

Solitary Confinement: The View from Europe

Sharon Shalev¹

This article examines the extent and nature of the use of solitary confinement in Europe. It offers insight into how different jurisdictions manage those they classify as requiring longer term segregation from the wider prison population, and asks if and how such practices differ to those prevalent in the US “supermax” prisons - massive isolation prisons where upwards of 25,000 human beings are confined in conditions of extreme isolation and abject deprivation for prolonged stretches of time for ill defined reasons and without clear exit routes. The article concludes by suggesting that though things are done on a much smaller scale and though some of the peculiarly extreme way of “doing” solitary confinement in the American supermax does not appear to have caught up in European prisons, solitary confinement is a common prison practice in Europe.

Cet article examine l'étendue et la nature du recours à l'isolement cellulaire en Europe. Il permet de mieux comprendre la façon dont différents pays gèrent les prisonniers qui sont classés comme ayant besoin d'être isolés de la population carcérale générale pour de plus longues périodes et pose la question si et comment ces pratiques diffèrent de celles en usage dans les prisons américaines dites « supermax » – d'immenses prisons d'isolement où plus de 25 000 êtres humains sont confinés dans des conditions d'isolement extrême et de privation abjecte pendant de longues périodes pour des raisons mal définies et sans voie de sortie claire. L'article suggère en conclusion que, même si les choses se font en Europe à une plus petite échelle et même si la façon particulièrement extrême de gérer l'isolement dans les prisons supermax américaines n'est pas encore présente dans les prisons européennes, l'isolement cellulaire est une pratique répandue en Europe aussi.

¹ Sharon Shalev, LLM, PhD is a Research Fellow at the Centre for Criminology, University of Oxford. She also manages the informational website: www.solitaryconfinement.org Contact: sharon.shalev@solitaryconfinement.org

I. Introduction

The American criminal justice system, its punitive attitudes and practices, and its excesses – its size, its harsh and unforgiving sentencing policies, its disproportionate impact on the poor and racial minorities and its costs – have, for good reason, taken central stage in much of the criminological literature over the last quarter century or so.² Less widely discussed is what happens inside prisons, including the so-called “supermax” prisons which proliferated across the US throughout the 1990s and the first decade of this century with very little public, or indeed academic, discussion.³ Yet few institutions epitomize penal excessiveness better than these massive isolation prisons, where upwards of 25,000 human beings are confined in isolation from each other and from the outside world in conditions of extreme deprivation for prolonged stretches of time for ill-defined reasons and without clear exit routes.

The use and abuse of solitary confinement in these supermax prisons in the “big incarcerator”, the United States, has occupied much of my own work since the mid 1990s. I have examined the architectural design of supermax prisons, their regime and prisoner provisions in them, the bureaucratic systems that underpin their operation, and how they affect those who live and work in them. I found them to be excessive, expensive, ineffective and extremely damaging to health and wellbeing.⁴

Concerned about “policy transfer”⁵ and the potential spread of similar practices to Europe, I have, more recently, embarked on a pilot study of European segregation practices, designed to examine the extent and nature of the use of solitary confinement in Western Europe.⁶ My research has taken me to some of the deepest and darkest corners of prison systems in several Western European countries, and offered a glimpse into how different jurisdictions

² For e.g. James Austin & John Irwin, *It's About Time: America's Imprisonment Binge*, 3d ed, (Belmont, California: Wadsworth, 1994); Elliott Currie, *Crime and Punishment in America* (New York: Henry Holt, 1998); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001); Marc Mauer, *Race to Incarcerate* (New York: The New Press, 1999).

³ This lacuna has now partially been filled by, among others, Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49:1 *Crime & Delinquency* 124-156; Craig Haney, “A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons” (2008) 35:8 *Crim Jus and Behav* 956; LA Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley and Los Angeles: University of California Press, 2004); Sharon Shalev, *Supermax: Controlling Risk through Solitary Confinement* (Cullompton: Willan Publishing, 2009); Derek Jeffreys, *Spirituality in Dark Places: the Ethics of Solitary Confinement* (New York: Palgrave Macmillan, 2013); Lisa Guenther, *Solitary Confinement: Social Death and its Afterlives* (Minneapolis and London: University of Minnesota Press, 2013); ironically, just as the supermax tide may be ebbing.

⁴ Shalev, *Supermax*, *supra* note 3.

⁵ Tim Newburn, “Atlantic crossings: ‘Policy transfer’ and crime control in the USA and Britain” (2002) 4:2 *Pun & Soc’y* 165.

⁶ The pilot study was generously supported by a grant from the John Fell Fund at the University of Oxford.

view and treat prisoners classified as requiring longer term segregation from the majority of the wider prison population. My preliminary findings indicate that, though things are done on a much smaller scale and though some of the distinctly extreme ways of “doing” solitary confinement in the American supermax⁷ does not appear to have caught up in European prisons, solitary confinement – defined here as the “physical and social isolation of individuals who are confined to their cell for 22 to 24 hours a day” – is a common prison practice in Europe, too.⁸

This article offers some preliminary observations on the different uses of solitary confinement in Europe, illustrated with country examples drawn from my recent field research. It begins with an overview of the human rights and legal framework for assessing prison conditions in general and solitary confinement in particular in Europe, followed by an examination of the context for and conditions in solitary confinement in a number of European jurisdictions. It concludes with some thoughts on the differences and similarities in the use of solitary confinement on both sides of the Atlantic.⁹

II. Solitary Confinement: the European Human Rights’ Framework

Any discussion of “European criminal justice systems” must first acknowledge that penal codes, cultures, attitudes, policies and practices vary greatly between European states, and can vary quite substantially even within the same jurisdiction.¹⁰ Some features, however, are common. Importantly, 800 million Europeans in the 47 Council of Europe member states which have ratified the European Convention on Human Rights (ECHR) enjoy the protections of the Convention, and state institutions in these countries are bound by decisions and judgments made by the European Court of Human

⁷ Discussed in detail in Shalev, *Supermax*, *supra* note 3.

⁸ Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim report to the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA 65/205, 66th Sess, UN DOC A/66/268 (2011) at para 24.

⁹ This article is based on a talk delivered at the *Ending the Isolation: Solitary Confinement Conference* held in Winnipeg, Manitoba, in March 2013.

¹⁰ The term “European” as used here refers to the 47 Member States of the Council of Europe. For a discussion of national differences in the administration of justice see Tapio Lappi-Seppala, “Explaining National Differences in the Use of Imprisonment” in Sonja Snacken & Els Dumortier, eds, *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Abingdon: Routledge, 2012) 35. This chapter focuses exclusively on European practices, laws and case law. For discussion of the international law governing the use of solitary confinement see Sharon Shalev, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, LSE, 2008), online: Solitary Confinement <www.solitaryconfinement.org>; Sharon Shalev, “Solitary confinement and supermax prisons: A Human Rights and Ethical Analysis” (2011) 11:2 J Forensic Psych Prac 151. See also Nigel Rodley & Matt Pollard, *The Treatment of Prisoners under International Law*, 3d ed (Oxford: Oxford University Press, 2009) (for discussion of the protection of prisoners under international law more generally).

Rights (ECtHR). These protections apply also to prisoners and detainees, and to all places of detention within the jurisdiction of member states.

Prison conditions, including solitary confinement, come under the scope of Article 3 of the ECHR, which states, “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹¹

The prohibition against torture and other forms of inhuman or degrading treatment or punishment is absolute and expressed in unqualified terms, but what constitutes prohibited treatment in any given case, as stated in *Ireland v UK*, “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.”¹²

To fall under the scope of Article 3, the treatment in question must cause suffering which exceeds the unavoidable level inherent in detention.¹³ The purpose of such treatment will also be taken into account, in particular the question of whether it was intended to humiliate or debase the victim. However, the absence of any such purpose does not necessarily mean that Article 3 has not been violated.¹⁴

Solitary confinement is, and has traditionally been, viewed under international law and by monitoring bodies as a potentially damaging practice. It is viewed as an undesirable, if at times necessary, prison tool, the use of which should be closely monitored and scrutinised. More than 40 years ago, the European Commission on Human Rights stated:¹⁵

Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security, the prohibition on torture and inhuman treatment contained in Article 3 of the Convention being absolute in character.¹⁶

Over the years this position has been affirmed and reiterated by the ECtHR, adding also the potential effect of solitary confinement on social abilities: “[Solitary confinement without appropriate mental and physical stimulation is likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities.”¹⁷

¹¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 September 1950, 213 UNTS 221, art 3, Eur TS 5 [ECHR]. Other Convention articles that are directly relevant but are beyond the scope of discussion here include Articles 5 (the right to liberty and security of the person), 6 (the right to a fair hearing) and 8 (the right to private and family life). For detailed discussion of procedural rights and additional protections, see Shalev, “Sourcebook,” *supra* note 10.

¹² *Ireland v United Kingdom*, No 5310/71 (1978), ECHR (Ser A) 1, at para 162, 2 EHRR 25 [Ireland].

¹³ *Iorgov v Bulgaria*, No 40653/98, [2004] ECHR 113, 40 EHRR 7; *Onoufriou v Cyprus*, No 24407/04, [2010] ECHR 23, at para 80.

¹⁴ *Peers v Greece*, No 28524/95, [2001] ECHR 296, at para 74, 33 EHRR 51.

¹⁵ The Commission became obsolete in 1998 with the restructuring of the European Court of Human Rights.

¹⁶ *Ensslin, Baader and Raspe v Federal Republic of Germany* (1978), 14 Eur Comm’n HR DR 64, at 109 [Ensslin].

¹⁷ *Razvyazkin v Russia*, No 13579/09, [2012] ECHR 1583, at para 104.

Notwithstanding its potentially damaging effects, the ECtHR concludes that “[t]he prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment.”¹⁸ Though not a form of inhuman treatment in itself, however, under certain circumstances solitary confinement would constitute a form of prohibited treatment, and even torture.¹⁹ This would depend on “the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.”²⁰ These factors: conditions, regime, duration, the individual’s socio-psychological make-up and the context for their placement in solitary, correspond with what the medical literature identifies as the key determining factors in how any one individual would be affected by the experience of isolation.²¹

The protections offered by Article 3 are further strengthened by the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which has unlimited access to any place of detention within the jurisdiction of member states, and operates a system of visits to assess how persons deprived of their liberty are treated. Through developing a set of standards which it applies when carrying out visits to places of detention, the CPT also plays an important standard-setting role and its standards and reports are increasingly relied on by the ECtHR in assessing prison conditions in any given case.

Over the years the CPT has paid particular attention to the use of solitary confinement, and its country reports often include reference to conditions in isolation and segregation units across Europe. In 2011, the CPT focused its annual report on solitary confinement, reiterating that it is a practice that “can have an extremely damaging effect on the mental, somatic and social health of those concerned. This damaging effect can be immediate and increases the longer the measure lasts and the more indeterminate it is.”²²

This statement was followed by a call on states to reduce the use of solitary confinement to an absolute minimum and ensure that its use in any given case meets what the CPT has termed the “PLANN” test: it must be proportionate,

¹⁸ *Öcalan v Turkey* [GC], No 46221/99, [2005] ECHR 282, at para 191, 41 EHRR 45.

¹⁹ The case law of the European Commission and Court on Human Rights over the years has established that the acts prohibited under Article 3 can fall into one of the following categories, depending on the gradual scale of the suffering inflicted: torture, inhuman treatment, inhuman punishment, degrading treatment, degrading punishment; though of course in practice these categories are not always easy to distinguish.

²⁰ *Ensslin*, *supra* note 16.

²¹ See Shalev, *Sourcebook*, *supra* note 10 and Sharon Shalev & Monica Lloyd, *Though this be method, yet there is madness in't: Commentary on A One Year Longitudinal Study of the Psychological Effects of Administrative Segregation* (2011), online: Corrections & Mental Health: An Update of the National Institute of Corrections <www.nicic.org>.

²² Council of Europe, *21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf* (2011) 28 at 39 [CPT (2011) 28].

lawful, accountable, necessary and non-discriminatory.²³

Finally, mention should also be made of the European Prison Rules (EPR), which contains 108 Rules and affirms that prisoners retain their human rights and sets detailed standards to guide the administration of prisons, prison conditions, the provision of health care in prisons, prison discipline, and the conduct of prison management and staff. Rule 60(5) of the EPR addresses solitary confinement specifically and stipulates that “solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.”²⁴

As well as these regional legal instruments, prison conditions and practices in all European jurisdictions must adhere to international and regional human rights law. Within those broad common parameters, however, significant variations exist between different jurisdictions in the way that prison systems in general, and solitary confinement in particular, operates. Some of these are examined below.

III. Context, Conditions, Regime: Assessing the Use of Solitary Confinement in Europe

In order the following measures for Gabriele Krocher and Christian Moller:

1. The accused must in no event be allowed to have any direct or indirect contacts with each other.
2. The same applies to contacts with the outside world.
3. No visit shall be permitted without my written consent.
4. The authorised representative of the accused may not visit them without the written permission of the undersigned judge. Visits shall be made, without surveillance, via the special security room so that no object may be handed over.
5. No newspapers, radio or television.
6. Books may be read, but they must be destroyed afterwards.
7. Medical examinations whenever necessary, but as a rule twice a week. The accused must be regularly weighed.
8. An inventory must be made of each cell.
9. No dangerous object may be brought into the cells.
10. The cells adjoining those of the two prisoners must be evacuated.
11. The cells of the two prisoners, as well as their clothing, must be inspected daily.
12. Both prisoners must wear prisoners' clothing.
13. Mail concerning the two prisoners must be forwarded to me via the cantonal police command.
14. The two prisoners may not have any tobacco, matches or lighter on them.
15. The two prisoners may spend twenty minutes a day in a ventilated room, under constant surveillance. They may smoke during that time.²⁵

²³ *Ibid* at 40-41.

²⁴ Council of Europe, *Appendix to Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*, (1987) at r 60(5) [EPR]. The 1987 EPR [Rec(87)3] were revised and replaced by the 2006 recommendation. Though not legally binding, the EPR does set out minimum standards for prison conditions.

²⁵ *Kröcher and Möller v Switzerland* (1981), 26 Eur Comm'n HR DR 40, at para 3 [Krocher].

On December 20th, 1977, two young German nationals, Gabriele Krocher-Tiedemann and Christian Moller, were arrested while trying to cross the German border into Switzerland following an exchange of gunfire during which two border officers were injured. They were found to be in possession of weapons, forged identification documents, and a large amount of money which was traced back to a ransom paid a month earlier for the release of the kidnapped Austrian millionaire Walter Palmer by the Movement 2 June (M2J) group, of which Gabriele Krocher was a member. The Swiss Investigative Judge who ordered their remand in custody in Berne prison made it clear that he had no intention of risking any incident involving their escape, rescue, or any harm being caused by them – to themselves or to others – during their confinement.

Not only were the cells adjoining Krocher and Moller's cells evacuated as ordered, the entire floor, and the cells above and below them were evacuated. They were both placed under continuous CCTV surveillance. The windows in their cells were locked and blacked-out, and ventilation was provided by a fan. A 60-watt lamp was kept on continuously. Cell furniture was fixed to the floor and walls. As well as not having access to TV, radio and newspapers, their watches and diaries were taken away from them. They were, in other words, "kept in conditions of solitary confinement in the full sense of the word."²⁶ With slight modification, the two continued to be held on remand under these conditions for eight months, until their sentencing.

The conditions of detention endured by Gabriele Krocher and Christian Moller are an extreme example of strict and prolonged solitary confinement – at least in European terms. But various forms of strict segregation of prisoners and detainees can nonetheless still be found in most European jurisdictions, albeit rarely with such attention to the fine detail of isolation. In what follows, I provide an overview of the context, conditions and regime in solitary confinement or segregation units in European prisons, illustrated by examples drawn from my field research, ECHR case law, and CPT country reports.

A. Context for Placement in Solitary Confinement

In Europe, as in most countries around the world, solitary confinement is used throughout the various stages of the criminal justice process. It is also increasingly used in many countries – in Europe and across the Atlantic – to house immigration detainees awaiting deportation. Broadly speaking, the official reasons for isolating a prisoner or a detainee fall under one of the following categories: prevention, protection, punishment and prison administration, or what I have described elsewhere as a technique for

²⁶ *Ibid* at para 4.

controlling risk, exemplified by the typical American supermax.²⁷

To my mind, a distinction between different types of solitary confinement is somewhat artificial, and tends to mask the fact that whatever the context, all forms of solitary confinement will inevitably involve the individual spending upwards of 22 hours a day, every day, locked up alone. Moreover, in many of the prisons that I have visited over the years, cells used to accommodate isolated prisoners – of whichever status – were exactly the same and often used interchangeably.

Still, as each of these forms does have different official justifications and purposes and its use is governed by different internal rules and regulations, and as this typology is widely used and understood internationally, the discussion below follows it. The different forms of solitary confinement are illuminated by practices that are peculiar to – or at least more prevalent in – some countries more than they are in others.

i. Pre-trial Solitary Confinement

Oslo prison was built in 1851, making it the oldest prison in operation in Norway. With a capacity of 392 cells, it is also the largest. As I stepped in to the high-ceilinged, stain-windowed, church-like building, I was struck by a strong, sweet smell, wafting around... I asked my host what that was and he answered that it is ‘waffle Friday’, a long-time tradition at the prison. When I asked if this tradition extended to the isolation wing for detainees held on remand, he looked at me with surprise and said, “Of course. All our clients get waffles on Friday, the only difference is that the isolation wing will get served the waffles inside their cell.”²⁸

Suspects held on remand may be held in isolation from each other and from the rest of the detainee population for their own protection or to prevent collusion between suspects and the intimidation of witnesses. This is common practice for short durations in most jurisdictions, but in some jurisdictions pre-trial detainees can also be isolated for prolonged periods – anything from several weeks to months. This practice is particularly prevalent in the Nordic countries, more usually praised for their humane policies and practices.²⁹

Throughout Scandinavia pre-trial detainees are routinely placed in prolonged court ordered isolation – for weeks, months and in some cases longer than a year – with restricted access to visits, telephone privileges, correspondence and newspapers – or a variety of such restrictions. Norway

²⁷ Shalev, *Supermax*, *supra* note 3.

²⁸ Personal notes of Sharon Shalev from visits to Oslo Prison, Norway (August 2012).

²⁹ For an excellent collection of essays on penal practices in the Nordic countries and what has been termed the “Scandinavian exceptionalism” see Thomas Ugelvik & Jane Dullum, eds, *Penal Exceptionalism? Nordic Prison Policy and Practice* (London and New York: Routledge, 2012), and in particular, Peter Scharff-Smith, “A Critical Look at Scandinavian Exceptionalism: Welfare State Theories, Penal Populism and Prison Conditions in Denmark and Scandinavia” in Thomas Ugelvik & Jane Dullum, eds, *Penal Exceptionalism? Nordic Prison Policy and Practice* (London and New York: Routledge, 2012) 38.

is a good example. Norway has one of the lowest incarceration rates in the world: in 2013, it ranked number 176, with a rate of 72 prisoners per 100,000 of the general population. Absolute numbers are correspondingly small: as of September 2013, the Norwegian department of corrections held some 3,649 people in its custody. Recidivism rates were low at 20% after two years.³⁰ This relatively positive outlook of Norwegian imprisonment takes a slight turn, however, when it comes to pre-trial detention in isolation. In 2012 almost 30% of those held in custody in Norway were pre-trial detainees, and (as of July 2011) over 12% of remand detainees were subjected to complete solitary confinement, meaning no newspapers, TV, correspondence and, importantly, no family visits. This form of confinement has to be approved by a judge in intervals of two weeks, and can last several months.³¹

In Sweden, also in 2012, as many as 47% of a total remand population of 4807 detainees were subjected to isolation and various other court ordered restrictions, some for periods lasting from 6 to 18 months.³² These included juveniles, some as young as 15.³³ Indeed, the scale of this practice in the Nordic countries is such, that some observers describe the use of pre-trial isolation as a “uniquely Scandinavian phenomenon”.³⁴

This practice of isolating remanded detainees has drawn much international criticism over the years. The infliction of solitary confinement on people who must be assumed to be innocent until and unless proven guilty is problematic and, furthermore, the uncertain and indeterminate nature of pre-trial detention has been shown to worsen the adverse health effects of solitary confinement potentially also affecting detainees’ ability to defend themselves in court as well.³⁵ Isolating pre-trial detainees may also pressurise them to collaborate with the investigating authority and provide information and even a confession. In this regard, the “Istanbul Statement on the Use and Effects of Solitary Confinement” plainly states that “when isolation regimes are intentionally used to apply psychological pressure on prisoners, such practices become coercive and should be absolutely prohibited.”³⁶ More

³⁰ Norwegian Directorate of Correctional Services, *2013 Annual Report* (Norway, Pelsyo, 2013), online: <www.nsd.uib.no/polsys/data/en/forvaltning/enhet/57155/hierarki>.

³¹ National Institute for Human Rights, *National Institution Thematic Report on the Use of Solitary Confinement in Prison: Norwegian Law and Practice in a Human Rights Perspective* (Oslo: Norwegian Centre for Human Rights, University of Oslo, 2005) at 47-51.

³² Swedish Prison and Probation Service, *Detainees with Restrictions* (2012), online: <www.kvv.se/sv/Publikationer/>.

³³ Council of Europe, *Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2009) 34 at para 37 [CPT (2009)].

³⁴ Malcolm Evans & Rodney Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (New York: Oxford University Press, 1998) at 247.

³⁵ Shalev, *Sourcebook*, *supra* note 10.

³⁶ “Istanbul Statement on the Use and Effects of Solitary Confinement” (Statement delivered and adopted

generally, the UN Human Rights Committee has routinely called for the practice to be abolished and the CPT has reiterated, repeatedly, that solitary confinement should only be used with pre-trial detainees in exceptional cases, and be strictly limited to the requirements of the case and proportional to the needs of the investigation.

The adverse effects of solitary confinement are also recognised in some national laws. Norway's *Regulations to the Execution of Sentences Act* states, "[p]ersons remanded in custody and other persons who are excluded from company shall be given priority as regards taking part in activities and associating with the staff in order to reduce the detrimental effects of isolation."³⁷

The European Court of Human Rights has been called upon to assess the practice of pre-trial isolation in several cases, including *Rohde v Denmark* in 2005, where the Court was asked to consider whether the detention in solitary confinement of a detainee held on remand for a lengthy period (11 months and 14 days) gave rise to Article 3 concerns. The Court found that, in the case before it, it did not:

The applicant was detained in a cell of about eight square metres, which contained a television. He also had access to newspapers. He was totally excluded from association with other inmates, but during the day had regular contact with prison staff. In addition, every week the prison teacher gave him lessons in English and French, he visited the prison chaplain and received a visit from his lawyer. He had contact 12 times with a welfare worker; and was attended to 32 times by a physiotherapist, 27 times by a doctor and 43 times by a nurse. Visits from the applicant's family and friends were allowed under supervision. The applicant's mother visited the applicant for about an hour every week. In the beginning friends came with her, up to five at a time, but the police eventually limited the visits to two at a time. The applicant's father and a cousin also visited him every two weeks.³⁸

In those circumstances, the Court found that the period of solitary confinement in itself, lasting less than a year, did not amount to treatment contrary to Article 3 of the Convention.

It should be noted, however, that the Chamber was split three-four in this case. In their joint opinion, the three dissenting judges noted that a distinction must be made between social isolation which is imposed post-conviction, and one which is imposed pre-trial as was the case here, and which must only be used when it is deemed absolutely necessary. They considered that the Court that approved the measure and its periodic continuation only gave general

by symposium participants at the International Psychological Trauma Symposium in Istanbul, Turkey, 9 December 2007), online: Solitary Confinement, The Istanbul Statement <www.solitaryconfinement.org/istanbul>.

³⁷ Norway, Ministry of Justice and the Police, *Regulations to the Execution of Sentences Act* 22 February 2002 pursuant to *Act of 18 May 2001* (No 21, the *Execution of Sentences Act* s 5), ch 1, ss 1-2.

³⁸ *Rohde v Denmark*, No 69332/01, [2005] ECHR 526, at paras 97-98, 43 EHRR 17.

reasons for their decisions and did not elaborate on whether less radical measures had been considered. Importantly, the dissenting judges also noted that the measure of solitary confinement was lifted as soon as the detainee admitted before the Court his involvement in the crime for which he was charged. In other words, they hinted at undue pressure to confess as a result of the conditions of confinement to which Peter Rhode was subjected.

Despite concerns about the health and wellbeing of isolated individuals and despite repeated criticisms, at the time of writing this “uniquely Scandinavian phenomenon” continues to pose a challenge to detainees and monitoring bodies as courts in the Nordic countries continue to order the isolation of remanded detainees.

ii. Protective Solitary Confinement

If I remove them from protection and put them back on the wing, they will be dead – or badly hurt – within a matter of hours. They are dead men walking.³⁹

A more common form of solitary confinement is its use for the prisoner’s own protection: from themselves when there is concern that they may self-harm, or from harm by others – for example in the case of former prison or police officers, police informants, prisoners with debts, physically vulnerable prisoners and so on. Prisoners can be kept in such protective isolation at their own request, or at the behest of the prison’s administration, and its duration can be open-ended.

In some jurisdictions the use of protective isolation is very widespread. Ireland is a good case at hand. The Irish Prison Service has some 4,230 prisoners and detainees in its custody, incarcerated in one of the 14 institutions run by the Department of Justice and Equality. With an incarceration rate of 92 people per 100,000 of the general population, Ireland ranks at 157 in the world table of incarceration rates, sitting between Madagascar and the Republic of South Korea.⁴⁰ Recidivism rates are high, with 62.3% of released prisoners returning to prison within three years.⁴¹

Prison Rule 63 (Protection of vulnerable prisoners) states:

(1) A prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.⁴²

³⁹ Interview of Senior Officer in Dublin, Ireland by Sharon Shalev (July 2013).

⁴⁰ International Centre for Prison Studies, *World Prison Brief* (2013), online: <www.prisonstudies.org/info/worldbrief/>.

⁴¹ Irish Prison Service, *Statistics 2013* (2013), online: <www.irishprisons.ie/index.php/statistics/yearly-figures>. This number includes both those returned to prison for violating the terms of their parole and those returned with new sentences.

⁴² *Prison Rules 2007 (Republic of Ireland)* SI 2007/252, online: Irish Statute Book <www.irishstatutebook.com>.

In July 2013, some 622 prisoners were held “on protection” under this rule across the Irish prison estate. Of these, 198 were confined to their cell for 22 to 24 hours a day.⁴³ According to the NGO Irish Penal Reform Trust, as of May 2013, 358 prisoners were held on protection for longer than six months. These numbers would indicate, as the CPT noted in its 2011 report on a visit to Ireland, that “23-hour lock-up should only be considered as a temporary respite, whereas in the Irish prison system it has developed into a general measure.”⁴⁴

The overuse of protection regimes in its prisons - up to 20% of the prison population - is acknowledged by the Irish Prison Service. In its 2013-2015 Strategic Plan, the Service committed itself to develop a strategy for better managing the use of protection regimes and reducing the overall number of prisoners in protective regimes by 30%.⁴⁵

States have an obligation to provide a safe environment for those confined in prison but should attempt to fulfil this obligation whilst allowing as much social interaction as possible among prisoners: “resort should be had to solitary confinement for protection purposes only when there is absolutely no other way of ensuring the safety of the prisoner concerned” and then for the shortest time necessary.⁴⁶ Further, “special efforts should be made to identify other prisoners with whom the prisoner concerned could safely associate and situations where it would be possible to bring the person out of the cell”⁴⁷ and, finally, “additional measures should be taken to provide them with appropriate conditions and treatment, access to activities, educational courses and sport.”⁴⁸

Recognising that protective solitary confinement may at times be a convenient, but not truly necessary, measure, the European court has made it clear that the decision to isolate a prisoner for their own protection for any period longer than a few days will be subjected to particularly close scrutiny. In a recent case concerning the placement of a homosexual prisoner in solitary confinement for eight months for his own protection, the Court stated that even if such safety measures were necessary, they were not sufficient in themselves to justify the applicant’s total exclusion from shared areas of the prison. This treatment caused the applicant mental and physical suffering which exceeded the unavoidable level inherent in confinement, and thus violated Article 3 of

ie/2007/en/si/0252.html>.

⁴³ Written Answer to Parliamentary Question 534, 20 July 2013, Republic of Ireland.

⁴⁴ Council of Europe, *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2011) 3 at 34 [CPT (2011) 3].

⁴⁵ Irish Prison Service, *Three Year Strategic Plan 2012-2015* (Longford: Ireland, 2012) at 48.

⁴⁶ CPT (2011) 28, *supra* note 22 at 44.

⁴⁷ *Ibid* at 48.

⁴⁸ CPT (2011) 3, *supra* note 44 at 35.

the ECHR.⁴⁹

iii. Solitary Confinement as Punishment / Prison Discipline

This is perhaps the most familiar form of solitary confinement: a prisoner commits an offence within the prison, is charged with a disciplinary offence and “awarded” time in segregation. Most prisons will have a special wing or section dedicated to punitive segregation, though some will simply have a number of cells set aside for this purpose, and a small number of prisons will have no provision for punishing prisoners in this way. The physical conditions and regime provisions, as discussed in the following section, can also vary greatly between prisons and different jurisdictions.

In most European states, solitary confinement would be imposed as punishment for a limited and pre-defined time and be subject to some due process protections, including the obligation to hold a formal hearing, to provide the prisoner information on the length of the punishment and the right to appeal the decision.⁵⁰ These rights are not always realised, though the CPT has done much to ensure that minimum standards and requirements are met in the imposition of punishments, including solitary confinement, and the ECHR will also look carefully at the decision making process in this matter.

Within this general framework, there are significant variations within Europe in the maximum permissible duration for its imposition as punishment. In Norway, the 2001 *Execution of Sentences Act* prohibited the use of solitary confinement as a punishment or a disciplinary sanction altogether.⁵¹ Elsewhere, the maximum permissible duration varies from 8 days in Belgium, to 14 days in Finland, 28 days in Poland and in England and Wales, 45 days in France and Estonia and to as long as 60 days in Ireland. It is common practice in some jurisdictions to hold prisoners in punitive segregation cells for the maximum duration allowed by law, release them for one day and then place them in isolation again. This can go on for months and even years. The CPT noted this, stating:

Standards have evolved considerably in the last 25 years; the trend in many member States of the Council of Europe is towards lowering the maximum possible period of solitary confinement as a punishment. The CPT considers that the maximum period should be no higher than 14 days for a given offence, and preferably lower. Further, there should be a prohibition of sequential disciplinary sentences resulting in an uninterrupted period of solitary confinement in excess of the maximum period.⁵²

The UN Special Rapporteur on Torture similarly called for the absolute

⁴⁹ *X v Turkey*, No 24626/09, [2012] ECHR, at para 58.

⁵⁰ For further discussion and case law see Shalev, *Sourcebook*, *supra* note 10 at 28-34.

⁵¹ Though critics note that the highly discretionary nature of the Act means that in practice solitary confinement is used as punishment (see National Institute for Human Rights *supra* note 31 at 34).

⁵² CPT (2011) 28, *supra* note 22 at 43.

prohibition of prolonged solitary confinement, which he defined as a period in excess of 15 days.⁵³

iv. Administrative Segregation / Small Units for High Risk Prisoners

The unit currently holds three fools (mentally ill prisoners) and four dangerous fools, desperados.⁵⁴

Several European states now operate small units for the management of prisoners who are thought to be very high risk because of the nature of their crime; their dangerousness; past escapes or attempts to escape from prison; or their behaviour in prison. Though the conditions of confinement in these units and the basic regime of solitary confinement in them are not greatly dissimilar to those one would find in a US supermax prison, the scale of these units is nothing like the typical American supermax.⁵⁵ Furthermore, as some of the examples examined below demonstrate, within the general framework of solitary confinement regimes, the depth and weight of confinement in these units differ from one European jurisdiction to another and they differ substantially from the typical American supermax.

The Belgian Department of Prison Administration forms part of the Ministry of Justice, a federal ministry. With 12,126 people held in custody, prisons are grossly overcrowded, operating at 125% capacity. Almost a third of these are pre-trial and remand detainees, and as many as 44% are foreign nationals. Indeed the problem of prison overcrowding is so severe, that the Belgian government has had to resort to leasing a prison (Tilburg) from its neighbour, the Netherlands.⁵⁶

The high security unit in Bruges prison – the AIBV (Afdeling Individuele Bijzondere Veiligheid or the Department of Individual Special Security) – is one of two such units, the other one being in Liege. The unit, which became operational in 2008, is located on a separate wing of Bruges prison, with separate gates, CCTV and security systems. It contains two visiting rooms (one of which is used for medical consultations) and 10 cells, used to accommodate prisoners in a regime of strict solitary confinement. Each cell has double doors: a grill door and a thick metal door which, when closed, completely blocks out sound and sight.

Prisoners are meant to be assigned to the unit because of their violent and aggressive behaviour in prison – troublemakers, often those who have assaulted staff, and especially those who took staff hostage. However, contrary

⁵³ UN Special Rapporteur, *supra* note 8.

⁵⁴ Interview with Senior Manager of a prison in Bruges, Belgium by Sharon Shalev (December 2012).

⁵⁵ Typically no more than a dozen cells each, compared to anything from 200 to over a thousand in a US supermax prison.

⁵⁶ *World Prison Brief*, *supra* note 40.

to its mission statement, the unit also holds mentally ill prisoners. At the time of my visit there were three severely mentally ill prisoners in the unit, and I was told that as the unit has its own mental health staff, it was the best place for them despite the conditions of solitary confinement and enhanced security in the unit.⁵⁷ All three were prescribed psychiatric medication.

The official aim of the unit is stabilize and normalize prisoners' behaviour and return them to a normal prison regime. However, although originally their stay at the unit was meant to be limited to six months, some prisoners were now held there indefinitely, and some will most likely never leave. The four "desperados" are handcuffed whenever they leave their cell, and escorted by a minimum of two guards. Until the courts intervened, one prisoner also had his feet shackled upon leaving this cell.

Cells contain a bed (fixed to the floor); a toilet and sink combination unit, but no shower; a large window with a perforated side-panel which can be opened for fresh air; a radio; and a TV set located on the wall behind a protective screen. Prisoners can order canteen goods once a week, using a special form. The goods, purchased with a prisoner's own funds, are kept in special storage for him, and he can ask for goods to be delivered to the cell up to three times a day. A prisoner who has no money can draw on a special "social fund" which would provide up to EUR 10 a month. The prison provides prisoners with basic clothing, shoes, bedding, towels and cleaning materials. Books are ordered from the local public library, and prisoners may keep up to 10 books in their cell at any time.

Family visits are allowed on principle for an hour a day, but in practice prisoners at the unit receive few visits; when they do, some are contact and some are not, at the discretion of prison staff. Visits take place in a designated room located inside the unit, which also doubles as a workshop room for those prisoners who engage in paid work activities, which they undertake alone for two to three hours per day. Other than infrequent family visits, the regime is minimal: all prisoners are provided with an hour of outdoor exercise in the unit's small yard, and two hours a week in a "gym room", both also located within the unit. These activities are done on an individual basis and the prisoners never see each other.

In contrast, prisoners in the Dutch equivalent of the AIBV, the EBI (extensive security unit) at Vught prison – which was also built with the specific purpose of holding up to 24 very high security prisoners in separation from the rest of the prison – enjoy somewhat more relaxed conditions.⁵⁸ The unit is relatively

⁵⁷ This is a direct result of the extreme shortage of beds in secure mental health facilities. In a recent case, the detention of a man suffering mental illness in a prison psychiatric wing for more than 15 years due to a shortage of beds in psychiatric facilities elsewhere, was found by the European Court to violate Article 3 of the ECHR in *Claes v Belgium*, No 43418/09, [2013] ECHR 34.

⁵⁸ This has not always been the case: see CPT reports from 2008 and ECHR case law, in particular the case of *Van der Ven v The Netherlands*, No 50901/99, [2003] ECHR 1 regarding the punitive regime at the unit in its

spacious, and cells, whilst single, have large windows and their own toilet/shower. Prisoners will on occasion be allowed to mingle with each other in small groups of between two to six and cook or watch television together in the specially designated communal rooms in the unit.

The separation of prisoners from staff, however, is near total, in the sense that the two groups operate in separate glass bubbles – quite literally. For example, there is a very well equipped gym in the centre of the unit, and an instructor sits inside a glass enclosure in the gym, instructing prisoners through an intercom system.⁵⁹ The physical separation between prisoners and staff is such that when, back in 1999, one prisoner attacked another in the outdoor exercise yard, staff could not physically intervene in time to stop the attacker from killing his fellow prisoner.⁶⁰ Elsewhere, for example in the UK's Close Supervision Centres, prisoners may have no contact with each other, but they have increased contact with prison staff.

These are just some examples. Small units for the management of a small group of prisoners classified as highly dangerous and or disruptive now operate in many European countries and the ECtHR has, by and large, accepted the rationale for the operation of these units so long as minimum standards and safeguards are met. I now turn to examine conditions and regimes in solitary confinement cells across Europe and how the European Court of Human Rights and the CPT have assessed conditions of confinement in them.

B. Material Conditions, Provisions & Regime

Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment.⁶¹

earlier days.

⁵⁹ Personal notes of Sharon Shalev from a visit to Vught Prison, Netherlands (2010).

⁶⁰ There were also other contributing factors: "Apparently, guards were not in a position to prevent the prisoner's death, due to several factors: the speed with which the incident occurred; their physical separation from the exercise yard by armoured glass panels; and, finally, security regulations prohibiting them from entering into direct contact with more than one inmate at a time" from Council of Europe, *Report to the Authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe and to the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/ Inf (2002) 30 at para 35. For further discussion of the Dutch prison system see Sandra Resodihardjo, *Crisis and Change in the British and Dutch Prison Services: Understanding Crisis-Reform Processes* (Ashgate: Farnham, 2009).

⁶¹ UN Special Rapporteur, *supra* note 8 at para 81.

As isolated prisoners will spend most of the day inside their cell, the physical conditions of confinement, including cell size, windows, sanitation, thermal comfort, privacy, fixtures and furnishings, the number and type of personal belongings they can keep in their cells and the regime provisions they can access, are of particular importance, and no more so than when the prisoner is likely to be held in solitary confinement for a prolonged period.

The material conditions in European segregation units and isolation cells, as I have observed during prison visits and has been reported in CPT country reports, vary substantially between countries and sometimes even within the same jurisdiction. Moreover, the distinction between a “good” and a “bad” isolation unit or cell is not always clear-cut: cells may be small and without internal sanitation, but contain a window, or they may be windowless but contain a toilet and a shower. Indeed, isolation cells may contain nothing at all, other than a thin mattress and a hole in the ground. In some European countries, old prison buildings, some dating back to the 19th century, are still operational. Cells in these prisons typically have very thick walls, are small, and contain no internal sanitation, meaning that prisoners have to “slop out” and use a bucket, or ask to be escorted to a toilet every time they needed to use it. Segregation cells in newer prisons may be equipped with a toilet and in some prisons even a shower, but with little else.

The expected duration of stay at the unit would also typically affect conditions there. In most of the prisons that I have visited, conditions in the disciplinary segregation units were far worse than those in longer-term segregation units for high-risk prisoners (where such units operated), though, as the CPT has noted, material conditions are not the only factor affecting the “feel” of a segregation unit. Reporting on a visit to Spain, the Committee noted that the segregation cells in Quatre Camins were “dilapidated and dirty” and the 10 man disciplinary segregation unit in San Sebastian Prison “offered very poor material conditions, with no equipment provided apart from a bed and a chair” yet, “despite this state of affairs, the prison did not suffer from an oppressive environment.”⁶²

Cells in the isolation wing of the remand prison in Gothenburg, Sweden, though they did not contain a toilet, were reported to be of a “generally good standard”.⁶³ However, detainees had to take outdoor exercise in “cage-like” rooftop exercise areas measuring some twenty-five square metres, which were not large enough to allow them to exert themselves physically. Several inmates met by the delegation indicated that they refused to take outdoor exercise because they found it humiliating and degrading, “like being a dog

⁶² Council of Europe, *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2011) 11 at 49-55 [CPT (2011) 11].

⁶³ CPT (2009), *supra* note 33 at para 47.

in a cage”.⁶⁴

This description fits with my own experience of the exercise yard in another remand prison in Sweden.⁶⁵ Elsewhere, for example in another prison which I visited in Norway, the yard was no more than a small, narrow and completely barren cubical, described to me by a prison officer working in that unit as “absolutely shameful”.

In other European countries, segregation units, especially ones used for disciplinary segregation, can be located in the prison’s basement, with very little access to natural light. In Ukraine, disciplinary segregation cells were “unsuited for use as inmate accommodation... some measured only 4.5 to 5 m², and some cells were very narrow (1.3 m). The cells were dark, dilapidated and dirty.”⁶⁶ Prisoners serving life sentences fared a little better, but they “spent 23 hours a day in their cells in a state of enforced idleness, their main activity being watching TV and reading books” and the exercise yards to which they had access for one hour every day were of an “oppressive design and too small for real physical exertion (e.g. some 9 m² at Colony No 60)”.⁶⁷ In Latvia the CPT reported:

The delegation found that material conditions in the establishment’s disciplinary cells were very poor. In this regard, particular mention should be made of five of the cells. Apart from being small (some 4.5 sq. meters) and dark (with hardly any access to natural light and dim artificial lighting), the cells in question were dilapidated, filthy, damp and badly ventilated. Further, a tap placed directly above the floor-level toilet was the only source of drinking water. At the end-of-visit talks with the Latvian authorities, the delegation emphasised that such cells were, by virtue of their size alone, unsuitable for use as prisoner accommodation (even for disciplinary purposes), and made an immediate observation requesting that these cells be withdrawn from service.

The other disciplinary cells were larger. However, they had dim artificial lighting, only limited access to natural light and ventilation, and were humid. Further, in-cell toilets were filthy and foul-smelling.⁶⁸

The disciplinary segregation cells in Forest prison in Belgium were of “the same configuration: a bare cell with a mattress on the floor (and blankets) and a stainless steel toilet...” and the entire area was found to be “poorly

⁶⁴ *Ibid* at para 48.

⁶⁵ Another interesting feature of that particular prison was a box with disposable surgical gloves which I saw in the guards’ station outside the exercise yard and was told was there in case there was need to search the prisoner before or after their exercise period.

⁶⁶ Council of Europe, *Report to the Ukrainian Government on the visit to the Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2011) 29 at 49 [CPT (2011) 29].

⁶⁷ *Ibid* at 45.

⁶⁸ Council of Europe, *Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2011) 22 at paras 19-20 [CPT (2011) 22].

maintained, dirty, smelly and inadequately ventilated.”⁶⁹ As well as these disciplinary cells, the prison had several “special” cells containing “nothing but a concrete bed placed in the middle of the cell, with two metal rings on each side used for restraining prisoners who were in a state of severe agitation or who were at risk of self-harm.”⁷⁰ In other prisons a hospital bed may replace the concrete slab, and the metal rings by leather straps, or the cell might be equipped with a plastic-coated mattress and padded walls. Such “special” or “security” cells can be found in many European prisons, and they are usually used for no longer than a few hours. Ironically, and in stark contrast to good practice recommendations, in many jurisdictions across Europe these cells are also used to house prisoners who are suicidal or at risk of self-harm.

i. Regime

The existence of a satisfactory programme of activities is just as important – if not more so – in a special unit than on normal location. It can do much to counter the deleterious effects upon a prisoner’s personality of living in a bubble-like atmosphere of such a unit.⁷¹

Physical conditions of confinement and the number and types of personal belongings that isolated prisoners can keep in their cell are just one aspect of solitary confinement, albeit an important one, which monitoring bodies and the courts will look at closely. As well as being locked up alone in a cell and deprived from social interaction, any regime provisions – access to sports, vocational, educational and therapeutic programmes (if any exist at all) – will be highly limited, and typically provided in cell or on an individual basis. Access to family and friends through telephone calls and visits will also be extremely limited and often involve no physical contact.

In Ireland, for example, Article 13 (1) of the *Prisons Rules 2007* authorises the prison Governor to impose the following punishment on a prisoner who has breached prison discipline:

- (d) prohibition, for a period not exceeding 60 days, on—
 - (i) engaging in specified authorised structured activities or recreational activities,
 - (ii) receiving visits (except those from a doctor or other healthcare professional, his or her legal adviser, a chaplain... (iii) sending or receiving letters (except letters from a person mentioned in subparagraph (ii))... (iv) using money or credit or any other facilities, including telephone facilities, or (v) possessing specified articles or articles of a specified class the possession of which is permitted as a

⁶⁹ Council of Europe, *Report to the Belgian Government on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (2012) 36 at para 43 [CPT (2012) 36].

⁷⁰ *Ibid* at para 44.

⁷¹ CPT (2011) 11, *supra* note 62 at para 131.

privilege...⁷²

In most jurisdictions the basic requirement to provide prisoners with a minimum of one hour of exercise in the fresh air is respected, but not in all. In Latvia, for example, prisoners placed in disciplinary isolation were prohibited from outdoor exercise until the Constitutional Court of Latvia ruled that this practice was unconstitutional.⁷³ They also had no access to reading material (except religious and legal texts) and faced a complete prohibition of contact with the outside world (except with a lawyer), contrary to EPR Rule 60.4.⁷⁴

The opportunity for, and frequency of, contact with the outside world will be examined by the European Court very closely indeed and, where a prisoner is afforded such contact, this will be viewed by the Court as an important mitigating factor. In the case of *Ramirez Sanchez v France*, which involved the housing of a prisoner convicted of terrorism offences (“Carlos the Jackal”) in solitary confinement for close to eight years, the Court considered that this did not violate Article 3 of the ECHR, as he had ample human contact, carefully calculated by the Court:

In the present case, the applicant received twice-weekly visits from a doctor, a once-monthly visit from a priest and very frequent visits from one or more of his 58 lawyers, including more than 640 visits over a period of four years and ten months from his representative in the proceedings before the Court, now his wife under Islamic law, and more than 860 visits in seven years and eight months from his other lawyers.⁷⁵

Thus, the Court considered that Ramirez’s isolation was not complete, did not have a detrimental effect on him and that he showed no signs of mental or physical deterioration. The Court nonetheless noted that, “solitary confinement, even in cases entailing relative isolation, cannot be imposed on the prisoners indefinitely.”⁷⁶

In contrast, in *Ilascu and others v Moldova and Russia*, the Court found that the combination of conditions on death row including strict isolation and poor material conditions (interestingly also for an eight year period), did violate Article 3 and constituted torture:

Mr. Ilascu was detained for eight years, from 1993 until his release in May 2001, in very strict isolation: he had no contact with other prisoners, no news from the outside – since he was not permitted to send or receive mail – and no right to contact his lawyer or receive regular visits from his family. His cell was unheated, even in severe winter conditions, and had no natural light source or ventilation. The evidence shows that Mr Ilascu was also deprived of food as a punishment and that in any event, given the restrictions on receiving parcels, even the food he received from outside

⁷² *Prison Rules 2007*, *supra* note 42, Art 13 (1), s d (i).

⁷³ CPT (2011) 22, *supra* note 68 at para 21.

⁷⁴ *Ibid* at para 22.

⁷⁵ *Ramirez Sanchez v France* [GC], No 59450/00, [2006] IX ECHR 685, at para 13, 45 EHRR 491.

⁷⁶ *Ibid* at para 145.

was often unfit for consumption. The applicant could take showers only very rarely, often having to wait several months between one and the next...

The applicant's conditions of detention had deleterious effects on his health, which deteriorated in the course of the many years he spent in prison. Thus, he did not receive proper care, having been deprived of regular medical examinations and treatment... and dietetically appropriate meals...

The Court concludes that the death sentence imposed on the applicant coupled with the conditions he was living in and the treatment he suffered during his detention... were particularly serious and cruel and must accordingly be considered acts of torture within the meaning of Article 3 of the Convention.⁷⁷

In short, where there was a legitimate justification for holding a prisoner or detainee in solitary confinement, and where material conditions were not – in their totality – too extreme, the Court has so far been willing to find even a regime of prolonged, and relatively strict solitary confinement, permissible under the ECHR. Where material conditions are poor in the extreme, and especially when combined with unmitigated social isolation, the Court has found violation of the prohibition against torture, inhuman or degrading treatment.

IV. European Practices of Solitary Confinement: Some Concluding Thoughts

In many respects, once you have seen one segregation unit you have seen them all: there are only so many possible variations on the theme of solitary confinement – a man, or a woman, alone in a cell, isolated from human contact and social life. Still, within these parameters, as this article has demonstrated, there are differences. Some of these differences are largely in the theory behind, or the reasons for, the use of solitary confinement: protection, prevention, or punishment. Other differences lie in the actual practice: material conditions, regime and the degree of isolation. But there is also something else, less tangible, which accounts for differences between prisons and between segregation units within them: an atmosphere, an intent, an attitude; not just the quantity, but also the quality of human interaction and relationships. Visiting segregation units, one begins to get a sense of that “something else” that cannot be gleaned from official narratives or statistics. Although the European segregation units I have visited differ markedly from each other, those differences pale into insignificance when these units are compared to an

⁷⁷ *Ilascu and others v Moldova and Russia* [GC], No 48787/99, [2004] VII ECHR 318, at paras 438-44, 40 EHRR 46.

American supermax.

The tension between practices and attitudes on both sides of the Atlantic was brought into sharp focus in July 2012, when the European Court of Human Rights was asked to rule in *Babar Ahmed et al v UK*, a case involving the extradition of three men suspected of terrorism offences from the United Kingdom to the United States. The issue at hand was whether conditions of confinement at the federal supermax prison, Administrative Maximum Facility (ADX), in Colorado, where the men were likely to be held should they be convicted, were compatible with Article 3 of the European Convention on Human Rights and its absolute prohibition of torture and inhuman or degrading treatment or punishment.⁷⁸

The Court asked for further information on the American supermax prisons and the conditions and regime in them, and for a time it appeared that it might decide that extraditing the men to the US would put them in risk of treatment which violated the Convention. But hard diplomatic and political realities then took over.⁷⁹ The Court ruled that the conditions under which the applicants were likely to be held at the ADX did not contravene the ECHR and that the applicants could therefore be extradited to the US to face trial, with the exception of one of the applicants, Haroon Aswat, a paranoid schizophrenic who was detained at the time at Broadmoor High Security Psychiatric Hospital:

While the Court in *Babar Ahmad* did not accept that the conditions in ADX Florence would reach the Article 3 threshold for persons in good health or with less serious mental health problems, the applicant's case can be distinguished on account of the severity of his mental condition... Therefore, in light of the current medical evidence, the Court finds that there is a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.⁸⁰

For the other applicants, extradition to the US could go ahead. The Court's reasoning for its decision relied almost entirely on official narratives as articulated by ADX warden and staff. Though confined to their cell for the majority of the day, the Court reasoned, ADX prisoners were provided with a "great deal of in-cell stimulation and services" and could also talk to other prisoners, "admittedly only through the ventilation system".⁸¹ Any limitations placed on prisoners were "reasonably related to the purported objectives of the ADX regime" and they could participate in a step down programme, albeit

⁷⁸ *Babar Ahmad and Others v the United Kingdom*, No 24027/07, [2010] ECHR 1067, 51 EHRR SE6.

⁷⁹ For further discussion see Sonja Snacken & Dirk van Zyl Smit, "Distinctive Features of European Penology and Penal Policy-Making" in Tom Daems, Dirk van Zyl Smit & Sonja Snacken, eds, *European Penology?* (Oxford: Hart Publishing, 2013) 3.

⁸⁰ *Aswat v United Kingdom*, No 17299/12, [2013] ECHR 322, at para 57, 58 EHRR 1.

⁸¹ *Ibid* at para 222.

one which takes a minimum of almost five years to complete, three of which are spent in near total isolation.

Though not entirely surprising, I believe that the Court's decision was a regrettable and, moreover, a misguided one. The conditions, regime, atmosphere and attitudes in a typical American supermax, as I have witnessed them and as reported by other observers, violate, in my view, not only the European Convention on Human Rights, but also the international prohibition against cruel, inhuman and degrading treatment or punishment more widely. Supermax prisoners are not treated with "humanity and with respect for the inherent dignity of the human person".⁸² I would also like to think that, notwithstanding its tradition of allowing prison authorities a wide margin of appreciation in prison practices, if the European Court were to encounter within Europe the harsh, unrelenting and routine deprivations of an American supermax prison, it would reject such practices as contravening the European Convention on Human Rights.

So we must hope that the European Court's judgment in *Babar Ahmed* is an aberration, and that, at least within Europe, the Court will continue to play, alongside the CPT, the NGO community, the UN Special Rapporteur on torture and other international human rights bodies, a central role in ensuring that the worst excesses of solitary confinement are avoided and that it is only used in very exceptional circumstances, as a last resort, for as short a time as possible,⁸³ and that its use in any case is proportionate, lawful, accountable, necessary and non-discriminatory.⁸⁴ We must also hope that the public, political, and professional cultures within Europe continue to resist punitiveness and reject the use of mass isolation prisons.⁸⁵

⁸² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 10, Can TS 1976 No 47. The universal right to be treated with dignity is protected under numerous international human rights instruments including, *inter alia*, the *United Nations Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UNGAOR, 45th Sess, Supp No 49, UN Doc A/RES/45/111, (1990).

⁸³ UN Special Rapporteur, *supra* note 8 at para 89.

⁸⁴ CPT (2011) 28, *supra* note 22 at 40-41.

⁸⁵ Sonja Snacken, "Resisting Punitiveness in Europe?" in Sonja Snacken & Els Dumortier, eds, *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Abingdon: Routledge, 2012) 247.