Assessing solitary confinement in Norway in the context of Article 3 of the ECHR

*Does Norwegian law and practice comply with Article 3 of the ECHR and standards developed under the case-law of the ECtHR?*

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1 Introduction

1.1 Norway and human rights.
   The Convention, Article 3 and the Court

Norway has a good international record when it comes to the protection of human rights and fundamental freedoms. The State is often portrayed as the leading example for other states to follow in the human rights area.\(^1\) Indeed, the respect for human rights stands strong domestically; both in law and practice, as well as in popular public opinion, continuously enhanced by the entering into numerous international agreements for the protection of human rights. Moreover, Norway has been one of the leading advocates for the promotion and strengthening of human rights in other states of the world. Certainly, Norway has prided itself on being one of the most “staunch human rights defenders, advancing a progressive human rights agenda” in the entire world community.\(^2\)

Despite overall good standing, the State has received considerable criticism on its practice surrounding the use of solitary confinement. Criticism comes from both domestic and international actors; such as the Parliamentary Ombudsman\(^3\), the Media, a variety of domestic and international human rights organizations such as Amnesty International, and several treaty bodies such as the UN Committee Against Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter “the Committee” or “the CPT”), and so on. Critics claim that there exists an overly extensive use of solitary confinement (isolation), and that this amounts to a breach of one of the most fundamental of all human rights; namely the right to freedom from torture, inhuman and degrading treatment and punishment.

Albeit differently formulated, this right is enshrined both in domestic law and in the many international treaties that Norway has entered into. An important treaty containing the prohibition of torture and inhuman and degrading treatment and punishment is the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “the Conven-

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2 Ibid.
3 The Norwegian Parliamentary Ombudsman for Public Administration.
tion” or “the ECHR”). The Convention was signed in 1950 and entered into force in 1953. As of today, 47 European states – all members of the Council of Europe – have ratified the Convention.4

Article 3 of the Convention reads as follows:

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

Along with the right to life, the right to freedom from torture, inhuman and degrading treatment and punishment has been referred to as the most fundamental human right. Despite its fundamental character, Article 3 interestingly enough gives no further guidance neither to its content nor to its application.

The ECHR Section II establishes the European Court of Human Rights (hereafter “the Court” or “the ECtHR”). The Court is an international judicial body whose task is to “ensure the observance of the agreements (…) in the Convention”.5 In exercising this task, the Court enjoys jurisdiction in “all matters concerning the interpretation and application of the Convention”.6 It is primarily through the jurisprudence of the Court that an understanding of the content, scope and application of the Convention – thereunder Article 3 – has developed.7

Norway has been a State Party to the Convention from the very outset. However, it was not before 1999 that the Human Rights Act implemented the ECHR into Norwegian law and deemed the Convention provisions and the Court’s practice lex superior to domestic laws and practices.8 This means that Norwegian legislative bodies, courts and other administrative bodies are under an obligation to comply with the standards established from the Convention text and the Court’s practice. Hence, the ECHR and the related Court case-law has a strong position in the Norwegian legal system.

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4 Council of Europe, The Court in brief.
5 ECHR Article 19.
6 Ibid. Article 32.
8 Human Rights Act Section 3.
In this thesis, it is the ECHR Article 3 and the case-law of and standards established by the ECtHR that will serve as a benchmark for assessing whether Norway is complying with its international legal obligations to prohibit torture and inhuman and degrading treatment and punishment of prisoners.

1.2 Objectives and limitations

1.2.1 Objectives

The main research question of this thesis is

*Does Norwegian law and practice comply with Article 3 of the ECHR and standards developed under the case-law of the ECtHR?*

For the purpose of answering the research question, the thesis is divided into several parts.

Since this thesis revolves around the use of solitary confinement, a definition and explanation is necessary. What is solitary confinement, and what are the complications related to it? Why is the use of isolation controversial in a human rights context? Part 2 of the thesis is dedicated to answering these questions.

To determine whether or not Norway complies with its obligations under the ECHR Article 3, it is necessary to examine how this provision has been understood. Since it is primarily through the work of the ECtHR that an understanding of Article 3 has developed, part 3 of the thesis will look into the Court’s practice surrounding the use of solitary confinement. This part will analyse Court practice and make an attempt to discuss and determine what standards the Court has established in regard to solitary confinement. This part, in other words, seeks to establish when – if ever – the use of solitary confinement constitutes a violation of Article 3.

For comparing the use of solitary confinement in Norway to the standards derived from Article 3, it is necessary to look into how solitary confinement is practiced in Norway. This will be the topic of part 4 of the thesis. This part will consist of an analysis of domestic legislation in regard to solitary confinement, and then move on to a presentation of how solitary confinement is actually practiced.
Part 5 of the thesis will provide an analysis of the criticism Norway has received in regard to its use of solitary confinement. In light of the criticism, this part of the thesis will discuss whether Norway complies with the ECtHR’s standards on the use of solitary confinement, or whether Norwegian law and practice constitute a violation of Article 3. I will conclude this part of the thesis by arguing that Norway is indeed largely violating the Article through its law and practice.

Part 6 will provide a summary and some final remarks. I will here present several indicators which imply the likelihood of a case being brought before the ECtHR in the nearest future. The thesis will be concluded by suggesting which changes and improvements Norwegian authorities need to make in order to bring the relevant legislation and practice in compliance with the requirements of the ECHR Article 3.

1.2.2 Limitations

A series of choices concerning the theoretical framework have been made so as to keep the thesis within its permitted scope. Firstly, although the freedom from torture, inhuman and degrading treatment and punishment is enshrined in numerous legal bodies, the focus of this thesis will only be on the ECHR, its Article 3 and the related ECtHR case-law. Furthermore, when referring to police custody, this thesis will mean the police custody of criminal suspects arrested pursuant to the Criminal Procedure Act (hereafter “the CPA”). Persons apprehended in police custody for other reasons will not be covered. Moreover, only isolation of persons in police custody and of remand prisoners (court-ordered solitary confinement) will be covered. Also, the solitary confinement of convicted prisoners and persons in preventive detention is not a part of this thesis.

The criticism directed towards Norway comes from different sources. However, this thesis will focus on criticism deriving from the work of the CPT and from the Parliamentary Ombudsman. The background for this is that the CPT’s criticism is quite comprehensive, encompassing all the criticism Norway has received from other human rights bodies. The CPT con-

9 Such other reasons may include disturbing the peace, refusing to obey police orders, identification purposes, recovering from intoxication, the taking into custody of ill persons or persons who pose a danger for themselves or others, as well as the taking into police custody of foreign nationals under aliens legislation.
ducts inspection visits to all member states of the Council of Europe with the purpose of preventing violations of the ECHR Article 3 and strengthening the protection for persons deprived of their liberty by the authorities. The committee examines the conditions under which such persons are kept, and it delivers reports with points of criticism and suggested improvements to the respective governments. For these reasons, the ECtHR often refers to the work of the Committee when assessing whether a particular treatment constitutes a breach of the Article. Hence, the CPT’s views hold a particular relevance in the case-law of the ECtHR. Moving on, one of the main tasks of the Parliamentary Ombudsman is to investigate “cases and matters that have been dealt with and decided on by the public authorities” so as “to make sure that the public authorities respect and uphold human rights”. The Ombudsman may criticize the practice of the authorities in a particular case or in general. He or she may also “draw attention to shortcomings in statutory law, administrative regulations or administrative practice”. In length of this, he or she may suggest any improvements considered necessary in order to avoid unjust treatment of the citizens and for the avoidance of human rights violations committed by the authorities. It is not in the powers of the Ombudsman to “pass binding decisions or reverse decisions made by public bodies” or to “issue legally binding instructions to the authorities”. In practice, however, the authorities largely respect the opinions and recommendations of the Ombudsman and generally strive to comply with his or her requests and recommendations for improvement. As such, the Ombudsman serves as a special safeguard against unjust treatment of citizens by the authorities. It is for these reasons that the criticism deriving from the Ombudsman will – along with the CPT criticism – be important for the purposes of this thesis.

ECHR Article 3 prohibits torture and inhuman and degrading treatment and punishment. However, for the purpose of this thesis, solitary confinement will be regarded as “treatment” only. The terms isolation/complete isolation and solitary confinement will be used interchangeably.

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10 Council of Europe, The CPT in brief.
12 Ibid. p. 11.
13 Ibid.
2 Solitary confinement. 
What is solitary confinement? Complications surrounding the use of solitary confinement

Solitary confinement, or isolation, may be defined as “the physical isolation of individuals” who are confined to their one-person cells for most of the day. Meaningful contact with other people is typically reduced to a necessary minimum with prison staff. In addition, restrictions and limitations – even complete prohibition – may be imposed on the contact with the outside world. “The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.” As regards contact with other inmates; solitary confinement means that the individual in question is prohibited from contact with these. Exercise, airing, and so on is typically executed in solitude.

Research has documented that solitary confinement may cause serious psychological and physical harms. A long list of symptoms have been documented and the effects have been reported to occur even after only a few days in solitary confinement – and rising with each additional day spent in such isolation. On this background, the use of isolation, and recent years’ increase in its use, has been described as a “very problematic and worrying development”.

Individuals may react differently to solitary confinement. However, a significant number of these will nevertheless experience serious health problems regardless of the specific conditions of the isolation, regardless of time and place and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.

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14 Istanbul Statement, p. 1. 
15 Ibid. 
16 Ibid. 
17 Ibid. p. 2.
With this in mind, it has been recommended that the use of solitary confinement should be kept to a minimum; it “should only be used in very exceptional cases, for as short a time as possible and only as a last resort”. 18

Given the nature of solitary confinements and its consequences, the use of isolation has raised several human rights concerns. Among these are the complications on the right to liberty and security, the right to a fair and prompt trial, the right to freedom of association and correspondence, the right to respect for private and family life, and the right to freedom of expression, which includes the *receiving* of expressions. 19 Most vigorously, however, solitary confinement is discussed as a breach of the right to freedom from torture, inhuman and degrading treatment and punishment.

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18 Ibid. p. 5.

19 Just as the right to freedom from ill-treatment is enshrined in numerous domestic and international legal instruments, so are these rights. In the ECHR, these rights follow from Articles 5-8 and 10-12.
3 The ECtHR on the use of solitary confinement

3.1 Introductory remarks on Article 3 and the contexts in which it appears in the Convention

It follows from the ECHR that it is the responsibility of the State Parties to “secure to everyone within their jurisdiction the rights and freedoms” enshrined in the Convention.\(^{20}\) With this, State Parties are obliged to take such measures as are necessary to prevent ill-treatment contrary to Article 3.

Article 3 imposes both negative and positive obligations; an obligation to refrain from certain actions, and obligations to take positive actions to secure individuals their rights and to protect them from prohibited treatment.\(^{21}\) In other words, Article 3 can be infringed by both *deliberate infliction* of ill-treatment and also by *negligence or failure* to take specific action, or provide adequate standards of care, including the prevention or abolition of laws and practices contrary to Article 3.\(^{22}\)

Article 3 is stated in absolute terms; there are no exceptions to the prohibition. This means that under no circumstance is it possible to engage in conduct contrary to that which is prohibited in this article. This also means that no circumstance may justify the resort to such conduct; not the behaviour of the victim, nor the pressure on the perpetrator or any other circumstance.\(^{23}\) The ECHR Article 15 allows State Parties to derogate from their obligations in times of war or other public emergency. However, Section 2 of Article 15 states that this does not apply to Article 3. Therefore, Article 3 being an absolute prohibition also means that it cannot, under any circumstances, be derogated from.

Another central characteristic of the Convention is that its interpretation is *dynamic*; it is reflective of changing social mores, standards and expectations.\(^{24}\) The Court has in several cases

\(^{20}\) ECHR Article 1.


\(^{22}\) Ibid.

\(^{23}\) Gäfgen v. Germany, paragraphs 86 and 107.

pointed out that the Convention is a “living instrument” which must be interpreted in light of present-day conditions. This means that treatment which has previously not reached the thresholds of Article 3 might be assessed differently in the future. It also means that treatment previously considered to be “only” inhuman or degrading, might in the future be considered to reach the higher threshold of torture.

As pointed out above, Article 3 of the ECHR is brief in its wording. It does not mention solitary confinement at all. In fact, it does not mention any type of ill-treatment in particular. Hence, it has been up to the Court to elaborate on what type of treatment falls within the scope of Article 3, as well as which threshold this treatment needs to exceed in order for it to constitute ill-treatment contrary to Article 3.

Article 3 does not prohibit all forms of ill-treatment; only ill-treatment which reaches a minimum level of severity falls within the scope of the Article. In the case of Ireland v. the UK, the Court established a test for determining whether the ill-treatment in question reaches the threshold of Article 3. The Court expressed that

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(\ldots) \text{ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is (\ldots) relative; it 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 (\ldots).}\]

In the Soering case, the Court added that – in addition to the above mentioned factors – the severity of the ill-treatment also depends on factors such as the nature and context of the ill-treatment, and the manner and method of its execution. The Court has also acknowledged that what constitutes unacceptable ill-treatment may also vary from place to place and from culture to culture.

Also, specifically relevant to situations where persons are deprived of their liberty, the Court has stated that:

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27 Ireland v. the United Kingdom, paragraph 162.
28 Soering v. the United Kingdom, paragraph 100.
The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.\textsuperscript{30}

This severity-test and the mentioned elements have been repeated over and over again in the Court’s practice, and the ECtHR routinely refers to these in the assessment of whether a violation of Article 3 has taken place.

\textbf{3.2 Is isolation a violation of Article 3?}

In regard to solitary confinement, there have been a considerable number of cases before the ECtHR in which its use has been questioned.

It must be noted upfront that the use of solitary confinement does not \textit{itself} constitute a violation of Article 3; “the removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment”.\textsuperscript{31}

On the contrary, the Court recognizes that there is a need for tough security regimes in some cases, making solitary confinement a justified measure for the above mentioned purposes.\textsuperscript{32} Other justifications for the use may be the interests of the administration of justice, thereunder to prevent the detainee from making external criminal contact, the interests of the investigation and evidence-gathering, and so on.\textsuperscript{33}

However, it is acknowledged that, beyond certain limits, and when prolonged, solitary confinement may amount to ill-treatment contrary to Article 3.\textsuperscript{34} In several cases, the ECtHR has found the use of solitary confinement to be of such a nature that it has amounted to a violation of Article 3.

\textsuperscript{30} Poltoratskiy v. Ukraine, paragraph 132.
\textsuperscript{31} Öcalan v. Turkey, paragraph 191.
\textsuperscript{32} Ovey (2006), p. 82.
\textsuperscript{33} Harris (2014), p. 264.
\textsuperscript{34} Rodley (2009), p. 402.
This reveals that a limit in fact does exist between cases where the measure is allowed, and cases in which the use exceeds this limit and rather becomes a violation of Article 3. Through hearing cases on solitary confinement, the ECtHR has established “a clear set of principles for determining when the conditions of detention might engage Article 3”.\(^{35}\) Court practice on the matter provides guiding principles for the assessment of whether the use of solitary confinement infringes the Article.

The sections below will look into when this threshold is reached. When might solitary confinement cross the line between being a permitted measure, to rather becoming a breach of Article 3? What standards and guidelines are established by the Court in this context?

### 3.3 ECtHR practice on isolation.

**Determining the criteria and threshold for violation**

#### 3.3.1 The time period spent in isolation

The cases referred to in the following sections will illustrate that the time period spent in solitary confinement is not on its own decisive in regard to Article 3. Other factors must also be taken into account. This means that even a long time spent in solitary confinement may nonetheless be in conformity with Article 3. And vice versa; even a short stay in solitary confinement may be a breach of the Article when seen in context of the other circumstances of the case.

However, the ECtHR has established that generally “prolonged solitary confinement is undesirable, especially where the person is detained on remand”.\(^{36}\) The Court has indeed expressed its concerns on particularly lengthy periods in solitary confinement.\(^{37}\) As such, despite not being the decisive element, the time period spent in isolation is certainly a relevant factor when assessing whether Article 3 has been violated.

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\(^{35}\) Ovey (2006), p. 94.

\(^{36}\) Ensslin, Baader and Raspe v. Germany, p. 109, paragraph 5.

\(^{37}\) For example in Ramirez Sanchez v. France, cf. paragraph 150.
3.3.2 A context-based evaluation.

The use of isolation must be seen in context of other material and psychosocial conditions of detention

In context of deciding when solitary confinement is acceptable, and when it exceeds the acceptable and rather becomes a breach of Article 3, the ECtHR has expressed that

In assessing whether solitary confinement may fall within the ambit of Article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned.\(^{38}\)

The Court has further established that the “physical conditions in which a prisoner was held must be taken into account when examining the nature and duration of his solitary confinement in relation to Article 3”.\(^ {39}\)

The Court requires the State to ensure that any person who is detained is held under conditions that are compatible with respect for human dignity, that the manner and method of the detention do not subject the detainee to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.\(^ {40}\) This means that all conditions of detention in isolation must be taken into account when determining whether the isolation amounts to a breach of the Article; the cumulative effect of all conditions must be taken into consideration.\(^ {41}\)

On the one hand, ECtHR practice contains examples of extreme cases in which there was no doubt that the isolation amounted to a breach of Article 3. For example, in the case of I. I. v. Bulgaria, the Court classified as inhuman and degrading treatment the detention of an individual for three months in a very small cell without any natural light or satisfactory ventilation, coupled with poor sanitary facilities and no provision for spending time out of his cell. The Court has also indicated that “complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality of the detained person; this consti-

\(^{38}\) Van der Ven v. the Netherlands, paragraph 51.

\(^{39}\) Rodley (2009), p. 404.

\(^{40}\) Yarashonen v. Turkey, paragraph 71.

tutes a form of inhuman and treatment which cannot be justified by the requirements of security or any other reason”.

The Ilașcu case also deserves mentioning in this context. In this case, the criminal suspect was detained under very strict isolation for eight years. During his time in isolation, he had no contact with other prisoners, and had no means of receiving updates and news from the outside world. He had no right to contact his lawyer or to receive regular visits from his family. The Court concluded that the length of the solitary confinement along with its stringency together amounted to a breach of Article 3.

On the other hand, Court practice contains examples of the use of solitary confinement which was considered to be in conformity with Article 3 despite its length. The Rohde case is of particular relevance in this context. In this case, which regarded the pre-trial solitary confinement of a criminal suspect for 11 months, the Court established that the lengthy time period spent in solitary confinement was “not in itself in breach of Article 3”. The Court found no violation of the Article, supporting its conclusion on the highly satisfactory material and psychosocial conditions in which the solitary confinement was conducted. The detainee had no contact with other inmates, however, there was extensive contact with prison staff throughout the day. Moreover, the detainee had wide contact with the outside world through meetings with his counsel, medical personnel, welfare workers and supervised meetings with family and friends. Similarly, in Ramirez Sanchez, the detainee had been kept in solitary confinement for over eight years. However, the conditions in which he had endured the isolation were similar to those in the Rohde case. The Court emphasized that the material conditions surrounding the isolation held a satisfactory standard, hence no violation of Article 3 was found.

3.3.3 Justified by a legitimate interest

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43 Ilașcu and Others v. Moldova and Russia.
45 Rohde v. Denmark.
46 Ibid. paragraph 93.
47 Ramirez Sanchez v. France.
48 Ibid. paragraphs 126-135.
The above mentioned Ramirez case is important not only for the Court’s emphasis on material and psychosocial conditions of isolation, but also for the Court’s emphasis on the fact that there existed a legitimate interest for isolating the detainee. When the Court concluded that no violation had taken place, it also emphasized that having regard to his character and the unprecedented danger he posed, the lengthy isolation of the detainee could not amount to a violation of Article 3. Hence, the concerns held by the government “could not be said to have been without basis or unreasonable”, and they were of such a character that they “had to be taken into account”. 49

The Court has repeatedly stressed that the existence of a legitimate interest by isolating a person is a necessary component when justifying use of isolation. This means that isolating criminal suspects arbitrarily and without any purpose is difficult to defend in relation to Article 3. Other legitimate interests – besides the danger that the detained person poses – may be the interest in preventing the detained person from making criminal contacts, from interfering with the investigation, as well as other security interests. The common denominator has been that a legitimate interest is one that is connected either to the detainee himself, or to the interests of the case.

In the Rohde case, the Court minority presented an interesting and relevant perspective in this context. The minority was of the view that the authorities’ decision on isolation was not sufficiently justified. The minority was “not convinced that it was absolutely necessary, in the circumstances, to subject the applicant to the exceptional measure of pre-trial detention in solitary confinement for such a long time”. 50 This statement – despite the fact that it was not held by the majority – holds relevance since it stresses that even though material and psychosocial conditions of detention hold an acceptable standard, this is not enough as a justification to isolate a person when there is no legitimate interest for doing so.

3.3.4 Proportionality

The mere presence of a legitimate interest is not enough. In addition, the imposition of isolation must be a proportionate measure in response to defining such a legitimate interest. One

50 Rohde v. Denmark, paragraph 1 of the dissenting opinion.
factor that the Court will examine in cases involving solitary confinement is whether this special regime imposed is reasonably proportionate with the legitimate interest which the State is seeking to advance through the isolation of the person in question.\textsuperscript{51} This means that not only must there be a legitimate interest, but the use of isolation must also be proportionate to that interest. The Court has emphasized that solitary confinement should only exceptionally be resorted to, and after every precaution has been taken.\textsuperscript{52}

### 3.3.5 Access to judicial review

The Court has established that in cases involving a prolonged period in isolation, a thorough investigation must be conducted into the necessity and proportionality of the isolation. The imposition of isolation must also be considered in context of other available alternatives.\textsuperscript{53} Moreover, the Court has deemed it essential that there exists an independent judicial authority to conduct reviews of the merits of and reasons for the prolonged solitary confinement\textsuperscript{54}, and to challenge the continued segregation\textsuperscript{55}.

In order to avoid any risk of arbitrariness, the State must give substantive reasons for any decision to impose and continue the use of isolation.\textsuperscript{56} The statement of reasons should establish that the authorities have carried out an assessment that takes into account any changes in the prisoner’s circumstances, situation or behaviour, and the reasoning will need to be increasingly detailed and compelling the more time goes by.\textsuperscript{57}

The purpose of judicial review is, therefore, firstly to establish whether sufficient grounds for imposing solitary confinement exist at all. If such reasons exist, the purpose of regular reviews is to ensure that they are present for the entire time in isolation so that isolation is not used excessively.

\textsuperscript{51} Erdal (2006), p. 130.
\textsuperscript{52} Ramirez Sanchez v. France, paragraph 139.
\textsuperscript{53} Harris (2014), p. 265.
\textsuperscript{54} Rodley (2009), p. 405.
\textsuperscript{55} Harris (2014), p. 265.
\textsuperscript{56} Ramirez Sanchez v. France, paragraph 139.
\textsuperscript{57} Ibid.
4 Solitary confinement in Norway

4.1 Norwegian law on the use of solitary confinement

The CPA Chapter 14 governs the arrest and subsequent remand imprisonment of criminal suspects.

4.1.1 Solitary confinement in police custody

The Criminal Procedure Act Sections 171, 172 and 173 regard the grounds on which a criminal suspect may be taken into police custody. In short, the following are the main reasons for taking persons into police custody:

- There is reason to fear that the suspect will evade criminal prosecution or the execution of a sentence.
- There is an imminent risk that he or she will interfere with any evidence in the case.
- Police custody is necessary in order to prevent the suspect from committing new crimes.

The Criminal Procedure Act says nothing further on the conditions of police arrest facilities, how the time in police custody is to be spent, and under which circumstances isolation may be used. However, the CPA Section 183 Paragraph 1 provides that detailed regulations may be given by the Ministry of Justice and Public Security. Such rules are provided through the Regulation on the Use of Police Holding Cells (hereafter “the RUPHC”).

RUPHC Section 2-9 regulates the receiving of external visits during police custody. The general rule is that persons in police custody are not allowed to receive external visits from any other person than his or her legal counsel or – where the arrestee is a foreign national – a consular representative from his or her home country. Exceptions can be made in case special reasons necessitate it. By forbidding external visits, the RUPHC Section 2-9 provides for the partial isolation of the arrestee.
RUPHC Section 3-1 regulates the transfer of the arrested person from the police custody establishment to an ordinary prison for the rest of the time in police custody. Detention in police establishments is only meant to be a temporary solution. In accordance with Section 3-1, the person deprived of his liberty shall be transferred to an ordinary prison within two days following the arrest. For persons under the age of 18, this deadline is set to one day. However, exceptions are allowed if such transfer is not possible due to practical reasons. If such reasons exist, the arrestee may be kept in the police establishment for a prolonged time period. The RUPHC gives no further guidance as to what may constitute such practical reasons. This leaves room for a wide range of reasons to fall within this category, including staff shortage, lack of capacity in ordinary prisons, and so on. Moreover, the RUPHC gives no further guidance as to how long the arrestee may be kept in a police cell in case such practical reasons exist.

Above mentioned are the two most significant regulations in the RUPHC in context of this thesis’ topic. The RUPHC has no further regulations on the use of isolation in police custody. The RUPHC regulates access to external visits, however, it is completely silent on the access to association with other inmates. Moreover, it does not regulate the access to other types of external correspondence. Hence, the question of complete isolation in police custody is not directly regulated – neither in the CPA nor in the RUPHC. This despite the extensive use of complete isolation that actually takes place during police custody in Norway – as will be elaborated on in further detail below.

4.1.2 Solitary confinement during remand imprisonment.

Court-ordered isolation

The CPA Section 183 establishes that if the Prosecution Authority (hereafter also referred to as “the PA”) wishes to detain the arrested person for a longer time, it must – as soon as possible and no later than three days following the arrest – present him or her before a court for a preliminary hearing. The PA must request the court’s approval for remanding the detainee in custody. If the arrestee is below the age of 18, he or she must be presented before court at the latest within one day following the arrest. This deadline may be extended by 24 hours if it expires on a weekend day.
If the court approves the request for remand imprisonment, the court may also decide that the detainee shall be subjected to further restrictions during his time in remand custody. One example of such restrictions is isolation.

The CPA Section 186 regards the use of partial isolation during remand imprisonment. Partial isolation may consist of prohibitions on the receiving of visits, or on the sending and receiving of letters or other consignments, or that such visits or exchange of letters and other consignments may only be allowed under the scrutiny of the police. Visits from and correspondence with a defence counsel are not subjected to such restriction. Also, remand prisoners below the age of 18 are not subjected to such restrictions save for in special circumstances. Partial isolation may also consist of denial of access to newspapers or broadcasts, or the exclusion from company of other specified co-prisoners.

It follows from CPA Section 186 that the conditions for subjecting the detainee to partial isolation are as follows:

- The use of partial isolation has to be decided by a court order.
- The use of partial isolation has to be justified by considerations for the investigation.

The CPA Section 186 (a) regards the use of complete isolation during remand imprisonment. Complete isolation means that the person remanded in custody is excluded from the company of all other co-prisoners; he or she is referred to enduring the deprivation of his liberty in complete solitude. Save for necessary contact with prison staff and with legal counsel, the isolation is absolute. Complete isolation may be imposed alone or in combination with partial isolation as mentioned above.

It follows from the CPA Section 186 (a) that the condition for subjecting the detainee to complete isolation is that there is an imminent risk that the person remanded in custody will interfere with evidence in the case if he or she is not isolated.

It is the Prosecution Authority that requests court permission for remanding the detainee in custody. It is also up to the PA to request the court’s permission for the use of isolation. If the PA so does, it must provide grounds for the need of isolation. The court makes the decision based on that material from the PA. If the court agrees to isolation, it must also provide rea-
sons for its decision. Also, the court has to justify that the use of isolation is not a disproportionate measure.

If the court decides that the detainee may not be isolated, or the Prosecution Authority has not requested the court’s approval on the matter, the detainee has to be kept in an ordinary remand facility, and no restrictions involving partial or complete isolation must be imposed.

It further follows from the CPA Section 186 (a) that a court order on the use of isolation can be renewed by the court following new periodical judicial hearings.

4.2 Solitary confinement in practice

4.2.1 Solitary confinement in police custody

4.2.1.1 On the physical and material conditions of detention.

Police arrest equals automatic complete isolation

As pointed out above, the RUPHC establishes that external visits are not allowed save for when justified by special reasons. However, such partial isolation is not the only consequence of police custody. On the contrary, being taken into police custody in Norway amounts to automatic complete isolation. Police custody establishments in Norway are designed as one-person cells. Persons taken into police custody are thereby automatically isolated from all other inmates. Being accommodated into a one-person cell is not in itself a bad thing, considering cell overcrowding and similar poor conditions of detention in many other countries. However, detainees in police custody are completely deprived of contact with other inmates for the entire duration of the stay. Moreover, the exception for allowing external visits is rarely used. Hence, the degree of isolation in police custody is overwhelming, and it is imposed automatically.\(^{58}\) No assessment is made in the individual case of the need and necessity of isolating the arrestee from both external visits and association with other inmates. All arrestees brought into police custody – regardless of the type of crime they are suspected for,

\(^{58}\) Horn (2012), p. 29-30.
of the reason for keeping them in police custody and of the actual need and necessity of isolation – are automatically isolated for the entire time in police custody.

In addition, isolation in police custody has to be endured under relatively strict physical and material conditions. Police cells are often minimally decorated; typically no chairs, one mattress, a metal toilet in the corner, a window to allow daylight, and so on. Most commonly, it is not possible to turn the in-cell artificial lights on and off. There is no television, books, newspapers or any other means of time-pass. Daily airing is typically limited to one hour maximum per day. Such conditions of detention are known for having the potential to inflict serious physical and psychological harm on the detained person, for example anxiety and depression, panic attacks, suicide attempts, self-inflicted injuries, false confessions, and so on. Indeed, Norwegian police districts have registered a growing tendency of aggressive behaviour from inmates who are kept in police detention facilities for a prolonged time; a tendency described as unfortunate and unwanted.

4.2.1.2 Oversitting of the deadline in the RUPHC Section 3-1

As pointed out above, the RUPHC’s two-days deadline for transferring an arrestee to an ordinary prison for the remainder of time in police custody is the general rule. Exceptions from this general rule can only be made where practical reasons make a transfer impossible. In practice, however, this deadline is often not respected. This means that, despite the RUPHC’s intentions – as a general rule – not to keep the arrestee in police detention facilities for more than maximum two days, there is an extensive practice for just that. This means that the arrestee is kept in complete isolation longer than what was intended by the RUPHC to be the normal practice – more specifically until a preliminary hearing takes place. The Parliamentary Ombudsman, upon examining the available data, has concluded that the number of arrestees transferred to an ordinary prison after two days in police arrest is relatively small. He has further expressed that these tendencies are a source for concern.

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59 Årstale (2010), p. 3.
60 Sulland (2011).
61 Ombudsman 2011/2412.
62 Ibid.
According to the National Police Directorate, difficulties in arranging enough prison-cells is the most important reason for the violation of the two-days deadline in RUPHC Section 3-1.\textsuperscript{63} Lack of resources is also the most important reason why all detainees in police custody are automatically subjected to complete isolation. Buildings used by the police today are simply not designed for allowing inmates in police custody the freedom of associations with each other. Operating police custody would demand significantly more resources if the authorities were to make such arrangements as to allow for association between inmates. Therefore, it is the consideration for resources that is the main reason for why the use of isolation is not limited only to cases in which it is considered necessary. No individual assessment is made in each case to discuss whether or not complete isolation is necessary, rather it is automatically imposed. Another important aspect of the justification is the fact that police arrest facilities have been intended for short-time use only. That is the reason behind the sparse decoration of police cells, and the reason why police resources are not used to facilitate inmate contact.

4.2.2 Solitary confinement during remand imprisonment

The outcome of a preliminary hearing may be one of the following:

- The court may find that the Prosecution Authority has not sufficiently justified the need for remand imprisonment. As such, the requirements for keeping the arrestee are not fulfilled, and the arrestee must be released.
- The court may find that the PA has sufficiently justified the need for remand imprisonment. The arrestee may therefore continue to be kept in detention.

In case of the latter outcome, the court may in addition allow the use of isolation; the detained person is referred to remand imprisonment in solitary confinement.

However, isolation in remand imprisonment is controversial for the following reason: Remand imprisonment is supposed to be endured at a proper remand facility, and under such conditions which follow from an individually tailored program for each detainee. This follows from the Execution of Sentences Act and the related Regulations to the Execution of Sen-

\textsuperscript{63} Ombudsman (2008), p. 197.
The background for such provisions is that there is a need for proper facilities and a tailored program since time spent in remand imprisonment can be particularly lengthy. The mentioned Act and the related Regulations aim to help the damaging effects of isolation through giving the detainee a tailored program. Such individual programs consist of measures to allow for meaningful time-pass through both indoor- and outdoor-activities, access to sufficient airing, supervised family contact, and so on, in order to avoid the damaging effects of complete isolation. Some of the ECtHR cases referred to above demonstrate that even prolonged isolation may be in compliance with Article 3 if means of obtaining and/or maintaining meaningful contact with others exist, and if the detainee is provided with measures which allow for time-pass. However, very often, remand prisoners are sent back to a police custody establishment instead of being accommodated into a remand facility. Statistics reveal that a considerable number of these detainees are kept in custody at police establishments for more than a week.  

This is the controversy pertaining to isolation during remand imprisonment in Norway, and raises the following questions:

- In cases where the court has approved the Prosecution Authority’s request for remand imprisonment, but rejected the use of solitary confinement – or where the PA has not requested such permission at all, detainees who are sent back to police custody establishments for the purpose of enduring remand imprisonment, are nevertheless subjected to complete isolation due to the conditions in police cells.

- In cases where the court approves the use of solitary confinement, detainees who are sent back to police establishments are subjected to a regime not appropriate for enduring remand imprisonment. Since the purpose of remand imprisonment is to keep the detainee for a longer time, his stay in remand custody has to be somewhat tailored to his needs. However, since police resources are not intended for tailoring programs for detainees kept in police establishments, no such individual program is possible to make for a remand prisoner returned to a police establishment. Hence, the detainee is – over a longer period of time – referred to enduring remand imprisonment in solitary confinement under the strict conditions which exist in police cells. The isolation itself

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64 Ombudsman 2011/2412.
is not a matter of concern; whether isolation has to be endured at a police establishment or at a proper remand facility is not itself problematic. What makes this problematic, however, are the conditions under which the isolation has to be endured. The burden of enduring remand imprisonment in a police cell increases with the time spent under such conditions.

The main reason for sending remand prisoners back to police establishments is difficulties in arranging for a place at a proper remand facility. There is a lack of capacity in ordinary remand prisons, forcing correctional services to return the person remanded in custody to a police cell. This means that in cases where there is no basis for isolating the detainee, he is nonetheless subjected to automatic complete isolation upon being sent back to a police establishment. Where the court is requested and subsequently rejects the use of isolation, the de facto isolation following the return to police establishments happens in disrespect of the court order. Moreover, in cases where there is basis for isolating the detainee, he is deprived of the benefits of a tailored program that detainees remanded in custody are legally entitled to receive.
5 Is Norway in compliance with the prohibition against ill-treatment?

Generally, the ECtHR has set the threshold for finding a violation of Article 3 very high. However, Norwegian practice on solitary confinement remains highly controversial. The criticism against Norway is persistent and holds the same relevance today as it has in previous decades. There exists a firm belief in many that Norwegian practice is indeed a violation of the prohibition against torture, inhuman and degrading treatment.

5.1 Police custody

As presented above, the general rule in the RUPHC is that criminal suspects are only to be held in police arrest facilities – and the isolation that follows from a stay in these – for a maximum of two days. However, the exception for “practical reasons” is wide, leaving authorities a wide margin for contravening the deadline. As seen above, there is also a wide practice for such disrespect of the deadline, so that the arrestee may be kept in isolation for up to three days before preliminary hearing takes place. For example, figures for 2009 reveal that more than 50 per cent of those taken into police custody that year were kept isolated for longer than the RUPHC allows for.65 These figures are valid not only for that particular year. On the contrary, recent years’ data also indicate that such numbers reflect a growing tendency. As such, figures for 2012 and 2013 reveal that there has been a persistent rise in the number of violations of the two-days deadline.66 The Parliamentary Ombudsman has on several occasions requested that the two-days deadline be respected by the authorities, and that the exception for “practical reasons” can only be used in exceptional cases. It is not to be understood as a justification for systematic violations of the deadline67, and certainly not be made the norm in all cases.68 Seen in light of the number of violations, it seems that this advice is not being followed by the responsible authorities.

68 Ombudsman 2008/1775.
Moreover, rules governing police custody say nothing on the use of isolation despite the fact that the extensive use of isolation that takes place in police custody is both automatic and complete, and may last up to several days before preliminary hearing or before the arrestee is released for other reasons. Therefore, it is not possible to see any legal basis for the actual and complete isolation that arrestees in police custody are subjected to.

Automatic isolation might have been less controversial if that was an inevitable consequence of the deprivation of liberty that follows from an arrest. In the Poltoratskiy case, the Court stated that inevitable suffering related to deprivation of liberty is not a breach of Article 3.69 Some claim that isolation in police custody is just that: Since isolation in police custody has been practiced for more than 100 years in Norway, it must be considered as a matter of course; an implicit consequence of the arrest itself. And that this is also the practical explanation of the absence of laws regulating the use of isolation in police custody.70 However, there is not full agreement on such a stance. On the contrary, being isolated is a special regime which comes as an additional measure to the deprivation of liberty. It is not in any way an inherent, unavoidable consequence of being taken into police custody. This means that imposition of isolation should be justified separately – not follow automatically from the justification of arrest. It appears that the CPT adheres to the latter view, since the Committee on many occasions has directed criticism towards Norwegian laws and practice concerning the use of isolation.71 The main point of criticism is that isolation is used in too many instances. The CPT is of the view that the use of isolation should be limited to where it is “absolutely essential in order to protect the interests of justice”.72 If the CPT were of the view that isolation is an inherent, unavoidable consequence of police arrest, it would not have addressed solitary confinement as an issue separate from police arrest.

The ECtHR has held that – except for the right to freedom – imprisoned persons also enjoy the rights provided for in the Convention, including the right to freedom of association. All limitations on Convention rights must therefore be specially justified.73 From the analysis of Court practice above, it appears that the lack of laws regulating the use of solitary confine-

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69 Poltoratskiy v. Ukraine, paragraph 132.
70 Horn (2012), p. 44.
71 This criticism is presented in greater detail in the sections below.
72 CPT/Inf (94) 11, paragraph 65. Cf. also CPT/Inf (97) 11, paragraph 19.
73 Hirst v. the United Kingdom, paragraph 69.
ment is not a circumstance which in itself constitutes ill-treatment contrary to Article 3. However, this may be an element in the assessment, considering the fact that such a grave measure is imposed without any basis in legislation, without any form of individual assessment of the need for and necessity of it, and may still last for up to several days. The fact that automatic imposition of isolation is controversial is further supported by the European Prison Rules. These Prison Rules, adopted by the Council of Europe in 2006, contain a thorough guidance on the treatment of prisoners. Their aim is to protect the fundamental rights of prisoners and to promote satisfactory conditions of imprisonment.74 The European Prison Rules apply to all members of the Council of Europe, which includes Norway. Article 3 of these Rules prescribes that persons deprived of their liberty shall only be subjected to “the minimum necessary and proportionate” restriction.75 Hence, all excessive restrictions – such as not allowing the freedom of association, correspondence and so on – are contrary to these Prison Rules. Though the Prison Rules are not legally binding on the member states, the ECtHR increasingly refers to these, and uses them as a basis in its assessment of whether a particular treatment of prisoners is contrary to Article 3 of the ECHR.76 For this reason, the Prison Rules hold a particular relevance in cases concerning conditions of imprisonment, which includes the discussion on whether isolation in police custody in Norway may constitute a violation of Article 3.

The use of automatic isolation in police custody may further be justified by the fact that in the initial phases of a criminal investigation, there is a need to get clarification in the circumstances surrounding the case. It is not always easy for the police to establish early on whether or not there exists a risk for destruction of evidence so strong that the criminal suspect has to be isolated.77 Hence, referring a criminal suspect to isolation immediately after the arrest, and for the entire time spent in police custody, is not without a purpose. The interest in avoiding destruction of evidence may therefore necessitate that it be considered a legitimate purpose to use isolation until the situation at hand is sufficiently clear to determine whether further isolation is necessary. Also, in many cases there is a real, present risk for the destruction of evidence, so the use of isolation in these cases is indeed warranted.

75 Emphasis added.
77 Horn (2012), p. 42.
However, this view still does not justify the automatic isolation of all detainees. The interest of the investigation – to avoid destruction of evidence – may obviously be a legitimate reason for holding a specific person isolated from others after an individual assessment of the need to do this. However, many are arrested and isolated without regard to any fear of evidence destruction. Persons arrested based on a risk for the avoidance of criminal prosecution or on the basis of danger for repetition are also automatically isolated - without any particular need for this measure. Therefore, it must be concluded that the most important reason for the widespread use of isolation today is the consideration of resources along with the fact that Norwegian police establishments are designed as one-person cells only. Such circumstances only allow for automatic complete isolation of all detainees for the entire time in police custody.

ECtHR practice requires the presence of a legitimate interest for isolating a person. However, the lack of resources, the design of buildings and traditions for isolating are not listed among such interests as the Court has found to be legitimate. When isolation in Norway happens despite the absence of such interests as the Court has found legitimate, this makes Norwegian practice of solitary confinement further difficult to deem in compliance with Court practice. In fact, automatic isolation regardless of any purpose clearly contradicts the ECtHR’s notions that there ought to be a legitimate interest before a measure as strong as isolation may be imposed. A strong argument can be made that being subjected to a measure as serious and invasive as isolation – without any legitimate interest, justified solely with consideration for resources – is an unnecessary suffering which very well constitutes a form of inhuman and degrading treatment.

Court practice also establishes that in addition to a legitimate interest, the imposition of isolation ought to be proportional to such interests. The CPT adheres to such a view by stating that

The principle of proportionality calls for a balance to be struck between the requirements of the situation and the imposition of a solitary confinement-type regime, which can have very harmful consequences for the person concerned.\(^7\)

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\(^7\) CPT/Inf (97) 11, paragraph 18.
However, it is not possible to enter into an analysis of proportionality when – in many cases – there is no legitimate interest present at all, making the Norwegian practice of isolation in police custody even more an unwarranted measure.

As a justification of the practice of isolation in police custody, it has further been argued that the isolation is acceptable since it is only meant to last for a few days. However, critics claim that isolation is not a burden only when it is long-lasting. Quite the contrary, the effect on the detained person is particularly significant the first time after the arrest. The detained person is then in a particularly vulnerable position, since the arrest results in major changes and great insecurity, which again leads to a greater need for contact and association with other persons. The first time period after the arrest is a critical phase. The situation is characterized by uncertainty, helplessness and passivity. The lack of association with others makes it the more difficult to adjust to this new situation.\(^79\) Also, there has been expressed concerns over the risk that the imposition of isolation may be used as a means of pressure to make the person cooperate with the police.\(^80\) The harmful impacts of isolation are further strengthened when seen in context of the other conditions of detention. Isolation under such strict physical conditions will be experienced as more invasive, as not being able to distract oneself and consume time will enforce the feeling of being isolated – thus add to the gravity of the ill-treatment. There is no getting around the fact that isolation in police arrest must be considered one of society’s most intrusive measures. When there is no legitimate interest justifying the isolation, this makes even a few days in solitary confinement an unnecessary burden. These aspects have to be taken into consideration when determining whether or not this constitutes ill-treatment contrary to Article 3.

However, research also reveals that individual differences are great. Some persons are affected by the above mentioned consequences of isolation whilst others are not. Also, there are variations in-between those affected; everything ranging from smaller psychological effects to completely psychotic conditions. In other words, all persons kept in isolation are not equally severely affected.\(^81\) In some cases, the Court has considered a particular form of treatment severe enough to cross the severity threshold where the applicant could prove that he or she

\(^79\) Horn (2012), p. 51.
\(^81\) Horn (2012), p. 51.
had characteristics which made him or her particularly vulnerable to such treatment. In other cases, where the applicant has shown no such particular characteristics, the Court has had a tendency to be more lenient in its assessment as to whether there has been a violation of Article 3 or not. In any case, this provides further strength to the argument that isolation should not be imposed automatically. Rather, it should be based on an individual assessment of the need and necessity, as well as its consequences on the isolated person. Norwegian law and practice on the area fail to meet such requirements.

Finally, another controversial aspect of solitary confinement in police custody is that there is no judicial review available. This is a natural consequence of the lack of regulations in domestic law; the police is not under any legal duty to make an assessment of the necessity of isolating the detainee, nor is there any independent authority to review the use of isolation under police custody. This is clearly against ECtHR’s stipulations that there ought to be access to judicial review to challenge intrusive measures imposed on a person.

5.2 Remand imprisonment

Presented above are the conditions in the Criminal Procedure Act for isolating a remand prisoner. The CPA Section 186 (a) states that where there is an imminent risk that the person remanded in custody will interfere with evidence if he or she is not isolated, that person can be subjected to complete isolation. If there is no such risk present, isolation may not be imposed. It is also evident from the presentation above that where the conditions for imposing isolation are present, the remand prisoners must be sent to a proper remand facility – not a police establishment, and he must also be given a tailored program during the entire time in remand imprisonment.

However, Section 186 (a) does not require any strong form of necessity for allowing the use of isolation. In this regard, there has been expressed concerns over the fact that the Prosecution Authority will request and the courts will allow the use of isolation as long as there exists an abstract risk for destruction of evidence – without isolation being an absolute necessary measure. Both the Ministry of Justice and the Director of Public Prosecutions (hereafter also

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83 Horn (2011) b, p. 55-56.
referred to as “the DPP”)

have clearly stipulated that isolation during remand imprisonment may only be used in cases where it is strictly necessary.\(^\text{84}\) As presented above, the Parliamentary Ombudsman has given similar statements. The preparatory works of the CPA also specify that isolation is not to be used unless it is strictly necessary.\(^\text{85}\) However, the wording of the CPA itself does not reflect these stipulations, making it seem as though current legislation contains flaws. This raises questions as to whether the use of isolation during remand custody is sufficiently justified as a legitimate interest, and whether it is proportionate to the interests of the investigation which the use is seeking to advance. Hence, Norwegian legislation is more confusing than helpful when it comes to the administration of solitary confinement. It may seem as though it contains sufficient safeguards to protect against unwarranted isolation during remand imprisonment. However, due to the requirements being relatively lenient, the protection the legislation affords may not be as strong. As will be discussed in further detail below, there have been concerns that the Prosecution Authority and the Norwegian domestic courts are too lenient when it comes to requiring and approving the use of isolation during remand imprisonment.

The Director of Public Prosecutions has conducted a survey into the Prosecution Authority’s routines, examining the reasons and justifications provided for requesting court approval for the use of isolation.\(^\text{86}\) The purpose was to establish whether the need for isolation was sufficiently specified in cases where the PA had requested permission for the use of solitary confinement. The survey revealed, however, a considerable nonconformity between law in books and law in practice. The DPP concluded that only 17 per cent of the PA’s requests regarding isolation complied with even the mildest demands on reasoning in the legislation mentioned above. The DPP also pointed out that the PA’s use of standardised formulations may indicate that no concrete and individual evaluations are made prior to requesting court approval for the use of isolation. The DPP’s survey therefore indicates that persons remanded in custody are isolated following a very general and abstract assessment of the need of it.\(^\text{87}\) This indicates that, for a large part, the PA’s requests for isolating a remand prisoner, and the renewal of a

\(^{84}\) Ibid. p. 54.


\(^{86}\) Director of Public Prosecutions 1/2003.

\(^{87}\) Horn (2011) b, p. 56.
previous decision on isolation, have become a matter of routine instead of a thorough assessment which sufficiently considers the need for such a serious measure in each case.

Norwegian courts have also been subjected to criticism in this regard. It follows from the CPA Section 186 (a) that courts – if they agree to the PA’s requests for solitary confinement – must, in their assessments, specify in which way the investigation will suffer if the person remanded in custody is not confined in solitude. However, court practice reveals that courts do not follow this up to the required level. On the contrary, courts are generally thought to be very lenient in their assessments. In court assessments, the risk is generally described at a very abstract level, without any concrete evidence of the risk being particularly significant in the individual case. In other words, courts generally approve the use of isolation with basis in such abstract assessments of the risks involved. Such risks will almost always be present in all cases, particularly in their initial phases. However, courts generally approve without any concrete assessment of the strength of the risk for destruction of evidence in the individual case.\(^{88}\)

As presented above, the ECtHR has established that there ought to be access to sufficient judicial review both for imposing solitary confinement and upon renewal of a previous court decision on allowing isolation. The CPA Section 186 (a) provides a legal basis for such review by an independent court. However, if such review is not conducted in a satisfactory manner, the ECtHR’s requirement is not fulfilled. The CPT has also expressed concerns as to whether judicial review of the lawfulness of isolation is conducted in a satisfactory manner.\(^{89}\)

As such, the CPT has thought it necessary to suggest improvements for the judicial authorities on this area. For example, the Committee has emphasized that “any request for the imposition of restrictions\(^{90}\) be carefully scrutinised by the competent court”. Moreover, that “courts make every effort to specify as precisely as possible the scope of the restrictions imposed (they should be tailored to the circumstances of each particular case)”, and that “courts be particularly attentive to the effects of restrictions on the mental and physical health of the remand prisoner concerned”.\(^{91}\)

\(^{88}\) Ibid. p. 55-56.
\(^{90}\) Restrictions such as for example isolating the prisoner.
\(^{91}\) CPT/Inf (97) 11, paragraph 36 (emphasis added).
Section 186 (a) was added to the CPA in 2002. Prior to this, no access to judicial review existed for the use of complete isolation during remand imprisonment. Rather, complete isolation was an automatic consequence of the restrictions or prohibitions on correspondence with the outside world pursuant to the CPA Section 186 (partial isolation). The preparatory works of the CPA Section 186 (a) reveal that the amendment was considered necessary partly due to the massive criticism Norway had received from international human rights actors, including the CPT. On this background, it is particularly noteworthy that even though the Norwegian legislatures have in some way responded to the criticism, the outcome has not been as remarkable as the preparatory works should indicate. If the wording of the CPA Section 186 (a) and the PA’s and the courts’ practice does not sufficiently provide the necessary safeguards, this argues for the fact that this might be a breach of the State’s positive obligations under Article 3.

Moving on, the lack of sufficient legal basis and the questionable manners in which isolation is justified and reviewed is not the only concern regarding solitary confinement during remand imprisonment. Another point of concern is that when the Prosecution Authority requests permission to use solitary confinement, and the courts refuse this – or where the PA does not submit such request – there exists no basis at all for the *de facto* isolation that takes place when remand prisoners are sent back to police establishments. This practice not only stands as contrary to the current domestic legislation mentioned above, but it also contradicts the ECtHR’s requirement to refer to both a *legitimate interest* for the isolation and the *proportionality* of it.

Sending remand prisoners back to police establishments is problematic not only in cases where the requirements of necessity and proportionality are not fulfilled. The practice of using police establishments for remand imprisonment is also problematic where isolation is both necessary and proportionate, if the prisoner there is deprived of the special tailored program he is legally entitled to receive in remand imprisonment. Such practice, hence, is contrary to domestic legislation. In this context it is also noteworthy that the European Prison Rules prescribe that “persons who have been remanded in custody by a judicial authority (…) should only be detained in prisons, that is, in institutions reserved for detainees of” this particular
By this, the Prison Rules acknowledge that remand imprisonment requires special facilitation, which can best be addressed in establishments—prisons—designed for such purposes, as opposed to, for example, police establishment facilities which do not suit such purposes. In these cases, therefore, it is not the isolation itself that raises concerns. Rather it is the harsh conditions in the police cells, in which the prisoners are isolated that raises concerns. The context-based assessment which the ECtHR employs, as analysed in part 3 of this thesis, prescribes that even prolonged isolation is in compliance with Article 3 if there are means of meaningful contact with other human beings. However, police establishments do not facilitate such contact. Some may argue that the isolation in police cells is not absolute; there will still be contact with custodial staff. However, resource considerations limit such contact with staff. Police resources are not meant to be used for creating special programs for persons detained in police cells. Moreover, staff contact cannot be deemed to sufficiently fulfil the need for human contact. This practice is particularly problematic where remand prisoners are kept in police establishments for several weeks or months. As some of the data referred to in this thesis reveals, such long stays in police establishments do occur, for which Norway has been reprimanded by the CPT. Moreover, the Ombudsman has reacted negatively to data revealing that remand prisoners have been kept in police arrest facilities from three to up to 15 days, and criticized these aspects. He has found reasons to underline that these are considerable violations of the two-days deadline in the RUPHC Section 3-1. The most recent data has revealed that the number of remand prisoners isolated in police establishments for a prolonged time has been in a continuous rise in recent years. The Ombudsman described the extent of this development as alarming, and has on several occasions expressed that this development will be problematic in the context of Norway’s human rights obligations.

5.3 CPT criticism towards Norway

The CPT has since its first visit to Norway in 1993 “paid particular attention to the situation of remand prisoners subjected to solitary confinement (…) in the interests of an ongoing investigation”. Following the 2011 visit, the CPT noted that “a considerable number of per-

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92 European Prison Rules Article 10.2.
93 Ombudsman 2007/1097.
94 Ombudsman (2014), paragraph 3.1.
95 Ombudsman 2007/1097.
96 CPT/Inf (2011) 33, paragraph 71.
sons remanded in custody were kept in police detention facilities beyond the 48-hour time limit”.\textsuperscript{97} The CPT noted that such stay in police detention facilities, in some cases, could last up to nine days, and it also referred to several cases where remand prisoners had been held under such conditions for more than six months. The CPT further took notice of the fact that the authorities justified such practices by referring to lack of capacity in remand prisons.\textsuperscript{98} The Committee stated that such practice is of “particular concern” since Norwegian police establishments are “not suited to accommodate detained persons for prolonged periods”.\textsuperscript{99} The CPT made reference to “the very harmful effects a solitary confinement regime can have on the prisoner concerned”, and recommended Norwegian authorities to intensify their efforts for ending “the practice of accommodating persons in police establishments after they have been remanded in police custody”.\textsuperscript{100}

Also following previous visits to Norway, the CPT has expressed concerns on the same issues. Already in 1993, the CPT stated that it was “common for persons remanded in custody to be kept for some time on police premises for want of places in remand prisons”.\textsuperscript{101} The 1993 delegation found that “persons on remand could be held for a week or more” at police establishments, and recommended the authorities to “take steps to ensure that persons remanded in custody are not kept for prolonged periods in police establishments”.\textsuperscript{102} The CPT noted that the police cells were, in principle, adequate for short stays. However, “the physical environment and regime offered fell distinctly short of what a detainee held for a prolonged period is entitled to expect”.\textsuperscript{103} With such statements, the CPT emphasizes that persons isolated over a longer time period are entitled to special treatment according to a tailored program. Norwegian authorities fail to provide for this when remand prisoners are kept in police facilities, making this practice worthy of critique.

Following the 1997, 1999 and the 2005 visits, the CPT expressed similar concerns. Norwegian authorities had pointed out that the “recent statistics showed a considerable improve-
ment” when it came to keeping remand prisoners in police detention facilities.\textsuperscript{104} However, the CPT found that information from various sources, including the Parliamentary Ombudsman, indicated that “persons remanded in custody could be detained for prolonged periods, on occasion up to one month, in police establishments”.\textsuperscript{105} The CPT made clear that the Norwegian police establishments did not provide “appropriate conditions in which to hold persons for such extended periods of time”.\textsuperscript{106} Indeed, “detainees held for prolonged periods are entitled to expect a better physical environment and regime” than that which was available at the visited Norwegian police establishments.\textsuperscript{107} The CPT recommended the authorities to “continue to make efforts to ensure that such persons are held on police premises for the shortest possible period of time”.\textsuperscript{108} The aim “should be to put an end, except in exceptional circumstances, to the practice of accommodating remand prisoners in police establishments”.\textsuperscript{109}

5.4 Conclusions

The aim of this thesis has been to examine whether Norwegian law and practice on solitary confinement is in conformity with Article 3 of the ECtHR. Based on the analysis above, I have come to the conclusion that the use of isolation in police custody and during remand imprisonment in Norway is – on the whole – indeed in violation of Article 3 as it can amount to inhuman and degrading treatment.

The problematic aspects that have been up for discussion in regard to police custody is the automatic complete isolation of all detainees – regardless of the crime and whether or not any real risk for destruction of evidence exist. There is no legal basis for such isolation, and the detained person can be kept isolated for several days, especially given the frequent violations of the two-days general rule on the transfer to ordinary prison, and since the deadline for presenting the detainee before a court is three days. These practices have long traditions in Norway, and the only justifications for continuing this practice seems to be the consideration of resources and the consideration for the initial phases of the investigation.

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{103}
\item\textsuperscript{104} CPT/Inf (97) 11, paragraph 8.
\item\textsuperscript{105} Ibid.
\item\textsuperscript{106} CPT/Inf (2000) 15, paragraph 13.
\item\textsuperscript{107} Ibid. paragraph 14.
\item\textsuperscript{108} Ibid.
\item\textsuperscript{109} CPT/Inf (2006) 14, paragraph 10.
\end{enumerate}
\end{footnotesize}
I find the above mentioned reasons not sufficient to justify the use of automatic complete isolation. And given the standards laid down in the case-law of the ECtHR, it is highly likely that Norway could be found in violation of Article 3 of the ECtHR with regard to the widespread practice of solitary confinement. Given the extreme character of this measure, it appears remarkable that no law or regulations exist. It is a recognized principle of law that no state may intervene in the personal liberty of individuals without adequate legal authority.\textsuperscript{110} Since no legal basis exists for imposing isolation under police custody, Norwegian practice does not respect this principle of law. Automatically isolating individuals for up to several days without any assessments as to the necessity means that many detainees will be excessively isolated for no reason at all. The decision to institute solitary confinement is not arrived at by a “controlled process of decision-making”.\textsuperscript{111} Such arbitrariness appears to amount to ill-treatment contrary to Article 3. It is understandable that in the initial phases of an investigation, the circumstances of the case are not always clear. For this reason, it is not reasonable to demand that the use of one-person cells at police establishments is entirely abolished. However, I adhere to the view that no detainee should be kept isolated for long before a thorough review of the necessity of isolation under the rest of the time in police custody is conducted. I am of the opinion that such assessment should preferably be conducted within a matter of 24 hours, not of several days. Isolation in police custody that may last up to several days without any consideration of the need of it can be considered an unwarranted restriction imposed on the detainee. Figures reveal that about 90 percent of all detainees under police custody are released without being brought before a court for a preliminary hearing. This means that over 90 percent of persons isolated in police establishments for up to three days will never get a review into the necessity and legitimacy of such deprivation of freedom.\textsuperscript{112} I consider this to amount to ill-treatment contrary to Article 3. Adding to this is the fact that there is a remarkable lack of response from Norwegian authorities on the matter. Despite the lack of laws and regulations on this area, and despite the practice for which there is a very long tradition, there has never been any thorough review conducted by the Norwegian authorities into the matters and their relationship to the State’s human rights obligations under Article 3.

\textsuperscript{110} Årstale (2010), p. 2.
\textsuperscript{111} Rodley (2009), p. 404.
\textsuperscript{112} Årstale (2010), p. 3.
Norwegian authorities is remarkable, and I find this to add to the unreasonableness of the practice surrounding isolation in police custody.

The problematic aspects that have been up for discussion in regard to *remand imprisonment* is the unwarranted automatic imposition of complete isolation which takes place when a remand prisoner is returned to a police establishment cell instead of a proper remand facility. The other problematic aspect is that remand prisoners who are to be isolated in a proper remand facility following a court order, are sent back to police establishments in which they are deprived of a tailored program. The problem in this regard is not the isolation itself as it is in the case of isolation despite court order, but the problem here is the *conditions* in which the isolation has to be endured. The justification that authorities have provided for this practice is that there is a lack of capacity in proper remand facilities, forcing the correctional services to return the person remanded in custody back to police establishments.

I find the justification for such arrangements insufficient in regard to detainees for which the court has decided that there is no basis for imposing isolation. For such cases, the same arguments made above for isolation in police custody apply equally. I find that imposing such a strict measure that isolation is, despite a court order, is a breach of Article 3 because there is no legitimate interest behind it, which also makes it a disproportionate measure. And also for the reason that it is directly in disrespect of the judicial review conducted by the court. Hence, it entirely contradicts the intentions behind judicial review.

For the other group; those in whose cases isolation has been approved by a court, I find that whether or not it can be deemed a violation, depends on the length of the stay in police cells. As the analysis of ECtHR practice demonstrates in part 3 of this thesis, the ECtHR applies a context-based assessment when deciding whether or not the imposed isolation is a breach of Article 3. As some of the data presented throughout the thesis shows, isolation in police establishments can last from some days to several weeks and – in the most extreme cases – to several months. I find that even a few days in police establishments for remand prisoners, in which they are deprived of a program fitted for their individual case, is controversial. However, despite the fact that such practice is highly critique-worthy, I do not find a few days to generally be in violation of the Article. On the other hand, when the remand prisoner is confined to a police cell for several weeks and months, I find that the threshold for breach is reached. As discussed above, the Execution of Sentences Act and the related Regulations pre-
scribe that the damaging effects of isolation shall be helped by giving the detainee a personalized program. However, depriving the detainee of this, and instead referring him or her to a lengthy remand imprisonment under the harsh conditions that exist in police cells, I find to be a breach of the prohibition against ill-treatment. In such cases, the isolation itself is not a breach of the Article. Rather, it is the conditions in which the isolation is endured that make the treatment amount to ill-treatment contrary to Article 3.

For the above mentioned aspects of Norwegian law and practice, I think it correct to conclude that Norway is indeed violating Article 3 of the ECHR. Not only is Norway not fulfilling its negative obligations under the Article to refrain from conduct contrary to the Article, but the State is also – by not sufficiently responding and taking the necessary measures to correct this conduct – violating its positive obligations under the Article.

Another problematic aspect discussed in the thesis is the incapacity of current legislation to reflect in its wording the stringency of isolation as a measure under remand imprisonment, and domestic court’s ability to sufficiently assess whether there is a legitimate reason for isolating the person remanded in custody. Even though the wording of the law is not so strict, and even though the above referred to surveys may indicate that courts do not properly assess the need, I find that this is not enough to amount to a breach of the Article. It might be so that the wording of the law alone does not particularly specify that there ought to be a strong risk for evidence-destruction present. However, the CPA must be interpreted in light of its preparatory works as well as the guidelines from the Ministry of Justice, the Director of Public Prosecutions and the Parliamentary Ombudsman, all stipulating that isolation in remand imprisonment may only be used when strictly necessary. Also, Norwegian courts are generally very reliable, efficient, just and well aware of their duties. The surveys mentioned above provide a critical view on the practice of both the Prosecution Authority and the courts, and raise several questions. However, I do not find those sufficient for establishing that the practice of the PA and the courts is contrary to Article 3. There ought to be more thorough investigation into the practice of the courts and the PA before they can be deemed to not sufficiently caretaking their duties in regard to remand imprisonment. Only then can thorough assessments of their practices be made and conclusions drawn as to whether the practice of these two authorities constitutes a breach of Article 3.
6 Summary and final remarks

The thesis inquired into whether Norwegian law and practice on solitary confinement is in compliance with or whether it amounts to a breach of the ECHR Article 3. The ECtHR’s case-law on the topic has been reviewed. So has Norwegian domestic law and practice. The thesis has concluded that many aspects of Norwegian law and practice are of such a character that they could amount to ill-treatment contrary to Article 3, if they were to be brought before the ECtHR. Other aspects, however, may vary from case to case, hence whether or not they comply with or constitute a breach of the Article will be a relative assessment in the individual case. Yet other aspects are a reason for concern, but require further investigation before a thorough assessment can be made of whether they amount to a breach of Article 3. This is the case for the practice of the domestic courts and the Prosecution Authority.

So far, there have been no applications to the ECtHR claiming that isolation in police custody or remand imprisonment has been a violation of Article 3 for the above mentioned reasons. However, several indicators do imply that that a case might come up before the Court in the nearest future, in which Norway may be deemed to breach its obligations under the Article.

Firstly, as the thesis has discussed, Norwegian law and practice on the area is highly controversial, and I have concluded that – largely – it indeed could lead to violations of Article 3, as it contradicts the practice of the ECtHR on several points. Due to the concerns that this raises, there are reasons to seek the authoritative clarification of the matters by the Court.

Secondly, there has been massive criticism towards Norwegian practice, and the criticism is persistent. Both domestic and international actors all assert that the Norwegian use of solitary confinement is contrary to the State’s human rights obligations under Article 3 and ought therefore to be changed. I would like to stress the ECtHR’s tendency to refer to criticism made towards the state whose case it is hearing; particularly the criticism deriving from the CPT. Criticism from various actors is not itself decisive of whether or not there is a violation. However, consistent criticism from several recognized human rights actors must speak in that direction. Norway’s long history for being internationally criticised in this respect, I think creates a climate particularly suitable for encouraging the bringing of a case before the Court.
On this background, I believe that a case may soon be brought before the Court to get a clarification on the matters.

Thirdly, there seems to be a remarkable carelessness and passivity from Norwegian authorities, as they seem particularly reluctant to confront the criticism and conduct a thorough investigation into their practice of isolation. Despite the massive criticism over several decades, there is surprisingly little response from Norwegian authorities. There are sporadic comments on the general level of compliance with international obligations, for example in connection to amendments to the legislation, following CPT visits, and so on. However, no thorough inquiries have been made into the above mentioned practices and to the legal framework surrounding solitary confinement and their relationship to the ECHR Article 3. The reluctance of Norwegian authorities to make an effort to uncover the real practice and its complications, to gather sufficient data and conduct analyses into the practice of the Prosecution Authority and the domestic courts, to respond properly to the criticism directed towards Norway and to follow up the recommendations of the Parliamentary Ombudsman, I believe will work as incentives in the near future, encouraging persons isolated under such conditions to take their case to the ECtHR.

What, then, should Norway do in order to bring its practices in compliance with the standards of Article 3 as established by the ECtHR? There are several point on which Norwegian authorities need to make improvements.

Firstly, the responsible authorities must conduct thorough inquiries into the use of isolation under police custody and remand imprisonment, which have been missing so far. It must be a goal for the authorities to seek to uncover the exact number of people taken into police custody and isolated in police establishments. There must be proper, systematic records of the length of stays in police-cells and how many of those accommodated in police cells are released before a preliminary hearing takes place. Furthermore, it must be recorded how many of those remanded in custody are returned to police establishments, and how many of those are cases in which the court has accepted or denied isolation. There must also be exact numbers for how long remand prisoners are kept in police establishments before being transferred to a proper remand facility or released. There are a number of figures and statistics available today, numbers which this thesis has referred to several times. However, the available material is not systematic and does not cover the entire process from police custody to remand im-
prisonment.\textsuperscript{113} The lack of adequate statistics has also been criticized by the Ombudsman.\textsuperscript{114} Given the extreme character of isolation as a measure, it seems highly critique-worthy that no systematic, thorough data exists. The collecting and making available of such data should be a priority of the authorities.

Moreover, there ought to be a review of current legislation, and the legislative authorities must discuss to what extent domestic laws comply with the ECHR Article 3 specifically. As discussed above, legislation surrounding the use of isolation in police custody and remand imprisonment contains several flaws, which, firstly, give no legal basis for isolation in police custody and, secondly, may also give the Prosecution Authority and the courts means to be too lenient in their assessments of the necessity of isolation during remand imprisonment. It is further highly extraordinary that the preparatory works of the current legislation contains no thorough assessments into the level of compliance with Norway’s obligations to refrain from ill-treatment contrary to Article 3. In order to improve on these points, domestic legislation must be amended so as to contain thorough and specified conditions for imposing isolation both in police custody and during remand, as well as what circumstances may justify deviating from such rules. It is important that the legislation reflects the stringency of solitary confinement as a measure, and expressly prescribes that this measure is only to be resorted to when it is “in strict compliance with the criteria of reasonability, necessity and legality” and that it may only be used for the time necessary.\textsuperscript{115} It is also important during such an amendment process that the responsible authorities thoroughly address the criticism directed towards Norway and make detailed assessments of and comments on the level of compliance with Norway’s obligations under Article 3. In other words, revisions of the Criminal Procedure Act, the RUPHC, Execution of Sentences Act and the related Regulations are required. Such amendments will not only lead to more controlled isolation, but are also necessary for ensuring compliance with the principle that no intrusion into the personal freedom shall be made without sufficient authority in the law. In connection to such amendments to law, thorough examination into the practice of the Prosecution Authority and the domestic courts should also be conducted. Amending the legislation to contain safeguards is not sufficient if the authorities whose task is to enforce the legislation not adequately follow up their duty to do so.

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\textsuperscript{113} Årstale (2010), p. 3.
\textsuperscript{114} Ombudsman 2008/1775.
\textsuperscript{115} Montero-Aranguren v. Venezuela, paragraph 94.
\end{flushleft}
A particular concern seems to be the three-days deadline for preliminary hearing as set out in Section 183 of the Criminal Procedure Act. Previously, the deadline was *as soon as possible* or maximum *one day* following the arrest. However, in 2006, the deadline was raised to three days. The preparatory works discussed whether expanding the deadline would open up for isolating the arrestee at a police establishment for a longer period of time. However, it was concluded that this would not be a substantial risk as the primary requirement was still to conduct a preliminary hearing *as soon as possible*, and exceeding this deadline would only be justified when it was absolutely necessary.\(^{116}\) However, figures reveal that raising the deadline has in fact increased the days spent in isolation at police arrest even though it was not intended to do so.\(^{117}\) Therefore, I believe that this deadline should be changed back to *one day*. By reducing the number of days spent in police custody before preliminary hearing, the law would provide for a judicial review earlier in the process, reducing the number of days the inmate is detained in isolation without any assessment of the necessity of it by an independent court.

All the above mentioned suggestions for improvements will not have any particular effect if sufficient funds are not allocated for such purposes. Amending current legislation, criticising the conditions in police cells and criticising the practice of returning remand prisoners to police establishments is of no particular use when, at the same time, not enough resources are allocated for improving the design of police establishments and providing the correctional services with facilities to keep remand prisoners. As the thesis reveals, the lack of sources is often used to justify the critique-worthy practices in Norway. Consideration of resources will always be prominent in any field of life, however, that is not an accepted reason for not complying with human rights obligations. Indeed, “conditions that infringe prisoners’ human rights are not justified by lack of resources”.\(^{118}\) Insufficient sources cannot “justify failure to secure Convention rights and freedoms. This is especially the case when considering Article 3 issues”.\(^{119}\) As one of the richest countries in the world, Norway should not lack resources for improving on the mentioned points. Taking into consideration Norway’s generally good level

\(^{116}\) Ot.prp. nr. 66 (2001-2002).
\(^{118}\) European Prison Rules Article 4.
\(^{119}\) Seminar Paper, p. 5.
of compliance with its human rights obligations, it is particularly remarkable that consideration of resources is used as an excuse to justify a controversial practice on such an important and essential area as the deprivation of liberty. It is the responsibility of the Ministry of Justice to cooperate with the police and correctional services to improve on these matters.

While the CPT has over 20 years of history for criticising Norway’s law and practice on the matters discussed in this thesis, not much seems to have changed. Not only the CPT, but also several other international and domestic recognized human rights actors have criticised the same practice and made several recommendations and encouraged the following up of these suggestions. However, Norwegian authorities seem reluctant to meet the criticism. If Norway is to continue to appear as a reliable human rights advocate, the responsible authorities have to take the criticism seriously and properly address the issues as well as make the above mentioned improvements.
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