The Obligation to Investigate Ill-treatment of Persons with Disabilities: the Way Forward

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The Obligation to Investigate Ill-treatment of Persons with Disabilities: the Way Forward

Janos Fiala-Butora*

Introduction

Freedom from torture, inhuman and degrading treatment or punishment is a cornerstone of the international human rights protection system. It is a fundamental right that cannot be limited or derogated even in the case of war or an emergency threatening the life of the nation.1 It is part of *ius cogens* in international law,2 and according to the European Court of Human Rights “must be regarded as one of the most fundamental provisions of the [European Convention on Human Rights] and as enshrining core values of the democratic societies”.3

Despite the prohibition’s absolute nature, persons with disabilities continue to suffer ill-treatment on a massive scale. Many still live in horrible conditions in large, segregated institutions, where various forms of abuses take place. Practices that would otherwise constitute torture are justified on medical and economic grounds. Chemical and physical restraints, “corrective” medical interventions, physical and sexual violence, and facilities not adapted to their needs all form part of persons with disabilities’ daily experience.

This Article explores for the first time in the academic literature why mainstream human rights instruments have failed to protect persons with disabilities from ill-treatment, and how their shortcomings could be remedied under the recently adopted United Nations Convention on the Rights of Persons with Disabilities (CRPD). While the adoption of the CRPD has stirred the debate on the relationship between disability and torture, scholars’ interest has been largely oriented at involuntary treatment4 and

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2 U.N. Committe Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2*, CAT/C/GC/2, § 1 (January 24, 2008).

3 Pretty v. the United Kingdom, no. 2346/02, April 29, 2002, § 49.

monitoring of detention facilities. Taking a different tact, I argue that raising substantive standards and monitoring are insufficient in themselves to prevent torture. Instead, victims should be empowered by providing them effective access to remedies.

This article shows that the obligation on states to investigate torture, as developed by the jurisprudence of the European Court of Human Rights, constitutes a particularly effective mechanism to eliminate ill-treatment. It provides an important deterrent against actions and neglect by public authorities, and a meaningful remedy to victims. However, notwithstanding its successes in protecting prisoners or racial minorities, the doctrine has so far been unable to address abuses faced by persons with disabilities. Despite their particular vulnerability to ill-treatment, the complaints of very few of them have ever reached courts or international bodies, and the practices they are subject to have not yet been condemned and outlawed.

The cause of this failure, I explain, lies in the fact that the doctrine of the obligation to investigate has been developed as a response to the problems of non-disabled persons. It therefore cannot respond to the specific obstacles faced by persons with disabilities in achieving justice. The European Court has so far been unable to make the shift in its understanding of the connection between ill-treatment and disability and adapt its standards to meet the needs of persons with disabilities.

The CPRD was adopted as a response to the recognized inability of mainstream human rights instruments to effectively protect the rights of persons with disabilities. However, its provision guaranteeing freedom from torture and other ill-treatment is as vague as those found in other treaties. Therefore, if the protection it provides is to be effective, the Committee on the Rights of Persons with Disabilities, the body entrusted with authoritative interpretation of the CRPD, must develop detailed standards for combating ill-treatment. I will argue that the obligation to investigate, despite its deficiencies, serves as a very useful framework for addressing the ill-treatment of persons with disabilities. The Committee must recognize the experience of the European Court of Human Rights to build on its successes, but also realize and overcome its shortcomings, in order for the prohibition of torture to become a reality rather than an aspiration.

It is commonplace that persons with disabilities constitute a particularly vulnerable group. They often live in settings characterized by a massive imbalance of

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power, which makes them extremely defenseless to all kinds of abuses.\(^7\) This article argues that instead of providing them protection, law to a great extent disempowers them and contributes to their further victimization. Inaccessible procedures and remedies, legal mechanisms created with the non-disabled citizen in mind foster ill-treatment and protect its perpetrators instead of helping the victims. It is precisely these outdated doctrines that the Convention on the Rights of Persons with Disabilities should help to overcome. Instead of being a source of their vulnerability, law could and should ensure that the prohibition of torture becomes a reality rather than simply an aspiration for people with disabilities.

Part I of this Article describes the unique nature of the ill-treatment of persons with disabilities, and additional obstacles compared to non-disabled persons that they face in the justice system. The second chapter will analyze the individual components of the doctrine of obligation to investigate. The third chapter will explore the gap between the European Court’s seemingly progressive standards and its inability to incorporate persons with disabilities within its scope of protection. This analysis must serve as the starting point for addressing the problem under the CRPD. Chapter four will explain how the doctrine could be adapted by the Committee on the Rights of Persons with Disabilities so that it could be utilized by persons with disabilities to its full potential. I will conclude with some wider arguments concerning the roles of victims and perpetrators in preventing ill-treatment by international human rights standards.

**I. Ill-treatment of persons with disabilities**

People with disabilities have historically never been immune from horrendous forms of ill-treatment. Although the killing of disabled babies at Mount Taygetos in ancient Sparta,\(^8\) or the medieval practice of locking away “crazy” people in “madmen’s towers”\(^9\) would be unacceptable today, at closer look it seems that these practices have simply been transformed rather than abandoned. The twentieth century witnessed the rise of the eugenics movement, Nazi Germany’s plan of complete extermination of people with disabilities during World War II, and the political abuse of psychiatry in the Soviet bloc.\(^10\) The plight of political dissidents falsely declared disabled and placed in psychiatric institutions for political reasons has been well documented since the fall of Communism,\(^11\) but as Lewis observes, “for each political prisoner there were hundreds of people with mental disabilities languishing in the same institutional regime and suffering the same discipline and abuse”.\(^12\) Little attention has been paid to their suffering,\(^13\) and

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\(^7\) Gerald Quinn et al, *supra* note 4, at 134.
\(^12\) Lewis, *supra* note 62, at 294.
their situation has improved little since the fall of Communism. As the below analysis will show, at the beginning of the third millennium, people with disabilities are still subject to various forms of ill-treatment that should have been eradicated a long time ago.

Of course, people with disabilities can and do become victims of ill-treatment not only on the account of their disability. For example, in countries where ill-treatment of prisoners is common, if incarcerated, they are in risk of physical violence just as any other person is. This article is concerned only with practices specific to persons with disabilities. In other words, from all the various forms of ill-treatment inflicted on them, I concentrate only on those suffered because of their disability, and specifically on those which I consider widespread and typical forms of abuses.

In the absence of clear legal standards, there is some uncertainty over which abuses committed against persons with disabilities could be considered torture or inhuman or degrading treatment. This problem is exacerbated by the absence of clear definitions in many jurisdictions. In the below analysis I will follow the approach of the European Court of Human Rights, which considers “ill-treatment” as an umbrella term encompassing torture, inhuman treatment and degrading treatment. Concerning the definitions of these three forms of ill-treatment, the Court considered that a special stigma is attached to the term “torture”, therefore only “deliberate inhuman treatment causing very serious and cruel suffering” could fall under it. The Court did not provide an exhaustive definition of inhuman treatment, it only held that it “covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable”. Degrading treatment was defined as treatment that arouses in its victims “feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”.

There is thus no clear-cut division between the various forms of ill-treatment prohibited by Article 3 of the European Convention. A treatment that is inhuman can also be degrading. The difference between inhuman treatment and torture lies in the intensity of suffering experienced by the victim, therefore the same act can be qualified differently in different circumstances. Contrary to the United Nations Convention Against Torture, the European Court does not strictly require “purpose”, such as obtaining confession, punishment or coercion, to constitute a necessary element of the finding of torture, although it obviously constitutes an important factor.

Not all forms of abuse are prohibited. The European Court held that ill-treatment must attain “a minimum level of severity” if it is to fall within the scope of the Article 3;

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15 Which is not to deny that within prisons, they can experience additional violations of their rights compared to other prisoners on the account of their disability.
16 Ireland v. the United Kingdom, supra note 11, § 167.
17 Greek case, supra note 11.
18 Ireland v. the United Kingdom, supra note 11, § 167.
19 Ireland v. the United Kingdom, supra note 11, § 167.
20 Selmouni v. France, supra note 5, § 98.
the assessment of this minimum level depends on “all of the circumstances of the case and the nature and context of the treatment, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”. Therefore the victim’s disability can be important in establishing a violation of the European Convention. Practices that could be considered permissible for non-disabled persons can be prohibited against a disabled individual. However, the subjective feeling of the victim is not decisive. A widely held prejudice against persons with mental disabilities is that they do not feel pain, therefore violence against them is permissible. The European Court, however, considered, that “there are circumstances where proof of the actual effect on the person may not be a major factor”. Treatment of a mentally ill person can constitute inhuman treatment “even though that person may not be able, or capable of, pointing to any specific ill-effects”. Some practices are thus outlawed regardless of the perpetrator’s correct or incorrect views about the victim’s subjective experience.

In the below analysis I will look at examples of widespread abuses committed against persons with disabilities, and contrast these with the European Court’s above-described standards. Classifying these practices as ill-treatment in the absence of authoritative court decisions could be regarded as subjective. However, as the central thesis of this article is that the legal system has been notoriously unresponsive to the abuses faced by people with disabilities, limiting our description to court decisions would exclude exactly those types of violations of international law that should be of the most central concern. To mitigate subjectivity, to the extent possible my analysis relies on the decisions of the European Court declaring similar abuses to violate Article 3 of the Convention in other areas.

Inhuman and degrading living conditions – A number of reports have exposed intolerable living conditions in institutions for people with disabilities. These found overcrowding, insufficient heating, lack of access to showers and bathroom facilities.

Many institutions are overcrowded, often housing more than 10 residents per room. In Bulgaria, residents of social care homes have on average 2 to 3 square meters of space in the dormitories, which includes the area occupied by the bed. There are

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21 Ireland v. the United Kingdom, supra note 11, § 162.
23 Id. at 3.
24 Keenan v. the United Kingdom, no. 27229/95, April 3, 2001, § 113.
25 Id. § 113.
27 Lewis, supra note 62, at 297.
28 Bulgarian Helsinki Committee, The Archipelago of the Forgotten: Social Care Homes for People with Mental Disorders in Bulgaria 17 (2005).
29 Id. at 18.
institutions with 20 residents per room. While in some places residents are free to use the institution’s yard, in others leaving the building is strictly forbidden. The Czech Ombudsman noted that residents of a care home for persons with mobility impairments are in this respect in a worse situation than prisoners, because prisoners are guaranteed an hour of outdoor exercise per day by the law, while residents of the institution virtually never leave the building.

Access to bathing facilities is grossly inadequate, ranging from no showers at all in the winter to one shower per week without towels for women with disabilities in a Romanian institution. Where facilities are available, showers can be reduced to one per week as a punishment, as it was customary in a Czech child institution.

Sanitary facilities in many institutions are not only dirty but also inaccessible in the winter, resulting in residents relieving themselves in their beds. In a Czech institution, residents with mobility impairments were found to be forced to defecate to a mobile toilet in their room in front of each other without any cover. The worst is the condition of bedridden residents, who are not taken to the toilet, but only cleaned sporadically by staff. In a Romanian child institution, when investigators lifted the sheets, they “found many children left sitting in their own urine and feces. The stench of human excrement was overpowering”.

The lack of heating is a serious problem in some countries. Investigators of the Mental Disability Rights International (MDRI) found Serbian institutions with little or no heat in the winter. It is common for Bulgarian institutions to have no central heating, and to heat the rooms for a few hours only some days of the week. Heating is often provided by coal stoves, which presents a high fire risk, especially if the floor is “untreated wood”.

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31 Otakar Motejl, Veřejný ochránce práv - Ombudsman, Zpráva z Návštěv Zařízení (Ústavy Sociální Pěče) [Report on the visit of institutions (Social Care Homes)] § 64 (2006).
32 Amnesty International, supra note, at 5.
33 Michael Perlin, supra note 85, at 343.
35 Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003, CPT/Inf (2004) 23, § 25 (June 24, 2004) [hereinafter CPT Bulgaria 2003 report].
36 Motejl, supra note 97, § 115.
38 Mental Disability Rights International, Torment not Treatment: Serbia’s Segregation and Abuse of Children and Adults with Disabilities vii (2007).
40 Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 April to 7 May 1999, CPT/Inf (2002) 1, § 170 (January 28, 2002) [hereinafter CPT Bulgaria 1999 report].
All the above problems are factors which are taken into account by the European Court of Human Rights in deciding whether living conditions in a place of detention meet the threshold of inhuman or degrading treatment. There have been a number of violations found in cases of prisons or police detention centers, the conditions of which were often better compared to those described above.\textsuperscript{41} However, so far only one person with a disability has been successful in complaining about the living conditions in his or her institution, the applicant in the case of \textit{Stanev v. Bulgaria}, a resident of the Pastra Social Care Home.\textsuperscript{42}

\textbf{Lack of privacy} – Although it is related to living conditions in general, the European Court singled out for separate criticism situations where persons are stripped naked in front of staff-members of the other sex. For example, in the case of \textit{Valasinas v. Lithuania} it held that a body search carried out this way amounted to degrading treatment and constituted a separate violation of Article 3.\textsuperscript{43}

Compared to the isolated incident is \textit{Valasinas}, exposure of their naked body to others is a daily experience of many persons with disabilities. One commentator noted male residents walking around totally naked and female residents only partly covered in an institution.\textsuperscript{44} Shower in front of staff of the other sex is also common. The Czech Ombudsman noted with concern the practice of bathing residents with mobility impairments by staff of the other sex and in the presence of residents of the other sex.\textsuperscript{45} This practice is even more curious in the case of girls regularly taking showers under the supervision of male staff in places where male employees are very scarce because they are hard to attract.\textsuperscript{46} Some reports also noted lack of partitions between toilets and showers.\textsuperscript{47} These seemingly unreasonable practices can be only explained by complete disregard to the dignity of people with disabilities, to the extent that their disability becomes the only “justification”. What would be unacceptable for “normal” people, suddenly seems fine when is done to persons with disabilities. This commonly held prejudice seems to be the underlying cause of many abuses taking place in institutions,\textsuperscript{48} of which the above are only an example.

Residents’ lack of privacy is also violated by practices such as prohibition to wear their own clothes and forcing them to wear pyjamas\textsuperscript{49} or old army uniforms,\textsuperscript{50} shaving

\textsuperscript{41} See for example \textit{Peers v. Greece}, supra note 21.
\textsuperscript{42} \textit{Stanev v. Bulgaria}, no. 36760/06, January 17, 2012.
\textsuperscript{43} \textit{Valasinas v. Lithuania}, supra note 16, § 117.
\textsuperscript{44} Perlin, \textit{supra} note 85, at 346.
\textsuperscript{45} Motejl, \textit{supra} note 97, § 112.
\textsuperscript{46} \textit{Bulgaria’s abandoned children} (BBC Four, 2007).
\textsuperscript{47} Lewis, \textit{supra} note 62, at 297.
\textsuperscript{49} Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 March to 7 April 1995, CPT/Inf (97) 1 [Part 1], § 200 (September 25, 1995) [hereinafter CPT Bulgaria 1995 report].
\textsuperscript{50} Kanev, \textit{supra} note 110, at 442.
their heads,\textsuperscript{51} and a general prohibition to keep private items at their disposal,\textsuperscript{52} although it is unclear whether these would constitute degrading treatment under Article 3. Shaving of a prisoner’s head was condemned by the European Court in \textit{Yankov v. Bulgaria},\textsuperscript{53} but in that case its purpose was the victim’s humiliation and punishment, not mere disregard to his private life. In 2004, a Hungarian court found that forcing residents to wear pyjamas during the day as a punishment for violation of house rules constituted degrading treatment, and forbade the practice.\textsuperscript{54}

**Inadequate healthcare** – The European Court has held that persons in the disposal of authorities should be provided with adequate medical care.\textsuperscript{55} In the case of \textit{McGlinchey v. the United Kingdom} it went into great details in reviewing the steps of a prison’s medical services, which failed to prevent the death of a prisoner suffering from heroin withdrawal symptoms.\textsuperscript{56} This suggests that the Court is likely to exercise a very careful scrutiny over failures to provide adequate care to detainees.

Many people with disabilities have very limited access to medical care.\textsuperscript{57} This is often caused by the inability of institutions to employ medical personnel,\textsuperscript{58} caused in turn by the low salaries and the inability of professionals in the remote locations these institutions are placed.\textsuperscript{59} The CPT noted with concern the lack of medical professionals in Bulgarian institutions, and recommended the immediate increase of their numbers.\textsuperscript{60} Amnesty International found that 40\% of residents of the Batoshevo institution suffered from tuberculosis caused by “poor living conditions, nourishment and inadequate medical care”.\textsuperscript{61} Dental care seems to be especially problematic.\textsuperscript{62} MDRI found people of all ages missing teeth in institutions.\textsuperscript{63}

Unavailability of professionals is not the only reason for the neglect of people with disabilities. As a Slovakian report noted, doctors are often little concerned about the health of residents of institutions, as they consider their treatment “pointless”.\textsuperscript{64} Therefore they are rarely visiting the institutions, often do not respond to emergency calls, and insist that the institutions, which have no doctors, should “take care” of their residents. One

\begin{itemize}
\item \textsuperscript{51} \textit{Videnova v. Bulgaria}, no. 33063/2005, unreported.
\item \textsuperscript{52} Motejl, \textit{supra} note 97, at 108.
\item \textsuperscript{53} \textit{Yankov v. Bulgaria}, \textit{supra} note 17, § 118.
\item \textsuperscript{54} Somogy Megyei Bíróság [Somogy Regional Court], No. 1.P.f.21.637/2003/5, unreported (January 15, 2004).
\item \textsuperscript{55} Ilhan v. Turkey, no. 22277/93, July 27, 2000; see also the analysis of the \textit{Hurtado v. Switzerland} case in Neziroglu, \textit{supra} note 26, at 15.
\item \textsuperscript{56} \textit{McGlinchey and Others v. the United Kingdom}, \textit{supra} note 20, § 57.
\item \textsuperscript{57} Winick, \textit{supra} note 114, at 538.
\item \textsuperscript{58} Kaney, \textit{supra} note 110, at 460.
\item \textsuperscript{59} Id. at 466.
\item \textsuperscript{60} CPT Bulgaria 1995 report, \textit{supra} note 127, § 179 (September 25, 1995).
\item \textsuperscript{61} Amnesty International, \textit{supra} note 96, at 4.
\item \textsuperscript{62} Lewis, \textit{supra} note 62, at 297.
\item \textsuperscript{63} Mental Disability Rights International, \textit{supra} note 107, at 44.
\item \textsuperscript{64} ANNWIN, \textit{Dodržiavanie Ľudských Práv v Zariadeniach Sociálnych Služieb na Slovensku} [Satisfying Human Rights in Social Service Institutions in Slovakia], Report for the International Helsinki Federation, 3 (2005).
\end{itemize}
doctor summarized the rationale behind this approach when being asked to help to resuscitate a child from an epileptic shock the following way: “perhaps it would be better to leave the child to die”.  

Many residents are also often severely malnourished. The daily food allowance in Bulgarian institutions amounted to 0.5 USD in Bulgarian institutions in 1998, which was barely enough for survival, and even decreased in the following years. Even this meager amount falls to the prey of corruption: the Bulgarian Helsinki Committee found residents eating “boiled lettuce” as the main meal for a whole month, when they, according to the kitchen records, should had eaten six kilos of veal.

Lack of medical care, nutrition and heating results in alarming mortality rates, despite the fact that residents of institutions represent all age groups. Amnesty International reported that 27 out of the 140 residents of the Dragash Voyvoda home died in the winter of 2001/2002 due to the lack of medical treatment. They died out of untreated pneumonia, as neither they, nor the institution could afford to pay for antibiotics. No deaths took place during the summer.

The care many institutions are providing is thus wholly inadequate. As one documentary about a Bulgarian child institution exposed, children with severe conditions were left without essentially any medical attention. Gangrene was taken care by amputation; a broken leg was not treated and not even noticed for some time at all. A nurse working in the institution explained that unless the severely malnourished and neglected children have high temperature, they are fine, and do not need and will not get any care. Apparently noticing a broken leg was not part of her job description.

Meeting special needs – In the case of Price v. UK, the European Court had ruled that placing the applicant, a four-limb deficient thalidomide victim with kidney problems in a police cell not accommodated to meet her special needs violated Article 3 of the Convention. The Court considered that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.

The Convention thus requires that public authorities accommodate the special needs of disabled persons if they exercise control over them, for example in police cells.

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65 Id.
66 Kanev, supra note 110, at 465.
67 Id.
69 Id.
70 Bulgaria’s abandoned children (BBC Four, 2007).
71 Id.
or prisons. A similar conclusion was reached by the UN Human Rights Committee in the case of *Hamilton v. Jamaica*.73

Such a reasonable accommodation should go without saying in the case of institutions established to care for people with disabilities. However, most of the institutions in post-communist Europe are placed in buildings which are completely unsuitable for the purpose they are supposed to serve. Their facilities typically consist of rural mansions of noble families nationalized by the Communist regime, or ex-army barracks, typically with huge rooms, inaccessible facilities,74 and unable to provide the necessary therapeutic environment.75 Wheelchairs are often not available,76 or not used for staff convenience, and persons with mobility impairments might be forced to crawl on the floor, or stay in their rooms around the clock.77 As a result, many residents become bedridden, as the Czech Ombudsman noted in his report.78

Violence – Violence against detainees belongs to the typical forms of ill-treatment which the European Court had the opportunity to criticize on a number of occasions.79 Claims of physical violence from institutions of persons with disabilities have never reached the European Court, but that is far from suggesting that these would be violence-free areas. Although violence is particularly difficult to document, reports suggest that both staff-on-resident and resident-on-resident physical abuse takes place in many of them. The CPT for example noted that physical punishment of residents was common in Bulgarian institutions, and was particularly concerned about the use of heavy cudgels, steel pipes, and wooden sticks, which seemed to belong to the ordinary equipment of Bulgarian care homes.80 Physical punishments were also regularly inflicted on children.81 Another report about Bulgaria found that in some institutions violence during the night was so widespread that nurses were afraid to leave their rooms, they locked themselves in and did not respond to calls from residents.82 MDRI observed residents attacked by other residents in Kosovo’s institutions, and others in possession of sticks and knives.83 They found that one resident was beaten to death with an iron bar by another resident.84 Amnesty International also found residents killed by their peers in Bulgaria.85

75 ANNWIN, *supra* note 142, at 1.
76 Motejl, *supra* note 97, § 62.
78 Motejl, *supra* note 97, § 63.
79 See for example *Tomasi v. France*, *supra* note 11; *Aksoy v. Turkey*, *supra* note 42; *Mathew v. the Netherlands*, *supra* note 19.
81 Bulgaria’s abandoned children (BBC Four, 2007).
84 Id.
Violence is not only widespread; it is often officially tolerated. When a Bulgarian director of a child institution was confronted with evidence about one of her employees regularly beating up residents, she reluctantly responded that she had been well aware of the situation, but now that it had been exposed she would have to fire the abusive staff member, which would be very inconvenient because she would have to find a substitute.\footnote{Bulgaria’s abandoned children (BBC Four, 2007).} In a Slovakian institution, the director himself was delivering the physical punishments.\footnote{ANNWIN, supra note 142, at 4 (2005).} Another widely publicized event from Slovakia also showed some insights into the functioning of institutions. A resident with intellectual disability of the Rokytovce nad Ondavou care home was beaten to death on January 6, 2006.\footnote{Lucia Laczkó, Naozaj vrah? [Really a murderer?], Pus 7 dní 4/06, January 23, 2006.} It turned out that he was punished for his attempted escape by one of the staff members, who tied him to a bed and told three other residents to beat him with sticks, and then left the room. After returning, he realized that the victim had died. A criminal investigation against the staff member was reluctantly initiated after the media exposed the events, emphasizing what a great employee he was and how well he cared about his family, suggesting that the life of a “crazy” resident whom nobody would miss was not worth the hassle.\footnote{Id.} The most shocking feature of the whole incident was the fact that this kind of punishment had apparently been common in the institution.\footnote{Viera Šimkovičová, Obete ľahostajnej krutosti [Victims of indifferent cruelty], SME, January 6, 2008.}

The prejudice that life and health of persons with disabilities is less valuable than that of others,\footnote{Lawson, supra note 91, at 570.} and therefore violence against them is more acceptable, is a recurrent theme of institutional care, and often of life in the community as well.\footnote{Don MacKay, The United Nations Convention on the Rights of Persons with Disabilities, 34 Syracuse J. Int’l L. & Com. 323, 325 (2007).} Pilot studies conducted in Australia and the U.S. showed that people with disabilities are more likely than others to experience physical violence even if living in the community.\footnote{Mark Sherry, Hate Crimes Against People With Disabilities, available at \url{http://www.wwda.org.au/hate.htm} (last visited April 1, 2010); Leslie Myers, People with Disabilities and Abuse, available at \url{http://www.ilru.org/html/publications/readings_in_IL/abuse.html} (last visited April 1, 2010).} According to the World Health Organisation’s (WHO) World Report on Disability persons with disabilities are 4-10 times likelier to become victims of abuse and violence than their non-disabled peers.\footnote{World Health Organization and the World Bank, World Report on Disability (Geneva: World Health Organization and the World Bank, 2011).}

**Sexual violence** – Institutions by their nature promote an unnatural way of life. Sex in them is present as a hidden, unnatural phenomenon. A report about Slovakian institutions has exposed how co-education was handled in that country. After the fall of Communism, the directors of the previously male- or female-only institutions responded to the requirement of coeducation by exchanging a few residents, for example by swapping 5 women from a female institution with 5 men from a male institution. As a
result, the 5 women placed in the male institution would soon become involuntary prostitutes for the male residents.\textsuperscript{95}

Rape and sexual violence was also reported from institutions in Kosovo. Staff reported that rape among residents constituted “normal practice”, and in the absence of complaints authorities chose to pretend that abuse and coercion do not exist.\textsuperscript{96} Perhaps the most bizarre form of official tolerance of rape has been reported from the Shtime institution, where staff facilitated the rape of a female resident by a male resident “to calm her down” if she became restless.\textsuperscript{97} Most of the children residing earlier in that institution showed signs of having been sexually abused.\textsuperscript{98}

Sexual violence of course does not take place only among residents, rape by staff members occurs as well. An incident exposed that in a Czech institution female residents were regularly raped by a male caregiver. After one of the victims decided to go through the pains of criminal prosecution, the institution backed up the abusive employee, the charges were dropped and he continued to be employed in the institution.\textsuperscript{99} In a Bulgarian institution, according to the director, medical examinations confirmed that as a result of rape by male caregivers none of the girl residents, aged 12 to 18, were virgins.\textsuperscript{100}

Rape was considered to amount to torture by the European Court,\textsuperscript{101} and sexual violence against a male prisoner was also an important element in finding torture in another case.\textsuperscript{102} The European Court has not yet ruled on the case of forced sterilizations or forced abortions, but there is no doubt that these practices would constitute at least inhuman treatment under Article 3.

Restraints – Various measures are used around the World to restrain “agitated” or “restless” persons with disabilities. Leather straps and tying to bed seem to be universally popular, but are certainly not the only form used in institutions. Four Central European countries (Hungary, the Czech Republic, Slovakia and Slovenia) became infamous for the use of “cage beds” in their institutions, as exposed by the 2003 report of the Mental Disability Advocacy Center.\textsuperscript{103} Cage beds are regular hospital beds with a metal frame installed on the top, with metal bars or netting (these are also known as “net beds”) on each side. They resemble a small cage, hence the name. Residents are locked in the beds for reasons of restlessness,\textsuperscript{104} confusion (one justification for their use is that they prevent

\begin{itemize}
  \item[\textsuperscript{95}] ANNWIN, supra note 142, at 3.
  \item[\textsuperscript{96}] Mental Disability Rights International, supra note 178, at 8.
  \item[\textsuperscript{97}] Id. at 10.
  \item[\textsuperscript{98}] Id. at 12 (2002).
  \item[\textsuperscript{100}] Bulgaria’s abandoned children (BBC Four, 2007).
  \item[\textsuperscript{101}] Aydin v. Turkey, supra note 13.
  \item[\textsuperscript{102}] Selmouni v. France, supra note 5.
  \item[\textsuperscript{103}] Mental Disability Advocacy Center, Cage Beds: Inhuman and Degrading Treatment in Four EU Accession Countries (2003).
  \item[\textsuperscript{104}] David Zahumenský, Jsou klecové lůžka nelidská a ponižující? [Are cage-beds inhuman and degrading?], 6 Via Iuris 34, 35 (May 18, 2006).
\end{itemize}
elderly residents from “falling”),\textsuperscript{105} as punishment,\textsuperscript{106} and often simply for staff convenience, as admitted by a Slovak psychiatrist.\textsuperscript{107} Some places use the beds regularly during the nights to prevent residents going to the toilet and “disturbing” others.\textsuperscript{108} The length of placement varies from a few hours to some residents, including small children, spending their entire lives in them.\textsuperscript{109}

Since 2003, Hungary has banned the use of cage beds, and Slovenia has also withdrawn them entirely. Slovakia forbade their use in social care institutions and continues to use them in psychiatric institutions, while the Czech Republic still uses them in all types of institutions, and has so far rejected any requests to ban them despite newer documentaries and reports exposing the abuses. Even a death of a mentally disabled woman locked in a cage bed in the cellars of an institution, who suffocated from eating her own feces after hours of attempts to attract the attention of staff, has not shaken the belief of Czech authorities in cage beds being an appropriate method of “care” for the disabled in the 21st century.\textsuperscript{110}

Cage beds are, however, not the most extreme form of restraints. Researchers found women chained to walls\textsuperscript{111} and in outdoor cages in Bulgaria\textsuperscript{112} and Nicaragua.\textsuperscript{113} In other places, staff uses residents to guard others to be kept in their room and bed in order to prevent them leaving the institution without permission.\textsuperscript{114} Chains, leather straps, handcuffs are also widely used.\textsuperscript{115} In Slovak institutions, after the withdrawal of cage beds it became common to restrain “difficult” residents to their beds for whole nights for staff convenience.\textsuperscript{116} In Serbia, researchers found several men restrained to beds during the day, and a 21 year old boy who had never been let out of his crib in 11 years.\textsuperscript{117}

Isolation is also widely used, often as a punishment, including the punishment of children for “misbehaving”.\textsuperscript{118} Similarly widespread is the use of heavy medication, also known as “chemical restraints”, to control residents in the absence of adequate staff.\textsuperscript{119}

\textsuperscript{105} Eliška Bártová & Ludvík Hradílek, Ústavy stále zavírají lidi do klecí [Institutions still lock people into cages], Akutálně, April 7, 2006.
\textsuperscript{106} Mental Disability Advocacy Center, \textit{supra} note 207, at 32.
\textsuperscript{107} Pacient: Putá sú horšie ako klietka [Patient: Handcuffs are worse than cages], SME, July 15, 2004.
\textsuperscript{108} Ad: Humanisti z Bradavíc [Humanists from Bradavice], SME, July 16, 2004.
\textsuperscript{109} Stredověké mučení českých detí [Medieval torture of Czech children], Britské listy, June 14, 2004.
\textsuperscript{111} Szeli, \textit{supra} note 89, at 353.
\textsuperscript{112} Amnesty International, Bulgaria: Disabled women condemned to ‘slow death’, EUR 15/002/2001 (October 10, 2001).
\textsuperscript{113} Perlin, \textit{supra} note 85, at 347.
\textsuperscript{114} Amnesty International, \textit{supra} note 96, at 6.
\textsuperscript{115} Kanev, \textit{supra} note 110, at 462.
\textsuperscript{116} ANNWIN, \textit{supra} note 142, at 2.
\textsuperscript{117} Mental Disability Rights International, \textit{supra} note 104, at v-vi (2007).
\textsuperscript{118} Děti v léčebně dostávaly injekce i za trest [Children in the hospital received injections also as punishment], Mladá Fronta Dnes, July 13, 2004.
\textsuperscript{119} Mental Disability Rights International, \textit{supra} note 104, at 12 (2007); Amnesty International, \textit{supra} note 100, at 6.
The CPT\textsuperscript{120} and the UN Human Rights Committee\textsuperscript{121} have both condemned the use of cage beds as constituting inhuman treatment. The use of other restraints is also subject to carefully weighed standards, and they can never be used as a punishment.\textsuperscript{122} The practice of applying them by unqualified staff without medical supervision\textsuperscript{123} for prolonged periods (days, sometimes weeks)\textsuperscript{124} is simply unacceptable,\textsuperscript{125} and also outlawed in most countries; nevertheless it widely occurs.\textsuperscript{126}

The European Court has considered the use of restraints in a psychiatric institution in the infamous \textit{Herczegfalvy v. Austria} case, in which it concluded that despite the troubling length of their application it would not find them to constitute inhuman treatment if their use was a “therapeutic necessity”.\textsuperscript{127} This standard was thought to provide very wide deference to medical practitioners, and was considered by Lewis as one of the main reasons why so few complaints concerning psychiatric care reach the European Court.\textsuperscript{128}

\textbf{Forced medication} – the separate treatment of persons with disabilities by the law is perhaps the most apparent in the approach to medical treatment. Persons with psychosocial disability, or “mental illness”, can be legally administered medication without their consent in most if not all countries of the World on certain grounds, such as dangerousness or lack of capacity. The European Court of Human Rights has been so far very deferential to forced medication if procedural standards were met and doctors were involved in the decision-making.\textsuperscript{129} The Court did not take the opportunity to condemn forced medication even when the proceedings were flawed and it found a violation on procedural grounds.\textsuperscript{130}

Institutions provide many examples of practices that are or should have been outlawed. Surgical castration is still practiced in some countries,\textsuperscript{131} as is ECT applied in its unmodified form,\textsuperscript{132} or against the person’s will.\textsuperscript{133} Biomedical research on residents

\begin{itemize}
\item\textsuperscript{121} U. N. Human Rights Committee, \textit{Concluding observations: Slovakia}, CCPR/CO/78/SVK, § 13 (August 22, 2003).
\item\textsuperscript{123} Mental Disability Advocacy Center, \textit{Report: Towards a positive legislative framework for people with disability in the Republic of Croatia: a gap analysis}, 43 (2008).
\item\textsuperscript{124} Kanev, \textit{supra} note 110, at 463.
\item\textsuperscript{125} UN General Assembly, \textit{Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary-General}, A/63/175, § 55 (July 28, 2008).
\item\textsuperscript{127} \textit{Herczegfalvy v. Austria}, no. 10533/83, September 24, 1992, § 82.
\item\textsuperscript{128} Lewis, \textit{supra} note 126, 305 (2002).
\item\textsuperscript{129} See \textit{Winterwerp v. Netherlands}, \textit{supra} note 34, § 42.
\item\textsuperscript{130} \textit{Shuktakurov v. Russia}, no. 44009/05, March 27, 2008, § 128.
\item\textsuperscript{131} \textit{Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, § 103 (July 12, 2007).
\item\textsuperscript{132} Kanev, \textit{supra} note 110, at 460.
\end{itemize}
sometimes takes place without their consent and knowledge. Excessive, therapeutically unjustified amount of medication is often used to manage difficult behavior in the absence of staff, or as punishment. Concerning medication for therapeutic purposes, it is difficult to talk about consent in the case of persons with intellectual disability living in institutions, who are medicated without ever being asked about it, or without ever being informed about their “right” to refuse medication. In one reported case, a resident was forced to take 1800 (!) pills monthly until a psychiatrist examined him and reduced the amount. If any form of forced medication is to be considered inhuman treatment, this massive violation of informed consent should be top on the list.

All these practices are standard medical procedures in their respective countries, permitted by and performed in accordance with law. They continued existence is a troubling reminder of the gap between the formal equality of persons with disabilities and the reality governed by “exceptions” and medical rules. If protection from ill-treatment has any meaning in international law, victims of these practices must have at least an arguable claim that the medical practices currently widely accepted, and of course those generally condemned, should be subject to much stricter judicial scrutiny, and many of them should be outlawed.

Conclusion – The above examples show that persons with disabilities are frequently subject to practices violating international standards. While I do not suggest that all forms of ill-treatment take place on a daily basis, the problem should also not be minimized, because the reported abuses are only the tip of the iceberg.

Theresa Degener classified the ill-treatment of persons with disabilities to two main categories: torture through the medicalization of ill-treatment, and ill-treatment through neglect. Both of these approaches are common in institutions. In addition, institutions make their residents more vulnerable to other forms of abuses as well, creating a disability-specific pattern of violence, neglect, rape, and other practices characterized by the victim’s absolute powerlessness and inability to obtain protection.

The above list is of course not exhaustive. For example, some suggest that forced institutionalization as such should be recognized as ill-treatment due to its adverse impact on disabled peoples’ wellbeing. Of course, people with disabilities face ill-treatment not only in institutions, but also in the community. They are more often subject to rape

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134 Kanev, supra note 110, at 460.
136 Lewis, supra note 62, at 298.
137 ANNWIN, supra note 142, at 3.
138 See, for example, Kanev, supra note 110, at 459.
139 U.N. OHCHR, supra note 74, at 11.
140 International Disability Caucus, supra note 50.
and violence, and their lives are put in danger by neglect and inadequate medical care. The description therefore concentrated only on practices that are specific to persons with disabilities, and are in violation of established substantive international standards. The gap between the massive scale and severity of these abuses and the lack of response by international bodies, notably the European Court of Human Rights, suggests that the enforcement mechanisms of the protection against torture are systematically failing to take account of the situation of persons with disabilities.

II. The obligation to investigate torture in international law

Despite its absolute prohibition, the World is far from eliminating torture and other forms of ill-treatment. The case-law of the European Court of Human Rights provides ample examples of it taking place even in established democracies of Western Europe, not to mention countries of the former Communist block. States have responded to this “plague of the second half of the twentieth century” by creating new legal mechanisms to combat it, for example by requiring governments to regularly monitor places of detentions where ill-treatment is most likely to occur. International law, however, contains another highly effective, yet often overlooked tool to combat torture, the obligation to investigate ill-treatment. Although the concept as such was already recognized in the text of the United Nations Convention Against Torture adopted in 1984, it gained particular significance when it was adopted by the European Court of Human Rights, which created a very detailed set of requirements for its enforcement. Since then the doctrine has played a crucial and successful role in the Court’s fight against torture in the European region, and its success has inspired bodies in other jurisdictions as well.

This chapter will describe the origins of the obligation to investigate ill-treatment, and will analyze in detail its content as developed in international law. Since the European Court of Human Rights has made use of it to the greatest extent, and has developed the most detailed standards for its enforcement, my analysis will focus mostly on its jurisprudence, noting the occurrence of the doctrine in other jurisdictions as well.

A. The doctrine’s development – Article 3 of the European Convention on Human Rights states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The Convention does not provide a definition of the various forms of ill-treatment, nor does it specify what obligations follow from the prohibition.

141 MacKay, supra note 187, at 325; UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary-General, A/63/175, § 68 (July 28, 2008).
144 U.N. Economic and Social Council, Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, E/CN.4/1986/15, § 1 (February 19, 1986).
These have been gradually developed by the jurisprudence of the European Court of Human Rights.

The European Court has always approached the Convention as a “living instrument”, interpreting it in the light of present day conditions, and going beyond its text if justice and fairness so required. As the early judgment of Artico v. Italy phrased it, “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”. This victim-friendly approach has been typical for the European Court, and underlies the developments in its case-law relating to torture.

Article 3 of the European Convention was initially interpreted as imposing only a negative obligation on states and their agents to refrain from ill-treating persons in their jurisdictions. The first cases were concerned with “classic” physical violence against suspects and prisoners, but as allegations of newer forms of abuse reached the Court, the list of prohibited actions expanded. Besides beating, rape, torture by electricity or cold showers, the European Court has also found a violation of Article 3 on the account of invasive body searches, forced haircuts, force-feeding of hunger-strikers, solitary confinement, or not providing adequate medical care to an ill prisoner. The numerous complaints concerning the physical conditions of detention constitute a specific body of decisions, where the European Court considers factors such as overcrowding of prisons, their temperature, hygienic conditions, and access of prisoners to natural light and outdoor exercises.

Although the list of prohibited acts has been growing dynamically, some applicants were still unsuccessful before the European Court. Torture often takes place in isolated places, without the presence of outside observers, so it is often impossible for victims to meet the high burden of proof required by the Court. As Judge Bonello’s famous separate opinion in the case of Sevtap Vezneradoglu v. Turkey put it,

“[e]xpecting those who claim to be victims of torture to prove their allegations “beyond reasonable doubt” places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive

146 Tyrer v. the United Kingdom, supra note 5, § 31.
147 Artico v. Italy, no. 6694/74, judgment May 13, 1980, § 33.
155 Neverzhitsky v. Ukraine, no. 54825/00, April 5, 2005.
156 Mathew v. the Netherlands, no. 24919/03, September 29, 2005.
and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim’s complaint is almost invariably confronted with the negation “corroborated” by many.  

Acknowledging the evidential burden and its unfair impact on victims resulted in the first procedural innovation of the European Court: the shifting of the burden of proof to the state authorities in certain circumstances. As the Court summarized its approach: where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention.

Therefore, sometimes the victim’s injuries themselves constitute sufficient evidence of ill-treatment. If the respondent government cannot explain the source of these injuries, the European Court will rule in favor of the applicant.

The position of some victims, however, did not improve even with loosening the evidentiary requirements. Torture takes many forms, and apart from the limited circumstances when a person suffers well-documented injuries that clearly occurred at the time of detention, the shift of the burden of proof is an inadequate remedy. If there are no injuries (for example, in the case of psychological ill-treatment), or if they are not well documented, or if they could have been caused by various means, the victim still faces evidentiary difficulties. The European Court, which deals with the complaints several years after the events leading to them took place, was often confronted with cases with contradictory or missing factual information. In the case of Assenov v. Bulgaria the Court responded to these situations in an innovative way. It stated that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention”, requires by implication that there should be an effective official investigation.

The Court with this decision created a new, “procedural” obligation under Article 3 of the Convention, which requires states to effectively investigate all allegations of ill-treatment. In doing so it followed its own jurisprudence under Article 2 of the

159 Veznedaroğlu v. Turkey, supra note 14, partly dissenting opinion of Mr. Bonello.
160 Tomasi v. France, supra note 11.
161 Selmouni v. France, supra note 5, § 87.
162 See for example Tomasi v. France, supra note 11.
163 For a description of the recognition of psychological ill-treatment in international law, see Irfan Neziroğlu, A Comparative Analysis of Mental and Psychological Suffering as Torture, Inhuman or Degrading Treatment or Punishment under International Human Rights Treaty Law, 4 Essex Hum. Rts. Rev. 1 (2007).
Convention guaranteeing the right to life, where it has established a similar procedural obligation in the 1995 decision of *McCann and Others v. the United Kingdom*.\(^{165}\)

The obligation to investigate is based on the experience that in many cases the victim does not have access to any evidence. State authorities can make the complaint futile by withholding crucial information, or simply not obtaining it. Since victims’ opportunities to conduct an investigation are much more limited compared to state bodies’, for ill-treatment to be effectively combated it is crucial that authorities be obliged to establish the factual circumstances of all allegations of ill-treatment. According to the European Court,

[i]f this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance…would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.\(^{166}\)

Of course, some form of an obligation to investigate torture had already existed in probably every national legal order of the World. The innovativeness of the *Assenov* decision lies in extending the protection of Article 3 to this area. Before *Assenov*, if the domestic authorities did not gather the necessary information, the European Court had no option but to reject the application on the ground that there was not enough evidence to establish whether torture had taken place. Since *Assenov*, the Court can find a violation of Article 3 under its “procedural limb” where a “substantive” violation of Article 3 cannot be proven, but where the state authorities did not investigate the allegations effectively.\(^{167}\) This has far reaching consequences, since it is not the domestic authorities but the European Court which sets the standards of what such an “effective investigation” should entail. States are thus under an obligation to provide for investigatory mechanisms that satisfy the international requirements, which makes concealing any form of ill-treatment difficult, and provides victims with a new avenue of complaint and a more reasonable chance of success. If the domestic investigation is effective, victims are much more likely to receive redress already at the domestic level, or ultimately at the European Court. If the investigation is not effective, victims can now prevail before the European Court under the procedural limb of Article 3.

The procedural obligation is not an alternative to the substantive obligation, but exists in addition to it. The European Court can find a violation of either of them, or of both if, despite the inadequate domestic investigation, the victim can gather sufficient evidence to substantiate his or her claim of ill-treatment. Only the two obligations together can provide an effective deterrence against ill-treatment. By assumption, better investigative standards lead to less impunity and more frequent punishment of perpetrators, and consequently to the eradication of ill-treatment, or at least some widespread forms of it.

\(^{165}\) *McCann and Others v. the United Kingdom*, no. 18984/9, September 27, 1995.

\(^{166}\) *Assenov v. Bulgaria*, supra note 27, § 102.

\(^{167}\) See for example *McKerr v. the United Kingdom*, no. 28883/95, May 4, 2001.
Since Assenov the European Court has found a number of violations on this procedural ground. A similar obligation was later developed by the Inter-American Court of Human Rights,\(^\text{168}\) the United Nations Committee Against Torture, which decides on petitions lodged under the United Nations Convention Against Torture, and the United Nations Human Rights Committee, which decides communications under the International Covenant on Civil and Political Rights.\(^\text{169}\) Although the Convention Against Torture, adopted in 1984, contains an obligation to investigate ill-treatment in its Article 12, this area had been underdeveloped in the Committee’s jurisprudence. Since Assenov it has relied to a great extent on the more developed case-law of the European Court of Human Rights.\(^\text{170}\)

The obligation to investigate has not been the last invention of the European Court under Article 3 of the Convention. The initial interpretation prohibited only actions carried out by state bodies. Although the list of state agents has been interpreted expansively by the Court to cover not only prison guards and policemen, but also hospital-,\(^\text{171}\) school-,\(^\text{172}\) and airport\(^\text{173}\) authorities, this has proved to be insufficient to cover all possible forms of ill-treatment, the perpetrators of which are often private persons with no links to the state. The Court responded by creating a “positive” obligation on states to protect potential victims from ill-treatment inflicted by private persons.\(^\text{174}\) Of course states cannot be held responsible for all ill-treatment committed in their jurisdiction. The limits of such an obligation must therefore still be clarified by the Court. A few initial decisions showed the potential of this doctrine, and its possible relevance for persons with disabilities.\(^\text{175}\) Therefore, although most ill-treatment discussed in this article is perpetrated by “state agents” in the wide meaning of the term, and the obligation to protect from private persons is therefore less relevant for our purposes, this should not mean to question the importance of the positive obligation to protect. The next few years will tell whether the doctrine will be able to fulfill its potential.

The state’s procedural obligation to investigate was later extended to cover ill-treatment committed by private perpetrators.\(^\text{176}\) Although the labels often seem confusing (the “procedural” obligation is also often referred to as “positive” obligation, even in the Court’s earlier decisions), we can currently distinguish four different obligations a state has under Article 3: a) the “negative-substantive” obligation requires state agents to refrain from inflicting ill-treatment; b) the “negative-procedural” obligation requires

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\(^{169}\) For an example of the Committee’s approach to the procedural obligation, see Motta v. Uruguay, (R.2/11), ICCPR, A/35/40 (29 July 1980) 132, § 16.


\(^{171}\) Winterwerp v. the Netherlands, no. 6301/73, October 24, 1979.

\(^{172}\) Costello-Roberts v. the United Kingdom, no. 13134/87, March 25, 1993.

\(^{173}\) Amuur v. France, no. 19776/92, June 26, 1996.


\(^{175}\) See particularly Z. and Others v. the United Kingdom, no. 29392/95, May 10, 2001.

states to investigate ill-treatment caused by state agents; c) the “positive-substantive” obligation requires states to provide protection from ill-treatment inflicted by private persons; and finally, d) the “positive-procedural” obligations requires states to investigate ill-treatment perpetrated by private persons. The standards of the two procedural obligations are very similar, therefore I will not differentiate between them in the below analysis.

B. The standards of investigation – In the Assenov case, the European Court did not specify the standards against which the effectiveness of a domestic investigation should be measured. These were developed gradually by the Court’s jurisprudence. This includes not only decisions under Article 3 of the Convention, but also Article 2 (the right to life) and Article 13 (the right to an effective remedy), as the standards of investigation under these articles often overlap and supplement each other, especially in cases where ill-treatment of a person results in his or her death, and consequently more provisions of the Convention are engaged.177

The doctrine’s success is due to a great extent to the strictness with which the European Court has enforced it. The obligation to investigate could not be an absolute one in the sense that it would always require a successful establishment of the circumstances of each case. This is objectively not always possible, and therefore it would confront states with a task impossible to meet, and would become counter-productive. If, however, the standards were too relaxed, the doctrine would lack the required deterrent effect and would not achieve its aim of providing compensation to victims and reducing levels of ill-treatment. The obligation would therefore be meaningless if any kind of investigation the domestic authorities come up with would satisfy it. The European Court responded to these competing interests by gradually developing stricter and more detailed rules. The Assenov holding required the investigation to be “effective”, and this initial vagueness, which provided a lot of leeway to domestic authorities, was supplemented by much stricter and more detailed rules that allow the European Court to exercise a very strict scrutiny of domestic investigations.

The standards of an effective investigation developed by the European Court can be classified into five set of requirements:

1. The authorities must act as soon as a complaint is lodged. Even if there has been no official complaint lodged, they should act on their own motion once they receive sufficiently clear indications that torture or inhuman and degrading treatment took place.178 The logic of this requirement lies in the fact that victims of torture are often so traumatized by their experience that they are unable or unwilling to lodge a formal complaint.179 Moreover, if they continue to be detained, they are still at the hands of their torturers, therefore they risk further ill-treatment if they complain.

179 Aksoy v. Turkey, no. 21987/93, December 18, 1996, §§ 97-98.
2. The investigation must be effective in law as well as in practice, which means that it must in principle be able to lead to establishing the circumstances of each case.\textsuperscript{180} It must also be able to lead to the identification and punishment of the responsible persons,\textsuperscript{181} and must not be hindered by acts or omissions of the investigating authorities.\textsuperscript{182} Effectiveness in law therefore requires that the domestic legal order must provide sufficient framework for conducting an efficient investigation – for example, by outlawing the acts of ill-treatment in question, providing adequate competences to the investigating bodies, and allowing for sufficient sanctions to punish the perpetrators.

Concerning effectiveness in practice, the European Court has emphasized a number of times that this “is not an obligation of results, but of means”.\textsuperscript{183} Therefore the investigation does not always have to be successful in the sense that it would confirm that complainant’s version of the facts. The Court acknowledged that allegations of torture are often extremely hard to substantiate if the victim is isolated from the outside world, without access to doctors, lawyers, family and friends, who could help him or her with documenting the injuries and gathering evidence.\textsuperscript{184} Nevertheless, the investigating authorities must take “whatever reasonable steps they can to secure the evidence” concerning the incident,\textsuperscript{185} including, for example, a detailed testimony of the victim, of possible witnesses and perpetrators, forensic reports from various fields, and medical testimony capable to provide an accurate description of the injuries suffered and their possible causes.\textsuperscript{186} Any deficiency in the investigation which can result in an inability to establish the cause of injuries of the persons responsible can result in breaching this requirement.\textsuperscript{187}

The European Court has shown surprising strictness in scrutinizing this requirement. Although the weighing and evaluation of evidence under the European Convention system is in principle in the competence of domestic bodies, the Court did not hesitate to second-guess and overrule their conclusions on a number of occasions. For example, in the case of \textit{Salman v. Turkey} it rejected the autopsy reports of the domestic forensic experts, relying instead on the autopsy reports commissioned by the applicants several months after the events that came to a different conclusion than the Turkish prosecutor.\textsuperscript{188} The Court is also very critical of situations where not all witnesses named by the victim are heard by the domestic authorities.\textsuperscript{189}

3. The investigating authorities must be independent from those implicated in the events. This does not mean only hierarchical or institutional independence, such as prosecutors investigating the actions of subordinate police departments, but also practical

\begin{footnotesize}
\begin{enumerate}
\item Kaya v. Turkey, no. 22729/93, February 19, 1998, § 87.
\item Aksoy v. Turkey, supra note 42, § 98.
\item Aydin v. Turkey, supra note 13, § 103.
\item Edwards v. the United Kingdom, no. 46477/99, March 14, 2002, § 71.
\item Aksoy v. Turkey, supra note 42, § 97.
\item Slimani v. Francie, supra note 40, § 32.
\item Bati and Others v. Turkey, no. 33097/96, June 3, 2004, § 134.
\item Slimani v. France, supra note 40, § 32.
\item The application was lodged by the victim’s wife; Salman v. Turkey, 21986/93, July 27, 2000.
\item Edwards v. the United Kingdom, supra note 46.
\end{enumerate}
\end{footnotesize}
independence. The latter led to a violation for example in the case of *Ergi v. Turkey*, where the prosecutor placed too much emphasis on the version of events supplied by members of the gendarmerie, who were the potential perpetrators, and discontinued the investigation relying solely on this “evidence”, without taking additional steps.  

4. It is necessary to provide a sufficient level of **public scrutiny** of the investigation, in order to maintain the public confidence in respecting the principles of the rule of law by the investigators and in preventing an appearance of toleration of unlawful acts or their collusion with the perpetrators. The required degree of public scrutiny will vary with the circumstances of each case, but the complainant must always have an effective access to the investigation. This means more than simply being announced the results. He or she must have the right to suggest evidence and put questions to witnesses and suspects, and must also have access to the case file.

5. Lastly, the investigation must be **prompt**, and the authorities must make efforts to expedite it. This requirement follows from the same aim of maintaining public confidence in the investigation as in the case of public scrutiny, but is also based on the fact that with the passage of time it is more difficult to gather evidence, and witness testimonies become less reliable. Particularly in the case of forensic medical evidence a purposeful delay of days or even hours may frustrate the effectiveness of the investigation. The European Court has not set up detailed standards yet relating to acceptable time-limits, and has acknowledged objective difficulties which may prevent progress in a particular situation, nevertheless any unjustified delay may lead to the violation of Article 3.

The standards described above have provided the European Court with a very effective framework to scrutinize actions of domestic authorities. Since the *Assenov* decision, the Court has found several procedural violations under Article 3, which have considerably expanded the protection of the European Convention against ill-treatment. The doctrine was especially useful in providing a meaningful remedy for prisoners and Roma persons ill-treated by state authorities and private individuals. However, it is not without its limitations. Particularly, despite promising attempts, so far no person with a disability has achieved victory by relying on it, therefore it played no role in combating ill-treatment in places where people with disabilities are subject to it. The possible reasons and the doctrine’s shortcoming from disability perspective will be analyzed in the next chapter.

### III. The failure to investigate the ill-treatment of persons with disabilities

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191 *Indelicato v. Italy*, *supra* note 15, § 37.
192 *Büyükdağ v. Turkey*, no. 28340/95, December 21, 2000, § 67.
193 *Edwards v. the United Kingdom*, *supra* note 46, § 84.
194 *Slimani v. France*, *supra* note 40, § 49.
195 *Slimani v. France*, *supra* note 40, § 32.
197 *A. F. v. the Czech Republic*, application no. 17893/07, unreported.
As the first chapter showed, many practices to which people with disabilities are subject violate, or in some cases arguably violate, existing international substantive standards on the prohibition of ill-treatment. In principle, these norms should have led to exposing and gradually eliminating the unlawful practices. However, reality seems to be at odds with this wishful thinking. The recent examples show that for a large number of persons with disabilities ill-treatment is still a daily experience, and in the past decades their situation has improved little, if at all.

Even more importantly, international legal mechanisms played little role in any improvement. Where torturous practices were effectively banned, such as the use of cage beds in Hungary, this was the result of advocacy efforts of non-governmental organizations, not the forward-looking decisions of courts. Currently, most reports exposing prohibited practices have to rely on activities of non-governmental organizations, international bodies, or ad hoc appointed domestic investigative commissions, not court decisions. People with disabilities have been manifestly unsuccessful in achieving redress for their ill-treatment before courts, and in using the court system to eradicate the unlawful practices. This is underlined by the lack of decisions of international bodies relating to ill-treatment of people with disabilities: very few persons with disabilities have been successful before the European Court of Human Rights and UN bodies with such claims. The few successful cases mostly came from the prison context. Despite the fact that there are hundreds of thousands of persons with disabilities languishing in institutions across Europe, the European Court of Human Rights has decided only in one recent case that their living conditions amount to inhuman treatment.

The obligation of effective investigation has been developed in international law to help vulnerable groups to avail themselves of the protection of substantive norms prohibiting ill-treatment. After the Assenov decision, the European Court found several procedural violations under Article 3. The new doctrine helped a number of victims, typically prisoners and Roma persons, who were until then unable to obtain redress. However, despite these successes, the doctrine has failed to help people with disabilities in overcoming the barriers they are facing in achieving justice. In the below analysis I will look into the causes of this failure. I will assess the specific obligations of effective investigation identified in chapter 2 as applied to the examples of disability-specific ill-treatment described in chapter 1 of this article.

A. Effectiveness – Effectiveness “in law” requires that the investigation is in principle able to achieve its aims of establishing the circumstances of the case, providing compensation to the victim, and securing the punishment of those responsible. The European Court did not specify other criteria concerning the structure or legal status of

198 Rosenthal, supra note 65, at 393.
200 Hamilton v. Jamaica, supra note 160; McGlinchey and Others v. the United Kingdom, supra note 20; Price v. the United Kingdom, supra note 158; Keenan v. the United Kingdom, supra note 76.
201 Tobis, supra note 66, at 1.
202 Stanev v. Bulgaria, supra note 63.
investigatory bodies, therefore states are free to choose the means to meet these obligations. However, the requirements, especially the need for punishment, leave no doubt that criminal investigation is in practice the only mechanism satisfying them. Civil proceedings can play a role in securing compensation from the perpetrators after a criminal conviction, and monitoring bodies can be useful by alerting the authorities to systemic or individual instances of ill-treatment. They are, however, unable to secure the punishment of those responsible, therefore cannot be used alone, only together with criminal investigation. The European Court’s case-law supports this observation: in all the cases reviewing the effectiveness of investigation under Article 3, criminal proceedings played a major role, and were often the only mechanism utilized by the respondent governments. Exceptions are found only in cases from the United Kingdom concerning situations where the victim died, and therefore inquest proceedings were used to establish the circumstances of the death.\(^{203}\)

The previous conclusion should not deny the importance of other mechanisms in combating ill-treatment. States are free to set up inspection bodies to monitor the living conditions in various closed and open care settings, detention facilities, hospitals, etc., both systematically and on an ad hoc basis. Indeed, an international obligation to do so exists for states that ratified the Optional Protocol to the United Nations Convention Against Torture.\(^{204}\) Monitoring by ombudspersons, inspectorates, parliamentary or other public committees, internal units of police forces, healthcare or social care authorities, can be very valuable as a matter of good policy and improvement of conditions generally. However, they are unable to impose punishment on perpetrators and provide compensation to victims, have generally narrower competencies than criminal investigatory bodies,\(^{205}\) therefore they do not meet the requirements of an effective investigating mechanism under Article 3 of the European Convention. Their findings can trigger criminal proceedings, and as a practical matter they can have better knowledge about the situation in a particular institution than prosecuting authorities, therefore they can play a role in establishing the circumstances of a particular case; but that is insufficient to meet the states’ obligation under the European Convention if the criminal proceedings are deficient.

Criminal proceedings are in principle able to meet the requirements of effective investigation with regard to most situations of ill-treatment. However, the picture is much bleaker in the case of persons with disabilities, where numerous shortcomings can be identified.

Criminal investigation can be pursued only if the act allegedly committed by the perpetrator is defined as a crime by the domestic legislation. However, as detailed above in the previous chapter, many measures that are considered ill-treatment under

\(^{203}\) These were reviewed under Article 2 (the right to life) of the Convention, not Article 3. See Edwards v. the United Kingdom, supra note 46.

\(^{204}\) United Nations, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 18, 2002, 42 I.L.M. 26.

\(^{205}\) For example, they cannot compel witnesses to testify, do not have access to all types of documents, and often cannot investigate individual complaints; see, for example, Edwards v. the United Kingdom, supra note 46, § 79.
international norms are perfectly legal under national laws. For example, the use of cage beds might be contrary to Article 3 of the Convention, but is explicitly allowed in the Czech Republic.\footnote{Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009 (September 30, 2009).} A cage bed victim’s criminal complaint would be futile; the investigating bodies would have to reject it on the ground that even if his or her allegations were true, the act complained of does not constitute a crime, therefore no criminal investigations can be initiated. The situation is similar with regard to many other medical interventions. The European Court itself considered therapeutic necessity to constitute an exception from the otherwise absolute prohibition of ill-treatment.\footnote{Herczegfalvy v. Austria, supra note 5.} This decision provides a dangerous precedent for national authorities to devise their medical regulations in a way that shields various practices from criminal investigation. It is very difficult to imagine a criminal investigation into the use of electroconvulsive therapy (ECT) without a patient’s consent, if it is explicitly allowed by the domestic regulations\footnote{See the official protocol on the use of ECT in Hungary, supra note 249, § 5.2.} – even if it arguably constitutes ill-treatment in international law. Even the breach of medical protocols in itself might not be sufficient to trigger an investigation. Surgery without a patient’s consent in the required (e.g. written) form is not allowed, but also not criminalized in many countries.\footnote{David Zahumenský, Jak je to s vyšetřováním pochybení lékařů policií? [How is it with the investigation of doctors’ failure by police?], 17 Via Iuris 1, 1 (January 30, 2009).} Therefore a victim of such an intervention might have a legal cause for suing the doctor, but not for initiating a criminal investigation. These examples are not to deny that a victim might be successful with his or her complaint before the European Court regardless of the domestic standards, which do not bind the European Court. However, if the victim is powerless to secure an effective investigation on the domestic level, in most cases this bars any further progress for lack of evidence. Unless able to commission a private investigation and gather the evidence alone, they have no possibility to convince any court that they suffered ill-treatment. Therefore for their success it is essential that the ill-treatment in question be considered a crime under the domestic law. If it is not, the investigation, even if initiated, does not meet the requirement of effectiveness in law.

The question of unsatisfactory living conditions is even more problematic. The horrible situation in some institutions can be hardly described as other than inhuman treatment, therefore the violation of substantive standards of Article 3 is not in doubt. However, often no person can be regarded to be personally responsible for these conditions, as they are the result of systemic failures of the states’ social care or healthcare systems. If the state budget’s daily food allocation for residents of Bulgarian institutions is equal to 0.5 USD, it is not surprising that many of them are dying of malnutrition – but the cooks are hardly to blame. Similarly, lack of access to antibiotics is a serious problem in some institutions. However, it is not caused by their directors, but the national health insurance schemes that exclude indigent residents of institutions from their coverage.\footnote{Amnesty International, supra note 146.} Criminal investigation can be conducted only against individuals, who either intentionally or negligentely violated the criminal norms. Systemic failures, which are manifested by institutional neglect of persons with disabilities, can be considered an
economic or political rather than a criminal problem. A criminal investigation to such complaints therefore cannot provide a solution, and cannot be considered to be effective.

The limits of criminal law are evident even in cases where the act complained of constitutes a crime and was committed by an individual. If the perpetrator is not criminally responsible, the investigation is discontinued. Many acts of physical and sexual violence in institutions are committed by the residents themselves, and these crimes are outside the attention of prosecuting bodies, especially if their alleged diminished mental capacity was the exact reason for their institutionalization, which is typically the case in institutions for persons with intellectual or psychosocial disabilities.

The above examples highlight the different philosophies of procedural obligations under Article 3 and criminal investigation. The former is centered on the victim, and its aim is to provide him or her redress in case of ill-treatment, for which the state as a whole is responsible. The subject of criminal law, however, is the perpetrator, and its aim is his or her punishment. If the ill-treatment took place, but it is not possible to prosecute a specific individual either because he or she died, is underage, or cannot be identified, the criminal proceedings must be discontinued, as it cannot fulfill its purpose. In these situations the state fails short to provide an effective remedy to the victim if it relies solely on criminal law. A good example is the case of Ribitsh v. Austria. Mr. Ribitsch was beaten during interrogation, and a criminal investigation to his ill-treatment was initiated, but it was not possible to prove which of the three police officers present caused his injuries. The domestic courts acquitted the suspected police officers, which left Mr. Ribitsh’s claim under Article 3 unaddressed. The European Court held that

[i]t is not disputed that Mr Ribitsch’s injuries were sustained during his detention in police custody… while he was entirely under the control of police officers. Police Officer Markl’s acquittal in the criminal proceedings by a court bound by the principle of presumption of innocence does not absolve Austria from its responsibility under the Convention. The Government were accordingly under an obligation to provide a plausible explanation of how the applicant’s injuries were caused.

Because the government did nothing but referred to the outcome of the domestic criminal proceedings, the Court found a violation of the Convention.

Article 3 does not require that the suspected persons are always convicted, as this would be objectively impossible to satisfy even for the best trained and resourced investigative bodies. However, it does require that even in the absence of conviction, the state conducts an effective investigation and provides compensation to the victim. The

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211 For example in the case of rape or violent attacks in institutions.
213 *Id.*
214 *Ribitsch v. Austria*, supra note 5.
215 *Id.*
state continues to be liable for its obligation under Article 3 even if the persons responsible under domestic criminal law provisions are acquitted, not identified, or do not exist at all. Therefore in the above mentioned cases criminal investigation cannot be considered to be effective in law to meet the procedural obligations under Article 3.

Concerning effectiveness in practice, this criterion is reviewed by the European Court on a case by case basis, and it is difficult to establish patterns of noncompliance that would be specific to ill-treatment of persons with disabilities. It is however important to underline that the European Court strictly requires states to take all reasonable steps they can to establish the circumstances of each case. The abovementioned different aim of the criminal investigation compared with the procedural head of Article 3 undermines this requirement, as the investigating bodies would not gather evidence that would not further the criminal investigation’s aim, even if it might be necessary to meet the state’s obligations under Article 3. This is, however, likely not the most important deficiency under this criterion. Review of publicized cases of ill-treatment suggest that even in the absence of legal obstacles, investigating bodies are reluctant to act on complaints of persons with disabilities and take any meaningful steps to establish the circumstances of the allegations.216 This is especially true if other state bodies, such as institution, are implicated in the events.217

B. Independence – The European Court has never doubted the institutional independence of prosecution services for the purposes of the duty to investigate. They are in principle independent from governments across Europe. However, the requirements of Article 3 do not apply only to proceedings that are classified as “criminal investigation” in national laws. Investigation is an autonomous term of the Convention, and includes all activities of state agents from the moment they learn about instances of ill-treatment. Therefore it includes steps taken by social care homes, hospitals, schools and other bodies that are in direct contact with persons with disabilities. And since, as discussed above, employees of these organizations are often responsible for ill-treatment either as perpetrators or through their negligence, they can hardly be regarded as “independent from those implicated in the events”. If they discontinue the proceedings, for example by rejecting the victim’s claims within their own internal complaint mechanisms, which bars further progress to investigative bodies, this can easily lead to the violation of the procedural obligations under Article 3 under this account.

Independence can be compromised also by the actions of the criminal investigation bodies. Although prosecution services are institutionally independent from other state bodies, Article 3 requires also practical independence. This means that investigators should not be partial in favor of some parties or witnesses to the detriment of others. However, persons with disabilities are often not considered to be credible witnesses.218 In some countries criminal law itself devalues their testimony by expressly

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217 Id.
218 Id. at 133.
providing less credit to their statements than to that of non-disabled persons’. Even where that is not the case, legal and medical labels gravely disadvantage people with intellectual and psychosocial disabilities in the criminal proceedings. It is not difficult to see that prosecutors would be less likely to investigate if their only evidence was a statement of a “retarded” person, negated by that of the “sane” suspect.

Practical independence is especially endangered if the suspects are medical or social care authorities. Disability is still a medical domain in many countries, therefore medical personnel’s views about what is appropriate treatment for persons with disabilities prevails over the views of others. This prejudice is to some extent also internalized by the European Court, which approved restraints on the basis of “therapeutic necessity” in Herczegfalvy. It is therefore not surprising that prosecutors tend to accept doctors’ and other professionals’ rather than victims’ testimony about the acceptability of “treatment” practiced in institutions. Caregivers have ample opportunity to discredit the contrasting evidence by the use of medical jargon, referring to the alleged victims “delusions”, “mental retardation”, “psychotic state”, “mental illness”, all showing that the victim just does not know what he or she is talking about.

The above mentioned case from the Czech Republic provides a good example of this problem. After a woman with psychosocial disability was raped in a psychiatric institution by a male nurse in early 2007, she filed a complaint using the institution’s internal complaint procedure. The management contrasted her allegations with the explanations of the nurse, and rejected her complaint as unfounded. She was not allowed to contact the police. After two months of struggle she managed to secure legal assistance from a non-governmental organization, and filed a criminal complaint with their help. Due to the passage of time, the investigation was unable to obtain medical evidence about whether the rape had taken place, and the criminal proceedings were terminated. The victim’s testimony, although corroborated by that of other residents of the institution, was discounted as unreliable due to her disability. The testimony of the institution, on which the prosecutor relied, does not deal with the alleged events at all – it simply references to her mental illness and explains that persons with psychiatric problems are unreliable witnesses. The prosecutor did not contemplate the possibility that even if the woman had a mental illness, she could still have been a victim of rape, and decided not to obtain additional evidence. Such a bias towards the testimony of the potential perpetrator goes against the heart of the obligation of practical independence under the Convention.

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219 See for example Article 81(1)(c) of the Hungarian Criminal Procedure Code, 1998 évi XIX tv. a bűntetőeljárásról.
220 Michaela Kopalová, Nesnadné vyšetřování protiprávních lékařských zákroků [The difficult investigation of illegal medical interventions], 7 Via Iuris 6, 8 (August 9, 2006).
221 See the description of the case at Mental Disability Advocacy Center, supra note 197, at 10.
222 See the decision of the Czech Constitutional Court: Nález Ústavního soudu č. II ÚS 544/07 (March 21, 2007).
223 As it turned out later, she had not been the only victim of rape in the institution.
224 A. F. v. the Czech Republic, application no. 17893/07, unreported. The case ended with a friendly settlement before the European Court.
C. Own motion – Criminal proceedings may be initiated not only upon a criminal complaint lodged by the victim or witnesses, but also by the investigating authorities’ own motion if they learn about a crime. Criminal proceedings are thus facially compliant with this requirement of an effective investigation.

However, contrary to other victims of ill-treatment, persons with disabilities residing in institutions have very limited opportunities in communicating with the outside world. Even prisoners have a right of unrestricted letter communication with their lawyers and state bodies since the European Court’s decision in Golder v. the United Kingdom, but not persons with disabilities residing in institutions. Censorship of letters and restrictions on phone calls, including emergency calls, are common in institutions. Whether justified as a therapeutic measure or simply as a matter of control over residents, caregivers act as gatekeepers over what kind of information leaves the premises. Although these practices without doubt constitute a violation of the right to respect for one’s correspondence under Article 8 of the European Convention, we are yet to see a decision recognizing this problem as an unjustified intrusion into disabled peoples’ private lives. Until then, however, the fight against ill-treatment is seriously compromised. If investigating bodies receive no notice of crimes committed in institutions, they obviously can initiate no investigation. Their activities are thus limited to situations where the problem cannot be contained anymore within the domain of the institution – for example, where a resident dies as a result of the ill-treatment. That, however, leaves most of the crimes uninvestigated. A systemic violation of the right to respect for one’s correspondence thus leads to another systemic failure of the criminal system to protect victims of ill-treatment.

Since the investigating bodies cannot be blamed for this problem, the obligation of effective investigations seems to be of little use. It would be hard to construct it in a way which would require police forces or prosecution services to know about possible atrocities committed against persons with disabilities, for example by regularly monitoring their living conditions and well-being. However, as explained above in the part concerning independence, the obligations under Article 3 are not limited to state bodies formally involved in criminal proceedings. Monitoring bodies outside of the criminal system, where they exist, conduct regular visits of institutions and learn about allegations of abuse. The institutions themselves, and also hospitals, schools, day care centers and the like, know or should know about the incidents and injuries occurring on their premises. They have been classified as state agents under the Convention, therefore

225 Certain crimes, such as defamation, might constitute an exception in some countries in that they require the consent of the victim to the initiation of criminal proceedings. These situations are, however, outside of the focus of this article.
226 Golder v the United Kingdom, no. 4451/70, February 21, 1975.
227 UN Centre for Human Rights, supra note 251, § 197.
228 Gombos, supra note 78, 368.
229 Minkowitz, supra note 241, at 425.
230 Examples include the Finnish Parliamentary Ombudsman, the Hungarian Parliamentary Commissioner for Human Rights, and the Dutch Healthcare Inspectorate; see Mental Disability Advocacy Center, Inspect!, 2006.
they are bound by its obligations.\textsuperscript{231} Once they learn about information suggesting possible ill-treatment, they must investigate it or forward it to other investigating bodies. If they fail to do so, the state’s responsibility is engaged.

If a victim later manages to contact the investigating bodies, but due to the passage of time it is not possible to establish the truthfulness of his or her allegations anymore, the state risks a violation of Article 3. It is enough for the victim to show that his teacher/caregiver/physician knew about his allegations, but they failed to effectively investigate them on their own motion.

This has serious implications for all bodies providing care to persons with disabilities. They typically deal with complaints internally, if at all, and limit residents’ access to the outside world. This presents a huge risk of abuse of authority, especially if their employees are implicated in the ill-treatment they are supposed to investigate or report. Even if they act in good faith, and forward to the police complaints that are in their opinion well-founded, they risk a violation of their duties. Since their staff is not trained in nuances of the effective investigation doctrine, there is a great risk that their criteria of a “well-founded” complaint might divert from that of the European Court’s.

\textbf{D. Public scrutiny} – The inappropriate level of public scrutiny must be regarded as one of the most serious flaws of investigations of ill-treatment of persons with disabilities. In criminal proceedings, publicity is guaranteed only at the trial stage. The lack of publicity in the proceeding preceding trial can frustrate the investigation to such an extent that it never in fact reaches the courts.

An important component of publicity is the involvement of the victim in the investigation, even if he or she did not initiate it. The European Court stressed that the authorities must be proactive, and reach out to the victim even if he or she did not request such involvement.\textsuperscript{232} An important reason for this requirement lies in the fact that in the case of ill-treatment, the victim is often the only person apart from the perpetrator who can give first hand testimony about the events. It is therefore crucial that he or she is involved in the investigation from the beginning, and has the opportunity to challenge testimonies provided by the suspects and witnesses and to suggest additional evidence. However, criminal investigation is notoriously inefficient in complying with these requirements. Its main aim is the punishment of the perpetrator, not the protection of the victim’s interests. Victims play a secondary role in the proceedings, comparable to that of ordinary witnesses, and have little opportunity to influence the proceedings.

An example of the victim’s unsatisfactory involvement is the lack of legal representation. Suspects are provided with an attorney paid by the state if they cannot afford one; this is regarded as a fundamental safeguard of the criminal proceedings, protected also by Article 6(3) of the European Convention on Human Rights. However, often no right to legal representation exists for victims of crimes, the fact which the

\textsuperscript{231} Ashigdane v. the United Kingdom, no. 8225/78, May 28, 1985.

\textsuperscript{232} Slimani v. France, \textit{supra} note 40, § 47.
European Court already criticized.\textsuperscript{233} Even if a victim can afford to hire a lawyer, or receives aid to do so, the lack of criminal lawyers trained in representing and communicating with persons with intellectual and psychosocial disabilities makes this safeguard illusory in most cases. Specialized legal assistance is essential for the victim’s effective participation in the criminal proceedings, but the need for such services is rarely met.\textsuperscript{234}

Victims are similarly restricted in accessing investigatory files. While suspects often have a right to inspect case files and make copies of documents, the corresponding right of victims is often limited by the discretion of the prosecutors.\textsuperscript{235} Medical reports are especially sensitive, and victims’ access to them is especially troublesome, as a recent decision of the European Court shows.\textsuperscript{236}

The involvement of victims in the investigation is seriously compromised by the fact that many persons with intellectual and psychosocial disabilities, and the vast majority of them living in institutions, are deprived of their legal capacity.\textsuperscript{237} As a result, they cannot act independently before state bodies, including those involved in investigation. They cannot file complaints and appeals, suggest additional evidence, and decisions are not delivered to them. They can exercise these rights only through their guardians, who act on their behalf. Guardianship is an institution principally aimed at protecting the rights of persons with disabilities who cannot act alone. It does not seem to be problematic that a disabled person receives help from his or her guardian. However, it is very problematic if appointing a guardian also means that the person under guardianship is stripped of the right to act alone, even if he or she would be able to do so. Help thus comes at a huge price: the person under guardianship cannot act without the consent of the guardian; his or her own opinion and wishes become irrelevant under the law, only those conveyed by the guardian matter. The guardian, besides being an aide, thus also becomes a gatekeeper in the investigation proceedings: he or she decides what statements of the person under guardianship reach the authorities. This dual role seriously compromises the victim’s access to the investigation. The guardian might be a huge source of support, but can also have conflicting interests or be indifferent. In any case, he or she is not the direct victim and witness of the ill-treatment in question, and is often less likely to pursue the victim’s rights with the same zeal and vigor as the victim him or herself. This is obvious especially in the case of “public” guardians, non-relatives appointed as guardians of several persons with disabilities, sometimes having responsibility for more than 100 persons.\textsuperscript{238}

The question of guardianship can be considered one of the crucial factors behind the continuation of ill-treatment in institutions. Even if the residents’ guardians are family members, many of them are the ones who placed them into the institution, and are

\textsuperscript{233} Edwards v. the United Kingdom, supra note 46, § 84.
\textsuperscript{234} Lewis, supra note 126, at 301.
\textsuperscript{235} See for example article 61(2) of the Czech Criminal Procedure Code, zákon č. 161/1961 Sb. trestní řád.
\textsuperscript{236} K.H. and Others v. Slovakia, supra note 200.
\textsuperscript{237} Mental Disability Rights International, supra note 107, at 29.
\textsuperscript{238} Mental Disability Advocacy Center, Guardianship and Human Rights in Hungary, 72 (2007).
therefore often little interested in their well-being.\textsuperscript{239} Typically, however, residents have public guardians, who are very often the directors or other employees of the institution.\textsuperscript{240} Therefore, in the better case victims are hindered by a guardian living far away from them and not interested in submitting and pursuing their criminal complaint; and in the worse case, their guardian is responsible for the conditions in the institutions, and acts as both a suspect and a victim (as a guardian of the primary victim) in the same case. This obvious conflict of interests, not relevant only in the ill-treatment area, goes unnoticed by the laws of many European countries, as no safeguards exist to provide direct access to the investigation to a person under guardianship if his or her guardian is implicated in the events, or is simply uncooperative. The European Court’s decisions provide examples of conflicts of interests both between a care home director acting as a guardian of one of the residents subject to ill-treatment in his institution,\textsuperscript{241} and between a guardian hindering the investigation of the ill-treatment of the victim who was her relative.\textsuperscript{242}

Apart from the above mentioned problems relating to the person of the victim, the whole structure of the criminal investigation seems to be problematic under the publicity requirement of Article 3. Evidence is typically gathered by the prosecution or police forces based on the victim’s and witnesses suggestions, but without their involvement. They are not present when the testimony of suspects and other witnesses is taken, therefore they cannot cross-examine them. Evidence and testimonies are documented, and the victim is notified about them once the investigation proceeds to trial, or is discontinued. If the investigation is closed, only then can the victim suggest additional evidence or expose the flaws of the suspect’s or witnesses’ testimonies. These lead to the investigation being reopened, and the whole circle repeated again. It is likely that after two or three discontinuations of the investigation, which can take months if not years, the gathering of medical evidence becomes impossible, victims’ memories fade, and the investigation must be finally closed on the ground that due to the passage of time it is impossible to establish beyond a reasonable doubt how the events took place. Such a scenario is typical in the case of allegations against institutions, which police are reluctant to investigate in any case. In one documented case, concerning the death of a resident of a Bulgarian institution, the prosecution closed and then reopened the investigation several times.\textsuperscript{243} The institution each time provided a different explanation about the circumstances, which was always accepted by the authorities because they had no information to the contrary. Such information was on every occasion provided by the victim’s relatives, who always refuted the suspects’ explanation and achieved that the investigation be re-opened. After several years of going back and forth, the investigation was finally discontinued because the victims simply did not remember crucial information relating to the events – information, which the victim’s relatives would have asked on the first opportunity if they had the chance. Years of fruitless investigation could have been avoided by one confrontation between the complainants and suspects. Criminal proceedings, however, do not provide for such an opportunity before the trial

\textsuperscript{239} Id. at 70.
\textsuperscript{240} ANNWIN, supra note 142, at 3.
\textsuperscript{241} Stanev v. Bulgaria, no. 36760/06, unreported.
\textsuperscript{242} Shtukaturov v. Russia, supra note 240.
\textsuperscript{243} Bulgarian Helsinki Committee, supra note 177, at 25.
stage. This is in contradiction with the purpose of the publicity requirement of Article 3, which is aimed at providing a balance between the victim’s and suspect’s opportunity to influence the investigation. It can be impractical to require such a balance in all criminal proceedings, but victims of ill-treatment enjoy special protection under Article 3, therefore investigative mechanisms should be adapted to their situation.

The European Court recognized the importance of victims’ relatives’ participation in the investigation proceedings. Emotional and psychological support is indeed essential for victims of serious crimes to go on with their complaints. However, persons with disabilities, especially those living in institutions, have a very limited circle of relatives and other social contacts to whom they could turn to. Coupled with the fact that they have no opportunity to leave the institution and therefore remain in danger of further ill-treatment, the psychological pressure and the possibility of victimization makes it extremely difficult for them to stick to their complaint until it is resolved in the unlikely case that they dared to lodge one. The role of social networks is also important for obtaining information about the possible avenues a victim of a crime can take to achieve redress. Most citizens without legal training do not know what legal steps they need to make if were treated unfairly, but know somebody they can ask for advice. Residents of institutions have nobody to turn to. It is not surprising that they rarely lodge criminal complaints, given the fact that most of them have never heard about such a possibility. If the publicity requirement of Article 3, which is aimed at strengthening the victim’s position during the investigation of ill-treatment, should have any use for persons with disabilities, it should be adapted to take account of their limited social contacts.

E. Promptness – Unjustified delays in investigation are a general problem of certain countries of the World, not specific to crimes committed against persons with disabilities. However, it is important to note two disability-specific aspects of the inadequate speed of investigation.

The first relates to the initial phases of the proceedings, as described above in the part concerning “own motion”. Since persons with disabilities have no direct access to investigating bodies, and their caregivers act as proxies in forwarding their complaints, precious time can be lost while the complaint advances through the bureaucracy. The European Court has emphasized that days or even only hours of delay can lead to the loss of medical evidence, therefore internal complaint mechanisms of institutions, where days can pass before the complaint is even read, can frustrate the aim of the investigation.

Another problem relating to the speed of criminal proceedings can occur in its final phases. Even if the investigation is successful, it might take years to secure a conviction before the domestic courts. Many persons with disabilities might simply not live long enough to achieve redress for the violation they suffered. Since the mortality rates in institutions are often much higher than outside of them, and this is in close

244 Slimani v. France, supra note 40, § 47.
245 Quinn et al, supra note 4, at 136.
246 See for example Mikheyev v. Russia, supra note 59.
connection with the gravity of inhuman conditions found in these institutions, victims of violence living in the most dangerous places have a good chance of dying before their case is decided by the courts. This can lead to the dropping of the charges, as in the absence of the victims and witnesses the prosecution might not be able to take the case to trial. Inhuman conditions in some institution thus perversely contribute to the ineffectiveness of the investigation. That this is not only a theoretical problem is evidenced by the experience of the Mental Disability Advocacy Center, which had to withdraw a number of its cases from domestic and international bodies because the victims died in the course of the proceedings. Fortunately, if the case had already reached the European Court when the victim dies, the Court can continue the proceedings if there is a relative interested in pursuing the victim’s case – a rule, which again adversely impacts on persons with disabilities, since the reason why they often end up in institutions is exactly that they had no relatives interested in their fate.

F. Conclusion – The European Court of Human Rights has been so far unable to live up to the expectations of persons with disabilities. As the above analysis shows, the standards of effective investigation it developed are under-inclusive of the specific needs of persons with disabilities. These norms were created as a response to the problems of prisoners and Roma persons. People with disabilities were not at the forefront of the reform, therefore the result is inadequate to combat ill-treatment in the forms they are most often subject to it. This is especially evident in post-communist countries. The position of victims of widespread human rights violations living in institutions across Central and Eastern Europe has improved little since their countries ratified the Convention almost two decades ago.

The European Court has in the past showed remarkable flexibility in adapting its standards to meet the needs of various victims facing ill-treatment, in order to provide them with effective protection instead of a theoretical one. However, these developments came to a standstill when it came to the issues of persons with disabilities. They are still invisible for the Court, which has so far been unable to make the necessary shift in its understanding of the connection between ill-treatment and disability. How to find a solution to the above problems, how the standards of effective investigation in international law should be amended so that also persons with disabilities can benefit from them, will be the subject of the next chapter.

IV. The ill-treatment of persons with disabilities and the Convention on the Rights of Persons with Disabilities

The previous chapters showed that international law currently does not provide effective protection from ill-treatment to persons with disabilities. This failure is of course not limited to the field of ill-treatment. Mainstream human rights instruments have in general been unable to secure the equal enjoyment of human rights for persons with

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247 Including violence, lack of adequate healthcare, nutrition, heating, and inadequate sanitary conditions as described in chapter 3 of this article.
248 See for example J. V. v. the Czech Republic, no. 17613/07, unreported; Mitev v. Bulgaria, no. 42758/2007, unreported.
disabilities because they were unable to recognize what disability means in the human rights context. As Stein argues, as a result “six hundred million persons with disabilities worldwide have implied but not actual human rights protection”.

The recognition of this problem by the United Nations led to the adoption of the first human rights treaty of the 21st century, the Convention on the Rights of Persons with Disabilities (hereinafter CRPD). It does not create new rights, only clarifies the scope of protection to persons with disabilities compared to other human rights treaties. However, although the rights it covers have already been secured, at least in theory, for persons with disabilities by other international human rights treaties, their ineffectiveness in the area of disability underlines the CRPD’s importance. Its aim is to turn the theoretical protection into a practical one by adapting the existing human rights standards to the specific situation of people with disabilities. It provides visibility to the violations of their rights and makes international law specific enough to provide effective protection to them.

In the field of ill-treatment, the text of the CRPD does not go much beyond the provisions of other treaties. Its Article 15(1) provides for a general prohibition of all forms of ill-treatment, and specifically prohibits medical experimentation without consent, and in Article 15(2) it requires state to take effective legislative, administrative, judicial or other measures to protect victims from ill-treatment. The wording is similar to other human rights treaties; this, however, should not lead to underestimating its importance. The CRPD is the first human rights instrument stressing the connection between torture and disability. Compared to mainstream treaties, which neglected persons with disabilities’ issues, and previous soft law instruments, which concentrated on improving the conditions of persons with disabilities in general, the CRPD formulates prevention from disability-specific abuse and ill-treatment as a right. This not only gives salience to previously overlooked issues, but provides an avenue for victims to challenge them.

A. The CRPD’s relevance to torture prevention

It is not yet clear how exactly the CRPD will help to combat ill-treatment. The attention of commentators has so far concentrated mostly on two issues where it could represent an important breakthrough, on the question of substantive standards and monitoring.

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251 Stein, supra note 260, at 82.
254 Lawson, supra note 91, at 565.
As shown in previous chapters, the ambiguity over substantive legal standards concerning some medical practices is a clear obstacle from preventing ill-treatment of persons with disabilities. Similarly to UN bodies, the European Court of Human Rights has failed to consider psychiatric treatment and restraints from the angle of ill-treatment, and when it did, it deferred to medical professional under the therapeutic necessity standard. These issues are at the heart of Article 15 of the CRPD, which can bring much needed clarity through the decisions and comments of the Committee on the Rights of Persons with Disabilities.

Opinions of commentators so far vary as to what these standards are, or should be. A particularly contested issue is whether involuntary psychiatric treatment constitutes torture under the CRPD. While Minkowitz argues that no medication against the person’s will is permissible, Weller considers that there is a “shifting continuum of acceptability” of medical treatment, and according to Lord only bogus medical practices were outlawed, involuntary treatment according to “standard medical protocol” is still permissible. Notwithstanding the question whether all involuntary medication is prohibited, commentators agree that some forms of treatment, such as psychosurgery (lobotomy) and unmodified electroconvulsive therapy (ECT) constitute inhuman treatment or torture under the CRPD.

Another area where Article 15 is particularly relevant is the monitoring of places of detention, an important mechanism to prevent torture. In Europe, the Committee for the Prevention of Torture (CPT) has conducted visits to facilities where people are deprived of their liberty since 1987. On the global level, the recently ratified Optional Protocol to the United Nations’ Convention against Torture (OP CAT) requires signatories to establish national preventive mechanisms to monitor domestic detention facilities.

255 Herczegfalvy
260 UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary-General, A/63/175, § 59 (July 28, 2008).
262 See also Lord, supra note 243, at 18; International Disability Alliance, Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments 5 (2008).
While monitoring has certainly contributed to improvement of conditions in prisons, police stations and similar facilities, it is not that clear whether it had the same impact for institutions where persons with disabilities are held. The CPT included a section on psychiatric facilities and restraints in its Standards, but they do not encompass all issues relevant to persons with disabilities. Therefore a number of recent articles argues that monitoring mechanisms should be improved by incorporating the perspectives of persons with disabilities.

Both the above areas are certainly important for preventing the ill-treatment of persons with disabilities. However, they are insufficient in themselves. More precise substantive provisions are futile if victims cannot make use of them due to inaccessibility of remedies. Similarly, the improvement of substantive standards should not be limited to periodic reviews of state performance by the Committee of Persons with Disabilities, it is important that victims can shape the law through their complaints.

Monitoring mechanisms, although can be successful in introducing and improving general standards, do not provide an effective remedy to victims. They typically lack enforcement mechanisms, cannot decide individual cases of ill-treatment, and are unable to provide redress and compensation to victims. Moreover, their purpose is to visit facilities periodically, not to maintain a continuous presence in them. Coupled with the controversy over what type of facilities housing persons with disabilities can be considered “places of detention”, they cannot be considered an effective mechanism to prevent ill-treatment by empowering victims.

This article argues that the protection against ill-treatment can only be effective if the substantive provisions and monitoring are accompanied with an obligation on domestic authorities to effectively investigate torture and other forms of ill-treatment. Only that can provide victims with an effective remedy, and secure their access to courts and international bodies where they can make use of the substantive provisions. Therefore, if the CRPD is to be more successful than its predecessors in eradicating ill-treatment, the procedural obligations have to be strengthened in the first place. These are, however, not detailed in the CRPD. They will therefore have to be developed by the Council of Europe, The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2009, 40 (2009).


Elina Steinerte, Rachel Murray and Judy Laing, Monitoring those deprived of their liberty in psychiatric and social care institutions and national practice in the UK, The International Journal of Human Rights Vol. 16, No. 6, August 2012, 876.

Id. At 869

Id. at 868.
opinions and general comments of the Committee on the Rights of Persons with Disabilities, the body entrusted with interpreting it. The Committee should make the issue of effective investigation a high priority, in order to give persons with disabilities an effective and timely remedy for the widespread violations they continue to suffer in many parts of the World.

B. The investigation of ill-treatment under the CRPD

The procedural obligations under Article 3 of the European Convention can serve as a very useful starting point for the Committee, as they are the most developed and authoritative from all international standards. The set of criteria devised by the European Court makes it possible to carefully review the actions of domestic authorities and held them accountable if they do not make everything in their power to eliminate ill-treatment. The previous chapter, however, identified the shortcomings that make this standard less effective for persons with disabilities. The CRPD has the potential to overcome these failures, if its various provisions are read together in support of each other.

One of the most problematic questions regarding the ill-treatment of persons with disabilities concerns the legal form of the investigation. The European Court has never declared criminal investigation to be inadequate per se to meet its requirements, but has criticized several aspects of it. In light of the shortcomings identified in the previous chapter, it is difficult to accept that criminal investigation could be modified to such an extent as to be responsive to all the disability-specific issues related to ill-treatment. Perhaps it would be more effective to require states to establish specialized bodies investigating ill-treatment of persons with disabilities. Specialized bodies now exist in many countries overseeing involuntary treatment in psychiatric institutions, therefore it would not be such a stretch to require states to recognize that persons with disabilities need special attention not only when subject to involuntary treatment, but also as victims of ill-treatment. Specialized bodies could be set up in addition to criminal bodies, providing a range of remedies for persons with disabilities. In any case, the Committee should be much more active in formulating recommendations concerning the legal form of investigative mechanisms. The approach of the European Court, which preferred not to interfere with this issue, and criticized only the specific failures of investigating bodies, did not bring the necessary improvements in criminal law, and therefore cannot be considered successful in this regard.

Notwithstanding the above, criminal law should also be modified to the extent possible. Criminal investigation is only effective if the substantive definitions of crimes are sufficiently clearly defined and therefore easy to apply by the investigators. This is, however, not the case with many types of ill-treatment committed against persons with disabilities, which often fall into the grey area of medical exceptions, many of them never

269 See, for example, the Mental Health Review Tribunals in England and Wales and the Consent and Capacity Board in Ontario, Canada; Terry Carney et al, Advocacy and Participation in Mental Health Cases; Realisable Rights or Pipe-dreams?, 26 Law in Social Context vol. 2, 125, 141 (Spring 2008).
In the absence of effective investigations, victims cannot prove their ill-treatment before the courts, which therefore do not have the opportunity to address the substantive issue and declare these practices to be torture or other form of ill-treatment. The ineffective investigation is thus both the cause and effect of the lack of clarity in the substantive norms, and they reinforce each other in a vicious circle. If criminal investigation is accepted by the Committee as a suitable mechanism for combating ill-treatment, this must be accompanied by a requirement to immediately transpose the substantive norms on ill-treatment to domestic criminal laws. The Committee is in a better position to do so than the European Court; while the Court can only react to individual complaints, and therefore has no opportunity to address specific forms of ill-treatment unless victims raise it, the Committee through its general comments can outlaw some forms of ill-treatment on its own initiative. This must include some practices that are currently considered standard medical procedures in some countries. In the absence of generally accepted and clear global medical standards, international law has to set clear and enforceable limits on the deference to medical judgment if it wants to avoid the European Court’s daunting experience with the Herczegfalvy “therapeutic necessity” standard.

Another set of problems stems from the fact that criminal law is centered on the perpetrator, not the victim, therefore the investigation is discontinued if the perpetrator cannot be prosecuted. Examples include systemic violations, such as inadequate heating or medical care in an institution, for which no single person is responsible, and abuse committed among residents without criminal responsibility. If criminal law is to play any role in this area, the criminal liability of institution directors or other staff members for these issues should be significantly extended. This can create the necessary pressure to provide adequate administrative and financial response to these problems.

As explained in the previous chapter, regardless of its legal form, persons with disabilities often do not have adequate access to investigatory mechanisms both because they enjoy limited support by their social networks and are also additionally disadvantaged by procedural rules. Article 12 of the CRPD, which guarantees legal capacity to persons with disabilities on an equal basis with others, can be instrumental in overcoming the legal obstacles erected by outdated guardianship laws in the investigation proceedings. The minimum that Article 15 and 12 read together should require is that persons under guardianship have a right to address the investigating bodies and present their evidence alone, without the permission of their guardians or other procedural hurdles.

Of course, eliminating the legal obstacles is only the first step, since persons with disabilities can be disadvantaged in the proceedings also due to lack of information or communication skills, and insufficient social networks. The former could be addressed with reading the obligation to effective investigation together with Article 13 of the CRPD, which guarantees effective access to justice. The state should be under an

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270 Kanev provides a vivid example how mechanical restraints applied to thirty-two out of hundred residents of an institution during a two month period were all justified as an “exceptional” measure by staff: Kanev, supra note 234, at 358 (2001-2002).
obligation to provide information in the investigation proceedings to persons with disabilities about their rights in an accessible format. Investigative bodies and judges should also be trained in understanding disability issues and in communicating with persons with disabilities. The state should also be required to provide similarly trained and specialized legal counsels, which is considered by Perlin to be the most critical issue of reform. This is a far cry from the present situation, where often not even the employees of institutions are trained in communicating with their residents.

An international treaty cannot create the necessary social networks to support each disabled complainant. However, law can and should address this problem, for example by recognizing the types of social contacts typical for persons with disability. Associations and other organizations of persons with disabilities should be acknowledged as an important source of social support. They should have adequate rights in the investigation proceedings as well, by participating either on behalf (as representatives) or in support of complainants with disabilities. This, of course, should not mean that the state could absolve its obligations by delegating them to private bodies: organizations of persons with disabilities should be recognized in addition to, not instead of legal representation provided by the state. They should have access to institutions as well, in order to learn about complaints of ill-treatment and bridge the gap between persons with disabilities and investigating authorities.

Investigation should also pay attention to the fact that many persons with disabilities cannot leave their place of residence due to the lack of alternative accommodation, and this might be impossible if they live in an institution. Not only makes this their access to the investigating bodies very difficult, often making it completely unrealistic to initiate the investigation, but also exposes them to further victimization. Since the persons caring for them are often implicated in their ill-treatment as perpetrators or through their negligence, victims are under extreme pressure to withdraw their complaints, including the threat of possible expulsion. The experience of victims of domestic violence suggests that an investigation can be successful only if the alleged perpetrator is separated from the victim. This should be recognized in the case of persons with disabilities living in institutions as well. The complainant in risk of further ill-treatment should be removed from the institution upon making a well-founded complaint and requesting protection from further victimization; or alternatively, the alleged perpetrator should be removed from the institution for the duration of the investigation. In addition, the possible choice of remedies should ensure that victims are not better off without making a complaint. While the European Court typically considers monetary compensation and punishment of the perpetrators as adequate, persons with disabilities should also be provided with psychological, medical and social services necessary to resume ordinary life, as the International Disability Alliance suggests.

271 Michael L. Perlin, supra note 114, at 426.
272 Motejl, supra note 97, § 41; Kanev, supra note 110, at 466.
273 Lawson, supra note 4, 478.
274 Opuz v. Turkey, no. 33401/02, July 9, 2009.
Victims of ill-treatment can be retraumatized if they continue to be exposed to the risk of violence, which can lead to posttraumatic stress and increased suffering. Articles 19 of the CRPD, guaranteeing independent living to persons with disabilities, read together with Article 15 should require that victims of ill-treatment in institutions be provided with adequate community-based alternative accommodation as a matter of high priority.

The establishment of internal complaint mechanisms should also be taken much more seriously under the CRPD than it was by the European Court. As these procedures often act as gatekeepers in the investigation of ill-treatment, some procedural guarantees should be applicable to them, such as decisions made by an impartial body, right to be heard, right to support and representation, right to appeal, and protection from further victimization. Failure to act on an internal complaint, or to maintain an internal complaint mechanism, should be considered with the same strictness as a failure to initiate a criminal investigation. If taken seriously, instead of being an obstacle in pursuing justice, internal complaint mechanisms could turn into a useful tool in combating ill-treatment.

The above list is not an exhaustive one. These are only examples that the Committee would be well advised to take into account in developing the standards of an effective investigation under Article 15 of the CRPD, based on the shortcomings identified in the previous chapter. Further litigation might uncover additional deficiencies of the European Court’s standards. They nevertheless serve as a useful starting point for setting up standards for investigation under the CRPD. The Committee can build on the experience of the European Court, and make sure that it does not repeat its mistakes.

The CRPD can also have a beneficial effect on the European Court’s standards. In the past the European Court showed remarkable flexibility in incorporating other international documents’ norms in its jurisprudence. The CRPD has already been recognized by the European Court as an authoritative source when it comes to interpreting the European Convention in the case of a complainant with a disability. If the Committee develops workable standards under Article 15 of the CRPD, these can serve as an impetus for the European Court to improve its own standards under Article 3 of the European Convention. The two sets of norms would therefore ideally converge in the future, expanding the options of persons with disabilities, who could apply to either the Committee or the European Court if they were ill-treated, and could receive effective protection from both international bodies. Only this increased level of protection provided to victims could eventually lead to the eradication of ill-treatment of persons with disabilities.

Conclusion

This article showed that persons with disabilities are subject to torture and other forms of ill-treatment on a large scale. The abusive practices continue, even though they

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violate existing international norms. The obligation to investigate ill-treatment, which has been used with great success to help other groups of victims, has been insufficient to address the problems of people with disabilities. My analysis showed how this doctrine should be modified to provide effective protection to persons with disabilities.

It might be argued that my analysis concentrates too heavily on practices typical for institutions, possibly ignoring some forms of abuses taking place in the community. However, providing an exhaustive list of the various forms of abuses was not my aim. The examples chosen depict the most serious and widespread forms of ill-treatment and highlight the procedural obstacles that prevent victims in difficult situations from achieving redress for their suffering. Institutions are in a sense a laboratory for developing remedies for ill-treatment and a litmus test for measuring their effectiveness. An investigative mechanism that is able to helps residents of institutions will most likely also be able to combat ill-treatment outside of them.

Of course the solutions proposed in this article will not in themselves eliminate all ill-treatment of persons with disabilities. As long there are institutions with a huge power imbalance between staff and residents, abuses will continue to take place. Nevertheless, the scale of the problem will depend to a great extent on how law addresses it. Therefore the obligation to investigate ill-treatment must play a crucial role in improving the position of persons with disabilities. Its importance is not simply in that it requires governments to investigate ill-treatment, but that it provides standards that enable domestic and international courts to review whether the investigative steps are effective or not. It shifts the power balance between victims and perpetrators by empowering the victims and making indifferent authorities accountable. Only if equipped with such a tool as proposed in this article will persons with disabilities be able to claim their rights and make the investigative authorities part of the solution instead of the problem.

On a more abstract level, the prohibition of ill-treatment is a good example of why mainstream human rights instruments have been unable to secure the rights of persons with disabilities. The general, vague norms of international treaties can become effective only if they are accompanied by detailed standards interpreting their provisions in specific situations. The standards under mainstream instruments have been developed as a response to the problems of non-disabled persons, therefore they are under-inclusive of the specific interests of persons with disabilities. This article showed how this problem manifested itself in the area of the investigation of ill-treatment, and how these deficiencies can be overcome. A similar analysis would be required to address all the other areas of international human rights law where the standards currently in place do not reflect the experience of persons with disabilities.

It is commonplace that persons with disabilities constitute a particularly vulnerable group, unable to protect themselves against abuses. The most important lesson from this article is that when it comes to ill-treatment, law is to a great extent the cause of this vulnerability. Instead of providing them effective protection, law presents itself with inaccessible procedures and remedies to people with disabilities. Legal mechanisms created with the non-disabled citizen in mind foster ill-treatment and protect its
perpetrators instead of helping the victims. It is precisely these outdated doctrines that the Convention on the Rights of Persons with Disabilities should help to overcome so that the prohibition of torture becomes a reality rather than simply an aspiration for people with disabilities.