}Andorra, Norway and Denmark have 71 prisoners per 100,000 inhabitants, while Finland has 60 prisoners/100,000 inhabitants.
\textsuperscript{183}International Centre for Prison Studies, World Prison Brief, online: King’s College London <http://www.kcl.ac.uk/>
\textsuperscript{184}Thomas Hammerberg – Commissioner for Human Rights, “Viewpoints on Prison: Prisoners Should Be Treated with Dignity,” 2007, online: Council of Europe <www.coe.int>
been praised over the last decade for the thorough control courts have over the guards’ actions and the fact that treatment is monitored by many local volunteer groups. As well, prison officials have to satisfy substantially higher burdens of justification than their counterparts in other countries when they act to limit the prisoners’ exercise of their retained rights.\textsuperscript{185}

In Netherlands, since the eighties the ratio has been 1 and a half prison staff per prisoner.\textsuperscript{186} In addition, the regime is well regarded in the use of segregation. The prisoners cannot be locked up for more than 14 days and during this time, they are allowed to have visitors, to attend church, to have one hour of fresh air daily, and to receive mail.\textsuperscript{187} The need for maximum security cannot be used as reason to lock a prisoner up more than 6 months with an additional 6 months if necessary. The last published CPT report mainly agreed upon the good standards as applied to the cells but pointed out a too restrictive regime in the high security units. The assessment was made in the terrorist unit and the restrictions have increased in these sections due to the political context. The CPT strongly disagreed with the practice of handcuffing these prisoners at all times when they were out of their cell, even when they were receiving medical treatment. As well, the CPT considered the conditions in these cells worse than those in the cells in the rest of the system (exposed toilet facilities, little light and poor ventilation).\textsuperscript{188}

The last CPT report in Andorra (2004 as the 2011 has not been released yet) praised the country for the effectiveness with which it implemented the last recommendations.\textsuperscript{189}

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\textsuperscript{186}Othmani, \textit{supra note} 180 at 80.
\textsuperscript{187}Constantijn Kelk, “The Netherlands,” in Van Zyl Smith and Dunkel, \textit{supra note} 55 at 496.
\textsuperscript{188}CPT, Report to the authorities of the Kingdom of the Netherlands, CPT/Inf (2008) 2 at 24-30.
\end{flushright}
The 2009 Belgium report assessed the conditions as being “excellent.”\textsuperscript{190} As well, the prison has improved its activity system by using a lot of volunteers. The number of idle prisoners was decreasing every year.\textsuperscript{191}

Special appreciation was given to Denmark in 2008, whose prisons had impressive conditions even for very difficult inmates. Each prisoner had 12.5 m\textsuperscript{2} with furniture, fridge, TV, separate toilette, paintings and plants to stimulate sensitivity and reduce the impression of segregated detention. The high quality programming and facilities for education and work were also praised. A wide range of classes was provided, as well as training related to the prisoners’ issues (anger management, cognitive skills, drug addiction treatment etc). Each unit had a computer room, billiards, tennis table, darts, gym, and recreation rooms. The inmates were also allowed ample time outside (to play football etc).\textsuperscript{192} There has been great progress since 2002. Back then, many prisoners were locked up for 23 hours in their cell and were segregated for all kinds of reasons, from indecent language to attempting to escape.\textsuperscript{193}

Luxembourg was also admired for its impressive prison conditions and the broad variety of activities offered to prisoners.\textsuperscript{194} Norway was one of the few countries found not to be understaffed.\textsuperscript{195} As well, the generally high standards of conditions were appreciated but Norway was also criticized for the short amount of time spent outside at the maximum security prison.

\textsuperscript{190}CPT, Rapport au Government de la Belgique, CPT/Inf (2010) 24 at 49.
\textsuperscript{191}Sonja Snacken, “Belgium,” in van Zyl Smith and Dunkel, supra note 55 at 63-67.
\textsuperscript{193}Anette Storgaard, “Denmark”, in Smith & Dunkel, supra note 55 at 195.
\textsuperscript{194}CPT, Rapport au Grand-Duche de Louxembourg, CPT/Inf (2010) 31 para 32-33 at 18.
\textsuperscript{195}The staff is also very self aware of its duties. In 2009 the Union of the Norwegian Correctional Service Employees filed a complaint against the Norwegian Correctional Service at the Council of Europe. They accused NCS of breaking the European Prison Rules because it hires unqualified personnel. See Complaint 09/09 from Sept 2009, online: The Union of the Norwegian Correctional Services Employees, www.stl.no/ky.
Such isolation was considered to have “deleterious effects” on prisoners. Overall, the CPT considered that solitary confinement was used too extensively.\textsuperscript{196}

In Sweden the regime was said to be very good, with each prisoner involved in at least one program (work, education, treatment, and training). In addition, it was said that Sweden is the only country that does not use solitary confinement as a disciplinary measure. Segregation is used only in extreme cases.\textsuperscript{197} Be that as it may, in 2006 the CPT expressed concern regarding the prolonged isolation of some prisoners, as well as their restricted access to toilets at night and a cage-like exercise area. However, the CPT agreed that the rest of the prisoners’ conditions were of high quality, with 10 hours per day spent out of their cell.\textsuperscript{198}

The conditions in Switzerland were considered satisfactory. The number of prison staff had increased with more people covering the work places in prisons (95% in the prisons visited).\textsuperscript{199} As well, solitary confinement was rarely used. In addition, in 2001, there were no more than 60 prisoners in each maximum security facility.\textsuperscript{200}

At the last reviews, most of the countries in Europe were considered to have improved their conditions even though there were still problems with overcrowding, the shortage of staff or of staff training, as well as the lack of sufficient activities or work places.\textsuperscript{201} Though most prison

\textsuperscript{196}\textsuperscript{CPT, Report to the Norwegian Government, CPT/Inf (2006) 14.}
\textsuperscript{197}Hanns von Hofer and Ryan Marvin, “Sweden,” in van Zyl Smith and Dunkel, supra note 55 at 640.
\textsuperscript{198}\textsuperscript{CPT, Report to Swedish Government, CPT/Inf (2009) 34.}
\textsuperscript{199}\textsuperscript{CPT, Rapport au Conseil federal Suisse, CPT/Inf (2008) 33 at 65.}
\textsuperscript{200}\textsuperscript{Andrea Baechtold, “Switzerland,” in van Zyl Smit and Dunkel, supra note 55 at 670.}
administrators agree with the European Prison Rules, these countries are restricted in their abilities to offer a full range of activities because of budget issues and the increased number of inmates. Numerous prisoners spend most of their days locked up with little to keep them busy. Even when they are given work this is of poor quality, with little rehabilitative value. The prisoners are more diverse (including ethnicity and mental capacity) and the states find it difficult to adapt work according to their capacity. In addition, though many prisons provide limited access to cultural and sports events, there is little conclusive evidence that the prison experience provides the inmates with meaningful preparation for life after release.  

Despite the number of decisions against Italy on the matter of solitary confinement, and the concerns raised by the CPT towards The Netherlands, the UK, Spain, and Latvia, the use of this measure has decreased in the past years. Lithuania was one of the few countries in which segregation was still problematic. However, this was mainly due to the fact that segregation was similar to punishment by starvation, as the prisoners received very little food while in solitary confinement.

Almost all countries offer the right to conjugal visits in order to reduce the incidence of prison rape and general violence. The time allowed varies from a few hours to a whole weekend. Some countries like Switzerland even offer apartments connected to the prison so the inmates can spend time with their children. Eastern Europe is considered to have the most humane types of visits. Prisoners have three days at regular times to spend with their partners.

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203 See above at 34.
204 CE, Prison Rules, supra note 38 at 123-124.
206 Othmani, supra note 180 at 73.
207 Baechtold, supra note 200 at 666.
spouses or children in small flats. Their family brings sufficient food for all members. There are about 12 bedrooms for the inmates and their spouses, playgrounds for children, communal rooms and cooking areas. While these visits are widely available, because of the long distances, it is often difficult for families to make such visits.\textsuperscript{208}

However, in every other aspect, Eastern Europe is still a challenge for the Council of Europe. The traditional conditions in Central and Eastern Europe were very different from Western Europe. Prisons were very dangerous places, where people were accommodated in large dormitories holding up to 50 people. They were locked in these places for 23 h daily and because of this overcrowding, sometimes they had to sleep in shifts.\textsuperscript{209} The conditions, though much improved, are still cramped and unhealthy, lack privacy and foster well developed criminal subcultures.\textsuperscript{210} In Ukraine, the conditions for cooking are extremely unhygienic, the ratio of meat per prisoner is small, about 34.57 g per day and most food items are past their expiry dates. Though food supplies from home are not permitted by the CPT standards, Ukrainian prisoners rely heavily on packages from home for surviving.\textsuperscript{211} Moreover, the last detention centres visited by the CPT were lacking any kind of activity (e.g. TV, books, radio etc.).\textsuperscript{212} In fact, some prisons in this country are still considered to be “life threatening.”\textsuperscript{213}

\textsuperscript{208}CE, Prison Rules, supra note 38 at 118.
\textsuperscript{209}Ibid. at 115.
\textsuperscript{210}Murdoch, supra note 177 at 214.
\textsuperscript{211}Ibid at 215.
\textsuperscript{212}Report to Ukrainian Government, CPT/Inf (2009) 15 at 19.
\textsuperscript{213}US Country Report, supra note supra note 173.
As well, the last CPT reports state that there were countries where prisoners had to sleep on the floor or tables, because of the chronic overcrowding,\textsuperscript{214} and where “slopping out” was still practiced (prisoners had to defecate in a bag because they did not have access to toilets).\textsuperscript{215}

A study made on prison conditions in the Republic of Moldova revealed that they were still using Asian style toilets (a hole in the floor of the cell). At the Leova Penitentiary, there were cells accommodating 80 inmates with only one shower and two Asian style toilets. There were long periods without running water, which was brought from the well in the courtyard. Other prisons, such as Soroca, had cells with 2 to 16 beds with one Asian style toilet for each cell. The shower rooms had 58 showers. In all prisons there was a lack of heat, ventilation, and hot water.\textsuperscript{216} The CPT has made annual visits in the Republic of Moldova to monitor its progress which is still slow. The number of cases against this country is also increasing.\textsuperscript{217}

Systemic problems exist in Turkey as well. There were several reports made on the only prisoner at Imrali Prison. He was totally alone for years and the Government refused to transfer him.\textsuperscript{218} The last report on general prison conditions, show a number of improvements and good conditions in some units of the visited prisons. However the unit for people who have received

\textsuperscript{215}E.g. Report to the Government of Ireland, CPT/Inf (2011) 3 at 30 (St Patrick prison); Report to the Government of Portugal, CPT/Inf (2009) 13 at 25; Rod Morgan, “England and Wales,” in van Zyl Smit and Dunkel, supra note 55 at 221.
\textsuperscript{217}See above at 39.
\textsuperscript{218}Report to the Turkish Government, CPT/Inf (2010) 20.
“aggravated life in prison” (a commuted sentence from the death penalty) is overcrowded, dirty and without activities. These people will spend the rest of their lives in an individual room.\(^{219}\)

Russia is probably the most problematic country with respect to prison conditions. Issues are related to the number of people imprisoned, but also to the lack of cooperation. Generally, after a CPT report, the Governments respond and try to explain their actions and show proof of good faith and improvements. This is not the case with Russia. It is the only country that has refused to let the CPT reports be published, which indicates that the findings were highly unfavorable. However, the CPT did make a public statement in 2006\(^{220}\) which was very uncommon for this body. Public statements are made only when there is a systematic refusal to cooperate. It was mostly concerned with the unlawful detentions in the Chechen Republic and the life threatening abuses that took place in the prisons there. In 2003, the CPT made the first statement regarding the reluctance of the Government to implement the recommendations regarding conditions at the Grozny prison.\(^{221}\) As well, it was said that the overcrowding was catastrophic, especially in pre-trial detention, because of the very long investigations.\(^{222}\) There was also strong censorship of the limited mail and the conversations of the prisoners. They were allowed to have 4 telephone calls per year. Some improvement was noted to food, clothing and sometimes space.\(^{223}\)


\(^{221}\)Public Statement Concerning the Chechen Republic of the Russian federation, CPT/Inf (2003) 33.

\(^{222}\)Alexandr Uss and Anna Pergataia, “Russia,” in van Zyl smit and Dunkel, supra note 55 at 565.

\(^{223}\)Ibid at 570-584.
Physical Abuse

As a general rule, it must be observed that physical ill-treatment in prison has been rather uncommon in European prisons over the last years. However, there is still an abundance of ill-treatment in pre-trial detention, sometimes even in countries known for their good practices.224

This attitude is partly due to the fact that in former socialist countries, and some other states, a written confession is seen as illustrating the effectiveness of the police officer. Moreover, even though most police officers do not condone this aggressive kind of behavior, they are generally protective of their colleagues. Thus, at least occasionally, ill treatment occurs in police detention. As well, the CPT believes that the lack of knowledge of standards and obligations also has a role in perpetuating these attitudes.225 Moreover, the CPT found that these kinds of violations are not systemic, but are mostly caused by individuals.

There are several countries where regular violence in police custody has been determined over the last 2 or 3 years. Serious allegations were received in Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Ireland, Montenegro, Portugal, Serbia, Ukraine, Russia and Turkey. In Austria, Romania, Slovenia, Slovakia, the abuses were mainly on discriminatory grounds.226 There are countries where torture is still practiced regularly, such as Ukraine and Russia, although it is not allowed by law. It was also reported that in these countries, though most people in custody file reports to the national Ombudsman, these reports are censored by the detention centre authorities and their authors threatened and beaten.

224Kelberg, supra note 37 at 597
225Schmuck, supra note 36 at 69-70.
226US Country Reports, supra note 173.
As well, the CPT received very serious allegations of abuse upon their last visits. In Spain, there was an allegation that a prisoner had been severely beaten with a truncheon upon his request to use the lavatory outside his cell. Another incident of abuse at a police station left a 21-year old detainee with hypoesthesia of the right infraorbital nerve and contusion of the right infraorbital edge, together with serious, permanent weakness of his vision, a hemorrhage inside his ear and hematoma of his right auricle. There were two other cases of serious head trauma when the suspect was apprehended from the street.\textsuperscript{227} The visit in Hungary showed that the “special response team” still exists and they practice punches, kicks, slaps, provocative behavior and verbal abuse.\textsuperscript{228} A special intervention team with faces covered exists in detention centres in Romania as well, and unnecessary use of force is frequent in some prisons (Bacau, Jilava). The CPT considers there is no need for these teams.\textsuperscript{229} Again, the situation in Russia was mentioned as being tragic.\textsuperscript{230} In prisons in the Chechen Republic, torture was systemic. There was proof of beating, asphyxiation, electric shocks, hyperextension, suspension of the limbs, infliction of burns, and sexual abuse. There were absolutely no improvements since the 2003 Report and the Government continued to refuse to cooperate.

The study in the Republic of Moldova also revealed that 50% of the complaints received by the Government were made by detainees regarding their treatment. The Helsinki Committee for Human Rights also received several letters indicating systematic handcuffing, use of gasmasks, direct blows to the kidneys and head, electrocution through wires connected to

\textsuperscript{227}\textsuperscript{228}\textsuperscript{229}\textsuperscript{230}
fingers, and rape threats.\textsuperscript{231} The Moldavian detention centres have many issues, but torture is the most serious of all and it has nothing to do with the poor economy of the country.

However, aside from these tragic situations, abuses from officers have been rectified in the past few years and the number of complaints has decreased. However, the CPT is very concerned about the inter-inmates violence which is still widespread. The CPT has maintained that it is the officers’ obligation to safeguard the prisoners from each other and to promptly intervene in each situation. Overcrowding and staff shortages affect the degree of violence in prisons. It is not only the developing countries that have this problem, but also countries like Belgium, where inter-prisoners violence was identified in all prisons,\textsuperscript{232} as well as France\textsuperscript{233} and Switzerland.\textsuperscript{234} The CPT is especially concerned by the passive reaction of prison personnel when faced with this kind of violence.\textsuperscript{235} Some countries can be reluctant to accept their duty in protecting the prisoners from each other. In many cases the English courts have stated that prison is a dangerous place and that officers cannot be responsible for the attacks that take place there. As such, an inmate was killed by another dangerous prisoner who, despite his known history of violence, was given scissors in a workshop. In other cases, courts decided that authorities are not to be held responsible for giving razors to dangerous offenders or for allowing a known schizophrenic to hold another inmate hostage for five hours.\textsuperscript{236}

\begin{footnotesize}
\textsuperscript{231} Bystrom, supra note 216 at 38.
\textsuperscript{232} CPT/Inf (2010) 24 at 35.
\textsuperscript{233} CPT/Inf (2007) 44 at 14.
\textsuperscript{234} CPT/Inf (2008) 33.
\textsuperscript{235} CPT/Inff (2008) 41 (Romania)
\end{footnotesize}
In the last few years, concerns were raised by the Human Rights Commissioner because of the “terrorist threat.” With the US condoning some forms of torture for terrorist suspects and with the debate around the “ticking bomb,” European states started to develop more tolerance towards the use of force in some situations. In 2006, The Human Rights Commissioner expressed his view that torture undermines the very values we want to defend in a society built on respect for human rights. He urged the states not to support the US methods and to refuse handing over detainees solely based on “diplomatic assurances” that they will not be tortured.\(^{237}\) In 2008, he accused Spain and Ukraine of practicing “ticking bomb” torture. The Commissioner asked countries to cease using humans as a “means to an end” and to accept the “ticking bomb” as a method built on an unlikely scenario, which brought creative exceptions with alarming consequences into European prison practices.\(^{238}\)

**Health Care**

The health of prisoners is very poor compared to the health of the general population in absolutely every country. Despite the recommendations of the CE regarding the need to have equivalent health care standards, the reality is very different. There are many problems regarding transmissible diseases, especially in Central and Eastern Europe. HIV infections, hepatitis, and tuberculosis are the most serious of the illnesses affecting an increasing number of prisoners.\(^{239}\) The prison is a pathogenic environment, largely because of disrespect for basic rules of hygiene

\(^{239}\)Murdoch, supra note 177 at 226.
(overflowing toilets, release of noxious smells) and unsystematic screening.\textsuperscript{240} 40\% of prisoners in Russia have a form of Tuberculosis of which 10\% is active. 40\% of all TB cases in Russia are in prison and 60\% of the drug resistant forms are here as well. It was estimated that it is 40-50 times more likely for someone to get TB in prison than outside. The TB death rate is 201 per 100,000 prisoners.\textsuperscript{241} In Ukraine, TB is the most frequent cause of death among prisoners. In this country, out of 200,000 prisoners, 14,000 suffer from TB. In the Republic of Moldova, in 2001, 42\% of the death in custody was attributed to TB.\textsuperscript{242}

Drug abuse increases the incidences of transmissible diseases. In Slovenia 130 out of 220 prisoners were drug addicts in 2005, while in Poland 30\% had drug addictions and another 30\% were alcoholics. Similar rates are present in the prisons of Bulgaria, Romania, Latvia, and Estonia.\textsuperscript{243} In Hungary, every person with HIV was segregated for his entire time in prison. In addition, Poland is the only country from the ten in the study that had personnel trained to assure counseling pre and post HIV screening. In the Republic of the Moldova, the doctor of the prison visited stated that there is a chronic shortage of medical supplies. Only 5\% of the prisoners’ medical needs were covered.\textsuperscript{244} Hungary was one of the few countries that screened all prisoners for HIV, a practice which stabilized the number of infected people.\textsuperscript{245}

\textsuperscript{240}Othmani, supra note 180 at 71.
\textsuperscript{241}Uss and Pergataia, supra note 222 at 574-575.
\textsuperscript{243}Morag MacDonald, “A Study of the Health Care Provision, Existing Drug Services and Strategies Operating in Prisons in Ten Countries from Central and Eastern Europe,” Publication series NO 45, European Institute of Crime Prevention and Control, affiliated with the UN (HEUNI), Helsinki 2005 at 73.
\textsuperscript{244}Bystrom, supra note 216 at 40.
\textsuperscript{245}Ferenc Nagy, “Hungary,” in van Zyl Smit and Dunkel, supra note 55 at 362.
However, in the nineties, a number of states took action against the spread of these diseases. Switzerland introduced the Hindelback pilot-project, a needle exchange program, in 1994. They observed that the number of drug addicts did not increase while the number of infected people decreased. This program has also been introduced by Germany and Spain.\textsuperscript{246} In 2009 the PNSP (Prison Needle Syringe Program) was introduced in over 60 prisons, including institutions from Switzerland, Germany, Spain, Luxembourg, Moldova, Armenia, Romania, and Portugal. In addition, PNSP is being considered by countries like Azerbaijan, Ukraine, Belgium and the UK.\textsuperscript{247}

The Methadone Maintenance Treatment plan was introduced in the nineties in order to reduce HIV infection due to drug use. Countries like Spain, Switzerland, Germany and Denmark have been using it ever since.\textsuperscript{248} As it is very expensive, some countries were reluctant to introduce it. In the Netherlands there has been a lot of litigation on this matter, the most important case being known as “The Methadone Case.” Since then, the program has been mandatory in Dutch prisons.\textsuperscript{249} However, CPT manifested concern regarding the use of such treatment in some countries. While the programs may be efficient, there are still numerous deaths in these programs.\textsuperscript{250} Some countries even use the Heroin Maintenance Program, though this is not very widespread (Switzerland, United Kingdom).\textsuperscript{251} Some countries administer heroin only to chronic addicts in order to prevent their death. Also, condom programs are commonly

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\textsuperscript{246}Jurgens, \textit{supra note} 150 at 54-66.
\textsuperscript{247}“Clean Switch: The Case of PNSPs in Canada,” 2009 at 6; online: Canadian HIV/AIDS Legal Network <http://www.aidslaw.ca>.
\textsuperscript{248}Jurgens, \textit{supra note} 150 at 68-69.
\textsuperscript{250}CPT/Inf (2010) 31 (Luxembourg), CPT/Inf (2011) 3 (Ireland).
\textsuperscript{251}\textit{Ibid} at 74-75.
\end{flushleft}
used to prevent infections from spreading.\textsuperscript{252} Though there are many countries that impose drug treatments, Sweden has an especially strict drug policy for a drug free prison. They do regular urine testing and use tracker dogs while searching personal mail and visitors. These methods seem to be effective, as each year about 45\% of the drug users are in some sort of treatment program.\textsuperscript{253}

Mental illness is an issue of special concern as few countries provide proper care. Suicidal prisoners are still a problem and authorities fail to handle them properly and with dignity. The CPT discovered a shortage in trained psychiatric personnel in almost all prisons in Europe. The latest CPT recommendations included the need for a psychiatrist in prisons (Albania, Austria, Finland, France, Germany, Greece, Hungary, Sweden, Slovenia, Slovak Republic, Portugal, Romania, and Norway). As well, there is an increasing concern that people who need psychiatric attention are being detained instead of going to psychiatric facilities. Keeping them in psychiatric wings of prisons for a long time is not a solution as they cannot receive proper help. Failing to provide assistance for mentally disturbed people can very easily become an inhuman treatment.\textsuperscript{254} In England and Wales it was found that 78\% of male remand prisoners, 64\% of the sentenced male prisoners and 50\% of the female prisoners suffered from a personality disorder.\textsuperscript{255} In 2003, 94 prisoners in these areas have committed suicide. The rate had increased to 2 suicides per week in 2004.\textsuperscript{256} It is common practice to segregate people with suicidal tendencies, an action which is believed to aggravate their illness. Belgium used

\begin{footnotes}
\textsuperscript{252} Baechtold, supra note 200 at 670.
\textsuperscript{253} Von Hofer and Marvin, supra note 197 at 646.
\textsuperscript{254} Cooper, supra note 3 at 63-64.
\textsuperscript{255} CE, Prison rules, supra note 38 at 128.
\end{footnotes}
segregation for all types of medical situations, from self-control crisis to drug addictions and suicidal ideation.\textsuperscript{257} The CPT does not condone Germany’s practice to strap suicidal inmates to their bed for 36 hours.\textsuperscript{258} In order to avoid deaths, some countries have introduced force feeding or forced treatment in cases of hunger strikes.\textsuperscript{259} On the other hand, it was said that as long as new prisons are small, apparently built to be overcrowded in some countries, it is no wonder that drug addictions and suicides are common.\textsuperscript{260}

Another health matter which attracted the CPT’s criticism was the surgical castration of sex offenders in the Czech Republic. The last report demanded that the government put an end to this practice once and for all.\textsuperscript{261} In previous reports the CPT demanded the same thing without any effect.\textsuperscript{262} In response, the Czech Government affirmed that it has no intention to cease this method as it assures increased safety for the society and it is seen as a consensual treatment for sex offenders. The Czech government promised to increase the guarantees against abuses and to provide better information before asking for consent.\textsuperscript{263} Other countries like Denmark provide anti-hormone therapy for sexual offenders. The CPT requested that these people be monitored very thoroughly during this treatment.\textsuperscript{264}

\textsuperscript{257}Snacken, supra note 191 at 60. 
\textsuperscript{258}CE, Prison Rules, supra note 38 at 120. 
\textsuperscript{259}Nagy, supra note 244 at 61, Jose Luis de la Cuesta and Isidoro Blanco, “Spain,” in van Zyl Smit and Dunkel, supra note 55 at 617, Barbara Stando-Kawecka, “Poland,” in van Zyl Smit and Dunkel, supra note 55 at 528-529, Baechtold, supra note 200 at 664. 
\textsuperscript{263}CPT/Inf (2010) 23. 
\textsuperscript{264}CPT/Inf (2008) 26 at 34.
The CPT also found it troubling that some countries are not prepared for medical emergencies in prison,\textsuperscript{265} that medical equipment is old and not working well,\textsuperscript{266} that bed restraints are used on ill prisoners,\textsuperscript{267} that they fail to announce the findings of traumatic lesions present upon admission,\textsuperscript{268} that they do not have a nurse available at all times (Sundays in particular),\textsuperscript{269} that medical reports are too succinct and psychotropic drug medication is used too often,\textsuperscript{270} and that they have no specialized treatment for the care of the severely mentally ill.\textsuperscript{271}

The CPT has said time and again that the authorities are responsible for screening and treating every prisoner in their custody. In the nineties some Western and Scandinavian countries transferred the health care responsibility of prisoners to the Ministry of Health. This has greatly improved the quality of care as the service providers are better trained and paid and specialized institutions have been created near prisons. The quality of treatment is much closer to the standards in such countries as Norway, France, England and Wales, Germany, etc.\textsuperscript{272}

b. Canadian Practices

As seen above, the prison conditions have long been considered under s 12 of the Charter.\textsuperscript{273} However, this litigation has not been particularly successful and generally has been rejected by Courts which prefer not to intervene too much in the internal issues of the Corrections Service. A number of scholars have expressed their opinion ever since the eighties

\begin{itemize}
\item \textsuperscript{265}CPT/Inf (2010) 33 (Greece)
\item \textsuperscript{266}CPT/Inf (2008) 41 (Romania)
\item \textsuperscript{267}CPT/Inf (2006) 14 (Norway)
\item \textsuperscript{268}CPT/Inf (2006) 11 (Poland)
\item \textsuperscript{269}CPT/Inf (2009) 35 (Latvia)
\item \textsuperscript{270}CPT/Inf (2010) 5 (Austria)
\item \textsuperscript{271}CPT/Inf (2010) 35 (U.K.)
\item \textsuperscript{272}CE. Prison Rules, supra note 38 at 121.
\item \textsuperscript{273}See above at 40-46.
\end{itemize}
that the courts should broaden their approach and address the issues of confinement conditions, abuses and health care in detail.\textsuperscript{274}

The violations of human rights in prisons may not be as outrageous as in some European countries. However, the lack of successful litigation is not due to the fact that violations do not exist. In 2008-2009, there were 6000 complaints addressed to the Correctional Investigator which resulted in an investigation. The most frequent complaints were those regarding health care in prisons (851), followed by reasons for transfer (447), segregation (416), concerns with cells’ conditions (app 400), staff behavior (357), and visits (311).\textsuperscript{275} As the Correctional Investigator concluded, systemic abuses are unavoidable since prison is a world where decisions affecting human rights are made every day.\textsuperscript{276} However, treating prisoners with dignity enhances public safety and sends the public the message that human dignity is above everything.\textsuperscript{277} These evidence-based assumptions should be starting points when looking for solutions to the problem of protecting human rights in custody.

\textbf{Prison Conditions and Regime}

Overall prison conditions were found to meet the international standards in 2010. Thus, these conditions are comparable to Western European and Scandinavian prisons.\textsuperscript{278}

\begin{itemize}
  \item \textsuperscript{275}Sapers and Zinger, \textit{supra note} 27 at 1522.
  \item \textsuperscript{276} \textit{Ibid} at 1516.
  \item \textsuperscript{277}Zinger, \textit{supra note} 27 at 127-128.
  \item \textsuperscript{278}US Country Reports, \textit{supra note} 173.
\end{itemize}
Nevertheless, the Annual 2009-2010 Report of the Office of the Correctional Investigator considers the issues regarding confinement conditions to be ongoing. The report points out that restrictions and austere regimes have increased in prisons because of drug abuse and gangs, for both men and women. Lock-ups are very common, as well as transfers for security reasons and disturbances. These cause serious interruptions in any kind of educational program.279 As well, overcrowding has increased by 50% in the last few years which has led to many prisoners sleeping in bunk beds or on the floor. The Correctional Investigator expressed his opinion that double-bunking is never a solution, regardless of whether it is for a long or short time. Numerous cells are noisy, crowded and without natural light. Even in segregation there are two prisoners locked in the same cell because of overcrowding. In addition, in the Atlantic, Quebec and Prairies regions, women are locked up in segregation because of a shortage of appropriate accommodation. In the Pacific region, 75% of the prisons have no running water or toilets in the cells. Moreover, lock-ups of up to 24 hours are very common, which makes the access to toilets extremely problematic. Thus, the prisoners must use plastic bottles and bags for excrement and urine, which are thrown out of the window after use. As a result, the cells are smelly and basic hygiene needs are not met. Meals are also served in these cells.280

Other reports drew attention to issues in prisons over the last decade. A John Howard Society Report pointed out the terrible conditions in provincial detention centres in Ontario. It was shown that in the Toronto West Detention Centre three people were living in a cell for one, which meant that one was sleeping next to the toilet, on the floor. Since there was no table in the


280 Ibid at 31-37.
cell, the meals had to be served on the toilet. The Ombudsman of Ontario made recommendations regarding these conditions in his 2001-2002 report since he received almost 8,000 complaints about the conditions here. The report pointed out that these conditions do not meet the UN standards since the facilities lacked space, any recreational rooms and overall were not humane.  

Another John Howard Report described the conditions in remand, especially in the Toronto Jail, as being overcrowded, unsanitary and dangerous. In 2007 there were 2,853 more people in remand than 10 years before, all held in maximum security facilities. Their conditions were harsher than those for sentenced prisoners, which is against the UN minimum standard rules. There were also no programs, work or services available to them.

Segregation continues to be a very big problem in Canadian Corrections. The Report maintained that segregation and other forms of solitary confinement are being used more often for behavior and mental health issues, despite the recommendations made during the previous years. Sections such as Special Needs Units and Special Handling Units are accommodating more and more prisoners, for undetermined periods of time. It was said that the impact of these units on prisoners’ rights is the same as that of segregation, but their use is in no way regulated.

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by the CCRA. Thus, Corrections often use these units, even as an alternative to administrative segregation.²⁸⁴

The issue of isolation has been repeatedly addressed in earlier reports. The Arbour Report was not the first, but it probably was the most comprehensive condemnation of Corrections for several issues, including the conditions for women in segregation in the Prison for Women in Kingston. The events Madam Justice Arbour investigated began on April 22nd, 1994 with a confrontation between six inmates at the Prison for Women and a number of correctional staff. These inmates were placed in the Segregation Unit, where the tension between them and the staff continued. A male Institutional Emergency Response Team (IERT) was called in from Kingston Penitentiary. Their intervention was videotaped and later investigated by the Commission of Inquiry conducted by Justice Arbour. The six women were released from segregation between December 7, 1994 and January 15, 1995. The Commissioner of the Correctional Services appointed a Board of Investigation to look into the events of April 22. The report almost ignored the IERT intervention. The Correctional Investigator made a report in February 1995 to the Solicitor General, in which he criticized the Board’s investigation, the IERT operation and the duration and conditions of segregation for the six women. As a result, the report was discussed in the House of Commons and the Governor General in Council appointed the Commission of Inquiry conducted by Madam Justice Arbour to look into the events under consideration.²⁸⁵

²⁸⁴Michael Jackson, Justice Behind the Wall, (Douglas and McIntyre, 2009), sector 4, chapter 1, online: Justice Behind the Walls <http://www.justicebehindthewalls.net> [Jackson, Justice]
One of the things the report was critical of was the conditions in segregation. After the intervention of the Extraction Team, the women were left in their cells barely covered by a paper gown, on cement floors, with nothing to sleep or sit on, with the windows opened for a long time (at 10 degrees Celsius). They were left there in body belts and leg irons for over 24 hours, after which they were given a security blanket. Most of those women continued to remain in segregation after the events in April 1994 until January 1995. They only received a mattress in May. Their access even to toilet paper was restricted and underwear was denied. Showers were not provided regularly in the initial weeks. Programming was not supplied in the Segregation unit, until cell-based management was introduced in the fall of that year (1994). Moreover, there is no evidence that the review process contained any assessment of whether segregation was still necessary. Madam Justice Arbour considered that the harsh and punitive aspect of the segregations was blatant. At that time recommendations were made regarding the use of segregation, especially for people emotionally and mentally disturbed, together with the strong suggestion that the CSC introduce a system of external control over the decisions to use segregation. This system, though recommended by many institutions ever since, has not been introduced up to the date of this thesis.

The problems in the Prison for Women were illustrated in prisoners’ writings as well, after the Arbour report. For once, the prison included all levels of security, thus all women were treated as being in maximum security. There was little access to health or educational programs.

\[287\] *Ibid.* at 255-256. See also Sapers and Zinger, *supra note* 27 at 1525.
Moreover, the food in segregation was insufficient and the access to liquids was limited. In segregation, many women were denied their legal rights, including calls to their lawyers. Moreover, the programs for addictions and anger management available for women were designed for men, so they had limited application and effect. The Kingston Penitentiary for Women was closed in 2001. However, there is no other maximum security facility for women in Canada. Thus, these women are held in male institutions. In the Prince Albert Penitentiary in Saskatchewan, there is a group of four cells in the male prison, where females in maximum security are held. Considering the fact that 68% of the imprisoned women are victims of past abuses, living in a male institution would be extremely traumatizing. Only a few programs are offered here, and the women usually do not attend them, as they must pass the male unit to get to their classes. The idea of building prisons closer to the inmates’ homes, in order to support more specialized treatment was initially considered a positive action, however things did not turned out as planned and the women’s imprisonment is still a very negative experience.

The critiques regarding prison conditions exploded in Canada with the Ashley Smith Case. In “A Preventable Death” report, the Correctional Investigator considered the lack of external review for segregation placements as one of the system failures that eventually led to Ashley Smith’s death. Ms Smith, known to be mentally ill, was incarcerated for 12 months before she died. She was held in segregation for most of this time, with no efficient counseling or

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290 Ibid at 289.
291 CBC, Inside Canada’s Prisons, visual material, 2007. [CBC]
292 Zinger, supra note 27 at 429.
programming for her illness. Any treatment would have been impossible, since in 11 months she had been transferred 17 times. It was stated that instead of receiving the care she needed she was under a highly restrictive, inhumane segregation regime, without anything to do and not even a book to read. There was no purposeful activity, no human contact, and no stimulation available.\textsuperscript{294} She died in an anti-suicide dress, on the floor in segregation, with a ligature around her neck, under the direct observation of several correctional investigators.\textsuperscript{295}

It is clear that despite the long history of recommendations related especially to administrative segregation, the issue has not been solved. On the 12\textsuperscript{th} of April 2009, there were 848 people in segregation: of this group 37\% (about 311) had been in segregation for over 60 days. The situation has deteriorated every year and more mentally ill prisoners are segregated. The complaints concerning harsh conditions in segregation have also increased. Paradoxically, there are 7,619 places for segregation in Canadian prisons while total number of places available for the general population in maximum and medium security (the only ones that have segregation) is 10,000.\textsuperscript{296} The fact that the authorities pay little attention to segregation (considered to have been historically abused in Canada), is seen as critical. As only disciplinary segregation is time limited by CCRA, many prisoners spend months and years in administrative segregation.\textsuperscript{297} The conditions, even at present, can be mind-numbing. Glen Rosenthal described the conditions in which he lived as horrible. In particular he stated that he had to lie on his back in his cell for 24 hours, without complaining because of his fear that the staff would


\textsuperscript{295}Ibid., para 27.

\textsuperscript{296}Sapers and Zinger, supra note 27 at 1525.

\textsuperscript{297}Michael Jackson and Graham Stewart, A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety, September 2009, Queen’s University Library Online at 63-66.
urinate in his coffee or spit in his food. As well, in the BC Penitentiary it was rumored that 10 day lock-ups were commonly used after disturbances, and prisoners were not allowed to go out at all or contact anyone, including their lawyers during this time. In Edmonton and Nova Scotia Centres, Extraction Teams (as described in the Arbour report), were commonly used. In Nova Scotia after the team finished, the prisoner was left naked in his cell, in restraints, and shackled to a bed without a mattress for several hours.  

It can be said that there are numerous examples of good practices. Most of the prisons offer jobs and pay the prisoners for the work. There are education programs which they may attend, skill development programs, and classes to reach a 10 grade level of education. However, only 2% of the correctional budget is invested in programming, which is a very small amount. There are specialized programs such as the Aboriginal Offenders Substance Abuse Program and Women Offenders Substance Abuse Program but these are not enough. An Alcohol Spectrum Disorder Program has begun in prisons and in the community for people on parole. It is supported by the John Howard Society, but it is not yet as extensive as it should be. Even in the super maximum security prisons like the one near Montreal, prisoners have entertainment such as TV, electronic games, and may enroll in educational programs.

Because most prisoners are released from minimum security institutions and because the risk there is not considered very high, these places are the ones with the most focus on preparing

298 Jackson, Justice, supra note 284, at sector 4, Chapter 4.
299 Sapers, Roundtable, supra note 170.
the prisoner for life outside. Some of these institutions like New Brunswick, Pittsburg Minimum Security, and Frontenac Penitentiary have particularly good conditions. The inmates there live in houses with less supervision. Various programs and activities such as work, attending church, cooking, and conjugal visits are the norm for this level of prisons.\textsuperscript{302}

However, to conclude, it must be said that for decades several issues have been seriously affecting the rights of prisoners in relation to conditions. One of these issues is the confinement of maximum security women in male institutions, with all the detrimental effects that follow. Second, overcrowding is extremely troubling as it has numerous negative effects on life and health in prison.\textsuperscript{303} The fact that double-bunking is used as a response to this problem is even more troubling. Third, the men’s maximum security regime is also of concern. As presented, the repressive internal regime characterized by frequent lock-ups is common. Moreover, in these places, external scrutiny is lacking, and publicly stated commitments to compliance with the rule of law are not tested.\textsuperscript{304} Here the greatest number of segregation issues occur and most of the incidents pass unnoticed.\textsuperscript{305}

\textbf{Abuses}

It is obvious that a prison cannot be a calm place and there is a predisposition to incidents in any system. However, a number of abuses were forbidden long ago (such as lashing,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{302}CBC, supra note 291.
\item\textsuperscript{303}For the effects of overcrowding in prison see Allan Manson, Patrick Healy, Gary Trotter, Julian Roberts and Dale Ives, \textit{Sentencing and Penal Policy in Canada}, 2\textsuperscript{nd} ed. (Toronto: Edmond Montgomery Publications Limited, 2008) at 416-423.
\item\textsuperscript{304}Manson, supra note 55 at 147.
\item\textsuperscript{305}Mary E. Campbell, \textit{supra note} 149 at 324.
\end{enumerate}
\end{footnotesize}
lobotomization, castration etc),\textsuperscript{306} and there is no evidence that they have been practiced since that time. There is also no evidence that practices such as electro-convulsive treatment or any kind of compulsory surgeries have occurred.\textsuperscript{307} Nevertheless, statistics which show that it is 20 times more likely for someone to get killed in prison than on the street, should be of concern.\textsuperscript{308} All things considered, a prison sentence should not be transformed into a sentence to death.

Allegations of brutality have been made frequently in the past. In Milhaven, Archambault and Dorchester, complaints of excessive violence, use of tear gas, deliberate humiliation and degrading treatment have given birth to inquiries.\textsuperscript{309} The Arbour Report also condemned the use of violence by the male extraction team on female prisoners. Members of the IERT had a standard uniform and a standard set of weapons, all designed to protect the members of the team, to assure their anonymity and to intimidate inmates. Even if compliant, the women were stripped in the presence of this team with box cutters. They were marched backwards out of their cell and led to the corner of the range. They were held against the wall with a clear plastic shield, where they were put in a body belt. For one of the women in particular, the application of this restraint was lengthy and painful because the person using it did not know how to put it on properly.\textsuperscript{310} In their writings, female prisoners also testified about the violence encountered in prisons by

\textsuperscript{306} Smith, supra note 133.
\textsuperscript{308} Manson, Healy, Trotter, Roberts & Ives, supra note 303 at 423.
\textsuperscript{309} Ryan, supra note 307 at 150-152.
\textsuperscript{310} The Arbour Report, supra note 285 at 71-73.
themselves and their peers.\textsuperscript{311} National Prison Justice Day was also created to commemorate the death of prisoners in custody, as an attempt to end such meaningless deaths.\textsuperscript{312}

Complaints regarding prison violence have decreased in the last decade, according to the US State Department Country Report.\textsuperscript{313} Most of the complaints concerning abuses have been encountered, as in Europe, in police custody rather than in prisons. However, the report on Ashley Smith shows that force was used when treatment should have been granted.\textsuperscript{314} As well, the Annual Report for 2008-2009\textsuperscript{315} showed that during 10 days in maximum security there were 379 separate use of force incidents. Exceptional search teams, such as security patrols, cell extraction teams and general strip searches are increasingly common. In 2008-2009 there was a 25% increase in the use of force and a 50% increase in health issues due to this. Inmate injuries have risen from 138 to 222 and staff injuries from 86 to 139. The increased use of inflammatory and chemical agents has been noticed. Even compliant inmates are often searched at gunpoint. The report also includes accounts of inter-prisoner violence. Thus, the rate of homicide in prison was 6.8\% of the 532 prisoners who died between 1998 and 2008. This translates to about 28 killed per 100,000 in prisons, compared to the national rate which is 1.8 per 100,000. In 2007, homicides accounted for 30\% of the deaths in prison, most of them due to stabbing.\textsuperscript{316}

\textsuperscript{311}Jo-Ann Mayhew, “Corrections is a Male Enterprise” at 153; Ms. Cree, “Entranched Social Catastrophe,” at 161 in Gaucher, \textit{supra note} 279.
\textsuperscript{313}US Country Reports, \textit{supra note} 173.
\textsuperscript{315}Sapers, Annual Report, \textit{supra note} 279.
Other types of abuses were reported in the jails and prisons for young females in BC. For example, they were routinely strip-searched and asked to lift parts of their bodies, while in unlocked cells. The girls reported feeling vulnerable, since the male prisoners could come by at any time and see them. As well, pat downs were routinely done by male guards. Considering the fact that 63% of these females were abused, this could be considered a type of re-victimization.\(^{317}\) The kinds of abuses reported were generally verbal ones, they complained about being called “bitches” on a regular basis and having the guards “joke” with them by twisting their arms at the back or squeezing their pressure points to have them kneeling and to embarrass them. Sometimes guards were smoking outside their cells just to make fun of them as they could not smoke or were encouraging inappropriate feelings from vulnerable girls. Male guards were often alone with female teenagers, which is against UN standards. The girls reported being afraid at times and numerous allegations of sexual harassment have been made. These include discussions about sex, guards asking them for “advice,” guards looking them up and down and winking at them and sometimes even grabbing and touching them. Incidents of extra force used to separate females who were fighting with each other were also reported (the girl was grabbed by the throat and slammed against the wall).\(^{318}\) Harassment occurred from other prisoners as well. 26% of the girls said they received sexual comments, 22% were grabbed or touched without consent, 11% punched or beaten and 45% verbally abused. 24% of the young males in gender shared institutions admitted harassing other inmates, at least verbally. Staff’s responses to


\(^{318}\) Ibid at 43.
these complaints include saying “then don’t come to prison.” Some girls also complained about male guards speaking in a vulgar way about them to male offenders during the programs.  

**Health Care**

According to the UN Minimum Standard Rules and the CCRA the health care systems inside and outside the prisons should be similar. However, this is a very difficult goal to achieve, especially in a country where the Ministry of Health has nothing to do with treatment in custody. Although the standards for health are perhaps higher in Canada than in Eastern Europe, Canada Correctional Services have often been criticized for the severe failure to provide adequate health services.

All institutions provide full-time treatment by nurses and physicians and a nurse is present in an institution 24 hours daily (even if not in every wing). Good dental care is also provided. Temporary absences may be allowed for treatment in a public hospital if necessary. The inmate may refuse or withdraw from a treatment at anytime and the treatment is given only on an informed consent basis.  

All reports from the last decade show an increasing number of people infected with transmissible diseases, mainly because of sex and drug use. A 2001 CSC report showed that in the Pacific region there was an increase from 20% to 23% of people infected with Hepatitis C. Between 1997-2001 there were 526 new cases of chronic or acute HCV discovered every year. Numerous prisons introduced counseling and testing. Screening upon admission increased by 26.7%. However, from the studies made, it was clear that the transmission of disease was very

319 Ibid at 44.
320 Manson, Healy, Roberts, Trotter & Ives, supra note 303 at 134-135.
high after admission and many prisoners did not enter already carrying the infection. CSC increased the Methadone Maintenance Program and on distribution of bleach so the injecting equipment could be disinfected. However, they did not want a needle-exchange program, since their aim was to have a drug free prison.\textsuperscript{321} Regarding Hepatitis B, CSC instituted a vaccination program, but the infection rate of HBV still increased from 0.1% to 0.3%. For sexually transmitted diseases, testing is done on a voluntary basis and inmates were reluctant to do it. Since 1992, CSC has distributed condoms, dental dams and water based lubricant, as a strategy.\textsuperscript{322}

Despite these methods, the Annual Report for 2009-2010 of the OCI showed that the rate of HIV infection was 7 to 10 times higher among inmates than in the general population. The rate of those infected with Hepatitis C was 30 to 40 times higher. Between 2000 and 2008, the HCV rate of infection increased by 50%, so obviously CSC’s prevention methods were not very effective. The Correctional Investigator condemned the CSC for not providing the same harm reduction measures available in the general population and considered that this disparity raised human rights issues. As well, he is of the opinion that a needle exchange program would be beneficiary.\textsuperscript{323} A study on HIV in prisons showed that the only effective measure taken in 2005 was the tattoo project, which provided, at the inmates’ expense, sterile tattoo services. Though condoms and bleach were already available they were not as effective.\textsuperscript{324} However, though the pilot project was a real success, the government decided not to fund it after 238 days of use. This

\begin{footnotes}
\item[322] Ibid at 21-22.
\item[323] Sapers, “Annual report 2009-2010,” supra note 279 at 22.
\end{footnotes}
decision was harshly criticized by the John Howard Society. They also criticized CSC’s reluctance to introduce a needle exchange program. The Canadian Legal HIV/AIDS Network has released studies showing that the needle exchange program would be the best solution for reducing harm in prisons and that anything else is a deprivation of human rights. They reported an increase in HIV infection in 2009 which was 10-15 times higher than among the general population. There is no doubt that this increase is connected to drug consumption – half of the prisoners admitted sharing needles. The Legal Network showed that in 2005, 269,000 Canadian prisoners admitted injecting drugs while in prison. In 2009, studies showed that most prisons offered methadone programs, bleach, condoms and lubricant. However these strategies are ineffective when 30 or 40 prisoners use the same syringe. For example, at Joyceville Penitentiary sometimes up to 90 inmates used the same needle. They affirmed that they were so anxious to inject that disinfecting the needle was their last thought. The Network stated that since needle exchange programs are available outside of prison, the “highest level attainable of health” in prisons cannot be reached.

The aging of the prison population is another issue. Older inmates develop chronic diseases, such as cancer, emphysema, diabetes and cardiovascular diseases. There is no suitable treatment for them, especially since the architecture and physical infrastructure of the prison was

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326 The idea that needle exchange programs should be introduced in Canadian Corrections has occurred as early as the nineties, together with the success of the program in Switzerland. For support given to the program at that time see Richard Elliott, “Prisoners’ Constitutional Right to Sterile Needles and Bleach,” in Jurgens, supra note 158, Appendix 2.
329 Clean Switch: The Case of PNSPs Canada,” supra note 247.
not created with an older population in mind. But the prison population is not a healthy one and they come from pathogenic environments to begin with. These problems are aggravated by the prison itself and the lack of suitable treatment for an aging population. The Correctional Investigator urged the CSC to study and develop a strategy to anticipate these needs.\textsuperscript{330}

Other OCI Reports showed that the CSC staff is not trained to respond to medical emergencies. In 2002, Roger Guimond died at the Port Cartier Institution. He suffered seizures and suffocated in his own vomit under the direct observation of correctional and health care staff.\textsuperscript{331} The situation was repeated in the Ashley Smith case when she asphyxiated herself, without the staff intervening.\textsuperscript{332}

At the Pathways Aboriginal Program Unit, a prisoner deliberately cut his left arm, which caused the laceration of his brachial artery. He pressed the emergency button, but when the paramedics arrived, after 33 minutes, he was found unconscious. He was given CPR while kept in leg irons. The Correctional Investigator pointed out that one of the system’s failures was the staff’s passivity. They watched him dying for 30 minutes, without giving him help, before the paramedics arrived.\textsuperscript{333} Thus, the main problems concern the staff’s lack of training and inability to give CPR or to react in anyway upon discovering a body. Other problems were their failure to

\textsuperscript{331}Sapers, “A Preventable Death,” supra note 294.
\textsuperscript{332}Ibid at 19.
decontaminate an area after using mace, the absence of on-site defibrillators and the inaccessibility of emergency supplies.\(^{334}\)

However, the biggest health issue is psychiatric care, just as in most European countries. The Provincial Human Services and Justice coordinating Committee have pointed out numerous examples of progress made by officers in the area of mental health training. Since 2006 they have developed guidelines for working with the mental health system, every police officer receives 60 days of mental health training and officers also take online courses such as Critical Incident Response Training.\(^{335}\) However, other studies show that, at least in detention centres, there is very little improvement. The staff is not properly trained and the centres are not equipped to address the needs of ill people. It is also very difficult for detainees to access health care in the community.\(^{336}\)

The Correctional Investigator identified several improvements from previous years. Mental illness awareness has increased through staff training, new funding was provided, ($ 60 million since 2005), and mental health screening at intake is more common.\(^{337}\) However, there is still a shortage of professionals in the area of prison mental health (20% vacancy). In addition, 90% of the inmates have experienced mental health issues and generally they are put in segregation when incidents occur (1/3 of each prison population is in segregation, about 900 Canadian prisoners). Self-harm is also increasing and occurs more frequently in segregation.


\(^{335}\) “Police and Mental Health: A Critical Review of Joint Police/Mental health Collaborations in Ontario,” January 2011, at 24, online: Provincial Human Services and Justice Coordinating Committee Ontario <http://www.hsjcc.on.ca>


25% of the female inmates have manifested extreme forms of self injury, including head-banging. Unfortunately, instead of being treated as mental health issues, these are responded to as behavioral problems.338

At present CSC have five regional treatment centres, where people with serious mental health issues are sent to stabilize. However, this is just a short term solution; they are returned to regular institutions when they are better. Asylums for the mentally ill were abandoned some time ago to humanize the system. Instead, the situation of mentally ill inmates and drug abusers has worsened.339 Moreover, a co-occurrence of substance abuse and mental illnesses has been noticed. 80% of the prisoners are substance abusers, thus 80% suffer from a concurrent disorder. These people have difficulties adapting to the requirements of life in prison and their behavior is interpreted as an act of violence to which the correctional investigators often respond with violence. The Standing Committee has recommended that a partnership between CSC and the Ministry of Health be made to correct the shortcomings of the system. There are successful examples of this partnership in Norway and England and Wales. The committee considers that the conditions of the cells need to be reviewed, as well as the use of administrative segregation and staff training, as these are factors that exacerbate mental illness. As well, more rehabilitation programs should be available for the prisoners, including programs for sex offenders and inmates with bipolar disorders.340

338 Ibid. at 13-16.
340 Ibid at 44.
Ashley Smith is just one example of such system failures. The staff was unable to effectively handle her behavior, thus she was held in segregation, with little counseling or treatment.\textsuperscript{341} It seems that most inmates experience their first contact with the mental health system through the justice system. This led Senator Kirby to state that, in Canada, “the streets and prisons are the asylums of the 21st century.”\textsuperscript{342}

People with addictions and mental illnesses are also more likely to commit suicide if not properly treated. A study showed that suicides account for 60\% of deaths in prisons, while 80\% of accidental deaths are due to overdoses. Of the suicidal prisoners, at least 50\% had known tendencies as they were in a suicide program and 25.5\% were addicts. In 50\% of the cases, the deaths occurred because the officers failed to check if the prisoners were alive in their cells, 20\% as a failure to be given services for stress or death management, and 25\% had drugs or prescription administration issues.\textsuperscript{343}

c. \textit{Comparative Conclusion}

To conclude, both Europe and Canada have their own issues regarding corrections, some of which have been corrected over time, others that are still persistent. Obviously, cases like \textit{Dougoz} or \textit{M(T)} are the lucky ones that have been addressed by a court. But as this presentation shows, there are numerous situations which technically deny prisoners’ rights without the prisoners even being aware of these rights. No country is without issues in corrections, especially as prison is a closed, risky environment, which by itself invites abuses. The question is not if

\textsuperscript{341} Sapers, “A Preventable Death,” \textit{supra} note 294.
\textsuperscript{343} Gabor, \textit{supra} note 334.
human rights abuses occur in one system or another, as it has been shown that they do occur. The question is rather how these abuses are responded to and which system is more effective in this respect.
Chapter 5 Relief Avenues and Remedies

As the previous chapters show, both at the regional level in Europe and at the national level in Canada, there is legislation protecting the rights at issue. There is also a body of case law, which more or less covers aspects related to the protection of inmates’ right to be free from torture and cruel and unusual punishment or treatment.

However, in order for these rights to be freely exercised, the offender must have the possibility of bringing her claims before a judicial or administrative body, a forum that has the capacity of hearing the claim and granting appropriate remedies. It has long been established that a right without a remedy is not a right. We could also add that a potential remedy which cannot freely and easily be demanded in appropriate fora is not a real remedy. If systemic abuses still exist even within a clear legal framework, it can be concluded that perhaps the remedial avenues are not functioning at their maximum capacity.

This is the reason why the focus of this chapter is on access to justice and the remedies for breaches of the right to be free from torture and inhuman treatment in custody. It is necessary to examine how feasible it is for a convict to make a claim in each of the regions, what opportunities and alternatives he has, how costly it is to pursue these avenues and how lengthy the process is. These are all factors that need to be taken into account when assessing the effectiveness of a system and its capacity to provide real, trustworthy protection. In addition, these circumstances need to be balanced against the remedies that can be granted by each body and the range of possibilities available to compensate the person whose allegation was found to be justified.
It should be mentioned from the very beginning, that as the first chapter demonstrated, European countries and Canada are under the same international obligations in this matter, so the premises of the discussion are the same. From their inception, the creators of the international human rights bodies have acknowledged the permanently binding connection between a right and the possibility of claiming remedies for its breach.

Thus, the UN Standard Minimum Rules for the Treatment of Prisoners, after affirming the recommended standards,\textsuperscript{344} establishes the complaint procedure that needs to exist in any signatory state.\textsuperscript{345} It is the obligation of the state to ensure that each prisoner has the possibility to make weekly requests or complaints to the head of the institution or to the inspector upon his visits. As well, prisoners cannot be censored in their right to address complaints to an administrative or judicial forum.

This principle is reiterated in the “Body of Principles for the Protection of All Persons under any Form of Imprisonment or Detention.”\textsuperscript{346} This act guarantees the right of any person in custody to complain, especially in cases of torture or inhuman treatment, before authorities invested with remedial power.\textsuperscript{347} Moreover, in case it is impossible for the victim to file a complaint himself, this right is granted to a family member.\textsuperscript{348} If violations are determined, appropriate remedies must be granted in accordance with the domestic law.\textsuperscript{349}

\textsuperscript{344}See above page 12
\textsuperscript{345}SMRs, supra note 12, Part I, para. 36
\textsuperscript{346}Body, supra note 28.
\textsuperscript{347}See above presentation page 16-17.
\textsuperscript{348}Body, supra note 28, Principle 33.2.
\textsuperscript{349}Ibid, Principle 35.
“Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment” urges that all complaints regarding torture or cruel treatment be taken seriously and “promptly and effectively investigated.”\(^{350}\) Failure to do so can be an indication of state compliancy with torture methods. The state must assure full redress and reparation, including medical care and rehabilitation and must prosecute or apply appropriate disciplinary sanctions to the parties responsible.\(^{351}\)

A final international guarantee is given by the “Declaration of Basic Principles of Justice for Victims of Crime or Abuse of Power.” Considering that the prisoners are potential victims of state abuse of power, it is safe to conclude that the obligation established by this act refers to them as well. Thus, the state must include the criminalization of the state abuse in the national legislation and must assure remedies for the victims, such as compensation, restitution and medical care.\(^{352}\)

Aside from these legal frames, there is another international tool available for the protection of the rights of people in custody. Thus, countries party to the First Optional Protocol to the International Covenant on Civil and Political Rights,\(^{353}\) recognize the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of any right guaranteed by the ICCPR.\(^{354}\) The Committee is not a Court. Yet, it is

\(^{350}\)Effective Investigation, supra note 30, S 2.

\(^{351}\)Ibid, s 1 (c)


\(^{353}\)OP ICCPR, supra note 15

\(^{354}\)ICCPR, supra note 13, s 10.
the closest existing forum to an international court of human rights.\textsuperscript{355} An individual from any country that has accepted the Committee’s jurisdiction can send a written complaint to this forum after he has exhausted all national remedies. Thus, the Committee is a body of last resort. The complaint is registered with the Secretariat and the admissibility conditions are verified by the HRC.\textsuperscript{356} If the conditions are met, the case is examined on the merits and the Committee decides whether there was a violation on the part of the state and what remedy would be appropriate.\textsuperscript{357} The issue of torture and cruel and unusual punishment, as it is established by art 7 of the ICCPR, has been raised in numerous occasions before the Committee.\textsuperscript{358} The Committee makes recommendations of remedies it considers appropriate in the situations where it finds violations. Over time, these have included compensation and requests that the state investigate, prosecute and punish the responsible persons, improve conditions of confinement, release the applicant from prison, grant medical treatment, and offer guarantees of non-repetition.\textsuperscript{359}

Canada and European countries have had complaints against them.\textsuperscript{360} However, they have never had a complaint on the basis of serious ill treatment in prison or any kind of torture and cruel punishment. A case from Georgia was considered for physical and mental torture in detention in 1998; however, back then, Georgia was not a party to the Council of Europe.\textsuperscript{361}

\textsuperscript{355} Alfred de Zayas, “The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the international Covenant on Civil and Political Rights” in de Zayas, supra note 37 at 71.

\textsuperscript{356} Admissibility conditions are set up in the OP ICCPR, supra note 15, art 1, 2, 3 and 5(2).

\textsuperscript{357} De Zayas, supra note 353 at 77-91. See also Eva Rieter, “ICCPR Case Law on Detention, the Prohibition of Cruel Treatment and Some Issues Pertaining to the Death Row Phenomen,” (2002) 1 JJIS 83.


\textsuperscript{359} Dinah Shelton, Remedies in International Human Rights Law, 2\textsuperscript{nd} ed (Oxford: University Press, 2005) at 185-186 [Shelton, Remedies].


\textsuperscript{361} Georgia’s accession was on the 27\textsuperscript{th} of April 1999; See online: Council of Europe: www.coe.int.
lack of challenges for such violations may be explained by the fact that the kind of ill treatment the Committee dealt with was extremely serious and mainly came from prisoners incarcerated in Latin America. We should remember that the international instruments, including the ICCPR only offer a general protection, the standards set are quite low compared to others in regional and national bodies. The reason for this is that these standards be reached by all countries, no matter their internal situation. Though some prison conditions in Eastern Europe and prison practices in Europe and Canada are truly horrific, they barely compare to the cases the Committee in Geneva has been confronted with. Not only are the European Court and the courts in Canada more accessible than the Committee, but in this matter, the Committee’s involvement might not be very efficient for the citizens of these regions, considering the general standards it works with. On the other hand, the decisions of the Committee are not binding and cannot be directly implemented. State parties are expected to keep their commitments under the Optional Protocol in good faith. However, to date, the states have honored their pecuniary or non pecuniary obligations in only a few cases.\textsuperscript{362} Thus, not only might it be difficult for a person in custody to access a very costly procedure, with few expert lawyers available, but the chances of success are not significantly high. Moreover, even if they succeed, there is no guarantee that the state will comply with its obligation. In addition, this avenue is not very well known to European and Canadian citizens, for whom other avenues are more easily accessible.

However, though the procedures that will be presented may be more efficient despite their shortcomings, it is important to acknowledge that there is an international procedure, equally available for prisoners in Canada and Europe and this could be used in the future. The

\textsuperscript{362}De Zayas, supra note 354 at 144 & 117.
existence of this avenue is also important as it could act as a stimulus for the national and regional fora to improve their procedures and protections so that claimants do not have to access the last resort option.

a. Procedures at the European Court of Human Rights

The Dougoz case, presented in the first chapter, was introduced at the European Court in 1998 after it was dismissed by the two available jurisdiction levels in Greece: Indictments Division of the Piraeus Criminal Court of First Instance and the Court of Cassation. The case was decided by the European Court in 2001. Invoking art 44(1) of the European Convention of Human Rights, the applicant asked for “just satisfaction” for the breaches of art 3, 5 (1) and 5(4), which was supposed to consist of an award of 18 million drachmas. The Court considered the sum to be excessive and awarded him 5 million drachmas in respect of non-pecuniary damage and costs plus value added tax that may be chargeable. The applicant introduced a remainder of the application for just satisfaction, which was dismissed by the Court.

The Dougoz case is typical from the procedure and remedies point of view. Though the European Court is one of the most efficient international bodies with regard to solving individual claims and giving decisions that apply directly to the national systems, the procedures are far from perfect. They are lengthy, costly, and highly formalistic. As well, though the rate of success is quite high, the remedies available are limited. On the other hand, this avenue of claiming relief for violations is gaining wider popularity every year. The procedural requests are also becoming remarkably well known by the practitioners and despite their shortcomings, the procedures before the Court are known as fair and nondiscriminatory.
Articles 35, 38, 40, 46 and 49 of the Convention, as well as Protocols 9 and 11 regulate the issue of procedures before the Court and remedies that can be granted by this body. The procedures, as available for the prisoners in their claims for violations of art 3, have been developed through the years by the jurisprudence and are still expanding, especially in the area of remedies.

Art 34 guarantees the possibility for any victim of a state violation to introduce claims before the European Court, if the admissibility requirements set up in the Convention have been met. This article was without precedent in the international community.\textsuperscript{363} A number of states have incorporated the human rights provisions in their legislation and they apply variations of art 3 directly. However, even in states where this is not the case, the obligation of guaranteeing these rights still exists due to the fact that the Convention and the jurisprudence of the Court are binding. When domestic law is not capable of providing relief for the violation, the victims may use art 34 for recourse before the European Court.\textsuperscript{364}

The convict whose rights have been violated can file a complaint to the Court. For underaged youth, the complaints can be introduced by the youth’s legal guardian. As well, a group of prisoners can unite and, as a group, claim similar rights, (e.g. they allege that the prison conditions are in violation of art 3). However, the Convention does not guarantee collective rights, but individual ones. Thus, a prisoner cannot act as a representative for a group of inmates to claim their rights or for the whole population of that facility, even if certain conditions or treatments are affecting all of them. The names of those interested must appear as applicants and

\textsuperscript{363} Chirita, \textit{supra note} 75, at 683.
each must prove a breach of his right. The convention does not guarantee an actio populis.\textsuperscript{365} As well, the violation must have already taken place and the consequences of this violation must be proven. The possibility that the breach will take place is not enough (e.g. the prison where a certain accused is likely to be imprisoned has notoriously bad conditions).\textsuperscript{366} Family members may represent the victim, if the convict cannot make the claim himself due to serious reasons, such as health problems or the fact that the facility he is in raises serious obstacles in contacting the Court. However, these cases occur only under exceptional circumstances.\textsuperscript{367} The Court has made it very clear that art 34 confers a fundamental right and the state must assure that people in custody have the possibility to address claims and send supporting documents to the Court at all times. It is not the responsibility of penitentiary authorities to evaluate if the claims are admissible or if the convict should be allowed to send notifications.\textsuperscript{368}

Thus, the first step is to address a written complaint to the Court. The complaint is formalistic and must contain specific information in order to be considered for admissibility (name, address, representative, facts, claim, domestic law applicable, Convention articles that support the claim, precedents etc.). Together with the complaint, the convict must send all the documents supporting his claim such as proof of the facts, relevant legislation, and proof of exhaustion of national remedies. Lack of any of these elements will lead to a rejection of the complaint and the case will not be judged on the merits. Thus, even though at this stage there is no formal need to have a legal representative, it is practically impossible for a non-professional

\begin{footnotes}
365 Chirita, supra note 75 at 686-687.
366 Ibid, at 689.
367 Shelton, Regional Protections, supra note 364 at 611.
368 Chirita, supra note 75.
\end{footnotes}
to write a strong, admissible claim by himself. Briefly, a convict will likely need a lawyer from the first stage of his claim.

Before 1998, the claims were reviewed first by the European Commission of Human Rights and if admissible, were judged on the merits by the Court. The 1998 reform that took place under the Convention’s Protocol 11, replaced both bodies with a new Court.\(^{369}\) Today each application is screened by the registrar to ensure that the standard information exists. If anything is missing or there is a lack of jurisdiction, the applications may be stopped here. If the applicant insists on going forward with her application as it is, the secretary registers it and gives it a number. The application is then reviewed by a judge-reporter who presents his opinion on the admissibility of the application before a seven judge Chamber. If the judge-reporter recommends a dismissal, this can take place before three judges who unanimously render the application inadmissible. This is the fate of the largest percentage of the applications and the ones introduced by convicts are no exception. Often, an immediate rejection is due to defects of the petition or to the manner of submission. However, the applicant is notified of the reasons for rejection and may respond in writing.\(^ {370}\) This single process, from the registration of the application to the decision as to its admissibility takes at least a few months, but sometimes it takes more than one year, depending on the quantity of applications received. Only if the admissibility is tied to the merits of the case are they heard together, but it is unlikely in a claim for violation of art 3.

The admissibility conditions for an application are set forth in art 35 of the Convention. Thus, the petition will only be heard on the merits if all domestic remedies have been exhausted

\(^{369}\) Shelton, Remedies, supra note 359 at 189.
\(^{370}\) Shelton, Regional Protections, supra note 364 at 588.
and the application was submitted at the Court within six months of the date of the decisions emerging from the body of last instance. The application must not be anonymous or substantially the same as a matter that has already been examined or that has been submitted to another international court, and it must not be ill-founded or an abuse of the right of application.\footnote{ECHR, supra note 10, art 35 (1), (2), (3).}

The European Court is a body of last resort. Thus, the applicant must have unsuccessf码头ly tried all the effective and accessible remedies available in the national law. The applicant must include the proof of use of these remedies in his application or of special circumstances that made it impossible for him to access those avenues.\footnote{Shelton, Regional Protection, supra note 364 at 714.} However, the applicant must use only those avenues that can redress the wrong. For example, if he chooses the judicial remedy, he has to use all his appeals, but does not have to make a complaint at the Constitutional Court, (in most countries, this tribunal cannot render any individual remedy). However, if there are parallel avenues (e.g. judicial remedies and inmate grievance procedures) the applicant must use both of them.\footnote{Chirita, supra note 75 at 708-710.} Nevertheless, the condition is satisfied if the applicant can prove that a certain avenue or appeal was not used because it was not effective or was unduly prolonged.\footnote{Shelton, Regional Protection, supra note 364 at 714.} In addition, if the petition is rendered inadmissible because national remedies were not exhausted, the convict can reintroduce it after he meets this condition.

As well, the complaint must be introduced within six months of the last relevant decision. If the applicant pursues further national avenues which he is not sure they are effective, (so
called “extraordinary remedies”), the time still runs from the last ordinary remedy. This is why a
good knowledge of the legal system is necessary for succeeding in Court.

One of the conditions is not submitting the claim to another international body. However,
failure to meet this condition does not have such drastic consequences. The applicant can
withdraw the petition from the other court and that will make his claim admissible before the
European Court. 375

If the application is admitted, according to art 38 the analyses of the case will continue
together with the legal representatives of the parties. Each of the parties will send memorandums
with arguments sustaining his cause. The Court can make investigations of its own, and it is very
common for it to rely on reports made by other bodies, especially when the prison conditions are
challenged (European Committee for Prevention of Torture, UN Committee for Prevention of
Torture etc). The procedure is mainly written, the replicas and duplicas take place in writing. It is
rare that the Court holds oral hearings. This happens only in the most important cases, but the
Court tries to avoid them in order not to prolong the proceedings. At this phase of the
proceedings legal representation is mandatory. Before the complaint is communicated to the
state, the applicant can represent himself; from then on the communication between the court and
the claimant takes place through a lawyer. If the claimant cannot afford one, the Court may
consider granting financial judiciary support. However, as stated above, it is highly unlikely that
a claim will make it so far without legal support.

375 Ibid. at 701.
The proceedings at the Court are free of charge. Nevertheless, the costs that may result from such an avenue should not be underestimated. The postal services, the cost for obtaining documents, judicial assistance and sometimes travel expenses can be considerable. However, if the complaint is admitted, the applicant will be able to ask the defendant for costs.\footnote{Chirita, supra note 75 at 729-731.}

Aside from the costs, that at least up to one point the applicant must support, the length of the proceedings may be a serious shortcoming. Until 1998, the fact-finding was done by the European Commission. Today, the system is not so bureaucratic, but the Court has a greater amount of work and it has to handle all the aspects of a case.\footnote{Shelton, Regional Protection, supra note 364 at 758.} In the \textit{Dougoz} case the decision was given in four years, but there are cases when the proceedings take even longer. When serious and continuous violations such as breaches of art 3 in prison are at issue, there is the possibility that by the time the decision arrives, the applicant has suffered further or is dead.\footnote{See \textit{Pantea v Romania}, supra note 113. The case was solved \textit{post mortem} and the compensation was given to the family of the applicant.}

The decisions in which the European Court condemns a state for a certain violation should serve two purposes. One is to bring relief to the applicant. The other is to deter future violations and to uphold the human rights standards set in the Convention. Considering the increasing number of claims the Court faces every year, one would imagine that the purpose of deterrence has not been achieved. However, evaluating the facts of the cases, at least regarding prison litigation, we cannot but remark that the violations are much less horrific. Instead, the number of petitions reflects the increasing accessibility and popularity which the Court has gained in the last years rather than the ineffectiveness of its measures. In Western countries this
kind of violation has almost disappeared. The CPT reports and recommendations, together with
the decisions of the Court have led to a reform of many prison systems.\textsuperscript{379} However, the Court
noticed that there are some countries which tend to be very resistant to reform on particular
issues. It is why it decided in the last few years to develop the application of art 46 which regards
the binding force and the execution of judgments.\textsuperscript{380} The decisions based on this article are
called “pilot judgments.” They are still rendered in individual cases, but along with the remedy
offered to the individual, the Court imposes an obligation on the states to repair their structural
legislative, judicial or administrative issues. Thus, the decision falls beyond the applicant and it
imposes an obligation upon the state, which affects an indeterminate number of people who are
in the same situation.\textsuperscript{381} The execution of these decisions is supervised as a matter of priority by
the Committee of Ministers and the failure to comply attracts sanctions on the state at issue.\textsuperscript{382}
The pilot judgments cover several areas identified as problematic. One of them concerns the
situation of prisoners in Turkey. Considering the fact that most of the judicial principles
regarding prison discipline and conditions arise from Turkish cases,\textsuperscript{383} the Court safely

\textsuperscript{379}See Romania which reformed its system at the middle of the last decade in accordance to the Standards imposed
by CPT, see the improvement in the Italian solitary confinement, the disability facilities and qualified personnel in
prisons in all Central and Western Europe.

\textsuperscript{380}\textit{ECHR, supra note 10, Art 46; art 46 states:} 1 The High Contracting Parties undertake to abide by the final judgment
of the Court in any case to which they are parties; 2 The final judgment of the Court shall be transmitted to the
Committee of Ministers, which shall supervise its execution.; 3 If the Committee of Ministers considers that the
supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer
the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of
two thirds of the representatives entitled to sit on the Committee; 4 If the Committee of Ministers considers that a
High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving
formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to
sit on the Committee, refer to the Court the question whether that Party has failed to fulfill its obligation under
paragraph 1.; 5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for
consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the
Committee of Ministers, which shall close its examination of the case.

\textsuperscript{381}Chirita, \textit{supra note 75} at 749-751.

\textsuperscript{382}Erik Fribergh, “Pilot Judgments from the Court’s Perspective,” Stockholm Colloquy 2008 at 6.

\textsuperscript{383}See above Chapter 3.
concluded that there is a structural state problem. On the occasion of *Gulmez v. Turkey*, the Court urged Turkey to reconsider its prison discipline regime. Though the Court found a violation of art 6 rather than 3, it established that the violation had occurred due to systemic issues regarding prison discipline procedures. It requested that the state enforce this judgment by bringing its prison system into accordance with the European Prison Rules under the supervision of the Committee of Ministers.

Regarding the remedies for the applicants, the authority is art 41 of the Convention which requires that the person whose right has been violated be granted “just satisfaction.” The formulation is broad, and indeed, the Court has wide discretion when it comes to establishing relief. However, the range of remedies that the Court can effectively enforce is definitely much narrower than the range in national law. The declared purpose of the redress is to place the victims of violations in a position that is as close as possible to the one they would have been in, had the violation not occurred. This may be possible when it comes to violations where restitution is obvious, such as property violations. But the reality is that where there are violations of art 3 in general and those related to prison in particular, not much can be done to return the victim to the previous situation. The Court does not have the power to nullify acts of the member states, regardless of whether they are legislation or prison administrative acts. However, the Court can request the state to annul the act that may create improper conditions for the convict and this would be the closest to a *restitutio in integro* in these cases. Although a declaratory judgment is common for the Court and though sometimes it considers that simply

384 *Gülmez v. Turkey*, no. 16330/02, judgment, 20.05.2008.
385 Shelton, *Regional Protections*, supra note 364 at 793.
386 Shelton, *Remedies*, supra note 359 at 189.
acknowledging that a violation has occurred provides just satisfaction,\textsuperscript{387} this is rarely the case for serious breaches such as those concerning torture and inhuman treatment.

However, in cases of torture and ill treatment the Court has used non-monetary remedies. Considering the seriousness of an infringement of art 3, the Court held the need to investigate and punish the person responsible as inherent.\textsuperscript{388} As such, in a series of cases, the court requested the state to initiate such an investigation, in addition to the compensation.\textsuperscript{389}

Thus, despite the common belief, compensation is not the only remedy available to the Court. However, especially in art 3 cases, it is the remedy most commonly seen and it has been largely used for ill treatment in custody since 1992 up to the present. Even between 1992 - 1998, a period under which the former Court was not very open to considering any remedy, there were still 50 cases in which prisoners were awarded damages for moral injuries.\textsuperscript{390} Damage awards are generally awarded for pecuniary or moral damages. They are the second-best response to be considered when full rectification is impossible\textsuperscript{391} and full rectification is not possible when a person has spent years of her life in inhuman conditions or has been severely humiliated by guards or faced other forms of physical or psychological abuse.

In general, claims of pecuniary loss are difficult to win before the Court, because there must be evidence of the exact damage and the connection between the damage and the loss.\textsuperscript{392} In

\begin{footnotes}
\item[387] 51 cases between 1982-1991. See Shelton, Remedies, supra note 359 at 260.
\item[388] Ibid. at 279.
\item[390] Ibid. at 263.
\item[391] Shelton, Remedies, supra note 359 at 291.
\item[392] Between 1991-1997 there were about 700 cases and just 19 damages for pecuniary loss were granted; Shelton, Remedies, supra note 359 at 296.
\end{footnotes}
cases of ill treatment in prison, these kinds of damages are even more unlikely and they would only be possible when some connection between physical abuse and future loss of income can be proved.

However, damages for non-pecuniary injury are far more frequent as no causality needs to be proven. The proof of the facts is enough for the Court to award the compensation. When it comes to mistreatment in custody, all applicants request moral damages and they base their allegations on anxiety, psychological or physical harm, humiliation, isolation and confusion, and distress. The Court awarded moral damages for mistreatment in prison in Ribitsch v Austria,\textsuperscript{393} when the applicant was granted the equivalent of $19,805. The sum was justified by the Commission not only through the perspective of the violation but also as an encouragement for people in similar positions to bring their complaints forward.\textsuperscript{394} In some cases, the Court awarded similar sums, as in Dougoz ($20,878.97), but in other cases such as Tomasi v France,\textsuperscript{395} the applicant received the equivalent of $116,329. Nevertheless, the Court has never addressed the issue of how these damages are measured and has never set a formula for calculating them. They are assessed on an equitable basis, depending on factors such as the seriousness of the violation, culpability, and frequency of the occurrence from that state etc.

This method of awarding damages was criticized for being a subjective judgment of the moral worth of the victim and the wrongdoer.\textsuperscript{396} It was also said that in those rare situations when the Court grants compensation for pecuniary damages, it is in a very inappropriate position

\textsuperscript{393} Ribitsch, supra note 108.
\textsuperscript{394} Shelton, Remedies, supra note 359 at 307.
\textsuperscript{395} Tomasi, supra note 107.
\textsuperscript{396} Shelton, Remedies, supra note 359 at 345.
as it cannot evaluate the exact loss which would depend upon national conditions (e.g. the value of the lost income). It was suggested that the Court be able to ask the state itself to establish the value of the prejudice through internal procedures.\footnote{Chirita, supra note 75 at 746.}

The Court has also systematically denied requests for punitive damages. They have been largely requested in cases of torture and ill treatment, especially in the Turkish prison context. The Court did not explain its decisions in any way.\footnote{See e.g. Tekin v Turkey (2001) EHRR 95.}

The final remedies are the costs and fees, which are granted on a regular basis in almost all successful applications. They generally include the fees for expert opinions, for the lawyer, translation expenses, typing, shipping of documents, telephone calls etc.\footnote{Shelton, Remedies, supra note 359 at 372-373.} Costs for training on Court’s procedures or books are regularly rejected.\footnote{Shelton, Regional procedures, supra note 364 at 813.} Even the sums allowed for the lawyer are often derisory and are sometimes less than the applicant would gain in a national case. At the moment this is not a very big issue, as it is a matter of prestige for any attorney to appear at Strasbourg. Nevertheless, it was said that in time these low payments may diminish the quality and quantity of legal services available to applicants.\footnote{Shelton, Remedies, supra note 359 at 375.}

In a condemnation decision or a friendly settlement, the execution of the obligation of the state is supervised by the Committee of Ministers. When the state makes the payment it notifies...
the Committee which keeps track of all payments made by respondent states, adoption of other measures of redress and of preventive measures.402

b. Procedures in Canada

A larger number of avenues can be chosen by inmates to claim their rights in Canada. As well, for each of these there are several remedies available to redress a possible violation.

In M(T) a Charter application was made during the same trial in which the offender was tried for the original offences. Thus, in the initial criminal trial where M(T) was charged with three counts of mischief, he made an application that his rights under s 12 of the Charter have been violated. For the reasons presented above,403 a violation was found. This was considered intricately related to the offence with which the youth was charged. Thus, the trial judge ordered a stay of these original proceedings. She argued that a stay was a strong remedy and it was not the only one available, but it was just and appropriate. She mentioned the fact that the offences were minor, while the infringements of the rights were serious and overwhelming, elements which allowed a strong remedy.

However, the Charter application is not the most frequent avenue taken when prison conditions and treatment are at issue. The majority of the claims related to these problems are addressed and solved through the internal institutional procedure within Correctional Service Canada. These procedures are regulated by the Correctional and Conditional Release Act404 and

402 In June 2007, at its meeting, the Committee reviewed 800 cases of compensation and was closed 273 which were fully honored. Shelton, Regional Procedures, supra note 363 at 816.
403 See above at 27-28.
404 CCRA, supra note 54, ss 90-91.
Regulation\textsuperscript{405} and by the Canadian Correctional Commissioner’s Directive on Inmates Grievance Procedure.\textsuperscript{406} As a parallel administrative avenue, complaints can be addressed to the Correctional Investigator, the Canadian Ombudsman for prisons.\textsuperscript{407}

The complaints can be addressed to the Correctional Investigator even if the matter is the subject of a current or past complaint or grievance under the CCRA.\textsuperscript{408} The office complements but does not replace the Service’s internal offender complaint and grievance procedure or the role of the Courts as avenues of redress.\textsuperscript{409} The complaints addressed to the investigator have increased from 787 to 6,388 in just a few years. The largest area of systemic offender complaints revolves around prison conditions: the general institution conditions, segregation, transfers, double-bunking and availability and access to programming and health care. If the investigator discovers irregularities in conditions or treatments during the investigations based on these complaints or during his occasional visits to the facilities, he makes recommendations with directions for improvement to the institution in question and to the Commission and Chairperson of the National Parole Board.\textsuperscript{410} Although his recommendations are not binding, the fact that the Office of the Correctional Investigator is an independent agency brings the office a great amount of credibility. The investigator does not act on behalf of the prisoner or the institution, thus he is an objective third party. Having this quality, he has access to the Solicitor General who can present the unresolved prison issues set in the reports to Parliament.\textsuperscript{411} Thus, though he cannot grant remedies to the prisoners for the conditions and treatments they have been put through, he

\begin{itemize}
\item \textsuperscript{405}Corrections and Conditional Release Regulations. SOR 92-620, ss 74-82 [CCRR].
\item \textsuperscript{406}CD 081, Offender Complaints and Grievances (2008-10-31). [CD 081]
\item \textsuperscript{407}See above at 25.
\item \textsuperscript{408}CD 081, supra note 406, s 79.
\item \textsuperscript{409}Online: Correctional Service Canada <www.csc-scc.gc.ca.>
\item \textsuperscript{410}CCRA, supra note 54, s 178.
\item \textsuperscript{411}Ibid.
\end{itemize}
has the power to make effective recommendations for the improvement of those conditions. All the assessments he makes have, as starting points, the internal legislation and the international prison standards ratified by Canada.\textsuperscript{412} Nevertheless, the Correctional Investigator has argued that the role of his office is extremely important as the balance between internal and external monitoring can prevent, detect and rectify breaches of human rights. In 2010, he also argued that in order to function better and assure the protection of human rights behind walls, the office needed to be free from the submissive relationship it has with Parliament. It is exactly because law and order tend to be politicized that external scrutiny is so important.\textsuperscript{413}

The internal procedure of the Services is bureaucratic, but the Acts regulating it have improved it, as well as the protection granted by the Charter and the possibilities of judicial review. Under this procedure, the inmate has unlimited access to bring forward complaints or grievances. Whenever he is dissatisfied with the conditions or the treatment applied to him by a staff member, he can make a complaint to the superior of that person. If the convict is not satisfied with the result he then may address the complaint to the head of the institution or the director of the parole district.\textsuperscript{414} If his complaint is not positively resolved than the inmate can address the complaint to the head of the region.\textsuperscript{415} Finally, if this step fails as well, he will direct his complaint to the Correctional Commissioner.\textsuperscript{416} The inmate can only apply for judicial review after all four steps have been taken.\textsuperscript{417} The Correctional Act assures that every offender has complete access to this procedure and that she will not suffer any negative consequences for

\textsuperscript{412}For the detailed result of the Office’s work see the reports of the Correctional Investigator presented above, Chapter 3.
\textsuperscript{413}Sapers and Zinger, supra note 27 at 1527.
\textsuperscript{414}CCRR, supra note 405, ss 74-75.
\textsuperscript{415}Ibid., s 79
\textsuperscript{416}Ibid s 80.
\textsuperscript{417}Ibid, s 81.
pursuing it.\textsuperscript{418} The procedure must be expeditious and fair for all matters under the Commissioner’s jurisdiction.\textsuperscript{419}

The Commissioner’s Directive brings clarifications to this procedure. Thus, for assuring the fairness of the process, the head of the institution, when addressed with a complaint, will consult the Inmate Grievance Committee and the Outside Review Board upon request. The first one contains an equal number of inmates and staff members, while the latter is formed by members of the community. Both of them make recommendations regarding the direction in which the grievance should be resolved at this first level of complaint. The complainant must introduce the grievance within 30 days from the occurrence of the problem, in writing and register it with the clerk.\textsuperscript{420} The inmate must receive written and motivated responses from all levels addressed within a prescribed period of time (15 to 25 days from the first and second level and 60 to 80 days from the third level).\textsuperscript{421} Complaints regarding segregation and confinement conditions and treatment are considered urgent and must be dealt with promptly. People in this situation must be provided with the daily possibility of addressing grievances.\textsuperscript{422} All prisoners must be provided with complaint forms for all levels and must have access to the Offender Complaint and Grievance Procedure Manual.

The failure of this administrative procedure opens the door to judicial review. Most of the judicial avenues require that the internal procedure be completely exhausted.\textsuperscript{423} In this way,

\begin{footnotesize}
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\item \textsuperscript{418}CCRA, \textit{supra} note 54, s 91.
\item \textsuperscript{419}\textit{Ibid}, s 90.
\item \textsuperscript{420}CD \textit{081}, \textit{supra} note 406, ss 27 – 31.
\item \textsuperscript{421}\textit{Ibid}, ss 31-37.
\item \textsuperscript{422}\textit{Ibid}. s 42.
\item \textsuperscript{423}Bordage \textit{v} Archambault Institution, (2000) 204 FTR 133; Pinkney \textit{v} Canada (Correctional Services), 2001 FCT 1053.
\end{itemize}
\end{footnotesize}
controversies over internal decisions are brought as applications to the Trial Division of the Federal Court.\textsuperscript{424} However, when it comes to a Charter or \textit{habeas corpus} application, the judicial remedies are prevalent and there is no need for exhausting the internal procedure\textsuperscript{425}.

It was argued by the courts that there are some shortcomings of the internal procedure that cannot be overcome unless the Courts play the predominant role in solving the issues of the inmates based on Charter applications.\textsuperscript{426} For once, the policies of the Commissioner should not be left to the review of internal boards of the authorities who are actually subordinate to the Commissioner. Second, the CCRA and CCRR do not contain any remedies or grounds on which the grievances may be reviewed. Third, decisions with respect to grievances are not legally enforceable. Thus, the fairness and the effectiveness of this procedure are in question.

As well, in the Arbour Report the grievance system was strongly criticized. Most of the women involved in the events inquired in 1994, filed complaints. Some of these complaints were never answered though they were in regard to serious allegations of the use of force, the conditions in segregation, cross gender search, body cavity search etc. Any complaints were generally answered late, and in a number of instances they were responded to by an inappropriate person. There was no system to prioritize the complaints and those reviewed were rejected as unreliable.\textsuperscript{427} Recommendations were made regarding the proper time to answer, the implication of the Commissioner of CSC, the explanation etc. In 1998 the Working Group for

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\item \textsuperscript{424} Manson, \textit{supra note} 55 at 133.
\item \textsuperscript{426} \textit{May v Ferndale Institution}, 2005 SCC 82, para 63 – 72.
\item \textsuperscript{427} Arbour Report, \textit{supra note} 284 at 150-151.
\end{itemize}
\end{footnotesize}
evaluating the CCRA, including the grievance system praised its efficiency.\textsuperscript{428} It was stated that all recommendations made in the Arbour Report have been implemented. As well, the efficiency results from the fact that 19% of 23,000 yearly complaints were upheld, they were answered within 11.5-17 days and just 5.3% of them reached the last level of grievance. While this may be true, some tragic events after 2000 pointed at failures of the system again. Once again, this system was subject to improvement recommendations from the Office of the Correctional Investigator in the Annual Report of 2004-2005.\textsuperscript{429} It was then held that the grievance system was dysfunctional in terms of “expeditiously resolving the grievances of the offenders especially at the national level.” Although some progress has been made, it was mentioned that the key recommendation (e.g. priority of the complaints) from the Arbour Report must be restated. In addition, the system was criticized again by the Investigator in 2007 after the death of Ashley Smith, in the “Report on a Preventable Death.”\textsuperscript{430} Ms Smith had filed 7 complaints in August 2007, some of which were answered after transfers from one institution to another or after her death in October 2007. Among other things, in her complaints she was asking for basic products, such as hygiene items and she was denied even those.\textsuperscript{431} Recently, an external review of the grievance system was made, which together with criticism, contained steps of improvement for the system. They included: reducing the bureaucracy by taking out the second level of grievance and thus, making the process speedier; using more inmate committees, properly training the

\textsuperscript{430}\textsuperscript{430}Sapers, “Report on a Preventable Death,” supra note 293.
\textsuperscript{431}\textsuperscript{431}Critiques of the grievance system were brought by scholars from the eighties up to date. See e.g. MacKayne, supra note 273 at 708; Jackson and Stewart, supra note 296, at 190-192.
clerks that receive the grievances, and taking measures against the trivial systematic complainants who are slowing down the process of the other complaints etc.\textsuperscript{432}

However, it was argued that the Charter protection can be invoked before administrative bodies as long as they have jurisdiction over the parties, subject matter and remedy. Thus, these bodies could award a just and appropriate remedy under s 24 of the Charter, especially since their decision is under judicial review.\textsuperscript{433} Nevertheless, if the National Parole Board could be considered an administrative tribunal of competent jurisdiction, the Head of the Institution or the Commissioner of Canada may not, so they cannot grant constitutional remedies in response to inmates’ grievances. That is not to say that the capacity these institutions have to redress abusive conditions or treatment is to be neglected. As will be further shown, the Courts are reluctant to interfere with prison system and administrative decisions, so sometimes the internal procedures may be the best avenue.

Though this internal procedure is available and largely used for prisoners’ issues, the Charter violations are normally decided in Court. The rule is that Constitutional disputes are decided in the course of ordinary litigation.\textsuperscript{434} This includes two avenues: either the provision of s 12 is invoked as a defense to a criminal prosecution, as in M(T) or it constitutes an issue in a distinct trial. Nevertheless, the two do not exclude each other and can be invoked separately. The remedies in each case will be shown to be different.

The proceedings in these cases take place under s 24 of the Charter which states that a court of competent jurisdiction will decide these matters and award appropriate remedies. Art 24(1) states that “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” It was argued that a “court of competent jurisdiction” refers only to jurisdiction over subject matter and parties, every court having been given unlimited discretionary competence over remedies by the concluding words of the section.\(^{435}\) The language of s 24(1) replaces the words originally existing in the Bill of Rights stating that remedies are “declaration, injunction and similar relief.” However, it is improper to say that every court has the power to grant any remedy that it finds appropriate. While there is a wide range of remedies that can be granted by a criminal court, it cannot award damages. This principle was strongly underlined in the leading case in the matter of damages awarded for Charter breaches under s 24(1), *Ward v City of Vancouver*.\(^{436}\) SCC stated that for a tribunal to grant a Charter remedy under 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to award. SCC specifically determined, for the first time, that damages can be a just and appropriate remedy for Charter breach violations, but they cannot be rendered by a provincial criminal court. The tribunal allowed to award damages is generally one which has the power to consider Charter questions, and which by statute or inherent jurisdiction has the power to award damages. Thus, if the


\(^{436}\)Ward v. City of Vancouver, 2010 SCC 27, 213 CRR (2d) 166 [Ward]. In this case violations of s 8 were found and the claimant was awarded damages under 24(1) for the illegal seizure of his car and strip search. The SCC upheld the damages for strip search, establishing for the first time principles for where damages are just and appropriate remedies and for establishing their quantum.
remedies that can be granted in criminal courts are considered inappropriate, the offender will have to seek redress in a court competent to award compensatory or punitive damages.  

Aside from this issue, fora competent to hear Charter issues are both the courts and administrative tribunals which make determinations of legal questions, as long as they have competent jurisdiction over the matter independent of the Charter. However, there were situations in which the Court decided that it had jurisdiction to entertain a challenge to existing prison conditions, though it did not have jurisdiction independent of the Charter. It argued that the jurisdiction existed on the basis that the prison officials responsible for managing the institution were exercising statutory powers. Thus the Divisional Court at issue decided that it had jurisdiction but it was its discretion to refuse it.

Since Charter applications are frequent in many kinds of criminal offences, Provincial Courts sometimes are confronted with such issues (as in M(T)). However, the most common fora confronted with Charter challenges are the Superior Courts as they have constant, complete and concurrent jurisdiction to hear requests for Charter remedies. Federal Courts have authority over federal administrative law and suits against the federal government. So generally speaking, prisoners claiming abusive treatment or bad prison conditions can apply in the federal court. Nevertheless, Superior Courts retain jurisdiction with respect to the constitution of federal law

437 See e.g. Stuart, supra note 136 at 555; David P. Cole and Allan Manson, Release from Imprisonment (Toronto: Carswell, 1990) at 151.
439 Re Husse, supra note 146.
440 Sack, Poskanzer & Barett, supra note 438 at 155-156.
and the prisoners can choose where they want their case to be heard. Thus, the Superior Courts have the most important role in hearing Charter challenges.\(^4^4^1\)

The person that can make an application is “anyone whose rights have been infringed.” Thus, the offender himself must invoke the Charter provision.\(^4^4^2\) However, sometimes it can be a real challenge to begin a trial from behind bars, especially when the violations invoked are the confinement conditions. Though there are both judicial and administrative guarantees against it, the possibility that a prisoner has been prevented by the correctional authorities from contacting the court, and thereby effectively precluding from any remedy, should never be excluded.\(^4^4^3\) As before the European Court, in extreme situations, family should be permitted to introduce claims on behalf of a convict.

The range of remedies that can be granted by a criminal court, where a Charter violation is found, is quite wide. Under s 24(1) this range may include adjournment, dismissal, judicial stay or reduction of sentence.\(^4^4^4\)

Declaratory relief is also widely used. It is a good alternative from the institutional perspective, where the courts are reluctant to become actively involved. However, this is not a very good option when the administrators are unworthy of trust, where subsequent litigation is likely to occur or where the breach is the result of systemic inadequacies (e.g. double-bunking or programming in prison).\(^4^4^5\) The other possibility is an injunction where a party is required to act

\(^{4^4^1}\) Sharpe & Roach, supra note 434 at 114-115.
\(^{4^4^2}\) Charter, supra note 59, s 24; W. Ian C. Binnie “Standing in Charter Cases,” in Charter Cases, supra note 438 at 77-78.
\(^{4^4^3}\) Berlin & Pentney, supra note 435 at 14-6.
\(^{4^4^4}\) Stuart, supra note 136 at 553.
\(^{4^4^5}\) Sharpe & Roach, supra note 432 at 337-339.
in a certain manner or refrain from doing so. This could be a remedy for situations where institutional conditions fail to meet constitutional standards. The Canadian system was criticized for not adopting a “totality of conditions” analysis premised on the guarantee against cruel and unusual punishment as in the USA.\textsuperscript{446} In Canada, the only reference to conditions has been made by a one line declaration in \textit{McCann}.\textsuperscript{447} Beyond the injunction remedy, it was asked if it was legitimate to wonder whether courts could restructure an institution by controlling the reform through judicial decision. Though it was accepted that it was doubtful that the Courts had the expertise, it was also argued that to respond to systemic deficiencies with only a declaration of unconstitutionality seems a breach of faith with the judiciary’s basic mandate, as it leaves the problem of meeting constitutional standards in the hands of those who have deliberately denied it.\textsuperscript{448} The Canadian Courts have not been open to any kind of structural injunctions to date, although it is clear that these are available. Whether they are to be used or not, depends on how judges will decide to exercise their discretion to order just and appropriate remedies.\textsuperscript{449}

When s 12 is invoked as a defence, as it was in \textit{M(T)}, the usual remedies that are applied for cruel and unusual punishment with regard to sentence, are to order a new trial, a stay of proceedings, a mitigation of sentence or exclusion of evidence.\textsuperscript{450} Exclusion of evidence for violations of s 12 is unlikely. If the abusive treatment is applied in order to obtain a confession then s 24(2)\textsuperscript{451} will be applied as a result of breaches to the right to silence (s 10(b)). It was said

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\textsuperscript{446}Cole & Manson, supra note 435 at 153.
\textsuperscript{447}See above at 44.
\textsuperscript{448}Cole & Manson, supra note 435 at 154.
\textsuperscript{449}Sharpe & Roach, supra note 432 at 339-340.
\textsuperscript{450}Ibid. at 255-270.
\textsuperscript{451}S 24(2) of the Charter states that “Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence
that the first defense should be to order a new trial, because a stay of proceedings is a very severe remedy. It is generally used when the accused is irreparably prejudiced and the prejudice would be aggravated by the trial.\footnote{Ibid. at 269.} However, this is ultimately at the discretion of the judge. As proved by \textit{M(T)}, the judge can decide upon a stay even if other remedies are available, but if the violation is considered as serious and the original offence is seen as mild.\footnote{See above at 28-29.}

When these remedies are considered too severe, there is the possibility of mitigating the sentence. Apparently this is available especially in situations where the violations resulted in burdens that could be characterized as punishment or hardship.\footnote{Allan Manson, “Charter Violations in Mitigation of Sentence,” (1995) 41 CR (4th) 318 at 319.} This remedy is often used after findings of arbitrary detention or excessive trial delay. However, there is another category for which this remedy is available and that is when the unconstitutional conduct mitigates the seriousness of the offence. Thus, it is possible to invoke this defence for bad detention conditions or abusive treatment during arrest, when this treatment did not produce a stay.\footnote{Ibid at 421-322.} When the other remedies that can be used as defences are rejected, the mitigation can be the most visible, expressive and effective form of redress.\footnote{For a different opinion see Oren Bick, “Remedial Sentence Reduction: A Restrictive Rule for an Effective Charter Remedy,” (2006) 51 Crim LQ 199 at 211.} However, though this remedy exists, the Courts are reluctant to apply it. It is believed that many Charter violations, including those of s 12 remain without remedy because the mitigation of the sentence is not seen as a viable option.\footnote{Ibid. at 209.}
Moreover, this remedy could be used even post-sentencing. The Supreme Court recommended that such a measure be developed in circumstances in which the sentences are actually served by reason of illegality, gross mismanagement and unfairness. This suggestion was initially made in the Arbour Report. Nevertheless, this recommendation has not been applied to date.\footnote{Stuart, supra note 136 at 554.}

Since the violations discussed in this thesis are more likely to appear after sentencing, aside from the internal procedures, the best alternative is civil litigation. Unlike the remedies available in criminal proceedings, these are affirmative or positive remedies employed by the plaintiff to restore his rights. Though they are the best solution, especially for corporal punishment, they are not all that common.\footnote{Ken Cooper-Stephenson, “Tort Theory for the Charter Damages Remedy,” (1998) 52 Sask L Rev 1 at 10.} This may be because of the shortcomings that civil litigation has in Canada, as pointed out by scholars. A civil suit is expensive, uncertain in outcome and even if successful, plaintiffs are likely to be the subject of confidentially agreements. Moreover, the proceedings of civil litigation are very difficult when the plaintiff is in prison.\footnote{Stuart, supra note 136 at 604.} As well, in Canada, the compensatory damages are effective in commercial or civil cases where a loss can be proven. For Charter violations that resulted in injuries or humiliation, determining damages is more like guess work.\footnote{Sharpe & Roach, supra note 434 at 343.} Though there is no need to prove a loss,\footnote{Cooper-Stephenson, supra note 459 at 81.} Charter rights are abstract and hard to translate into money. However, damages could be appropriate to control inappropriate behavior, as when an official violates the Charter without a
statutory authorization. Ward v The City of Vancouver is, as mentioned above, the leading case in damages awarded for Charter violations. The SCC strived to set up some principles to diminish the guess work a judge would have to do in order to establish damages. For the first time, damages for Charter breaches are established as a distinct remedy from tort law. SCC determined that damages must be a response to a serious Charter breach, and their purpose is to restore the claimant to the position he would have been in had the breach not been committed. The quantum of the damages is to be determined upon the seriousness of the breach and its repercussions on the claimant. The damages awarded must be fair to both the claimant and the state. Thus, criteria such as the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of money from public programs to private interests are also we taken into account when deciding upon the quantum of damages. Damages under s 24(1) must be awarded after the breach of Charter rights has been assessed as an independent wrong, worthy of compensation in its own rights. Though the claimant may join a s 24(1) claim with a tort claim, the damages awarded under s 24(1) may not duplicate the ones granted under the private law causes of action. Although this case is extremely important for the doors it opens in civil suits for Charter breaches, it is still unlikely that this remedy will be very much used by imprisoned people in the years to come. The principles are still vague, the outcome uncertain and a civil suit is still expensive and inaccessible to the poor. Thus, the shortcomings of civil litigation are still

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463 Sharpe & Roach, supra note 434 at 345.
464 Ward, supra note 436.
overwhelming. The same issues occur with the punitive damages. They are intended to punish rather than compensate, but they have never been awarded in violations of s 12.  

In conclusion, issues of abusive treatment or prison conditions are dealt with in Canada through the internal procedure or by addressing complaints to the Correctional Investigator. It is also common to make Charter applications as a defence if the violations occurred before the sentencing hearing. However, civil litigation is not very successful in this area. In such cases, we cannot help but ask ourselves what redress exists for violations. The internal procedures may help improve conditions or result in disciplinary punishments to the abusive staff member, but the harm suffered by the offender remains without redress.

c. Comparative Conclusion

The differences between the regional procedures and remedies and the national ones are remarkable. Regional proceedings are more bureaucratic by far, require a higher degree of knowledge and are lengthier. Furthermore, the range of remedies is narrower and sometimes less effective due to the fact that the Court is not familiar with the exact context in which the violation occurred. However, the pilot judgments which allow the court to require systemic reforms are a great step forward, not necessarily in the area of remedies, but for the long term protection of human rights in Europe.

In Canada the procedures are varied, the range of remedies is wider; the proceedings do not take so long and they are not as costly. The possibility of invoking the breach as a defence and receiving a tailored remedy is the big advantage of a national protection system. The internal

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465 Sharpe & Roach, supra note 432 at 346.
procedures are also specific to national systems and they are helpful in correcting institutional deficiencies. However, the reluctance of the Courts to intervene in structural issues, the fact that they tend to push these problems towards internal procedures which still have many shortcomings, and the barriers in the way of civil remedies can be seen as disadvantages due to having an unsupervised national protection. As well, the small number of Charter cases on s 12 can be due to the high standard imposed by courts for cruel treatment and punishment - “gross disproportion,” which can be too high to reach unless the totality of conditions is addressed. Moreover, as shown, the totality of conditions has not been discussed, so many serious cases have been dismissed since the standard has not been reached.
Chapter 6 Conclusion

Comparing a regional system of human rights to a national one is not always an easy task and sometimes its utility is called into question. First of all the two systems do not exclude each other. Anywhere in the world where they exist, the national system is the basic one while the regional one is of last resort. A regional system has both benefits and drawbacks and every one of its failures and successes echoes deeply on a national level.

It has been the purpose of this thesis to explore a system that incorporates both avenues in contrast with one that only presents the basic system. This has been done in connection to prisoners’ rights, a sensitive, disputed and lively area in current human rights field, and this needs improvement in every system. The major aspects of this protection, from the legal framework and case law, to the actual grievance process and remedies, have been analyzed with the goal of finding the major differences a regional protection presents in comparison to a sole national one. Depending upon the success and failures of each system, other improved avenues can be recommended for consolidating the protection of inmates.

However, it is important to keep in mind that the comparison could not be exact. Canada is indeed very similar to Western European countries, both culturally and politically, but they are not identical. Moreover, the European system incorporates Eastern states which still have developing economies and this creates barriers in developing equal protection of human rights. The European system, having to accommodate all these differences, created standards based on the similarities of all 47 states rather than on the differences. This is why the cases which confront the court cover a greater volume of situations than those dealt with in Canada. On the
other hand, the European court, though it has extremely high standards, had to adapt some financial remedies to the economic situations of different states. The two theme cases of this thesis – Dougoz and M(T) refer to very different situations to begin with and the solutions given to them also vary depending upon the background. This is why the entire analyses made in this thesis have taken into account the political and geographical circumstances of each area.

As mentioned before, the European system, a regional system of last resort, with jurisdiction over all member states, has at its core the European Court of Human Rights and it is governed by the European Convention of Human Rights. Some countries have transferred the provisions of the Convention into their own legislation and apply it *per se*, but even for those who failed to do so, the European norms are still compulsory and the standards must be upheld. However, despite its efforts, the Court cannot always take into account the financial and political context of all members. This is why its norms appear at times to be rigid and too high for certain states, especially the Eastern ones. Even as a last resort mechanism, the Court’s standards must be maintained and this leads to the states that cannot afford it to try and cover up as many of their breaches as they can. It illustrates the fact that certain national European systems are extremely faulty and the European Court has had a limited effect in improving them. Another problem of the European process is its length. During the last decade the Court has definitely become more proficient and effective and as a result the number of cases have increased dramatically, to the point where they outnumber the Court’s resources. Thus, a process can take double or triple the time it would in a national system. Also, though there is no fee for introducing a complaint or having a case heard, lawyers and materials can be very expensive when sending one’s litigation to another country. As well, because of the lack of context the
Court has in dealing with 47 different countries, each complaint must meet formal conditions. Also, each complaint is assessed by clerks, many from the country in question, processed and upon admission, sent to be heard. As a result, the process is generally very bureaucratic. The remedies also reflect the limits of the regional systems. Considering the fact that the remedies are being applied to states and monitored by external institutions, feasible sanctions that can be properly followed-up are far fewer than those in national systems and sometimes are not customized for specific issues.

Nevertheless, having such a complex supra-system to regulate, monitor and sanction the national system, has many benefits. External mechanisms have proven their usefulness, especially in an area where correctional law mixes with human rights law. Most of the issues addressed in this thesis regard the situations where prison conditions, health care in detention centres and abuses can become torture or inhuman treatment. These are not isolated incidents but rather patterns in certain correctional systems, thus solving one case will have little positive effect on the general context. This is why a mechanism above national instances is probably the only one that can impose long term changes. As presented in the previous chapters, cases are transformed in principles and norms, and each solved case imposes obligations on all state members. Moreover, the new direction the court has taken is to give pilot judgments, which are meant to redress a repeating situation in a country or area. As well, the European system is a good example of cooperation between a Court per se, and a monitoring mechanism such as the CPT, and the Council of Ministers within the Council of Europe, which monitors the implementation of remedies by the states. The follow-up mechanisms and the very clear principles the Court has developed in many human rights areas and especially in regard to art 3,
has transformed the European system into a very successful one. However, the strikingly successful national systems in Europe are the ones that have a tradition in human rights protection themselves. Countries like Norway, Sweden, Finland, and Denmark are probably the closest in the world to achieving a perfect balance between corrections and human rights. They had good systems to begin with and the regional one improved them impressively. As mentioned before, these kinds of results are much less visible in countries that are reluctant or probably do not have the skills or the means to implement a national human rights protection.

As far as Canada is concerned, it is not part of any regional mechanism which can render compulsory decisions. On the positive side, this allows Canada to fix its own standards according to the cultural and financial context. Thus any measure in corrections and human rights is a customized one. As well, theoretically, there are many avenues an inmate can take to invoke his rights – the internal procedure, Charter based litigation, habeas corpus etc. When invoked in a criminal trial or by itself before juridical or administrative bodies, the remedies that can be rendered are various and sometimes better suited to specific situations than the ones a regional court is able to render.

However, practice has shown problems in the Canadian system when dealing with inmates’ issues related to human rights. First of all, jurisdiction is still in dispute. Courts are reluctant to accept any kind of litigation if it has not gone through the internal system procedure. The internal procedure is purely administrative so its remedies are also limited. The charter allows courts to manage litigation based on it directly, but the jurisprudence on s 12 has not been well developed in prison matters. Many cases reach a settlement between corrections and the complainant so they never reach the Court. As presented in the previous chapter, breaches in
human rights occur as often in Canadian corrections as in the European ones, even if the type of breach may differ. They are, however, brought before a judicial body not as often. This being the case, though it may be good for the individual, it does not solve the status quo regarding the failures in corrections and the case law and principles remain nearly nonexistent. As a result of these conflicts and the reluctance of the system to actually deal with the issues, the wide range of avenues available has limited effectiveness, while the numerous remedies rarely get to the point where they can actually be applied. An external monitoring mechanism would have the power to cover unsolved issues, to rule for an improvement in the internal grievance system, to request Court jurisdiction over certain matters and to make decisions that would require an upgrade of the correctional system. The Correctional Investigator of Canada has an important role in monitoring corrections from the human rights point of view, but he lacks the power of enforcing any kind of decision. The recommendations he makes are often implemented only partially, implemented late, or not at all.

Upon the analyses above, I consider that optimal human rights protection can be reached by having a feasible national system, specific to the needs of the population and the economic and cultural context. This needs to be accompanied and sustained by an external monitoring system, which is part of an effective regional or international mechanism. It is the only way the national system can be properly directed and obliged to follow international standards and avoid internal abuses.

In Europe it would be useful if the Court forced the development of national human rights’ systems using pre-established criteria. For several countries in Central and Eastern Europe, human rights are not a major concern and human rights in prisons are even of less
concern in a number of countries on the continent. Obliging them to implement and follow standards in their own courts would lead to more context-related decisions and remedies and it would make a great difference in the amount of work the ECHR would be faced with. This will mean a less bureaucratic court, shorter waiting times for a decision and lower costs for the people who make claims. The pilot judgments are an effective avenue to enforce a solid national protection system and prison reform. I doubt that this is close to happening, especially in the context of the “war on terror.” The tendency is to create an increasing number of exceptions to art 3 and the Court is more lenient in its attitude towards states. Arguably, this will lead to a decrease in the effectiveness of the Court’s decisions and its influence over states.

For Canada, a good solution would be to accept the authority of an international body. The only one regionally available is the Inter-American Court of Human Rights with the Inter-American Commission. The Commission accepts individual complaints and acts as a court of first instance, similar to the former European Commission. The Court acts more or less as a court of appeal. As previously mentioned, there have been cases of torture in prison and, especially in the last few years, the Court’s decisions have been successfully implemented. The problem is that between the Latin American states which form the great body of members and Canada, there are significant cultural differences, far greater than between European states. In Europe all members have very similar forms of government, the same economic goals and they are bound together by the European Union. The issues that South American states face are extremely serious as far as any kinds of human rights are concerned and the issues are very different from the abuses that exist in Canada or European states. The Latin American states cannot be concerned about prison conditions when, even guards are afraid to go into their prisons, when
killings by cartels are common and when cells are sometimes totally non-existent. Though the Inter-American court may be a solution in the future, Canada simply does not fit into the picture at present. Also, the follow-up mechanisms are not working at their best at the moment and political influence over the court is still high.\footnote{For details regarding the Inter-American Court of Human Rights see e.g. Michelo Hansungule, “Protection of Human Rights Under the Inter-American System: An Outsider’s Reflection,” in International Human Rights Monitoring Mechanism, supra note 37, at 679-705; Shelton, Regional Protections, supra note 363, at 497-542.}

The other option for Canada is the Human Rights Committee, presented above. Canada has already recognized its jurisdiction by ratifying the Optional Protocol of the ICCPR and it had cases before the committee. The problem with this body is that although it is a petitioning system, it is for the most part unknown to the general population and even to professionals. Also, it is a quasi-judicial body, it is not a Court \textit{per se}, and this makes it difficult at times for it to impose its decisions as it should. No doubt, most states comply as a sign of good faith, but the fact that the HRC lacks a proper follow-up mechanism and that its decisions are non-binding, takes away much of its effectiveness. Moreover, its competence is not universal but rather limited to what the states have recognized. However, the evolution of the Committee is encouraging and the fact that it upholds international standards for human rights in prison in its decisions is also remarkable. The Committee works with the CAT, the international equivalent of the CPT. CAT lacks the authority of the CPT but it is a step forward in monitoring internal affairs. As mentioned before, Canada allows prison visits from CAT but their recommendations are seldom implemented. Since the premises already exist, for the moment it would be helpful if Canada would augment its commitment towards the HRC, popularize information about the Commission in detention centres and work towards training professionals in this system.
Though the solutions for improving human rights protection in prisons seem obvious, the options for Canada are limited. Until the Inter-American court defines its principles better, the HRC remains the only feasible option. It is up to Canada to determine how effective its commitment to the HRC is for its citizens and whether this was only a formal international commitment or a real effort to increase the protection of human rights.
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