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of National Preventive Mechanisms under OPCAT“

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1. Introduction

The number of prisoners is on the rise, on a global level as well as in Europe (Aebi, Tiago, and Burkhardt 2017, 52; World Prison Brief 2016, 2). Typically, the attention brought to criminal cases and perpetrators in public ends with the judgement. After the sentence is final and the person is detained in a penitentiary institution, very little is discussed publicly. Only in some cases of blatant ill-treatment or perceived unjust benefits, does it re-enter the public sphere (Easton 2013, 485). In general, people outside the prison system are not informed or not interested in what is going on with sentenced persons inside penitentiary centres. Leading to the description of prisons as the “most forgotten element of criminal justice” (Coyle 2006, 112). The focus on the crime and the proceedings resulting in the conviction of the offender is also apparent in the detailed rules of proceeding during criminal trial and the fundamental principles of fair trial and parity of weapons. In contrast, the rules of procedure and prisoners' rights for the time following the conviction are less detailed, practical experience is discussed less in public, and scientific studies are rare. Topics such as food and nutrition, daily life, contact with the outside world, conditions of imprisonment, accommodation, times of locked doors, transfers between different detention centres, disciplinary sanctions, and request and complaint mechanisms are arranged by law, but only as general provisions. The application on a daily basis is, therefore, mostly up to discretion of prison authorities (SPT 2012a, 4).

The application of the rules on a daily basis has a huge impact on the detainees.¹ As the Subcommittee on Prevention of Torture (SPT) of the United Nations put it: “The erroneous premise that due process ends at the moment of sentencing, and that it does not apply to the actual custodial conditions and regime, encourages the use of torture and ill-treatment in [...] prisons for adults and juveniles” (SPT 2012a, 3). The starting point for the effective prevention of torture and other ill-treatment is the recognition of detainees and prisoners as carriers of human rights. From a human rights approach, prisoners need to be seen as subjects with rights and duties, rather than objects of punitive treatment. Currently, in European Prison Law it is universally recognised that prisoners retain all human rights and the restriction of rights is allowed only in cases that are absolutely necessary for the functioning of the penitentiary system, such as in the restriction of the right to free movement.

1 The thesis on hand is concerned with criminal detention of convicted prisoners, in particular adults. Excluded from its scope are juveniles kept in penitentiary institutions as well as remand prisoners and persons serving administrative detention. The terms “prisoner”, “detainee” and “persons deprived of their liberty” are therefore used synonymously for a person deprived of his or her liberty following a criminal conviction.

The connection between prevention of torture and legal protection mechanisms results from the realisation that torture and ill-treatment cannot be absolutely ruled out, but are much more likely to occur in situations where there is an imbalance of power prevalent, and places that are not publicly accessible where very little information from the inside is in the public domain. The danger of being subjected to torture or ill-treatment is far greater if rights are not clearly defined, if persons are not being informed about their rights, if there are no possibilities to address infringements of these rights and achieve redress, and if there are neither clear rules of procedure for complaints nor an independent² monitoring authority with the competence to check and enforce. In the words of the SPT: “Whilst a generally high level of respect for human rights and the rule of law within a society or community does not provide a guarantee against torture and ill-treatment occurring, it offers the best prospects for effective prevention“ (SPT 2010a).

With the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) the signatory states are obliged to establish one, or several, independent national bodies. Under the so called National Preventive Mechanisms (NPM), there is unrestricted access to all “places where people are deprived of their liberty”.³ As of 01.05.2017 there are 83 states which have ratified the Optional Protocol, 65 of these have assigned their NPM. The NPMs' mandate includes the ability to make unannounced visits inside states in order to monitor the treatment of detainees and the conditions of detention. They also draft annual reports on their work which are made available to the public.

In this thesis I set out to comparatively study the reporting activities of the NPM of selected states regarding their perspective on the legal protection mechanisms and prison litigation in penitentiary institutions for convicted persons. With the term “legal protection” I refer in a wide sense to all mechanisms in connection with the (judicial) protection of prisoners' rights. For the purpose of simplification, I have divided legal protection mechanisms into four subdivisions: 1. Information of the detainees on their rights and obligations, 2. Request and complaints mechanisms, 3. Disciplinary procedure and sanctions, and 4. De facto access to and effectiveness of legal protection. These four subdomains are obviously interrelated, and the following questions in respect to each topic highlight the interest and illustrate the widespread issues needed to be taken into account when studying legal protection mechanisms.

1. Information on rights and obligations: How are the detainees informed about their rights and obligations? Is this information presented in a comprehensible

² Independent meaning neither on the side of the prison authority nor on the side of the detainees.

³ These are penitentiary institutions but additionally include a range of different facilities such as homes for the elderly and mentally ill, police stations and detention centres for foreigners.

way, is it exhaustive and complete?

2. Requests and complaints mechanisms: What options are there to make a complaint or a request? What are the (formal) criteria to file a complaint successfully? Who decides upon the complaints? Is there a time limit on the decision? What are the competences of the deciding authority? Which measures are taken in reaction to the complaints? How is the complainant informed about the decision? Is there a (informal) system to reward or sanction persons that have filed complaints?
3. Disciplinary procedure and sanctions: What are the rules governing the elements of an offence, proceedings, sanctions, enforcement? How are detainees informed about elements of an offence, proceedings and possible sanctions? What are the standards in the procedure? How is the concerned person informed of the decision made, the enforcement and possible remedies? Are there (informal) consequences of disciplinary proceedings, such as the withdrawal of benefits or reduced chances for an early release?
4. De facto access to and effectiveness of legal protection mechanisms: What possibilities exist for detainees to get access to counselling services and information on the topic? Is there a legal aid scheme or access to a lawyer free of charge? Are prisoners represented by legal advisers in their proceedings? Are publications and decisions of courts accessible for prisoners in order to prepare their case?

These four parts serve only a rough classification of the content of legal protection mechanisms. As such, they are interrelated and each one of them has several dimensions: What is the theoretical premise? What are the rules governing the processes set out in national legislation? How do the mechanisms function in practice? Which consequences are connected?

Existing literature on NPMs can generally be divided into two categories: The first category is concerned with the functioning of a NPM in a certain state. This literature discusses the question which existing institutions should be assigned as NPM or what kind of a new institution is to be established (e.g. Pirjola 2008; Geamănu 2012). After the ratification, the design and mandate of a

certain NPM is contrasted to the requirements set forth in the OPCAT (e.g. Zhamanayeva 2014). The second category of literature is concerned with the question what aspects are necessary to improve effectiveness and functioning of a NPM (e.g. Birk et al. 2015; Steinerte 2014). To my knowledge, so far there exists no literature and research on the annual reports of NPMs, and even less on their perspective on legal protection mechanisms.

The reports of the NPMs provide a unique source of information; the mandate of NPMs and their assigned tasks are laid down in the OPCAT and, therefore, are essentially the same in all signatory states. Their powers to conduct unannounced visits and have unrestricted access to all penitentiary institutions and persons deprived of liberty provide for a knowledge basis of the conditions of imprisonment and treatment of prisoners that is truly unprecedented. As the NPMs mandate includes at its core not only examination of the treatment of persons deprived of their liberty and the conditions of detention, but also to make recommendations to the relevant authorities with the aim of improving treatment and detention conditions, to submit proposals and observations concerning existing treatment and draft legislation, and to publish and disseminate its reports.⁴

The central research question for the work at hand is the following:

What is the perspective of NPMs regarding the legal protection mechanisms in penitentiary institutions for convicted persons?

Related questions are:

- How many NPMs touch upon the subject of legal protection in their reports?
- In which way and to what extent are NPMs concerned with legal protection mechanisms and are they discussed in the annual reports?
- What role does information on rights, complaints, discipline, and de facto access to justice play in the totality of legal protection from the perspective of NPMs?
- What can be said about the legal protection of prisoners in a certain state based on the reports of NPMs?
- Which challenges, problematic topics and solutions are perceived by the NPMs?

The following study is structured as follows: After a short overview on the existing literature on

4 See OPCAT Article 20.

the topic of prisoners' rights, legal protection mechanisms and National Preventive Mechanisms the research design and methodological approach is explicated. Chapter two contains an introduction of the concept of prisoners' rights and legal protection mechanisms. The topic of chapter three is the OPCAT itself: an overview on the history of its drafting and implications for torture prevention is given, and the mandates of the NPMs as well as the SPT are outlined. Chapter four deals with the reports of the selected NPMs. After a short overview on the ratification status and reports concerning legal protection mechanisms, selected reports will then be analysed in depth. The fifth and final chapter concludes in summarisation of the findings, conclusions drawn, and an outlook for further studies in the field is given.

1.1. Research design and methodology

This thesis aims to reach a comprehensive picture of the NPMs' perspective on the topic of the legal protection mechanisms currently in place in prisons, the interconnection of problems faced, the deficiencies, the best practices, the challenges and the opportunities to strengthen these legal protection mechanisms. At the same time the work of the NPMs will be assessed critically. Having in mind the process of restructuring the prison system in Austria as well as several ambitions to strengthen prisoners' rights in Europe, the thesis aims to provide knowledge on the part the NPMs are playing and what needs to be considered when seeking to improve the existing situation. This thesis seeks to provide a useful insight for practitioners while at the same time helps to address a research gap.

1.1.1. Methodology

The second and third chapter provide the theoretical background of prisoners' rights, legal protection mechanisms, and the Operational Protocol. References are the literature on theoretical concepts of prisoners' rights, legal protection mechanisms and the monitoring through external bodies as well as the existing human rights framework on the topic, and standards and evaluations of the SPT.

The sources and main subject of research of this thesis are the annual reports of the NPMs. The organisation(s) in each signatory state that are assigned as NPMs have the mandate to engage with the public and actively encourage discussion on their work and the conditions and treatment of persons deprived of their liberty. The state parties have to “publish and disseminate the annual reports of the national preventive mechanisms” (Article 23 OPCAT). Thus, the annual reports of NPMs are largely accessible online to the public. In principle, they constitute a relatively homogeneous source, because they generally serve the same objective and purpose and are

written by commensurable institutions, that are the NPMs.

In order to analyse the annual reports I use both quantitative, as well as qualitative, approaches to content analysis. For data collection and selection, quantitative methods were used, whereas for the in depth analysis of the reports a qualitative content analysis based on Mayring (2007, 2010) is the appropriate instrument of choice. This method is particularly useful in studying the annual reports as it offers both a structured approach, and a flexible way to adjust the research design to the sources. To proceed systematically the analysis follows explicit rules, which is necessary for the results being comprehensible and revisable (Mayring 2010, 12 f). At the centre is the classification system, whereby the data is arranged according to determined subjects that are perceived as empirically and theoretically useful in order to facilitate a structured description of the collected data (Mayring 2010, 24). In order to determine the classification system, I started out with the four subsections of legal protection presented above, and connected them with the open thematic coding methods of Grounded Theory using inductive methods to create categories (Flick 2007, 391; Mayring 2010, 83 ff).

1.1.2. Data selection

There are currently 83 states worldwide that have ratified the OPCAT and 65 of them have assigned their NPM. I restricted my research to the 37 of those states that are members of the Council of Europe (CoE) and that have ratified the OPCAT. This restriction of sources is on the one hand necessary for reasons of feasibility of the study. On the other hand, it is a fruitful selection, as the member states of the CoE are all members of the European Convention on Human Rights (ECHR) and are under jurisdiction of the European Court of Human Rights (ECtHR). They therefore share common human rights standards and are part of what, in the literature, is called European Prison Law (van Zyl Smit and Snacken 2009). However, of the 37 states that are both a member of OPCAT and the CoE, six states had to be excluded from the research sample. For three states there were no reports available online⁵, and three states⁶ did not provide their NPM's reports in a language comprehensible to the author.

After a first round of collecting the relevant annual reports of the NPMs, I noticed that the reports of a single NPM differ widely from year to year, because for example, the NPM set a specific focus area for one year in its monitoring activity. A NPM may have focused on health care of persons deprived of their liberty in the year 2015, therefore its latest report does not contain any detailed information on legal protection, but could have been a focus in the previous

⁵ Malta, Romania and Turkey.

⁶ Cyprus, Italy and Luxembourg.

year of the NPM's monitoring activity. Consequently, a restriction to the latest report of each NPM would not have provided a useful selection. The area of study therefore comprised the four most recent annual reports for each NPM, as far as available. In total 103 reports of NPMs of 31 states formed the database for the present thesis. In Annex 1 there is a comprehensive overview of the states, the date of ratification of the OPCAT, assigned NPM, as well as the publicly available and reports considered in this study.

1.1.3. Assumptions and limitations

The deprivation of liberty inside prisons always goes hand in hand with restrictions and infringements of the detained individuals' human rights. The tension between human rights of an individual and the involuntary placement in detention cannot be resolved.

The reports of the NPMs offer a unique insight behind closed walls of “places where people are deprived of their liberty” (Article 1 OPCAT). However, one must not forget that they also offer a particular perspective. The reports of NPMs serve several purposes, control of authorities through public dissemination of information is one of them, as is the justification of the NPMs work and financial means.

The thesis does not intend to classify certain reports or the work of certain NPMs as “good” or “bad”. It is crucial to not perceive the reports as the truth or reality, but in contrast to understand that NPMs do not have an objective-neutral role. They have their own concrete and subjective standing, and in connection with setting up the NPMs in the signatory states there have also been developments classified as “human rights business” with its own dynamics, motivation and interests of the persons involved.

There are also inherent boundaries to the work and validity of NPMs: They might not know (or not report) about certain deficiencies and problems for example, because there is a lack of credibility for the NPM as an institution, or because it is impossible that interviews and visits inside a certain institution are anonymous and persons giving information to the NPM can be easily traced back. Danger of (informal) reprisals by prison authorities as well as by fellow detainees may play a role. At the same time, certain topics can be represented excessively in a situation where a group of prisoners takes over the representation and become opinion leaders.

The central assumption I make is that the situation of detainees in penitentiary institutions at least in all states that are the subject of this thesis, is similar. This does not mean that I strive to neglect differences in the conditions and treatment from one country to another, or the differences between institutions within one country. I expect small differences in prison

management and personal attitudes of prison staff as well as fellow detainees can make a huge difference in the everyday life of an imprisoned person. With similarity and comparability I understand that the life of people deprived of their liberty and the challenges and problems that are unavoidably connected to this are similar as they all face severe restrictions in their personal freedom and possibility to make decisions on how to conduct their lives for the time of detention.

This assumption of similarity does not only refer to individual prisoners, but also on a general basis to the deprivations, problems, challenges, and options concerning penitentiary institutions. However, the point is not to reject or negate existing differences. Obviously, the 31 states whose NPMs reports are analysed in the work differ greatly. For example in their political system, size of prison population, general respect for human rights and available financial resources, to mention just a few. Still, the assumption of similarity of penitentiary conditions up to a certain point is necessary in order to be able to comment in abstracto on legal protection mechanisms in penitentiary institutions.

2. Prisoners' rights and the protection of these rights

Prisoners are particularly vulnerable to human rights infringements, as the imprisonment encompasses their entire lives and their privacy, autonomy, and contacts to the outside world are unavoidably restricted. An articulate and widely renowned quotation is that “people are sent to prison as punishment, not for punishment”⁷ (van Zyl Smit and Snacken 2009, 81). The connection between legal protection mechanisms, prisoners' rights, and the prevention of ill-treatment is the topic of this chapter. On a basic level, the argument can be summarised as follows: Prisoners are human beings. Human beings have rights. That makes prisoners carriers of rights. This logic, and the perception of prisoners in general as carriers of subjective rights, is not something that was established in the early history of detaining people. The theory of the inherent limitation of prisoners' rights⁸, for example, has only been abolished for a few decades. That persons deprived of their liberty retain all human rights is the prevailing opinion today. Conditions of imprisonment, thus, must not include a further restriction of rights than is absolutely necessary in the context of deprivation of liberty and the purpose of imprisonment (Kau 2015, 25; van Zyl Smit and Snacken 2009, 64 ff; Eechaudt 2013, 256; Birk 2012, 478).

Prisoners' rights can be divided into two categories: First, the so called material rights, that is rights in connection with accommodation, hygiene, nutrition, health, and so on. Material rights, as has already been discussed, are based on the premise that prisoners deprived of their liberty retain all rights that are not lawfully taken away by the decision to sentence them to prison. Material rights are determined and developed by the European Committee for the Prevention of Torture (CPT) and the European Court of Human Rights (ECtHR) as well as national jurisprudence. Material rights are also spelled out in several international human rights documents, such as the European Prison Rules (EPR).⁹

The second category are procedural rights, as van Zyl and Snacken put it, or what is called legal protection in this thesis: Procedural rights are necessary to meet the requirements that makes

7 The quotation is ascribed to Alexander Paterson (1884-1947), a British penologist and prison commissioner (van Zyl Smit and Snacken 2009, 81).

8 In the German speaking world known as a special relation of powers (*besonderes Gewaltverhältnis*) that legitimises the forfeiture of rights (see Altmann 2014, 776 f with further references).

9 The European Prison Rules (CoE 2006) are a recommendation of the Committee of Ministers of the Council of Europe and as such not legally binding. There exists a myriad of relevant international recommendations (not legally binding in principle, e.g. the Standard Minimum Rules of Prisoners of the UN) and provisions in international human rights treaties (legally binding, e.g. the Convention against Torture of the UN or the ECHR) that are relevant in this context. This study is not the place to enumerate them all, for an overview on the most relevant ones in connection with prisoners and legal protection see Vermeulen et al. 2011; Eechaudt 2016.

human rights enforceable by the individual prisoner, thus making her or him a subject (van Zyl Smit and Snacken 2009, 345 f). The reason for this set of rights not being internationally defined clearly and defended by the ECtHR is that they touch upon a subject much more sensitive, and the ECtHR is therefore not willing to interfere with the member states systems too much, and, bows in front of them. Choosing instead to refer to their margin of appreciation (Livingstone 2000, 309).

This chapter is structured as follows: first, the inherent vulnerability of prisoners to rights violations inside penitentiary institutions will be discussed by elaborating on the inherent characteristics of prisons using the concept of total institutions. Second, the development and recognition of prisoners as subject of rights is shown with reference to the jurisprudence of the ECtHR and literature on prisoners' rights. The third part is devoted to the dimensions of legal protection of rights and their contribution to the prevention of so called “torture, inhuman or degrading treatment or punishment“.

2.1. Penitentiary institutions as total institutions

The term “total institution” does not only refer to prisons. According to Goffman, it encompasses five groupings of institutions. First, institutions for persons “felt to be both incapable and harmless: these are the homes for the blind, the aged, the orphaned and the indigent“ (1961, 16). Second, places to care for persons seen as incapable of looking after themselves and a (unintended) threat to the community, such as mental hospitals. Third, institutions to protect the community from what is seen to be intentional dangers, such as remand detention centres and penitentiaries. Fourth, institutions to pursue working tasks, such as boarding schools, work camps and army barracks. Finally establishments for religious purposes such as abbeys and monasteries (Goffman 1961, 16 f). All these institutions have several factors in common that led Goffman to declare them as “total institutions”. Interestingly, most of the total institutions for Goffman are also “places where people are deprived of their liberty“ in the sense of the definition by OPCAT.

Describing and elaborating on the characteristics of total institutions is necessary in order to understand the situation prisoners find themselves in. The characteristics of total institutions are defined as the following:¹⁰

¹⁰ See also Goerdeler 2016, 93 f.

- clear cut differentiation between “outside“ and “inside“;
- binary model and distinction between detainees and staff;
- breakdown of barriers between different spheres of life;
- extreme power imbalance;
- seclusive and non-accessible institution for the society outside.

The breakdown of barriers by different spheres of life describes the fact that in society people “tend to sleep, play, and work in different places, in each case with a different set of co-participants, under a different authority, and without an over-all rational plan“ (Goffman 1961, 17). The situation in total institutions is a different one; the barriers that separate different spheres of life are non-existent. All aspects of life are conducted in the same place, with people one has not chosen to spend time with, everybody is required to do the same things at certain times, these activities are tightly scheduled, they are imposed by an authority from above, and are not subject to negotiation or self-organising involvement and following explicit and implicit rules (Goffman 1961, 17 f):

“Prisons encompass the whole of the lives of their inmates and are characterized by hierarchy, routine, rituals of degradation and initiation, bureaucratic categorizations and segregation of their populations through processes of 'role stripping' (loss of the variety of social roles played in the outside world and replacement by the role of 'criminal' and 'prisoner') and 'mortification' (loss of one's 'personal face' and privacy, loss of agency and the capacity to control their destiny.“ (van Zyl Smit and Snacken 2009, 39)

Rules of everyday life and organisation of activities are defined by the prison authorities, who also control the passage of information, e.g. plans for inmates. This results in a situation for detainees described by Goffman as “exclusion from knowledge of the decisions taken regarding [their] fate“ (1961, 19).

In total institutions there is a cleavage between inmates and staff; whereas staff is socially integrated in the outside world and operates inside the total institution on an eight-hours-day-work basis, inmates typically live inside the institution and have only restricted contact with the outside world (Goffman 1961, 18; van Zyl Smit and Snacken 2009, 39). Between these two spheres, social mobility is more or less non-existent, and social distance is typically great. Communication between prisoners and staff is necessary, but according to Goffman, characterised by hostile stereotypes and formal restrictions¹¹ (1961, 18 f). The prison staff, as

¹¹ The different functions assigned to staff e.g. in the Austrian prison regime as both, caring and guarding, needs to be seen critically under these characteristics see Stuefer 2013. In general, professionalism and training on the

representative of the authority prisoners are subjected to, can use force against the prisoners. Meaning detainees are controlled by an authority they do not necessarily recognise as legitimate. Under the prison system, prisoners experience a “loss of agency and the capacity to control their destiny“ (van Zyl Smit and Snacken 2009, 39).

Additionally, in contrast to other total institutions such as homes for elderly or orphans, in prison the primary aim is to protect society against inmates; the welfare and well-being of the persons is not the immediate issue (Goffman 1961, 16; van Zyl Smit and Snacken 2009, 39).

This description of characteristics of prisons should not negate the great variations and complexities of realities inside prisons. Van Zyl Smit and Snacken pointed out that based on the prisoner-staff-ratio, staff are unable to execute total power, and are reliant on prisoners' co-operation in the performance of their duties. The authors refer to a “tolerable *modus vivendi*“ that is to be achieved in order to have a working prison system (van Zyl Smit and Snacken 2009, 40).

Due to these characteristics of prisons as total institutions, they are by their very function places that are vulnerable to working in ways that threaten individuals' rights and exhibit the necessity for the recognition and enforcement of prisoners' rights (Bennett 2016, 326; van Zyl Smit and Snacken 2009, 41). As van Zyl Smit and Snacken put it: “The imbalance of power between staff and inmates entails an inherent risk of abuse and inhuman or degrading treatment“ (2009, 41).

2.2. Origin and importance of prisoners' rights

The above mentioned theory of inherent limitations, or the assumption of a special relation of powers, served as legitimisation to restrict rights and reject claims of prisoners (Altmann 2014, 776 f). The ECtHR and the European Commission for Human Rights¹² for several decades were resistant to depart from the theory of inherent limitations, according to which the deprivation of liberty automatically entails loss of other rights and freedoms (van Zyl Smit and Snacken 2009, 10). Bringing claims connected with issues in prison showed an uneven outcome in the early

part of prison staff is essential for the achievement of effective prevention of ill-treatment Murdoch 2005.

12 The European Commission of Human Rights was an institution of the Council of Europe. Established in 1954, its competence was to launch cases in the ECtHR on behalf of individuals. Back then individuals were not able to access the court directly but first had to file a complaint to the Commission, who then filed a case at the court if it found the case to be well-founded. With the entering into force of the 11th Protocol to the Convention on 01.11.1998 the Commission was abolished and since then, individuals can apply to the court directly (CoE 2017).

years of the ECtHR. The ECHR was, also, not specifically designed as having prisoners in mind.¹³ (Livingstone 2000, 314 ff)

The ground-breaking judgement in this context was the so called *Golder* case of the ECtHR in 1975, where the court departed from the theory of inherent limitations and stated that restricting the rights of the claimant (in the case it concerned the right to correspondence and the right to access to a court) could only take place on the same basis as the rights of all other persons¹⁴ (ECtHR 1975, § 37 ff). In this judgement the ECtHR made clear that prisoners have rights, rather than privileges that could be taken away from them as subject to discretion, and acknowledged prisoners' humanity. They, in principle, have the same rights as people outside penitentiary institutions (Livingstone 2000, 311). As a consequence, the court required the prison authorities to “justify the extent to which the special circumstances of imprisonment *necessarily* lead to deprivation of rights“ (Livingstone 2000, 311 emphasis in original).

As is pointed out in the literature, the ECtHR in the beginning was interested mostly in protecting procedural rights of prisoners (e.g. access to a lawyer or to court), not interfering too much with states discretionary powers and the question of material rights (Livingstone 2000, 314; van Zyl Smit and Snacken 2009, 11).

In the light of prison litigation the judgement *Campbell and Fell* needs to be mentioned. The applicants raised the issue (amongst others) that they were prohibited from being represented by a lawyer in their disciplinary case and the court held this in violation of Article 6 ECHR (ECtHR 1984, § 67 ff; Livingstone 2000, 316).¹⁵

The lack of protection of prisoners' rights until the 1980s by the ECtHR also contributed to a growing quest for other ventures, resulting in the drafting and ratification of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which entered into force in 1989 and established the European Committee for the Prevention of Torture (CPT), an international visiting and monitoring body that subsequently developed into an

13 In contrast for example to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Livingstone 2000, 310).

14 This is if the restriction is (1) in accordance with the law and (2) is necessary in a democratic society in the interests of either national security, public safety, economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8 ECHR).

15 Meaning the court in this case saw the disciplinary proceedings as “criminal charge“ in the sense of Article 6 ECHR. Not all disciplinary proceedings are “criminal charges“ in this sense and, therefore, not always need to satisfy the requirements of a fair trial. There exist a myriad of judgements of the ECtHR and debate in literature on this topic, for an overview and further references see Grabenwarter and Pabel 2016, 478 ff. To summarise, Article 6 ECHR is applicable in disciplinary cases when additional days of imprisonment are a possible sanction.

autonomous source of European Prison Law (CoE 2017; van Zyl Smit and Snacken 2009, 12 f).

Concerning the jurisprudence of the ECtHR there are a number of cases from the early 2000s onwards in which the court recognised material as well as procedural rights of prisoners.¹⁶ For the purpose of this exploration on prisoners' rights, the following quotation from the *Dickson* case summarises the basic principles that the ECtHR has established:

“In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention [...]. Accordingly, a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, inter alia, from the necessary and inevitable consequences of imprisonment [...] or from an adequate link between the restriction and the circumstances of the prisoner in question.” (ECtHR Grand Chamber 2007, § 67 f)

2.3. Rights in connection with legal protection mechanisms

Legal protection mechanisms in the literature are often discussed under the topic of “good order“ in detention. Four obligations in the management of detention facilities are enumerated as being equally important to achieve “good order“: custody, care, order and justice. Custody refers to the question of external security of the institution, such as prevention of escapes. Care refers to tasks such as physical and mental health care, or the arrangement of activities that keep the detainees active and are perceived as worthwhile. Order relates to safety inside the prison, mostly in connection with discipline and control. Justice is used to refer to the aim of fair and accountable treatment, including effective complaints mechanisms, and explanations of authority decisions in a clear and understandable way for the affected person (van Zyl Smit and Snacken 2009, 263 ff).

The rights of prisoners in connection with legal protection mechanisms will be discussed in detail here. To each of the four sections of legal protection (information, complaints, disciplinary procedure, de facto access to justice) I will first present what the EPR¹⁷ contains on the subject

16 Here is neither the right place nor time to explain in detail the rulings of the ECtHR in connection with prisoners' rights. For procedural rights see van Zyl Smit and Snacken 2009; Grabenwarter and Pabel 2016. For judgements on material rights of prisoners see the Factsheet of the ECtHR on Detention Conditions and Treatment of prisoners (ECtHR 2016).

17 The European Prison Rules are a recommendation of the Committee of Ministers of the Council of Europe that contain principles and practices concerning the condition of detention and treatment of detainees (CoE 2006). First adopted in 1973, the EPR was revised in 1987 and 2006. The EPR is so called soft law, meaning they are not legally binding, but as a recommendation set standards. Also the ECtHR, as well as the CPT, have made use of the EPR in their judgements and reports.

and then present the discussion in the literature on the topic as well as mark out essential aspects and problems typically connected with them.¹⁸

2.3.1. Information

As for a right to information, the EPR includes the obligation to inform prisoners “in a language they understand of the regulations governing prison discipline and of their rights and duties in prison” (Rule 30.1.) and “about any legal proceedings in which they are involved and [...] the time to be served and the possibilities of early release” (Rule 30.3.). This information is to take place at admission and as often as deemed necessary after admission, and can be provided orally or in writing. Prisoners also have the right to keep a written version (Rule 30.2.).

The Committee of Ministers held that it is important for prisoners to be informed in a language they can understand. Further, there should be steps taken in order to ensure that the prisoners remain properly informed (Committee of Ministers 2006, 58).

The availability of information is crucial for any attempt to bringing litigation in prison, and also for the treatment of detainees that respects their human dignity. Without knowing one's own rights and at the same time also not knowing one's duties and the obligations to staff or the prison authorities, it is impossible to engage with the prison management in a way that is meaningful (see also van Zyl Smit and Snacken 2009, 306 f in relation to the ability to make complaints and requests).

2.3.2. Requests and complaints

The EPR provides for a right to file requests and complaints (Rule 70.1), a right to receive a substantiated decision in the case of denial or rejection (Rule 70.3), a right to appeal to an independent authority (Rule 70.3), a right to seek legal advice “when the interests of justice require” (Rule 70.7), and prohibit the punishment of a person because he or she has filed a request or complaint (Rule 70.4.).

The term “request” is defined by the Committee of Ministers as concerning favours or facilities that prisoners are not entitled to by right but which may be granted by the prison authorities (2006, 83). Whereas the term “complaint” is referred to as a formal objection against decisions,

18 The Association for the Prevention of Torture (APT) provides a detailed account on detention issues on its website. Titled “Detention focus” the standards and critical topics on several issues, including the right to information, complaints procedure, disciplinary measures and access to a lawyer amongst others, are presented. In addition to general information, the APT listed the relevant articles from international human rights treaties and standard minimum rules for the treatment of prisoners. See <http://www.apr.ch/detention-focus/en> (accessed 01.05.2017).

actions or lack of action of the prison administration (Committee of Ministers 2006, 84).¹⁹

The ECHR contains the right to an effective remedy (Article 13) for everyone whose Convention rights are violated.²⁰ The Committee of Ministers stressed that prisoners need to have “ample opportunities” (2006, 83) to make requests and complaints both inside the prison system and outside of it. The effective exercise of these rights should be encouraged by the prison system and the requests or complaints made should be dealt with without delay. As there is a relatively high proportion of illiterate prisoners, provision should be made so that requests and complaints can also be filed orally. Additionally to the rules set out in the EPR the Committee requests states to register requests and complaints, because an analysis of their substance “can contribute to a better management of the institution” (2006, 85).

The underlying idea of a right to file requests and complaints is, according to van Zyl Smit and Snacken, in a modern prison based on human rights: “a high level of interaction between prison staff and prisoners [is required] and that it can lead to the maintenance of order in a way that will not be as dependent on overt physical repression as would otherwise be the case” (2009, 346). The authors argue that effective grievance procedures, justification, and explanation of decisions by prison authorities are a key element of justice and fair treatment in detention (van Zyl Smit and Snacken 2009, 305). For the right to make requests and complaints to be effective it is crucial that the corresponding authority is obliged to respond to the request or complaint in a serious manner. If the authorities do not react and do not investigate an alleged violation of rights, it can constitute ill-treatment (van Zyl Smit and Snacken 2009, 307). This being said, it is not necessary that a thorough investigation is started after each complaint; some requests and problems might not be legitimate, or in other cases the prison staff can easily deliver satisfaction (van Zyl Smit and Snacken 2009, 308).

The question of independence of the body that decides upon complaints is crucial; a complaint mechanism is only of use if it is perceived as serious, credible and legitimate by prisoners (as well as authorities). From a rights based approach, the position of a prisoner “is developed by the recognition given to the status as full citizen of a democratic society rather than subordinates dependant on the grace and favour of the prison authorities” (van Zyl Smit and Dünkel 2001, 827). The right to file complaints and a subsequent effective grievance procedure is key from this perspective. On the side of the authorities, there should be a register of all complaints and request

19 Complaints may also be referred to as “objection”, “grievance” or “appeal”. In the Austrian Penal Enforcement Act (Strafvollzugsgesetz - StVG) the term used is “Beschwerde”, both for an initial complaint as well as a remedy against a denial of a request or rejection of an initial complaint (sections 120 ff StVG).

20 For details see van Zyl Smit and Snacken 2009, 310 ff.

made, which can serve, on the one hand for supervisory authorities to check on effectiveness and responses being made (van Zyl Smit and Snacken 2009, 312) and on the other hand, for the management of the prison to assess whether there are problematic topics or discontent rising within the prison population.

2.3.3. Disciplinary proceedings

Prison discipline is where legal protection mechanisms are discussed most. The CPT as well as the ECtHR have (compared to other issues of legal protection) elaborated extensively on disciplinary issues and the EPR includes detailed rules.²¹ In the way disciplinary procedures are practised Zyl Smit and Snacken see “an important aspect of the fairness and justice of the prison system as experienced by the prisoners“ (van Zyl Smit and Snacken 2009, 299).

2.3.3.1. Disciplinary offences

First, the acts constituting disciplinary offences need to be defined and laid down in national law (EPR Rule 57.2 lit a). As is the general principle in criminal law: *nulla poena sine lege* (no penalty without a law) which requires that one cannot be punished for a conduct that is not prohibited by law. Zyl Smit and Snacken point out that this is the most basic requirement and contrast with the previous state inside prisons where an arbitrary and disproportionate sanctioning stemmed from the sentiment that inside a penitentiary institution “everything is forbidden that is not explicitly allowed“ (van Zyl Smit and Snacken 2009, 299).

2.3.3.2. Disciplinary sanctions

The types and durations of punishment need to be defined by law too. In the prison context, typical sanctions range from fines to withdrawal of benefits, exclusion of community activities to solitary confinement. The EPR contains several rules regarding the punishment of a disciplinary offence: First, all types and duration of possible punishments that may be imposed should be determined by law (Rule 57.2). Second, the severity of any sanction is to be proportionate to the offence and in accordance with national law (Rules 60.1, 60.2). Third, some punishments are prohibited: collective punishment, corporal punishment, placing in a dark cell (Rule 60.3), total prohibition on family contact (Rule 60.4), any instrument of restraint (Rule 60.6) and, as a catch all phrase “all other forms of inhuman or degrading punishment“ (Rule 60.3). According to the EPR, solitary confinement, that is the “isolation of an individual prisoner from other prisoners,

21 This is true also for example in the Austrian Prison Act, where the disciplinary system is regulated in sections 107-117, whereas the complaints mechanism is less structured in sections 120-122 and the right to information and legal aid are virtually non-existent.

exclusion from communal activities, and sometimes a limitation of other contacts, such as visits or contacts with prison staff“ (van Zyl Smit and Snacken 2009, 276) should only be imposed in exceptional cases and as short as possible (Rule 60.5).²²

As to the sanctions the Committee of Ministers underlines that there needs to be a complete list of punishments set down in a legal act that may be imposed on any prisoner who commits an offence, and that precaution is to be taken to ensure that prison staff do not “have a separate informal system of punishments that bypass the official procedures“ (2006, 78 f).

Interestingly, the EPR requests that the disciplinary offences be laid down in law, as well as the possible sanctions, but does not require a connection between offence and punishment, just mentions that it needs to be proportionate.²³

2.3.3.3. Disciplinary procedure

Then the procedure needs to be defined, especially what steps are to be taken to investigate the incident and impose a sanction. The EPR asks the national law to determine the procedures to be followed at disciplinary hearings, the competent authority to impose punishments, and the appellate process (Rule 57.2). Any allegation of infringement of the disciplinary rules by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay (Rule 58). Other prisoners must not have any disciplinary capacity over their fellow detainees (Rule 62).

The EPR includes the right to be informed in detail on the accusations against him or her, in a language that is understood (Rule 59 lit a), to have adequate time and facilities for the preparation of the defence (Rule 59 lit b), to defend themselves in persons or through legal assistance (Rule 59 lit c), to request witnesses (Rule 59 lit d), and to have the assistance of an interpreter free of charge if necessary to follow the hearing (Rule 59 lit e). After sentencing, there is to be a remedy available to an independent higher authority (Rule 61). There is also a prohibition of double jeopardy (Rule 63).

The Committee of Ministers stressed that it is inherent in the conditions of imprisonment that rules will be broken from time to time and that there needs “to be a clear set of procedures for

22 Solitary confinement is a practice in prisons that is highly controversial, see van Zyl Smit 2011, 276 ff with further references.

23 Again for the Austrian Prison Code there is a enumeration of offences (section 107 StVG) and an enumeration of sanctions (section 108 StVG) but no clear guidance what sanction is appropriate to what violation of prison rules, leading to a diverging practice between different penitentiary institutions, as the Austrian NPM has pointed out. This finding of the Austrian NPM and others will be discussed in further detail in the fourth Chapter.

dealing with such incidents“ (2006, 77). All detainees should know in advance what the rules and regulations inside the institution are (Committee of Ministers 2006, 77).

Concerning the practice of a warning to the prisoner as a first reaction following a perceived breach of rules,²⁴ the Committee held that “care must be taken to ensure that the use of such warnings is fair and consistent and does not give rise to a system of unofficial sanctions“ (2006, 78).

Until the beginning of the 21st century, there was not much attention paid to disciplinary proceedings in prisons (Coyle 2006, 122; van Zyl Smit and Snacken 2009, 302). Whether disciplinary proceedings in prison are criminal sanctions in the sense of Article 6 of the ECHR and all requirements of a fair trial established for criminal procedures are applicable in disciplinary procedures is subject of intense contestation and debate. From the jurisprudence of the ECtHR it is established that proceedings that can result in additional days of imprisonment are criminal charges in the sense of Article 6 ECHR²⁵ (van Zyl Smit and Snacken 2009, 302). All other forms of sanctions do not necessarily fall under the term criminal sanction. As Eechaudt pointed out it is questionable to exclude them from the area of application as the situation of prisoners in disciplinary procedures is not comparable to other petty offences committed by a person outside: “Prison disciplinary proceedings and associated sanctions such as the prohibition of family contact, solitary confinement or the forfeiture of a sum of money can have severe impact on a prisoner's time in detention.“ (Eechaudt 2013, 268)

As far as I have been able to research, there is no clear guidance on what authority is to conduct the hearing and decide upon the sanction, neither in the EPR nor in the literature.

2.3.3.4. Execution of sanctions

The EPR is silent on the question of what needs to be observed in the course of executing the punishment. As mentioned above, the Committee of Ministers was concerned with the danger of a “system of unofficial sanctions“ (Committee of Ministers 2006, 78), and this will also be discussed further with regard to the reports of the NPMs in the fourth chapter.

24 Such a warning is provided for in the Austrian Prison Act in section 108 Abs 1 StVG (Abmahnung).

25 See the judgements *Campbell and Fell* (ECtHR 1984), *Ezeh and Connors* (ECtHR 2004), *Hirst* (ECtHR Grand Chamber 2005), *Dickson* (ECtHR Grand Chamber 2007); for a detailed account in the literature see Silvis 2013; Murdoch 2005, 250 ff; van Zyl Smit and Snacken 2009, 301 ff.

2.3.4. De facto access to legal protection

2.3.4.1. Legal aid and importance of specific knowledge

The EPR includes some general comments on legal aid for prisoners: The entitlement to have legal advice in general, the right to be informed about the possibility to apply for free legal aid (if such exists), the right to confidential correspondence with their legal representative, and the right to have access to documents relating to their legal proceedings.²⁶

These general rules mean that the prisoners are allowed to be legally represented (at their own will and expense),²⁷ and in the case that there is a legal aid scheme available in a member state, the prisoners are to be informed about this possibility. Van Zyl Smit and Snacken point out that the EPR as well as the CPT and ECtHR do not regard the issue of legal aid for prisoners as essential (van Zyl Smit and Snacken 2009, 346).

2.3.4.2. Law in the books

Prisoners' rights and legal protection mechanisms are nicely set out in theoretical explanations and to a large part also in national legislation. In order to realise their potential it is crucial to question the effectiveness of legal protection mechanisms in practise. Easton described problems in bringing litigation for prisoners as “it was costly in time and money and demanded a high level of skills and support. Also, once granted, rights may be depoliticised or neutralised by poor enforcement, lack of assistance in bringing claims, or inadequate remedies“ (2008, 143).

Difficulties on the side of individuals in prison are connected to a lack of information, as well as of skills and resources (e.g. to pay a specialized lawyer). The enforcement of prisoners' rights needs specialised knowledge, because human rights treaties, as well as national legislation, often is general in nature and it may be difficult to apply them to a specific situation in prison. In addition it needs to be stressed again that the legal nature of the EPR is that of recommendations made by the Council of Ministers. They are a description of how the prison system should be structured and what prisoners should be entitled to by national law (Easton 2013, 256, 489; Eechaudt 2013, 256).

In a different article, Easton elaborated on the reasons why effective legal protection for prisoners faces serious problems. According to her, states recognise rights on a formal level but fail to implement them in practice because of four (interrelated) issues:

26 EPR Rules 23.1, 23.2, 23.3, 23.6. According to the Committee of Ministers the rules seek to establish that all prisoners have the right to legal advice and not only untried prisoners (Committee of Ministers 2006, 51).

27 The rights of access to a lawyer is one of the most fundamental safeguards also according to van Zyl Smith and Snacken (2009: 214), but brings with it problems of resources and availability of specialized legal advisers.

- lack of political commitment;
- support for prisoners is unpopular with the public;
- inadequate resources; and
- lack of organisational capacities to implement change (Easton 2013, 477).

3. The Optional Protocol to the Convention against Torture

3.1. OPCAT general introduction

3.1.1. History of OPCAT

In 1948 the international community recognised torture as an unacceptable assault to human dignity. Article 5 of the Universal Declaration of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (APT and IIDH 2010, 10). The development of measures fighting torture on the international level has since progressed. I will provide here only a short overview of the most important steps leading to the adoption of the OPCAT by the UN General Assembly on 18th December 2002 and its entering into force on 22th June 2006.²⁸

The idea for a system of regular visits to all places of detention is credited to Jean-Jacques Gaultier, who was inspired by the results of those being conducted by the International Committee of the Red Cross (ICRC) to prisons during times of war (APT and IIDH 2010, 11). Jean-Jacques Gaultier was a “Swiss banker and philanthropist” (APT and IIDH 2010, 16). He set up the Swiss Committee against Torture in 1977, now renamed and known as the Association for the Prevention of Torture (APT). In cooperation with several international NGOs and states, especially Switzerland, Sweden and Costa Rica, the idea of introducing a system of visits was discussed and drafts were made. The birth of OPCAT lies in the belief that visits undertaken by external observers with adequate powers can prevent torture, or at least decrease the risk of ill-treatment occurring (Murray et al. 2011, 7).

Initially such a visiting mechanism should have been part of the UNCAT, but as a result of strong resistance, was not included. Instead the idea of an optional protocol was pursued. A draft for such an optional protocol was put forward by Costa Rica in 1980 (Ledwidge 2006, 70; APT and

²⁸ For a comprehensive overview on the history of fighting torture on an international level see Murray et al. 2011; Nowak and McArthur 2008.

IIDH 2010, 16). The proposal was postponed in order to prevent delaying the approval of the UNCAT (APT and IIDH 2010, 17). The establishment of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) within the Council of Europe needs to be seen within this context. Other than on a global level, the member states of the Council of Europe were more open towards the idea of establishing an international visiting mechanism (Murray et al. 2011, 10 ff). The European Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ECPT) was adopted in 1987, and its key feature is the CPT as an internationally organised visiting mechanism, which started operations in 1989. The CPT has the mandate to visit places of detention in Council of Europe member states that have ratified the ECPT.²⁹ (Ledwidge 2006, 71; APT and IIDH 2010, 17; Murray et al. 2011, 10 ff)

On the global level, after the first draft proposed by Costa Rica in 1980, there followed a decade of drafting and redrafting at the UN level, where a special working group on the topic was established in 1992. Arguments in opposition of the idea were against obstructing interventions of states that did not want to have an external monitoring body. This brought forward the consideration that an additional mechanism was unnecessary as there existed regional bodies (such as the CPT), and was mostly concerned with the problem of financing. As Ledwidge pointed out there is indeed an issue with financing the implementation, as “many UN mechanisms are surprisingly poorly resourced” (2006, 71).

A decisive step forward was taken by Mexico in 2001 with the idea that instead of one internationally organized visiting body there should be monitoring and visiting mechanisms on a national level. This proposal was obviously criticised for the possibility of national bodies losing necessary independence, and freedom of action or expression. This idea, however, still turned out to be a breakthrough in international debate (Ledwidge 2006, 71). In 2002 the UN Working Group presented a text that combined the idea from the Mexican draft on national bodies with the original idea of an international visiting mechanism. This OPCAT was finally adopted by the UN General Assembly by majority vote on 18 December 2002,³⁰ and entered into force on 22 June 2006, following the 19th and 20th ratifications by Honduras and Bolivia.³¹

29 The first state being visited by the CPT was Austria in May 1990 (Ledwidge 2006, 70).

30 127 states voted in favour, 42 abstained and 4 states voted against OPCAT, namely Marshall Islands, Nigeria, the United States of America and Palau Islands.

31 According to Article 28 the OPCAT enters into force on the thirtieth day after the date of deposit of the twentieth instrument of ratification.

3.1.2. What the OPCAT entails

The OPCAT comprises 37 articles. Article 1 sets out the objective of the protocol:

“The objective of the present Protocol is to establish a system of regular visits undertaken by independent international or national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”

The concept of “places where people are deprived of their liberty” is defined in a far-reaching way in Article 4.2 as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave by order of any judicial, administrative or other authority”. This definition encompasses very different institutions, such as retirement and nursing homes, psychiatric facilities, facilities for child and youth welfare, facilities for persons with disabilities, correctional institutions, and police detention centres. As clarified above for this piece of work, I focus on correctional institutions (prisons) for convicted persons.

The system of regular visits which OPCAT seeks to establish is twofold: Firstly, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT) is to be established on an international level with the UN (Articles 2, 5 – 16). Secondly, each state party is obliged to establish a so called NPM following the ratification of the OPCAT (Articles 3, 17 - 23).

3.1.2.1. The Subcommittee on Prevention of Torture

The SPT consists of 25 members and has the mandate to conduct visits to places where people are deprived of their liberty and make recommendations to state parties. Concerning the NPMs the SPT can:

- (i) advise and assist state parties in the establishment of the NPM;
- (ii) advise and assist state parties in the evaluation of needs and means in order to strengthen the prevention of torture;
- (iii) make recommendations and observations to state parties in order to strengthen the capacity and mandate of the NPMs;
- (iv) cooperate with relevant UN and other mechanisms in the field.

To ensure the capacity of the SPT to fulfil its mandate, several more regulations define the obligation of state parties to cooperate with the SPT: receive it on their territory and grant unrestricted access to places of detention, grant the opportunity to have private interviews with persons deprived of liberty and provide all relevant information, encourage cooperation between the SPT and NPMs and “examine” the recommendations made by the SPT and enter into

dialogue with it on implementation measures (Articles 12 ff).

3.1.2.2. The National Preventive Mechanisms

The OPCAT does not explicitly describe the kind of organisation state parties need to establish as a NPM. But it formulates several key requirements for the NPM:

- (i) functional independence of NPM as well as its members;
- (ii) members need to have required capabilities and professional knowledge;
- (iii) necessary resources for functioning of the NPM are provided;
- (iv) NPMs have powers to regularly examine the treatment of persons deprived of their liberty;
- (v) NPMs make recommendations to authorities with aim of improving the treatment and conditions of persons deprived of liberty;
- (vi) NPMs can submit proposals and observations concerning existing or draft legislation (Articles 18 and 19).

According to the text of the OPCAT, the NPMs are granted:

- (i) access to all information concerning number of persons and places where those are deprived of their liberty as well as concerning the treatment and conditions of detention (Article 20 lit a and b);
- (ii) access to all places of detention and their installations and facilities (Article 20 lit c);
- (iii) the opportunity to have private interviews without witnesses with persons deprived of their liberty and other persons deemed to have relevant information (Article 20 lit d);
- (iv) the liberty to choose the places they want to visit and persons they want to interview (Article 20 lit e);
- (v) the right to have contacts with SPT (Article 20 lit f);
- (vi) the right to retain information collected confidentially (Article 21.2);
- (vii) guarantees that no person that has communicated with the NPM is sanctioned in any way (Article 21.1);
- (viii) guarantees that its recommendations shall be examined by state authorities and they should enter into dialogue with the NPM (Article 22).

In addition, the states are to publish and disseminate the annual reports of the NPM (Article 23). The exact structure of an NPM is not prescribed in OPCAT, how best to implement an NPM is said to be within the discretion of each state, depending on the existing structures and institutional cultures. There exists extensive literature on the subject of how NPMs are implemented and what the pros and cons of different organisational structures are.³²

³² See instead of many Murray et al. 2011, 115 ff.

3.1.3. Expectations concerning OPCAT

So in what ways are visiting mechanisms such as those prescribed by OPCAT expected to prevent the occurrence of torture? Obviously visiting mechanisms on their own are not going to prevent torture and other ill-treatment from happening altogether. Ledwidge notes as working mechanisms to fight torture: “keeping of accurate custody records, the recording of interviews and statements and perhaps most significantly independent judicial oversight of detention and indeed judicial oversight and control over what constitutes a reliable confession” (Ledwidge 2006, 72).³³

Visiting mechanisms are expected to help the prevention of torture in various ways: They allow the examination of condition of persons deprived of their liberty, and records and interviews by first-hand observation rather than through intermediaries. Through examination of the conditions in place, or records and through interviews, visiting mechanisms are expected to be able to make realistic and practical recommendations that will enter into dialogue with the authorities in order to improve the situation (APT and IIDH 2010, 19). The possibility of an unannounced visit and inspection by an external agency is also often referred to as having a considerable deterring effect (APT and IIDH 2010, 19; Ledwidge 2006, 72). Nowak and McArthur for instance put forward the deterring effect that could be achieved with NPMs as even stronger than the use of criminal law against the perpetrators or effective complaints by victims of torture (Nowak and McArthur 2008, vi).

Additionally, as the APT points out: “[V]isits from the outside world can be an important source of moral support for persons deprived of their liberty” (APT and IIDH 2010, 19).

In general it can be said that the expectations concerning the positive effects following the implementation of OPCAT and the setup of National Preventive Mechanisms were high. It goes without saying that there is a plethora of ways that this can go wrong.

3.2. The perspective of the SPT concerning the responsibility of NPMs and legal protection mechanisms

The OPCAT contains detailed rules on how a NPM is to be established, its mandate, and its powers. On the other hand, it does not say much on the topic of operation, such as how the

³³ Also see APT and IIDH (2010, 20 ff) for an enumeration of instruments that need to be in place for a functioning system of prevention of torture and other ill-treatment.

NPMs conduct their visits, recommendations, or actions in general. In part, that is the task of the SPT: According to Article 11 of the OPCAT, the SPT shall “[m]aintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities“ as well as “[a]dvice and assist them in the evaluation of the needs and means necessary to strengthen the protection of persons deprived of their liberty“. In this role the SPT has published several reports, guidelines and statements. The ones concerning legal protection of prisoners' rights should be discussed here.

The annual reports of the SPT have evolved over time. The first and second annual reports in 2008 and 2009 contained little programmatic information, and were mostly on how the SPT was set up and what the work consisted of. Starting with the fourth annual report in 2011, the SPT dedicated considerable thoughts and space in the reports to the topic of legal protection of prisoners. The SPT gave its assessment among others to the following sub-areas of legal protection: torture prevention in general, rights based approach, design of NPMs, importance of due process, legal aid and judicial control.³⁴

3.2.1. SPT on torture prevention in general

Torture prevention in the sense of OPCAT has a wide scope and entails “any form of abuse of people deprived of their liberty which, if unchecked, could grow into torture or other cruel, inhuman or degrading treatment or punishment“ (SPT 2008, 6 f). The task of bodies seeking to contribute to torture prevention is to check upon legal features, and the system in practice so that gaps in protection systems are to be identified and precautionary measures strengthened (SPT 2008, 6f).

To question what is necessary to create a system of effective torture prevention, the SPT stated that there is no catch-all recipe, but rather the risks and shortcomings of a system need to be assessed individually. While the ratification of international human rights documents is a relevant factor, the SPT stresses that it is neither enough nor a guarantee for effective torture prevention if a state has fulfilled its formal obligations from international law (SPT 2011, 21).

A breeding ground for torture and other ill-treatment can become the condition if a state ignores problematic fields, the legislator neglects its obligation to act, and the judiciary is inactive. So according to the SPT a “generally high level of respect for human rights and the rule of law does

³⁴ Please note that the following is not a comprehensive summary of the SPT's annual reports but rather a compilation of its statements in relation to legal protection and due process. For the development of the relationship between the SPT and NPMs see Steinerte 2013.

not provide a guarantee against torture and ill-treatment occurring, it offers the best prospects for effective prevention“ (SPT 2011, 22).

3.2.2. Detainees as subjects with rights and obligations rather than objects

The first and foremost aspect to be discussed when it comes to legal protection is the recognition that all human beings, including detainees, are carriers of rights. The SPT stressed the current mainstream prevailing opinion that imprisoned persons retain their fundamental rights (such as the right to privacy), only some rights such as the freedom of movement are suspended and restricted (SPT 2013, 10). The SPT states “It must be made clear from the outset of detention that only some rights of detainees are suspended or restricted. In addition, the rights which the prison authorities must provide must be defined and guaranteed“ (SPT 2012a, 14).

Further in the annual report two years later:

“Deprivation of liberty does not negate the right to personal self-determination, which needs to be respected and protected to the maximum extent possible while in prison. In particular, all persons enjoy, inter alia, freedom of conscience, which remains inviolable, and the right to a life plan, which is only temporarily interrupted by the fact that they are imprisoned“ (SPT 2014, 13).

From that starting point, the prison regime needs to recognise inmates as subjects rather than objects of treatment or coercion. Central from a human rights approach is the ability of people to enforce their rights and have them respected (SPT 2013, 10, 2014, 13).

Due process regulations then are therefore necessary in order to provide a safeguard and protection regime. From the point of view of the SPT, the relationship between inmates and prison staff or authorities needs to be designed “in terms of rights and obligations, including means of obtaining defence and legal remedies“ (SPT 2013, 10). Otherwise, the SPT repeatedly concluded: “detainees have rights without guarantees“ (SPT 2012a, 14, 2013, 10).

3.2.3. Design of the NPM

As already mentioned above, the SPT's mandate includes making recommendations to states on how best to design their NPM. The SPT has stressed this notion in its reports: The form and structure of an NPM should be created in accordance with the state's conditions (i.e. complexity of legal structure, administrative and financial issues, geography), so there is, and should be, a great variety of NPMs. The SPT underlined that just because a certain model of NPM works in

one country, this does not mean that the same structure would work in a different country as well (SPT 2010b, 13, 2011, 17). The SPT refuses to “formally 'assess' or 'accredit' NPMs as being in compliance with the criteria set forth in the Protocol” (SPT 2011, 17).

The SPT also mentioned that it is not the objective of the OPCAT to establish a complaints mechanism, and the visits to places of detention are not meant to function as vehicles for investigating, examining and addressing the situation of particular individual detainees (SPT 2011, 15).

3.2.4. Importance of due process

3.2.4.1. Definition

Due process is defined by the SPT in the following way:

“Due process means that certain procedures should be followed so that the State can legitimately give effect to fundamental rights; that is, it establishes a set of requirements that must be observed so that individuals can defend themselves properly against any act by the State that might affect their rights” (SPT 2013, 10).

3.2.4.2. Due process does not end with the conviction

The SPT clearly took sides for a human rights approach and connected the appearance of torture and other ill-treatment with the lack of legal protection mechanisms and due process:

“The erroneous premise that due process ends at the moment of sentencing, and that it does not apply to the actual custodial conditions and regime, encourages the use of torture and ill-treatment in places of detention, and more specifically in prisons for adults and juveniles” (SPT 2013, 10).

In order to protect the rights of all detainees throughout their imprisonment it is the obligation of states to provide a “special judicial or similar mechanism” (SPT 2013, 10), as well as complaint procedures and supervision of places where people are deprived of their liberty (SPT 2013, 10, 2014, 13, 2015, 16). The relationship between inmates and prison staff and authorities should, therefore, according to the SPT not rely on coercion and punishment but rather “in terms of rights and obligations, including means of obtaining defence and legal remedies” (SPT 2013, 10).

3.2.4.3. Need for effective procedure

Several times the SPT calls on states to establish legal guarantees for detained persons that can also be implemented into practice. Legal safeguards are only effective if they are actually used, and if there is an actual ability to use them. The SPT used visual language in its 2011 report:

“So, for example, the right of access to a lawyer or to a doctor is virtually meaningless if there are no lawyers or doctors to which access might be had. It is simply not enough to provide safeguards on paper only. It is necessary to ensure that there are systems in place to make those safeguards real. The Subcommittee is well aware of the disparities between law and practice in these areas and [...] it will continue to probe the extent to which the preventive safeguards for which it argues are actually enjoyed in practice“ (SPT 2011, 14f).

The SPT continued to criticise missing legal protection mechanisms in practice in 2012, 2013 and 2014, stating that prisoners have rights without guarantees (SPT 2012b, 10, 2013, 10), and demanded effective legal procedures that enable all detainees to challenge “any act or omissions on the part of the detention staff or authorities which are believed to exceed what has been legally sanctioned, and their incidental consequences“ (SPT 2014, 13).

3.2.4.4. Lack of legal protection because of punishment

The reasons for the hesitancy of states in establishing effective legal protection mechanisms are also touched upon by the SPT in its annual reports: The notion of imprisonment as punishment with a rehabilitative or correctional function leads to a situation “whereby prison authorities, technical staff and security guards unilaterally decide the punishment regime“ (SPT 2013, 10).

According to the SPT, the belief that inmates are dangerous persons positioned outside 'normal' society is responsible for the neglect of their interests in the media, which in turn contributes to the vulnerable position of detainees (SPT 2013, 10). Additionally, the SPT mentioned the “erroneous belief that due process ends at the moment a person is sentenced and does not include aspects relating to prison conditions and regime after this point“ (SPT 2012b, 14).

Therefore it called for states not only to implement complaints mechanisms and monitoring bodies, but also to have “suitable and comprehensive judicial procedures in place for the oversight and control of prison management relating to both sentenced and remand inmates“ (SPT 2012b, 14).

3.2.5. Access to legal aid

Repeatedly the SPT has stated that effective legal protection without access to a lawyer is not worth the name legal protection mechanism. An essential part of due process and legal protection for prisoners is the possibility to have available adequate legal knowledge in order to enable them to access complaints mechanisms and successfully have their rights enforced. The SPT does not only demand access to a lawyer from the very onset of detention, but also considers it necessary to take into account the qualifications of the persons that are serving as legal aid

lawyers (SPT 2012b, 18, 2013, 10, 2014, 13). Due to the fact that the proceedings which arise from the context of detention ask for specialized knowledge in the field of national law and international rights standards, the effective legal protection may require “the expertise of different forms of legal skills than those appropriate for defending against a criminal charge” (SPT 2014, 13, see also 2013, 10).

3.2.6. Judicial control and due process

Due process for the SPT lies at the heart of legal protection; for torture prevention to be effective there needs to be suitable and far-reaching judicial procedures to make sure that people whose rights have been infringed are able to hold authorities accountable and receive redress. The SPT has set out several requirements for judicial control: First, the judicial body needs to be impartial and independent.³⁵ Secondly, the proceedings are to be adversarial in nature, meaning that both the detainee and the staff or authorities are parties to the process and the deciding judicial body hears both sides before making its decision. Thirdly, the judicial body needs to have the competence in the field. With the term “competence” the SPT on the one hand refers to the ability of the judges to “take into account relevant national and international human rights standards” (SPT 2014, 13). On the other hand, it refers to competence as the judge's powers to “determine whether the detention staff or authorities have acted in breach of their mandate or in excess of their authority” (SPT 2014, 13), and whose decisions “must be fully enforceable against any government authority” (SPT 2013, 10). Fourthly, the judges should be different persons than those that determined the criminal charges and sentenced the imprisoned person (SPT 2013, 10). Lastly, the SPT stressed that the role and function of judicial control is different to the one of monitoring bodies (SPT 2013, 10). The former being the instrument to enforce rights on an individual level if there are claims of rights being infringed. The latter being overview and control of places where people are deprived of their liberty in order to find gaps in the prevention system and propose improvements.

3.2.7. Miscellaneous

Two other topics were brought up by the SPT in connection with legal protection: solitary confinement, an issue that will be touched upon further in the empirical part of the study, and the

³⁵ Impartiality refers to the judge not being on one side of the two parties, independent means the judge decides upon her or his own assessment and is not bound by instructions.

principle of non-discrimination. Particular modalities in the prison regime should be based on a risk assessment for every individual detainee. The SPT argued, that building regime design onto categories such as the general psychological profiles or their criminal record, can rob them from exercising their rights and constitute a form of discrimination (SPT 2014, 14).

3.2.8. Reports of NPMs

In an additional report entitled “Analytical assessment tool for national preventive mechanisms“ the SPT gave recommendations and guidelines for the work of NPMs. Concerning the annual reports, which are the main subject of scrutiny in this thesis, the SPT enlisted what these reports should encompass:

- “(a) Accounts of current challenges to the protection of the rights of persons deprived of their liberty [...];
- (b) Analysis of the most important findings and an account of recommendations and the responses of the authorities thereto;
- (c) Follow-up on issues outstanding from previously published reports;
- (d) Consideration of thematic issues;
- (e) Accounts of cooperation with other actors on the prevention of torture;
- (f) an overview of all other national preventive mechanism activities undertaken and their outcomes“ (SPT 2016a, 11).

4.1. Overview

Image 1: States with NPMs designated



The further analysis is restricted to the Council of Europe member states that have also ratified the OPCAT. Of all 47 member states to the Council of Europe, 38 have ratified the OPCAT³⁸ and 37 have designated their NPMs.³⁹

39 Bosnia and Herzegovina has not designated a NPM yet.

Image 2: States with designated NPMs in Europe



Source: APT OPCAT database,⁴⁰ dark are the states that have ratified the OPCAT and designated their NPM.

From these 37 Council of Europe member states that have ratified the OPCAT and designated their NPM, the analysis as follows is restricted to the annual reports of NPMs of 31 states. The NPMs of Cyprus, Italy and Luxembourg have not published their reports in a language accessible to the author (that is English and German). For Malta, Romania⁴¹ and Turkey, there are no annual reports available online.⁴²

For this thesis I have chosen to limit the subject of analysis to the four latest reports of the NPM of each country. The number of available reports depends on the date of ratification and the assignment of the NPM. Some NPMs have already published more than ten reports (such as the Estonian with twelve reports since 2005), while for the majority of NPMs there are less than five reports available. The NPMs of Hungary, Lithuania, Moldova and Montenegro have only published one report so far. For the analysis presented in this thesis, at least the four latest reports

40 <http://www.apr.ch/en/opcat-database/> (accessed 01.05.2017)

41 On the website of the Romanian NPM, the link to the annual report does not work: http://www.avpoporului.ro/index.php?option=com_content&view=article&id=392&Itemid=264&lang=en (accessed 01.05.2017) I contacted the NPM in order to draw its attention to the broken link and asked to send me the reports by e-mail, but did not receive a response until the drafting of this thesis.

42 The reports have been accessed through the Websites of each NPM. In addition, some reports that were not available at the NPMs' websites, were retrieved from the Website of the SPT: <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/AnnualreportsreceivedfromNPM.aspx> (accessed 01.05.2017).

of each NPM were considered. In total 103 reports have been analysed. Annex 1 presents an overview on states, ratification date, NPM assigned and reports considered in this thesis.

The annual reports of NPMs are as an essential communication instrument that serves manifold purposes. According to the APT, the reports should (i) make the NPM visible and ensure its accountability, (ii) provide information on the activities and functioning to relevant actors and the public, (iii) point out and analyse key issues in the context of torture prevention, (iv) bring forward recommendations, (v) evaluate positive or negative developments, and (vi) open up dialogue with state authorities (APT 2012, 1).

The annual reports of the NPMs are considerably diverse in structure and approach, as well as their length. Regarding the quantity of pages the reports range from six pages for the one of the Greek NPM and eight pages for the reports of the NPM of Liechtenstein, to the reports of the French NPM with 254 pages and the Georgian NPM's with 528 pages. All reports include a description of the structure and composition of the NPM and the visits and activities undertaken in the relevant year. Some NPMs structure their reports along the establishment visits, such as the Croatian, Portuguese and Swiss NPM. Some, such as the Austrian NPM, along the kind of institution and topic of concern and others according to the set focus of activity within one year (such as the French NPM).

For this thesis, the analysis was restricted to the comparably small part of each of the NPMs' reports that considered one of the above mentioned dimensions of legal protection of prisoners. The focus on legal protection mechanisms in this study may shed a misleading light on the reports and the work of the NPM. In contrast to topics such as conditions of living areas, health, and conditions of solitary confinement cells, that are mentioned in each and every report and receive a great deal of attention, the topic of legal protection of prisoners' rights represents a niche and is only touched upon briefly, if at all.

As mentioned above, subject of research were the reports of the NPMs of 31 states that are members of the Council of Europe as well as of OPCAT, have their NPMs assigned and reports publicly available online in either English or German. It is also important to mention, that title or style of writing of several reports indicate, that the English report represents a summary of a different, comprehensive report.⁴³

Of these 31 NPMs, the NPMs of Liechtenstein and the Netherlands did not mention legal

⁴³ This is the case for example for the reports of the NPMs of Azerbaijan, Estonia, the Netherlands, Sweden and the United Kingdom. For the United Kingdom the situation is specific, as there are 18 assigned NPMs and their common report as provided to the SPT consists of a brief overview of all their activities.

protection mechanisms at all in their reports, while fourteen NPMs⁴⁴ elaborated extensively on legal protection mechanisms. The remaining 15 NPMs⁴⁵ touched upon one or two aspects of legal protection, but did not mention a context, give their evaluation or explain details.

As to the provision of information on rights and obligations, 23 NPMs⁴⁶ mentioned observations in this area, while eight NPMs⁴⁷ did not touch upon the subject at all. Mechanisms to make requests and file complaints were mentioned by 20 NPMs⁴⁸, eleven NPMs⁴⁹ did not report on any aspect of this topic. 19 NPMs⁵⁰ reported on prison discipline and legal safeguards therewith, while twelve NPMs⁵¹ did not raise this topic. Lastly, 16 NPMs⁵² were concerned with the question of de facto access to justice and legal aid, 15 NPMs⁵³ did not mention these issues.

This chapter presents the information from the reports of the NPMs, my own assessment of the NPMs' perspective is presented in the final chapter.

4.2. The perspective of NPMs on the provision of information

4.2.1. Introduction

The term “information” used here refers to the information provided to prisoners regarding their rights and obligations in the penitentiary institution and the legal protection mechanisms available. The term “information” in the context of persons deprived of their liberty often is used

44 The NPMs of Albania, Austria, Bulgaria, Croatia, Finland, France, Georgia, Macedonia, Poland, Serbia, Slovenia, Spain, Switzerland and the Ukraine.

45 The NPMs of Armenia, Azerbaijan, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Lithuania, Moldova, Montenegro, Norway, Portugal, Sweden and the United Kingdom.

46 The NPMs of Albania, Austria, Azerbaijan, Bulgaria, Croatia, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Lithuania, Montenegro, Norway, Poland, Serbia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the Ukraine.

47 The NPMs of Armenia, the Czech Republic, Denmark, Liechtenstein, Macedonia, Moldova, Portugal, and the Netherlands.

48 The NPMs of Albania, Armenia, Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Georgia, Hungary, Lithuania, Macedonia, Moldova, Poland, Serbia, Slovenia, Spain, Switzerland and the Ukraine.

49 The NPMs of Azerbaijan, Estonia, Germany, Greece, Liechtenstein, Montenegro, the Netherlands, Norway, Portugal, Sweden and the United Kingdom.

50 The NPMs of Albania, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, the Czech Republic, Finland, France, Georgia, Macedonia, Poland, Portugal, Serbia, Slovenia, Spain, Switzerland, the United Kingdom and the Ukraine.

51 The NPMs of Denmark, Estonia, Germany, Greece, Hungary, Liechtenstein, Lithuania, Moldova, Montenegro, the Netherlands, Norway and Sweden.

52 The NPMs of Albania, Bulgaria, Croatia, Denmark, Finland, France, Georgia, Macedonia, Montenegro, Portugal, Serbia, Slovenia, Spain, Switzerland, the United Kingdom and the Ukraine.

53 The NPMs of Armenia, Austria, Azerbaijan, the Czech Republic, Estonia, Germany, Greece, Hungary, Liechtenstein, Lithuania, Moldova, Netherlands, Norway, Poland and Sweden.

with regards to information on the world outside of the institution. Access to media and news is crucial for prisoners to be able to keep themselves “up to date” in a situation of isolation from daily life in society. As the topic of this thesis is legal protection mechanisms, NPMs reporting on prisoners having problems to access newspapers or information over TV is not discussed here.

Of all reports considered in this study, the NPMs of fifteen states see deficits in the provision of information (Albania NPM 2011, 36, 52; Austria NPM 2015, 100 ff; Bulgaria NPM 2013, 8; Finland NPM 2016, 73; France NPM 2013, 148, 153; Georgia NPM 2016, 20, 172; Greece NPM 2016, 4; Lithuania NPM 2016, 27; Norway NPM 2016, 35; Poland NPM 2015, 23; Serbia NPM 2014, 39; Sweden NPM 2016, 41; Switzerland NPM 2012, 18; United Kingdom NPM 2014b, 20; Ukraine NPM 2014, 66). The NPMs of Georgia, Serbia, the United Kingdom and the Ukraine, for example, drastically described the failings:

“Existing practice of informing prisoners on their rights cannot ensure appropriate awareness of prisoners with regard to either general rights of the prisoners or a particular right to lodging a request/complaint and handling procedure” (Georgia NPM 2016, 172).

“Majority of irregularities noted by the NPM and identified in its reports and through the recommendations made, were related to [...] more detailed and timely information provided to convicted persons on the rights, obligations, rules, and other issues regulating the execution of the prison sanctions, as well as information on the methods and conditions for the exercise and protection of their rights” (Serbia NPM 2014, 39).

“In most places, detainees were not given clear information about their rights or how to make a complaint” (United Kingdom NPM 2014b, 20).

“Prisoners held at penitentiary institutions have no opportunity to receive information of legal nature” (Ukraine NPM 2014, 66).

On the other side, the NPMs of two states⁵⁴ reported that information is provided properly and did not raise any concerns in connection with the provision of legal information (Macedonia NPM 2015, 24; Montenegro NPM 2014, 29 f). The NPM of Montenegro reported:

“According to the statements of convicted persons, upon the arrival at the Prison for short sentences, they are duly informed of the rights and obligations that have been established by house rules, and Rulebook [sic] on the execution of imprisonment in IECS, and the Rulebook on House Rules is visibly displayed in premises where the convicts reside” (Montenegro NPM 2014, 29 f).

The NPM of Macedonia in 2014 raised concerns regarding convicted persons pointing out that they have not been fully introduced to their rights, obligations and privileges (Macedonia NPM

54 The NPMs of the remaining 14 states either did not mention the topic at all, or did not engage in an overall-evaluation but only mention either singular deficits or positive points. A further description is provided in this section of the study.

2014, 190). In 2015 the NPM, after a follow-up visit, positively assessed that the persons are informed of the house rules and “have regular meetings with their head instructors during which they are informed of the manner of receiving benefits, and on the conditions of progressing in this institution” (Macedonia NPM 2015, 24).

4.2.2. Importance of information

The importance of informing persons deprived of their liberty on their rights and obligations and legal procedures for enforcement is argued differently by the NPMs, and mostly not mentioned separately in detail, but perceived as obvious.

The Swedish NPM perceives information as a prerequisite for the access to justice: “The issue of information about rights is central in conjunction with a deprivation of liberty. One prerequisite for inmates to be able to assert their rights is that they are aware of them” (Sweden NPM 2016, 41). Similarly the NPM of France argued that the exercise of defence rights presupposes the knowledge of them (France NPM 2013, 147).

The provision of information is also needed because of the special conditions of persons in penitentiary institutions that are not comparable to the possibilities people outside such institutions have to acquire legal information, as the French NPM pointed out:

“Conditions of imprisonment do not make the usual channels of information (French government publications giving information to the public about new laws etc., official listings of new laws and decrees and online websites etc.) accessible to prisoners. It is therefore important for the administration to make up for this impossibility, without excessive formality or procedure” (France NPM 2013, 174).

Similarly the Swedish NPM points to the limited opportunities for detained persons in prisons to acquire supplementary information as a condition that makes the provision of information vital (Sweden NPM 2016, 42).

A further strain of argument follows the consequences, if prisoners are not informed on their rights and have no avenues for starting legal proceedings. The consequence of a lack of information is said to be the breaking of rules of the institutions, persons without knowledge on their rights and obligations therefore are in danger to be subjected to disciplinary measures (Poland NPM 2013, 39). The Bulgarian NPM asserted that a “lack of information often leads to acts of dissent by launching hunger strikes, self-harm, unreasonable aggression towards supervisory staff and render difficulties to the administration in the detention facilities” (Bulgaria

NPM 2013, 10).

4.2.3. Accessibility of information

The possibilities to access sources of information on rights and obligations presented serious difficulties according to NPMs (Austria NPM 2016, 115; France NPM 2015, 104; Bulgaria NPM 2013, 24; Georgia NPM 2016, 179; Macedonia NPM 2015, 190; Poland NPM 2014, 32; Slovenia NPM 2013, 23; Spain NPM 2015, 83; Ukraine NPM 2014, 65). As a prerequisite to be able to ask for information on a special topic, details on the existence and procedure is required.

In Georgia, the NPM found a lack of availability of information:

“According to the evaluation of the Special Prevention Group, information regarding their rights and complaints handling procedure is not regularly available to prisoners. There are no lists of prisoners’ rights, including information on right [sic] to file a request/complaint and handling procedure at any corridors or cells. Prisoners do not have a written document in their cells containing information on the request/complaint handling procedure” (Georgia NPM 2016, 172).

The NPM of Georgia recommended to the Minister of Corrections that all necessary measures are to be taken in order to ensure that firstly, all relevant legal documents such as the Imprisonment Code and the internal statute of the institution are available in prison and secondly “that the information about the rights/obligations of prisoners, including the right to file requests/complaints and procedure of handling request/complaints” (Georgia NPM 2016, 179) are displayed in places accessible to the prisoners. Similarly the French NPM called on the administration to ensure access. Rules and regulations, as well as texts with information are “without value if they are not distributed to the prison population” enabling prisoners to “take advantage of them in their daily lives” (France NPM 2014, 92 f).

At the same time the Georgian NPM reported that the visits to facilities revealed information on rights was neither displayed in the cells nor in the corridors (Georgia NPM 2015a, 18; similar Austria NPM 2016).

The Macedonian NPM included the question whether there is a visible display of information on the rights of persons deprived of liberty and the house rules into the list of areas to be examined at each visit to a penitentiary institution in 2012 (Macedonia NPM 2012, 274). In the following years, the NPM reported on the appropriate positioning of the house order in one facility (Macedonia NPM 2013, 246), and on the failure to post the information at a visible spot in a different institution. Therefore, in the second facility the convicted persons were prevented from

the possibility to review the rules (Macedonia NPM 2014, 190). The accessibility of information also varied greatly from institution to institution in Slovenia (Slovenia NPM 2013, 23).

Not only should information be accessible when needed, the Spanish NPM pointed out that it is also necessary that inmates are allowed to keep a copy of documents entailing information (Spain NPM 2015, 83). A possibility to keep information accessible at all times has been observed by the Swiss NPM in one facility, where the house rules were screened on the internal TV station (Switzerland NPM 2012, 20 f).

The NPM of Poland repeatedly criticised the fact that prisoners do not have access to information published in the “Bulletin”⁵⁵ as the administration is not required to provide it to them on request.⁵⁶ As detainees also do not have access to the internet, this situation results in an infringement of constitutional rights according to the Polish NPM (Poland NPM 2014, 32, 2013, 33).

Resources for information such as legal codes, handbooks for prisoners, court decisions, etc. could be compiled in the prison library, which detainees can access freely, as the French NPM recommended (France NPM 2015, 104, 2013, 181). At the same time the French NPM's diagnosis on the state of affairs of prison libraries in France reads as follows:

“In any event, the Contrôle Général has never seen a collection of *Journal officiel* in prison libraries; criminal codes and procedures are often old (there is no requirement to renew them annually); codes of administrative law (providing instructions on how to go about urgent applications, etc.) have never been seen” (France NPM 2014, 223).

Access to legislation databases and registers of court decisions sometimes is simply dependent on whether the computer in the library is working: The Estonian NPM described the situation in different penitentiary institutions and assessed that its recommendation regarding the accessibility about the (functioning) computer in the library was followed (Estonia NPM 2015, 25, 2014, 32).

According to the Ukrainian NPM, the libraries in Ukrainian prisons are poorly equipped, and lack “proper numbers of the texts of the Constitution of Ukraine, Criminal Code, Criminal Procedure Code, Criminal Enforcement Code of Ukraine and other legal acts determining the status and authority of law enforcement bodies, the rights and obligations of prisoners and the procedure of enforcement of criminal sentences; prisoners do not have ample opportunities to

55 The term “Bulletin” is not explained by the Polish NPM, but from context it is clear that the Law Gazette (*Bundesgesetzblatt* in Austria) is meant.

56 Poland has been sentenced by the ECtHR for rejecting the request and subsequent complaints of a prisoner to have access to three websites with legal information (Poland NPM 2016, 17).

make use of such texts and other relevant academic literature” (Ukraine NPM 2014, 66). The NPM also reported on complaints of prisoners, who even on request were refused to be given an explanation regarding the appeal's procedure (Ukraine NPM 2014, 66).

4.2.4. Language

One aspect of the provision of information that many NPMs are aware of is the question of the language of the information given. In general, NPMs are of the opinion, that translation of information required is an essential requirement (France NPM 2015, 93, 2013, 154; Georgia NPM 2016, 180; Germany NPM 2016, 30, 2014, 79; Lithuania NPM 2016, 27; Norway NPM 2015, 44; Serbia NPM 2016, 68; Slovenia NPM 2015, 55; Spain NPM 2015, 83, 2013, 185; Sweden NPM 2016, 42; Switzerland NPM 2016, 55). There is not a single report where the NPM indicated that it did not view access to information in a language the detained person understands as a right of the person.

As for the application of this right in practice, the NPM of Georgia in a study, drawing on questionnaires, found that 44% of prisoners have been informed on their rights in a language they did not understand (Georgia NPM 2015a, 17).

The observation of the NPMs is that the brochures for information on rights, obligations and prohibitions often are available in one language that is the official language of the state, but are not translated to other languages (Austria NPM 2016, 97, 2015, 115; France NPM 2013, 154; Georgia NPM 2016, 180; Germany NPM 2014, 82; Lithuania NPM 2016, 27; Poland NPM 2015, 23 f; Spain NPM 2015, 83; Switzerland NPM 2011, 20, 2012, 18). The Georgian NPM recommended that “brochures should be produced in various languages and supplied to the prisoners, containing practical information on filing and reviewing the requests/complaints” (Georgia NPM 2016, 180; similarly Norway NPM 2015, 46). The Albanian NPM stated: “Prisons and detention facilities do not yet offer a service of communication in a foreign language for the foreign prisoners and detainees, so as to make sure that they get all other services and procedures as offered to other people” (Albania NPM 2011, 36).

The NPM of Norway requests prison staff to ask every person the question “Do you need an interpreter?” in several languages in order to ensure that the question is understood. This offer and the use of an interpreter needs to be documented in the person's file according to the NPM (Norway NPM 2015, 44; similarly Poland NPM 2015, 23).

Therefore, persons who are not able to read and understand the official language of the state in

which they are detained, rely on other prisoners to forward information, and complained about this to the Austrian NPM (Austria NPM 2016, 97). The Austrian NPM reported that one facility reacted on its critique and ordered that at admission, all detainees are provided with a version of the house rules in an understandable language. The mechanism concluded: “This will ensure that detainees are aware of the house rules” (Austria NPM 2016, 116).

As the translation of information documents can be quite costly, the German NPM recommends mitigating translation costs by using “model house rules” that can be used in several facilities. Thus, only small changes need to be made. According to the NPM, there are “model house rules” already in use in some of the German Länder (Germany NPM 2014, 82, 2016, 30). The Slovenian NPM sees the necessity to translate house rules into languages other than English and Italian dependent on the available financial resources (Slovenia NPM 2014, 87), therefore not necessarily in each and every case.

The French NPM welcomed the improvements in the provision of information through booklets which “are drafted in several languages and correspond to the cultural diversity of persons deprived of liberty. They are handed over in person and their distribution is accompanied with a spoken explanation of their form and content” (France NPM 2014, 93).

Several NPMs noticed professional interpreters not being called in for translation services in the case of communication problems. The Austrian NPM criticised the lack of awareness of staff in numerous facilities to consult a qualified interpreter if needed (Austria NPM 2016, 97; similarly Switzerland NPM 2011, 21). In Norwegian prisons, there is equipment for video interpretation, but the NPM found it was not used for the interviews at admission to the penitentiary facility (Norway NPM 2016, 36) (without providing an explanation). The same was reported by the NPM of the United Kingdom on the telephone interpreting service (United Kingdom NPM 2014b, 20).

On the other side in the case of French prisons, the NPM reported that interpreters are reluctant to come to an institution, because the payment of their services is usually delayed (France NPM 2013, 154). Instead of qualified external personnel for translation, in many penitentiary institutions other prisoners that know the foreign language are used (Albania NPM 2011, 36).

Sometimes, unofficial interpretation service over telephone is organised, where the administration resorts to “local networks” such a local shopkeeper or a colleague's wife, as the French NPM reported (France NPM 2013, 154). The use of sworn in interpreters, for the NPM, is a guarantee for professionalism and impartiality, whereas using whoever is able to speak both

languages for translation services is seen as problematic (France NPM 2013, 154).

The NPMs of Austria and Albania see the practice of using other prisoners for interpretation as a reason for concern (Albania NPM 2011, 36; Austria NPM 2016, 97). The Spanish NPM did not seem to share this notion, stating that there is usually no problem with communication “as other inmates normally act as interpreters” (Spain NPM 2013, 83). Without clearly mentioning it as obligatory or explaining in which cases it would be necessary, the Spanish NPM still requested “a system for simultaneous interpretation for those cases when it is necessary” (Spain NPM 2013, 83).

Using fellow detainees for interpretation services seems to be unproblematic for issues of daily activities. Having professional interpreters around at all times is also infeasible regarding the costs and organisational efforts. In contrast using prisoners (or warders) for translation in areas where serious interests are concerned, is highly problematic. For example at a medical examination or disciplinary hearing, it is unacceptable to rely on just anybody who is around and knows the languages. Especially with respect to possible conflicts of interests, interpreters used need be external to the institution and of a professional background.

4.2.5. Content of information

The French NPM criticised the development that increasingly there are rulebooks available for detained persons, but these seldom contain profound information on legal rights and procedures:

“Certainly, there are more and more booklets for new arrivals in prisons; they are always rather silent on possible remedies, whether administrative (how many mentioned the Contrôleur Général?) or judicial. Without information, prisoners have no “hold” (as they say in rock climbing) on how to take legal action.” (France NPM 2014, 224)

Besides the French NPM, other NPMs commented on the necessity for a general provision of information that includes legal rights and procedures: The Macedonian NPM is concerned with prisoners (not) being informed of their right to send a request to the ECtHR (Macedonia NPM 2012, 271). The Swiss NPM found difficulties with possibilities of complaints in general (Switzerland NPM 2011, 21). The Austrian NPM criticised the incomplete list of prisoners' rights in the house rules (Austria NPM 2015, 115). The German NPM stressed the need to include the list of institutions with whom prisoners can communicate confidentially (Germany NPM 2014, 82). The Ukrainian NPM classified the leaflet “Rights and duties” as inadequate, as it contains only limited information on the exercise of rights (Ukraine NPM 2015, 124). The Georgian NPM

reported that only 25% of prisoners say that they have been informed about their rights and obligations in full detail, while additional 14% were not able to remember whether the information provided was detailed (Georgia NPM 2015a, 17).

The information provided proved to be outdated in a number of cases as follows from the NPM reports, making it necessary for NPMs to call on the administration to keep them updated regularly (Austria NPM 2015, 102; France NPM 2013, 159, 181, 2014, 92; Slovenia NPM 2013, 23; Ukraine NPM 2015, 124). The Finnish NPM explained that it regularly observed that the information provided is outdated. At the same time the NPM reported, that the heads of institutions usually follow the recommendations of the NPM and make up for the shortcomings and instruct staff accordingly (Finland NPM 2016, 73). The NPM of the Ukraine criticised the lack of information, and that the material posted on the information boards is not well kept, as the instructions are outdated (Ukraine NPM 2015, 124). The NPM of Slovenia noticed that the house rules were not drafted in compliance with the applicable regulation. Therefore the NPM called for a harmonisation (Slovenia NPM 2013, 23). The Swedish NPM declared it unacceptable “for the Prison and Probation Service to distribute information that is twenty years old and does not describe current legislation” (Sweden NPM 2016, 42).

The information provided does not only need to be complete and up-to-date, but also understandable. With understandable it is not only meant that the information is translated into a language that the imprisoned person knows, but also to use the language in a way that it is possible for persons not familiar with the subject to follow and make use of the provided information (Spain NPM 2015, 83; Sweden NPM 2016, 41). The Polish NPM called upon the prison administration to meet its obligation to inform detainees about their rights, which “includes also the provision of appropriate guidelines and clarifications, taking into account the intellectual abilities of inmates, their knowledge, education, etc.” (Poland NPM 2013, 39).

None of the NPMs indicated that the information provided fulfils the above mentioned requirements. The wording of the NPMs which mentioned the provision of information, either described the current situation as not satisfactory, or recommended how information should be provided.

To conclude this section, a quote from the NPM of France on the accessibility of information:

“For the Contrôleur Général, making rules and regulations easily accessible to prisoners in written form remains an objective to be reached, without overlooking the fact that a part of the prison population does not know how to read or does not speak French” (France NPM 2014, 93).

4.2.6. Who provides information and how information is provided

Regarding the questions of who provides information and when and how the information is provided, the NPMs have several points to criticise and propose. Regarding the time for information there is a consensus that information needs to be provided from the very beginning of imprisonment at admission (see for instance France NPM 2015, 104; Switzerland NPM 2012, 20 f, 2016, 56; Norway NPM 2016, 35). In Georgia, 42% of persons detained in penitentiary institutions reported that they have not received information about their rights to file complaints at admission (Georgia NPM 2015a, 17). Additionally, the Georgian NPM elaborated on the effectiveness of information provision at admission. As persons recently admitted to a penitentiary institution typically are in a situation that is stressful for them, the NPM finds it “hard to imagine them being able to concentrate on the list of rights and duties and remembering the provided information. Therefore, this practice is more of a formal nature and does not achieve the aim of informing prisoners about their rights properly” (Georgia NPM 2015a, 18).

Regarding the question, who is responsible for the provision of information, it is clear from the reports that the prison administration has the obligation to provide information. The Slovenian NPM pointed out that even in cases where individual detainees are vandalising and/or tear apart house rules, the institution “is responsible for ensuring this implementation regulation is available in each and every accommodation room” (Slovenia NPM 2013, 23).

The NPM of Bulgaria considered it problematic that according to Bulgarian legislation the detainees are given oral information on their rights and duties from supervisory staff that are also the ones responsible for order and security, and whose duty it is to ensure compliance with these rights. The resulting “conflict of interests” as the NPM puts it, leads to the provision of information in a strictly formal way (Bulgaria NPM 2013, 24).

In a similar notion, the NPM of Ukraine elaborated on the discretion of prison staff in connection with the provision of rights. The persons in Ukrainian prisons are not aware of their rights and duties, the NPM noted, and the administration ignores providing information. The NPM described: “In certain cases, officials respond ‘There are things I read out, and there are things I will not mention’, or ‘Nothing is allowed’” (Ukraine NPM 2015, 124). The obligation of prison staff to provide information on rights and legal protection mechanisms, therefore, is also problematic. With no one responsible to check on whether information was provided, and in a situation where prisoners are unable to receive information through other channels, considerable power and responsibility is assigned to prison staff.

Several NPMs see it as their duty to ask prisoners, whether they have been informed about their rights and obligations and what they have been informed of. The only NPM that seems to have the opinion that the distribution of information is the task of the NPM, is the one of Azerbaijan: “The meeting with all inmates detained there was conducted in the hall of the facility, and their appeals were heard and legal advice was given to them” (Azerbaijan NPM 2014, 27).

In Georgia, social workers in prison are to play an important role in connection with the provision of rights and duties. The NPM positively noted that its recommendation has been implemented and social workers have been instructed to regularly provide the imprisoned persons “with the detailed explanation about their rights and duties as well as the information about the right to file requests/complaints and procedure of handling requests/complaints” (Georgia NPM 2016, 172 f, 179).

In Croatia, the national legislation assigns the mandate to visit prisoners and “instruct them about their rights [...] and ways to realise those rights” (Croatia NPM 2014, 28) to the executing judge. The Croatian NPM criticised that in the prisons visited, none of the detainees has ever talked with the executing judge, because he or she does visit the institution, but does not talk with prisoners during the visit (Croatia NPM 2014, 28).

The practice of informing detained prisoners about their rights orally and not through handing out comprehensive written information (additionally) is mentioned by several NPMs. In Bulgaria, the prisoners have to sign a document saying that they have received the information (Bulgaria NPM 2013, 24). As to the legislation, the Bulgarian NPM referred to the EPR that requires prisoners to be informed in writing and orally, and the Bulgarian prison code that entitles prisoners to receive information orally and to seek information in writing through an explicit request (Bulgaria NPM 2013, 8). The Bulgarian NPM criticised that written information is only provided to prisoners if they ask for it and considers this problematic: “The NPM believes that the right to seek information must be converted into the right to receive written information on matters related to the implementation of the sentence” (Bulgaria NPM 2013, 8).

In Poland there exists a similar situation whereby national legislation only enjoins instruction being given orally during proceedings. The NPM of Poland predicted: “It seems that the right to information will become increasingly important, so that it will be possible one day to provide all inmates with guides” (Poland NPM 2015, 23). I perceive it as interesting, that the Polish NPM does not clearly request the prison administration to provide information in writing or to recommend the legislation to be changed, but only ventures a prognosis that things might change

in the (distant) future.

For prisons in Switzerland, the Swiss NPM sees the provision of information in writing as the mandatory minimum, requesting the provision of information as “at the minimum with a written fact sheet outlining, in a language they are capable of understanding, the rights and duties that apply to them” (Switzerland NPM 2016, 55).

The Georgian NPM reported, drawing on a study on complaints mechanisms, that 33% of prisoners have been informed orally and 26% in writing (Georgia NPM 2015a, 17).

The French NPM described the deficits of oral provision of information, that it “is rapid, but often incomplete, thereby reducing its scope” (France NPM 2013, 154). The Spanish NPM requests detainees to be allowed to keep a copy of the provided information, indicating that in the status quo they are not entitled to have written information on rights in their cells (Spain NPM 2015, 83).

The French NPM further evaluated the effectiveness of the provision of information. It found that the “information is in most cases provided in accordance with legal requirements, in terms of form and deadlines, but proves to be inadequate in practice” (France NPM 2014, 153).

In this context it is also important to mention that several NPMs are of the opinion that it is not only the responsibility of the prison management to provide information to prisoners, but that there exists an obligation to check whether the information is understood and to include whether information has been provided in the personal file (France NPM 2015, 162; Norway NPM 2015, 44; Sweden NPM 2016, 42; Slovenia NPM 2013, 17). Again, it is the French NPM that understands and describes the obligation widely:

“It is the responsibility of staff to ensure that each person deprived of their liberty has full knowledge of what they can or cannot ask for and is able to do it; they therefore need to be vigilant and to check that where no request is made it does not hide a difficulty in self-expression” (France NPM 2015, 162).

Therefore, for the French NPM, providing information to prisoners is not something that one can do in a few minutes and then tick it off the list, but rather that staff have the duty to proactively engage with persons in order to ensure they are capable to interact with the prison administration successfully.

4.3. The perspective of NPMs on complaints mechanisms

4.3.1. Introduction

The topic of this chapter is the perspective of NPMs towards the possibilities to make a request, complaint or file a remedy and therefore ask the prison administration to act upon a certain topic of interest. The terms “application”, “request”, “complaint”, “remedy” and “appeal” are used in a similar meaning in this chapter. Although they are not exactly the same, they have in common that they (i) present a venue for the detained person to make themselves and their needs heard, (ii) request the prison administration to act, and (iii) start a more or less formal procedure, in which the application of the person is decided upon by the prison management.

For example in the Austrian Penal Enforcement Act the term “complaint” is used both as a possibility to inform the prison management about an unpleasant situation (e.g. verbal abuse by a staff member) and as a remedy against a decision by the administration (e.g. a transfer to another cell or upon a disciplinary sanction). Although I am not familiar with prison regulation in states other than Austria, the reports of the NPMs do indicate that the term complaint has different meanings in other jurisdictions too.

4.3.1.1. Importance of complaints mechanisms

As to the importance of complaints mechanisms and their connection to the objective of preventing ill-treatment the Georgian NPM stated: “The right of speedy and impartial examination of complaints against public officials and the existence of the system of effective internal monitoring represent significant elements of the fight against torture” (Georgia NPM 2016, 20). For achieving this, the NPM sees an obligation for states to establish an effective system and calls to “adopt legislation, create a mechanism for filing complaints, establish the investigative organ and other institutions, including the independent judicial organ authorized to interpret rights and determine compensation for victims of torture” (Georgia NPM 2016, 23).

Similarly the Austrian NPM described “an effective complaint procedure as a basic precaution against mistreatment in prison” and referred to the standards of the CPT to underline that channels for pursuing complaints need to be available inside and outside the penitentiary system (Austria NPM 2016, 117).

The NPM of Albania stressed that all complaints must be taken seriously, disregarding their topic, due to the specific situation prisoners find themselves in: “Some complaints may seem insignificant but we should take into account that the prisoners have limited independence in their life. In these circumstances, even a petty concern may have major consequences” (Albania

NPM 2014, 30; similarly Georgia NPM 2015a, 30).

In theory, effective complaints mechanisms are said to improve detention conditions by holding prison administrations accountable. The French NPM reflected on the situation of complaints mechanisms in France and found positive developments, although there remain numerous shortcomings and problems:

“Certainly it is not to be forgotten that these processes, even when they appear to be unfruitful may, fortunately, result in the prison administration changing their original position and attitudes. However, with regard to the number of processes which prisoners claim to have undertaken, these outcomes still remain limited” (France NPM 2014, 228).

4.3.1.2. Availability of complaints mechanisms

In Croatia, the NPM reported that there are several legal instruments available in the national legislation for persons deprived of their liberty in prisons: “Filing a complaint to the head of prison, the Central Office of the Prison System Directorate or to the executing judge are surely those from which prisoners expect the most protection of their rights” (Croatia NPM 2014, 28). At the same time the Croatian NPM questioned the effectiveness of these legal instruments, as it found dramatic problems in the enforcement of decisions.⁵⁷ The NPM referred to the possibility to file a complaint to the executing judge having resulted in 200 final decisions, all assessing a violation of the prisoners' rights regarding the accommodation conditions, but

“[d]espite the fact that everyone in the Republic of Croatia must respect and comply with a final and enforceable i.e. executable judicial decision, these prisoners are still serving their prison sentence in the same conditions. Taking account of all of the above, it is justified to ask whether this is actually an efficient legal instrument?” (Croatia NPM 2014, 28)

Referring to several judgements of the ECtHR, that convicted Bulgaria for the violation of the right to an effective remedy (Article 13 ECHR), the NPM stated that “[t]he major hindrance to introducing a preventive remedy are precisely the poor detention conditions as there are no alternative detention facilities offering adequate living conditions” (Bulgaria NPM 2016, 25). Therefore the introduction of a system of effective legal protection mechanisms would need to be part of “adequate action to genuinely improve detention conditions” (Bulgaria NPM 2016, 25), tackling overcrowding and general poor living conditions.

According to the NPM, the Bulgarian legislator amended the national legislation and introduced a remedy for receiving damages. The Bulgarian NPM stated its support for a compensatory remedy, but raised concern on the practicality of achieving redress within a reasonable time

⁵⁷ Detention conditions and violations of the right to an effective legal remedy (Article 13 ECHR) have been the subject of judgements of the ECtHR against Croatia (Croatia NPM 2015, 37).

because of the length of court proceedings (Bulgaria NPM 2016, 26). Thus, it recommended reconsidering the “establishment of an [new] independent administrative body to provide compensations [...] in a fast, accessible and friendly manner” (Bulgaria NPM 2016, 26).

The Polish NPM referred to the right to file complaints, requests and applications as one of the basic rights of prisoners. Its evaluation of the fulfilment of this right as positive is mentioned in the reports of the Polish NPM with identical wording in three consecutive years (Poland NPM 2013, 39 f, 2014, 37, 2015, 24). In the latest report of the Polish NPM the right to file complaints, requests and applications is not mentioned any more, nor did the NPM give an evaluation on other topics of legal protection.

The NPM of Hungary referred to national legislation that entitles every person to “submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power” (Hungary NPM 2016, 34). The NPM underlined that persons deprived of their liberty are subject to “organs exercising public authority” and are thereby also entitled to the right to make complaints (Hungary NPM 2016, 34).

4.3.1.3. Position of NPMs

The OPCAT defines the mandate of NPMs as monitoring bodies, not targeted towards introducing a separate venue of complaints mechanism with the NPMs as receiving and deciding upon complaints, but in contrast to supervise and observe the existing complaints mechanisms. The NPMs of the Czech Republic and Denmark underlined this function in their reports: The Danish NPM stressed that it does not and cannot investigate complaints and “consequently and according to practice, neither does [it] investigate matters or issues being tried by the courts or which are expected to be brought before the courts” (Denmark NPM 2012, 42).

Similarly the NPM of the Czech Republic explained:

“The Defender is not authorised to substitute for the responsibilities of 'review bodies' in prisons (usually the prevention and complaints department, or, in case of disciplinary punishment, another responsible employee). She recommends to the prisoners (barring urgent cases) to first address these 'review bodies' with any of their complaints” (Czech Republic NPM 2015, 52).

4.3.1.4. Excursus: study on complaint handling mechanism in Georgia

In 2015 the Georgian NPM published a special report on the topic of mechanisms for requests and complaints in Georgian prisons. This report is the result of a research study on the reliability and effectiveness of request/complaint handling mechanisms, drawing on questionnaires answered by 1,957 prisoners in 14 penitentiary institutions (Georgia NPM 2015a, 5). Besides analysing the situation in Georgian prisons, the study describes the case law of the ECtHR as

well as standards and opinion published by the CPT (not restricted to Georgia) and refers extensively to the EPR and other international standards. Inter alia the knowledge of the imprisoned persons was compiled, showing that their subjective evaluation of their knowledge on legal protection was much higher than their objective knowledge on the complaints procedure (including e.g. different bodies receiving complaints, time limits for decisions) (Georgia NPM 2015a, 11 f). In the following examination on the NPMs perspective on complaints and procedures thereof, the positions of the NPM of Georgia will therefore be given considerable space as there is no NPM that has analysed the complaints mechanism in its reports in comparable depth and length.

4.3.2. Filing complaints

First of all, the persons deprived of their liberty need to have the right to file applications, requests or complaints, as the NPM of Albania, Georgia and Macedonia pointed out, quoting the applicable national legislation (Albania NPM 2016, 36; Georgia NPM 2015a, 11; Macedonia NPM 2013, 264).

4.3.2.1. Confidentiality

A further topic mentioned by NPMs is the confidentiality of complaints being filed. For confidentiality reasons the prisoners need to be able to file applications or complaints in closed envelopes or have other options to submit their complaints anonymously (Bulgaria NPM 2014, 55; Hungary NPM 2016, 34; Spain NPM 2015, 69).

The possibility of filing anonymous complaints is considered crucial by several NPMs. The presence of boxes in common areas of the ward to enable people to file complaints anonymously is a common practice (Lithuania NPM 2016, 30; Albania NPM 2016, 33; Macedonia NPM 2013, 264). Problems with these boxes were a topic touched upon by several NPMs: The confidentiality can for example lack when the boxes for filing anonymous complaints are subject to surveillance because they are placed right next to the warders' room (Macedonia NPM 2013, 264). The Macedonian NPM also found that the mailboxes were labelled with a confusing heading. Further, in one institution it was easy to open the complaint boxes and therefore accessible for everybody, including other prisoners and staff. In the same institution the boxes were also placed within the range of vision of the video surveillance. An additional breach of confidentiality described by the Macedonian NPM consisted of prison staff attending the meeting on a complaint with the principle of the prison (Macedonia NPM 2013, 264).

The same problem was reported by the Georgian NPM, namely that several complaint boxes were under video surveillance, making the identification of the author of confidential complaints easy (Georgia NPM 2015a, 20). But also in facilities where the complaint boxes were placed outside the video surveillance area, the Georgian NPM found that prisoners were reluctant to file confidential complaints. The reason is a lack of trust in the boxes being able to ensure confidentiality, as the NPM noted (Georgia NPM 2015a, 35). The NPM also mentioned that subculture should be considered, due to which the use of complaint boxes “may lead to problems among prisoners” (Georgia NPM 2015a, 35).

4.3.2.2. Necessary material

The French NPM pointed out, as written applications are the norm in French prisons, the persons deprived of their liberty need to be provided with the necessary physical means, namely paper, envelopes and pens (France NPM 2015, 168). Similarly the Georgian NPM sees an obligation of the prison to supply the detainees with the means necessary for writing letters and found that overall in 90% the material was provided (Georgia NPM 2015a, 19 f). At the same time, for prisoners in closed facilities the situation is entirely different. For these prisoners the NPM assessed that “it is practically impossible to obtain an envelope for writing a confidential complaint without identification of a prisoner” (Georgia NPM 2015a, 37).

4.3.2.3. Numbers

As to the numbers of complaints being made, the Austrian NPM reported a tenfold increase in complaints in one penitentiary institution, allegedly due to renovation works causing severely crowded conditions (Austria NPM 2016, 116).

The Georgian NPM studied the frequency of persons filing complaints and found that more than half of the prisoners questioned filed complaints in the past two years. According to the results of the study, on average male prisoners made more complaints than female prisoners and persons kept in closed institutions filed more complaints than prisoners in semi-closed facilities (Georgia NPM 2015a, 26 f). The NPM's study on complaints mechanisms contained this information, the reasons behind the different frequency of complaints were not ascertained in the study, neither did the NPM provide its interpretation.

4.3.2.4. Reasons for filing complaints

The NPM of France elaborated on the reasons for persons deprived of their liberty to make a complaint and described four major categories of reasons:

Firstly, the claim of disproportionate force or measures used against the person, e.g. after being

separated for awaiting a disciplinary procedure.

The second category is formed by complaints concerning harassment, in that the person perceives himself or herself as “the victim of repeated, constant discrimination by one or more members of staff” (France NPM 2014, 227). This felt discrimination may lie in the not-granting of benefits such as employment or activities, provocation, insults or disclosure of personal information to others.

Thirdly, the issue of perceived non-assistance in a situation of danger and need for help, especially in health-care related situations.

The fourth and last category of complaints as carved out by the French NPM is the disappearance of property, e.g. during transfers or after searches of cells (France NPM 2014, 227).

4.3.2.5. Reasons for not filing complaints

Reasons for not filing a complaint mentioned by other NPMs except for the Georgian are twofold: First the assumption that filing a request, application or complaint is useless because the mechanisms are not effective. Second the fear of (informal) consequences and retaliation.

(i) Complaints are perceived as useless

The Croatian NPM published information from the prison administration stating that in nine out of fourteen Croatian prisons there has not been a single complaint to the prisons' director from prisoners on remand.⁵⁸ The NPM's interpretation is the lack of trust “in the efficiency of complaints as one of the basic mechanisms for protection of their rights” (Croatia NPM 2015, 37), that discouraged prisoners from filing a complaint. Similarly the Czech NPM refers to the prevalent distrust of prisoners in the complaints mechanism and calls on the bodies responsible for complaints “to address the convicts' complaints and resolve them objectively” (Czech Republic NPM 2015, 52).

(ii) Fear of repercussions

The Spanish NPM draws on individuals visited and their explanations for not having ever filed any complaint. One person mentioned that he is classified in the best category and therefore fears negative consequences for complaining although he did report about having felt verbally abused by staff. The fear of repercussions following a complaint or the reporting of an incident were described by two other individuals. They mentioned that the staff have the power to initiate proceedings against the reporting person, or arrange an increase in the number of searches the

⁵⁸ The Croatian NPM did not specify during what time there has not been a single complaint from prisoners on remand, it might be the reporting period, that is the year 2014, but it is not possible to verify from the information given in the report.

specific person is subjected to (Spain NPM 2013, 98 f).

The need for having complaints procedures in place that are effective and can be exercised by the detained persons without having to fear repressions is also mentioned by the NPMs of Armenia, Croatia, Denmark and the Ukraine (Armenia NPM 2010, 22; Croatia NPM 2016, 26; Denmark NPM 2010, 12; Ukraine NPM 2015, 218). For example the Armenian NPM reported that its research revealed that prisoners are reluctant to lodge complaints about the prison staff because they fear (negative) consequences (Armenia NPM 2010, 22; similarly Croatia NPM 2016, 26).

The Georgian NPM pointed out, that intimidation as a reason not to file complaints often stems from the penitentiary administration, but can also come from other prisoners, as well as visiting persons from outside the institution such as the prosecutor or investigator. Similarly the Armenian NPM reported:

“Alongside with that there is an unavoidable polarity of relations between the administration and the detainees and convicts, which results in the first place from the low level of trust in penitentiary officers, as well as the 'internal code of conduct' in penitentiary institutions, according to which cooperation with the administration is not encouraged” (Armenia NPM 2010, 22).

The NPM of Georgia also mentioned that intimidation does not necessarily take a direct form, but can as well come in the form of self-censorship because of the fear of conditions getting aggravated (Georgia NPM 2016, 176, 2015a, 41).

The Georgian NPM contacted the Ministry of Corrections and put forward the position that there is a considerable number of persons that abstain from filing complaints due to intimidation. According to the Georgian Ministry of Corrections (as quoted by the Georgian NPM) the existing number and the content of the requests/complaints would “clearly demonstrate that the prisoners are not repressed” (Georgia NPM 2016, 176), thereby rejecting the NPM's position. The NPM subsequently recommended “to take all necessary measures [...] in order to avoid repressions” (Georgia NPM 2016, 180), indicating that reprisals remain a persistent problem.

The French NPM described blackmailing as a further form of repression against persons issuing complaints and described the following incident. A prisoner who filed a complaint was confronted by an officer with two forms in his hand, one for withdrawing the complaint and the second one for filing an application to be transferred to a different institution. As the person did not want to be transferred to a prison further away from their family, he/she saw himself/herself forced to withdraw the complaint (France NPM 2014, 229).

(iii) Information from the Georgian NPM's study

In the study on complaints mechanism in Georgia, there are two different kinds of information as to the reasons for persons refraining from issuing a complaint provided. First, prisoners that did not make a complaint in the last two years were asked for their reasons not to file complaints and gave the following answers:⁵⁹

- 69.8% said that they did not have any reason to complain;
- 14.9% did not have any hope that the complaint would be considered;
- 4.8% did not think it to be right to file a complaint;
- 4.7% did not have hope that the complaint would reach the intended destination;
- 4.2% did not know the procedure for filing a complaint;
- 4.0% did not have a guarantee of confidentiality;
- 3.8% did not manage to formulate a complaint;
- 3.8% were afraid of punishment for filing a complaint;
- the remaining 10.7% either did not know Georgian, refused to answer, found it difficult to answer or mentioned other reasons (Georgia NPM 2015a, 36).

A couple of pages later, the NPM presents the prisoners' reasons for abstaining from filing a complaint, although they wished to make one. According to the NPM 10% of all prisoners taking part in the study “mentioned that they wished to file a complaint, but due to certain reasons they did not do so” (Georgia NPM 2015a, 41). Of these group of persons, 41% disclosed intimidation (from administration, investigator or other individuals) as the reason for not filing a complaint although they wished to do so. Additionally, 18.3% feared that filing a complaint “would aggravate their situation within the penitentiary facility” (Georgia NPM 2015a, 41, 90).

Further answers were: 12.6% did not know how to file complaint; 7.4% had no access to technical means; 3.4% lacked the money;⁶⁰ 3.4% saw no point in filing complaint; 2.9% mentioned poor health condition as the reason; 2.3% didn't know Georgian; 2.3% argued that the social worker did not show up; 1.7% said that the administration did not allow complaints; 1.1% mentioned pressure from the attorney; 1.1% that the complaint was not taken; 1.7% refused to answer and 12.6% found it difficult to answer (Georgia NPM 2015a, 90).⁶¹

⁵⁹ N = 901.

⁶⁰ The Georgian NPM did not mention whether there is a fee to pay when filing a complaint. Elsewhere the Georgian NPM explained, that there are court fees for filing appeals. There exists a scheme for granting an allowance or being exempt from court fees for persons registered in the “Unified Database for Socially Vulnerable Families”. Nevertheless, convicted prisoners are excluded from this database, with the effect that their right to court access is restricted and they “lack the possibility to protect legal interests by means of judicial control” (Georgia NPM 2015a, 56).

⁶¹ N = 188, in the survey it was possible to choose more than one answer, therefore the sum exceeds 100%.

4.3.3. Handling of complaints

4.3.3.1. Admission and registration

First of all, after a complaint is made, the prison administration needs to declare it admissible, register it into the complaint register and forward it to the competent person. The NPM of Albania reported serious consequences because a complaint of persons on hunger strike did not get forwarded (Albania NPM 2016, 36).⁶² However, except for this incident the Albanian NPM seemed to be satisfied with the process of keeping and updating the registry:

“[T]he Directorate General of Prisons carried out a good job pursuant to the recommendations of the People's Advocate [ed. note: that is the NPM] for setting up a system for admission and processing of complaints/claims [...]. This system is currently operational at each Penitentiary Facility” (Albania NPM 2014, 4 f).

The Lithuanian NPM conducted inspections of the registration of detainees' requests, applications and complaints and remarked positively that complaints “regarding possibly inappropriate behaviour of officers were registered separately” (Lithuania NPM 2016, 30 f).

In contrast the Croatian NPM found that records on filed complaints were lacking in some of the visited institutions (Croatia NPM 2016, 26; similar Norway NPM 2016, 34). The Macedonian NPM found a lack of separate registries for complaints in two institutions where complaints are only registered in the personal file of the complainant, a practice contrary to other institutions where a separate register for complaints is kept (Macedonia NPM 2013, 267). The Serbian NPM requested to keep “separate records of complaints and appeals, which shall include information on the resolution of complaints, the dates when relevant decisions were passed and advice on available legal remedy” (Serbia NPM 2015, 51).

In Austria for several years since the report on the year 2013 the NPM calls on the Ministry of Justice and the prison administration to implement a complaints management system. Starting from the finding that there was no complaints book nor a complaints register in one facility visited by the NPM it took up the subject and confronted the Ministry with it. The NPM assessed that complaints are not recorded in a systematic, comprehensive and structured way, leading to a situation that it is “currently not possible – neither inside the institution nor externally – to access meaningful data showing in which areas (e.g. insufficient work, quality of food, spare time activities etc.) a potential for conflict might be building up, and where quick responses may be

62 In its report, the Albanian NPM included the names of the two persons it identified responsible for the misconduct. This is certainly an outstanding activity for the NPM, namely pointing the responsibility to individual officers and making their names publicly known. None of the other NPMs has done this. In general, the facility is mentioned and the prison's management in general is blamed for the identified problems.

required” (Austria NPM 2014, 60). According to the Ministry it was not possible to maintain a complaints book because complaints were “made in very different ways (verbally and in writing, internally and externally) and are often presented repeatedly” (Austria NPM 2014, 61). Although, according to the NPM the Ministry for Justice has acknowledged the importance of a complaints management system and said it was developing options for the technical implementation, two years later the NPM still reported the absence of a complaints register (except for one prison facility) and repeated the importance of implementing such a system (Austria NPM 2016, 117).

The lack of registration of applications, requests or complaints is not limited to Austria. In 2013 the French NPM noticed complaints of prisoners on applications not being dealt with and not reaching the intended persons. This led the NPM to describe the status quo of handling procedures as problematic, as requests or complaints were not always registered and prisoners did not systematically receive a reply (France NPM 2013, 176). The next year the NPM reported: “Finally, because to our knowledge, there is no jurisdiction, either legal or administrative, that keeps records of complaints or appeals from prisoners, [...] if they were recorded this would in itself be a very useful index of the climate in a Prison” (France NPM 2014, 222).

Under the heading of “traceability” the French NPM discussed the problems and necessary improvements of handling procedures in detail in its latest available report from the year 2015.

“Traceability should enable the progress of a request to be monitored throughout its various stages. In this way all information should be retained related to its receipt (date, type of request), its identification (sender and recipient), its handling (transfer to the department responsible, time taken for handling, acknowledgement) and the reply given (content, identification of the respondent). This procedure which is undoubtedly lengthy is the sole guarantee of rights for persons to which it applies” (France NPM 2015, 175).

The lack of rules on the handling and on the responsibility to take care of requests and complaints in some institutions resulted in a situation where the fate of a request is dependent on the goodwill of the recipient (France NPM 2015, 172).

As the French NPM pointed out, it is also necessary to install and communicate handling time limits. If, as is currently the state, complainants do not know about the time limits for handling their complaint, they “will think that their request has not been received by its recipient and will write another request” (France NPM 2015, 172). Due to this, the French NPM perceives it as indispensable to reply to the prisoner immediately after the request or complaint has been received:

“Primarily requests should receive a reply; an absence of reply – in addition to being perceived as a sort of disrespect – creates a new request: where there is no reply, requests are presented repeatedly, demonstrating the impatience of those making them; they are addressed to contacts which are different each time and in particular, as appropriate, to those higher up the management hierarchy than those to whom detainees have first applied and even to external participants” (France NPM 2015, 172).

The French NPM subsequently elaborated on the benefits and disadvantages of its proposed traceability procedure: On the positive side there is not only the “sole guarantee” for protecting the rights of prisoners, it also brings benefits for the administration as its decisions can be justified far better and it opens up new possibilities to analyse the administration's own methods of handling requests and complaints and improving them (France NPM 2015, 175).

The negative side obviously is the bureaucracy that comes with this proposed procedure. The French NPM warns that too much bureaucracy could be detrimental for contacts between staff and persons deprived of their liberty because, in itself, it can lead to the feeling of being subjected to a “dehumanised system” (France NPM 2015, 175). Then, there is also the hazard of staff using a delaying tactic of referring to requests made verbally with the request for a written application. For the handling of “simple or immediate requests or those that are urgent and require a direct reply from staff” (France NPM 2015, 176) making and reacting to oral complaints and requests should be secured and traceability cannot be used for all types of places and requests. As an evaluation of practice the NPM stated: “One notes that even if there have been positive developments in acknowledging this right, actuality has not yet reached satisfactory level and progress in a number of areas remains to be made” (France NPM 2015, 177).

The Georgian legislation requests a registration number to be assigned to each complaint. For confidential complaints, this registration number (and a respective coded envelope) should be posted near the complaints box no later than one day after the complaint was received. For requests or complaints that are not confidential, the person should be given a registration number (Georgia NPM 2015a, 22). In practice, the NPM found that every fifth complainant did not receive a registration number (Georgia NPM 2015a, 23). Similarly to the French NPM who focused on the importance of replying to complaints, the Georgian NPM also found that prisoners who filed several complaints on the same issue usually did this because of “inadequate/inefficient response to complaints, which means the failure to fully solve the problem” (Georgia NPM 2015a, 28).

Regarding the establishment of facts the only NPM who mentioned the topic of providing

evidence and burden of proof is the Bulgarian NPM. It stated that the “the burden of proof on the claimant should not be excessive; s/he is required to present available evidence but the major burden of proof falls upon the body in charge” (Bulgaria NPM 2016, 26).

The requirement of complaints being registered has two objectives, as pointed out by the NPMs. First, it provides for the possibility to trace the individual complaint from it being filed to the handling, investigation, and decision upon it. It also helps to ensure that every complaint is followed up, and applications don't get lost. Second, the registration of complaints also serves the purpose of receiving a picture of the state of satisfaction with the regime by prisoners. Therefore, it permits the management to have notice regarding the question in which areas there is a potential for conflict and how it needs to react.

4.3.3.2. Other incidents reported by NPMs

The Czech NPM reported on one case, where the complainant requested the recording of the video surveillance system as evidence. The prison did not provide the recording, but deleted the tape, claiming it did not prove the allegations made by the prisoner. The NPM criticised that such a practice “harms the credibility of the whole investigation” (Czech Republic NPM 2015, 52) and recommended to store recordings if needed as evidence.

The Ukrainian NPM reported on the practice of authors of written complaints being “called to the administration with opening of the envelope and reading of the contents, and even tearing the letter and throwing it away” (Ukraine NPM 2015, 124). This and other observations of censorship and destruction led the NPM to state that in practice, the only possibility is to file an oral complaint to the officer on duty (Ukraine NPM 2015, 218), while it requested the prison administration to pay attention to and take all measures possible to improve complaint mechanisms.

4.3.4. Decision on complaints

The final decision on the request or complaint needs to be issued to the person who made the request or complaint. There are certain aspects concerning the response and decision mentioned in the report of the NPMs that need to be considered.

First, the decision needs to be taken in due time (see for instance Albania NPM 2016, 40; Croatia NPM 2015, 37). Second, several NPMs point to the necessity that the decision is not only provided orally but in writing (Albania NPM 2016, 40; Bulgaria NPM 2013, 10; France NPM

2015, 175; Poland NPM 2013, 39 f; Serbia NPM 2015, 67). Third, the response needs to be properly substantiated, meaning to include a reasoning that explains the process of decision-making (Czech Republic NPM 2015, 52; Finland NPM 2016, 73; France NPM 2015, 170 ff; Slovenia NPM 2016, 44).

The Macedonian NPM has the question “[h]ow is the prisoner informed about the director's decision?” (Macedonia NPM 2012, 270) on its list of topics to focus on when visiting penitentiary institutions, but does not elaborate further on either the practice in the visited institution nor the NPM's standards. Similarly the Hungarian NPM stressed that its members examine at each visit “how those complaints get registered, investigated and redressed by the staff, and how the complainants are notified thereof” (Hungary NPM 2016, 34), but did not report on its findings.

4.3.4.1. Response in due time

The Georgian NPM clearly set out time limits for handling requests or complaints necessary for an effective complaints mechanism and mentioned the relevant Georgian legislation, as well as, the existent time limits for different sorts of complaints. The NPM evaluated some of these time limits as too long and welcomed amendments to the law, that were under review. In cases where a response within the legal time limits is not possible, the Georgian NPM recommends the person being informed in writing of the necessity to extend time (Georgia NPM 2015a, 30 f).

The Croatian NPM criticised that the directors of institutions “still fail to respond to prisoners' complaints within the prescribed legal period of 15 days. Sometimes complainants never receive a reply to their complaints, and sometimes they get it after a few months, by which this legal instrument becomes ineffective and loses its purpose” (Croatia NPM 2015, 37, 2014, 28). Similarly the Slovenian NPM reported of undue delays in processing complaints (Slovenia NPM 2016, 44, 2015, 47).

Regarding the necessity to provide a response at all, the NPM of Norway reported that the “the absence of an administrative decision [...] constitute[s] serious breaches of the inmates' legal protection” (Norway NPM 2016, 34).

4.3.4.2. Response in writing

The practice of a verbal response instead of a written one is mentioned and criticised by several NPMs: The NPMs of Albania, Bulgaria and Serbia explicitly request to provide written replies (Albania NPM 2016, 40; Bulgaria NPM 2013, 10; Serbia NPM 2015, 67).

The Polish NPM sees the necessity of providing a written response only in cases which were not

immediately granted after the application or request was filed (Poland NPM 2013, 39 f, 2015, 24). The NPM also repeatedly criticised the practice of responding to complaints and requests in Polish prisons, as the responses were publicly placed in the corridors of the residential wards.

“In view of the need to protect personal data of prisoners, the said practice must be eliminated and inmates must be informed about the results of their requests individually, orally or in writing, in line with the relevant regulations” (Poland NPM 2014, 37, 2013, 39).

The Georgian NPM reported the problematic practice of response letters to complaints being delivered in unsealed envelopes. Responses to confidential complaints in closed institutions are generally opened by an officer in the presence of the prisoner, who then hands the response to the person to read it and subsequently takes it back and add it to the personal file of the inmate. This practice is problematic because “[i]n such case administration employee can easily read received response and understand the topic of the inmate's confidential complaint” (Georgia NPM 2015a, 38), rendering the label “confidential” superfluous. Another problem is that the complainant is not allowed to keep a copy of the decision in his or her custody.

4.3.4.3. Justified response

As regards to the reasoning, according to the Slovenian NPM, the replies to complaints should always “include their [ed. note: the prison administrations'] positions regarding all essential statements in complaints from convicted persons or explanations from the institution” (Slovenia NPM 2016, 44).

The Finnish NPM considered it problematic that it could not verify that prisoners are always given a justified decision (Finland NPM 2016, 73).

The lack of a complete response in which all issues are included, that have been mentioned by the complainant is also mentioned by the Georgian NPM as problematic (Georgia NPM 2016, 117). The opposite of a reasoned response on an individual basis is the practice in Georgia to reply to complainants using template answers (Georgia NPM 2016, 175, 181). The complainants mostly received a response within the set time limit, but this reply was not an individualised decision (Georgia NPM 2015a, 32). In addition, if the decision included a reasoning, it often ignored the arguments brought forward by the complainant:

“[I]n a number of cases the decision on which the termination of the proceedings was based did not contain the justification on why the information provided by the prisoner was not taken into consideration and only the information submitted by the prison staff was taken into account” (Georgia NPM 2016, 176).

Similarly the Croatian NPM described the responses to complaints as “usually superficial and

general” (Croatia NPM 2016, 26).

Two other problems found by the Georgian NPM were that the recipients were not able to understand the response properly and that the response is only communicated to the prisoner but they are not given a copy. Both make it impossible for the complainant to file a remedy (Georgia NPM 2016, 177). The Georgian NPM criticised the national legislation and called for an amendment in order to give detainees the right to keep responses and all other material in connection with the proceedings inside their cells (Georgia NPM 2016, 182).

As an evaluation, the NPM of Georgia described the activity of the administration giving responses to complaints as “of formal character and cannot be considered as effective activity” (Georgia NPM 2016, 178). As to the measures that need to be taken in order to eliminate these problems, the NPM concluded that trainings in fields such as legal writing for staff members is not enough, but that it is necessary that requests or complaints are “sufficiently studied by the various units of the penitentiary system and the decisions are properly justified” (Georgia NPM 2016, 176).

The NPM of Georgia also assessed the satisfaction of complainants with the received responses and found that more than half of prisoners were not satisfied with the response (Georgia NPM 2015a, 43). The NPM elaborated on the situation:

“Practice of making unjustified decisions negatively influences building confidence among prisoners with regard to complaints mechanism which is clear based on survey data as well. In particular, out of the respondents who have not used right to file a complaint for the last two years (46%) 14.9% did not believe that the process would be carried out successfully and contents of the complaint would be considered” (Georgia NPM 2015a, 44).

In prisons in the Ukraine the complaints are often sent to the persons that are the subject of complaint. The NPM mentioned this practise as unacceptable. It further criticised the practice of inspections on complaints as superficial and responses as formal in character. The staff responsible for the investigation “does not review in detail actions of the administration and keep neutral and loyal position” and “internal investigations into alleged illegal actions by certain officials are superficial or not held at all” (Ukraine NPM 2015, 124).

How a response is made and its quality shows the respect for the person deprived of liberty as an individual, as the French NPM pointed out (France NPM 2015, 170). The requirements for a reply set up by the French NPM are that they “should be proper and courteous. [...] The content of the reply must be relevant. [...] Replies should not be contradictory. [...] Replies should take account of the criteria for decision-making which should be known to all, objective and identical

to all. [...] Replies should not be summary but detailed and reasons given” (France NPM 2015, 173 f).

At the same time the NPM assessed the reality in French prisons as the criteria for decision making are rarely explained, as are the replies themselves. This situation leads to “a feeling of incomprehension or even anger by those receiving them. This way of proceeding makes the detainee think that he has no right to receive explanations and that he should content himself with the information provided” (France NPM 2015, 174).

4.3.4.4. Appeal

The NPM of Moldova evaluated the existing remedies and the proposed amendments as insufficient, as they lack regulation on the procedure and decision making. The NPM concluded: “the detainee will be deprived of the right to appeal the decision [...] and ultimately, as long as it will not be subjected to a judicial control, it will have a questionable character” (Moldova NPM 2009, 77).

The legislation in Georgia regarding appeals procedures has been heavily criticised by the Georgian NPM. Following its recommendations, the section that restricted venues of appeal for prisoners was deleted from the Georgian Imprisonment Code (Georgia NPM 2016, 178). The NPM highlighted this development as positive. As to the information on possible remedies, the NPM recommended that the Ministry “takes all necessary measures” in order to ensure that in the response to requests, complaints and applications the prisoner “is informed regarding the right to appeal the decision, indicating the place and the term to appeal the decision” (Georgia NPM 2016, 182).

Concerning the number of appeals filed by prisoners, the Georgian NPM found that 41.1% have never appealed a decision, 14.1% have at least once appealed a decision and 22.9% have appealed several times (Georgia NPM 2015a, 44, 53). To the degree of satisfaction that could be achieved with the decision upon appeals, the NPM unsurprisingly found that it is very low. Seven out of ten prisoners that have appealed “mentioned that appealing did not lead to any outcome” (Georgia NPM 2015a, 54).

In its 2015 report the NPM of Finland found that the appeal instructions attached to a decision of the prison director were incorrect. After contacting the prison governor, who gave notice that the person will be issued new appeal instructions the NPM saw the matter solved (Finland NPM 2015, 79). Nonetheless the following year the NPM reported that in general, prisoners are not always handed out a decision with instructions for appealing (Finland NPM 2016, 73).

The Ukrainian NPM found unjustified restrictions that deprived prisoners of the opportunity to appeal against an imposed disciplinary penalty in one institution (Ukraine NPM 2014, 66). A similar problem was reported by the Slovenian NPM who informed that prison staff denied prisoners “the use of legal remedies or methods of appeal” (Slovenia NPM 2016, 44). In Slovenia the NPM called for a review of the existing appeal procedure as the NPM has found considerable delays in the handling of appeal procedures at the prison administration in consecutive years, apparently because of staffing problems (Slovenia NPM 2016, 44).

The Macedonian NPM mentions the question “[h]ow is the right to appeal against the director’s decision realized?” (Macedonia NPM 2012, 270) as being on its list of topics that are to be addressed at every monitoring visit to a penitentiary institution, but does not elaborate any further on the findings in practice.

The NPM of Lithuania found that prisoners were not familiar with their rights in connection with appeals and criticised that “proper conditions are not created for submission of appeals” (Lithuania NPM 2016, 28).

In Bulgaria, as mentioned above, complainants are not provided with a written decision but are informed verbally on the outcome of their request or complaint against signature (confirming the reading of the decision), leading to the problem that without a written (and justified) decision their right to appeal is hindered as the Bulgarian NPM pointed out (Bulgaria NPM 2013, 10).

The NPM of Croatia elaborated on the superficial and general nature of responses and lack of responses in due time. The conclusion on the state of legal protection of prisoners’ rights in Croatia by the NPM is, that the mechanisms are inadequate and inefficient. In the report 2014 the NPM recommended to the Ministry of Justice to study the efficiency of legal instruments.⁶³ According to the NPM the administration rejected this recommendation stating that “efficient instruments for protecting the rights of prisoners are already ensured by the existing legislation which is harmonized with international standards” (Croatia NPM 2015, 11 f). The NPM reiterated that this opinion is not supported by its findings, and recalled rulings of the ECtHR against Croatia regarding the violation of the right to an effective remedy. The NPM described a case where a prisoner did not receive any response following eleven complaints and when issuing a remedy, the judge “failed to issue a formal decision and responded by a memo” (Croatia NPM 2015, 12). The Croatian NPM concluded in the 2016 report:

63 The Croatian NPM in the report 2015 used the term “inefficient” to describe the status quo of legal protection mechanisms, but subsequently referred for the purpose of illustration to Article 13 ECHR, the right to an “effective” remedy, indicating that the reason of concern is not the lack of efficiency but of effectivity.

“Until this situation changes significantly, legal remedies available to persons deprived of their liberty who are in the prison system will not be effective. Therefore, in order to strengthen the efficacy of legal remedies, it is necessary to introduce changes in the legal framework, educate officials and prisoners and publicly condemn any deterrent or prevention of filing complaints” (Croatia NPM 2016, 26).

4.4. The perspective of NPMs on prison discipline

4.4.1. Introduction

Prison discipline is the topic where the functionality of legal protection mechanisms becomes clear quickly, and the plethora of aspects that need to be taken into account as well. From the legislation establishing what acts qualify as disciplinary offences and the sanctions available for punishing offenders to the requirements for the procedure and due process and the pitfalls connected with them. Furthermore, the options for reviewing the lawfulness of the decision are essential from a rights approach.

From all reports analysed for this study the French NPM stands out, having examined and reported on the disciplinary procedure in depth in its report in 2013, with a focus on the legislative history of prison discipline, that is described as a relatively recent development of introducing the rule of law and legal safeguards since the mid 1990s. With the introduction of the decree of 2nd April 1996 the French NPM reported, that breaches of discipline and sanctions were clearly defined for the first time and listed according to their seriousness. Additionally, judicial remedy was opened. Further improvements followed with the act of 12th November 2000, opening the possibility for receiving legal aid in disciplinary proceedings. Inter alia, the act of 24th November 2009 and 1st June 2011 determined the procedure to be followed in disciplinary cases and introduced improvements according to the French NPM (France NPM 2013, 111).

Besides the history and examination of disciplinary proceedings in practice and recommendations for further improvements, the French NPM also shed light on the formal and informal consequences and side effects disciplinary procedures have on the legal status of the person and his or her further prospects. The following analysis of the NPMs' perspective on prison discipline is structured along the topics pointed out by the French NPM, with other NPMs' perspectives being introduced where available.

4.4.2. Procedure

In France, the procedure includes the following steps: first the incident report, second an inquiry, third the proceedings before the disciplinary committee, fourth its decision and the execution of the sanction and/or appeal procedure.

After an incident that could constitute a disciplinary offence, the member of the prison staff reports the incident by electronic means. From there on the charges made in the incident report are investigated by a so called inquiry officer, who then files an inquiry report (France NPM 2013, 111 f). The inquiry officer is usually a senior member of the prison staff, “they do not, in most cases, have the benefit of any specific training and the inspectors have ascertained that the inquiry reports are often poor, incomplete and vague” (France NPM 2013, 112). The NPM criticised that during the phase of investigation, there was generally no possibility to question the word of the officer concerned. After the inquiry report was drafted, there follows the proceedings in front of the disciplinary committee. The committee is chaired by the director of the institution and two assessors, one warder and one member of civil society external to prison.⁶⁴ The disciplinary hearing takes place in front of the committee, the accused prisoner being present as well as his or her legal representative (if existing). The NPM reported of lawyers complaining about the lack of opportunity for comparison of testimonies and real debate during the hearings (France NPM 2013, 112 ff).

The NPM therefore called upon the legislator to introduce the obligation to conduct the inquiry as well as the hearing in front of the disciplinary committee in an *inter partes* manner. Thus, ensuring that the defendant is given adequate notice and reasonable opportunity to present his or her case (France NPM 2013, 145). The French NPM also noted that the time frame between the alleged committing of the offence and the hearing before the disciplinary body “should be as short as possible and should not, in any case, be greater than fifteen days” (France NPM 2013, 141).

The Serbian NPM elaborated on the impartiality of the proceedings. When being asked about their opinion on the accused prisoner's behaviour, the prison officers in a disciplinary procedure “shall not provide a description of the misconduct or a proposal for the course of action, because this prejudices the outcome [...] and sways the decision-makers towards declaring a convict guilty of a misconduct” (Serbia NPM 2015, 67). According to the NPM it is the sole competence

64 The French NPM discusses the topic of the assessors' perspective and their training regarding prison proceedings, but does not describe how many persons, of what background, form the disciplinary committee besides the chair of three persons (France NPM 2013, 111, 113).

of the authority conducting the proceedings to decide on whether a disciplinary measure must be imposed or not, and the type and scope of imposed sanctions (Serbia NPM 2015, 67, similarly 2016, 64).

Regarding the person conducting the proceedings, the NPM of Portugal reported that the judicial officer in charge of disciplinary proceedings did not have a “specific formation on this area” (Portugal NPM 2016, 25 f) but “has always played this role” (Portugal NPM 2016, 26) along his career. The NPM did not raise concerns on the issue of qualification of the officer. It further reported that the procedures inspected did not “show any negative aspects to consider” (Portugal NPM 2016, 26).

The Croatian NPM, in contrast, perceived it as a fundamental shortcoming that proceedings in some penal institutions were governed by persons without legal education. In the words of the NPM:

“The lack of education of persons who hold disciplinary proceedings is certainly a problem, and considering frequent amendments of the CPA⁶⁵ and inconsistencies between the EPSA⁶⁶ and the CPA, such education is necessary and it would certainly result in a higher level of respect for the rights of persons deprived of their liberty” (Croatia NPM 2016, 15).

Most NPMs that mentioned proceedings in prison discipline at all, mentioned the requirement of the person accused of a prohibited conduct to be heard regarding the charges (Albania NPM 2014, 31; Finland NPM 2016, 73; Macedonia NPM 2012, 269; Switzerland NPM 2014, 46). The Georgian NPM referred to the applicability of article 6 ECHR in disciplinary proceedings. In addition, to be heard at all, the NPM elaborated on the necessity to have adequate time for the preparation of the defence. For the NPM, the requirement of adequate time for defence is “a guarantee against hasty judicial decisions” (Georgia NPM 2015b, 79). Thus, the NPM requested to respect this requirement also for cases when new circumstances emerge during the proceedings (Georgia NPM 2015b, 79).

The Czech NPM stressed the responsibility of the authority in charge of the proceedings to collect evidence and take it into account in order to ensure a “proper clarification of the circumstances of the disciplinary offence and proof of the perpetrator's guilt” (Czech Republic NPM 2015, 52). If the defence seems to lack credibility and there is no other evidence available, the NPM perceived it insufficient to conclude that the person is guilty because his or her defence is allegedly purpose-driven (Czech Republic NPM 2015, 52).

65 The Croatian Criminal Procedure Act.

66 The Croatian Execution of Prison Sentence Act.

The NPMs do not offer any further information regarding the questions in what way, e.g. in writing or orally, and how, e.g. hearing in front of the decision making authority or interview during a further stage of procedure by a different person than the one deciding upon the guilt and sanction, the accused person is to be heard.

Only the French and the Austrian NPM touched upon this. They found that the law, which explicitly requires an interpreter to be present during the disciplinary hearing (if necessary), is widely ignored. The French NPM reported that, with regard to the hearings that were monitored by the NPM, an interpreter was not present even once and “if any translation is carried out it is generally done by a prison official or [...] by a fellow prisoner” (France NPM 2013, 114). Declaring this situation unsatisfactory the NPM further elaborated on its finding that in “at least one institution inspected, whatever the reality, the box in the form indicating that the person appearing before the committee ‘understands French’ was systematically ticked” (France NPM 2013, 114 f). A similar lack of consulting a professional interpreter for the disciplinary hearing was reported by the Austrian NPM who stressed to use trained interpreters and not to rely on “fellow detainees” (Austria NPM 2016, 97).

A further problematic topic touched upon by the French NPM is its finding that lawyers of accused persons rarely attend the disciplinary hearings. The NPM reported of one head of prison's information that in the year 2011 out of 281 accused persons that were to appear before the committee, “167 [59 %] requested the assistance of a lawyer, while lawyers only came to 56 [34 %] hearings” (France NPM 2013, 115). Unfortunately, the NPM does not elaborate on the reasons for this.

Two points regarding the procedure not touched upon by the French NPM are the provision of charges in writing and the question of registration and keeping record of disciplinary proceedings. The accused person should be provided with a written document stating the charges made against him or her and is entitled to defence, as the Macedonian NPM mentioned (Macedonia NPM 2012, 269). The Macedonian NPM reported that the number, full name, type of penalty and duration were duly recorded in the institutions visited by the NPM. However, it noticed the lack of information on the name of the officer that proposed disciplinary measures to be taken.

Furthermore, the NPM criticised the practice of using correction fluid in the registration book, as it bears the danger of misuse. Instead, “the deletion of the incorrect data should be crossed with one line (this will point to the irregularity of the data, and at the same time the data will be

legible)” (Macedonia NPM 2013, 267). The registration of complaints handling for the Macedonian NPM therefore has the purpose of making the procedure following the initial filing of the complaint traceable. With its finding of the use of correction fluid and the warning of the danger of misuse, the Macedonian NPM indicates a lack of trust towards the book keeping and whether the information registered resembles the reality.

The NPMs of Finland, Serbia and Switzerland also raised concerns regarding the proper registration and recommended to pay special attention on the book keeping (Finland NPM 2016, 73; Serbia NPM 2015, 67; Switzerland NPM 2014, 39 f, 46, 2016, 54). The Finnish NPM requested to insert the accusations in the registry “even when suspected breaches of order have not led into disciplinary action” (Finland NPM 2016, 73). The NPM of Serbia demanded to register whether the prisoner in the disciplinary procedure was granted access to professional legal assistance (Serbia NPM 2015, 51). The Swiss NPM found a diverging practice of adhering to procedural guarantees. Regarding the registration of proceedings in several facilities, it criticised that it was not clear from the books, whether the accused person was granted the right to be heard (Switzerland NPM 2014, 45). Besides due keeping of the registry the Swiss NPM stressed that the file needs to be accessible for the prisoner concerned at all times (Switzerland NPM 2014, 46).

The Albanian NPM reflected in its report on its own position and underlined that it is not the NPM's task to “reassess the facts but to ensure that the procedure followed is fair” (Albania NPM 2014, 31). For a disciplinary procedure to be fair, for the NPM of Albania it needs to be established that the accused person appears “before the Disciplinary Commission, be heard and informed in writing about the grounds of the measure taken. According to the deliberated cases, this procedure has been duly respected” (Albania NPM 2014, 31).

Concerning the overall evaluation of disciplinary proceedings, four NPMs pronounced a positive result (Albania NPM 2016, 3 f, 31; Portugal NPM 2016, 24, 25, 36, 59; Slovenia NPM 2015, 44; Spain NPM 2013, 89). They found no violations of procedure: For the purpose of illustration the Slovenian NPM evaluated “the practice of implementing disciplinary proceedings [...] commendable and good” (Slovenia NPM 2015, 44) and the NPM of Portugal concluded on not finding “anything to criticize about the procedures observed” (Portugal NPM 2016, 24).

Several NPMs did not mention disciplinary procedures in their annual reports, the rest was concerned with certain aspects of the procedure not working as they should or found fundamental shortcomings regarding the procedure, such as the NPMs of Croatia and the Czech

Republic (Croatia NPM 2016, 15; Czech Republic NPM 2013, 61 f). The Armenian NPM reported a complete lack of procedure: “Before using a disciplinary punishment, as a rule, they do not implement comprehensive examination of the reasons for violations carried out by the detainees, nor do they take into account their health status” (Armenia NPM 2014, 122).

As to the number of disciplinary proceedings, the Austrian NPM reported a sharp increase in one Austrian prison. According to the management, the renovation works and crowded conditions caused the increase (Austria NPM 2016, 116). Similarly, the Georgian NPM noted the doubling of disciplinary punishments used in the year 2013. There was no explanation given, the NPM only recorded that its “recommendation to develop guidelines on the use of disciplinary punishment was not fulfilled” (Georgia NPM 2015b, 14).

4.4.3. Offences

The Georgian NPM reported on the most frequent conducts that formed the ground for disciplinary proceedings and sanctions: “making noise, shouting, verbally abusing prison staff or other prisoners, disobedience to the prison staff, being late or failure to appear at roll-call and contaminating the prison territory” (Georgia NPM 2015b, 73).

The Slovenian NPM reported that it asked the prison administration in which cases the offence “possession of alcohol” is treated as a severe disciplinary offence and in which it is treated as a minor offence, but did not receive any response from the administration (Slovenia NPM 2015, 45).

Numbers on how often disciplinary offences had occurred and proceedings had been initiated were mentioned by the NPMs of Azerbaijan, Georgia, Portugal, Serbia and Slovenia (Azerbaijan NPM 2013, 24 f; Bulgaria NPM 2014, 56 f; Georgia NPM 2016, 85; Portugal NPM 2015, 18; Slovenia NPM 2015, 43, 2014, 89; Serbia NPM 2015, 37). For example the NPM of Azerbaijan mentioned that 149 breaches of discipline were recorded in one institution in the first quarter of 2012 (Azerbaijan NPM 2013, 24 f), but does not say how many prisoners were held at the facility nor does the NPM give its evaluation. Due to the fact that the information provided in the reports is fragmentary, it is not mentioned here in detail.

Some grounds for disciplinary sanctions are heavily rejected by NPMs: attempt of suicide by the Croatian NPM and refusal to work by the Bulgarian NPM.

The NPM of Croatia stated it unacceptable to react to an attempted suicide with the initiation of

disciplinary proceedings and criticised: “Such treatment not only shows a complete misunderstanding of the situation in which a person tries to take his life, but also a lack of knowledge or arbitrary interpretation of the relevant legal norms” (Croatia NPM 2015, 11). Punishment as a reaction to an attempted suicide not only ignores the state of the art in treatment of psychologically fragile persons and neglects the reasons for the suicide attempt. In addition, such disciplinary punishments disproportionately affect the most vulnerable prisoners.

According to the Bulgarian Law on Implementation of Penal Sanctions and Detention, the “deviation of work” is an offence leading to the transfer from an open ward to a closed one. The Bulgarian NPM criticised the term “deviation of work” for its vagueness and stated that the imposition of a sanction for “refusing to carry out the work is unacceptable” (Bulgaria NPM 2013, 10). The NPM underlined that the work of prisoners is their right and not an obligation (Bulgaria NPM 2013, 10). The term “deviation of work” indeed is vague and leaves prisoners open to abuse. A deviation of work does not need to be intentional by definition. Simple mistakes, as well as getting more work done than was assigned, qualifies as deviation. Compared to the situation in Austria these remarks of the Bulgarian NPM are interesting, as work of prisoners is included in the Austrian Penal Enforcement Act as an obligation and the refusal to take up work is enlisted as a disciplinary offence.⁶⁷ Under the ECHR, forced labour is prohibited (Article 4 ECHR). However, labour that is required from a prisoner “in the ordinary course of detention” is exempted from the definition of forced labour (Article 4.1 lit a ECHR) and therefore not prohibited.⁶⁸ Still, the situation of prisoners being required to work remains problematic. In Austria, there are recent developments where prisoners attempted to found a trade union.⁶⁹ They do not primarily fight against the obligation to work as such, but request fair payment and inclusion in the national pension scheme. The Austrian NPM did not comment on this topic so far.

4.4.4. Discretionary power

4.4.4.1. Deficient legislation: lack of clear guidance

The lack of clear guidelines on the question of what sanction is to be used as punishment for what offence was of concern to the NPMs of Austria, Croatia and Georgia:

⁶⁷ Sections 44, 107 § 1 StVG.

⁶⁸ The question whether the obligation to work in prison falls under this exemption then remains on the interpretation of what work is requested in the “ordinary course of detention”. For the jurisprudence of the ECtHR and further references see Grabenwarter and Pabel 2016, 224 ff.

⁶⁹ <http://www.gefangenengewerkschaft.at/> (accessed 01.05.2017).

Regarding legislation the Austrian NPM posed the question “why there is neither a catalogue of criteria nor guidelines by the Federal Ministry of Justice” (Austria NPM 2014, 59) for the imposition of sanctions. Due to the lack of guidelines, the NPM found disparities in the application of sanctions; resulting in considerable inequalities in the punishment of the same offence between one facility to another (Austria NPM 2014, 59). In order to improve the situation, the NPM requested the Prison Administration to provide guidelines on the application of sanctions and make them available to prisoners:

“What administrative penalty can be expected for what misconduct should be published and periodically updated in a form that is available to prisoners at all times. [...] [I]t is not enough to clearly indicate what forms of conduct are deemed to be an administrative offence. The nature and duration of the measures to be taken in response must also be established” (Austria NPM 2015, 100).

The NPM unveiled its correspondence with the ministry on the topic:

“According to the Federal Ministry of Justice, the diversity of possible administrative offences, and hence possible sanctions, speaks against such a catalogue. Moreover in each individual case there is an option to complain taking legal remedy” (Austria NPM 2015, 100).

The NPM disapproved of the ministry's answer as neither adequate nor convincing. The Ministry's argument that there is an “option to complain taking legal remedy”, indicating the right to appeal against the decision can serve as a substitute for a clear set of information on what punishment can be expected for what misconduct was rejected by the NPM (Austria NPM 2015, 100 f, 2016, 117). In the Austrian NPM's words:

“Legal protection options are also not a replacement for predictability of punishments imposed in the case of offences. Even ignoring the fact that a decision must comply with laws even in the first instance, quite a number of inmates might lack the required knowledge or intellectual skills to launch a founded appeal” (Austria NPM 2014, 60).

The perspective put forward by the Ministry of Justice shifts the burden of ensuring lawful procedure and sanctioning onto the convicted person. Following the notion that whoever feels treated unjustly will take legal action to enforce his or her rights, the Ministry completely neglects the vulnerable situation prisoners find themselves in. Being subjected to an all-encompassing regime it is quite unlikely for individual prisoners to be able to successfully gather information and draft an appeal, already when one disregards their “intellectual skills” as the Austrian NPM put it.

Secondly, is not convincing that connecting offences to possible sanctions is impossible because of the diversity of possible offences. For example in criminal law there are established ranges of

sanctions, as well as for traffic offences. Thirdly, the consequence of lack of regulation on upper levels of legislation is that legislation, on a daily basis, is applied by prison staff and heads of prisons, granting them a considerable margin of appreciation.

Likewise the NPM of Georgia reported on the Georgian legislation not specifying “which disciplinary sanction may be imposed in specific cases” (Georgia NPM 2016, 17). In a situation where the law does not give guidelines to prison authorities regarding the imposition of sanctions and punishments, the result is that they enjoy “broad discretion in selecting appropriate sanctions” (Georgia NPM 2016, 17). This situation in return increases the risk of sanctions being applied disproportionately and differently amongst institutions (Austria NPM 2014, 59 f; Croatia NPM 2016, 13; Georgia NPM 2015b, 73, 81, 2016, 17). In the latest report of 2016 the Georgian NPM mentioned that its recommendations regarding the development of guidelines on the use of disciplinary penalties were not followed (Georgia NPM 2016, 82).⁷⁰

An example for very different application of sanctions was reported by the Croatian NPM. It found the measure of isolation being ordered 44 times in one prison with a capacity of 101 persons, while not being ordered at all in a different institution with a far bigger capacity of 626 persons (Croatia NPM 2016, 13). The remarkable difference in the frequency of ordering isolation in the two facilities, according to the NPM, “indicates that there are inconsistent criteria for its implementation” (Croatia NPM 2016, 13). It called for the inconsistencies “to be remedied as soon as possible” (Croatia NPM 2016, 13).

For the legislation governing penitentiary institutions in Switzerland, the NPM pointed to the lack of determination of interpretation on the level of single institutions, as there existed only directives on the level of the cantons. In addition, it found and criticised that the regulations of several cantons did not comply with constitutional guarantees and requirements of federal law (Switzerland NPM 2014, 28).

4.4.4.2. Proportionality of sanctions

Regarding the topic of proportionality between offence and sanction, several NPMs raised their voice:

The Georgian NPM referred to international standards calling for the harshness of any punishment to be in proportion to the committed offence. It stated that the Ministry did not follow the NPMs earlier recommendations to develop guidelines on the usage of administrative punishments (in legislation or a directive) and found disciplinary punishments being used

⁷⁰ There is no explanation why the recommendations were not followed by the Ministry of Corrections.

disproportionally in practice (Georgia NPM 2014, 11, 2015b, 14, 73, 2016, 80 f).

On the other side, the Polish NPM stated no criticism but approved: “The frequency of using disciplinary measures by prison authorities and the proportion of those measures to rewards did not raise any doubts” (Poland NPM 2013, 38, identically 2014, 36). From the reports of the Polish NPM it remains unclear what is meant with the term “rewards”. If rewards are a kind of benefit or privilege for a person whose behaviour in prison is perceived as positive, it remains an open question where the NPM sees the connection between these benefits and the frequency of disciplinary measures. If some prisoners behave well and are granted benefits, why should this influence the frequency of others to commit offences?

The NPM of Montenegro mentioned that for the (illegal) possession of a mobile phone the disciplinary sanction of isolation is the punishment generally imposed in many facilities (Montenegro NPM 2014, 20, 25, 30, 39). The NPM did not mention what the sanction entails in detail and for how long it is imposed. The overall situation of disciplinary procedures was approved by the NPM: “In the interview during the visit, no detainee had objections to the conduct of proceedings and the imposing of disciplinary measure” (Montenegro NPM 2014, 20). The NPM did not reflect in any way on its own role and the question, whether the detainees interviewed did not raise any objections because they did not have any or because they did not see a benefit in complaining to the NPM about it.

4.4.5. Sanctions

4.4.5.1. Possible sanctions provided for by national legislation

As to the sanctions available for disciplinary punishments enshrined in the national legislation the French NPM's report entails the information that there are seven sanctions for general use:

- “- warnings;
- withdrawal of the right to receive allowances;
- forfeiture of the right to make purchases in the prison shop subject to certain reserves;
- forfeiture of an appliance;
- forfeiture of an activity;
- confinement in an ordinary individual cell;
- placement in a punishment cell” (France NPM 2013, 115).

Seven further available sanctions are specific in the way that “their pronouncement is linked to the circumstances in which the fault was committed” (France NPM 2013, 115):

- “- suspension of employment or training;
- dismissal from employment or training;
- withdrawal of access to visiting rooms without a partition divider;
- performance of cleaning work” (France NPM 2013, 115).

The French NPM stressed that the imposition of confinement has automatic consequences with regard to the “suspension of access to sports, cultural and recreational activities, suspension of employment, professional training and education, suspension of the possibility of making any purchases in prison shops other than hygiene products, necessary items for correspondence and tobacco” (France NPM 2013, 118). With the imposition of solitary confinement, the prisoner is therefore given all these punishments as well.

At the same time, the punishment confinement as a rule does not have consequences concerning the correspondence, use of telephone, visits and practising of religion, as the NPM noted (France NPM 2013, 118).

In its list of topics that need to be taken into account when visiting a penitentiary institution, the Macedonian NPM included the questions “[a]re the disciplinary violations regulated with a rulebook by the competent administrative authority?” (Macedonia NPM 2012, 268) and “[i]s the type and duration of the sanctions which may be issued regulated in a special law or rulebook?” (Macedonia NPM 2012, 269). Regrettably, the NPM does not report on the findings. As the NPM sees it necessary to find an answer for this question it seems to be that there is no nationwide regulation of applicable disciplinary sanctions.

4.4.5.2 Findings on the practice of disciplinary punishments

The NPM of France carried out a study in twelve institutions where all imposed disciplinary punishments were collected and analysed, finding that the most common sanction remained to be placement in a punishment cell, the frequency of use ranging from 34% to 75% of all sanctions in one facility, while the number of warnings used as sanctions ranged from 4% to 9% (France NPM 2013, 115). The NPM also found that the documents handed out to prisoners who are subject to the punishment confinement containing the rules and regulations governing them were outdated and incomplete, partly the right to access of visiting rooms, radio, telephone and religious objects were not included and in practice these rights were commonly restricted (France NPM 2013, 120).

According to the Spanish NPM the sanction of withdrawal of the right to take part in group strolls and recreational activities was imposed most often, followed by solitary confinement

(Spain NPM 2013, 89).

The NPM of Azerbaijan mentioned that, in the year 2012, 52 persons and, in 2013, 92 persons were placed in “punishment isolators” as a disciplinary sanction and that “solitary confinement punishment was not applied at all” (Azerbaijan NPM 2014, 25). While 43 persons were subjected to this punishment in 2011. This example of the NPM of Azerbaijan highlights the problem of interpreting information provided in the reports of the NPMs: As the NPM does not provide information on the legislation in Azerbaijan nor further explains the terms used, it remains unclear what the sanction of either “punishment isolators” or “solitary confinement” consists of in practice and what the differences between them are.

Besides these rather severe punishments the NPM of Azerbaijan reported that mostly lighter punishments such as “warning or reprimand was applied” (Azerbaijan NPM 2014, 25).

In one facility the Bulgarian NPM noted a significant rise of “written warning; extra duty in maintaining hygiene up to seven days; solitary confinement during out-of-work/school hours, weekends or holidays up to 14 24-hour periods over three months” (Bulgaria NPM 2016, 37; similarly Bulgaria NPM 2014, 56 f) as disciplinary sanctions, in the same facility a decrease in the use of the sanctions of the prohibition of taking part in collective events and “solitary confinement up to 14 24-hour periods” (Bulgaria NPM 2016, 37).

The Georgian NPM observed that the same offence, namely making noise, was punished very differently throughout Georgian prisons. “Depending on the sole discretion of the Institution's director” (Georgia NPM 2015b, 73) the sanctions ranged from a reprimand to withdrawal of TV to restrictions on visits, shopping, parcels or telephone calls to solitary confinement. The NPM provided a detailed list of which sanction was used and how often throughout the reporting year (Georgia NPM 2015b, 74). As already mentioned above, in order to establish comparable practice of sanctions the Georgian NPM recommended strongly to develop guidelines on the use of sanctions.

The NPMs of Ukraine and Azerbaijan described punishments being imposed not only without a proper procedure but also without grounds (Azerbaijan NPM 2014, 30; Ukraine NPM 2014, 62 f). In the words of the Ukrainian NPM disciplinary measures such as incarceration were applied “on fictitious grounds or for petty misbehaviour, with no examination of prisoners' complaints” (Ukraine NPM 2014, 62 f).

(i) Application of prohibited sanctions

The application of prohibited sanctions (e.g. collective punishment or ill-treatment) was found by

several NPMs. The NPM of Albania mentioned positively that previous cases of physical abuse of prisoners by prison staff was eradicated, as the institution's director took immediate measures and improved the management and supervisory mechanisms. Nevertheless, the NPM of Albania reported of collective penalties being used such as exclusion from education activities (Albania NPM 2016, 12).

The NPM of Georgia mentioned that the sanction of withdrawal of TV in a situation where there is more than one person living in the same cell takes the form of collective punishment (Georgia NPM 2016, 85 f). It also stressed that sanctioning a conduct that is possibly the direct result of her or his “mental illness or intellectual disability” is prohibited (Georgia NPM 2016, 83).

The withdrawal of family contact as a punishment was discussed by the Georgian NPM in its reports: The NPM drew upon the legislation forming the ground for automatic restriction of certain rights including short and long visits. It recommended to amend the national imprisonment code, in order to rule this measure out of the possible sanctions and criticised that the legislator did not act accordingly (Georgia NPM 2015b, 76, 83).

(ii) Excursus: solitary confinement

In contrast to legal protection of prisoners' rights in general, nearly all of the NPM reports analysed for the present thesis mention the subject of solitary confinement. The NPMs thereby mostly comment on the conditions of rooms used for solitary confinement and the miserable state they are in (for a critique see Macedonia NPM 2014, 211 f, 230; Albania NPM 2014, 3; Armenia NPM 2010, 10 f; positively mentioning the clean and functional rooms Germany NPM 2015, 43).

Additionally the maximum time frame for people to be kept in isolation is often elaborated on by NPMs: Stating that either the time periods allowed in national legislation are too long compared to international standards, or the that the time limits in practice are not respected (see e.g. Switzerland NPM 2016, 53; Bulgaria NPM 2016, 37).

The NPM of Serbia reported on the situation of women prisoners in particular who are, because of their low number in Serbian prisons and the obligation of separation of men and women, often placed in a de facto regime of solitary confinement. The Serbian NPM declared this situation unacceptable, as being held in isolation for long periods is a severe disciplinary punishment for male prisoners, at the same time being the standard condition for female prisoners (Serbia NPM 2015, 7).

4.4.5.3. Side effects of disciplinary sanctions and informal punishments

Besides the official sanction that is imposed in the decision after a disciplinary procedure took place, and prescribed as punishment in the relevant national legislation or guidelines, there often exists an informal kind of sanction that also needs to be taken into account. The NPM of France has devoted special attention to this kind of disguised sanction, as it is called by the French NPM, and explored deficiencies in law as well as in practice (France NPM 2013, 125 ff).

First, the misuse of differentiated regimes. In France the NPM described the three different regimes in penitentiary institutions: The improved regime, the common regime and the closed regime. These differ in the duration of cell opening during the day, access to telephones and day time activities, access to keys for the so called comfort lock of their cells, usage of common rooms, etc. The question to which regime a person is assigned has a huge impact on their daily life. The rules and regulations governing the assignment to one of the regimes are, according to the French NPM, extremely broad and vague. Furthermore, no guidelines are provided as to the reasons for placement decisions. As a result, the decision of assignment to a stricter regime can itself be problematic and perceived as unfair by the person concerned. But the French NPM critically reported an “almost systematic placement in controlled regimes after disciplinary sanctions” (France NPM 2013, 126). In some institutions the assignment to the closed regime does not only start already when an incident report is filed, but prisoners were not relocated after the charges were dropped. The NPM observed that differentiated regimes are used as disciplinary tools and partly also serve as a venue for collective sanctions (France NPM 2013, 126 f). As the reasons for placement in a closed regime are not clearly defined and regulated, in contrast to disciplinary sanctions that have procedural safeguards and venues of appeal, the situation of prisoners being allocated to a stricter regime is described by the French NPM as follows: “However, none of the guarantees of disciplinary procedure apply: there is a total absence of both defence and means of remedy” (France NPM 2013, 127).

Similarly, the NPM of Croatia reported that transfer to a security regime happened “although they were not formally the subjects of any [...] disciplinary measure” (Croatia NPM 2016, 13). The NPM did acknowledge isolation of certain persons as necessary in certain cases, but requested that “this has to be decided upon in a legally regulated procedure” (Croatia NPM 2016, 13). The Finnish NPM reported related difficulties for prisoners who were suspected of something, or staff had noticed something about them, that impacted their reliability and consequently affected decisions on their treatment (the NPM mentioned placement, leave and unsupervised visits). At the same time the prisoner was not able to receive information about it

and did not have any legal remedy available (Finland NPM 2015, 60 f).

The French NPM explored a form of informal sanction not explicitly foreseen by law in side effects of the disciplinary procedure such as the lessened prospects of being a candidate for early release, because the judges competent for deciding upon release “rely on disciplinary proceedings to place objective elements at their disposal enabling them to assess the prisoner's behaviour” (France NPM 2013, 138). The impact disciplinary sanctions have upon court decisions was evaluated by the French NPM. Not only in questions of early release, the courts can also decide generally upon the withdrawal of the benefit of remission, following a disciplinary decision. As article 6 ECHR is applicable in disciplinary cases where additional days of imprisonment as a punishment are feasible, the NPM pointed out that courts often withdraw remission following disciplinary proceedings exactly for the time spent in the punishment cell. This makes the connection between the disciplinary punishment and decision on remission evidently clear, from which the French NPM concluded that article 6 ECHR applies in these cases (France NPM 2013, 138 f, 2014, 229). This would mean that the decision on a punishment of three days of solitary confinement results in three days of remission taken away, therefore de facto three days of additional time in prison.

Thirdly, regarding the confiscation of clothes of persons being placed in punishment cells, the French NPM observed the problematic practice that persons subjected to the punishment placement in a punishment cell were systematically handed out clothing that is made of tearable paper, intended to be given to persons in danger of committing suicide and their normal clothing being seized. After examining several cases where there was no suicide indication at all the French NPM reported: “This measure therefore appears to resemble a disguised means of punishment rather than a real prevention of suicide” (France NPM 2013, 129).

A fourth informal punishment the French NPM described is the withdrawal of financial aid from persons entitled to a cash allowance. Contrary to the legislation governing the entitlement of financial aid that says allowances are only to be restricted in the case of a person who is not willing to work. The law explicitly rules out behaviour and choices of activity (e.g. involvement in trafficking, not taking part in group activities or therapy) as grounds for withdrawal, which is only allowed in cases where the person refuses to undertake paid activity. The French NPM reported of the practice to withdraw cash allowances based on reasons brought forward with regard to the person's behaviour or psychological profile (France NPM 2013, 129 f).

A fifth such form is the automatic withdrawal of benefits when moved to a different ward inside

an institution following an alleged offence (France NPM 2013, 144). The French NPM not only poses the revocation of benefits without reason a problematic practice and an additional burden for the person that is subjected e.g. to separation because of the offence committed. Additionally, it is particularly hard to have these rights restored, even in the case when the unfavourable measure is not applied any more either because its ordering did not get “subsequently confirmed by the disciplinary committee, or when disciplinary measures are set aside after remedy” (France NPM 2013, 135 f). Distributing access to activities in the recreational time or regarding profession and training in an arbitrary manner is a further such informal sanction the French NPM has frequently detected (France NPM 2013, 136).

Lastly, the French NPM found the practices of transferring a person from one prison to another as a possible disguised sanction. The legislation regarding transfers in France requires a weighing of interests of security and order and the affected person's rights. In contrast, the French NPM described a practice of disciplinary transfers additionally to the disciplinary measure imposed, in cases where no necessity from security perspective was indicated (France NPM 2013, 130 f, 145).

NPMs reported of illegal and informal forms of treatment as punishments outside the official disciplinary agenda. The French NPM called upon the authorities to ensure that “discriminatory treatment of prisoners in the management of the concrete aspects of their daily lives, such as deprivation of activities, exercise and even meals, moral harassment (racist remarks, intimidation etc.) unusually frequent changes of cell, brutal searches of cells etc.” (France NPM 2015, 145) are not tolerated (France NPM 2013, 136 f).

The Spanish NPM simply called on the penitentiary authorities regarding the application of coercive measures to ensure “that they are not a concealed form of punishment” (Spain NPM 2015, 71).

For the regime in Polish prisons the NPM reported that staff members using the threat of opening a disciplinary case to discipline persons deprived of their liberty verbally, with the result of people refraining from asking for their rights. For the situation of prisoners held in the semi-open regime the NPM concluded that they are “well aware of the fact that they are in such an establishment as result of positive criminological prognosis and know very well that if they breach the applicable regulations, they may be transferred to a closed prison” (Poland NPM 2013, 38 f). The Polish NPM sees “constant verbal disciplining of inmates [...] inadvisable, since it results in an unjustified increase in severity of the deprivation of liberty” (Poland NPM 2013,

38 f).

The Croatian NPM reported on the violation of procedural safeguards through the withdrawal of benefits and even execution of the sentence at a time before the decision in the disciplinary case had become final (Croatia NPM 2016, 15).

The French NPM concluded its evaluation of the system of prison discipline by remarking that although the prison system “unquestionably possess[es] real disciplinary regulations subject to codified rules, though much room for improvement nevertheless remains. Indeed the existence of sanctions that are indirect, or devoid of any legal and statutory basis, is a reality and certain practices, which resemble the absence of law, are similarly not exempt from arbitrariness” (France NPM 2013, 139).

4.4.5.4. Excursus: sanctions in connection with the work of the NPM

The NPM of the United Kingdom reported on incidents of prisoners facing sanctions in connection with the work of the NPM (United Kingdom NPM 2014b, 24, 2014a, 30). The NPM reiterated that “any punishment or prejudice resulting from a person or organisation's contact with an NPM or its staff should not be permitted or tolerated” (United Kingdom NPM 2014a, 30) as the OPCAT set forth in article 21. The prison administrations in the United Kingdom approved a protocol in order to bolster and guarantee the ability of every person deprived of their liberty to speak freely with the NPM. Since the adoption of this protocol the NPM reported of ten cases in which sanctions allegedly took place, mostly following a prisoner having talked to a member of the inspection (United Kingdom NPM 2014a, 30).

4.4.6. Decision, appeal and judicial review

In a political system that calls itself based on the rule of law it is essential for individuals to be able to challenge the decisions of administrative bodies and have them examined by a higher authority or judicial body. The same applies for persons deprived of their liberty when they are subjected to disciplinary procedures, both before and after a sanction has been applied (France NPM 2013, 124, 143; Georgia NPM 2016, 84 f; Switzerland NPM 2014, 39).

For the situation in the Czech Republic, the NPM reported that the possibility of having disciplinary decisions reviewed by court was introduced to Czech law in 2011. Following its entering into force the NPM concluded that there has not been an increase in cases and the “feared flooding of courts with this agenda does not seem to have happened” (Czech Republic

NPM 2012, 61).

The Macedonian NPM listed the question “[h]ow are the issued disciplinary measures reviewed?” (Macedonia NPM 2013, 270) on its list of topics to be investigated when visiting penitentiary institutions, but did not further reflect on the legal requirements or the situation in practice concerning appeals procedures and venues for judicial review.

When issuing the decision of the disciplinary authority it is necessary to inform the affected person of the remedies open for them to tackle the decision. The Swiss NPM called for decisions to include the available remedies, indicating that this was not yet the case (Switzerland NPM 2016, 54).

The Croatian NPM positively pointed out its observation in one facility where “the written decision also contains an instruction on legal remedy, which is certainly an example of good practice” (Croatia NPM 2016, 13). For the general situation the NPM, in the same report, criticised that the decisions on appeals were not made in due time as prescribed in national law (Croatia NPM 2016, 26).

With regards to the information of possible venues of appeal the French NPM was able to confirm that the existence of a remedy to the higher administrative authority was “almost systematically mentioned” (France NPM 2013, 124). At the same time, other venues such as the request for “immediate suspension of sanctions by judicial means is never mentioned by the chairs of disciplinary committees” (France NPM 2013, 125).⁷¹

Several other NPMs have found deficient practices in this context: The Ukrainian NPM reported that prisoners did not only complain about arbitrary disciplinary punishments, but also that they were forced by staff of the facility “to write statements on absence of complaints” (Ukraine NPM 2015, 126). In Macedonia the NPM was informed by the prison administration that all persons who were subjected to disciplinary proceedings and punishment were informed of their right to make a complaint against the decision. At the same time, the NPM reported on security staff threatening prisoners during searches not to make appeals and also on prisoners who were not allowed to file a remedy against a decision imposing solitary confinement (Macedonia NPM 2014, 210).

According to the NPMs of Poland and Azerbaijan, in their countries the situation regarding

71 The French NPM attributes this disparity to the wording of a circular in which only the appeal to a higher administrative authority is mentioned as obligatory information to be provided with a decision. But as the French NPM underlined, the obligation to inform on other venues of appeal is entailed in the prison act (France NPM 2013, 125).

information on appeals is said to be unproblematic (Azerbaijan NPM 2014, 36; Poland NPM 2013, 38). The Polish NPM stated in 2013 that it did not find “any infringements of the law with regard to the prisoners' right to use the means of appeal against penalties or the negligence of the Prison Service in informing [...] about the existence of such means of appeal” (Poland NPM 2013, 38). One year later the Polish NPM “found only several cases where the persons using disciplinary measures failed to inform the inmates about the possibility to appeal against their decision” (Poland NPM 2014, 36).

Regarding the practice of decisions on appeals the Austrian NPM found “that there are significant regional differences with regard to whether and to what extent decisions in the first instance are confirmed” (Austria NPM 2014, 60). This led the NPM, after contacting the Austrian Ministry of Justice, to repeat its claim for a codified and regularly updated document that is available to prisoners at all times, delivering information on what disciplinary punishment can be expected for what misconduct. According to the Austrian NPM this would make “the standards by which appeals will be decided transparent” (Austria NPM 2015, 100).

In evaluation of the venues of appeal against disciplinary sanctions the French NPM found clear words describing the remedies as “no more than potential to a large extent” (France NPM 2013, 124). The problem described by the NPM is that filing a remedy does not have suspensive effect leading to an outcome where “as far as the harshest sanction is concerned, the applicant is no longer in a punishment cell when the judge is led to make a ruling on their case” (France NPM 2013, 125). Similarly, the Croatian NPM found that in none of the observed cases the appeal authority delivered its decision within the time frame set out in legislation of 48 hours, leading the NPM to the conclusion that either the law “or the current practice have to be changed” (Croatia NPM 2016, 15).

The NPM seems to take a very pragmatic point of view here: It does not state what is the right thing to do in its opinion, but just mentions that the current practice does not comply with the rules set out in national legislation. The NPM's choice of words indicates, that either solution would be satisfying. The law could be amended and time frame for the decision prolonged, or the appeal authorities could focus on filing their decision within the 48 hours.

In Georgia the NPM reported on the numbers of disciplinary measures and appeals taken against them (in 2014 from a total of 2,973 sanctions three prisoners challenged the decision, in 2015 from a total of 4,064 measures 28 persons appealed). In explanation of the low numbers of remedies used the NPM repeatedly reported the prisoners' assessment as useless: “In should be

noted, as the monitoring of penitentiary institutions during the recent years has revealed, that prisoners refrain from challenging their disciplinary punishment because, as they say it makes no sense” (Georgia NPM 2015b, 77, 2016, 85).

The NPM of Azerbaijan positively reported the regular supervision of the situation of disciplinary measures taken: The shortcomings and deficiencies found were determined and “complex measures are carried out for their elimination” (Azerbaijan NPM 2014, 36). In connection with prison discipline, in 2013 six appeals “regarding application of unnecessary force was received by the [...] management, and an appropriate investigation didn't confirm the facts enshrined in the appeals” (Azerbaijan NPM 2014, 36).

The French NPM called on the relevant ministry and prison administrations to improve the implementation in order to make remedies effectively available to prisoners, and thereby allow them to have real legal guarantees. Especially in light of the jurisprudence of the ECtHR that requests proceedings to be sufficiently fast to deliver effective safeguards in practice (France NPM 2013, 125, 143).

4.5. The perspective of NPMs on legal assistance and de facto access to justice

4.5.1. Introduction

Besides the question of access to legal assistance in general, the topic of restrictions to this access based on the financial situation of the concerned person in a penitentiary and their options to afford external legal representation need to be addressed separately. Several subjects come up here: is legal aid provided for free, what are the criteria for receiving legal aid and what is the scope of the assistance, e.g. is abstract advice on legal issues in general provided or a professional lawyer specialised in the field representing the person in their case?

As to the importance of legal assistance for persons deprived of their liberty the Ukrainian NPM mentioned the “lack of possibility to receive legal advice” (Ukraine NPM 2015, 117) as one of the main issues leading to cruel or degrading treatment or prisoners (Ukraine NPM 2015, 117, 123 f). The NPM concluded in connection with the violation of procedure that the situation is “leading to the lack of possibility to challenge administrations' actions” (Ukraine NPM 2015, 117).

According to the French NPM, the sole provision of information on rights in connection with legal protection mechanisms is not enough, “persons deprived of their liberty also need to be placed in a position to be able to effectively exercise those of their rights which may contribute to their defence, in the first place, the assistance of a lawyer” (France NPM 2013, 165). Similarly, the Georgian NPM sees the provision of legal aid at the heart of a functioning legal protection mechanism and stressed that “it is important that legal aid be ensured to these individuals from the moment they wish to complain about any ill-treatment administered against them” (Georgia NPM 2015b, 25, similar 2016, 23 f).

With regard to the relationship between the person deprived of liberty and his or her lawyer the French NPM explained that lawyers in general seem to be “the 'natural' advisers of prisoners wishing to take court action against the administration” (France NPM 2014, 226). Still the NPM points out that these relations are also not neutral, but may be formed by prejudice (France NPM 2014, 226).

4.5.2. Access to legal assistance

The right to be represented by a lawyer or receive legal assistance from outside of the penitentiary institution in general is mentioned by the NPMs of Albania, Azerbaijan, Denmark, France, Portugal, Serbia and Ukraine (Albania NPM 2016, 31; Azerbaijan NPM 2015, 42; Denmark NPM 2013, 47; France NPM 2015, 165; Portugal NPM 2015, 19; Ukraine NPM 2014, 66; Serbia NPM 2014, 66). The Danish NPM repeatedly stated in its reports that persons deprived of their liberty “are entitled to external legal assistance” (Denmark NPM 2012, 42, identical 2013, 47, similar 2010, 10, 2011, 23). The Portuguese NPM stated that “it was said that the prisoners were always authorised to contact the lawyer” (Portugal NPM 2015, 19). The NPM of Azerbaijan mentioned the right to receive legal assistance as one of the rights, that are under its primary attention during the fulfilment of its mandate (Azerbaijan NPM 2015, 42).

Regarding the situation of prisoners held in solitary confinement the Ukrainian NPM pointed to the discrepancies in national legislation where, on the one hand, the persons are not allowed meetings when being placed in solitary confinement and on the other hand, “the number and duration of convicted prisoners' meetings with their lawyers is not limited” (Ukraine NPM 2014, 66). The NPM called, with reference to the EPR, for all prisoners to have unrestricted access to legal assistance. Furthermore, they highlighted the prison management's obligation to provide reasonable opportunities in practice (Ukraine NPM 2014, 66).

The NPM of Albania requested the prison authorities to take “measures for providing frequent

contacts of the lawyer with detainees and prisoners” in order enable the provision of legal information (Albania NPM 2016, 31).

The Serbian NPM called upon the prison authorities to ensure “that all detainees are acquainted with their right to receive legal assistance” (Serbia NPM 2014, 66).

4.5.3. Free legal aid

Interestingly, several NPMs report on the possibilities to receive legal aid for persons who are not yet sentenced but subject to a criminal charge, but do not touch on the topic of free legal assistance when reporting of the detention situation convicted persons find themselves in (Albania NPM 2014, 74, 86; Czech Republic NPM 2016, 74 f; Croatia NPM 2013; Macedonia NPM 2014; Spain NPM 2015).⁷² This underlines the notion mentioned above, that in general there is much more attention to the criminal proceedings and legal safeguards for the time previous to the conviction by court than for the question of what happens with people once they are sentenced.

In France the NPM mentioned that with the Act of 12th April 2000 the free availability of legal representation was introduced: “Whatever their financial resources prisoners can have the benefit of legal aid if they apply for it” (France NPM 2013, 111).

In the United Kingdom, a legal aid reform took place in 2013. The NPM reported that the amendments resulted in a restriction of legal aid for some prison law matters (United Kingdom NPM 2014a, 14, 26). Unfortunately, the NPM does not give more information on why the amendment took place and what prison law matters are affected by the exclusion from the covering of legal aid.⁷³

According to the NPM of Ukraine there is a law on free legal aid “to guarantee access to secondary legal aid for persons in penitentiary facilities” (Ukraine NPM 2015, 218),⁷⁴ while at the same time the NPM heavily criticised the ineffective legal protection mechanisms and reported on persons complaining about the lack of opportunities to receive legal assistance (Ukraine NPM 2014, 62, 2015, 124).

In Georgia, there exists a state funded legal aid scheme for persons who are not able to afford

72 In the Albanian NPM's first report on the years 2008-2010 it mentioned the “Center for Free Legal Aid” in Tirana with which the NPM cooperated, in later reports this centre is not mentioned any more, nor is the scope or availability of (free) legal assistance discussed in more detail (Albania NPM 2011, 20, 48).

73 The NPM of the United Kingdom in a footnote provided a link for further information, which unfortunately is not working (United Kingdom NPM 2014a, 14).

74 From the information in the NPM's report it remains unclear what the term “secondary legal aid” stands for.

payment for legal assistance, but, as the Georgian NPM stressed, the law that includes this entitlement is not applicable for “victims of torture at places of deprivation or restriction of liberty” (Georgia NPM 2016, 24). Recommendations in order to include prisoners in the group of persons eligible for benefit have not been followed (Georgia NPM 2015b, 19, 25).

The French NPM reported that free legal advice services for prisoners in several prisons are provided with the purpose of “answering all requests for legal information in all legal fields” but with the exception of cases where an investigation is pending or a lawyer has already been appointed. Because of this restriction in scope the NPM found in 2013: “In practice, it was ascertained that prisoners rarely make use of these free legal consultations. It has been suggested that the impossibility of dealing with cases in progress [...] perhaps constitutes a brake upon use of the service” (France NPM 2013, 160).⁷⁵

One year later the French NPM reported that the prison population emphasised “the importance of the scheme” (France NPM 2014, 94). The duty of the authorities to provide information was stressed by the French NPM who reported that “[a]lthough legal information and advice access points are mentioned in many booklets provided to new arrivals, certain prisoners informed inspectors that they were unaware of the existence of a scheme of this kind [free legal information being provided]. This confirms the fact that information and the circulation thereof need to be a constant concern” (France NPM 2014, 94).

The NPM of the Czech Republic, for example in its report in 2014, recommended the regulation of provision of free legal aid but did not specify for whom the free legal aid is thought to apply (Czech Republic NPM 2014, 12). In a previous report the NPM had elaborated on free legal aid solely in connection with accused persons (Czech Republic NPM 2012, 59).

In Serbia, the NPM reported of one facility having “hired another lawyer to provide professional legal assistance” (Serbia NPM 2015, 36). Although it remains unclear if the provision of legal assistance is free of charge and available for all prisoners or only for the ones subject to disciplinary proceedings.

In connection with a visit to a penitentiary institution where, amongst others, eight female prisoners with non-Slovenian citizenship were imprisoned, the Slovenian NPM reported on free legal aid being provided to female prisoners for legal protection of their rights (Slovenia NPM

⁷⁵ It is not explained in the report of the NPM but context suggests that this provision of general legal aid is based on an agreement between certain prison facilities and the association of lawyers in France and is not the same as the above quoted provision of legal aid for individuals in cases where they apply for it (France NPM 2013, 160, 2014, 94).

2015, 55). This is the only occasion where the NPM mentions the provision of free legal aid in its reports. Therefore, it remains unclear whether there is free legal aid available in other institutions and for Slovenian citizens and male prisoners.

4.5.4. Qualification of legal assistance

Who delivers the legal assistance and what professional background the person has, was touched upon by several NPMs.

The Spanish NPM perceived it essential for “inmates to have legal guidance services during their stay in prison, in addition to an efficient system for the filing of complaints and claims” (Spain NPM 2015, 69). This “legal guidance service” should, according to the NPM, be provided through “the CP [Penitentiary Centre], the prison surveillance judge, the duty court, the Ombudsman's office or the autonomous committees” (Spain NPM 2015, 69). Important to notice is that the NPM did not include lawyers or legal professionals in its list of bodies to provide legal assistance.

With regard to the qualification of the persons delivering legal assistance the Serbian NPM stressed that the legal assistance granted for prisoners in disciplinary proceedings is provided by “law graduates” (Serbia NPM 2014, 65).

The French NPM seems to be the only NPM concerned with the question of qualification of persons providing legal advice on an in-depth level, stressing that prison law is mostly “terra incognita” and lawyers often are “unaware of the disputes which might occur after sentencing” (France NPM 2014, 226), leading the NPM to call for improvements in this area. The French NPM thereby attests to lawyers in general a lack of knowledge in the area of prison law. At the same time, it indicates that the legislation governing prison litigation, that occurs after sentencing, is a specific field of law unknown to many professional legal advisers.

For the assistance provided to prisoners in Georgian institutions, the NPM of Georgia did not seem to be concerned in a similar way as the French NPM. In Georgia, social workers are seen to play an important role for the legal protection of prisoners. As mentioned above, they are the ones in charge of providing prisoners with the information regarding their rights and obligations at admission and keeping them updated regularly. With regards to the drafting of complaints, the NPM recommended to the Ministry to also assign the duty to assist prisoners with the drafting of complaints to social workers. This recommendation was followed by the Ministry of Corrections, as the Georgian NPM mentioned (Georgia NPM 2016, 174). Regarding the qualification, legal background or education in prison law issues of social workers in penitentiary institutions, the

Georgian NPM did not raise any concerns.

4.5.5. Confidentiality

Several NPMs raised concerns with regard to the practice of enforcement of the obligation to ensure the confidentiality of the correspondence with lawyers and courts, as the NPMs found irregularities (France NPM 2013, 181; Ukraine NPM 2014, 66; Finland NPM 2015, 94; Macedonia NPM 2012, 273; Georgia NPM 2016, 174). Such as the Ukrainian NPM, who established that the letters were opened and read by prison officers (Ukraine NPM 2014, 66). The Finnish NPM noted the interfering with the confidentiality of correspondence is a serious violation of the prisoners' rights, irrespective if the interference happens “unintentionally or by design” (Finland NPM 2015, 94).

A further problem in connection with legal assistance was reported by the Albanian NPM who pointed out that there is a lack of rooms for (confidential) meetings (Albania NPM 2011, 40).

4.5.6. Evaluation of de facto access to justice

The Croatian NPM identified inefficient legal protection as “one of the issues that persons deprived of liberty in the prison system are faced with” (Croatia NPM 2015, 37).

4.5.6.1 Existing legal protection mechanisms not effective remedies

The NPM of Slovenia reported in its latest annual report that there has been an amendment in the Slovenian national legislation regarding the legal protection of convicts' rights. However, the NPM found out that most of its recommendations for reform regarding the article in the Slovenian Enforcement of Criminal Sanctions Act that governs legal protection of convicts' rights, were ignored. The NPM therefore rendered it “questionable whether the amended text of this Article can be an effective legal remedy as intended by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms” (Slovenia NPM 2016, 48).

The situation of prisoners in France led the NPM to the conclusion: “the great majority of them are helpless in the face of legal procedures” (France NPM 2014, 225). As reasons for this, the NPM mentioned first that the differentiation between different sets of legal procedures (e.g. the French NPM mentions the recourse to a third party, administrative remedy and judicial remedy) is unknown and not understood by the detainees. Second, the NPM observed that when making

complaints, “[p]eople set out feverishly but with few means” and put forward its opinion “that in these circumstances, the place and the role of external persons in advising and providing guidelines for prisoners [...] are necessary. But they are certainly insufficient” (France NPM 2014, 225).

As to a conclusion, the NPM of France summed up: “In any event, most prisoners today intending to take legal action are doubly alone: in relation to the legal system and with regard to their prison institution.” (France NPM 2014, 226)

Although not with such clear words, but still with the implication that there are serious deficiencies, the NPM of Armenia called for the “establishment of legal relations between the prisoners and the administration” (Armenia NPM 2014, 20). The reality inside penitentiary institutions is characterised by a “tacit code of conduct” (Armenia NPM 2010, 24) as the NPM put it. This internal code of conduct is described as being “more efficient than norms stipulated by law” (Armenia NPM 2010, 22).

The discrepancy between legal protection mechanisms as they are set out in national legislation and their effectiveness in practise is mentioned by several NPMs. The Croatian NPM deems it necessary to “further strengthen legal protection mechanisms available to persons deprived of their liberty and to make legal remedies effective in practice as well” (Croatia NPM 2015, 41).

4.5.6.2. Inspection and monitoring

To end this chapter, the NPMs' perspective on internal inspection as well as their own visiting and monitoring activity is presented as far as available. The NPMs of Poland and Georgia mentioned severe deficits in the internal inspection procedures of the penitentiary administration, while the NPMs of Armenia and Croatia considered the effectiveness of their own work.

The Polish NPM elaborated on the disfunctioning of internal supervision systems in its reports in 2013 and 2014. First, the visits of judges, whose responsibility it is to supervise the execution of the penalty of deprivation of liberty, are reported to be insufficient. The NPM found that “fundamental weaknesses of the current supervision system lie in its 'softness' where its efficiency is concerned (i.e. its influence on incidental and structural errors in serving a penalty in the visited prison) and in invisibility to prisoners whom it is supposed to serve” (Poland NPM 2013, 27 f). The NPM criticised that the Ministry of Justice did not recognise the problems (Poland NPM 2013, 27 f, 2014, 29 f).

Similar problems were reported by the Georgian NPM for the procedure of “General Inspection” in prisons in Georgia which it perceived as completely insufficient. The NPM criticised the

methodology of the undertaken inspections. First, the NPM criticised that administration representatives and only a small number of prisoners are questioned. In addition, the inspectors do not study documents and files. Second, the manner in which administration staff are questioned is described by the NPM as follows:

“For instance, a prisoner wrote in a complaint that he/she was treated provocatively and cynically. A representative of General Inspection asks formal questions to administration which are useless for verifying the information (e.g. a question whether the prisoner is treated provocatively and cynically and receive an answer that he/she is not)” (Georgia NPM 2015a, 45).

Therefore, the NPM found that “as a result of studying cases provided to us, proceedings are always terminated with an argument that violation of fact was not proved” (Georgia NPM 2015a, 45) because the outcome only depends on whether the suggested violation is confessed.

In Armenia, the NPM noticed a widespread mistrust in penitentiary facilities towards human rights organisations. “You will leave and nothing will change, and we still have to live here” (Armenia NPM 2010, 22) is a statement the NPM frequently encountered and provides as explanation for the lack of trust in the NPM and visiting bodies in general as well as in legal protection mechanisms.

The NPM of Croatia denounced the Ministry of Justice for ignoring the NPM's recommendations and questioned the use of its work under the existent conditions: “[T]he purpose of visits is to highlight irregularities and give recommendations to eliminate violations. If the Ministry ignores the report, a visit becomes an end in itself, which is absolutely wrong” (Croatia NPM 2013, 33).

5. Conclusion

The aim of this study was to investigate the perspective of National Preventive Mechanisms on legal protection mechanisms of prisoners' rights. Legal protection of prisoners' rights for this analysis was divided into four subdomains: (i) the provision of information on rights, (ii) the mechanisms available for complaints and requests, (iii) issues in connection with prison discipline and (iv) the de facto access to justice including access to legal assistance.

The overall evaluation of NPMs on the effectiveness of means available for legal protection of prisoners' rights is negative. Several NPMs did not engage with the topic of legal protection mechanisms in prison at all in their reports, their perspective therefore is not represented, no

matter whether they did not touch upon the topic because they did not see any problems with it in the institutions visited, or because they are not concerned with legal protection issues in general. Furthermore, the NPMs who took up the topic of legal protection in their reports consistently turned to issues raising their concern. Some did this by investigating certain seemingly small issues, whilst others did so through detailed research of all relevant points from their opinion and put forward an encompassing evaluation of the legal remedies as inefficient.

Overall, of the 103 annual reports of 31 NPMs analysed for this study, 29 NPMs mentioned legal protection of prisoners' rights in their reports. Of this group of 29 NPMs, the majority of 15 NPMs⁷⁶ only touched upon one or two points that can be seen in connection with legal protection. For example, the Greek NPM's contribution consisted of one sentence, stating that there is a need for the provision of sufficient information to all prisoners (Greece NPM 2016, 4).

14 NPMs⁷⁷ elaborated on at least three of the above mentioned subsections of legal protection mechanisms. Still, within this group there is a great variety and the reports of the NPMs of France and Georgia are the two which stand out. In its 2013 report, the French NPM devoted over 35 pages to the topic of prison discipline alone, while the Georgian NPM undertook a study on the complaints handling mechanisms in 2015 and published a separate report on it. The way and extent to which NPMs are concerned with legal protection differs widely, as has been presented in the fourth chapter. As a whole, there is a lack of attention in many NPMs' reports.

A reason for the lack of attention for legal protection mechanisms in some NPMs' reports that could be brought forward is that there are more pressing problems and deficiencies in the prison system that caught the NPM's attention. The best argument against this notion and in favour of the importance of legal protection mechanisms is the reports of the Ukrainian NPM. The NPM described the horrific state prisoners find themselves in, with regards to the conditions of the cells and overcrowding, but also with examples of prisoners being regularly beaten up by staff and the clear-cut hierarchy between one ruling class of prisoners and others (see e.g. Ukraine NPM 2015, 117 ff). Still, the Ukrainian NPM also considered the topic of legal protection of prisoners' rights and presented its point of view and concerns with regards to all four dimensions of legal protection as described above.

As to the first selected subdomain of legal protection, the provision of information on rights and obligations, the analysis showed that several NPMs are well aware of the crucial part access to

76 Those are the NPMs of Armenia, Azerbaijan, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Lithuania, Moldova, Montenegro, Norway, Portugal, Sweden and the United Kingdom.

77 Those are the NPM of Albania, Austria, Bulgaria, Croatia, Finland, France, Georgia, Macedonia, Poland, Serbia, Slovenia, Spain, Switzerland and the Ukraine.

information plays in a prison surrounding. Some NPMs only mentioned their findings that information is not easily accessible or not available in foreign languages or not complete. They still thereby raise concern for this issue and give it weight in their reports.

Other NPMs, most notably the French NPM, elaborated on the roots of the lack of information and found them in the specific situation prisoners find themselves in: excluded from the possibility of access to other sources, they are reliant on prison authorities to receive information, as well as everything else they need for their daily life.

It also became clear, that the question of whether information is provided or not, cannot be answered with a simple yes or no for the situation across the whole state. In contrast, the NPMs reported a variety of levels of information being provided and problems therewith, over different institutions. In institution A there might be a formalised procedure upon arrival where a person new to the institution is informed in a comprehensive way, while at the same time in institution B the duty of providing information is neglected and available info-sheets are not regularly updated.

The reporting activity of the NPM of Montenegro, who stated that in all visited establishments the people were duly informed, needs to be assessed carefully. First, the NPM does not elaborate exactly what information is provided by whom, at what time, to which individuals. Second, the NPM also does not refer to standards, either its own, the ones in national legislation or of international human rights documents (e.g. the EPR as did many other NPMs) to illustrate what “duly informed” entails from its point of view. Third, drawing on what individuals reported to the NPM and not assessing the situation itself, indicates a lack of awareness for the situation prisoners find themselves in.

As to the recommendations regarding the provision of information that the NPMs made, they can be summarised as follows: Firstly, provide complete and up-to date information in a comprehensible way in a written document that prisoners can keep a copy of, and secondly, ensure accessibility to legal documents.

Regarding the question of whether the provision of complete and up-to-date information on legal protection mechanisms is in itself sufficient to empower prisoners to enforce their rights, one needs to stay cautious too. Several NPMs pointed to the lack of access to legal documents such as the prison act and codes of procedure. Legal procedures in general are rather complex, even without the extreme power imbalance in the context of prisons and the lack of detailed procedural safeguards in prison law compared to criminal procedure (fair trial, parity of

weapons). As a matter of fact, it is very likely that without additional assistance from qualified persons, a person new to the field of prison law is not able to successfully enforce her or his rights even if she or he received information.

Concerning the second subtopic of complaints mechanisms and procedures, there exists in all states, presumably, not only one but several venues for complaint. However, most of the problems found by the NPMs are not that complaints mechanisms are missing, but rather that they are not efficient. Breeding grounds for problems in this area, as reported by the NPMs, range from the ignorance of final decisions by the authorities in charge of their implementation to the plethora of problematic fields on the way to receive a reasonable decision. Regarding the first point, the NPMs of Croatia and Bulgaria exemplified that if the administration is unwilling to enforce the final decisions made by the judiciary and improve the situation, the legal protection mechanisms are pointless. In Bulgaria, the NPM found it to be useless to file a complaint, because even if the decision supports the claimant's point of view that the material detention conditions amount to ill-treatment, there is no way to have their rights enforced, because the situation is the same all over the country's penitentiary institutions.

If the question of enforcement of final decisions is put aside, the problems regarding the handling procedure of complaints in general are manifold as the NPMs pointed out, such as the lack of venues to file complaints anonymously, deficient registration and investigation of complaints and the delivering of poorly substantiated decisions. The detainees' overall notion of complaints being useless contributed to them refraining from filing complaints, as well as the not unsubstantiated fear of repercussions. Again, it is the French NPM that elaborated extensively on the background of incentives for complaining and proposed solutions. Most of the other NPMs, as far as they even touched upon the subject, only mentioned that there "should be", e.g. a registration procedure, but did not explain how this could function in a satisfactory way.

In the subdomain of disciplinary procedures, the NPMs pointed to many deficiencies and pitfalls in practice, as well as in law. Inquiries and proceedings showed to lack impartiality. Some NPMs reported on accused prisoners who were not given ample opportunity to defend themselves, others simply attested that the word of the prison officers was not to be questioned. The discretion of the institutions' management in the interpretation and application of legislation raised the concern of NPMs. Countries represented in this study, such as Austria and Georgia, are certainly quite different, and their situation cannot be compared. Still, interestingly, their NPMs found similar deficits in the penitentiary institutions, e.g. with regards to the lack of clear guidance for which sanction is to be imposed for which offence.

Regarding the NPMs that found nothing to criticise about the practice of prison discipline, such as the Portuguese, their findings need to be assessed carefully. Similarly to the NPM of Montenegro in connection with the provision of information, the Portuguese NPM did not elaborate on what standards for the procedure it uses. It also did not mention what the focus of its monitoring activity was and how the disciplinary cases it observed were handled.

Negative consequences and side effects of disciplinary proceedings and sanctions are a problematic aspect of prison discipline. The withdrawal of acquired benefits, transfer to a different regime type and reduced chances for earlier release are only some of the consequences mentioned by the NPMs. In some cases, as the French NPM pointed out, these consequences affect persons even though the final decision did not find them guilty of the alleged offence. Whether they are applied intentionally or not, they have a severe impact on the affected person and lead to a de facto double jeopardy.

A written decision that contains instructions on legal remedies was pointed out by the Croatian NPM as “good practice”, supporting the finding of other NPMs that prisoners are often not informed on available remedies but in contrast, (in)directly advised to refrain from appealing. At the same time, NPMs heavily questioned the effectivity of appeal procedures due to their findings.

Access to justice through means of legal protection is reliant on the means available to the prisoner. This encompasses the knowledge of existent remedies and procedures as well as financial resources. While several NPMs noted the importance of legal assistance and confidential access to a lawyer, only few took up the topic of free legal aid. As to the de facto effectiveness of legal protection mechanisms, the NPMs that provided their evaluation painted a dark picture of the status quo and requested improvements. The awareness of prison authorities regarding the importance of due process and the professionalism of staff were mentioned by the NPMs as essential for improvements in the field.

Analysing the annual reports brought difficulties with it and was sometimes unsatisfying. Often, the NPMs note a finding in one institution or make a remark regarding the legislation, but refrain from giving their interpretation or explaining the reasons and context. Therefore, for further research on the NPMs' perspective and the topic of legal protection of prisoners' rights, it would be helpful to access further sources on the national context and consult practitioners in each state.

The question of who the members of the NPM are that conduct visits and draft reports, is another topic, that was not able to be included in the work at hand, but is certainly a topic worthy of

further research. Obviously, a NPM consists of humans that undertake its activities, therefore their personal and professional background and approach shape the NPM and research on how this translates into the outcome of their work is yet to be undertaken.

It was not the aim of this thesis to assess the impact of OPCAT and NPMs on the situation of prisoners' rights and their protection, and it is definitely too early to draw a conclusion. This is due to the fact that the OPCAT is a relatively new instrument of international law in torture prevention and in many signatory states, the NPMs are operational for only a few years. Nevertheless, the thesis at hand showed that NPMs' reports provide for a differentiated and new perspective on the conditions inside prisons and their development with regards to the importance of legal protection mechanisms needs to be followed.

Annex

Annex 1: Overview on state parties and NPM's reports

	CoE member + OPCAT state party	OPCAT ratification	NPM designated	Annual reports used in study	Number of reports analysed	Further re- ports avail- able
1	Albania	2003	People's Advocate	Reports on the years 2015, 2014 and compi- lation on years 2008- 2010	3	no
2	Armenia	2006	Human Rights Defender	Reports on the years 2013, 2012, 2009	3	no
3	Austria	2012	Austrian Ombudsman Board	Reports on the years 2015, 2014, 2013, 2012	4	no
4	Azerbaijan	2009	Commissioner for Hu- man Rights	Reports on the years 2015, 2014, 2013, 2012	4	yes, two for the years 2009-2010 and 2012
5	Bulgaria	2011	Ombudsman of the Re- public of Bulgaria	Reports on the years 2015, 2014, 2013, 2012	4	no
6	Croatia	2005	Office of the Ombudswoman	reports on the years 2015, 2014, 2013, 2012	4	no
7	Cyprus	2009	Commissioner for Ad- ministration and Hu- man Rights	reports available in Greek only		
8	Czech Republic	2006	Public Defender of Rights	reports on the years 2015, 2014, 2013, 2012, 2011	5	yes, four for the years 2006-2010
9	Denmark	2004	Danish Parliamentary Ombudsman	reports on the years, 2015, 2014, 2013, 2012, 2011, 2010, 2009	7	no
10	Estonia	2006	Chancellor of Justice	reports on the years 2015-16, 2015, 2014, 2013, 2012	5	yes, seven for the years 2005-2011
11	Finland	2014	Parliamentary Om- budsmen of Finland	reports on the years 2015, 2014	2	no
12	France	2008	General Controller of Places of Deprivation of Liberty	reports on the years 2014, 2013, 2012	3	no

	CoE member + OPCAT state party	OPCAT ratification	NPM designated	Annual reports used in study	Number of reports analysed	Further re- ports avail- able
13	Georgia	2005	Public Defender	reports on the years 2015, 2014, 2013 and special report on requests and complaint mechanism	4	yes, two for the years 2010 and 2012
14	Germany	2008	National Agency for the Prevention of Torture	reports on the years 2015, 2014, 2013, 2012	4	yes two for the years 2009-2010 and 2010-2011
15	Greece	2014	Ombudsperson's Office	reports on the years 2015, 2014	2	no
16	Hungary	2012	Commissioner for Fundamental Rights	report on the year 2015	1	no
17	Italy	2013	National Authority for the rights of persons deprived of their liberty	reports available in Italian only		
18	Liechtenstein	2006	Corrections Commission	reports on the years 2015, 2012	2	no
19	Lithuania	2014	Parliamentary Ombudsperson's Office	report on the years 2014-2015	1	no
20	Luxembourg	2010	Ombudsperson's Office	reports available in French only (not in English nor German)		
21	Macedonia, The former Yugoslav Republic of	2009	Ombudsman of the Republic of Macedonia	reports on the years 2014, 2013, 2012, 2011	4	no
22	Malta	2003	Board of Visitors of the Prisons	no reports available		
23	Moldova	2006	National Centre for Human Rights	report on the year 2009	1	no
24	Montenegro	2009	Protector of Human Rights and Freedoms	report on the year 2013	1	no
25	Netherlands	2010	Dutch National Preventive Mechanism	reports on the years 2015, 2014, 2013, 2012	4	yes, one on the year 2011
26	Norway	2013	Parliamentary Ombudsman	reports on the years 2015, 2014	2	
27	Poland	2005	Commissioner for Human Rights	reports on the years 2015, 2014, 2013, 2012	4	yes, eight on the years 2008-2011
28	Portugal	2013	Ombudsperson's Office	reports on the years 2015, 2014	2	no

	CoE member + OPCAT state party	OPCAT ratification	NPM designated	Annual reports used in study	Number of reports analysed	Further re- ports avail- able
29	Romania	2009	The People's Advocate	no reports available, the link on the website is broken		
30	Serbia	2006	Protector of Citizens	reports on the years 2015, 2014, 2013, 2012	4	yes, one on the setting up of the NPM in 2011
31	Slovenia	2007	Human Rights Om- budsman	reports on the years 2015, 2014, 2013, 2012	4	yes, four on the years 2008-2011
32	Spain	2006	Ombudsperson's Office	reports on the years 2014, 2013, 2012	3	yes, two on the years 2010 and 2011
33	Sweden	2005	Parliamentary Ombudsmen	reports on the years 2015-2016 and 2011- 2014	2	no not from NPM. only from Om- budsman
34	Switzerland	2009	National Commission for the Prevention of Torture	reports on the years 2015, 2014, 2013, 2012, 2011, 2010	6	no
35	Turkey	2011	National Human Rights Institution	no reports available		
36	Ukraine	2006	Parliamentary Commissioner for Hu- man Rights	reports on the years 2014, 2013, 2012	3	no
37	United Kingdom	2003	United Kingdom's NPM consists of 21 bodies, coordinated by Her Majesty's Inspec- torate of Prisons	reports on the years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016	5	yes, one for the years 2009-2010

List of Abbreviations

APT	Association for the Prevention of Torture
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECPT	European Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
EPR	European Prison Rules
EU	European Union
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
NPM	National Preventive Mechanism
SPT	Subcommittee on Prevention of Torture
StVG	Strafvollzugsgesetz
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Sources

Bibliography

- Aebi, Marcelo F., Mélanie M. Tiago, and Christine Burkhardt. 2017. 'Council of Europe Annual Penal Statistics SPACE I - Prison Populations Survey 2015'. Council of Europe, University of Lausanne.
http://wp.unil.ch/space/files/2017/03/SPACE_I_2015_Report_170314.pdf.
- Altmann, Christoph. 2014. 'Doppelzuständigkeit und Doppelbestrafung im StVG'. *Juristische Blätter*, 775–87.
- APT. 2012. 'National Preventive Mechanisms: Drafting Effective Annual Reports'.
http://apt.ch/content/files_res/OPCATBriefing_NPM_reports_en.pdf.
- APT, and IIDH. 2010. 'Optional Protocol to the UN Convention against Torture. Implementation Manual'. http://apt.ch/content/files_res/opcat-manual-english-revised2010.pdf.
- Bennett, Peter. 2016. 'Prisons and Human Rights'. In *Handbook on Prisons*, edited by Yvonne Jewkes, Jamie Bennet, and Ben Crewe, 2nd ed., 324–39. New York: Routledge.
- Birk, Moritz. 2012. 'The Situation of Prisoners in the World: A Global Detention Crisis'. In *All Human Rights for All: Vienna Manual on Human Rights*, edited by Manfred Nowak, Karolina M. Januszewski, and Tina Hofstätter, 477–83.
- Birk, Moritz, Gerrit Zach, Debra Long, Rachel Murray, and Walter Suntinger. 2015. 'Enhancing Impact of National Preventive Mechanisms. Strengthening the Follow-up on NPM Recommendations in the EU: Strategic Development, Current Practices and the Way Forward'.

- http://bim.lbg.ac.at/sites/files/bim/attachments/enhancing_impact_of_national_preventive_mechanisms_0.pdf.
- CoE, Council of Europe. 2006. *European Prison Rules, Recommendation Rec(2006)2*.
<http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/EUROPEAN%20PRISON%20RULES.pdf>.
- . 2017. ‘Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby’.
Treaty Office. <http://www.coe.int/web/conventions/full-list>.
- Committee of Ministers. 2006. ‘Commentary on Recommendation Rec(2006)2 on the European Prison Rules’. In *European Prison Rules*, edited by Council of Europe CoE, 39–100.
 Strasbourg: Council of Europe Publishing.
<http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/EUROPEAN%20PRISON%20RULES.pdf>.
- Coyle, Andrew. 2006. ‘Revision of the European Prison Rules, a Contextual Report’. In *European Prison Rules*, edited by Council of Europe CoE, 101–32. Strasbourg: Council of Europe Publishing.
- Easton, Susan. 2008. ‘Constructing Citizenship: Making Room for Prisoners’ Rights’. *Journal of Social Welfare and Family Law* 30 (2): 127–46.
- . 2013. ‘Protecting Prisoners: The Impact of International Human Rights Law on the Treatment of Prisoners in the United Kingdom’. *The Prison Journal* 93 (4): 475–92.
- ECtHR. 1975. ‘Case of Golder v. The United Kingdom, No. 4451/70’.
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57496%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57496%22]}).
- . 1984. ‘Case of Campbell and Fell v. The United Kingdom, No. 7819/77; 7878/77’.
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57456%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]}).
- . 2004. ‘Case of Ezech and Connors v The United Kingdom, No 39665/98, 40086/98’.
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-61333%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61333%22]}).
- ECtHR Grand Chamber. 2005. ‘Case of Hirst v. The United Kingdom (No.2), No 74025/01’.
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-70442%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-70442%22]})
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-70442%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-70442%22]}).
- . 2007. ‘Case of Dickson v. The United Kingdom, No. 44362/04’.
[http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-83788%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-83788%22]}).
- ECtHR, Unite de la Presse. 2016. ‘Factsheet Detention Conditions and Treatment of Prisoners’.
http://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf.
- Eechaudt, Vincent. 2013. ‘Member State Differences in Prison Disciplinary Regimes and Implications for European Union Cooperation’. In *Crime, Violence, Justice and Social Order. Monitoring Contemporary Security Issues*, edited by P. Ponsaers, A Crawford, J de Maillard, J Shapland, and A Verhage, 255–73. Maklu.
- . 2016. *De Naleving van Internationale Standaarden Rond Penitentiair Tuchtrect. En Case Study van Belgie En Frankrijk En de Relevantie Vor Europese Samenwerking*. Gent: Universiteit Gent.
- Flick, Uwe. 2007. *Qualitative Sozialforschung. Eine Einführung*. 7. Auflage. Rowohlt.
- Geamănu, Radu-Florin. 2012. ‘Implementing a National Preventive Mechanism for the Prevention of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Places of Detention in Romania’. *Lex et Scientia International Journal* 19 (2): 45–66.
- Goerdeler, Jochen. 2016. ‘Internationale Richtlinien im Justizvollzug: Anwendung in der Praxis’.

- In *Menschenrechte hinter Gittern*, edited by Axel Dessecker and Rainer Dopp, 93–128. Wiesbaden: Kriminologische Zentralstelle e.V.
- Goffman, Erving. 1961. 'On the Characteristics of Total Institutions: The Inmate World'. In *The Prison. Studies in Institutional Organization and Change*, edited by Donald R. Cressey, 15–67. New York: Holt, Rinehart and Winston, Inc.
- Grabenwarter, Christoph, and Katharina Pabel. 2016. *Europäische Menschenrechtskonvention*. 6th ed. München/Wien/Basel: C.H. Beck.
- Kau, M. 2015. 'Art 3 EMRK'. In *Internationaler Kommentar zur Europäischen Menschenrechtskonvention, IntKommEMRK*, edited by Katharina Pabel and Stefanie Schmahl. Carl Heymann Verlag.
- Ledwidge, Frank. 2006. 'The Optional Protocol to the Convention Against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture'. *Helsinki Monitor* 1: 69–82.
- Livingstone, Stephen. 2000. 'Prisoners' Rights in the Context of the European Convention on Human Rights'. *Punishment & Society* 2 (3): 309–24.
- Mayring, Philipp. 2007. 'Qualitative Inhaltsanalyse'. In *Qualitative Forschung. Ein Handbuch*, edited by Uwe Flick, Ernst von Kardoff, and Ines Steinke, 5. Auflage, 468–475. Rowohlt.
- . 2010. *Qualitative Inhaltsanalyse. Grundlagen und Techniken*. 11. Weinheim und Basel: Beltz.
- Murdoch, Jim. 2005. *The Treatment of Prisoners. European Standards*. Strasbourg: Council of Europe Publishing.
- Murray, Rachel, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf. 2011. *The Optional Protocol to the UN Convention Against Torture*. New York: Oxford University Press.
- Nowak, Manfred, and Elizabeth McArthur. 2008. *The United Nations Convention against Torture: A Commentary*. Oxford: Oxford University Press.
- Pirjola, Jari. 2008. 'The Parliamentary Ombudsman of Finland as a National Preventive Mechanism under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'. *Nordic Journal of International Law* 77: 163–74.
- Silvis, Johannes. 2013. 'Prison Management and Human Rights in Europe'. http://www.coe.int/t/dghl/standardsetting/prisons/Conference_18_files/ECHR-Presentation%20REV.pdf.
- SPT, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 2008. 'First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/40/2'. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f40%2f2&Lang=en.
- . 2009. 'Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/42/2'. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f42%2f2&Lang=en.
- . 2010a. 'The Approach of the Subcommittee on Prevention of Torture to the Concept of Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'. United Nations. docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d

- %2fPPRiCAqhKb7yhsquBlBCPFD%2bXLNadyD9hiZ4R2ifOm
 %2fkPeiu3sYGHOMGMsGCei%2fqxK3MyHYEY%2bGl
 %2b0lFf2BUyCt8DxrCROfZLQqGl4P9pjZ5cCvrH%2ba2E9K%2b2.
- . 2010b. ‘Third Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/44/2’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f44%2f2&Lang=en.
- . 2011. ‘Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/46/2’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f46%2f2&Lang=en.
- . 2012a. ‘Provisional Statement on the Role of Judicial Review and Due Process in the Prevention of Torture in Prisons, Adopted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at Its Sixteenth Session, 20 to 24 February 2012’. United Nations.
www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-OP-2_en.doc.
- . 2012b. ‘Fifth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/48/3’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f48%2f3&Lang=en.
- . 2013. ‘Sixth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/50/2’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f50%2f2&Lang=en.
- . 2014. ‘Seventh Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/52/2’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f52%2f2&Lang=en.
- . 2015. ‘Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/54/2’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f54%2f2&Lang=en.
- . 2016a. ‘Analytical Assessment Tool for National Preventive Mechanisms, CAT/OP/1/Rev.1’. http://www.ohchr.org/Documents/HRBodies/OPCAT/CAT-OP-1-Rev-1_en.pdf.
- . 2016b. ‘Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4’.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f57%2f4&Lang=en.
- Steinerte, Elina. 2013. ‘The Changing Nature of the Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: In Search for Equilibrium’. *Netherlands Quarterly of Human Rights* 31 (2): 129–55.
- . 2014. ‘The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention’. *Human Rights Law Review* 14: 1–29.
- Stuefer, Alexia. 2013. ‘Gedanken zum österreichischen Strafvollzug: Resozialisierung und

- Besserung oder Repression und Vergeltung?' *Juridikum*, 298–310.
- Vermeulen, Gert, Anton van Kalmthout, Neil Paterson, Marije Knapen, Peter Verbeke, and Wendy De Bondt. 2011. 'Material Detention Conditions, Executions of Custodial Sentences and Prisoner Transfer in the EU Member States.' IRCP - Institute for International Research on Criminal Policy Ghent University.
http://ec.europa.eu/justice/news/consulting_public/0012/JLS-DC-FR_IRCP41_en.pdf.
- World Prison Brief. 2016. 'World Prison Population List Eleventh Edition'. Edited by Roy Walmsley. ICPR Institute for Criminal Policy Research.
http://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.
- Zhamanayeva, Amina. 2014. 'The National Preventive Mechanism in Kazakhstan: Failure to Comply with International Standards?' University of Vienna.
- Zyl Smit, Dirk van. 2011. 'Strategies for Improving Prisoners' Rights and Prison Conditions in Europe'. <http://www.coe.int/t/dghl/standardsetting/prisons/Report%20by%20Mr%20Dirk%20van%20Zyl%20Smit%20%20General%20Rapporteur.pdf>.
- Zyl Smit, Dirk van, and Frieder Dünkel. 2001. *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions*. 2nd ed. The Hague/London/Boston: Kluwer Law International.
- Zyl Smit, Dirk van, and Sonja Snacken. 2009. *Principles of European Prison Law and Policy. Penology and Human Rights*. Oxford University Press.

Reports of NPMs used in the study

- Albania NPM, Avokati i Popullit. 2011. 'Activity of the People's Advocate on the Role of the National Mechanism on Prevention of Torture. Compilation of Annual Reports 2008-2010'. http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/AnnualReports2008-2010_Albania.pdf.
- . 2014. 'Activity of the Albanian Ombudsman Office in Its Capacity as the National Preventive Mechanism Against Torture. Annual Report 2013'. Tirana.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Albania2013.pdf.
- . 2016. 'Activity of the Albanian Ombudsman Office in Its Capacity as the National Preventive Mechanism Against Torture. Special Annual Report 2015'. Tirana.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Albanian_NPM_Raport2015.pdf.
- Armenia NPM, Human Rights Defender of the Republic of Armenia. 2010. 'Report. Observance of the Rights and Lawful Interests of a Person in Penitentiary. Institutions of the Ministry of Justice of the Republic of Armenia 2009'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/RA_HumanRightsDefenderas_an_independant_NPM-2009.pdf.
- . 2013. 'Annual Report on the Activities of the RA Human Rights Defender and on the Violations of Human Rights and Fundamental Freedoms in the Country in 2013'.
<http://www.ombuds.am/resources/ombudsman/uploads/files/publications/77966ae217133c07bc23feebea606ad8.pdf>.
- . 2014. 'Annual Report on the Activities of the RA Human Rights Defender and on the Violations of Human Rights and Fundamental Freedoms in the Country in 2013'.

- <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/273184b822b3ac7b78e29164302fef57.pdf>.
- Austria NPM, Volksanwaltschaft. 2013. 'Annual Report 2015 on the Activities of the Austrian National Preventive Mechanism'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/AustrianOmbudsmanBoards_2012.pdf.
- . 2014. 'Report of the Austrian Ombudsman Board and Its Commissions on the National Preventive Mechanism 2013'.
http://volksanwaltschaft.gv.at/downloads/48h64/Austria_Report%20on%20Activities%20of%20NPM_2013.pdf.
- . 2015. 'Annual Report 2014 on the Activities of the Austrian National Preventive Mechanism'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Austria2014.pdf.
- . 2016. 'Annual Report 2015 on the Activities of the Austrian National Preventive Mechanism'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Austria2015.pdf.
- Azerbaijan NPM, Commissioner for Human Rights of the Republic of Azerbaijan Ombudsman. 2013. 'Report on the Activity of the National Preventive Mechanism against Torture 2012'. Baku.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Azerbaijan_AnnualReport2012.pdf.
- . 2014. 'Report on the Activity of the National Preventive Mechanism against Torture 2013'. Baku.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Azerbaijan_NPM2013.pdf.
- . 2015. 'Summary of the Annual Report on the Activities in Promotion and Protection of Human Rights for 2014'. Baku. <http://ombudsman.gov.az/en/view/pages/59>.
- . 2016. 'Summary of the Annual Report on the Activities in Promotion and Protection of Human Rights for 2015'. Baku. <http://ombudsman.gov.az/upload/editor/files/Annual%20Report%202015.pdf>.
- Bulgaria NPM, Ombudsman of the Republic of Bulgaria. 2013. 'Annual Report of the Ombudsman as a National Preventive Mechanism on the Inspections Conducted in the Detention Facilities in 2012'.
<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/AnnualreportsreceivedfromNPM.aspx>.
- . 2014. 'Annual Report of the Ombudsman Acting as National Preventive Mechanism 2013'. <http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Bulgaria2013.pdf>.
- . 2015. 'Annual Report of the Ombudsman Acting as National Preventive Mechanism 2014'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/BulgariaAnnualReport2014.pdf>.
- . 2016. 'Annual Report of the Ombudsman Acting as National Preventive Mechanism 2015'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Bulgaria2015.pdf.
- Croatia NPM, Republic of Croatia Office of the Ombudswoman. 2013. 'Annual Report on the Performance of Activities of the National Preventive Mechanism 2012'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/CroatiaNPMAR2012.pdf>.

- . 2014. ‘Persons Deprived of Their Liberty and Performance of Activities of the National Preventive Mechanism’. <http://ombudsman.hr/en/reports/send/66-ombudsman-s-reports/83-persons-deprived-of-their-liberty-and-performance-of-activities-of-the-national-preventive-mechanism-report-2013>.
- . 2015. ‘Report on the Performance of Activities of the National Preventive Mechanism for 2014’. <http://ombudsman.hr/en/reports/send/66-ombudsman-s-reports/702-report-on-the-performance-of-activities-of-the-national-preventive-mechanism-for-2014>.
- . 2016. ‘Report on the Performance of Activities of the National Preventive Mechanism for 2015’. <http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Croatia2015.pdf>.
- Czech Republic NPM, Public Defender of Rights Ombudsman. 2012. ‘Annual Report on the Activities of the Public Defender of Rights 2011’. http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2011.pdf.
- . 2013. ‘Annual Report on the Activities of the Public Defender of Rights 2012’. <http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/CzechRepublic2012.pdf>.
- . 2014. ‘Annual Report on the Activities of the Public Defender of Rights 2013’. http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2013-web-pdfA.pdf.
- . 2015. ‘Annual Report on the Activities of the Public Defender of Rights 2014’. http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2014.pdf.
- . 2016. ‘Annual Report 2015’. http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/2015_annual_report.pdf.
- Denmark NPM, Folketingets Ombudsmand. 2010. ‘OPCAT Annual Report 2009’. <http://en.ombudsmanden.dk/publikationer/summary/opcat2009/>.
- . 2011. ‘OPCAT Annual Report 2010’. <http://en.ombudsmanden.dk/publikationer/summary/pdf/>.
- . 2012. ‘OPCAT Annual Report 2011’. http://en.ombudsmanden.dk/publikationer/summary/opcat2011/?obvius_version=2013-07-19+09%3A33%3A41.
- . 2013. ‘OPCAT Annual Report 2012’. http://en.ombudsmanden.dk/publikationer/summary/opcat_annual_report_2012/.
- . 2014. ‘Annual Report 2013’. <http://beretning2013.ombudsmanden.dk/english/ar2013/>.
- . 2015. ‘Annual Report 2014’. <http://beretning2014.ombudsmanden.dk/english/ar2014/>.
- . 2016. ‘Annual Report 2015’. http://beretning2015.ombudsmanden.dk/english/annual_report_2015/.
- Estonia NPM, Office of the Chancellor of Justice. 2013. ‘2012 Overview of the Chancellor of Justice Activities’. Tallinn. http://www.oiguskantsler.ee/sites/default/files/annual_report_2012.pdf.
- . 2014. ‘2013 Overview of the Chancellor of Justice Activities’. Tallinn. http://www.oiguskantsler.ee/sites/default/files/annual_report_2013.pdf.
- . 2015a. ‘2014 Overview of the Chancellor of Justice Activities’. Tallinn. http://www.oiguskantsler.ee/sites/default/files/annual_report_2014.pdf.
- . 2015b. ‘2015 Overview of the Chancellor of Justice Activities’. Tallinn. <http://www.oiguskantsler.ee/sites/default/files/Annual%20Report%202015.pdf>.

- . 2016. '2015-2016 Overview of the Chancellor of Justice Activities'. Tallinn.
<http://www.oiguskantsler.ee/sites/default/files/Annual%20Report%202015-2016.pdf>.
- Finland NPM, Parliamentary Ombudsman of Finland. 2015. 'Summary of the Annual Report 2014'. <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=zK31415095734653&cmd=download>.
- . 2016. 'Summary of the Annual Report 2015'.
<http://www.oikeusasiamies.fi/dman/Document.phx?documentId=dg29116163758950&cmd=download>.
- France NPM, Le Contrôleur général des lieux de privation de liberté. 2013. 'Annual Report 2012'. http://www.cglpl.fr/wp-content/uploads/2012/12/RA-2012_EN-relueCGLPLvi.pdf.
- . 2014. 'Annual Report 2013'. http://www.cglpl.fr/wp-content/uploads/2012/12/Rapport-annuel-2013_EN.pdf.
- . 2015. 'Annual Report 2014'. http://www.cglpl.fr/wp-content/uploads/2012/12/RA-2014_EN.pdf.
- Georgia NPM, Public Defender (Ombudsman) of Georgia. 2014. 'Human Rights in Closed Institutions. Report of National Preventive Mechanism of Georgia 2013'.
<https://drive.google.com/file/d/0B7johJVjupxNOUFSME1rODZ1QVv/view>.
- . 2015a. 'Requests/Complaints Mechanism in Penitentiary System of Georgia'.
<http://www.ombudsman.ge/uploads/other/3/3390.pdf>.
- . 2015b. 'The Report of the National Preventive Mechanism 2014'.
<http://www.ombudsman.ge/uploads/other/3/3388.pdf>.
- . 2016. 'National Preventive Mechanism 2015'.
<http://www.ombudsman.ge/uploads/other/3/3779.pdf>.
- Germany NPM, The National Agency for the Prevention of Torture. 2013. 'Annual Report 2012'.
http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2012.pdf.
- . 2014. 'Annual Report 2013'. http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2013_National_Agency.pdf.
- . 2015. 'Annual Report 2014'. http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2014_National_Agency.pdf.
- . 2016. 'Annual Report 2015'. http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2015_National_Agency.pdf.
- Greece NPM, The Greek Ombudsman. 2015. 'National Preventive Mechanism against Torture and Ill-Treatment. Annual Special Report 2014'.
https://www.synigoros.gr/resources/docs/eng_web.pdf.
- . 2016. 'Prevention of Torture and Ill-Treatment. Special Report 2015'.
https://www.synigoros.gr/resources/docs/npm_2015_en.pdf.
- Hungary NPM, Commissioner for Fundamental Rights. 2016. 'Comprehensive Annual Report of the Commissioner for Fundamental Rights on the Activities of the OPCAT National Preventive Mechanism in 2015'.
<http://www.ajbh.hu/documents/14315/2550078/NPM+Report+for+2015.pdf/22736708->

- 4afa-41ca-a300-a1c9a461fa24.
- Liechtenstein NPM, Vollzugskommission. 2013. '2012 Annual Report of the Liechtenstein National Preventive Mechanism pursuant to Art. 17 et Sq. of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)'.
http://www1.regierung.li/uploads/media/Annual_report_2012_preventive_mechanism_NPM.pdf.
- . 2016. 'Jahresbericht 2015 Des liechtensteinischen Nationalen Präventionsmechanismus gemäss Art. 17 ff. des Fakultativprotokolls zum Übereinkommen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe'.
http://www.regierung.li/files/attachments/Jahresbericht_NPM_2015_deutsch.pdf?t=636238293208671294.
- Lithuania NPM, Lietuvos Seimo Kontrolieriai. 2016. 'The Seimas Ombudsmen's Office 2014-2015 Report on National Prevention of Torture'.
http://www.lrski.lt/images/dokumentai/Seimo_Kontrolieriai_Report_EN_2014-2015.pdf.
- Macedonia NPM, Ombudsman Republic of Macedonia NPM. 2012. 'Annual Report 2011'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPMGodisenizvestaj2011.pdf>.
- . 2013. 'Annual Report 2012'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPMMacedonia.pdf>.
- . 2014. 'Annual Report 2013'. <http://ombudsman.mk/upload/NPM-dokumenti/2014/NPM%20Godisen%20izvestaj-2013.pdf>.
- Macedonia NPM, Ombudsman Republic of Macedonia NPM. 2015. 'Annual Report 2014'.
<http://ombudsman.mk/upload/NPM-dokumenti/Izvestai/NPM%20Godisen%20izvestaj-2014.pdf>.
- Moldova NPM, The Centre for Human Rights of Moldova. 2009. 'Report on the Activity of the National Mechanism for Torture Prevention'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Moldova_AnnualReport2009.pdf.
- Montenegro NPM, Protector of Human Rights and Freedoms of Montenegro. 2014. 'Annual Report of the National Mechanism for Prevention of Torture for 2013'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/MontenegroAnnualReport2013.pdf>.
- Netherlands NPM, Dutch National Preventive Mechanism. 2013. 'Annual Report National Preventive Mechanism 2012'.
<https://www.inspectievenj.nl/english/publicaties/jaarverslagen/2013/12/02/annual-report-national-preventive-mechanism-2012>.
- . 2014. 'Annual Report Dutch National Preventive Mechanism 2013'.
<https://www.inspectievenj.nl/english/publicaties/jaarverslagen/2014/11/18/annual-report-dutch-national-preventive-mechanism-2013>.
- . 2015. 'Annual Report National Preventive Mechanism 2014'.
<https://www.inspectievenj.nl/english/publicaties/jaarverslagen/2016/01/21/annual-report-national-preventive-mechanism-2014>.
- . 2016. 'Annual Report on National Preventive Mechanism 2015'.
<https://www.inspectievenj.nl/english/publicaties/jaarverslagen/2016/11/02/annual-report-npm-jaarverslag-2015>.

- Norway NPM, Sivilombudsmannen. 2015. 'Annual Report 2014. Doc. 4.1 (2014-2015)'.
<https://www.sivilombudsmannen.no/getfile.php/Rapporter/NPM%20Norway%20Annual%20Report%202014%20-%20low.pdf>.
- . 2016. 'Annual Report 2015. Document 4:1 (2015-2016)'.
https://www.sivilombudsmannen.no/getfile.php/Filer/%C3%85rsmelding/SIVOM_FOREBYGGENH_%C3%85RSMELDING_ENG_2015_WEB.pdf.
- Poland NPM, Commissioner for Human Rights (Ombudsman). 2013. 'Report of the Human Rights Defender (Ombudsman) on the Activities of the National Preventive Mechanism in Poland in 2013'. <https://www.rpo.gov.pl/sites/default/files/Report%20of%20the%20Human%20Rights%20Defender%20%28Ombudsman%29%20on%20the%20Activities%20of%20the%20National%20Preventive%20Mechanism%20in%20Poland%20in%202012.pdf>.
- . 2014. 'Report of the Human Rights Defender on the Activities of the National Preventive Mechanism in Poland in 2013 (Synthesis)'.
<https://www.rpo.gov.pl/sites/default/files/HUMAN%20RIGHTS%20DEFENDER%20BULLETIN%202014%2C%20No%206%20SOURCE.pdf>.
- . 2015. 'Report of the Human Rights Defender on the Activities of the National Preventive Mechanism in Poland in 2014'.
https://www.rpo.gov.pl/sites/default/files/Report_of_the_Human_Rights_Defender_%28Ombudsman%29_on_the_Activities_of_the_NPM_in_Poland_in_2014.pdf.
- . 2016. 'Report of the Commissioner for Human Rights (Ombudsman) on the Activities of the National Preventive Mechanism in Poland in 2015 (Synthesis)'.
https://www.rpo.gov.pl/sites/default/files/Raport_RPO_KMP_2015_EN.pdf.
- Portugal NPM, Portuguese Ombudsman National Human Rights Institution. 2015. 'Report to the Parliament 2014. National Preventive Mechanism'. http://www.provedor-jus.pt/site/public/archive/doc/Relatorio_a_Assembleia_da_Republica_2014_MNP_ING_.pdf.
- Portugal NPM, Portuguese Ombudsman National Preventive Mechanism. 2016. 'Report to the Parliament 2015'. http://www.provedor-jus.pt/site/public/archive/doc/NPM_2015_ING_.pdf.
- Serbia NPM, Republic of Serbia Protector of Citizens. 2013. 'National Preventive Mechanism of Republic of Serbia 2012 Report'. http://www.npm.ils.rs/attachments/038_NPM%20%20report.pdf.
- . 2014. 'The National Mechanism for the Prevention of Torture 2013 Report and Conclusions of the National Assembly of the Republic of Serbia'.
http://www.npm.ils.rs/attachments/067_NPM%20%20izvestaj%202013%20final%20engl.pdf.
- . 2015. 'National Preventive Mechanism 2014 Report'.
http://www.npm.ils.rs/attachments/135_IzV%20NPM%202014%20engl.pdf.
- . 2016. 'National Mechanism for Prevention of Torture 2015 Annual Report'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/Serbia_NPM2015.pdf.
- Slovenia NPM, Republic of Slovenia Human Rights Ombudsman. 2013. '2012 Report National Preventive Mechanism'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/HROmbudsman_Slovenia2012.pdf.

- . 2014. 'Implementation of the Duties and Powers of the NPM in 2013'.
<http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPMSlovenia2013.pdf>.
- . 2015. 'Annual Report of the Human Rights Ombudsman of the Republic of Slovenia for 2014'. http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/LP2014_VARUH_ENGLISH_v025_www-pages.pdf.
- . 2016. 'Annual Report of the Human Rights Ombudsman of the Republic of Slovenia for 2015 with Annual Report of the National Preventive Mechanism for 2015'.
http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/vcp_lp_2015_eng.pdf.
- Spain NPM, Defensor del Pueblo. 2013. 'Annual Report 2012'.
https://www.defensordelpueblo.es/en/wp-content/uploads/sites/2/2015/10/Spain_NPM_2012.pdf.
- . 2014. 'Annual Report 2013'. https://www.defensordelpueblo.es/en/wp-content/uploads/sites/2/2015/10/Spain_NPM_2013.pdf.
- . 2015. 'NPM 2014 Spain's National Preventive Mechanism against Torture'.
https://www.defensordelpueblo.es/en/wp-content/uploads/sites/2/2016/02/NPM_annual_report_2014.pdf.
- Sweden NPM, Riksdagens Ombudsmän National Preventive Mechanism. 2016. 'Annual Report 2015/16 Summary in English'. http://www.jo.se/Global/%C3%84mbetsber%C3%A4ttelser/Annual_Report_2015-16_summary_JO_Sweden.pdf.
- Sweden NPM, Riksdagens Ombudsman National Preventive Mechanism. 2016. 'Report from the OPCAT Unit 2011-2014'. http://www.jo.se/Global/Report_NPM_Sweden_2011-2014__English.pdf.
- Switzerland NPM, National Commission for the Prevention of Torture. 2011. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2010'.
https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/110630_ber-d.pdf.
- . 2012. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2011'.
https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/121009_ber-d.pdf.
- . 2013. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2012'. https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/130604_ber-d.pdf.
- . 2014. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2013'.
https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/140623_ber-d.pdf.
- . 2015. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2014'.
https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/150623_ber-d.pdf.
- . 2016. 'Tätigkeitsbericht Nationale Kommission zur Verhütung von Folter (NKVF) 2015'.
<https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/2015/taetigkeitsbericht-2015.pdf>.
- Ukraine NPM, Ukrainian Parliament Commissioner for Human Rights. 2013. 'Current Implementation of the National Preventive Mechanism Report 2012'.
http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/AnnualReport2012_Ukraine.pdf.
- . 2014. 'State of Implementation of the National Preventive Mechanism 2013 Report'.

- http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/AnnualReport2013_Ukraine.pdf.
- . 2015. ‘State of Implementation of the National Preventive Mechanism 2014 Report’. http://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/AnnualReport2014_Ukraine.pdf.
- United Kingdom NPM, HM Inspectorate of Prisons. 2013. ‘Third Annual Report of the United Kingdom’s National Preventive Mechanism 2011-12’. <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/05/NPM-3rd-Annual-Report-2011-12.pdf>.
- . 2014a. ‘Fifth Annual Report of the United Kingdom’s National Preventive Mechanism 2013-14’. <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/05/NPM-5th-Annual-Report-2013-14.pdf>.
- . 2014b. ‘Fourth Annual Report of the United Kingdom’s National Preventive Mechanism 2012-13’. <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/05/NPM-4th-Annual-Report-2012-13.pdf>.
- . 2015. ‘Sixth Annual Report of the United Kingdom’s National Preventive Mechanism’. <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf>.
- . 2017. ‘Seventh Annual Report of the United Kingdom’s National Preventive Mechanism 2015-16’. <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2017/01/NPM-annual-report-corrected.pdf>.

Abstract

German

Gefängnisse sind per Definition abgeschlossene Orte, sie sind für Außenstehende nicht zugänglich und es gibt wenige öffentlich verfügbare Informationen zu den Bedingungen hinter Gittern. Eine relativ neue Quelle für Informationen stellen die jährlichen Berichte der sogenannten Nationalen Präventionsmechanismen dar, die aufgrund des Fakultativprotokolls zum Übereinkommen gegen Folter errichtet wurden. Diese Masterarbeit untersucht deren Perspektive auf Rechtsschutzmechanismen im Strafvollzug. Für die Analyse wurden vier Teilbereiche des Rechtsschutzes herausgearbeitet: (i) Information der Inhaftierten über Rechte und Pflichten, (ii) Ansuchen und Beschwerden, (iii) Disziplinarverfahren und Strafen, (iv) de facto Zugang zum Recht und Effektivität der Rechtsschutzmechanismen. Von einem rechtebasierten Ansatz ausgehend wird zuerst der Kontext von Gefangenerechten und Rechtsschutzmechanismen sowie deren Rolle im Zusammenhang mit der Prävention von Folter vorgestellt. Der Hauptteil der Arbeit widmet sich anschließend der Analyse der Berichte der Nationalen Präventionsmechanismen. Analysiert wurden die Berichte der Nationalen Präventionsmechanismen von 31 Staaten, die sowohl Mitglied des Europarates als auch des Fakultativprotokolls sind. Die Analyse der Berichte zeigt eine große Diversität hinsichtlich des Stellenwertes, den die Nationalen Präventionsmechanismen dem Rechtsschutz in Haft geben. Manche sparen das Thema Rechtsschutz in ihren Berichten vollkommen aus. Diejenigen, die sich in ihren Berichten mit Fragen des Rechtsschutzes auseinandersetzten, äußerten durchwegs Bedenken und berichteten von massiven Defiziten.

English

Penitentiary institutions, by definition, are closed institutions not accessible to the public, and information on the conditions inside is typically rare. The annual reports of the so called National Preventive Mechanisms, established on the basis of the Optional Protocol to the Convention against Torture, present a relatively new source of information on detention conditions. This thesis sets out to analyse their perspectives on the legal protection of prisoners' rights. Legal protection for this analysis was divided into four subdomains: (i) information of the detainees on their rights and obligations, (ii) requests and complaints mechanisms, (iii) disciplinary procedure and sanctions, and (iv) de facto access to justice and effectiveness of legal protection. First, an introduction to the concept of prisoners' rights and legal protection mechanisms and their

importance for torture prevention from a rights based approach is given. The main part is devoted to the analysis of the reports of the National Preventive Mechanisms of the 31 states that are a member of the Council of Europe as well as signatory states to the Optional Protocol. It revealed a great diversity in their approach to legal protection mechanisms. Several National Preventive Mechanisms did not engage with the topic of legal protection mechanisms in prison at all. The ones who took up the topic consistently turned to issues raising their concern and reported of severe shortcomings.