

**The Standards Developed by the  
European Committee for the Prevention  
of Torture and Inhuman or Degrading  
Treatment or Punishment**

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## *Abstract*

This thesis aims to examine a selection of the standards identifiable in the published work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”). Part I commences with an examination of the mandate and *modus operandi* of the Committee, followed by an exposition of the two fundamental principles - of confidentiality and co-operation - which inform its work. The CPT’s standard-setting work is introduced by means of an examination of its evolution and rationale, the purport of standards set and the ways in which such standards find expression.

Part II concerns CPT precepts on police custody. It begins with an examination of the CPT’s “three fundamental safeguards against ill-treatment”: the rights to notify a third party of the fact of one’s detention, of access to legal advice and to a medical examination by a doctor of one’s own choosing. It then considers, in turn, the duty to inform a detainee of all his rights; the conduct of police interrogations; the electronic recording of interviews; the maintenance of custody records; and police complaints and inspection procedures.

Part III is devoted to a number of matters considered under the umbrella term “imprisonment”. It begins with a detailed examination of the phenomenon of prison overcrowding, its effects on detainees and the prison environment, and policies designed to eradicate it or at least mitigate its effects. There then follow two sections on recourse to and safeguards attending, the use of force and/or instruments of restraint and solitary confinement in places of detention (which places include, for the sake of completeness, police establishments, immigration detention centres, psychiatric establishments, *etc.*).

Part IV attempts to draw everything together, to assess the impact of CPT standards on national criminal justice and penal policy and to consider ways in which that impact might be enhanced.

## *Acknowledgments*

I am much indebted to Professor David Harris at Nottingham University for the unstinting help and encouragement which he has given me throughout my period of research. His unfailing courtesy and tolerance and kind words have helped me to complete an undertaking for which my fondness has, to say the least, waxed and waned over the last few years.

I should also like to thank Loraine Birtles for her assistance and maternal patience on those occasions when technology got the better of me, as well as all those, too numerous to mention, who attempted, without success, to revive the moribund computer on which I first attempted this piece of work. Thanks, too, to the partners of Messrs. Hewitson and Harker, without whose indulgence and co-operation in the latter stages of my research, this work would have remained (indefinitely) undone.

Lastly, it is important that I state that I should not have been able to complete my research without the help and co-operation of the Secretariat of the CPT. At regular intervals, it has sent me copies of every CPT document whose publication has been authorised. Access to the documents necessary to complete a Doctoral thesis has probably never been easier.

## *The Citation of CPT Documents in this Thesis*

It may be of some assistance to the reader if the manner in which CPT documents are cited in this work is explained. Visit reports are identified by reference to the State party visited, followed by a number representing the visit undertaken (the numeral “I” signifying the first visit to the Party - whether periodic or *ad hoc* in nature<sup>1</sup> – “II”, the second visit, and so on) and a paragraph reference. Thus, the citation “Finland I, para 56” is a reference to paragraph 56 of the report on the CPT’s first visit to Finland. The CPT Document Reference Number (“CPT/Inf”) is not indicated in the text. This may be found at Table A in the Appendix to this thesis.

A similar approach has been adopted in respect of other CPT publications. General Reports are identified by the abbreviation “GR”, preceded by an indication of its position in the sequence of annual reports. Thus, “2<sup>nd</sup> GR, para 74” refers to paragraph 74 of the Committee’s second General Report. The CPT Document Reference Number of such reports may be found at Table B of the Appendix.

In the same way, “Finland Response I” refers to the Response of the Finnish Government to the CPT’s first visit to the country and “Finland Response II”, to the Response formulated to the Committee’s second visit. Where a Party’s response has taken the form of an “Interim” or “Follow-up” report, the citation is altered accordingly. It should be noted that the Appendix does not contain a Table of Government responses. It was decided that in the light of the infrequent reference in this text to such responses, the creation of such a Table could not readily be justified. Accordingly, the CPT Document Reference Numbers of Party responses are indicated in the text, at the relevant footnote.

In adopting the approach just elaborated, it is intended to convey as much information to the reader as possible while seeking to avoid the creation of large and unwieldy footnotes.

### *Bibliographical references*

A similar shorthand has been adopted in respect of bibliographical references. Books and academic articles are identified in the text by reference to their author(s) and the year of their publication (e.g. “Evans and Morgan (1998)”). Full references for the publications cited may be found in the Bibliography (followed by a parenthetical indication of how they appear in the text).

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<sup>1</sup> These terms are explained below, at pp 11-12.

## *Abbreviations*

AJIL	American Journal of International Law
APT	Association for the Prevention of Torture
App	Appendix (to CPT visit reports)
BJC	British Journal of Criminology
Cmnd	UK Command Papers
The Committee/CPT	Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Comm Dec	Decision of the European Commission of Human Rights
Comm Rep	Report of the European Commission of Human Rights
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EJIL	European Journal of International Law
EPA 1991	Northern Ireland (Emergency Provisions) Act 1991
EPR	European Prison Rules
ETS	European Treaty Series
GAOR	General Assembly Official Records
ICLQ	International and Comparative Law Quarterly
ICPC	Independent Commission for Police Complaints for Northern Ireland
ICRC	International Committee of the Red Cross
ILM	International Legal Materials
Misc. Series	UK Miscellaneous Series

NGO	Non-Governmental Organisation
PACE 1984	Police and Criminal Evidence Act 1984
PACE (NI) 1989	Police and Criminal Evidence (Northern Ireland) Order 1989
PTA 1989	Prevention of Terrorism (Temporary Provisions) Act 1989
SCAT	Swiss Committee Against Torture
UK	United Kingdom of Great Britain and Northern Ireland
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNTS	United Nations Treaty Series

## *Table of Cases*

### ***ECHR***

*A.D.D.B. v Netherlands*, App No 37328/97, Court Decision of 5<sup>th</sup> September 2000 (unpublished).

*Aerts v Belgium*, App No 25357/94, Comm Rep, 20<sup>th</sup> May 1997.

*Aerts v Belgium*, Reports of Judgments and Decisions of the European Court of Human Rights 1998-V-1939 (1998).

*Akkoc v Turkey*, Judgment of the Court of 10<sup>th</sup> October 2000 (unpublished).

*Amuur v France*, Reports of Judgments and Decisions of the European Court of Human Rights 1996-III-827 (1996).

*Aydin v Turkey*, App No 23178/94, Comm Rep, 7<sup>th</sup> March 1996.

*Aydin v Turkey*, Reports of Judgments and Decisions of the European Court of Human Rights 1997-VI-1866 (1997).

*Delazarus v UK*, App No 17525/90, Comm Dec, 16<sup>th</sup> February 1993 (unpublished).

*Magee v UK*, Judgment of the Court of 6<sup>th</sup> June 2000 (unpublished).

*LJ v Finland*, App No 21221/93, Comm Dec, 28<sup>th</sup> June 1995 (unpublished).

*Peers v Greece*, App No 28524/95, Comm Dec, 21<sup>st</sup> May 1998 (unpublished).

*Raphaie v UK*, App No 20035/92, Comm Dec, 2<sup>nd</sup> December 1993 (unpublished).

*Tosunoglu v Greece*, App No 21892/93, Comm Dec, 12<sup>th</sup> April 1996 (unpublished).

### ***UN Committee against Torture***

*Qani Halimi-Nedzibi v Austria*, Communication No 8/1991;  
UN DOC.CAT/C/11/D/8/1991.

### ***UK***

*Raymond v Honey* [1982] All ER 756.



# PART I

Introduction

## An Introduction to the CPT

### *Introduction*

The object of this thesis is to examine in a critical sense the standard-setting work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”). More specifically, it is to examine a range of standards developed by the CPT in the first ten years of its operation. Because of the nature and requirements of the Ph.D. process, it is not possible to examine the work of the CPT exhaustively. Word and time constraints preclude anything other than a general overview, *inter alia*, of the evolution, mandate and *modus operandi* of the Committee. Fortunately, such matters have been studied in some detail by a number of commentators, who, it would not be an overstatement to say, may be considered “specialists” on the CPT.<sup>1</sup>

Those same constraints also preclude an exhaustive study of CPT standards. To examine in detail every standard or potential standard identifiable in the Committee’s published work would be a huge undertaking. Consequently, a number have been selected which, it is hoped, adequately represent the range of standards to

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<sup>1</sup> A far from exhaustive list of the principal publications on the CPT includes Evans, Malcolm and Morgan, Rod, *The European Convention for the Prevention of Torture: Operational Practice* 41 ICLQ 1992, pp 590-614; Morgan, Rod and Evans, Malcolm, *Inspecting Prisons: the View from Strasbourg*, 34 BJC (Special Issue), Spring 1994, pp 141-159 (also published in King, R. and Maguire, M. (eds.), *Prisons in Context*, Clarendon Press, Oxford, 1994) (“Morgan and Evans (1994)”); Evans, Malcolm D. and Morgan, Rod, *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Oxford University Press, Oxford, 1998 (“Evans and Morgan (1998)”); Morgan, Rod and Evans, Malcolm D. (eds.), *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, Oxford, 1999 (“Morgan and Evans (1999)”); Murdoch, Jim, *The Work of the Council of Europe’s Torture Committee* 5 EJIL 1994, pp 220-248 (“Murdoch (1994)”); and Cassese, Antonio, *A New Approach to Human Rights: The European Convention for the Prevention of Torture* 83 AJIL 1989, pp 128-153 (“Cassese (1989)”) and *Inhuman States. Imprisonment, Detention and Torture in Europe Today*, Polity Press, Cambridge, 1996, first published in Italian as *Umano-Disumano: Commissariati e prigionieri nell’Europa di oggi*, Gius. Laterza & Figli, 1994 (“Cassese (1996)”).

have emerged to date and whose study accurately reflects the way in which the CPT's standard-setting work has evolved and finds expression.

Studies of CPT standards have been undertaken before.<sup>2</sup> However, such studies have invariably comprised just one part of a broader examination of the Committee's work; they have not set out specifically and comprehensively to consider the content of its evolving corpus of standards. By contrast, it is the *express* intention of this thesis to examine CPT standards as they find expression in its published work. Accordingly, while there may be some margin for debate as to the exact content of such standards – for, although many speak for themselves, a sufficiently large penumbral area exists round some, it is submitted, to permit a certain creativity in interpretation – it is hoped that the present work represents as thorough an analysis of the various standards considered as time and space permit.

Axiomatically, in seeking to identify CPT precepts on the protection of detainees against ill-treatment, the most fruitful source of information is the Committee's published work, principally its reports on visits to States parties and its annual General Reports, supplemented, where appropriate (for example, when clarification on a particular point of domestic law is necessary), by the published responses of States parties visited. At various points in this text reference will also be made to the *European Prison Rules* ("the *EPR*"). The Rules are cited merely as a point of reference. It is not the purpose of this thesis to attempt a comparative study of the principles identifiable in the work of the CPT and those elaborated in the Rules. In the first place, the Rules, as their name suggests, relate principally to the detention of persons in *prison* establishments; whereas the present work devotes a not

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<sup>2</sup> See, e.g., Evans, Malcolm D. and Morgan, Rod, *The European Convention for the Prevention of Torture: 1992-1997*, 46 ICLQ 1997, pp 663-675 ("Evans and Morgan (1997)") at 668 *et seq.*; Evans and Morgan (1998), pp 247-315; Morgan and Evans (1999), pp 31-82; Kaiser, Gunther, *Detention in*

inconsiderable amount of space, in addition, to standards on detention in police (and, indeed, other) establishments, which detention falls outside the Rules' purview – except, it might be argued, insofar as they relate to *unconvicted* prisoners. In the second place, any effort to study the compatibility of standards developed by the CPT with those elaborated under the *EPR* – or even with those elaborated under other international instruments which inhabit the same field - would be covering ground previously trodden in exemplary fashion by other commentators.<sup>3</sup> Consequently, brief references to the *EPR* in this work are made simply to place the precepts of the Committee in a broader historical and international context.

In the identification and examination of CPT standards - and, where possible, potential standards – in this work, reference will be made to the experience of visiting delegations as well as to the Committee's interpretation of domestic law and practice. In some instances, it is worth noting, such law and practice may be said to offer *greater* protection for detainees than that sought by the CPT and this will be highlighted in the text. Obversely, where domestic provision falls short of CPT standards, the deficiency will be indicated and commented on. Further, reference will be made throughout, where appropriate, to detention in establishments other than prisons and police stations. However, it is not the author's intention to examine such detention in any depth. CPT standards on the detention, *inter alia*, of foreign nationals under domestic aliens legislation, the mentally ill and juveniles are not the subject of this work. They are deserving of quite separate treatment and the reader should look elsewhere for more comprehensive elaboration in this regard.<sup>4</sup>

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*Europe and the European Committee for the Prevention of Torture*, 1 *European Journal of Crime, Criminal Law and Criminal Justice* 1995, pp 2-17 at 8 *et seq*; and Murdoch (1994), p 233 *et seq*.

<sup>3</sup> See, e.g., Murdoch (1994), pp 231-238 and *CPT Standards within the Context of the Council of Europe*, in Morgan and Evans (1999), pp 103-136; and Suntinger, Walter, *CPT and Other International Standards for the Prevention of Torture*, also in Morgan and Evans (1999), pp 137-166.

<sup>4</sup> The CPT has used the medium of its annual General Reports to adumbrate standards on detention in places other than (adult) prisons and police establishments: see further below, p 50.

The reader should also be aware that to a very large extent, this work avoids examining material conditions of detention and the provision of regime activities in custodial establishments. Again, pressures of space have meant that detailed perusal of such features of detention is not feasible. However, where it is clear that the physical environment and the provision of activities are integral to the precept under discussion (for example, in the solitary confinement of detainees), appropriate reference and explanation will be offered in the text.

### *The essential role of the CPT*

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the ECPT”)<sup>5</sup> was opened for signature on 26<sup>th</sup> November 1987.<sup>6</sup> As at 18<sup>th</sup> August 2000, it had been ratified by all forty-one member States of the Council of Europe,<sup>7</sup> a number unlikely to have been anticipated twelve years earlier and which may be accounted for by the swelling of the Council of Europe following the accession of many central and eastern European States.<sup>8</sup> The ECPT establishes the European Committee for the Prevention of Torture and Inhuman or

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<sup>5</sup> Council of Europe Doc. H (87) 4, reprinted in 27 ILM 1152 (1988); ETS 126; UKTS 54 (1991); Cmnd 1634.

<sup>6</sup> The origins and drafting history of the ECPT have been covered *in extenso* by a number of academic commentators. See, e.g., Cassese (1989), p 130 *et seq*; and Evans and Morgan (1998), p 106 *et seq*. See also paras 1-11 of the Explanatory Report, which accompanies the text of the ECPT. (On the status of the Explanatory Report as a means of interpreting the Convention text, see below, n 13.)

<sup>7</sup> See 10<sup>th</sup> GR, para 14. Georgia ratified the Convention on 20<sup>th</sup> June 2000. It will enter into force in respect of the State on 1<sup>st</sup> October 2000.

<sup>8</sup> It was a *sine qua non* of their membership of the Council of Europe that such States sign and ratify the ECPT. It should be noted that their accession to the Convention may have rendered redundant in practice the Convention’s First Protocol (opened for signature in 1993; ETS 151; UK Misc. Series No. 3 (1994); Cmnd 2454), which authorises the Committee of Ministers of the Council of Europe to invite non-member States to accede to the ECPT. The Protocol has not yet entered into force and will only do so when ratified by all States parties. As at 18<sup>th</sup> August 2000, it had been ratified by all Parties except Croatia and Ukraine (see 10<sup>th</sup> GR, para 15). If it ever does enter into force it might be used to extend the geographical scope of the Convention further still (by, for example, embracing Applicant States for membership of the Council of Europe or certain non-European States which enjoy close links with Europe).

Degrading Treatment or Punishment (“the CPT” or “the Committee”).<sup>9</sup> This Committee is mandated:

“...by means of visits, [to] examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment”.<sup>10</sup>

In order to facilitate the CPT’s work:

“Each party shall permit visits...to any place within its jurisdiction where persons are deprived of their liberty by a public authority”.<sup>11</sup>

Following each such visit, the CPT is required to draw up a report setting out its findings. This report, which also contains, *inter alia*, the Committee’s recommendations for strengthening the protection of detainees against ill-treatment, is transmitted to the Party concerned.<sup>12</sup> It marks the commencement of a post-visit dialogue between the CPT and the Party addressed.

### ***A non-judicial organ***

In addressing States parties, the CPT acts in neither a judicial nor a quasi-judicial capacity. “It is not its task to adjudge that violations of the relevant international instruments [e.g. Article 3, ECHR] have been committed” or to interpret the provisions of such instruments.<sup>13</sup> Its function, rather, is “purely preventive”: to

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<sup>9</sup> Article 1, ECPT.

<sup>10</sup> Ibid.

<sup>11</sup> Article 2, ECPT.

<sup>12</sup> Article 10(1), ECPT.

<sup>13</sup> See Explanatory Report, para 17. The purpose of the Explanatory Report is to set out in detail the manner in which the provisions of the ECPT are to be interpreted and applied. It has been described as “an indispensable element of the proper interpretation and application of the Convention”, particularly in light of the fact that the Convention provisions and the relevant parts of the Explanatory Report “were always conceived as two parts of a whole”. Accordingly, the Report does more than merely supplement the ECPT; it should be “considered as an agreement or instrument made in connection with the conclusion of the Convention”: see letter of 9<sup>th</sup> November 1990 from the President of the CPT to

conduct fact-finding visits and, if necessary, on the basis of its findings, to offer non-binding recommendations with a view to improving detainees' protection against ill-treatment.<sup>14</sup> Accordingly, the CPT has no legal or quasi-legal sanctions at its disposal. In the event that a Party refuses to improve matters in the light of the Committee's recommendations, particularly if that refusal is repeated, or refuses to co-operate with the CPT in other ways, the latter may, "after the Party has had an opportunity to make known its views", issue nothing more censorious than a "public statement"<sup>15</sup> – although it does have a "wide discretion" in deciding what information to make public (subject to certain considerations of confidentiality and due process).<sup>16</sup> Thus, unlike the European Commission and Court of Human Rights, whose activities "aim at 'conflict solution' on the legal level, the CPT's activities aim at 'conflict avoidance' on the practical level".<sup>17</sup> Its task is "not to publicly criticise States, but rather to assist them in finding ways to strengthen the 'cordon sanitaire' that separates acceptable and unacceptable treatment or behaviour".<sup>18</sup>

### *The ICRC model*

The work of the CPT has emerged from - in fact, was inspired by - that of the International Committee of the Red Cross ("the ICRC"), which carries out visits to places where prisoners of war are detained and, if appropriate, makes recommendations for the improvement of conditions therein. All such visits are

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the Secretary General of the Council of Europe, in CPT/Inf (93) 10, pp 5-8 at 6-7. At the same time, however, the Report "does not have the same value as the text of the Convention": see letter of 10<sup>th</sup> July 1991 from the President of the CPT to the Chairman of the Ministers' Deputies, CPT/Inf (93) 10, p 13.

<sup>14</sup> *Idem*, para 25.

<sup>15</sup> Article 10(2), ECPT. The issuing of a public statement requires a majority of two-thirds among Committee members.

<sup>16</sup> See Explanatory Report, para 75. To date, two such statements have been issued, both concerning Turkey, the first in 1992 and the second in 1996: see Table A in the Appendix to this work.

<sup>17</sup> See 1<sup>st</sup> GR, para 2.

<sup>18</sup> *Idem*, para 3. Paragraphs 2 and 3, together with others contained in the CPT's 1<sup>st</sup> General Report, are reproduced in the first visit reports transmitted to Parties.

conducted in confidence,<sup>19</sup> which precept, together with that of co-operation between the ICRC and the local authorities (and the ICRC's scrupulously neutral approach to its work), provides the bedrock on which it operates. The ICRC may only visit places of detention when there exists a state of international armed conflict between States parties to the Geneva Conventions of 12<sup>th</sup> August 1949.<sup>20</sup> In all other cases, it may do so only by negotiating special agreements with the State concerned or, in circumstances in which a state of internal armed conflict exists, with each of the parties to the conflict,<sup>21</sup> which agreements may generally be terminated at any moment. However, the Committee will only undertake visits if certain non-negotiable conditions are agreed to: it must be granted access to all detainees in all locations which fall within the scope of its mandate; it must be able to interview detainees freely in the absence of witnesses; it must be free to draw up lists of prisoners; and it must be able to make repeat visits and to distribute aid if necessary.

The parallels between the work of the ICRC and that of the CPT are clear to see. The mandate of the CPT has simply been broadened to encompass peacetime visits to a wider range of places of detention. Interestingly, it is a mandate the realisation of which was first attempted at the global, rather than regional, level. In 1980, the Government of Costa Rica submitted a draft Optional Protocol to the – then – draft International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”),<sup>22</sup> which Protocol sought to create at the universal level a system of visits like that which eventually took shape in Europe. The proposal, while much debated, has yet to proceed beyond the draft

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<sup>19</sup> In practice, this means that while reporting publicly on the locations of its visits, the ICRC does not report publicly on its findings, which are transmitted only to the local authorities.

<sup>20</sup> See common Article 10/10/10/11, Geneva Conventions for the Protection of Victims of War, 12<sup>th</sup> August 1949; UNTS 75 31; UKTS 39 (1958); Cmnd 550.

<sup>21</sup> See common Article 3 of the Geneva Conventions for the Protection of Victims of War, *op cit*, n 20.

<sup>22</sup> The Convention entered into force on 26<sup>th</sup> June 1987 (23 ILM 1027; 24 ILM 535; UKTS 107 (1991); Cmnd 1775).



stage<sup>23</sup> and may be regarded as, to all intents and purposes, indefinitely stalled. This means that the ECPT is unique in international law. It is the first and, for the time being, only treaty-based mechanism which facilitates the regular and, if necessary, *ad hoc*, inspection of a variety of places of detention and the making of recommendations by the organ mandated to carry out such inspections.<sup>24</sup> The CPT's work and, it follows, the standards which it sets, are accordingly of great significance.

### ***Membership***

The ECPT provides that the Committee shall consist of a number of members equal to the number of Parties.<sup>25</sup> Members are elected by the Committee of Ministers of the Council of Europe from a list of three candidates provided by each Party.<sup>26</sup> They are elected for a period of four years and are eligible for re-election only once.<sup>27</sup> If it enters into force, the Second Protocol to the ECPT will, *inter alia*, permit members to stand for re-election for a second time. The Protocol was opened for signature in 1993 and as at 18<sup>th</sup> August 2000, had been signed and ratified by thirty-nine of the forty-one States parties.<sup>28</sup>

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<sup>23</sup> For a number of years now, a working group has been engaged in an effort to settle a text to be put forward for adoption: see, *inter alia*, Association for the Prevention of Torture ("APT"), *Working Group on the Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Analytical Report of the Association for the Prevention of Torture*, APT, Geneva, 1996, which covers the history of such efforts to the end of 1995; and, for recent evidence of the on-going work of the group, GAOR A/54/44, at p 2 (1999).

<sup>24</sup> The Committee Against Torture, established by UNCAT, is mandated to receive and examine reports from States parties and, under two optional procedures, communications from either States or individuals. Further, it is authorised to instigate (confidential) investigations if it receives "reliable information" which appears to it to show "well founded indications" that torture is being "systematically practised" in a State party. Clearly, the UN Committee's mandate is narrower than that of the CPT. Further, like the Council of Europe, the Organisation of American States has formulated a regional torture convention. However, it is principally concerned with acts of torture and does not possess the broad-ranging sphere of concern of its European sibling. Further, it does not establish an organ possessed of a mandate like that of the CPT.

<sup>25</sup> Article 4(1), ECPT. As at 18<sup>th</sup> August 2000, the CPT comprised 36 members, the seats of Greece, Hungary, Italy and Latvia being vacant and that of Georgia requiring to be filled as from 1<sup>st</sup> October 2000: see 10<sup>th</sup> GR, para 17.

<sup>26</sup> Article 5(1), ECPT.

<sup>27</sup> Article 5(3), ECPT.

<sup>28</sup> See 10<sup>th</sup> GR, para 15. Like the First Protocol, the Second Protocol (ETS 152; UK Misc. Series No. 4 (1994); Cmnd 2459) will only enter into force once ratified by every State party.

Members serve “in their individual capacity”.<sup>29</sup> They do not represent the Party that nominated them or, for that matter, any other interest or cause. Thus, they are to be “independent and impartial, and shall be available to serve the Committee effectively”.<sup>30</sup> They shall be:

“...chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention”.<sup>31</sup>

In this connection, the Explanatory Report suggests, *inter alia*, that:

“[i]t is not thought desirable to specify in detail the professional fields from which members of the Committee might be drawn...It would be desirable that the Committee should include members who have experience in matters such as prison administration and the various medical fields relevant to the treatment of persons deprived of their liberty. This will make the dialogue between the Committee and the States more effective and facilitate concrete suggestions from the Committee”.<sup>32</sup>

In order to ensure that in carrying out its work, the CPT is able to avail itself of as much expertise on matters falling within the scope of its mandate as possible, it may, “if it considers it necessary, be assisted by experts...”<sup>33</sup> This provision is important, it is submitted, because even the most balanced of Committees will lack expertise in

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<sup>29</sup> Article 4(4), ECPT.

<sup>30</sup> Ibid.

<sup>31</sup> Article 5(2), ECPT.

<sup>32</sup> See Explanatory Report, para 36. It has been said recently that the composition of the Committee comprises a good balance of gender and expertise: see Morgan and Evans (1999), pp 12-13 (reflecting the situation as it stood in December 1998). However, recent elections, it is clear, have left it a little short of medical practitioners, notably forensic doctors - especially when compared with the number of legally trained members - as well as persons with experience of police matters and women (who currently comprise only 9 out of 36 members): see 10<sup>th</sup> GR, para 18.

<sup>33</sup> Article 7(2), ECPT.

some areas. The “underlying idea” of the *ad hoc* use of experts, the Explanatory Report makes clear, is:

“...to supplement the experience of the Committee by the assistance, for example, of persons who have special training or experience of humanitarian missions, who have a medical background or possess a special competence in the treatment of detainees or in prison regimes and, when appropriate, as regards young persons”.<sup>34</sup>

It is clear from a perusal of visit reports that the use of outside expertise in the conduct of visits is a practice which may be considered, to all intents and purposes, as routine, a state of affairs which was perhaps not anticipated when the CPT commenced its work.<sup>35</sup>

### *Visits*

Visits to States parties, as we have seen, represent the means by which the CPT fulfils its Convention mandate. The effectiveness with which they are carried out, therefore, is crucial to the success or failure of the entire Convention system. Accordingly, they are worth examining in some detail.

### *The scope of the CPT's visiting role*

The CPT is entitled to make visits to “all kinds of places where persons are deprived of their liberty, whatever the reasons may be”.<sup>36</sup> Thus, it may visit and enjoys

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<sup>34</sup> See Explanatory Report, para 51.

<sup>35</sup> See Morgan and Evans (1999) p 14. Unlike members of the Committee, experts may “exceptionally” be excluded from delegations that visit a Party by the national authorities: Article 14(3), ECPT.

<sup>36</sup> See Explanatory Report, para 30.

complete freedom of movement<sup>37</sup> in, *inter alia*, police stations, prisons, immigration detention centres, psychiatric hospitals, juvenile detention centres and military barracks: in short, “any place within [a Parties’] jurisdiction where one or more persons are deprived of their liberty by a public authority...whether the deprivation is based on a formal decision or not”.<sup>38</sup> Visits may be made to both private and public institutions. However, because the crucial element is whether the deprivation of liberty is the result of action taken by a public authority, the CPT may not visit persons who are detained voluntarily, like certain psychiatric patients (although, in such circumstances, it should be permitted to satisfy itself that the requisite voluntariness is present).<sup>39</sup>

### *Types of visit*

Article 7(1), ECPT provides that the CPT shall undertake two types of visit. Visits of the first type, periodic in nature, are made to each State party putatively on a regular basis.<sup>40</sup> In formulating its programme of periodic visits, the Explanatory Report suggests, the CPT should “ensure, as far as possible, that the different States are visited on an equitable basis”.<sup>41</sup> Periodic visits vary in length, depending, *inter alia*, on the size of the Party being visited. At their longest, they may last between two and three weeks. During each such visit, the CPT may visit a number of different kinds of establishment in a variety of locations. However, “its programme of periodic visits

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<sup>37</sup> The right of free movement in places of detention is conferred on the Committee by Article 8(2), sub-paras (a) and (c), ECPT (see further below, pp 35-36). The right is circumscribed, however, by Article 9, ECPT (see below, pp 15-16).

<sup>38</sup> See Explanatory Report, para 28.

<sup>39</sup> *Idem*, para 32.

<sup>40</sup> The Committee originally expressed the intention to visit each Party on a two-year cycle. With the accession to the ECPT of a number of central and eastern European States and the decision to visit each such State within a year of their accession, however, that cycle has now stretched to one of four years: see *inter alia* Morgan and Evans (1999), p 15.

<sup>41</sup> See Explanatory Report, para 48. See also Rule 31.2 of the CPT’s Rules of Procedure.

should not imply, for practical reasons”, the Explanatory Report asserts, “systematic visits in all places where persons are deprived of their liberty”.<sup>42</sup>

The immanent rigidity of periodic visits and the increased length of the periodic visit cycle has imbued the second type of visit authorised by Article 7(1), namely, “such other visits as appear to [the Committee] to be required in the circumstances” - more commonly and conveniently referred to as *ad hoc* visits - with a greater significance. Over the course of its working life, *ad hoc* visits have become an increasing feature of the Committee’s activities, a trend which finds justification in the Explanatory Report, which states unequivocally that the CPT “should even accord a certain priority to *ad hoc* visits...”<sup>43</sup>

Typically, *ad hoc* visits are precipitated by a concern on the part of the CPT that the situation in a particular establishment or type of establishment or locality or Party generally demands urgent attention. Accordingly, it is invested with a certain discretion in determining the necessity of a visit, as well as the criteria on which such determination is based. Thus, whilst visits may not be triggered by the receipt of individual complaints – the ECHR organs, after all, offer more appropriate fora for the investigation of such matters – the CPT should be “free to assess communications from individuals or groups of individuals and to decide whether to exercise its functions upon such communications”.<sup>44</sup>

As the Committee’s experience has grown, a third type of visit has emerged, which may be considered an offshoot of the *ad hoc* visit procedure. *Follow-up* visits are swift, targeted visits to an establishment or establishments visited previously in

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Idem, para 49 (which also states that the CPT should enjoy a “similar” discretion when invited by a Party to visit places within its jurisdiction in order to “investigate certain allegations and to clarify the situation”).

the course of periodic or *ad hoc* visits. Today, therefore, the distinctions between the various categories of visit are increasingly blurred, particularly now that Parties are being visited for a third, fourth and even fifth<sup>45</sup> and sixth<sup>46</sup> time, with the consequence that even periodic visits may focus on establishments visited previously.<sup>47</sup>

Visits are not carried out by the full Committee. “As a general rule”, Article 7(1), ECPT stipulates, “visits shall be carried out by at least two members of the Committee”.<sup>48</sup> These members – who shall not include the member elected in respect of the State to be visited<sup>49</sup> - form part of a delegation, comprising also *ad hoc* experts,<sup>50</sup> interpreters and members of the Secretariat. The composition of such delegations varies depending on the length and nature of the visit and the size of the Party. Periodic visits may involve as many as five Committee members, two experts, a number of interpreters and two members of the Secretariat.

### *Notification of visits*

The CPT is duty-bound to “notify the Government of the Party concerned of its intention to carry out a visit”, following which notification it may visit those places of

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<sup>45</sup> At the time of writing, the UK had received five visits.

<sup>46</sup> Spain, for example, has been visited on six occasions. Turkey, it should be noted, has received nine visits to date.

<sup>47</sup> Although not strictly falling within the scope of the term *visit*, the recently developed practice whereby members of the CPT Bureau – which comprises three Committee members, the President and First and Second Vice-Presidents – and Secretariat visit Parties in advance of first periodic visits in order to address officials and activists on the work of the CPT is worth noting in the present connection. It has proved particularly useful in acquainting central and eastern European Parties with the Committee’s purpose and *modus operandi*: see *inter alia* 10<sup>th</sup> GR, para 8 and also Morgan and Evans (1999), p 22. The CPT has also engaged State authorities in direct, “face-to-face” discussions to coincide with the transmission of visit reports, the aim of which is to highlight certain key issues raised in the reports and to transmit information to relevant government departments: see *inter alia* 10<sup>th</sup> GR, para 9.

<sup>48</sup> Exceptionally, however, one member may conduct a visit, “e.g. in *ad hoc* visits of an urgent nature when only one member is available”: see Explanatory Report, para 50 (and Rule 34.1 of the CPT’s Rules of Procedure).

<sup>49</sup> See Rule 37.2 of the CPT’s Rules of Procedure.

<sup>50</sup> Rather like the Committee members who may participate in a visit, “as a rule”, a visiting delegation shall not be assisted by an expert who is a national of the State to be visited: Rule 38.2 of the CPT’s Rules of Procedure.

detention which it is authorised to visit “at any time”.<sup>51</sup> It is notable that no specific provision is made as to the period of notice, which means that, in principle, a visit could take place immediately after notification has been given.<sup>52</sup> However, in order that a visit may be rendered “as effective as possible”, the Explanatory Report provides that, “as a general rule and taking into consideration the principle of co-operation set out in Article 3, [ECPT]”,<sup>53</sup> the Committee should give the Party concerned “reasonable time to take the necessary measures...”<sup>54</sup>

In practice, the CPT has adopted a three-stage notification procedure. In the calendar year before they are due to take place, it announces its programme of periodic visits, without indicating the timing of such visits.<sup>55</sup> Approximately two weeks before the visit to a particular Party is due to commence, the CPT sends notice of its intention to visit to the national authorities. It is expected that this notification will indicate the timing and anticipated length of the visit and the composition of the visiting delegation, including Committee members, *ad hoc* experts, members of the Secretariat and interpreters. Lastly, the Party is furnished with a list of establishments to be visited a few days before the Committee’s arrival. This list is provisional and “should not preclude the Committee from announcing that it also wishes to visit other establishments in the course of the visit”.<sup>56</sup> The identification of places of detention

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<sup>51</sup> Article 8(1), ECPT.

<sup>52</sup> Recently, the CPT undertook an *ad hoc* visit to Spain a mere three days after learning of the incident which precipitated it and just two days after first contacting the Spanish authorities in connection with it (see the CPT’s sixth report to the Spanish Government relating to the apprehension, detention and interrogation of Mr Jesus Arcauz Arana, a suspected terrorist, in early January 1997).

<sup>53</sup> On the principle of co-operation generally, see below, p 31 *et seq.*

<sup>54</sup> See Explanatory Report, para 56. At the same time, the Report continues, “the Committee should carry out the visit within a reasonable time after notification”.

<sup>55</sup> See Rule 31.2 of the CPT’s Rules of Procedure. Ten periodic visits were scheduled for 2000: see Council of Europe Press Release dated 3<sup>rd</sup> December 1999. The Committee aspires to carry out visits on 200 days each year (see, e.g., 9<sup>th</sup> GR, paras 18-19). However, insufficient resources have meant that the number of “visit days” for which a budget is available currently stands at 150: see 10<sup>th</sup> GR, para 20.

<sup>56</sup> See Explanatory Report, para 58.

to be visited rests, as might be expected, with the CPT itself. However, it is reliant, to a certain extent, on information furnished by others, such as States parties, non-governmental organisations (“NGOs”), the media and, with its own developing experience, information gathered by its Members and the Secretariat in researching and conducting visits.

### *Restricting the right of visit*

Article 9(1), ECPT provides that:

“In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee. Such representations may only be made on grounds of defence, public safety,<sup>57</sup> serious disorder in places where persons are deprived of their liberty, the medical condition of a person<sup>58</sup> or that an urgent interrogation relating to a serious crime is in progress”.

This provision recognises that, “notwithstanding the obligations of a Party to permit visits by the Committee, certain exceptional circumstances may justify a postponement of a visit or some limitation of the right of access of the Committee as regards a particular place”.<sup>59</sup> In order to avoid compromising the CPT’s right of visit, however, Article 9(2) provides that:

“Following...representations [made under Article 9(1)], the Committee and the Party shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to

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<sup>57</sup> Which ground includes “an urgent and compelling need to prevent serious crime”: see Explanatory Report, para 71 (2<sup>nd</sup> indent).

<sup>58</sup> I.e. “where, having regard to the medical (including mental) condition of a person proposed to be visited, a visit at a particular time could prove detrimental to health”: *ibid* (4<sup>th</sup> indent).

<sup>59</sup> *Ibid*.



exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Committee proposed to visit. Until the visit takes place, the Party shall provide information to the Committee about any person concerned”.

## ***The publication of reports***

### ***Visit reports***

After each visit, the Committee is required to draw up a report on the facts found by its delegation<sup>60</sup> and transmit it to the Party concerned, together with any number of “recommendations” for improving detainees’ protection against ill-treatment, “comments” and “requests for information”. The Convention text only refers to recommendations and it is these to which Parties must respond; they are under no obligation to respond to comments and requests for information. Nevertheless, these latter expedients afford the CPT useful opportunities to make known its views on particular matters or to indicate areas of concern without having to resort to the more demanding and arguably more antagonistic formula of a recommendation.<sup>61</sup>

Visit reports are prepared by the delegations that carried out the visits to which they relate. They are subsequently adopted at one of the CPT’s tri-annual plenary meetings. Originally, it was the Committee’s intention to adopt reports within six months of a visit. However, pressures on resources, both financial and administrative, particularly following the accession to the ECPT of various central and eastern

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<sup>60</sup> Visit reports characteristically describe establishments visited in some detail, including the amount of available accommodation, size of the inmate population, cell size and furnishings, sanitary facilities and all aspects of the custodial regime. Consequently, it is possible for the CPT – and the reader – to formulate a “cumulative view” of the effect of the custodial environment on persons detained therein: see Morgan and Evans (1994) at 154.

<sup>61</sup> It is worth noting in the present connection that, notwithstanding the formal constraints of the reporting procedure, the ECPT makes provision, at Article 8(5), for the CPT to make *immediate* observations to a Party *in the course of a visit*, typically when its findings give cause for serious

European States, have made meeting this objective difficult. More commonly, the post-visit interregnum lasts up to nine months. Having been adopted, visit reports are transmitted under a cloak of confidentiality to the State party concerned, together with a request that the latter furnish the Committee, within six months, with an *interim* report on measures taken or proposed to be taken to implement CPT recommendations and, within twelve months, with a *follow-up* report containing fuller details of such measures.<sup>62</sup> Upon receipt and perusal of a response, the CPT engages in further dialogue by way of an exchange of letters. Ultimately, of course, this dialogue elides into the preparations being made for the next visit to the Party concerned.<sup>63</sup>

The visit report (as well as all other material gathered in connection with a visit and the responses of State parties) remains confidential unless and until the Party concerned authorises its publication.<sup>64</sup> It is a mark of the success of the Convention system that the overwhelming majority of visit reports have been published.<sup>65</sup>

### ***General Reports***

In addition to visit reports, the CPT is required on an annual basis to draw up a “general report on its activities”. This report is submitted to the Committee of Ministers and Parliamentary Assembly of the Council of Europe and, subject to the

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concern. The use made of this expedient by the CPT will be dealt with in greater detail below, at pp 51-3.

<sup>62</sup> Following an *ad hoc* visit, the CPT more commonly requests a single response.

<sup>63</sup> Interestingly, at least in the context of the present work, Morgan and Evans have suggested that “the nature of the dialogue tends to reinforce the value of fairly formal standards which can be readily articulated and can form a fixed point in a process that may span several years”: see Morgan and Evans (1999), p18.

<sup>64</sup> Article 11(1) and (2), ECPT. On the principle of confidentiality as it applies *inter alia* to the reporting procedure, see below, p 19 *et seq.*

<sup>65</sup> As at 18<sup>th</sup> August 2000, the publication of 65 of the 98 visit reports so far drawn up had been authorised: see 10<sup>th</sup> GR, para 11. Even the most recalcitrant Party, Turkey, has authorised the publication of the report on the CPT’s 1997 periodic visit (although seven other Turkish reports, dating back to 1990, remain unpublished).

Convention requirement of confidentiality,<sup>66</sup> made public.<sup>67</sup> General Reports should contain, *inter alia*, “information on the organisation and internal workings of the Committee and on its activities proper, with particular mention of the States visited”.<sup>68</sup> In the context of this thesis, the CPT’s annual reporting responsibilities are of great significance, for, as we shall see, they provide much of the foundation for the Committee’s standard-setting work. It has used them as the medium through which to set down a number of precepts on various aspects and categories of detention with a view to stimulating discussion as well as to giving some indication, in advance of visits, of its views on certain matters.<sup>69</sup>

## *Conclusion*

It is hoped that the foregoing analysis offers sufficient insight into the mandate and working methods of the CPT and the legal framework within which it operates to enable the reader to place its standard-setting work in some kind of institutional context. It is not intended to be an exhaustive account of the CPT as an organ of inspection. Rather, it is an attempt to adumbrate the most salient features of its work, before we consider the formulation and evolution of its standards. Two features of the ECPT system are deserving of particular examination, however, for they strongly shape and inform the nature of the Committee’s work. They are the principles that underlie its visit and reporting responsibilities and it is these to which we now turn.

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<sup>66</sup> As provided for in Article 11, ECPT.

<sup>67</sup> Article 12, ECPT.

<sup>68</sup> See Explanatory Report, para 79.

<sup>69</sup> See further below, p 50.

## Principles which Underpin the Work of the CPT

### *Introduction*

Because of the intrusive nature of its work and the sensibilities of States parties in the formulation and implementation of policy on detention (regardless of type), the CPT must adopt a *modus operandi* which is at once effective, permitting it to operate in accordance with its preventive mandate without undue hindrance or obstruction, and sensitive to the difficulties of States, *inter alia*, in tackling crime, punishing offenders, protecting society at large, safeguarding the welfare of vulnerable and disturbed individuals and operating an effective and humane immigration policy. Consequently, the Committee has developed a working method constructed on the twin pillars of confidentiality and co-operation. Respect for these two principles, both on the part of the CPT and its interlocutors, it follows, facilitates efforts to strengthen the protection of detainees against ill-treatment without the Committee's being or appearing to be didactic and abrasive. It is proposed to examine each principle in turn before considering in detail the CPT's standard-setting work.

### *The principle of confidentiality*

#### *The Convention text*

All aspects of the CPT's work, whether concerned with the preparation for and conduct of visits, the formulation of visit reports or the subsequent and on-going dialogue with States parties, are subject to a strict regime of confidentiality. Adherence to this regime, it is clear, is crucial to the proper functioning of the Committee and to State party confidence therein. Accordingly, the CPT has

characterised the principle of confidentiality as “one of the cornerstones of its conduct of business”.<sup>1</sup> The principle itself finds expression, *inter alia*, in Article 11, ECPT, which provides that:

“1. The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential.”<sup>2</sup>

“2. The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party.”<sup>3</sup>

“3. However, no personal data shall be published without the express consent of the person concerned.”<sup>4</sup>

### ***What information is confidential?***

The Explanatory Report to the ECPT develops each of the Article 11 provisions. Article 11(1), ECPT, the Report states, “establishes the principle of the confidential nature of the Committee’s activities”. Its reference to “information gathered by the Committee”, it suggests, is a reference, *inter alia*, to:

“... facts it has itself observed, information which it has obtained from external sources and information which it has itself collected.”<sup>5</sup>

In addition, the Rules of Procedure provide that confidentiality shall extend to “all Committee meeting reports and working documents”.<sup>6</sup> Clearly, therefore, all observations made and information received and collected and all meetings and consultations held and all minutes of meetings and consultations made, by the CPT in the course of its work are considered subject to the principle of strict confidentiality. Further, the Committee respects the principle of legal professional privilege in the

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<sup>1</sup> See 1<sup>st</sup> GR, para 78.

<sup>2</sup> See, similarly, Rule 45.1 of the CPT’s Rules of Procedure.

<sup>3</sup> See also Rule 42.1 of the CPT’s Rules of Procedure.

<sup>4</sup> See also Rule 45.2 of the CPT’s Rules of Procedure.

<sup>5</sup> See Explanatory Report, para 76.

<sup>6</sup> See Rule 45.1 of the CPT’s Rules of Procedure.

performance of its Convention responsibilities, for example, acceding to the requests of national authorities to omit from published visit reports passages relating to professional legal advice given to those authorities in connection with certain matters raised by visiting delegations.<sup>7</sup>

***Authorising publication of the visit report: a duty to publish the entire report***

To Article 11(2), ECPT, the Explanatory Report adds the following rider:

“[i]f the State concerned itself makes the report public, it should do so *in its entirety*”.<sup>8</sup>

The Committee’s Rules of Procedure develop this point further, stipulating that:

“...[i]f the Party itself makes the report public, but does not do so in its entirety, the Committee may decide to publish the whole report...

...Similarly, the Committee may decide to publish the whole report if the Party concerned makes a public statement summarising the report or commenting upon its contents”.<sup>9</sup>

***The publication of personal data: a qualified prohibition***

Paragraph 78 of the Explanatory Report qualifies the Article 11(3) prohibition against the publication of personal data without the express consent of the person concerned.

It provides that the prohibition:

“...might not exclude the publication of such data if the identity of the person concerned is not revealed or could not be discovered from the context”.

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<sup>7</sup> See, e.g., UK IV, paras 40, 42, 44 and 45 (relating to legal advice given by the Metropolitan Police Solicitors Department to senior officers from the Metropolitan Police Force and the Director of the Complaints and Investigation Branch of the Metropolitan Police in connection with a number of civil actions brought by persons alleging ill-treatment at the hands of officers employed by the Force).

<sup>8</sup> See Explanatory Report, para 77 (emphasis added).

<sup>9</sup> See Rule 42.2 and 42.3 of the CPT’s Rules of Procedure.

This qualification would, seemingly, facilitate the making of references in visit reports to specific individual cases, while safeguarding the identity of the person concerned.<sup>10</sup>

### *A continuing duty*

The confidential character of the CPT's work is further circumscribed – and, indeed, strengthened – by Article 13, ECPT, which provides that:

“The members of the Committee, experts and other persons assisting the Committee are required, during and after their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions”.

Rule 46.1 of the CPT's Rules of Procedure merely replicates the terms of Article 13, while paragraph 80 of the Explanatory Report emphasises its key points, stating that:

“[i]n accordance with [Article 13], members of the Committee, experts and other persons assisting the Committee are required to observe confidentiality, even after their term of office has come to an end. It relates to all facts or information which may have come to the notice of the Committee members or such other persons during the discharge of their functions when visits are being effected, or at any other moment”.

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<sup>10</sup> In only one instance, to date, has a detainee expressly consented to the publication of personal data from which his identification could be ascertained. It concerned a person interviewed by the CPT in Spain in the course of an *ad hoc* visit in 1997. His alleged ill-treatment at the hands of police officers formed the basis of an entire report. He consented to the revelation of his identification, both when the report was transmitted to the Spanish authorities and in the event of its publication: see Spain VI, p 8, n 1. The Convention prohibition against the publication of personal data – or at least the passing on of such data to other interested bodies – has been criticised in some parts because, it is argued, it may serve to mask ill-treatment: see Evans and Morgan (1998), p 374.

### *Sanctions against errant members of the CPT*

Following a number of leaks of “purportedly...confidential material” to the media during its early working life, as well as the latter’s misrepresentation of “matters that should have remained confidential”, the Committee determined, in 1990, *inter alia*, to “reinforce its practices and procedural rules on the subject of confidentiality”.<sup>11</sup> Accordingly, it formulated two new Rules of Procedure, Rules 47 and 48.<sup>12</sup> Rule 47 provides that:

“[i]f there are serious grounds for believing that a Committee member has violated the obligation of confidentiality, the Committee may, after the member concerned has had an opportunity to state his views, decide by a majority of two-thirds of its members to inform the Committee of Ministers of the matter”.

However, in its 1<sup>st</sup> General Report, the CPT adumbrated a more measured, two-stage reference procedure, which provides that:

“...if there are serious grounds for believing that a Committee member has violated the rule of confidentiality, the Committee may, after the member concerned has had an opportunity to state his views, decide by a majority of two-thirds of its members to issue an admonition to that member; in case of a new breach of confidentiality by the same Committee member, the CPT may inform the Committee of Ministers of the matter, under Rule 47 of its Rules of Procedure ...”<sup>13</sup>

In the absence of any indication from the CPT as to which of these two approaches is

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<sup>11</sup> See 1<sup>st</sup> GR, paras 79-80. On the Committee’s relationship with the media generally, see below, p 27-31.

<sup>12</sup> Both new Rules were formally introduced on 9<sup>th</sup> November 1990.

<sup>13</sup> See 1<sup>st</sup> GR, para 82, sub-para (iii).



to be preferred, it would be sensible to consider the more flexible and elaborate one suggested in its 1<sup>st</sup> General Report as most accurately representing its thinking on the subject. However, the Committee's elaboration of this embryonic internal disciplinary procedure has not ended there. To the process just highlighted, it has added, peremptorily, that:

“...if a Committee member to whom an admonition has been addressed is a member of the Bureau, he shall resign from his position as President or Vice-President”.<sup>14</sup>

It should be noted that this provision is not reflected in Rule 47 of the CPT's Rules of Procedure.

*A duty which binds members of the Secretariat, experts and interpreters*

Rule 46.2 of the CPT's Rules of Procedure stipulates that:

“A provision [replicating Article 13, ECPT and Rule 46.1 of the Rules of Procedure] shall be inserted in the contracts of experts and interpreters recruited to assist the Committee”.

In addition, the new Rule 48 provides that:

“1. If there are serious grounds for believing that a member of the Committee's Secretariat or an interpreter has violated the obligation of confidentiality, the Committee may, after the person concerned has had an opportunity to state his views, decide by a majority of its members to inform the Secretary General of the Council of Europe of the matter and request that appropriate measures be taken.

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<sup>14</sup> Ibid.

2. If there are serious grounds for believing that an expert has violated the obligation of confidentiality, the Committee shall, after the person concerned has had an opportunity to state his views, decide by a majority of its members on the measures to be taken".<sup>15</sup>

***Confidentiality in the conduct of relations with other organisations working in the same field***

Insofar as the CPT enjoys relations with agencies like the European Commission and Court of Human Rights, the International Committee of the Red Cross, the UN Committee against Torture, the UN Special Rapporteur on questions relevant to torture and the UN High Commissioner for Refugees, as well as any number of non-governmental organisations,<sup>16</sup> it is, it has insisted, "of course, bound by its obligation of confidentiality". Accordingly:

"...it cannot disclose [to such organisations] anything about its findings or its deliberations (though it can of course provide information on its working methods in general)".<sup>17</sup>

As a result, it maintains, "the flow of information between [it] and the bodies concerned is very much a one-way process".<sup>18</sup>

***States parties and the duty of confidentiality***

The Committee has been at pains to point out that the principle of confidentiality, as it applies to its own work and relations, should apply equally to States parties. For instance, in its 1<sup>st</sup> General Report, regarding "allegations in the media that the national

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<sup>15</sup> See also 1<sup>st</sup> GR, para 82, sub-para (iv).

<sup>16</sup> On such relations generally, see 1<sup>st</sup> GR, paras 42-44.

<sup>17</sup> *Idem*, para 43.

<sup>18</sup> *Ibid.* However, *cf* below, p 487. The CPT's adherence to the principle of confidentiality, particularly as it applies in its relations with NGOs, has been criticised by both NGOs and some commentators: see, e.g., Evans and Morgan (1998), pp 359-62 and 375-9.

authorities of a State party ha[d] disclosed confidential material”, it declared that “the Bureau should immediately draw the attention of those authorities to such allegations and *insist that the rule of confidentiality also applies to States*”.<sup>19</sup>

### ***Confidentiality in the preparation of annual General Reports***

By virtue of Article 12, ECPT, the CPT’s obligation to produce an annual report on its activities is, like other areas of its work, “[s]ubject to the rules of confidentiality in Article 11”. This constraint is given further emphasis in the accompanying Explanatory Report, which provides that “[w]hen preparing its report, the Committee must naturally comply with the provisions of Article 11 concerning the confidential character of certain types of information and data”.<sup>20</sup> Further, as might be expected, reference is made to the duty in the CPT’s Rules of Procedure.<sup>21</sup>

### ***Confidentiality and the issuing of public statements***

We have already touched on the public statement procedure in the context of the sanctions available to the CPT in the event of a failure to co-operate on the part of States parties.<sup>22</sup> However, what has not so far been examined in any detail is the extent to which the rule of confidentiality affects the contents of such statements and the manner in which they are issued. In this regard, the Committee’s Rules of Procedure make it clear that:

“Subject to the provisions of Rule 45, paragraph 2,<sup>23</sup> the Committee shall be released from the obligation of confidentiality when making a public statement”.<sup>24</sup>

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<sup>19</sup> *Idem*, para 82, sub-para (v) (emphasis added).

<sup>20</sup> See Explanatory Report, para 79.

<sup>21</sup> At Rule 49.1.

<sup>22</sup> See above, p 6.

<sup>23</sup> Rule 45.2 concerns the confidentiality of personal data: see further above, p 20, n 4.

<sup>24</sup> See Rule 44.3 of the CPT’s Rules of Procedure.

Clearly, the CPT's latitude in this area is considerable, a fact given emphasis by the Explanatory Report to the ECPT, which provides that "[t]he Committee will have a wide discretion in deciding what information to make public..."<sup>25</sup> However, it adds the – not unexpected - caveat that in exercising such discretion:

"...[it] will have to take due account of the need to secure that information passed over in confidence is not revealed. It should also take into consideration the desirability of not revealing information in connection with pending investigations".<sup>26</sup>

### *The CPT and the media*

In its 1<sup>st</sup> General Report, the CPT considered *in extenso* the potentially contentious subject of its relationship with the media.<sup>27</sup> Conveniently, it sought to explain the progressive shift in its attitude towards the role of the media in its work which took place early in its working life. At its inception, it admitted, it "refrain[ed] from having any contact whatsoever with the media, in order to ensure respect for the basic obligation of confidentiality".<sup>28</sup> Over time, however, it grew to realise that it had "underestimated the interest of the media as well as of non-governmental organisations and individuals in being fully informed about the CPT's activities".<sup>29</sup> Unfortunately, this interest did not always manifest itself in accurate reporting of the Committee's work, with the result that within the first year of its operation, it was forced to reassess its approach to relations with the media. "[A] few months after [it] became operational", it reflected, "some newspapers began carrying articles purportedly disclosing confidential material". Indeed, "on occasion", it seems, they

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<sup>25</sup> See Explanatory Report, para 75.

<sup>26</sup> Ibid.

<sup>27</sup> See generally 1<sup>st</sup> GR, paras 78-84.

<sup>28</sup> Idem, para 78.

<sup>29</sup> Idem, para 79.

set out – “sometimes in a distorted way” – matters “that should have remained confidential”. On one such occasion, following a CPT visit, a newspaper had “clearly pieced together information received from persons and organisations with which the visiting delegation had been in contact and [had] purported to disclose the delegation’s findings”. On another, a newspaper had “published erroneous statements about what the delegation was supposed to have seen in a particular prison”. Further, on more than one occasion, it is clear, newspapers had “alleged that the national authorities of a particular country had publicised confidential statements made within the CPT”.<sup>30</sup> “Highly concerned by this trend”, the CPT resolved to systematise its relations with the media. Accordingly, it adopted:

“a three-pronged policy: to officially channel to the media all information not covered by the rule of confidentiality; to reinforce its practices and procedural rules on the subject of confidentiality; [and] to react immediately to statements in the media distorting the CPT’s activities”.<sup>31</sup>

It is worth examining each feature of this policy in turn.

- *Furnishing the media with all non-confidential information*

The Committee determined in late 1990, that if it is to reduce the risk of media misrepresentation of its work, it should actively furnish media organisations with all material not covered by the rule of confidentiality. This approach, it resolved, would manifest itself, essentially, in two ways:

“i) a press release [would] be issued at the end of each visit – be it periodic or ad hoc – indicating the name of the country visited, the dates of the visit, the composition of the delegation and the places visited;

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<sup>30</sup> Ibid.

<sup>31</sup> Idem, para 80.

ii) the CPT's Bureau [would] maintain appropriate informal contacts with representatives of the media on a regular basis, while strictly respecting the rule of confidentiality".<sup>32</sup>

As to point (ii), unfortunately, the Committee has, to date, offered no indication as to what it means by the terms "appropriate" and "regular" when describing the contact to be made by the Bureau with media organisations. It is very likely, however, that a *modus vivendi* has emerged as a result of its experiences in the field.

- *Reinforcing practice and procedure under the rule of confidentiality*

The second strand of the CPT's revised policy on media relations is, unlike the first, *negative* in its circumscription of members' activities. Under it, the Committee identifies that conduct which is to be *avoided* in encounters with the media. Moreover, as we have seen, it lays down the consequences of breaching the principle of confidentiality.<sup>33</sup> The revised approach commences with the broad principle that "visiting delegations should avoid contact with the media during the course of a visit..."<sup>34</sup> Beyond this self-imposed silence of the visit, the media's access to members is circumscribed in the following way:

"...individual Committee members may give interviews to representatives of the media, but a) the interviews should not disclose any confidential information, b) they should be given on an 'on the record', attributable basis, and c) a copy of each interview should be forwarded to the CPT's Secretariat..."<sup>35</sup>

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<sup>32</sup> *Idem*, para 81.

<sup>33</sup> See above, pp 23-4.

<sup>34</sup> See 1<sup>st</sup> GR, para 82, sub-para (i).

<sup>35</sup> *Ibid*, at sub-para (ii).

- *CPT reaction to media distortions of its activities*

Regarding the third head of the Committee's revised media relations policy, it resolved, simply and logically, that when confronted with inaccurate or misleading representations of its activities "the Bureau should immediately issue a correction..."<sup>36</sup>

*The Committee's hopes for its revised media relations policy*

It is important for an organ like the CPT, which is, designedly, a facilitator of change, not to deny the constructive role capable of being played by the media in achieving its objectives. Media organisations represent indispensable vehicles for galvanising public and political opinion. Accordingly, rigid adherence to the rule of confidentiality, commendable though that may be, may prove counter-productive.<sup>37</sup> At the same time, however, it must take cognisance of the fact that all States, particularly in the criminal justice arena, are especially sensitive and susceptible to expressions of public whim. Consequently, to be perceived as exploiting or being careless in conducting relations with the media, may be regarded with little indulgence by States parties. Such conduct may be construed as an abuse of the trust placed in the Committee when Parties accede to its intrusive inspection regime. The Committee, it is safe to assume, was aware of the need to balance these two potentially antithetical interests when conceiving its revised policy on media relations. Indeed, it was presumably in this spirit that, having laid down this policy, it expressed:

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<sup>36</sup> *Idem*, para 83.

<sup>37</sup> Evans and Morgan are of the opinion that in its development of the principle of confidentiality generally, the CPT "should be seeking to restrict the principle...to the narrowest of bounds, whilst remaining faithful to the letter of the Convention text": see Evans and Morgan (1998), p 380.

“[a] trust...that the media will gradually become aware that they should respect the restraints under which the CPT operates in its efforts to engage in a fruitful dialogue with sovereign States”.<sup>38</sup>

At the same time, however, cognisant of the expediency of maintaining good relations with the media in the development of its work, it suggested that:

“...although [it] cannot put the bulk of its work in the public domain, it will strive to make public as much information about its activities as is compatible with the obligation of confidentiality”.<sup>39</sup>

As a result of such scrupulous efforts at balance, the CPT has described itself as “confident that its new policy in the area of relations with the media will prove helpful”.<sup>40</sup>

### ***The principle of co-operation***

Like that of confidentiality, the principle of co-operation accompanies and informs much of the work done by the CPT. It finds expression in a number of Convention provisions<sup>41</sup> and its published work contains many references to the reciprocal obligation of assistance binding on the Committee and States parties in the fulfilment of the Convention’s objectives (relating in particular to the manner in which visiting delegations are received by the authorities, both in a general sense and at individual establishments, and the assistance afforded them in the course of visits). The fundamental duty to co-operate finds expression in Article 3, ECPT, which provides, simply, that:

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<sup>38</sup> See 1<sup>st</sup> GR, para 84.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Namely Articles 3, 8, 9, 10, 16 (plus the related Annex to the Convention) and 17(1).



“[i]n the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other”.

The Explanatory Report reiterates the Article 3 duty, referring expressly to a mutual “oblig[ation]” and “spirit” of co-operation in the application of the Convention.<sup>42</sup> Thus, the Report maintains, “[i]n order to indicate the spirit of the relationship between the Committee and the Parties, Article 3 contains a general provision on co-operation”.<sup>43</sup> Given the absence of any judicial or quasi-judicial powers available to it, in order effectively to function and to bring about improvements in the treatment of detainees, the CPT, it is clear, is reliant to a great extent on States parties’ upholding this principle, which, the Explanatory Report asserts, “applies to all stages of the Committee’s activities”; for, as well as Article 3, ECPT, “[i]t is of direct relevance to several other provisions of the Convention, such as Articles 2, 8, 9 and 10”.<sup>44</sup>

#### *Co-operation in the course of a visit*<sup>45</sup>

The Convention’s much heralded principle of co-operation arguably manifests itself most clearly in the modalities of the visit process.

##### - *The obligations of the Committee*

Article 8(1), ECPT provides that the Committee shall “notify the Government of the Party concerned of its intention to carry out a visit”.<sup>46</sup> This duty of advance notice, as we have seen, would appear to mark the extent of the Committee’s obligations in this regard. For, thereafter, it may “at any time” visit any place of detention in the Party

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<sup>42</sup> See Explanatory Report, para 20.

<sup>43</sup> *Idem*, para 33.

<sup>44</sup> *Idem*, para 34.

<sup>45</sup> On the visit procedure generally, see above, p 10 *et seq.*

<sup>46</sup> Such notice ought to be received by an authority competent to handle such affairs, the existence of which should be communicated to the CPT in advance: Article 15, ECPT.

addressed.<sup>47</sup> There is, therefore, no specified time-frame for the conduct of a visit; it has been left to the Committee to determine just when to carry out a visit of which notice has been given. Paragraph 56 of the Explanatory Report refers to a process which, “as a general rule”, gives the Party concerned a “reasonable time” in which to take the steps necessary to facilitate the most effective visit possible, while stipulating that “the Committee should carry out the visit within a reasonable time after the notification”.<sup>48</sup>

With its creation of a duty to provide advance notice of a visit, the Convention clearly establishes the principle that there shall be nothing arbitrary and didactic about the Committee’s relationship with States parties. Its duty to observe what is, after all, a common courtesy, lends to the relationship an element of equality. Further, it makes Parties’ reciprocal duty of co-operation appear less onerous. Paragraphs 57, 58 and 59 of the Explanatory Report further elaborate the basic Article 8(1) duty. Emphasising the “spirit of co-operation” which is to inform all communication between the Committee and the State party visited, the Report provides that where the advance notice fails to state the date and place of the Committee’s arrival, it is “expected” that they will be provided “subsequently, before the visit takes place”.<sup>49</sup> As for the content of such advance notice, the Report suggests that in addition to announcing the visit, it should state the names of the Committee members and identify the experts, interpreters and other staff taking part in the visit, as well as the institutions which the delegation intends to visit.<sup>50</sup> However, announcing in advance the names of places to be visited does not “preclude” further announcements “in the

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<sup>47</sup> Paragraph 55 of the Explanatory Report reiterates the Article 8 arrangements.

<sup>48</sup> On the notification procedure adopted, see above, p 14.

<sup>49</sup> See Explanatory Report, para 57.

<sup>50</sup> *Idem*, para 58.

course of [a] visit”.<sup>51</sup> To deny the Committee this right would be to inhibit the seminal role conferred on it by Article 2 of the Convention.

- *The reciprocal obligations of States parties*

Article 8(2), ECPT sets out the “facilities” with which States parties shall furnish the Committee in order to enable it to carry out its mandate effectively. They comprise:

- “a. access to [a State party’s] territory and the right to travel without restriction;
- “b. full information on the places where persons deprived of their liberty are being held;
- “c. unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;
- “d. other information available to the Party which is necessary for the Committee to carry out its task. [However,] in seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics”.

The accompanying Explanatory Report emphasises that “in view of the particular nature of the visits which the Committee is required to make”, Article 8, paragraph 2 applies “equally before, during and after” visits.<sup>52</sup> Further, the list of facilities with which the Committee shall be furnished by the visited Party is “exhaustive”<sup>53</sup> - although the Report adds, justifiably, that “other necessary assistance” should be afforded where appropriate.

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<sup>51</sup> Ibid.

<sup>52</sup> Idem, para 60.

<sup>53</sup> Ibid.

It is understood that the Article 8(2) sub-paragraph (a) reference to the CPT's unrestricted rights of access and travel relates to the issue of immigration.<sup>54</sup> Thus, it must be read "in conjunction with" Articles 2,<sup>55</sup> 14(3)<sup>56</sup> and 16.<sup>57</sup> Accordingly, insofar as the provisions of Article 14(3) do not apply, "conditions prescribed by Parties with respect to immigration (eg visas) may not be invoked against members of the visiting team..."<sup>58</sup>

The reference to "full information" on places of detention at Article 8(2), sub-paragraph (b) has been interpreted as requiring that each State party:

"...supply the Committee on request with a list of the places under its jurisdiction where persons deprived of their liberty are being held, stating the nature of the establishment (prison, police station, hospital etc)...It is envisaged that the Committee will eventually request a comprehensive list of places within a particular area which it intends to visit within the jurisdiction of the State..."<sup>59</sup>

States parties are not obliged to furnish the CPT with a list of all detainees within their jurisdiction.<sup>60</sup> Rather, if the Committee requires information about a specific detainee, "including his or her place of detention", it may ask for it under the 'catch-all' provisions of Article 8(2), sub-paragraph (d).<sup>61</sup>

Sub-paragraph (c) of Article 8(2) is an understandable adjunct to the sub-paragraph (a) right of unrestricted access and travel. It serves to reinforce the

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<sup>54</sup> *Idem*, para 61.

<sup>55</sup> Concerning the Committee's general right of access to "any place... where persons are deprived of their liberty by a public authority".

<sup>56</sup> Concerning the right of States parties "exceptionally" to preclude an expert or other person assisting the Committee from taking part in a visit.

<sup>57</sup> Concerning the privileges and immunities enjoyed by the Committee, its members and experts assisting it.

<sup>58</sup> See Explanatory Report, para 61.

<sup>59</sup> *Idem*, para 62.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*. See further below, p 36.

Committee's freedom of movement, "particularly inside places referred to in Article 2".<sup>62</sup> However, the freedom to move from institution to institution and within institutions in a State party is one thing; to do so without being monitored is quite another. And, it is in this regard that States parties have chipped away at the Committee's powers. For, the right of "unlimited access" to places of detention enshrined in sub-paragraph (c) must be understood in the context of the Convention as a whole. This means that insofar as the Committee enjoys a freedom of movement, it can only be exercised in accordance with Articles 9<sup>63</sup> and 15,<sup>64</sup> ECPT.<sup>65</sup> Thus, visiting delegations must be prepared for the accompaniment of a State official during visits, ostensibly to provide them with assistance (a reference to the Article 15 "liaison officer"). Further, a Party may require a delegation to be accompanied by a "senior officer in places which are secret for reasons of national defence or which enjoy special protection for reasons of national security"<sup>66</sup> (a reference, presumably, to some of the Article 9 'claw-back' provisions). However, notwithstanding such constraints, by virtue of Article 8(3), ECPT, it remains the case that when the Committee interviews persons deprived of their liberty, it may do so "in private". This means, in practice, that "an accompanying person must not be present at [such] interviews" if this is the wish of the Committee.<sup>67</sup>

Sub-paragraph (d) of Article 8(2) is an instructive example of the extent to which the Committee and States parties are expected to co-operate in facilitating the Committee's task (as well as in respecting each other's often difficult positions). The

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<sup>62</sup> *Idem*, para 63.

<sup>63</sup> See generally above, p 15.

<sup>64</sup> Article 15, ECPT provides that "[e]ach Party shall inform the Committee of the name and address of the authority competent to receive notifications to its Government, and of any liaison officer it may appoint".

<sup>65</sup> Explanatory Report, para 63.

<sup>66</sup> *Ibid.*

<sup>67</sup> See Explanatory Report, para 63.

first sentence reference to a State party's duty to provide "other information... which is necessary for the Committee to carry out its task"<sup>68</sup> is, for all practical purposes, a requirement to provide all such information which is not expressly dealt with in the preceding sub-paragraphs and elsewhere in the Convention. It is, in other words, a mopping up provision and may be considered, accordingly, "of great importance to the Committee".<sup>69</sup> However, equally significant is the second sentence of sub-paragraph (d), which reads:

"[i]n seeking [other information available to the Party necessary for the Committee to carry out its task], the Committee shall have regard to applicable rules of national law and professional ethics".

This is the CPT's reciprocal obligation in this area. It is a clear expression of respect for the internal laws and practices of States parties on the disclosure of information, "in particular, rules regarding data protection and... medical secrecy..."<sup>70</sup> Moreover, as if to emphasise the duties of both the Committee and States parties in this regard, the Explanatory Report concludes, grandiloquently, that:

"[i]t is envisaged that possible difficulties in this field will be resolved in the spirit of mutual understanding and co-operation upon which the Convention is founded".<sup>71</sup>

Lastly, the form - as opposed to the substance - of the information requested, the Explanatory Report stipulates, should be left to States parties: "it is for the Parties to decide the form (eg originals or copies of documents) in which the information requested by the Committee shall be communicated".<sup>72</sup>

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<sup>68</sup> See also *idem*, para 64.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Idem*, paragraph 65.

## ***Conclusion***

The two overarching principles of confidentiality and co-operation have clearly seeped into every corner of the CPT's work. The former, in particular, is a jealously guarded precept and the consistency with which it is upheld by Committee members, accompanying experts and members of the Secretariat alike is a source of much pride. As we have seen, however, the rigour with which it is adhered to has invited criticism from a number of commentators and, perhaps more significantly, the Committee's NGO interlocutors. There is a danger, therefore, that in seeking to maintain such high standards of integrity, the CPT may stifle its effectiveness as an instrument of change. It risks isolating itself from that network of institutions, organisations and individuals whose contribution to its work may do much to advance the protection of detainees against ill-treatment in Europe. It must be recalled, however, that the Committee is possessed of a unique and intrusive mandate. Further, its members and Secretariat are undoubtedly acutely aware of their privileged position in international law and the responsibilities entailed thereby. Their caution in developing the scope and manner of the CPT's work is, therefore, understandable. In the years ahead, it will be most interesting to see how the CPT seeks to alter the regime of confidentiality which currently embraces its work, particularly if its undoubted effectiveness as an organ of inspection begins to falter.

## The CPT's Standard-Setting Initiative

### *Introduction*

No organ of inspection or examination can expect to operate properly without a certain circumscription of its remit. In the interests of expedition and consistency, it must work in accordance with determined - though not inflexible - guidelines or rules of operation. The CPT is no exception; in pursuing its inspectoral mandate, it is, it has stated:

"...feeling its way towards developing its own 'measuring rods', in the light of the experience of its members and of a careful and well-balanced comparison of various systems of detention".<sup>1</sup>

As a consequence of this approach, the Committee, it is fair to say, has augmented that "array" of standards on detention which already exist in the international arena and of which it makes use in carrying out its work.<sup>2</sup> Endeavouring to build on the guidance offered by these various standards, and, unlike the European Commission and Court of Human Rights, not obliged to apply and interpret substantive treaty provisions,<sup>3</sup> the CPT, early in its working life, sought to gauge:

"...the feasibility of...the gradual building up of a set of general criteria for the treatment of persons deprived of their liberty".<sup>4</sup>

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<sup>1</sup> See 1<sup>st</sup> GR, para 95.

<sup>2</sup> Ibid. See also paras 5 and 6 (ii) of the Report, as well as Explanatory Report, paras 22, 26 and 27.

<sup>3</sup> Idem, para 6 (ii).

<sup>4</sup> Idem, para 96.



Almost a decade later, this tentative suggestion, it may be safely conjectured, is steadily being realised. In subsequent General Reports, the CPT has adumbrated a number of "general standards" pertaining to various aspects of custody in police establishments, prisons, immigration detention centres, mental health institutions and juvenile detention centres. In addition, each published visit report, in highlighting delegation findings in the Party concerned, may be seen to apply and expound the established criteria.

### ***Publication and prescription***

It seems also that this gradual compilation of criteria against which to measure situations encountered during visits is not intended merely for the use of the Committee and the States parties addressed. With a view to influencing penal policy in States parties throughout Convention territory, the CPT has announced boldly that it might:

"...at some future date decide to make [its standards] public, so as to offer national authorities some general guidelines in relation to the treatment of persons deprived of their liberty".<sup>5</sup>

Significantly, in elaborating such guidelines in its General Reports, the CPT actually *guarantees* their publication. For, by virtue of Article 12, ECPT, the Committee is duty-bound to publish its general reports annually.<sup>6</sup> It remains to be seen, however, whether the Committee will, in addition, publish a separate document, codifying its myriad standards on detention.<sup>7</sup>

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<sup>5</sup> Ibid.

<sup>6</sup> See also in this connection Rule 49 of the CPT's Rules of Procedure.

<sup>7</sup> The Geneva-based NGO, the Association for the Prevention of Torture, has, to a certain extent, undertaken this task itself with the publication of a number of brochures on standards elaborated by the CPT.

The Committee's description of its standards as "guidelines" is not without significance. It is, it will be recalled, neither a judicial nor quasi-judicial organ; it cannot issue normative pronouncements. Accordingly, its developing *corpus* of standards enjoys no binding authority. Cognisant of this limitation on its powers, the CPT, from its inception, has sought to anticipate concerns about the boldness of its standard-setting work, insisting that were it to publish its "general criteria" for the benefit of States parties, "[i]t goes without saying that...it would in no way be trying to play a legislative role, for which it was not created". Accordingly, in setting standards, it is seeking to offer Parties nothing more peremptory than:

"...some non-binding guidelines that might be of assistance in the context of the improvement of the treatment and conditions of detention of persons deprived of their liberty".<sup>8</sup>

In this way, the CPT hopes to give national authorities "a clear advance indication" of its views on matters falling within its sphere of interest "and, more generally, to stimulate discussion".<sup>9</sup>

### ***Justifying the creation of a corpus of standards***

Notwithstanding the prescriptive limitations just outlined, the Committee, it is submitted, has nothing to fear in formulating and promulgating a set of standards that may ultimately be of use in the development of criminal justice and penal policy in all States parties to the Convention. For, not only does the investigative nature of its

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<sup>8</sup> 1<sup>st</sup> GR, para 96. Given the Committee's disavowal of anything more normative than "guidelines", it is a little surprising to read in the final paragraph of *every* published visit report that in their responses to visit reports, States parties are expected to provide *inter alia* "details of how it is intended to implement the CPT's recommendations and, as the case may be...an account of action already taken". For an organ which professes to offer nothing more peremptory than non-binding recommendations, these are rather exacting expectations, it is submitted.

<sup>9</sup> See 7<sup>th</sup> GR, para 24.

work lend itself to the use and dissemination of such formulae, but the Committee's need to treat States parties in an equitable, non-discriminatory way (or risk losing credibility) positively demands the creation of objective – though, as we shall see, not immutable - methods of measurement. They represent a logical and unavoidable consequence of its preventive mandate.

### ***The genesis of the CPT's standard-setting work***

Crucial to the effective execution of its fact-finding and reporting responsibilities, the CPT has insisted, is its power to issue recommendations. Such recommendations, it maintains, are:

"...designed to prevent the possible occurrence of treatment that is contrary to what reasonably could be considered as acceptable standards for dealing with persons deprived of their liberty".<sup>10</sup>

Issued in 1991, this statement introduced the notion of "standards" into the Committee's public discourse. Such "standards", it is clear, lend substance and meaning both to the CPT's methods of assessing custodial situations and to the recommendations arrived at through such assessment. Evidently, the nature of the CPT's mandate determines the tools with which it works. Because it operates in the field by way of periodic and *ad hoc* visits (unlike, for example, the European Commission and Court of Human Rights, which intervene only upon being petitioned by individual or State applicants<sup>11</sup>), it works, to all intents and purposes, with a *tabula rasa*; it requires no particular reason to visit a Party - though, axiomatically, it apprises itself fully of the general state of affairs obtaining therein in advance.

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<sup>10</sup> See 1<sup>st</sup> GR, para 4.

<sup>11</sup> *Idem*, para 6 (iv).

Accordingly, the discerning use of objective "measuring rods" may be regarded as crucial to its effective operation. In order properly to assess situations likely to be encountered in the course of visits and, of course, to fulfill its preventive mandate, the possibility of invoking a broad range of pre-determined precepts is useful. Unlike the European Commission and Court of Human Rights, the CPT is unable to develop such precepts, as needed, on a case-by-case basis, arriving at judgments based on a particular set of facts. Rather, it must visit each place of detention equipped with a consistent set of measuring criteria. This set must be comprehensive; it must possess no *lacunae*, otherwise, its practical value and, with it, the Committee's credibility, may be fatally undermined.

### ***The substance of CPT standards***

The first suggestion of the existence and content of a *corpus* of standards appeared in the CPT's 1<sup>st</sup> General Report. Therein, adumbrating its working methods and seeking to emphasise the broad reach of its interests and concerns, it stressed that:

“... the CPT must always look into the general conditions of detention existing in the countries visited... it must examine not only whether abuses are actually occurring but also be attentive to those ‘indicators’ or ‘early signs’ pointing to possible future abuses”.<sup>12</sup>

It is in the fulfillment of this pre-emptive role that the Committee has sought to develop and deploy a detailed body of examining criteria. In this regard, in that first annual report, regarding the focus of its attention in the course of visits, it reduced the rather imprecise notion "general conditions of detention" to the following tripartite formula:

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<sup>12</sup> See 1<sup>st</sup> GR, para 48. See, in the same connection, 2<sup>nd</sup> GR, para 35.

(i) the *physical environment* in which detainees are obliged to live (comprising, *inter alia*, the space available to detainees; arrangements for the lighting and ventilation of cells and communal areas; washing and toilet facilities; and eating and sleeping arrangements);

(ii) the *social* needs of and pressures on detainees (regarded by the Committee as comprising, *inter alia*, relationships with other detainees and law-enforcement personnel; links with families, social workers and the outside world in general; and the medical care provided by the authorities); and

(iii) the extent to which certain *basic safeguards* against ill-treatment exist in Parties visited (including, in respect of detention by the police, the right to have someone notified of the fact of one's detention; the right of access to a lawyer; the right to a medical examination; and the possibility of lodging a complaint about ill-treatment or conditions of detention).<sup>13</sup>

Taking up this theme in its 2<sup>nd</sup> General Report, the CPT defined more broadly the "wide range of issues" which it must "explore" in the fulfillment of its preventive mandate. Matters of particular concern in the conduct of visits, it suggested, include the rights possessed by detainees; custody, interrogation and disciplinary procedures; available avenues of complaint; physical conditions of detention; the nature and extent of regime activities; and the standard of health and hygiene in places of detention.<sup>14</sup> Some of these issues, clearly, the Committee had highlighted in its 1<sup>st</sup> General Report; others, like custody, interrogation and disciplinary procedures and regime activities, it introduced here for the first time.

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<sup>13</sup> Ibid.

<sup>14</sup> See 2<sup>nd</sup> GR, para 35.

Interestingly, the Committee also introduced at this juncture the notion that in examining places of detention, matters of concern must be viewed "both individually and cumulatively", thus demonstrating its determination to address not only the minutiae of life in custody, but also broader, systemic issues. Such an approach, it is fair to say, more accurately reflects the nature of detention, wherein the accumulation of individual problems and shortcomings in a particular environment can, to an extent less possible in the outside world, occasion serious institutional difficulties. At the very outset of its working life, therefore, the CPT merely set down the broad parameters of its standard-setting work. Subsequently, as its body of reports has grown, it has, as we shall see, given flesh to these skeletal provisions.

It is, perhaps, worth noting here that the CPT is not content to address only problems of *direct* concern to detainees. Rather, it considers that:

"...often one cannot understand and assess the conditions under which persons are deprived of their liberty in a given country without considering those conditions in their general (historical, social, economic) context. Although human dignity must be effectively respected in all Parties to the Convention, the background of each of these countries varies, and can account for differences in their response to human rights issues. It follows that, to fulfill its task of preventing abuses, the CPT must often look into the underlying causes of general or specific conditions conducive to mistreatment".<sup>15</sup>

Accordingly, having examined conditions of detention obtaining in a particular Party:

"...[it] may not find it appropriate to confine itself to merely suggesting immediate or short-term measures (such as, for example, administrative action) or even such measures as legislative improvements. It may find it

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<sup>15</sup> See 1<sup>st</sup> GR, para 49.

necessary to recommend long-term measures, at least whenever it has become apparent that unacceptable conditions exist in a country as a result of deep-rooted factors that cannot be alleviated simply by judicial or legislative fiat or by resort to other legal techniques. In such cases, educational and similar long-term strategies may prove essential”.<sup>16</sup>

Potentially, therefore, the CPT's developing body of standards may comprise a much broader range of matters than is ordinarily associated with an agent of inspection.

### ***"Quantifying" CPT standards***

One of the consequences to flow from its preventive mandate, the CPT has postulated, is the fact that in order to fulfill that mandate effectively, it must seek to engender among States parties a degree of protection of detainees that is:

“*greater* than that upheld by the European Commission and Court of Human Rights when adjudging cases concerning the ill-treatment of persons deprived of their liberty and their conditions of detention”.<sup>17</sup>

Unfortunately, the Committee has not expounded this hortatory gesture. We may speculate, however, that in order to protect detainees satisfactorily, it considers that it must seek to forestall treatment and behaviour which, under existing ECHR jurisprudence, could not readily be held to violate, *inter alia*, Article 3, ECHR. In other words, its object is to prevent a situation from degenerating to an extent which would justify an application to the ECHR organs for breach of Article 3. In appropriating for itself this particular responsibility, the CPT prepared the ground for the development of its own measuring rods. For, if, as we may infer from its remarks,

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<sup>16</sup> *Idem*, para 50.

<sup>17</sup> *Idem*, para 51 (emphasis added).

the standards developed under the Article 3, ECHR jurisprudence are deficient - or, at least, not entirely appropriate - for an organ working to a preventive mandate, it must, of necessity, fashion supplementary provisions. Otherwise, there would exist a practical *lacuna* in the protection against ill-treatment afforded detainees in States parties to the ECPT.

### ***Broadening the application of CPT standards***

With the opening for signature of Protocol Number 1 to the ECPT,<sup>18</sup> the CPT's earnest commitment to greater protection for detainees than is presently afforded by the ECHR organs may, in principle, extend beyond the boundaries of the Council of Europe. It was in this context that the CPT, in its 1<sup>st</sup> General Report, intimated its vision of the kind of European penal culture that might be established under its guidance. For, in welcoming the opening-up of the Convention and the potential expansion of the Committee's monitoring activities occasioned thereby, it sought to acclaim the benefits which might accrue to the cause of human rights in Europe. As a result of the CPT's enhanced role, it insisted:

"*common* standards of protection for persons deprived of their liberty would be applied to a broader circle of countries".<sup>19</sup>

In this single phrase, it is submitted, the CPT revealed its true *raison d'être*: to fashion and invite States to bring their penal systems into line with a *uniform* European standard; not with an ideal or lofty *desideratum*; but with a fundamental, realistic standard, attainable by all.<sup>20</sup> Logically, this object requires the *prior* determination of

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<sup>18</sup> See generally above, p 4, n 8.

<sup>19</sup> See 1<sup>st</sup> GR, para 86 (emphasis added).

<sup>20</sup> Professor Antonio Cassese, who was the very first President of the CPT, has stated that, subject to certain national and cultural differences between Parties, members of the CPT "have always agreed that our aim [is] to achieve the same level of civilized standards in the field of detention, throughout



the standard sought to be achieved and, therefore, it may be suggested, of a CPT model.

### *The source of CPT standard-setting work*

Inevitably, the mature standards inherent in and developed under, *inter alia*, Article 3, ECHR provide the basis of the CPT's standard-setting work. Indeed, during the first few months of its existence, in preparing for its inspectoral role, the Committee devised a collection of "common working tools" designed to meet the needs of its diverse membership, among which was a set of "general documents" on the jurisprudence of the European Commission and Court of Human Rights germane to its activities. Further, it has stated subsequently that:

“[i]n carrying out its functions [it] has the right to avail itself of legal standards contained in not only the European Convention on Human Rights but also in a number of other relevant human rights instruments (and the interpretation of them by the human rights organs concerned).”<sup>21</sup>

Moreover, unlike the European Commission and Court of Human Rights, the CPT “is not bound by substantive treaty provisions”. Rather, it is free simply to “refer to a number of treaties”, as well as to other international instruments - including “non-binding criteria”, like the various sets of standards approved by the Council of

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Europe”: see Cassese (1996), p 28. Given that, as we shall shortly see, the CPT invokes as *sources* of its standard-setting work, standards derived from international instruments which originate from beyond Europe, it is worth speculating whether what the CPT is really attempting to do is to set a common European standard – based, *inter alia*, on practice among European States – which standard may or may not have the potential to be applied beyond Europe, or whether, rather, it is seeking to apply to Europe established universal standards. It is a question to which we shall return in the Conclusion to this work.

<sup>21</sup> 1<sup>st</sup> GR, paras 5 and 95.

Europe<sup>22</sup> and the United Nations,<sup>23</sup> “and the case-law formulated thereunder”.<sup>24</sup>

Justifiably, therefore, the CPT has chosen to build its practice around the considerable international framework of binding and non-binding standards that exist today in the area of torture and inhuman and degrading treatment. At the same time, however, it has shown the enterprise and intrepidity of an organ bound neither by substantive treaty definitions of these phenomena nor by the jurisprudence of judicial and quasi-judicial organs acting in the same field. Consequently, to the CPT, the *extant* international framework represents merely a “point of departure or reference” in its assessment of the treatment of detainees on Convention territory;<sup>25</sup> it is free, it has made clear, to *supplement* this framework with its own corpus of standards, because, it has stated, “often...no clear guidance can be drawn from [existing standards]...or at least...more detailed standards are needed”.<sup>26</sup>

Actuated by such motives, therefore, the CPT has set about steadily compiling its own set of “measuring rods” on the strength of the experience of its members and associated experts and a comparative study of the systems of detention encountered by it.<sup>27</sup> Thus, although the CPT is content, when it suits it, to work within existing international parameters on the treatment of detainees, when it deems it necessary, it is quite prepared to go further and formulate and apply its own precepts. In this way, it is submitted, it may serve to create new parameters, albeit ones constrained by its inherent legislative powerlessness.

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<sup>22</sup> Such standards include, most obviously, the *European Prison Rules*, Recommendation R (87) 3 of the Committee of Ministers of the Council of Europe, adopted 12<sup>th</sup> February 1987, replacing Resolution (73) 5 on the Standard Minimum Rules for the Treatment of Prisoners.

<sup>23</sup> Which standards include the Standard Minimum Rules for the Treatment of Prisoners (Ecosoc Res. 663C (XXIV), 31<sup>st</sup> July 1957 and Res 2076 (LXII), 13<sup>th</sup> May 1977), the Code of Conduct for Law Enforcement Officials (GA Res. 34/169, 19<sup>th</sup> December 1979) and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (GA Res. 43/173, 1988).

<sup>24</sup> 1<sup>st</sup> GR, paras 6 (ii) and 95.

<sup>25</sup> *Idem*, para 5. See similarly Explanatory Report, paras 22 and 27.

<sup>26</sup> *Idem*, para 95.

<sup>27</sup> *Ibid.*

## ***Annual General Reports***

Thus far, the medium through which the CPT has most consistently pursued its standard-setting objective has been its annual General Reports, the purpose of which, it has stated, is, *inter alia*, to elaborate "certain substantive matters to which it pays attention when carrying out visits" – all the while, of course, "fully respecting" the rule of confidentiality laid down in Article 11, ECPT.<sup>28</sup> Therein, it endeavours to:

"explore [in detail] matters of interest concerning...deprivation of liberty...[in order] to give a clear advance indication to national authorities of its views on different matters falling within its mandate and more generally to stimulate discussion on issues concerning the treatment of [detainees]".<sup>29</sup>

These comments have prefigured annual CPT pronouncements on detention in police establishments;<sup>30</sup> prison conditions and regime;<sup>31</sup> health care services in prisons;<sup>32</sup> the detention of foreign nationals under aliens legislation;<sup>33</sup> the involuntary placement of persons in psychiatric establishments;<sup>34</sup> the detention of juveniles;<sup>35</sup> and women deprived of their liberty.<sup>36</sup> Clearly, therefore, the Committee's General Reports are of potentially great significance in its standard-setting work, all the more because, as we have seen, they offer the *only* means available to it of regularly placing its views in the public domain. As such, they may provide the most effective tool available to the CPT in its efforts to effect improvements in the treatment of detainees.

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<sup>28</sup> See 2<sup>nd</sup> GR, para 4. On the regime of confidentiality established, *inter alia*, under Article 11, ECPT, see above, p 19 *et seq.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Idem*, paras 36-43.

<sup>31</sup> *Idem*, paras 44-60.

<sup>32</sup> See 3<sup>rd</sup> GR, paras 30-77.

<sup>33</sup> See 7<sup>th</sup> GR, paras 24-36.

<sup>34</sup> See 8<sup>th</sup> GR, paras 25-58.

<sup>35</sup> See 9<sup>th</sup> GR, paras 20-41.

<sup>36</sup> See 10<sup>th</sup> GR, paras 21-33.

### *Setting standards in the course of visits*

In the conduct of visits, one stage is of particular significance in the present connection. It concerns the moment, at the end of a visit, when the Head of the visiting delegation, "if possible, with the rest of the delegation", meets the relevant national authorities one final time. These meetings, the CPT has stated, enable the delegation, first, to comment on the circumstances surrounding the visit and the manner of its conduct and, second, to offer some "tentative first impressions" of the places of detention visited, especially following the discovery of matters of "particular concern".<sup>37</sup> This notion of a final, reflective meeting with the national authorities of a Party, arranged, if necessary, with a view to inducing swift action on their part, has not simply grown pragmatically out of the manner in which visits are conducted. Textual authority for their convening exists, it might be argued, in the shape of Article 8(5), ECPT which provides that:

"if necessary [during a visit], the Committee may immediately communicate observations to the competent authorities of the Party concerned".<sup>38</sup>

In this way, the Committee is authorised formally to engage Parties in what is, we may presume, a forthright dialogue on matters of concern arising from its work. Thus, Article 8(5) is a very useful and flexible provision; the CPT would do well to exploit it at every possible turn. Already, it has been widely deployed in practice<sup>39</sup> and it should be encouraged, as a matter of convention, formally to invoke it during and after more visits in order to make particular observations to the Parties concerned. This would, to a certain extent, obviate the *interregnum* in communications inherent

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<sup>37</sup> See *inter alia* 1<sup>st</sup> GR, para 67; 2<sup>nd</sup> GR, para 23; and 3<sup>rd</sup> GR, para 14.

<sup>38</sup> See also in this regard Rule 39.2, Rules of Procedure.

<sup>39</sup> See, e.g., 2<sup>nd</sup> GR, para 23; and 5<sup>th</sup> GR, para 9. Such practice has, it seems, borne fruit. A number of Parties, the CPT noted in its 2<sup>nd</sup> General Report, have "reacted favourably" to Article 8(5) observations

in the Convention's existing reporting mechanism.<sup>40</sup> Indeed, Mr. Trevor Stevens, Secretary to the Committee, in a conference devoted to the implementation of the Convention convened in Strasbourg in December 1994, suggested that a greater readiness to make use of the Article 8(5) provisions might go some way towards addressing the difficulties which the Committee encounters in securing the swift – or, indeed, any - implementation of its recommendations.

It is clear, however, that recourse to the Article 8(5) procedure should not have the practical effect of undermining or replacing the CPT's reporting duties, as provided for in Article 10(1) of the Convention.<sup>41</sup> Further, enthusiasm for the practical potential of Article 8(5) should be tempered by the knowledge that it has been identified as capable of being invoked principally *during* the visit and that such invocation should be limited to "exceptional" situations, like those in which there exists an "urgent need" to improve the treatment of detainees.<sup>42</sup> Thus, the Committee is not to avail itself lightly of the Article 8(5) expedient. The provision does not confer on a delegation the freedom to communicate its views on almost everything relevant to the CPT's mandate in the course of a visit - even if of fundamental importance to its evolving body of standards. To validate an intervention of this kind, it seems, there must first exist a compelling justification. Thus, the Committee cannot, it seems, promote any body of general standards which it may develop through the kind of politic arrangement Article 8(5) otherwise seems to encourage. The procedure is, in practice, only of use in drawing attention to situations of

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and "desirable steps" have been taken "rapidly, without awaiting the transmission of the CPT's report". See similarly 5<sup>th</sup> GR, para 17.

<sup>40</sup> See, e.g., 1<sup>st</sup> GR, para 71; 4<sup>th</sup> GR, paras 8 and 19; 5<sup>th</sup> GR, para. 10; and above, pp 16-17.

<sup>41</sup> See, e.g., Explanatory Report, para 70.

<sup>42</sup> Ibid.

immediate and grave concern. It is principally an oral – or, at least, informal – mechanism, whereas the elaboration and promulgation of standards, in order to be effective, must be communicated in written form and, therefore, documented. The procedure may be invoked, in practice, only in the most particular of circumstances; there may be many breaches of penal standards which are not grave and, therefore, unlikely to precipitate recourse to it.

### ***Conclusion***

The standard-setting work of the CPT whether through the expedient offering of "tentative first impressions" at the end of each visit, the more formal invocation of Article 8(5), ECPT or the publication of visit and General reports, can only realistically achieve its avowed objective - the strengthening of the protection against ill-treatment afforded persons deprived of their liberty – it is submitted, if the Committee determinedly and consistently makes use of a broad range of standards in its work. For, without authority for positions adopted in the light of visits, it is clear, the CPT can neither form nor lend conviction to its observations.

In the following chapters we shall examine in detail the contents of a number of CPT standards on detention identifiable in its published work. To a certain extent, the task of codifying precepts has already been set in train by the Committee itself, as evidenced by the substantive chapters in its second, third, seventh, eighth, ninth and tenth General Reports. However, it may be argued that the contents of such reports represent only inchoate – albeit very significant – guidance. A more comprehensive code, which builds on and applies this annual framework, may be apprehended in the more broad-ranging text of visit reports.

In the following analysis it shall be presumed that a statement or observation of the CPT constitutes a 'standard' or 'guideline' or 'precept' if it resembles

something which one might sensibly identify as such. Accordingly, comments and even requests for information and not just, as might be expected, more forceful recommendations, may plausibly be regarded as containing at least the kernel of a standard.<sup>43</sup> There is inevitably an element of miscellany about this examination. Space constraints preclude an exhaustive study of CPT precepts on detention. Accordingly, many of those standards which are deserving of thorough examination have been omitted in favour of others. It is hoped that arbitrariness and confusion have been avoided in making the selection and that the resultant mix of standards at least conveys a sense of the nature of the Committee's evolving corpus of standards as well as of the processes behind its formulation.

The purpose of references in subsequent chapters to relevant provisions of the *European Prison Rules* has already been explained.<sup>44</sup> In this connection, it should be noted that any analysis of CPT precepts cannot be undertaken without at least acknowledging that they exist merely as part of a growing international legal framework. Accordingly, if one is to attempt to assess the impact of such precepts on State party law and practice – as we shall ultimately attempt to do<sup>45</sup> - it is, as some commentators have stressed:

“...important to bear in mind that, in so far as the standards set by the CPT are merely reflective of those already required of states by existing legally-binding international instruments, or clearly set out in the non-binding codes, *compliance cannot be attributed solely to the work of the CPT*”.<sup>46</sup>

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<sup>43</sup> For an examination of the terms “recommendation”, “comment” and “request for information” and the import which attaches to them under the terms of the ECPT, see above, p 16.

<sup>44</sup> See above, pp 2-3.

<sup>45</sup> See below, p 481 *et seq.*

<sup>46</sup> See Evans and Morgan (1998), p 259 (emphasis added).

# PART II

## Standards on Police Custody



## **The Development of CPT Standards on Police Custody: An Introduction**

Much of the present examination axiomatically concerns efforts to fight crime. For all States, this is an area of great sensitivity. The CPT, for its part, accepts that crime, particularly in its more abhorrent manifestations, like the “destructive phenomena” of terrorism and drug and arms dealing, “rightly meet[s] with a strong response from state institutions”. At the same time, however, and as might be expected, it considers that “under no circumstances must that response be allowed to degenerate into acts of torture or other forms of ill-treatment”. For, “[s]uch acts”, it holds, “are both outrageous violations of human rights and fundamentally flawed methods of obtaining reliable evidence for combatting crime”. Further, it considers, “[t]hey are degrading to the officials who inflict or authorise them” and, “[w]orse still...can ultimately undermine the very structure of a democratic State”.<sup>1</sup>

The Committee has been equally forthright in its condemnation of more insidious forms of ill-treatment. Where material conditions of detention in police establishments may be characterised as “poor”, where “important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained [therein]” and where interrogations are “intensive and potentially prolonged”, the “cumulative effect”, it has suggested - somewhat understatedly - is to place detainees “under a considerable degree of psychological pressure”.<sup>2</sup> Further, if the effect of

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<sup>1</sup> See Turkey PS I, para 28.

<sup>2</sup> See UK II, para 109.

such pressure is “to “break [a detainee’s] will”, then, it believes, he may be considered to have been treated inhumanly.<sup>3</sup>

### ***Focus of attention***

Those features of detention which the Committee regards as being of particular importance in determining the likelihood of ill-treatment in police establishments comprise, principally:

- (i) allegations of ill-treatment received prior to and during a visit;
- (ii) related medical findings;
- (iii) material conditions of detention observed in the course of the visit; and
- (iv) the content and operation in practice of the putative safeguards against ill-treatment which operate in the Party concerned.<sup>4</sup>

### ***Aims of the CPT’s standard-setting work in the context of police custody***

From its observations on its delegation’s visit to Northern Ireland in 1993, it is possible to determine just what the Committee hopes to achieve in developing a set of guidelines on the treatment of persons detained by the police. While its observations were clearly directed at the situation encountered in the course of the visit itself, they may be applied with equal force, it is submitted, in other instances. Indeed, the CPT has offered very similar formulations in numerous other visit reports. By following its recommendations and by “consolidating safeguards” against abuse, the Committee

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<sup>3</sup> Ibid.

<sup>4</sup> See, e.g., *idem*, para 36. It need hardly be stated that such features strongly influence the structure of visit reports.

averred to the UK authorities, public confidence in the fairness of treatment accorded persons detained by the police in Northern Ireland would be reinforced. For, the effectiveness of any police force, it continued, depends “in large measure” on the degree of support which it enjoys among the community at large.<sup>5</sup> Further, it claimed, by implementing the measures suggested, officers would be better placed to challenge unjustified allegations of ill-treatment. Emolliently, it added, parenthetically, that the police and security forces’ capacity to combat crime - more specifically, terrorism - would not be undermined by the making of the recommended changes.<sup>6</sup> Indeed, it suggested, adherence thereto might render their work more effective.

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<sup>5</sup> *Idem*, para 111.

<sup>6</sup> *Ibid.*

## **The Creation of Fundamental Safeguards Against Ill-treatment in Police Custody**

### *Introduction: a range of safeguards*

The CPT devotes considerable space in its published work to elaborating those features of police custody on which, in its view, States parties ought to concentrate if the risk of ill-treatment of detainees, inherent in all systems of detention, is not to be realised. For instance, having determined, in 1990, that in Austrian police establishments perceived "weaknesses" in the system of basic safeguards had given rise to a "serious risk of detainees being ill-treated while in police custody",<sup>1</sup> the Committee adumbrated a series of measures "designed to address [the] problem". The "most important" of these, it proclaimed, were:

- improved access to legal advice for persons in police custody;
- a right for persons in police custody to be examined by a doctor of their own choice;
- [the] drawing up of a code of practice concerning police interviews; [and]
- [the maintenance of] full records of police custody (including transportation), providing for greater accountability".<sup>2</sup>

To this basic list it subsequently added the "essential ingredient of any strategy for the prevention of ill-treatment", namely, the provision of "adequate professional training" for police officers.<sup>3</sup> In other visit reports, the CPT has developed this basic formula, reinforcing it, where appropriate, with measures designed to assist Parties to

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<sup>1</sup> See Austria I, para 48 and p 7 of the report, "Summary of the CPT's main findings".

<sup>2</sup> *Idem*, para 49.

<sup>3</sup> *Ibid.* See also p 7 of the report.

incorporate the safeguards adumbrated into their domestic criminal justice systems. As we shall see, it has also sought to augment the safeguards with other new and arguably equally fundamental principles, like the right of a newly-detained person to inform a third party of his choice of the fact of his detention and the duty of detaining authorities to inform a detainee, promptly and intelligibly, of the rights of which he may avail himself. The Committee's ultimate objective in all this is to conceive an exhaustive body of rights and responsibilities, which, if adhered to punctiliously by the police authorities, ought to minimise the risk of ill-treatment of persons detained by them. The aim of this and subsequent chapters, therefore, is to identify these rights and responsibilities.

***The three rights to which the CPT "attaches particular importance"***

Of the numerous rights and guarantees to which, in the view of the CPT, persons detained by the police are entitled, three, it has stated, are of "particular importance", being three "fundamental safeguards" against abuse. The three safeguards comprise:

"the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, Consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities)".<sup>4</sup>

These safeguards, the Committee has stated, should apply:

"as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc)".<sup>5</sup>

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<sup>4</sup> See 2<sup>nd</sup> GR para 36. Two of these safeguards, it is worth noting, also figure in the list of key guarantees adumbrated above.

<sup>5</sup> Ibid.

They should apply, in other words, "from the moment when those concerned are obliged to remain with the police".<sup>6</sup> Further, it has suggested, the three rights should be "expressly guaranteed" in law,<sup>7</sup> which means not only making express legislative provision, but, in addition, it seems, giving "clear instructions" to police officers that the rights are to obtain as from the outset of detention and spelling out "the modalities for ensuring the [rights'] effective application in practice..."<sup>8</sup>

### ***Underpinning the three basic rights***

Reinforcing the three fundamental safeguards, it is clear, is a second, protective tier of measures comprising, *inter alia*:

(i) a responsibility on the part of the authorities to inform persons detained by the police of all their rights - including the three fundamental ones - "expressly" and "without delay";<sup>9</sup> and

(ii) a responsibility on the part of national legislatures clearly to circumscribe the circumstances in which the exercise of "one or the other" of the three fundamental rights may be legitimately delayed in the interests of justice and to "limit... in time" such delays.<sup>10</sup>

It is proposed to examine the CPT's elaboration of each of these safeguards in turn. In addition, we shall examine a number of other guarantees which it considers are also important in forestalling ill-treatment in police custody.

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<sup>6</sup> See, e.g., Finland I, para 26; and Poland I, para 45. It is worth noting that the CPT considers that the same range of precepts should apply *mutatis mutandis* in the detention of foreign nationals under domestic aliens legislation: see, e.g., 7<sup>th</sup> GR, paras 30-1; and Belgium II, para 76.

<sup>7</sup> See, e.g., Denmark I, paras 126, 128 and 143.

<sup>8</sup> See Turkey I, para 22.

<sup>9</sup> See, e.g., Germany I, para 30; Iceland I, para 29; and Portugal I, para 37.

<sup>10</sup> See 2<sup>nd</sup> GR, para 37.

## The Right to Notify a Third Party of the Fact of One's Detention

### *Introduction: the basic precept*

The CPT holds that:

“[t]he right to inform a next of kin or other third party of one's arrest is a fundamental safeguard against ill-treatment and as such should be guaranteed by the law”.<sup>1</sup>

The *European Prison Rules*, though not expressly concerned with the rights of persons detained by the police, do provide, in an analogous sense, that:

“Untried prisoners shall be allowed to inform their families of their detention immediately and given all reasonable facilities for communication with family and friends and persons with whom it is in their legitimate interest to enter into contact”.<sup>2</sup>

This right, the right not to be held incommunicado, comprises a number of features. Some of these, as we shall see, require little analysis, being so essential to the right's meaningful exercise as to be axiomatic; others, by contrast, especially where the CPT itself is somewhat obscure, may require careful exegesis. The CPT's fundamental view of the right is, with one or two insignificant variations in expression, this:

(i) that persons detained by the police have the right to inform *without delay* a close relative or third party of their choice<sup>3</sup> of their situation;

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<sup>1</sup> See Denmark I, para 126.

<sup>2</sup> At Rule 91.1.

<sup>3</sup> See UK III, para 288 (concerning the CPT's querying of the authorities' circumscription of the right in order to limit the party to whom notification may be made to a “reasonably named” third party).

(ii) that this right should be expressly guaranteed; it should not merely be implied into other legal or regulatory provisions;<sup>4</sup>

(iii) that the right should be available to all persons detained by the police, “for whatever reason” (i.e. whether formally arrested or merely apprehended in order to “give an explanation” or for identification purposes or as a potential witness or having been “taken into care”);<sup>5</sup>

(iv) that the exercise of this right may be made subject to certain exceptions “designed to protect the interests of justice”;<sup>6</sup> and, consequently,

(v) that “any possibility exceptionally to delay the exercise of the right...should be clearly circumscribed, made subject to appropriate safeguards (e.g. any such delay to be recorded in writing together with the reasons therefor and to require the approval of a senior officer or public prosecutor [i.e. a higher authority<sup>7</sup>]) and [be] strictly [and expressly<sup>8</sup>] limited in time”.<sup>9</sup>

### *Developing the basic precept*

#### *Identifying the third party: the problem for foreign national detainees*

One particular problem encountered by police authorities in giving practical effect to the right of notification concerns foreign national detainees. In this connection, to the Greek authorities, regarding the possible identity of the third party to whom a person's

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<sup>4</sup> See, e.g., Belgium II, para 35. Some analysts contend that the CPT's response to State party practice in this regard suggests that it is of the opinion that “in the final analysis it is the binding nature of the provision rather than its exact form that matters”: see Evans and Morgan (1998), p 262.

<sup>5</sup> See Czech Republic I, para 27; and Sweden III, para 18.

<sup>6</sup> See, e.g., Greece I, para 37.

<sup>7</sup> See Germany I, para 35.

<sup>8</sup> See, e.g., Finland I, para 30; and Sweden I, paras 24 and 156.

<sup>9</sup> See Greece I, paras 37-8 and 267; and, similarly, Malta I, paras 84 and 112; and Belgium II, para 35.



detention may be notified, the CPT suggested, in the light of its 1993 visit to the country, that when foreign nationals are detained by the police:

"[they] should be provided with the address and telephone number of the consular authorities of their country".<sup>10</sup>

This, in fact, represents a logical development of the Committee's belief that foreign nationals apprehended by the police should be entitled, as from the outset of their custody, "to inform... for example, the consul of their country" of their detention.<sup>11</sup> Of course, foreign national detainees should not be told that they may *only* contact their national consular authorities; like all other persons detained by the police, the third party to whom such persons may wish their detention to be notified should not, the Committee believes, be circumscribed so restrictively. This may account for its implied disapproval of the forms used by Austrian police officers in May 1990 to inform detainees of the possibility of their contacting a third party: "interestingly", the CPT noted in its first Austrian visit report, the forms given to foreign nationals "*only* refer[red] to the possibility of contacting the consul of the detainee's country".<sup>12</sup>

The CPT also considers that notification should be given to the consular authorities only with the consent of a detainee. If, as a matter of policy, the consulate is *always* informed of the detention of one of its nationals, "even if the detainee object[s]", it has stated, there may be "very unfavourable consequences".<sup>13</sup>

### *Acting in contravention of the detainee's wishes*

Following on from this last point, and in a more general sense, in its first Swedish visit report the CPT suggested, peremptorily, that:

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<sup>10</sup> *Idem*, para 37.

<sup>11</sup> See Germany I, para 35.

<sup>12</sup> See Austria I, para 58 (emphasis added).

<sup>13</sup> See Spain I, para 54.

"[i]t is indisputable that notification of a person's custody to a third party should never be made against his wishes".<sup>14</sup>

It did, however, offer the caveat that unwanted notification should be possible in "exceptional circumstances": where, for example, a detainee is mentally ill.<sup>15</sup> The detention of minors, too, is probably an exception to the general rule.<sup>16</sup> The CPT's position is consistent with Rule 92.3, *EPR* which stipulates that:

"If an untried prisoner does not wish to inform [members of his family of his detention], the prison administration should not do so on its own initiative unless there are good overriding reasons as, for instance, the age, state of mind or any other incapacity of the prisoner".

### *Pressurising the detainee*

It is also the CPT's view, as one would expect, that there should be a "strict obligation placed upon the police...to refrain from placing any pressure of whatever kind" on detainees in the exercise of their right of notification.<sup>17</sup> In this regard, it was alleged by one prisoner met in Austria in 1990, for example, that he had been "coerced into signing a form renouncing his right to inform someone of his arrest".<sup>18</sup>

### *Keeping the detainee informed*

Without ever stating so expressly, the CPT is understandably keen to see that, as a matter of routine, detainees who have in fact exercised their right of notification are informed of its outcome.<sup>19</sup>

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<sup>14</sup> See Sweden I, para 22. Cf Swedish law in this area: *idem*, App III, para 10.

<sup>15</sup> *Ibid.*

<sup>16</sup> See further below, p 72.

<sup>17</sup> See Austria I, para 60.

<sup>18</sup> *Idem*, para 57.

<sup>19</sup> See Norway I, para 31.

### *A right exercisable "without delay"*

The right to inform a third party of the fact of detention is described by the CPT in its basic formulation as one which should be exercisable "without delay" or "immediately".<sup>20</sup> In other words, a detainee should be entitled to exercise the right from the moment he is first detained by the police. Accordingly, it is important to establish, definitively, at what point detention may be said actually to commence. Does it commence the moment a person is apprehended by the police or later, when he is formally "arrested", following, for example, the issuing of a judicial warrant authorising his detention? Does it begin only once a detainee has been placed in a police cell or, presumably later still, when his formal interrogation begins? The CPT's basic position, though laudably concise, is too simply expressed to accommodate subtleties such as these. In a number of visit reports, however, the Committee has been patently more forthcoming. Following its visit to Germany in December 1991, for example, in its measured way, it "stressed" that:

"...the period immediately following deprivation of liberty by law enforcement officers is the one during which the risk of intimidation and ill-treatment is at its greatest".<sup>21</sup>

Consequently, it stated, it is "essential" that the right to contact a third party:

"...be guaranteed as from the very outset of police custody (and not only from the moment when the detained person is formally 'arrested' by a judge or officially interrogated by the police/public prosecutor)".<sup>22</sup>

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<sup>20</sup> See, e.g., Iceland I, para 30; and Denmark I, para 126.

<sup>21</sup> See Germany I, para 34.

<sup>22</sup> Ibid. See also - though less comprehensively - Portugal I, para 41 (1<sup>st</sup> sub-para); and Sweden I, paras 24 (1<sup>st</sup> sub-para) and 156.

In other words, the right should be guaranteed "from the moment...[a person is] obliged to stay with the police".<sup>23</sup> (We have already seen, of course, how the CPT has sought to emphasise that the three principal safeguards against ill-treatment in police custody - which safeguards include the right not to be held incommunicado - should apply as from the very outset of detention "regardless of how it may be described under the legal system concerned (apprehension, arrest, etc)"<sup>24</sup>).

The CPT was prompted to offer these views to the German authorities because, under federal law as it stood in 1991, it appears, "very rarely" was a person apprehended by the police on suspicion of having committed a criminal offence (a so-called "Verdachtiger") permitted to inform a third party of the fact of his apprehension. However, if he was *also* the "subject of a criminal inquiry" (a "Beschuldigter"), he might "sometimes" be granted such an opportunity "if this [was] considered to be compatible with the needs of the inquiry".<sup>25</sup> If he was not the subject of a criminal inquiry, then he might inform someone of the fact of his detention at the point when a judge issued a warrant of arrest ordering his detention, which could be as many as 48 hours after his apprehension.<sup>26</sup> This left him, theoretically at least, incommunicado during his - potentially quite lengthy - most vulnerable period.

In other visit reports, too, the CPT has betrayed a certain anxiety about circumstances in which it is alleged or it is provided by law that a person detained by the police may notify a third party of his detention only "after questioning by a detective, or even...after their appearance before the prosecutor"<sup>27</sup> or "as soon as this

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<sup>23</sup> *Idem*, para 208. See, similarly, Sweden I, para 22 (though *cf* unpredictable Swedish practice: Sweden III, para 17).

<sup>24</sup> See above, p 59.

<sup>25</sup> See Germany I, para 32. German law in this respect is set out at para 31 and Appendix III, para 6 of the report.

<sup>26</sup> *Idem*, para 15.

<sup>27</sup> See Norway I, para 31.

can be done without detriment to the investigation”<sup>28</sup> or only after he has been charged with an offence *and* brought before a public prosecutor<sup>29</sup> or only “from the moment when a court order involving deprivation of liberty becomes effective”.<sup>30</sup>

Rather strikingly in this connection, in May 1991, officials of the National Police Board informed a visiting delegation to Sweden that “during the pre-arrest stage of custody [which could last for six or even, exceptionally, twelve hours], the general practice was not to notify the detained person's relatives or other third party of his situation”.<sup>31</sup> This was so, they advanced - a little artlessly and, seemingly, without further explanation - because such notification “could be prejudicial to the detainee”.<sup>32</sup> The CPT, in its subsequent visit report, memorably described the situation of such persons as “something of a twilight zone”.<sup>33</sup>

***Delaying the exercise of the right: exceptions “designed to protect the interests of justice”***

As we have seen, the CPT is prepared to qualify its basic position on the right to contact a third party in order to permit the police, in “exceptional” circumstances, to delay notification, provided that the interests of justice will be served thereby. However, such “possibilities”, it considers, should be “clearly circumscribed”.<sup>34</sup> As to the circumscription sought, the Committee has averred that domestic legal provisions which render the exercise of the right contingent on there being “[no] specific reason to believe that this could prejudice the [criminal] inquiry”<sup>35</sup> or possible “as soon as

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<sup>28</sup> See Sweden I, para 21. Seven years after its first periodic visit to Sweden, “the formal legal situation”, the CPT observed, “was unchanged”: see Sweden III, para 16.

<sup>29</sup> See Greece I, paras 36 and 14 (a juncture that might be reached as many as 24 or more hours after initial apprehension).

<sup>30</sup> See Portugal I, para 38 and App III, para 6.

<sup>31</sup> See Sweden I, para 22.

<sup>32</sup> Ibid.

<sup>33</sup> Idem, para 156.

<sup>34</sup> See above, p 62.

<sup>35</sup> See Iceland I, para 31.

this no longer causes any special hindrance to the investigation of the crime”<sup>36</sup> are “too vague”.<sup>37</sup> Any discretion vested in the authorities to delay exercise of the right, it considers, should be “more closely circumscribed”<sup>38</sup> or “spelt out more clearly”.<sup>39</sup> Accordingly, it has found much more agreeable legislation which confers on police officers a power to delay only if they can establish “[a] reasonable fear of destruction of evidence, hiding of objects or profits [and] warning of other suspects”.<sup>40</sup>

- *Acceptable duration of delay*

In the course of its second periodic visit to Finland, in June 1998, the CPT learned that, as had been the case during its first such visit, some six years previously, domestic law conferred on the police “a broad discretionary power to hold a person for up to 96 hours (i.e. until the first remand hearing) without any notification of his apprehension/arrest being given to his family or other persons with whom he has a close relationship”.<sup>41</sup> In its subsequent visit report, while acknowledging that the denial of the right of notification “for a brief period” may exceptionally be necessary in order to protect the interests of justice, the Committee felt compelled to remark that “the possibility to delay for up to four days...is not justifiable”. Consequently, it recommended that:

“...the period during which an apprehended/arrested person can be denied the right to notify his next-of-kin or another appropriate person of his situation be shortened substantially; in the Committee’s opinion, a maximum period of 48

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<sup>36</sup> See Finland II, para 28.

<sup>37</sup> Idem, para 29.

<sup>38</sup> Iceland I, para 31.

<sup>39</sup> Finland II, para 29. Cf Finland I, para 28 (domestic legal provision permitting exercise of the right of notification “provided that this will not jeopardise the ‘clarification’ of the case” allowed to pass without comment).

<sup>40</sup> See Iceland II, para 23.

<sup>41</sup> See Finland II, para 29.

hours would strike a better balance between the requirements of the investigation and the interests of detained persons”.<sup>42</sup>

This statement, it is submitted, represents the CPT’s fundamental position on the issue of delay.

- *Authorising the delay: the need for the approval of a senior police officer or public prosecutor*

While the content of this precept largely speaks for itself, it is nevertheless worth noting that the Committee considers that “it would be highly desirable for any delay in the exercise of a person’s right to notify someone of his situation to be always subject to the approval of a senior police officer *with the right to arrest*”.<sup>43</sup> It is also the Committee’s view, as might be expected, that the courts have a role to play in authorising delay.<sup>44</sup>

### *Refusing permission to exercise the right*

In suggesting that the exercise of the right of notification might legitimately be made subject to certain exceptions in the interests of justice, the CPT has, on occasion, referred to “the possibility for the police exceptionally to delay *or refuse*” contact with a third party.<sup>45</sup> This is a suggestion of rather questionable merit, it is submitted. For, why should the CPT countenance the vesting of a discretion in the police not merely to delay exercise of the right, but to prevent its exercise entirely? It would appear to vitiate the spirit of its belief that the risk of ill-treatment of detainees is at its

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<sup>42</sup> Ibid. See, in the same connection, Spain II, para 60; and Spain VI, para 23 (regarding the “unsatisfactory” possibility under Spanish law of withholding notification of the fact of detention for up to five days).

<sup>43</sup> See Finland II, para 30 (emphasis added). Cf Finnish procedure in this area.

<sup>44</sup> See, e.g., San Marino I, para 22 (approval of “judicial authority” required); Netherlands (NA) I, para 46, 2<sup>nd</sup> indent (approval of “court or a public prosecutor” necessary); and Belgium I, para 40, 2<sup>nd</sup> indent (approval of “judge or magistrate” required).

<sup>45</sup> See, e.g., Austria I, para 60 (3<sup>rd</sup> sub-para); and Denmark I, para 126 (emphasis added).

greatest in the first hours and days of police custody. As yet, however, it has not sought to justify this view. For instance, visiting Austria in 1990, while apparently taken aback by the possibility that the Austrian police "may...refuse to allow a person to exercise the right [of notification] if it is believed that there may be a risk of collusion"<sup>46</sup> - which possibility was seemingly realised, if the claims of detainees interviewed at the time are to be believed - the Committee did nothing more than to re-state its basic position on delay/refusal, without ever offering a view on the propriety or otherwise of refusing exercise.<sup>47</sup>

On the evidence of its visit reports, therefore, and notwithstanding the frequent invocation of its *dicta* exhorting national authorities, *inter alia*, clearly to circumscribe the circumstances in which police officers may legitimately qualify the right not to be held incommunicado and to render it subject to appropriate safeguards, the CPT has been surprisingly discreet in the face of State party practice which appears *prima facie* to fail to match its basic precept. It may be, however, that it takes a pragmatic approach, accepting that in the course of a criminal investigation, the interests of justice may possibly be served by denying a suspect contact with a third party. This is something considered below in an examination of CPT precepts on the solitary confinement of detainees at the request of the police in order to advance a criminal investigation.<sup>48</sup> It is difficult to see, however, how one could justify such a denial in respect of other categories of detainee.

### *A right to inform a third party in person?*

Whether a detainee should be permitted to contact a relative or other third party of his

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<sup>46</sup> See Austria I, para 13.

<sup>47</sup> *Idem*, para 60 (3<sup>rd</sup> sub-para). See similarly Portugal I, paras 39 and 41 (mere re-statement of basic position notwithstanding the discovery in 1992 that court orders authorising a person's arrest may also contain provisions which "expressly prohibit" his contacting his family or other third party).

<sup>48</sup> See below, pp 464-5.



choice personally is a practical question on which opinions may understandably differ. In a criminal investigation, to permit such personal contact creates the risk, however remote, of collusion or the destruction of vital evidence. Yet, it might equally be argued that a person merely suspected of a crime, being innocent in the eyes of the law, should be permitted to exercise those rights to which he is entitled freely. Even more forcefully, a suspected illegal immigrant, detained in connection with deportation proceedings and wishing to contact his national consulate, may be said to pose no immediate threat to public order.

Under Norwegian law, it would appear, the act of notification may be performed only by the "prosecuting authorities",<sup>49</sup> a state of affairs on which the CPT has offered no opinion and therefore, we may assume, one which it is prepared to accept.<sup>50</sup> Similarly quiescently, the situation encountered in Denmark in 1990, wherein, "[a]s a rule", an arrested person was not permitted to telephone a third party in person, it being done rather, "on his behalf" by the police, was also allowed to pass without comment.<sup>51</sup> The matter appears, however, to have been resolved in recent reports. To the Romanian authorities, for example, the Committee has gone so far as to suggest that the requisite notification may be given "either directly or through the intermediary of a police officer",<sup>52</sup> from which suggestion it is possible to infer that the CPT is prepared, in principle, to accept a situation in which the police authorities may deny detainees the opportunity to contact a third party in person, rather, undertaking the responsibility themselves.

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<sup>49</sup> See Norway I, paras 11 and 31.

<sup>50</sup> It is worth noting, however, that the act of notification would appear to be a *duty* of such authorities rather than a discretion.

<sup>51</sup> See Denmark I, para 125.

<sup>52</sup> See Romania I, para 32 (1<sup>st</sup> indent). See, in the same connection, Bulgaria I, para 83; Netherlands (NA) I, para 46; and Belgium I, para 40 (1<sup>st</sup> indent).

### ***Juvenile detainees: the provision of enhanced protection***

The Dutch *Code of Criminal Procedure* appears, sensitively, to afford the parents or guardians of a detained minor "unrestricted access" to their child,<sup>53</sup> a gesture which demonstrates, it is submitted, that the right to inform a third party of one's detention may be capable of spawning further, related rights. The Austrian authorities, too, would appear to have taken cognisance of the unique vulnerability of "young people" in the present connection. For, since 1989, the CPT noted in its first visit report, the detention of juveniles by the Austrian police has been "subject to special rules, whatever the type of offence".<sup>54</sup> This "judicial protection", it continued, has been achieved by conferring on young detainees:

(i) "a right to contact...a friend or relative *and* a legal adviser or probation officer",<sup>55</sup>

(ii) a right to be "assisted by [such persons] from the time of their arrest and throughout the period of police custody",<sup>56</sup> and

(iii) an entitlement to "psychological assistance by a person of their choice during [police] questioning".<sup>57</sup>

Gestures like these have, clearly, profoundly influenced the CPT. It has observed recently, with evident approval, for example, that:

“[o]ver and above [guaranteeing the three fundamental] safeguards, certain jurisdictions recognise that the inherent vulnerability of juveniles requires that additional precautions be taken. These include placing police officers under a formal obligation themselves to ensure that an appropriate person is notified of

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<sup>53</sup> See Netherlands I, para 36, note 3 (citing Section 490 of the Code).

<sup>54</sup> See Austria I, para 15 (referring to the – amended - law known as “Jugendgerichtsgesetz”).

<sup>55</sup> Emphasis added.

<sup>56</sup> This provision would appear to reflect, in principle, that of Dutch law in this area, as examined above.

<sup>57</sup> Austria I, para 15.

the fact that a juvenile has been detained (regardless of whether the juvenile requests that this be done). It may also be the case that police officers are not entitled to interview a juvenile unless such an appropriate person and/or lawyer is present".<sup>58</sup>

***A general failure on the part of States to conform to CPT guidelines?***

As the tenor of much of this examination suggests, in some instances, State party law and practice on so many aspects of the right to notify a third party may be said to fall some way short of the standards adumbrated by the CPT. For instance, in Maltese law, the right of an arrested person *inter alia* to inform someone of the fact of his arrest is simply not guaranteed.<sup>59</sup> However, it is "[a]pparently...usual practice" for the country's police to ask an arrestee whether he wishes someone to be notified and, if he does, to contact the person named on his behalf.<sup>60</sup> According to inspectors interviewed at the Police General Headquarters, Floriana, in 1990, however, an inquiry would be made of the detainee "[only] after the first period of questioning".<sup>61</sup> Justifying this arrangement, officers rather disingenuously argued that "on an island the size of Malta, it would in any event be common knowledge within a very short time if someone was detained by the police; consequently, the latter had no interest in not giving notification of custody".<sup>62</sup> The CPT, for its part, "[did] not find this argument reassuring". It was "particular[ly]" troubled by the possible consequences

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<sup>58</sup> See 9<sup>th</sup> GR, para 23.

<sup>59</sup> See Malta I, para 15. See, similarly, Greece I, para 36; Netherlands I, paras 36 and 159; and Denmark I, para 125.

<sup>60</sup> Ibid.

<sup>61</sup> Idem, para 82.

<sup>62</sup> Idem, para 83.

for "non-Maltese" detainees who might have no relatives or friends on the island privy to the local network.<sup>63</sup>

### *State party exemplars of the CPT's fundamental precept*

Lastly in the present connection, it may be instructive to consider some of those criminal justice systems which, in the light of the experience of visiting delegations, may be said to reflect the standards and objects on the right of notification which have been developed by the CPT. Rather strikingly, the United Kingdom has been described as offering an "impressive level of legal protection against the ill-treatment of detainees [in police custody]".<sup>64</sup> In particular, the Codes of Practice developed under the *Police and Criminal Evidence Act 1984* ("PACE 1984") have found CPT favour, being described, *inter alia*, as "extremely good".<sup>65</sup> In England and Wales, the CPT remarked, following its visit in 1990, the right not to be held incommunicado is, together with other rights, "formally guaranteed by law".<sup>66</sup> Accordingly, it applies:

"as from the outset of a person's custody by the police; exercise of the [right] may be delayed only in certain closely defined circumstances, and any such delay is subject to clear time limits (a maximum of 36 hours or, in the case of persons detained under the prevention of terrorism legislation, 48 hours)".<sup>67</sup>

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<sup>63</sup> Ibid. By the time of the CPT's second periodic visit to the Party in 1995, although instructions providing for a right of notification had been issued to police officers, significantly, they did not have the force of law: see Malta II, para 27.

<sup>64</sup> See UK I, para 216.

<sup>65</sup> Idem, para 238.

<sup>66</sup> Idem, para 217.

<sup>67</sup> Ibid. For a more detailed account of English legislation and relevant Codes of Practice in this area, see paras 17-18 of the report; and, for an insight into the similar provisions which obtain in Northern Ireland, see UK II, paras 19 and 54.

More impressive still, in some States parties, it is clear, certain legal provisions afford *greater* protection than that sought by the CPT. They deserve briefly to be considered here, it is submitted, as exemplars of good practice.

***Foreign national detainees: entitlement to notify more than one third party***

In the Netherlands, when a person is subject to "administrative detention" - that is, detention for a "period...of no more than one month...imposed in respect of a foreigner in the interests of public peace, public safety or national security"<sup>68</sup> - he appears to be entitled to have more than one third party immediately informed of the fact of his detention, namely, his relatives *and* his diplomatic or consular representative.<sup>69</sup> This is so notwithstanding the general absence in Dutch law of an express right of notification in respect of persons detained for interrogation purposes or, indeed, in police custody generally.<sup>70</sup>

***Means of communication***

The nature of the communication between detainees and third parties is not something on which the CPT has so far expressed an opinion. This is understandable, for it is unlikely that a police establishment in any State party will not possess that most immediate method of communication, the telephone. In Northern Ireland, however, the exercise of the right of notification is the subject of more elaborate arrangements. Under Codes of Practice developed in conjunction with the *Police and Criminal Evidence (NI) Order 1989*, ("*PACE (NI) 1989*") persons detained under the Order may "send a letter or message" to a third party *and* make a telephone call - all of

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<sup>68</sup> See Netherlands I, para 15.

<sup>69</sup> *Idem*, para 36, note 3 (citing Section 84, para 2 of the *Decree on Aliens*). Cf Denmark I, para 125 (referring to an instance in which two foreign nationals detained at Kastrup airport in 1990 were denied contact with family members already in the country).

<sup>70</sup> *Idem*, para 36, main text.

which may be read or listened to.<sup>71</sup> Thus, detainees have not one, but two opportunities to exercise their right of notification, each different in character. This situation, the CPT acknowledged in its second UK visit report, develops the basic right "over and above [mere] notification of custody".<sup>72</sup>

### *Visit entitlement*

Further positive provisions in the Codes of Practice which elaborate the terms of *PACE (NI) 1989* permit detainees to enjoy "supervised visits...at the custody officer's discretion".<sup>73</sup> Inconsistently, however - and the object of evident CPT concern in 1993 - those persons detained by the police in Northern Ireland on suspicion of having committed certain offences related to terrorism (under the *Prevention of Terrorism (Temporary Provisions) Act 1989* ("PTA 1989")) do not appear to benefit from the same *largesse*. The Code of Practice to which their detention is subject "makes no reference to facilities of this kind", an omission which the CPT characterised as a "lacuna"<sup>74</sup> given that the Act authorises the detention of persons without charge for up to seven days.<sup>75</sup> The Committee's unease at the absence of any reference in the Code to the kinds of facility apparently available to ordinary criminal suspects in Northern Ireland (i.e. monitored letters, telephone calls and supervised visits, at the custody officer's discretion) was undisguised: "it would be highly undesirable", it stated, "for such facilities to be routinely denied throughout custody periods lasting up to seven days".<sup>76</sup>

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<sup>71</sup> See UK II, para 55.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Idem, para 18.

<sup>76</sup> Idem, para 55. It is worth noting in this connection that Rule 92.2, *EPR* provides that "[untried prisoners] shall...be allowed to receive visits from [family and friends] under humane conditions subject only to such restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution".

## *Conclusion*

Clearly, among States parties to the ECPT, law and practice on the right of notification is, to say the least, varied. Some Parties, like Malta, in 1990, offer no express legal guarantee at all. Others, like the Netherlands, while providing no guarantee in law, do provide for the right by way of circular or other sub-legislative guidance, such as a code of conduct.<sup>77</sup> Lastly, some, like the UK, make very comprehensive legal provision. Further, it is evident that not all persons apprehended by the police on Convention territory are entitled to exercise the right. In some Parties, distinctions are drawn between those categories of detainee who may exercise it as from the outset of custody and those who may only do so subsequently, once their legal status has altered in the course of a criminal investigation (e.g. German law). In other Parties, while no distinction is drawn between categories of detainee, the right may be guaranteed only at a particular juncture in the criminal justice process (e.g. Swedish law), leaving all detainees incommunicado during the initial period of their detention. In addition, the grounds on which the police authorities may exceptionally exercise their residual right to delay notification may be obscure or undeveloped (e.g. Icelandic and Finnish law) and the period of time during which such notification may be withheld inordinately long (e.g. Finnish and Spanish law). There remains much work to be done, therefore, before State party law and practice may be said truly to reflect the CPT desiderata in this area adumbrated at the outset of this chapter.<sup>78</sup>

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<sup>77</sup> See, e.g., Netherlands Response I, CPT/Inf (93) 20, p 21.

<sup>78</sup> See above, pp 61-2.

## Access to Legal Advice for Persons in Police Custody

### *Introduction*

The CPT considers that:

"[I]ike the right not to be held incommunicado, the right of access to legal advice [for persons detained by the police] is a fundamental safeguard against ill-treatment".<sup>1</sup>

Consequently, as with the former right, the creation of an *express legal guarantee* of a right of access to legal advice is, it believes, "an absolute necessity".<sup>2</sup> Merely respecting the right in practice, in the absence of a guarantee in law, would appear, therefore, to be insufficient.<sup>3</sup> Further, that guarantee, the Committee considers, should specify clearly that the right shall apply "as from the very outset of custody".<sup>4</sup>

### *Content of the right*

On the evidence of its published work, the guarantee sought by the CPT in this area comprises, in essence, the following:

"...the right to contact and to be visited by [an independent] lawyer (in both cases under conditions guaranteeing the confidentiality of... discussions) as

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<sup>1</sup> See Malta I, para 86. The right of access to lawyer, of course, exists *in addition to* the right to notify a third party. It does not exist in the alternative.

<sup>2</sup> *Idem*, para 112.

<sup>3</sup> See, e.g., Netherlands I, para 41 (wherein the CPT expressed disappointment at its discovery, in 1992, of a situation in which, during the first six hours of a person's detention, "access to a lawyer may be granted, but is not a right").

<sup>4</sup> See, e.g., Sweden I, para 25 and, similarly, para 156. (*Cf* Swedish law and practice in this area: right to legal advice seemingly unavailable in the pre-arrest/suspicion stage of a police investigation: Sweden III, paras 18-21). See also Turkey I, paras 17, 19 and 24-5 (persons suspected of State Security Court offences granted access to a lawyer only after an elapse of four days; ordinary criminal suspects granted access only when making a formal statement, notwithstanding the terms of domestic law).



well as, in principle, the right...to have the lawyer present during interrogation".<sup>5</sup>

As with the right to notify a third party of the fact of one's detention, however, the right of access to legal advice may be made subject to a power vested in the police exceptionally to delay or restrict access, which power, the CPT believes, should be "clearly circumscribed" and, like the right of notification, made "subject to appropriate safeguards (e.g. such delay or refusal to be recorded in writing together with the reasons and to require confirmation by a senior officer)".<sup>6</sup>

### *Justifying the right*

Guaranteeing a right of access to a lawyer as from the very outset of police custody, like the right not to be held incommunicado, is, the CPT holds, "essential" to the struggle to eliminate torture and ill-treatment, since:

"[t]he period immediately following a person's loss of liberty is the one during which the risk of intimidation and ill-treatment is the greatest".<sup>7</sup>

The possibility for persons to have access to a lawyer during that period, it considers:

"...will have a dissuasive effect on those minded to ill treat detained persons; moreover, a lawyer is well placed to take appropriate action if ill-treatment actually occurs".<sup>8</sup>

The Committee might contend, further, that if a detainee is denied access to a lawyer during the initial stages of his custody, his defence against any action taken against

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<sup>5</sup> See, e.g., 2<sup>nd</sup> GR, para 38; and Germany I, para 35.

<sup>6</sup> See, e.g., Malta II, para 28, sub-para (i).

<sup>7</sup> See, e.g., Norway I, para 33; Netherlands I, paras 41 (2<sup>nd</sup> indent) and 159; and Belgium II, para 36.

<sup>8</sup> See, e.g., Czech Republic I, para 30; Turkey I, para 19; and France III, para 39.

him subsequently, such as the preferment of a criminal charge or, in the case of foreign nationals, the commencement of deportation proceedings, may be prejudiced. For, ready access to a lawyer may, *ipso facto*, increase the likelihood of better representation at subsequent hearings. In Sweden in 1991, for example, "a large number" of prisoners complained to a visiting CPT delegation about the legal assistance which they had received when arrested and placed on remand. "Many" persons alleged that they had seen their defence lawyer "for the first time only minutes before or even at the initial remand hearing". As a result, they claimed, "their interests had not been defended properly".<sup>9</sup>

### *Circumscribing the basic right*

#### *The right-holder*

It is the axiomatic view of the CPT that *every* person detained by the police should, without exception, be entitled to seek and receive legal advice. Accordingly, provisions which guarantee access are flawed, it believes, if they limit the right merely to certain categories of detainee. To the Austrian authorities, for example, it has postulated that the "extreme...rar[ity]" with which, in 1990, persons detained by the police seemed to obtain access to lawyers during the initial period of their custody<sup>10</sup> may have been due to the fact that under contemporary Austrian law, only persons suspected of having committed administrative offences<sup>11</sup> were entitled to be "visit[ed] and assist[ed]" by a legal adviser as from the outset of their custody.<sup>12</sup> Persons suspected of having committed criminal offences did not enjoy such a right,

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<sup>9</sup> See Sweden I, para 28.

<sup>10</sup> See further below, p 90.

<sup>11</sup> Which offences include breaches of the highway code and disturbances of the peace: see Austria I, para 11.

<sup>12</sup> By virtue of Article 36, para 4 of the country's *Verwaltungsstrafgesetz*.

limited, as they were, merely to "telephone contact" with their lawyers.<sup>13</sup> In its subsequent visit report, the CPT recommended that the Austrian authorities "extend" the right of visit and assistance "to persons suspected of having committed a criminal offence".<sup>14</sup> As it does in respect of the right to notify a third party, therefore, the CPT believes that all persons detained by the police, "for whatever reason", should be granted a right of access to a lawyer as from the outset of their custody.<sup>15</sup>

*When may custody be said to begin?*

We have already seen, in determining the moment at which the right not to be held incommunicado becomes exercisable, how difficult it is accurately to interpret when, in the view of the CPT, a person's detention may be said actually to commence. The same problem, of course, arises in respect of the right of access to a lawyer. Notwithstanding such difficulties, for present purposes, it is submitted, we should regard the CPT's request of the Danish authorities, following its visit in 1990, whether a person taken into police custody is entitled to obtain legal advice "as from the moment he is apprehended (as distinct from the moment when the first interrogation takes place)"<sup>16</sup> as a most apposite expression of its view on the matter. Under contemporary Danish law, it appears, access to a lawyer and his presence during interrogations were guaranteed "[only] from the moment [detainees were] questioned for the first time by the police".<sup>17</sup>

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<sup>13</sup> See Austria I, paras 14 and 59.

<sup>14</sup> *Idem*, para 60 (4<sup>th</sup> indent).

<sup>15</sup> See further Czech Republic I, para 30 (under Czech law as it stood in 1997, a detainee was entitled to contact a lawyer at the moment of charge (para 29), but not before or at any other stage of police custody); Poland I, para 49 (denial of access to a lawyer during the first 48 hours of police custody authorised because detainee not legally an "accused"); and Sweden III, para 21.

<sup>16</sup> See Denmark I, para 127.

<sup>17</sup> *Idem*, App 2, para 7. See, similarly, Finland II, para 31 (regarding the operation in practice of Section 10 of the country's *Pre-Trial Investigation Act*).

### *What kind of contact should a lawyer and his client enjoy?*

Simply guaranteeing a right of access to legal advice should not, the CPT considers, mark the extent of authorities' responsibilities in this area. As might be expected, it seeks, in addition, precision in determining the nature of the contact between a lawyer and his client. For instance, it has sought to know of the Danish authorities whether the "precise content" of a domestic guarantee includes, *inter alia*, a right of *visit*.<sup>18</sup> Finnish law would appear to be quite developed in this regard. It provides that a person "suspected of an offence and apprehended, arrested or remanded for trial... [has, in principle,] the right to be in contact with his counsel through visits, by letter or by telephone".<sup>19</sup> The CPT, it is no surprise, "welcome[d]" such provision.<sup>20</sup>

### *Guaranteeing the confidentiality of discussions*

We have already seen that the CPT considers that detainees should be able to contact and be visited by a lawyer "in conditions guaranteeing the confidentiality of [their] discussions".<sup>21</sup> So fundamental to the effective exercise of the right is this guarantee, it seems, that the Committee has sought to commend it as "the key element in the concept of access to a lawyer for persons in police custody".<sup>22</sup> Accordingly, it has insisted that:

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<sup>18</sup> *Idem*, para 127 (2<sup>nd</sup> indent).

<sup>19</sup> See Finland I, para 31 (citing Section 10 of the country's *Pre-Trial Investigation Act*).

<sup>20</sup> *Idem*, para 32.

<sup>21</sup> See above, p 78.

<sup>22</sup> See UK II, para 63. See, similarly, Spain I, para 50 (regarding the CPT's view that the possibility of a private consultation, particularly during the period immediately after loss of liberty, represents "the core of the notion of access to legal assistance". However, *cf* Spain V, para 47, wherein, notwithstanding the CPT's views, the complete denial of access to a lawyer for a suspected terrorist of two and a half days in January 1997, during which time, he alleged, he was subjected to particularly intense ill-treatment by the Civil Guard, was highlighted).

"[f]or the right of access to a lawyer to be fully effective as a means of preventing ill-treatment, it must include the right...to consult in private with a lawyer in all cases".<sup>23</sup>

Unsurprisingly, therefore, in Finland, in 1992, the CPT was "concern[ed]" to learn that in Finnish law, "in exceptional cases, discussions with a lawyer may be listened to, and correspondence inspected" by the detaining authorities,<sup>24</sup> and in Italy, in 1995, that the privacy of lawyer-client consultations in establishments operated by the carabinieri is guaranteed only "when that is possible, having regard to the existing infrastructures".<sup>25</sup> In other States parties, too, domestic law authorises breaches of the confidentiality of lawyer-client discussions. In Northern Ireland, for instance, although both *PACE (NI) 1989* and the *Northern Ireland (Emergency Provisions) Act 1991* ("the *EPA 1991*") provide that persons detained by the police may consult with a solicitor in private, by virtue of Section 45, *EPA 1991*, a police officer of the rank of Assistant Chief Constable or above may direct that a detainee "may only consult a solicitor in the sight and hearing of a uniformed officer of the rank of Inspector or above".<sup>26</sup> Visiting in July 1993, a delegation learned that this power was "apparently used rarely".<sup>27</sup> Nevertheless, the CPT subsequently felt compelled to "express strong reservations" about the possibility of vitiating the confidentiality of detainee/lawyer discussions in this way.<sup>28</sup>

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<sup>23</sup> *Idem*, para 60. See similarly Finland I, paras 32 and 148; and Romania I, para 35 (*cf* Romanian police practice in 1995: presence of police officers during lawyer-client consultations possible during period of "arrestation preventive", which, it seems, could last for some time (para 12)).

<sup>24</sup> See Finland I, paras 31-2 (regarding Section 12 of the country's *Remand Imprisonment Act*); and now Finland II, para 32.

<sup>25</sup> See Italy II, para 52.

<sup>26</sup> See UK II, para 60.

<sup>27</sup> In some 2% of cases, according to a Home Office study.

<sup>28</sup> UK II, para 60.

As for police practice in Northern Ireland, at the Castlereagh Holding Centre, where, at the time of the visit, two rooms had been set aside for detainee-lawyer consultations, "[t]he normal practice", apparently, "was for a police officer to observe the interview from outside the room, through a window in the door".<sup>29</sup> It was noted by the visiting delegation that "unless the detainee and his lawyer spoke loudly, they could not be heard from the outside". However, "several detainees spoken to expressed the firm conviction that their discussions with lawyers had been overheard by police officers", some alleging, even, that "detectives had taunted them by repeating details of [the] discussions". Further, a number of lawyers "also expressed doubts as to the *de facto* privacy of their discussions..."<sup>30</sup>

Breaches of lawyer-client confidentiality also appear to be authorised by Sweden's *Code of Judicial Procedure*. Section 9 of Chapter 21 of the Code provides that a person arrested by the police (or remanded in custody) shall have a public defence counsel appointed if he so requests and that such defence counsel may speak in private with his client. A counsel *other than* a public defence counsel, however, may do so "only upon the consent of the investigating authority or the public prosecutor".<sup>31</sup> Visiting the country in May 1991, the CPT had clearly been troubled by this distinction, for in its subsequent visit report it sought to ascertain the grounds on which the police or a public prosecutor might withhold their consent to a confidential meeting between a private defence counsel and his client and whether there exist any circumstances in which a public defence counsel may be denied such a meeting.<sup>32</sup>

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<sup>29</sup> *Idem*, para 61. A "similar arrangement", it seems, obtained at Gough Barracks Holding Centre.

<sup>30</sup> *Ibid.* In the same connection, in France, in 1996, a visiting CPT delegation observed in a number of police establishments visited how the acoustics of rooms set aside for lawyer-client consultations permitted conversations to be heard outside: see France III, para 39.

<sup>31</sup> See Sweden I, para 21 and App III, para 10.

<sup>32</sup> *Idem*, para 27. See, similarly, Netherlands I, para 42 (regarding the operation in practice of Section 50 of the country's *Code of Criminal Procedure*).

### ***Providing exceptions to the right***

Like the right to notify a third party of the fact of one's detention, the right of access to legal assistance, the CPT considers, may be subject to a power of delay on the part of the authorities "in order to protect the interests of justice". However, such power, it has asserted, should be "clearly defined" and its application "strictly limited in time".<sup>33</sup> Thus, while the granting of access to a lawyer as from the outset of police custody is, the Committee believes, crucial to the prevention of ill-treatment, it is prepared to "acknowledg[e]" that:

"...in order to protect the interests of justice, it may exceptionally be appropriate - for a certain period - to delay (or restrict) access by a [detainee] to a lawyer of his choice".<sup>34</sup>

The Committee's choice of wording here is significant, it is submitted, for, in a reference to the words underlined, it has stated that:

"...it finds it hard to understand why an exception of this kind should apply to access to any lawyer (and also, therefore, to an officially appointed lawyer)".<sup>35</sup>

To apply the exception to *any* lawyer, whether chosen by the detainee or appointed by the State, is, it considers, "difficult to justify".<sup>36</sup> Clearly, therefore, any power to delay or restrict access to legal advice - which power, the CPT concedes, may legitimately vest in the police - should not be an absolute one; a detainee should not be "totally denied [access] during the period in question".<sup>37</sup> Rather, *every* person detained by the police, it has declared, in a gesture reminiscent of its fundamental

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<sup>33</sup> See 2<sup>nd</sup> GR, para 37.

<sup>34</sup> See Netherlands I, paras 42 and 159 (original emphasis) and now Netherlands II, para 34; and Poland I, para 50.

<sup>35</sup> Ibid (original emphasis).

<sup>36</sup> Idem, para 159.

<sup>37</sup> See Greece I, para 40; UK II, para 58; and Belgium II, para 36.

position on this issue, "has the right to consult in private with a lawyer (*where necessary, an officially appointed lawyer*), without delay".<sup>38</sup> This right, it has insisted, should be both "unrestricted"<sup>39</sup> and the subject of a "legally binding provision".<sup>40</sup>

What this means in practice, it appears, is a guarantee - "as far as possible"<sup>41</sup> - of access to (including the right to consult in private with<sup>42</sup>) "another independent lawyer who can be trusted not to jeopardise the legitimate interests of the police investigation..."<sup>43</sup> It is in this area that the right of access to a lawyer may be said to differ fundamentally from that to notify a third party, the complete denial of which, it seems and as some commentators have suggested, the CPT is prepared to countenance in certain, closely defined circumstances.<sup>44</sup>

### *State-sanctioned lawyers*

Seemingly actuated by the need to balance the interests of justice and those of the individual detainee, in its 2nd General Report, the CPT suggested that:

"...[the development of] systems whereby, exceptionally, lawyers...can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of [the right] of access to legal advice".<sup>45</sup>

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<sup>38</sup> See Netherlands I, paras 42 and 159 (emphasis added).

<sup>39</sup> See Finland I, para 32. This is doubtless what the CPT meant when, in its 2<sup>nd</sup> General Report, it suggested that the power to delay, like that which, it considers, may vest in the authorities in respect of the right to notify a third party, should be "clearly defined" and its application "strictly limited in time": see 2<sup>nd</sup> GR, para 37.

<sup>40</sup> See UK IV, paras 61 and 163. Accordingly, provision merely in a Note for Guidance rather than in a binding Code of Practice is insufficient.

<sup>41</sup> See UK II, para 58.

<sup>42</sup> See Finland II, para 32.

<sup>43</sup> See, *inter alia*, Greece I, para 40; Poland I, para 50; Netherlands II, para 34; and France III, para 39.

<sup>44</sup> See above, pp 69-70 and also Morgan and Evans (1998), p 272.

<sup>45</sup> See 2<sup>nd</sup> GR, para 37. A similar suggestion in respect of the right of access to a medical doctor for persons detained incommunicado by the police is examined below, at p 114-15.



Such lawyers, it follows, could operate as officially-appointed legal counsel whenever a detainee is denied access to his own, nominated lawyer, thereby obviating the possibility that he is "totally denied" access to legal advice in police custody. In addition, of course, they may be of use to persons detained by the police who either do not have their own lawyer or do not know the name of a lawyer who may be contacted.<sup>46</sup>

In sum, therefore, it seems that the CPT is prepared to countenance the placing of restrictions on a detainee's right of access to a lawyer *of his own choosing* where the interests of justice so require. However, it is disinclined to see access denied absolutely: a detainee, it considers, should always be entitled to contact and be visited by an independent lawyer, in confidence, as from the very outset of his custody, even if the latter must be "officially appointed". In this way, it may be suggested, a detainee's inalienable right of access may remain fundamentally unaltered; the CPT's apparent concession of a certain State discretion ought not to dilute the essence of the right in practice.<sup>47</sup> Self-evidently, such officially appointed lawyers must be competent. They must be sufficiently familiar with the domestic criminal justice process to be able effectively to represent their client. They should not, therefore, act as little more than "silent observers" during proceedings and should endeavour to make appropriate contact with their client before the commencement of such proceedings.<sup>48</sup>

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<sup>46</sup> See, e.g., Ireland II, para 23. In Ireland, it appears, "informal arrangements" exist whereby officers will furnish suspects who know of no lawyer with the names of solicitors willing to attend at the station. However, no panel of duty solicitors has yet been drawn up and officers are not obliged to provide detainees who know of no lawyer with a list of names. Such matters, the CPT stated, should be the subject of "more formal arrangements".

<sup>47</sup> Of course, any putative right of access is rendered nugatory if the State is not prepared, even, to permit access to an independently appointed lawyer: see, e.g., Turkey I, para 18.

<sup>48</sup> See Romania I, paras 37 and 79.

### *Defining the exception*

Unfortunately, the Committee has not yet fully explained various terms used by it to circumscribe the power of the State to delay or restrict access. For instance, while a term like "[protecting] the interests of justice", although imprecise, is difficult to interpret other than conventionally (i.e. as connoting the need to avoid prejudicing a police investigation through, for example, collusion – deliberate or otherwise, on the part of the detainee or his lawyer - with others or the destruction of evidence), it is much less clear what the CPT means by "a certain period", being the period during which to delay or restrict access may "exceptionally" be "appropriate". Is a delay or restriction "appropriate" if it obtains only for a few hours? Is it still "appropriate" after a day or even 48 hours? The CPT has yet to say - although, it has, understandably, expressed "reservations" about the possibility of denying or restricting contact between a detainee and his lawyer for periods of up to six days.<sup>49</sup>

It is, similarly, difficult to determine with precision the meaning of the CPT's parenthetical reference to "restrict[ed]" - not merely *delayed* - access to a detainee's chosen lawyer, restricted access, like delayed access, being, in the view of the Committee, "exceptionally... appropriate". Interpreted narrowly, a restriction may connote nothing more proximate than correspondence by letter or, at best, telephone.<sup>50</sup> We have seen, however, how disinclined the CPT is to countenance anything less than *personal* contact between a lawyer and his client.<sup>51</sup> Arguably just as damaging to the preparation of a detainee's case would be the imposition of restrictions which, say,

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<sup>49</sup> See *Netherlands I*, paras 42 and 159. It will be recalled that in the context of the right not to be held incommunicado, the CPT is of the view that a power to delay notifying a third party of the fact of one's detention for up to 48 hours is acceptable: see above, pp 68-9.

<sup>50</sup> See, e.g., pre-1991 Austrian law on the detention of criminal suspects: above, pp 80-1.

<sup>51</sup> It is interesting to see, however, that in recommending to the Maltese authorities the introduction of a right of access to a lawyer for persons detained by the police, the CPT has suggested that only *telephone contact* is of *immediate* necessity; a right to personal contact need only be envisaged "in the short term" (in other words, it may be inferred, the CPT is prepared to countenance contact by indirect means as a short-term expedient and as a prelude to personal contact): see, e.g., *Malta II*, para 28.

limit the number of visits that a legal representative may make to his client or the amount of time that he may spend with him during each encounter. It is submitted that the CPT's formula as to acceptable restrictions is so vaguely expressed - or, at least, so undeveloped - as to permit, conceivably, all of these possibilities.

The potential harm that is occasioned by a failure adequately to circumscribe the power of the police to impose restrictions on the right may be illustrated by the following example. Under prevention of terrorism legislation as it operated in Northern Ireland in 1993, it was possible for the police to deny a detainee access to a lawyer for a period of 48 hours following a previous consultation. As a consequence, the number of consultations between a detainee and a lawyer might be limited to a maximum of three in any seven day period of detention.<sup>52</sup> "More significant[ly]", it meant that access to a lawyer might be granted "immediately following arrest, but before the interview process beg[an], and then subsequently denied throughout the whole period during which the person [was] detained".<sup>53</sup> This, the CPT clearly felt, effectively vitiated the right of access to legal advice conferred on persons detained under the legislation, particularly in light of the fact that the "majority" of such persons were either released or charged within two days.

***The provision, free of charge, of independent legal advice***

The notion of furnishing persons detained by the police with access to an independent - albeit State-financed - system of legal advice-giving has been advocated by the CPT ever since its inception. The right to such independent legal advice and to the cost of its provision flow naturally from the Committee's belief that the restrictions which, as we have seen, it considers may legitimately be placed on the right of access to a

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<sup>52</sup> Seven days, it will be recalled, is the maximum period of time that a person detained on suspicion of having committed a terrorist-related offence may be held without charge in the jurisdiction.

<sup>53</sup> See UK II, para 59.

detainee's chosen lawyer should not amount to a complete abnegation of his right to legal advice. That securing access to free and independent legal advice for persons detained by the police is a priority of the CPT was evident in its first Austrian visit report. Therein, in the light of some quite startling evidence to emerge from its delegation's visit in 1990, it recommended that:

"...urgent consideration be given to the possibility of devising a scheme for the provision, free of charge, of independent legal advice to persons in police custody".<sup>54</sup>

In this regard, although contemporary Austrian police practice was the subject of a ministerial circular which provided that a person detained by the police was entitled to inform both a third party of his choice and a lawyer of the fact of his detention, police officers interviewed in the course of the visit intimated that it was "extremely rare for persons to have access to legal advice during the initial period of police custody".<sup>55</sup> One station officer interviewed "could not recall any instance of [legal] advice being provided in five years experience"; while another suggested that "possibly [just] one out of 700 detainees so far handled by his station in 1990 had [had] the benefit of advice from a lawyer while in police custody".<sup>56</sup> Speculating as to why this should have been so, the CPT suggested that what Austrian criminal procedure lacked "most fundamentally" was a "developed infrastructure...permitting the provision of legal advice free of charge and at short notice to persons in police custody".<sup>57</sup> As a result of this and other deficiencies in the same area – such as the general failure of the Austrian police to respect in practice the right of detainees to contact both a third

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<sup>54</sup> See Austria I, para 60 (6<sup>th</sup> indent).

<sup>55</sup> *Idem*, para 59.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* (4<sup>th</sup> indent).

party and a lawyer following their detention and the right of visitation by a lawyer during the initial period of a police investigation<sup>58</sup> - the Committee could only conclude that, "save for someone who knows the name of a lawyer in advance, and who has the means to pay for his services, there is in practice an absence of any form of independent legal advice for detainees in police stations".<sup>59</sup>

Clearly, it is the view of the Committee that appropriate legal representation should be made available to every person taken into police custody even if this means providing it at the expense of the State. It was in this spirit, it may be inferred, that to the Danish authorities, regarding the statutory guarantees offered in this area under domestic law at the time of its visit in 1990, it posed the question:

"... what happens if a person in police custody states that he wishes to have legal advice but that he does not know of a lawyer and/or is not in a position to pay for a lawyer's services?"<sup>60</sup>

### *Presence of a lawyer during interrogations*

It will be recalled that the CPT's view on the entitlement of persons in police custody to the presence of a lawyer during questioning is the rather elliptical notion that the right should obtain "in principle".<sup>61</sup> Such a notion would seem to permit the creation of exceptions to the right, with the result that, in certain circumstances, the police authorities could prevent a detainee's lawyer from attending his client's interrogation. The CPT was curiously quiescent on the matter in its early published work. More

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<sup>58</sup> Ibid (1<sup>st</sup> and 3<sup>rd</sup> indents).

<sup>59</sup> Ibid.

<sup>60</sup> See Denmark I, para 127 (3<sup>rd</sup> indent). For further evidence of CPT concern about the provision of legal services to persons held in police custody but unable to pay for a lawyer, see Germany I, para 35; Ireland I, para 45 (and now Ireland II, para 24 – no provision of legal aid to persons detained in Garda establishments, but the situation is under review); and Bulgaria I, para 87 (wherein the Committee averred that "[i]t goes without saying that if the right of access to a lawyer is to be exercised effectively there must be a system of legal aid for detained persons").

<sup>61</sup> See above, p 79.

recently, however, it has developed a formula which, given the consistency with which it appears in published visit reports, may now be regarded as its fundamental position on the question. This formula develops its comparatively skeletal initial position in a number of interesting ways. Today, therefore, the right of access to legal advice for persons in police custody, the Committee considers, connotes an entitlement:

“...to have a lawyer present during any interrogation conducted by the police (whether this be during or after the initial period of police custody). Naturally, the fact that a detained person has stated that he wishes to have access to a lawyer should not prevent the police from beginning to question him on urgent matters<sup>62</sup> before the lawyer arrives. Provision might also be made for the replacement of a lawyer who impedes the proper conduct of an interrogation, though any such possibility should be closely circumscribed and made subject to appropriate guarantees”.<sup>63</sup>

The importance of a legal presence during interrogation was emphasised to the Spanish authorities in the light of the Committee’s first visit, in 1991. Learning that in Spanish police practice, access to a lawyer could be denied until a detainee was ready to make a formal statement *after* his interrogation, it remarked that:

“[a] right of access to legal assistance loses much of its effectiveness if it consists only of the presence of a lawyer when a statement is made and recorded...It provides little protection against the possible intimidation or

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<sup>62</sup> I.e. more than merely “informal conversations”: see Romania I, para 36.

<sup>63</sup> See, e.g., Poland I, para 50; Belgium II, para 36; France III, para 39; Spain V, para 53; and Spain VI, para 19. The CPT has yet to indicate what matters it regards as sufficiently “urgent” to warrant questioning in the absence of a lawyer and what circumscription and guarantees it considers are appropriate in respect of the replacement of obstructive lawyers.

physical ill-treatment of the detainee during the period prior to the interview at which his statement is given”.<sup>64</sup>

Interestingly, the Spanish authorities sought to justify the practice adhered to by reference to criminal procedure. The importance of access to a lawyer for persons detained by the police, they insisted, derives not from the protection against ill-treatment afforded thereby, but from that lawyer’s ability to render any defence to a criminal charge more effective. Consequently, they claimed, detainees have no need to consult a lawyer until in a position to make a formal statement.<sup>65</sup> The CPT, it is no surprise, disagreed, believing that the right’s very “*raison d’etre*” is to enhance detainees’ protection against ill-treatment as from the very moment they are obliged to remain with the police. Accordingly, its concerns are “quite distinct from the issues of criminal procedure (including the right to a defence and the evidential value of statements given by detained persons)...raised by the Spanish authorities”.<sup>66</sup>

### ***Conclusion***

Looked at as a whole, CPT precepts on the right of access to a lawyer in police custody may, with one or two exceptions, be considered analogous to the provisions of the *European Prison Rules* on the right of “untried prisoners” to legal representation. In this regard, Rule 93, *EPR* provides that:

“Untried prisoners shall be entitled, as soon as imprisoned, to choose a legal representative, or shall be allowed to apply for free legal aid where such aid is

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<sup>64</sup> See Spain I, para 50. See also Spain V, para 47 (wherein the CPT remarked that, where a lawyer is denied access to his client until the latter is required to make a formal statement and, once access has been granted, is denied the chance to speak with his client in private, he is rendered little more than an “observer”).

<sup>65</sup> See Spain VI, para 20.

<sup>66</sup> *Idem*, para 21. Following this exchange of views, the Spanish authorities, the CPT was “pleased to learn”, indicated that they would adopt measures with a view to guaranteeing a right of access to a lawyer as from the outset of detention.

available and to receive visits from that legal adviser with a view to their defence and to prepare and hand to the legal adviser, and to receive, confidential instructions. On request, they shall be given all necessary facilities for this purpose. In particular, they shall be given the free assistance of an interpreter for all essential contacts with the administration and for their defence. Interviews between prisoners and their legal advisers may be within sight but not within hearing, either direct or indirect, of the police or institution staff...”

The CPT, it should be noted, has yet to address the question of access to an interpreter. Nevertheless, the safeguard which it seeks in this area is a comprehensive one, connoting a legal guarantee of access from the moment a person is obliged to remain with the police, which guarantee is additional to the right to notify a third party of the fact of one's detention. This right of access comprises a right to contact and be visited by a lawyer, in both cases in conditions guaranteeing the confidentiality of discussions, as well as, *in principle*, the right to have a lawyer present during interrogations. In closely defined circumstances, access to a detainee's chosen lawyer may be legitimately delayed for a strictly defined – though, as yet, unspecified – period of time and other – again unspecified – restrictions may be placed on the access granted. However, access to legal advice should not be totally denied during that period. Accordingly, access to another independent, trustworthy lawyer, where necessary drawn from a pre-established list, should be facilitated. Further, it is desirable that a system of criminal legal aid be available for those unable to pay for the services of a lawyer.

As with the right of notification, among Parties to the ECPT, both law and practice on the right to legal advice for persons held in police custody vary markedly.



Some States, like Malta (again), make no provision at all.<sup>67</sup> Others, like the Netherlands, offer a right (of sorts) in practice without having enshrined it in law. In some (e.g. Sweden and Turkey), access is not available as from the outset of custody; while, in others (e.g. Austria), a distinction is drawn between different categories of detainee. Elsewhere, the guarantee only operates as from a particular moment in the criminal justice process (e.g. Czech and Polish law) and the power vested in the authorities to delay access may be considerable (e.g. the Netherlands, where a delay of up to six days is possible).

The confidentiality of lawyer-client consultations is not guaranteed in a number of States (e.g. Romania, Finland, Italy and Sweden), while a larger number still do not provide any form of free legal advice for the impecunious detainee. Like the right to notify a third party, therefore, there is some distance to travel before anything approximating uniform practice will obtain among Parties in the provision of a right of access to a lawyer for persons detained by the police.

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<sup>67</sup> See Malta II, para 28.

## **The Right to a Medical Examination by a Doctor of One's Own Choosing (and Other Related Safeguards)**

### *Introduction: the basic precept*

The right to request and receive a medical examination by a doctor of their own choosing, in addition to any medical examination carried out by a doctor called by the police authorities, is the last of the three rights vested in persons detained by the police to which the CPT "attaches particular importance". Like the two others, this third "fundamental safeguard" should, the Committee considers, "apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned..."<sup>1</sup> For their part, in the related context of the detention of "untried prisoners", the *European Prison Rules*, it is worth noting, provide that:

"...prisoners shall be given the opportunity of being visited and treated by their own doctor or dentist if there is reasonable ground for the application. Reasons should be given if the application is refused. Such costs as are incurred shall not be the responsibility of the prison administration".<sup>2</sup>

As to the nature of medical examinations carried out on detainees - notably, but not exclusively, those conducted by doctors summoned by the police authorities - "all such examinations", the CPT has proclaimed:

"should be conducted out of the hearing and preferably [unless the doctor concerned requests otherwise] out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and

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<sup>1</sup> See above, p 59.

<sup>2</sup> Rule 98, *EPR*.

the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer".<sup>3</sup>

Thus, the precept embraces questions of privacy, recording practices and access to the information obtained during the examination. There is no reason, it is submitted, why the same precept ought not to apply *mutatis mutandis* to medical examinations carried out by doctors chosen by detainees.<sup>4</sup>

The salient features of the precept are, to a certain extent, self-explanatory and may be dealt with, if at all, very quickly. However, other features, particularly those with which the CPT has sought to supplement its fundamental position, may require more considered scrutiny.

### *Developing the basic precept*

#### *An express guarantee*

As it holds in respect of the two other fundamental safeguards against police ill-treatment, the CPT considers that the possibility that a detainee may be examined by a doctor of his choice, in addition to any doctor provided by the police authorities:

"should be *expressly* provided for in respect of all stages of police custody".<sup>5</sup>

Again, like other safeguards, it seems that satisfactory provision requires legislative enactment; simple codification, in, for example, a subsidiary note of guidance, falls

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<sup>3</sup> See 2<sup>nd</sup> GR, para 38.

<sup>4</sup> Evans and Morgan discuss in some depth the kind of protection which, the Committee considers, ought to be made available to a detainee's nominated doctor and conclude that in the light of suggestions made by States parties that the police are responsible for the safety of doctors, the risk of hostage-takings and attempted escape, "the CPT has indicated that privacy [of consultation] is preferable, unless the doctor concerned requests otherwise" (though a "significant" number of Parties find such a prospect "unacceptable"): see Evans and Morgan (1998), p 280.

<sup>5</sup> See Denmark I, paras 128 and 143 ( *cf* Danish law: *idem*, App II, para 22); and, similarly, Finland I, paras 35 and 149 (and now Finland II, para 34); and Sweden III, para 24 (wherein the CPT made it clear that a failure to make specific provision gives the police too great a discretion to determine the necessity of an examination).

short of the suggested precept. For instance, visiting the Netherlands, in 1992, the Committee learned that Dutch legislation on police custody “does not regulate the matter of detainees’ access to a doctor”. Rather, the right is provided for by way of “ministerial instructions...issued jointly by the Ministers of Justice and the Interior, in co-ordination with the Minister of Health and the Dutch Medical Association”. In its subsequent visit report, the Committee averred that “even though it may already be the effect of the instructions...the Dutch authorities [should] expressly provide for [an effective right of access]”.<sup>6</sup>

### *A right as from the outset of custody*

Like the rights not to be held incommunicado and of access to a lawyer, the right to a medical examination (though, as we shall see, not necessarily one carried out by a doctor of a detainee’s own choosing) is a right which, the CPT believes, ought to be exercisable as from the very outset of a person’s custody.<sup>7</sup> “In the interests of both the prevention of ill-treatment and health care in general”, it has stated, “it is essential that a person taken into police custody is made the subject of a medical examination as soon as possible”.<sup>8</sup> Accordingly, it considers that:

“...toutes les personnes placees dans un lieu de detention de la police soient vues dans les 24h par un medecin (ou par un assistant medical/infirmier diplome faisant rapport a un medecin) et fassent, s’il y a lieu, l’objet d’un examen medical approfondi”.<sup>9</sup>

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<sup>6</sup> See Netherlands I, paras 44 and 46. See in the same connection Greece I, para 43 (adoption of “specific legal provisions” recommended).

<sup>7</sup> See, e.g., Luxembourg I, paras 32 and 144; and France I, para 44 (*cf* contemporary French law: *idem*, para 43).

<sup>8</sup> See Romania I, para 39.

<sup>9</sup> *Ibid.* In 1995, Romanian police practice in some establishments appears to have fallen short of this standard, with potentially serious consequences, it seems, for the control of the spread of infectious diseases: *idem*, para 81.

This, it seems, is what, in practice, the CPT now expects of the police authorities in facilitating access to a doctor “without delay”.

*Access to a doctor of the detainee's own choosing*

The CPT has supplemented its basic understanding of the right to a medical examination in a variety of ways. To the Austrian authorities, for example, it has recommended that:

"in addition to examination by a police doctor,<sup>10</sup> a person in police custody should have the right to be examined if he so wishes by a doctor *of his own choice*".<sup>11</sup>

This right, the Committee has sought to emphasise, is exercisable, not merely in the alternative – i.e. *instead of* any examination carried out by a doctor summoned by the police – but *supplementary to* any such examination: i.e. “si la personne concernée estime que l'intervention du médecin désigné par l'autorité compétente devrait être complétée par un second examen”.<sup>12</sup> In this regard, in what may be seen as a propitiating gesture towards the Austrian authorities following its visit in 1990,<sup>13</sup> the CPT suggested, parenthetically, that “such a right exists in other countries and has not caused insuperable practical problems”.<sup>14</sup> Unfortunately, the Committee offered no examples of such parties. However, it might have cited, it is submitted, Ireland, with the proviso that the Irish police do retain a residual discretion completely to *deny* a

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<sup>10</sup> Or, at least, a doctor designated or called by the police for the purpose of examining a person in their charge.

<sup>11</sup> See Austria I, para 64 (emphasis added). Cf Austrian law: *idem*, para 61 (“no right to be examined by a private doctor”). See, similarly, Malta I, para 88 (at the Sliema and Valletta District Police Headquarters in 1990, if a detainee requested or appeared to need medical attention, an - “independent” - doctor would be called from the nearest “polyclinic”) and now Malta II, para 33.

<sup>12</sup> See Belgium II, para 37; and France III, para 40.

<sup>13</sup> Austria was the first contracting Party to receive a CPT visit. Until sure of its position vis-à-vis States parties, therefore, the Committee may have wished to proceed particularly cautiously at this juncture.

<sup>14</sup> See Austria I, para 64.

detainee access to a doctor of his choice (which possibility did concern the CPT in the wake of its visit in 1993);<sup>15</sup> and England and Wales, where the right is provided for in a Code of Practice developed under PACE 1984.<sup>16</sup> Further, in another mollifying gesture, the CPT has suggested that “rien n’empêcherait qu’un tel examen soit effectuée aux frais de la personne détenue”.<sup>17</sup>

The Committee sought further to justify the right of access to a doctor of choice in its first Hungarian visit report wherein it observed that despite having been “impressed by the professionalism” shown by the police doctors met during its visit in 1994, it was clear that such doctors had had “the difficult task of combining aspects of the role of a treating doctor with the carrying out of certain duties<sup>18</sup> requested by the police”.<sup>19</sup> Having highlighted the potential conflict of interest inherent in this situation, the CPT averred that a further medical examination of the detainee by a doctor of his choice would represent “an essential additional safeguard”, particularly since, “as far as the delegation could ascertain, such access was rarely, if ever, accorded [in Hungary]”.<sup>20</sup>

### *Delaying access*

The CPT appears prepared to countenance, in principle at least, the vesting in the law enforcement authorities of a power to delay access to a doctor of a detainee's choosing. At the same time, however, it considers that the right to a medical examination without delay ought not to be rendered nugatory in practice.

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<sup>15</sup> See Ireland I, para 46.

<sup>16</sup> See UK I, para 220.

<sup>17</sup> See Belgium II, para 37; and, similarly, Spain VI, para 26.

<sup>18</sup> Such as any number of - potentially intimate - forensic routines, like blood/alcohol tests: see, e.g., Hungary I, para 46.

<sup>19</sup> *Idem*, paras 47 and 146. For details of the arrangements made for medical care in Hungarian police stations and holding facilities at the time of the visit, see para 46 (2<sup>nd</sup> indent) of the report. Regarding the CPT's views on the dual role of police doctors, see below, p 119 *et seq.*

<sup>20</sup> *Ibid.*

Accordingly, in its third UK visit report, adverting to the UK authorities' previous indication that, "in exceptional cases, the police [in England and Wales] may decide to delay...access",<sup>21</sup> it "invited" them to:

"explore the possibility of devising a scheme whereby any detainee whose access to a particular doctor requested by him [is] delayed by the police [can], if he so wishe[s], have access to another doctor (apart from a police surgeon) who [can] be trusted not to jeopardise the legitimate interests of the police investigation".<sup>22</sup>

This formula, it will be noted, resembles that invoked by the CPT in circumstances in which domestic law authorises the delay or denial of access to a *lawyer* nominated by a detainee, from which emerged its proposed accredited lawyer scheme.<sup>23</sup> The CPT is very eager, therefore, to find ways to avoid completely denying a detainee access to a doctor working entirely independently of the law enforcement authorities. Indeed, so concerned is it in this regard, that, as an alternative to the kind of scheme adumbrated above, the authorities, it has stated, might consider:

"allow[ing] in all cases the detainee to be examined by the doctor initially chosen by him, *but subject to the presence of a police surgeon at such examinations*".<sup>24</sup>

Just such a scheme would appear to have operated in Northern Ireland, when visited in 1993. There, although persons detained under the *PTA 1989* are entitled to be examined by a medical practitioner from the practice at which they are registered ("at their own expense") *in addition to* an examination by a State-appointed Medical

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<sup>21</sup> See UK Response I, CPT/Inf (91) 16, p 52.

<sup>22</sup> See UK III, para 42. In Northern Ireland, prevention of terrorism legislation vests a similar power to delay in the police: see UK II, para 67.

<sup>23</sup> See above, p 86.

<sup>24</sup> See UK III, para 42 (emphasis added). See, similarly, France III, para 40.

Officer, access to the former may be legitimately delayed for up to 48 hours, "if it is believed that the examination would prejudice the investigation".<sup>25</sup> It was noted in the course of the visit, however, that examinations carried out by detainees' own doctors are invariably attended by Medical Officers, a gesture rationalised by the authorities as a "precautionary measure designed to ensure that only medical matters are discussed during such an examination".<sup>26</sup> In the circumstances, given the existence of such a precaution, the CPT understandably sought to know why, in addition, a detainee's access to his own doctor might be delayed for as many as 48 hours.<sup>27</sup>

In summing up this particular aspect of the safeguard, it is difficult to dispute the assertion that its "underlying point...is not of course that a particular doctor should be present, but that an independent doctor should be available".<sup>28</sup> It is this, it is submitted, which is central to the effective operation of the safeguard in practice.

### *Purpose of the medical examination*

Although the point is rather axiomatic, it is nevertheless worth noting that the CPT has described the right to a medical examination as a right to be examined by a doctor "either for treatment or the drawing up of a forensic medical report".<sup>29</sup> Thus, in the Committee's view, we may infer, access to a doctor should be provided not only when a detainee needs or requests an examination and/or medical treatment, but, also when, for a particular reason, he must or requests to be examined in order that a forensic medical report may be compiled.

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<sup>25</sup> See UK II, para 67.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> See Evans and Morgan (1998), p 279.

<sup>29</sup> See Greece I, para 43.



### *The provision of a corps of medical staff permanently on call*

The CPT, as we have seen, has emphasised repeatedly the need to guarantee at a legislative level a detainee's right of access to a doctor. As might be expected, it has also been prepared to contemplate precisely how that guarantee might operate in practice. In other words, how it is possible to fashion a system that guarantees the availability of a doctor at all times for examination and treatment purposes. In its first Portuguese visit report, for example, it welcomed as "a most appropriate development" the "consideration" being given by the Ministry of Justice in 1992 to the provision of a doctor "permanently on call" at the Judicial Police Headquarters in Lisbon. "Such doctors", it considered, "would be able, when necessary, to examine persons brought before a judge by the police with a view to their remand in custody".<sup>30</sup> Similarly, without actually expressing outright approval, the Committee received favourably a proposal on the subject of police doctors made by the Chief of Police for the Canton of Geneva, Switzerland, in the course of a visit in 1991. He explained to the visiting delegation that no system of police doctors operated in the Canton and that, consequently, he had:

"propose la creation, au sein de l'Institut de Medecine Legale de l'Universite de Geneve, d'une permanence de medecins qui seraient a disposition, sur appel de la police..."<sup>31</sup>

Clearly aware that without further circumscription of its role, a body like that described would lack the appearance of impartiality, the Chief of Police had developed his proposals, asserting that such a system would function:

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<sup>30</sup> See Portugal I, para 46.

<sup>31</sup> See Switzerland I, para 103. As for the situation in Switzerland generally, see para 122 of the report.

"...sans toutefois que ces medecins aient un lien de dependance hierarchique avec le Chef de la Police".<sup>32</sup>

His simple proposal clearly attracted the CPT, for it found it "des plus importantes" and sought the views of the Swiss authorities.<sup>33</sup> A similar system was found to operate in some parts of France in late 1991 and was equally well received by the Committee. There:

""[l]'approche consistant a donner a un seul service totalement independent la tache de mener a bien de tels examens medicaux apporte des garanties d'objectivite, d'uniformite et de professionalisme..."<sup>34</sup>

Although there is little other evidence to suggest that the creation of systems like those considered in Portugal, proposed in Switzerland and operating in France is a cause that the CPT is prepared expressly to promote, there is no doubt that it considers them to have merit, at least in principle, and that their further consideration may be appropriate.<sup>35</sup>

#### *Provision for regular visits by qualified nurses*

Referring to circumstances in which, because of the size of an establishment, the right of access to a doctor may be somewhat attenuated in practice, the Committee has expressed the view that:

"...it might be wise, in respect of high-capacity police detention centres...to make arrangements for regular visits by a qualified nurse. This nurse could

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<sup>32</sup> Ibid.

<sup>33</sup> Idem, para 124.

<sup>34</sup> See France I, para 57.

<sup>35</sup> See also, in the same connection, the tenor of the CPT's observations in Sweden I, at para 30.

carry out a number of tasks which are currently carried out by ordinary police officers (distribution of medicines including psychotropic drugs, etc.)”.<sup>36</sup>

### *Unannounced visits*

In its first Austrian visit report, the CPT cited an Austrian Ministry of the Interior press communiqué, issued four months before its delegation's visit in May 1990, in which the introduction of a "system of 'spot checks' [to police establishments]...[a]pparently... by fully independent doctors..." was announced.<sup>37</sup> No further details were provided and, in any case, the scheme was "eventually discarded as being impractical". The concept, however, appealed to the Committee, which sought to receive, first, "full details of the system...e.g. rules of operation; number of visits carried out, when and where; findings, etc"; and, second, "the reasons why the idea... was considered impractical".<sup>38</sup> It may be argued that in responding thus, particularly in the light of the project's abandonment, the Committee inferred that in its view, a properly conceived system of unannounced visits to police establishments, carried out by fully independent doctors, with a view to interviewing and/or examining detainees, may be worth serious consideration. It is worth noting in this regard that the Committee cited the "spot check" initiative as one of a number of "impressive" measures taken or planned by the Austrian authorities in order to address the problems inherent in the country's contemporary criminal justice system.<sup>39</sup>

### *The physical conditions in which medical examinations take place*

The material environment in which the formal medical examination of persons detained by the police may be conducted is something on which the CPT has

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<sup>36</sup> See Netherlands II, para 36.

<sup>37</sup> See Austria I, para 63.

<sup>38</sup> *Idem*, paras 64 and 102.

<sup>39</sup> *Idem*, para 101.

commented expressly - and not just in the most obvious sense that "very dilapidated" premises, it considers, should be "renovated".<sup>40</sup> For instance, it has proclaimed that:

"[o]f course, if they are to perform their tasks effectively, forensic doctors must be provided with suitable premises and equipment. Above all, they must benefit from good lighting when carrying out examinations".<sup>41</sup>

This observation was made in the light of discoveries in Spain, in 1994, first, that medical examination rooms at the Civil Guard Headquarters, Madrid, "[did] not enjoy the required amount of light and, more generally, [were] poorly equipped for the purposes of medical examinations"; and, second, that persons previously held at the Headquarters were found to display injuries that either "had not been observed at all" by the forensic doctor or were "more extensive" than had been recorded by her. These phenomena, the CPT speculated in its visit report, may have been caused, "in part", by the "poor" facilities available to the doctor concerned<sup>42</sup>. Accordingly, it recommended that they be "substantially improved".<sup>43</sup>

More specifically, having visited the premises of the Service d'urgence medico-judiciaire at l'Hopital de l'Hotel-Dieu, Paris, in 1991, the Committee made a number of observations about obtaining conditions, both expressly and impliedly critical. In particular, it noted, "il n'y avait qu'une seule salle d'attente pour toutes les personnes amenees au Service", with the result that "des personnes gardees a vue et menottes etaient souvent placees a cote de victimes de violence" – the latter also being treated at the hospital, it seems.<sup>44</sup> This situation, the CPT proclaimed, was "des plus inappropriées". Accordingly, it recommended that "des mesures soient prises

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<sup>40</sup> See Hungary I, paras 46 and 48 (4<sup>th</sup> indent) (regarding the infirmary at the Budapest Police Central holding facility, visited in 1994).

<sup>41</sup> See Spain III, para 38.

<sup>42</sup> Ibid.

<sup>43</sup> Idem, para 39.

<sup>44</sup> See France I, para 58.

afin de remédier [de tels] manquements”.<sup>45</sup> Clearly, what the CPT had in mind in this regard was the systematic separation of police detainees from victims of physical violence, all of whom might be waiting to be treated in hospital at the same time. The provision of separate waiting rooms, it is submitted, would be one obvious way of avoiding what is, at best, a problem of insensitivity.

The CPT was also critical of the arrangements made for family visits in the hospital and hinted at ways in which they might be improved. The arrangements – described as “loin d’être idéaux” – generally obliged family members to “rester debout dans l’étroit couloir central et converser avec [un patient] à travers un petit guichet dans la porte de la chambre”.<sup>46</sup> The CPT invited the French authorities to “improve” such provision, with a “comparable” unit at l’hôpital Ste. Marguerite in Marseille offering something of a model, it seems. There, visits could take place “en général, dans la chambre du patient”, although the door to the room would be left open “avec un policier à proximité”.<sup>47</sup> Such facilities, the CPT observed, were “better” than those afforded in Paris – though, it might have commented on the constant close attendance of a police officer, which may be said to have vitiated the visit process.

On physical conditions generally in establishments designated to treat police detainees, the CPT declared itself “favourably impressed” by the French authorities’ identification of “[e]léments pour un schéma d’aménagement d’unités spécifiques d’hospitalisation des détenus”,<sup>48</sup> an expression of approval for an apparent attempt to systematise and regulate the physical environment in all places where detainees may receive medical treatment. Further, in the light of its desire for confidentiality in the examination process, it is also no surprise to find the Committee, in its identification

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<sup>45</sup> Ibid. See also para 209 of the report.

<sup>46</sup> Idem, para 61.

<sup>47</sup> Idem, para 62.

<sup>48</sup> Idem, para 64.

of appropriate material conditions in which to conduct examinations, calling specifically for an environment which “guarantee[s] notably the[ir] confidentiality...”<sup>49</sup> Accordingly, it is “quite improper”, it has declared, to conduct a medical examination in an interrogation room equipped with a two-way mirror – “thereby enabling the...examination to be observed by law enforcement officials” – rather than in a facility which has been “specifically set aside and equipped for that purpose”.<sup>50</sup>

Lastly, it need hardly be stated that forensic medical examinations should, in the view of the CPT, be conducted on an individual by individual basis, the collective examination of groups of detainees being, it believes, quite “undesirable”.<sup>51</sup>

#### *The provision of necessary medication to detainees*

The readiness with which persons detained by the police receive the medication which their physical condition requires was undoubtedly in the contemplation of the CPT in its first Austrian visit report, drawn up in the wake of its delegation’s visit to the country in 1990. In Vienna, it had learned, persons detained in police establishments “sometimes did not receive the medication required by their medical condition (e.g. insulin for diabetics)”.<sup>52</sup> Consequently, the Committee recommended that the Austrian authorities “review” the “existing procedures”.<sup>53</sup>

#### *The examination procedure*

##### *- Identifying medical staff*

The formal procedures to which, the CPT believes, doctors ought to adhere when examining persons held in police custody were considered in its third Spanish visit

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<sup>49</sup> See France III, para 52.

<sup>50</sup> See Spain V, paras 48 and 54.

<sup>51</sup> See Turkey I, para 36.

<sup>52</sup> See Austria I, para 62.

<sup>53</sup> Idem, para 64.

report.<sup>54</sup> In the course of a visit to the country in June 1994, the Committee noted therein, a number of detainees had claimed that medical examinations carried out in the city of San Sebastian following arrest had been conducted "by someone purporting to be a doctor", the person concerned not having offered any formal identification or credentials.<sup>55</sup> Addressing the issue, the Committee recommended that:

"... doctors who examine detained persons [should] formally identify themselves to the persons in question".<sup>56</sup>

- *Distinguishing medical and custodial personnel*

In its first French visit report, the Committee observed that, in 1991, at one hospital designated for the formal examination and treatment of persons detained by the police, police officers and medical staff had been very similarly, if not identically, dressed. Questioned on the matter, one police officer had claimed that a lack of differentiation "facilitated contact". For its part, the CPT considered that:

"il est tout aussi important pour les patients...d'être capable de distinguer clairement les fonctions précises (soins ou sécurité) des différentes personnes auxquelles ils doivent avoir affaire".<sup>57</sup>

Consequently, the French authorities, it stated, should take appropriate measures to ensure that:

"les personnels soignant et de sécurité...soient clairement distinguables l'un de l'autre".<sup>58</sup>

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<sup>54</sup> While the CPT's observations in the report were confined to State-employed "forensic" doctors, they may be regarded as applying equally to any doctor called upon to examine persons in police detention, it is submitted.

<sup>55</sup> See Spain III, para 37.

<sup>56</sup> Ibid.

<sup>57</sup> See France I, para 61.

<sup>58</sup> Idem, para 63.

The Committee might have added that enabling a detainee to distinguish between medical and custodial personnel helps create that element of privacy which it regards as central to the effective exercise of the right.

- *Recording medical findings*

A guarantee of ready access to an independent doctor in respect of persons detained by the police is "important", the CPT considers, precisely because it expedites the "independent and objective recording, on a regular basis, of medical evidence of injuries sustained by detainees".<sup>59</sup> The recording of a doctor's forensic findings is something to which the CPT has given much thought. For instance, pursuant to its oft-repeated basic position on medical examinations, it has recommended that the form used to record details thereof:

"...should be such as to ensure that the following information is systematically recorded:

(i) statements made by the person concerned which are relevant to the medical examination (including the description by the person examined of his state of health and any allegations of ill-treatment);

(ii) the doctor's objective medical findings based on a thorough examination;

(iii) the doctor's conclusions in the light of (i) and (ii) [e.g. whether and to what extent, a person's allegations are consistent with the doctor's findings<sup>60</sup>]"<sup>61</sup>

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<sup>59</sup> See UK II, para 70.

<sup>60</sup> See Spain VI, para 25 (2<sup>nd</sup> indent).

<sup>61</sup> See Spain III, para 39 (and now Spain V, para 54 and Spain VI, para 24: standardised medical form recently introduced, but no provision for recording detainee's statements or doctor's conclusions); and similarly UK II, para 70. In Turkey, in 1997, while the standard forensic medical form used to record findings corresponded with CPT precepts, the use of such forms was found to be very inconsistent: see Turkey I, paras 34-5.



- *What doctors should look for in the course of a medical examination*

Following on from the last sub-section, the CPT, it should be noted, has supplemented its formal precepts on the right to a medical examination in police custody with practical advice to doctors concerning the kind of (non-physical) signs of distress which it considers they should look for during examinations. "[G]iven the pressures that can be brought to bear on a detained person", it has suggested, forensic doctors "should not necessarily accept at face value statements by such persons to the effect that they are being treated well". Accordingly, going beyond the investigations made during a routine medical examination, such doctors, it believes, should pay "[p]articular attention...to a detained person's psychological state - and more especially to changes in that state during the period of custody..."<sup>62</sup> At the same time, however, in reaching his conclusions, the doctor, the Committee insists, "is not being asked to state whether or not the person examined has been ill-treated". This, after all, "is the task of the judicial authorities". Nevertheless, it maintains, "in order to assist public prosecutors and courts properly to assess the information set out in the medical form, the doctor should indicate the degree of consistency between any allegations made and the objective medical findings".<sup>63</sup>

- *Confidentiality of medical findings*

As might be expected, the CPT is of the view that:

"...the confidentiality of medical data [relating to the examination of persons in police custody should] be strictly observed".<sup>64</sup>

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<sup>62</sup> See Spain III, para 39.

<sup>63</sup> See Turkey I, para 37.

<sup>64</sup> See Czech Republic I, para 32 (4<sup>th</sup> indent).

Such confidentiality cannot be guaranteed, it considers, quite understandably, where detainees' medical certificates are simply attached to their custody records, rendering them "openly available to police officers",<sup>65</sup> or where open copies of forensic reports are handed to the officers who have accompanied detainees to their examinations.<sup>66</sup>

- *Examinations over and above those required or requested by the police and/or detainee*

When it is "appropriate", the CPT has suggested, forensic doctors should be able to carry out "specialist examinations" of detainees whom they have been asked to examine. Further, such doctors, it considers, should be able to "reserve their conclusions [on the health of the detainee(s) concerned] until such time as the results of those examinations are available".<sup>67</sup> Unfortunately, the CPT has not yet explained the kind of "specialist examinations" to which it adverts here - though, presumably, they include referrals to doctors with a particular expertise following the discovery of abnormalities during routine examinations.

- *Procedure in the event of the transfer of detainees*

To the Spanish authorities, following its *ad hoc* visit in June 1994, the CPT recommended, uncontroversially, that in the event of a detainee's transfer from one police establishment to another:

"... copies of the reports drawn up in respect of that person by a doctor performing forensic duties [should] be systematically forwarded to the competent forensic doctor [at the new establishment]".<sup>68</sup>

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<sup>65</sup> *Idem*, para 31 (referring to the practice, *inter alia*, at the Prague Police Headquarters, when visited in 1997).

<sup>66</sup> See Turkey I, para 39 (though *cf* 1995 Ministry of Health Circular: forensic reports to be forwarded to the relevant public prosecutor and police chief in *sealed envelopes*).

<sup>67</sup> See Spain III, para 39.

<sup>68</sup> *Idem*, para 37.

- *The weight to be given to a doctor's views in gauging a detainee's fitness for detention or interview*

As might be expected, the CPT is troubled by the possibility that a doctor's views as to the fitness for detention and/or interview of an individual may be "overridden" by the police.<sup>69</sup> It is not clear, however, whether the Committee is absolutely opposed to the prospect or whether, rather, there are circumstances in which it might countenance the continued detention and/or interview of persons, notwithstanding the views of doctors. Nevertheless, clearly, the CPT would *prefer* the views of examining doctors to be heeded by the police.

- *Suppressing evidence of ill-treatment at the request of the detainee*

A doctor may encounter "[p]articular difficulties" in faithfully recording his medical opinion, the CPT has stated, when a detainee alleges ill-treatment at the hands of the police, but requests that his allegations remain unrecorded or even that details of his injuries remain entirely secret.<sup>70</sup> In the Committee's view, when faced with such a request, a doctor "must exercise his clinical judgment in a manner consistent with medical ethics".<sup>71</sup> Without at least a passing acquaintance with the notion and content of medical ethics, this expression of opinion raises as many questions as it answers. Fortunately, the Committee has also stated that if a doctor faced with this dilemma were to exercise his judgment in a way that results in no formal record being made of a detainee's allegations and injuries - as was the case, it seems, in respect of Medical Officers at the Castlereagh Holding Centre, Northern Ireland, in 1994<sup>72</sup> - then the medical form placed in the detainee's custody record "would not contain a record of

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<sup>69</sup> See, e.g., UK II, para 68. In Northern Ireland, examining doctors are "requested to certify", *inter alia*, as to the fitness for detention and interview of persons whom they are called upon to examine.

<sup>70</sup> *Idem*, para 71.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

objective clinical findings". To act in this fashion, it holds, would be "potentially misleading".<sup>73</sup>

Consequently, it has proposed two ways in which injuries observed during a medical examination may be recorded by a doctor, notwithstanding a detainee's objections. First - and least sympathetic to the detainee - it considers that a doctor might, whatever the detainee's reservations, make an "appropriate entry" in the latter's medical record. Alternatively, he might refrain from completing the official medical record at all and simply transmit to the police all the information requested by it - "in particular" his opinion as to a detainee's fitness for detention or interview - "in another manner".<sup>74</sup> A third approach that might prove useful is one that, in 1993, had clearly been used with some practical effect at the Castlereagh Holding Centre itself. It would require doctors to record the details of injuries observed "on the pre-printed medical report form [supplied]", but to keep the form "separately [from the detainee's general prison file] (and privately)". As a result, some record, at least, of injuries observed would exist, "to which reference might be made when preparing a statement for use in any subsequent court proceedings".<sup>75</sup>

### ***Protecting vulnerable detainees***

#### ***- Persons detained incommunicado***

Following visits to Spain in 1991 and April 1994, the CPT recommended to the authorities that a person being held in incommunicado detention in police custody - and, therefore, in an especially vulnerable position - should, if he so requests:

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

"...be examined by the relevant forensic doctor *and*, if he so wishes, by a doctor chosen from a list of doctors drawn up in agreement with the appropriate professional body".<sup>76</sup>

Thus, like detainees who are not subject to such restrictions, those held *incommunicado* are, in the view of the CPT, entitled to seek and receive up to two medical examinations. At the same time, however, the Committee does not consider that the latter detainees should necessarily benefit from a right of access to a doctor *of their own choice*. For, in an otherwise unremarkable re-statement of one of its basic precepts in this area, it intimated in its first Spanish visit report that *only* persons detained by the police or Civil Guard "who [are] not being held *incommunicado*" should enjoy such a right.<sup>77</sup> Although it made no attempt to justify such a position, the CPT might have suggested that to facilitate access to an isolated detainee's chosen doctor would effectively render nugatory his secluded status.

Subsequently, however, the Committee moderated its position, confessing to the Spanish authorities that it found the pragmatic approach to the medical examination of persons held *incommunicado* adopted by one judge interviewed in June 1994 "equally acceptable". The judge concerned had remarked to the visiting delegation that he was quite prepared to:

"...accede to a request made by a detainee held *incommunicado* to be examined by his own doctor, *provided that the forensic doctor was also present at the examination*".<sup>78</sup>

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<sup>76</sup> See Spain I, para 57 (2<sup>nd</sup> indent); and Spain II, para 68 (emphasis added).

<sup>77</sup> See the combined effects of Spain I, para 57, 2<sup>nd</sup> and 3<sup>rd</sup> indents.

<sup>78</sup> See Spain II, para 68 (emphasis added). See now Spain V, para 48 and Spain VI, para 26 (from the latter of which it is clear that the views expressed by the judge in 1994 are now incontrovertibly part of the CPT's body of standards in this area. These views reflect, it may be stated, those expressed by the Committee in respect of the right to an independent medical examination for detainees who are not subject to restrictions: see above, p 101).

- *Intoxicated detainees*

In establishments obliged to handle large numbers of intoxicated detainees, we may infer from the CPT's first Finnish visit report, the provision of what it has termed an "ongoing healthcare service" may be desirable. This inference flows from its discovery in May 1992 at the Helsinki Police Detoxification Centre that, while a nurse was present five evenings a week, "apparently" there was no such provision at weekends, "when the Centre was busiest".<sup>79</sup> The Committee discovered, further, that although a doctor did visit the Centre once a day, he only examined those persons who wished to see him or whose condition was brought to his attention by the staff. Otherwise, he was summoned only if the staff thought it necessary or if a detainee requested it.<sup>80</sup> Although the CPT recommended that "improvements be made" to the Centre's medical service and, "in particular", that the presence of a nurse at weekends "be guaranteed",<sup>81</sup> precisely what, it considers, should constitute an "ongoing healthcare service" - other than the provision, daily, of nursing care of an unspecified duration - is not clear in the text of the report.

*The medical training of police officers*

Although the need to expedite access to a medical doctor for detainees in police custody with a view to their examination and treatment necessarily comprises the bulk of CPT standard-setting work in the present connection, it has, occasionally, contemplated the broader role of doctors in domestic police procedures. In its first German visit report, for instance, it lauded as "particularly valuable" and as exemplars "which could be more widely followed", two instances - noted in the course of its visit

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<sup>79</sup> See Finland I, paras 37 and 150. Cf much more appropriate provision at the Helsinki Police Headquarters (where daily nursing presence was guaranteed, a doctor was on duty three days a week and a doctor was permanently on call): *idem*, para 35.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Idem*, para 39 (1<sup>st</sup> indent).

in December 1991- in which doctors were involved specifically in the training of police officers. First, consistent with its precept that "it is... essential for police officers to be able to detect when a detainee is in need of medical assistance, even when he does not request such assistance", in Bavaria, it noted, on the "initiative" of the Director of Police of Straubing, police officers were trained by a doctor in order to "familiarise them with different types of behaviour [requiring medical assistance] (for example, that of a diabetic)".<sup>82</sup>

Second, in Berlin, it learned, a Health Department brochure had been issued to officials, offering advice and information regarding, *inter alia*, "people with mental illnesses or other problems (elderly people, alcoholics, drug addicts, epileptics etc)".<sup>83</sup> Given the encouraging language used by the CPT to describe both initiatives, it would not be presumptuous, it is submitted, to infer a belief on its part that the same kind of thought and sensitivity ought to be brought to bear by other Convention parties.

On other occasions, the CPT has been more exact as to the requirements of the medical training of custodial staff. At the Helsinki Police Detoxification Centre, Finland, in 1992, for example, its delegation observed that officers received no "specialised training" in the treatment of intoxicated detainees. Rather, the authorities considered that, as a rule of thumb, if a new admission was "incapable of talking", they would be sent to a hospital; "otherwise, [they] would be placed in a cell".<sup>84</sup> In its subsequent visit report, the CPT suggested that in the absence of specialised training, "a range of serious medical conditions (e.g. internal bleeding, diabetes) may be masked by, or mistaken for, a state of intoxication"; and that, therefore, when

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<sup>82</sup> See Germany I, para 38.

<sup>83</sup> Ibid.

<sup>84</sup> See Finland I, para 37.

"apparently intoxicated persons are taken into [police] custody, it is of critical importance that their health be appropriately monitored".<sup>85</sup>

Although the Committee offered no guidance as to the manner of such monitoring, we can be sure from its remarks on the practice at Helsinki that simply observing cells by means of a closed circuit television network, combined with a commitment on the part of custodial staff to "physically check...the condition of those detained from time to time" is insufficient; "such measures", the CPT averred, "cannot be considered to be a substitute for an adequate level of medical supervision".<sup>86</sup> Significantly in this regard, it noted, with approval, the terms of a recommendation of the Finnish Parliamentary Ombudsman to the Ministry of the Interior regarding the use of an Alcometer to test the alcohol levels of persons admitted to the Centre in order to make "an immediate and more reliable distinction between a person who has drunk alcohol... and a person who has taken an overdose of medicine or who has an attack of illness".<sup>87</sup>

Further, the level of medical supervision required of custodial authorities, it considered, should be premised on the need to provide, *inter alia*, "specialised training in the care of intoxicated detainees and in the recognition of conditions which could be mistaken for a state of intoxication"<sup>88</sup> - which conditions include "mental disorder...or handicap...or...the influence of drugs or...withdrawal symptoms", disorders whose identification, it remarked to the UK authorities following its visit in 1990, should be encouraged among both police officers and police surgeons.<sup>89</sup> Without "specific training" in the identification of such conditions, the CPT has

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<sup>85</sup> *Idem*, para 38.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* (note 8).

<sup>88</sup> *Idem*, paras 39 and 150.

<sup>89</sup> See UK I, para 222.



insisted, their detection in practice - and, therefore, the readiness with which the persons affected may be treated humanely and protected against abuse - is "not always a straightforward matter".<sup>90</sup>

*The particular role of forensic doctors in preventing ill-treatment in police custody*

For the purposes of the present study, doctors who are employed by the police specifically to carry out forensic tasks may be distinguished from those general medical practitioners who may be called upon to examine and treat persons in police custody in the sense that, in addition to the carrying out of such examinations and the compilation of medical reports (both of a general nature and, more specifically, where police ill-treatment is suspected or alleged), the former perform "a range of other forensic tasks (e.g. performing blood/alcohol tests and taking intimate samples)".<sup>91</sup> Although this distinction is a somewhat loose, unscientific one, it does at least permit the limited exploration here of a medical function which is acquiring a profound importance in contemporary criminal justice systems. In some jurisdictions, indeed, the routine provision of forensic examinations in respect of persons detained by the police may be considered a more significant safeguard against ill-treatment than any putative right of access to a doctor of a detainee's own choice. Turkey's regime of forensic examinations, for instance, has been broadly welcomed by the CPT, "provided the doctors concerned enjoy formal and de facto independence, have a mandate which is sufficiently broad in scope and have been provided with specialised training".<sup>92</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> See Hungary I, para 46.

<sup>92</sup> See Turkey I, para 31.

- *Frequency of examinations*

Information gathered during its visit to Turkey in October 1997, the CPT has observed, indicated that all persons suspected of offences falling within the jurisdiction of the State Security Courts,<sup>93</sup> as well as most ordinary criminal suspects, are examined by a forensic doctor at the end of their period of police custody. Medical examinations at the outset of such custody, however, it seems, are “far less common” and when carried out, are “normally performed in a local public hospital rather than an accredited forensic service”.<sup>94</sup> (A Prime Ministerial Circular issued after the visit, which establishes a duty to examine “both at the beginning and at the end of the custody period”, was “welcome[d]” by the CPT.<sup>95</sup>) Responding to these findings, the Committee recommended that:

“...persons held for lengthy periods by the law enforcement agencies [should] be examined on a regular basis (at least every 48 hours) by a forensic doctor...[S]uch a procedure is followed in comparable situations in certain other countries and has proven an effective means of combating both ill-treatment and unfounded allegations of ill-treatment”.<sup>96</sup>

It considered, further, that if, as the Turkish authorities claimed, it is thought impractical to transfer a detainee to a forensic medical service for examination every 48 hours, then:

“...[it would have] no objection to the examination...taking place on police premises, provided certain basic requirements were met (in particular, the

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<sup>93</sup> Which offences comprise “crimes against the State; terrorist offences; drugs and arms-related offences, etc”: see Turkey PS I, para 27.

<sup>94</sup> Turkey I, para 32.

<sup>95</sup> Ibid.

<sup>96</sup> Idem, para 33 (reiterating a recommendation made in the, as yet unpublished, report on its 1994 visit to the country).

material environment should be such as to allow a thorough examination to be made and law enforcement officials should not be present at the examination)".<sup>97</sup>

Clearly, therefore, where, in the absence of any effective right of access to a doctor of a detainee's own choice, a Party makes provision for the medical examination of persons in police custody by a forensic doctor, such examination, the CPT considers, should take place at least every 48 hours for the duration of detention.

Elsewhere, the CPT has "welcome[d]" seemingly informal arrangements under which police officers invariably request a medical examination following the use of force at the time of a person's arrest or subsequently, during his detention, and whenever a detainee is transferred to the custody of another agency or when it is necessary in order properly to attribute responsibility for injuries sustained by a detainee.<sup>98</sup>

- *The protection of particular types of detainee*

The need to protect those categories of detainee "who might be considered to be at particular risk of ill-treatment, or who frequently allege such treatment"<sup>99</sup> is a CPT concern which emerged from visits to Spain in 1991 and 1994. On both occasions, the Committee came away with the view that:

"a closer involvement of forensic doctors in the medical examination of [such] detainees... would be desirable".<sup>100</sup>

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<sup>97</sup> Ibid.

<sup>98</sup> See Spain VI, para 28 (regarding the practice of the Catalan and, to a lesser extent, Basque police forces in 1998).

<sup>99</sup> See Spain I, para 56. We may be sure that the categories of detainee that the CPT has in mind in this regard are vulnerable ones, like persons held incommunicado or who are intoxicated or young or mentally disordered or display signs of rough treatment.

<sup>100</sup> Ibid and Spain II, para 66.

The great care with which the CPT has, on more than one occasion, exhorted the Spanish authorities to develop the role of forensic doctors in the medical examination not only of certain, vulnerable categories of detainee, but, seemingly, of *all* persons detained by the police or Civil Guard, regardless of the motive behind their detention,<sup>101</sup> may very well have been precipitated by its findings, in both 1991 and 1994, first, that "it would...be premature to conclude that the phenomena of torture and severe ill-treatment have been eradicated" in Spanish police establishments;<sup>102</sup> and, second, that allegations received by it of "general rough treatment" were "len[t]...credibility" by their "sheer number", as well as by "certain... on-site observations" made by its visiting delegations.<sup>103</sup>

- *The value of such protection*

As we have seen, the closer involvement of forensic doctors in the medical examination of detainees is important, the CPT insists, because "[t]he findings of [such] doctors will carry considerable weight in legal proceedings"<sup>104</sup> – and such proceedings may very well flow from the *ex officio* examination of complaints of police ill-treatment. Further, the possibility that legal action may be taken against the State on the basis of such findings carries with it, in the view of the CPT, a considerable potential to forestall ill-treatment in police custody.<sup>105</sup>

- *The provision of appropriate support*

Given what we have learnt already about the role of forensic doctors in the

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<sup>101</sup> See, for instance, the combined effects of Spain I, paras 45, 57 (1<sup>st</sup> indent) and App II, paras 9-13 and Spain III, para 37.

<sup>102</sup> See Spain I, para 25; Spain II, paras 20 and 206; and, reinforcing the first two instances, Spain III, para 33.

<sup>103</sup> See Spain I, para 26; and Spain II, paras 21 and 207. For an insight into the kind of findings that, ultimately, led to such conclusions, see Spain I, paras 17-24; and Spain III, paras 11-33.

<sup>104</sup> See Netherlands (NA) I, paras 26 and 158.

<sup>105</sup> See further below, p 345.

prevention of ill-treatment in police custody, at least as circumscribed by the CPT, it is no surprise to learn that it also considers that:

"it is...essential that [forensic doctors] be provided with appropriate training, facilities and safeguards".<sup>106</sup>

Without ever having expounded this basic position, the CPT has nevertheless recommended that "due consideration" be given to the request of one clinical pathologist interviewed in the Netherlands Antilles in 1994, who sought:

"...a protocol regularising her relationship with the Attorney General, for video recording facilities during autopsies and for expert advice to be available in appropriate cases".<sup>107</sup>

To accede to such a request, it is submitted, would provide a means, *inter alia*, of safeguarding the independent status of forensic doctors,<sup>108</sup> preventing abuse of their investigations and findings and facilitating their work in a most appropriate way. It is worth noting, too, that the involvement of and co-operation between central government and national medical associations in the provision of specialised training to forensic clinicians has also pleased the CPT.<sup>109</sup>

- *Independence*

It should be noted that in examining the role of forensic doctors in the criminal justice system, the CPT has never lost sight of such practitioners' community function as medical doctors. For instance, to the Spanish authorities, following its two visits in 1994, it sought to "stress" that:

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<sup>106</sup> See Netherlands (NA) I, para 26.

<sup>107</sup> Ibid. See also para 158 of the report.

<sup>108</sup> See, further, next sub-section.

<sup>109</sup> See Turkey I, para 40.

"although forensic doctors are employed by the State to carry out certain specific duties, as doctors they retain a basic duty of emergency care and advice to the persons they examine".<sup>110</sup>

Consequently, it considered that "[f]orensic doctors should be provided with all the means necessary to perform effectively this hybrid function".<sup>111</sup> At first sight, such a hybrid existence may be said to compromise forensic doctors' vaunted position of independence, since the balance that must be struck between their roles as protectors of detainees and as forensic practitioners operating at the behest of the police may create actual or potential conflicts of interest. However, the CPT has never appeared unduly perturbed by the prospect of conflict, for instance, remarking following its 1993 visit to Northern Ireland – where Medical Officers<sup>112</sup> working in the Holding Centres "ha[d] the difficult task of combining aspects of the role of a treating doctor with the carrying out of certain duties requested by the police"<sup>113</sup> - that such Officers had "successfully adapted to this hybrid function", displaying "impress[ive]" levels of independence and "quality of care" and prompting complaints neither from detainees nor police officers about the manner in which they performed their duties.<sup>114</sup>

Despite adducing no evidence as to how such a congenial accommodation had been achieved, it was nevertheless clear in its second UK visit report that the Committee is prepared to countenance, in principle at least, situations in which the doctors examining and/or treating detainees held in police custody do not, notionally, operate independently of the State. Such arrangements may be particularly important,

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<sup>110</sup> See Spain II, para 66.

<sup>111</sup> Ibid.

<sup>112</sup> I.e. "General practitioners who ha[ve] entered into a contract to provide the medical services foreseen in the [relevant] Code of Practice": see UK II, para 68.

<sup>113</sup> Idem, para 69.

<sup>114</sup> Ibid.

it is submitted, for detainees who, for a particular reason - such as their being held *incommunicado* - are unable to obtain access to a doctor of their choosing.

### ***Conclusion***

In seeking to urge greater respect among Parties for a right of access to a doctor for persons detained by the police, the CPT has made it clear that any right created should be the subject of an express legal guarantee. This guarantee should stipulate that a detainee is entitled to be examined, if he so wishes, by a doctor of his own choice, in addition to any examination carried out by a doctor called by the police; that all medical examinations are to be conducted out of the hearing and, unless the doctor concerned requests otherwise, out of the sight of police officers; and that the results of every such examination, together with relevant statements made by the detainee and the doctor's conclusions, are to be recorded in writing by the doctor and made available to the detainee and his lawyer.

If access to a detainee's nominated doctor is legitimately delayed, access to another, independent doctor should be facilitated (although the CPT might accept a situation in which a detainee's nominated doctor is permitted to carry out an examination in the presence of a police surgeon). Further, persons detained *incommunicado* should be able to request an examination by a doctor summoned by the police *and* by a doctor chosen from an accredited list drawn up in conjunction with the relevant professional organisation.

Among States parties, the level of protection afforded detainees in the present connection ranges from its complete absence to, in some respects, quite sophisticated provision. For instance, in 1990, Maltese law made no provision at all and access to a doctor in the country's police establishments was afforded very much on an *ad hoc*

basis. There is also no express guarantee in Danish, Finnish or Swedish law; while, in the Netherlands, provision is made merely by Ministerial circular. French law and Romanian practice do not facilitate access as from the outset of detention, while Austrian law provides no right to be examined by a doctor of a detainee's choosing.

By contrast, Codes of Practice in England and Wales and legal provisions in Ireland offer somewhat greater protection. Further, some national – or, at least, regional – practices deserve to be highlighted, such as the practice in parts of France of providing a corps of doctors permanently on call and the use made of doctors in some German lander for training purposes. Such diverse provision demonstrates, it is submitted, the magnitude of the task confronting the CPT in its efforts to bring about improvements in the protection of detainees against ill-treatment in police custody across Convention territory.



## A Fourth Fundamental Safeguard: the Duty to Inform a Detainee of His Rights

### *Introduction: the basic precept*

In order to be able effectively to exercise his three fundamental rights as from the very outset of his deprivation of liberty by the police, as the CPT desires, a detainee must, of course, first be aware of his entitlement to such rights. “It is axiomatic”, the Committee considers, “that rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence”.<sup>1</sup> It is for this reason that when promulgating its three fundamental safeguards against ill-treatment in police custody, the Committee invariably expresses the concomitant belief that:

“[p]ersons taken into police custody should be expressly informed without delay of all their rights, including [the three fundamental ones]”.<sup>2</sup>

This duty to inform, incumbent on police officers, the CPT believes, ought to be a “strict” one.<sup>3</sup> Further, it applies in respect of *every* person detained by the police, including those being held incommunicado.<sup>4</sup> Indeed, so central is it to the Committee’s evolving body of standards that it has described it on numerous occasions as “equally fundamental” as the three primary safeguards.<sup>5</sup> Not surprisingly, therefore, it has dismissed claims on the part of some authorities that by informing persons taken into police custody of their rights and thereby facilitating,

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<sup>1</sup> See Turkey I, para 26. Visiting the country in October 1997, very few detainees met in police establishments had received any information about their rights: *idem*, para 27.

<sup>2</sup> See, e.g., 2<sup>nd</sup> GR, para 37; and, similarly, Greece I, para 35; Spain II, para 58; and France I, para 45.

<sup>3</sup> See Austria I, para 60 (1<sup>st</sup> indent, at point ii).

<sup>4</sup> See Spain VI, para 27.

<sup>5</sup> See, e.g., Germany I, para 30; and Norway I, para 30.

*inter alia*, access to a lawyer and doctor, police investigations may be slowed down or disrupted.<sup>6</sup>

### ***Justifying the basic precept***

The putative duty to inform a detainee of his rights without delay self-evidently flows from the CPT's belief that the three fundamental rights should be guaranteed *as from the very outset of custody*.

### ***Giving practical effect to the basic precept***

In the course of its periodic visit to Sweden in May 1991, the CPT has stated, “[m]any” prisoners interviewed claimed that the police had not informed them of their rights, “in particular”, their right of access to legal advice.<sup>7</sup> “In order to ensure that persons in police custody are duly informed of [all]<sup>8</sup> their rights,” the CPT averred subsequently:

“a form<sup>9</sup> setting out these rights [should] be given systematically to detainees at the outset of their custody. This form should be available in different languages”.<sup>10</sup>

“Further”, it continued:

“...the detainee should be asked to sign a statement attesting that he has been informed of these rights”.

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<sup>6</sup> See Luxembourg II, para 71.

<sup>7</sup> See Sweden I, para 29.

<sup>8</sup> An addition proffered in Hungary I, para 49.

<sup>9</sup> In other visit reports, the terms “document” (see, e.g., France I, para 46; Italy I, para 48) or “brochure” (see, e.g., Liechtenstein I, para 32) have been preferred.

<sup>10</sup> See Sweden I, para 29 (and now Sweden III, para 26); and, similarly, Germany I, para 39; Greece I, para 44; and Romania I, para 43. It is worth noting that the CPT has formulated similar precepts in respect of other categories of detainee: see, e.g., Spain IV, para 43 (regarding newly-arrived prisoners);

Such gestures, the Committee holds, are “hardly onerous, easy to implement and undeniably useful”.<sup>11</sup>

***Developing the basic precept: explaining a detainee’s rights intelligibly***

The need to ensure that a person detained by the police properly understands his situation and the rights of which he may avail himself is a precept which clearly inheres in the putative duty to inform. The CPT’s approach to the issue is twofold, taking account, first, of the lay character of the overwhelming majority of persons held in police custody; and, second, the possibility of their being foreign nationals. Accordingly, in a formula which, in its generality, conceivably addresses both these points, the Committee has, in some visit reports, appended to its basic precept a condition which requires the act of informing to take place:

“...in a language which [detainees] understand”.<sup>12</sup>

Both aspects of the duty will now be considered separately.

***The need to avoid confusion among detainees***

Section 61(1) of the Portuguese *Code of Criminal Procedure*<sup>13</sup> provides that an accused person is entitled to be informed by the court or the criminal investigation department before which he is to appear of the rights available to him. Such rights include:

“[t]he right to choose his own defence counsel or ask the court to appoint one...the right to be present during any procedural acts which directly concern

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7<sup>th</sup> GR, para 30 (regarding foreign nationals detained under aliens legislation); and 8<sup>th</sup> GR, para 53 (regarding psychiatric patients and their families).

<sup>11</sup> See Belgium II, para 38; and, similarly, 6<sup>th</sup> GR, para 16.

<sup>12</sup> See, e.g., Netherlands I, para 35; Iceland I, para 29; and Belgium I, para 36.

<sup>13</sup> The *Codigo de Processo Penal, Decreto-Lei 78/87*, 17 February 1987.

him; to be heard by the investigating court or judge whenever they are called upon to take any decision affecting him; to remain silent; to intervene in the inquiry and investigatory procedure; and, in accordance with law, to appeal any decision taken against him”.<sup>14</sup>

The provisions of section 61(1) are seemingly “reproduced on a card carried by police officers which is apparently read to those arrested by them”.<sup>15</sup> Visiting the country in January 1992, the CPT “fear[ed] that the technical nature of [the] wording [of section 61(1)] could well render [the card] unintelligible to many detained persons”.<sup>16</sup>

Similarly, at the Helsinki Central Police Department and Helsinki Detoxification Centre, Finland, in May 1992, detained criminal suspects, a delegation noted, were given a “booklet setting out their rights”.<sup>17</sup> To the Committee’s disappointment, however, the booklet “simply reproduced the relevant legal provisions,” the “clear” result of which, it averred, was that the “complexity of the language employed might render it obscure to many detainees”.<sup>18</sup> Consequently, “[i]n order to ensure that persons in police custody are duly informed of their rights”, to both the Finnish and Portuguese Governments, the CPT recommended, *inter alia*, that:

“systematically at the outset of their custody, [such persons] be given a form setting out those rights *in a straightforward manner*”.<sup>19</sup>

Clearly - and understandably - therefore, the CPT considers that persons detained by the police should be informed of their rights in a way which is not so technical as to

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<sup>14</sup> See Portugal I, App 3, paras 7-8.

<sup>15</sup> Ibid. See also para 47 of the substantive report.

<sup>16</sup> Idem, para 47.

<sup>17</sup> See Finland I, para 42.

<sup>18</sup> Ibid.

<sup>19</sup> See Portugal I, para 48; and Finland I, para 43 (emphasis added). See, similarly, Netherlands I, para 48; and Italy I, para 180 (information on rights to be set out in a “simple” manner).

be unintelligible. Accordingly, it regards the simple repetition of the salient provisions of the relevant legislation as inappropriate; not even nationals of the Party concerned, it believes, can be expected to understand such a gesture.<sup>20</sup> It would seem, therefore, that the form or booklet used to convey the necessary information should be explanatory, not merely recitative.

Of course, some rights are self-explanatory: the right to inform a relative or friend of one's detention, for example, requires little elaboration. Others, however, like the melange of rights of which persons detained by the Portuguese police must, by law, be informed, may require further explanation before they may be considered properly capable of being understood. The tenor of the CPT's remarks to the Slovenian authorities following its visit in early 1995 arguably lends weight to this contention. In Slovenia, it was alleged by "a certain number" of detainees, either their rights "had not been fully explained to them...or they had not fully understood the significance of the forms which they had signed".<sup>21</sup> In the view of the CPT, the forms concerned - which were used to convey the information required by Article 4 of the Slovenian *Code of Criminal Procedure* - "could usefully be supplemented by a *written statement* of rights, phrased in straightforward terms", to be given to detainees at the outset of their custody.<sup>22</sup>

Even more pertinently, to the Liechtenstein authorities, following a visit to the country in April 1993, the Committee observed that:

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<sup>20</sup> Although the CPT's recommendations in this area relate to the provision of written information only, it may be assumed that it considers that the same precept should apply to any *oral* explanation offered by officers.

<sup>21</sup> See Slovenia I, para 37.

<sup>22</sup> *Ibid* (emphasis added).

“...la brochure [setting out the relevant rights] devrait comporter des explications sur la procedure qui leur est applicable et leurs droits en la matiere”.<sup>23</sup>

To other Parties, the CPT has suggested that a detainee should be able to certify that his rights have been explained in a manner understood by him.<sup>24</sup>

### *The detention of foreign nationals*

Inevitably, on apprehending a foreign national who cannot – or, cannot fully – understand the language spoken locally in the country in which he is detained, police officers face considerable difficulties in discharging the kinds of explanatory duties just outlined. However, it is obvious from the Committee’s published work that, in its view, any mutual misunderstanding can never justify apparent acts of discrimination against such persons in the exercise of their rights. For, as we have seen, it considers that written information on rights should be made available to all detainees as from the outset of detention “in different languages”.<sup>25</sup>

Problems of comprehension were raised by the CPT in its first Irish visit report. Visiting Ireland in 1993, a delegation noted that, with one notable exception – regarding the right to request a medical examination<sup>26</sup> - the country’s *Criminal Justice Act 1984* appeared to mirror the CPT’s basic precept on police officers’ primary duty to inform.<sup>27</sup> At the same time, however, the Act, it observed, “[did] not expressly state...that detainees should be informed of their rights in a language which they

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<sup>23</sup> See Liechtenstein I, para 32. Although this recommendation was made in the context of the detention of persons under domestic aliens legislation, it may be regarded as equally applicable, it is submitted, in respect of the detention of a State’s own nationals.

<sup>24</sup> See Italy I, para 48; and Luxembourg I, para 34. The need for detainees to record the fact that they have been made aware of their rights may now be said to be part of the CPT’s fundamental precept in the present connection: see further below, pp 189-90.

<sup>25</sup> See above, p 128. See also, Liechtenstein I, para 32; and San Marino I, para 31.

<sup>26</sup> However, cf now Ireland II, para 25.

<sup>27</sup> See Ireland I, para 48.

understand...”<sup>28</sup> As a result, the information form given to detainees, was available “only in English”, and some foreign detainees interviewed complained that they had understood neither the oral nor the written information with which they had been furnished.<sup>29</sup> In the light of these findings, the CPT recommended, first, in a reflection of its original formula, that the language in which persons detained by the Irish police are told of their rights should be one which they understand; and, second, that the written form on which their rights are listed should be “available in a variety of languages”.<sup>30</sup>

What the CPT means by terms like “variety” and “appropriate” as applied to the languages in which, it avers, information forms should be made available, we can only speculate. Undoubtedly the particular circumstances obtaining in States parties must be taken into account, so that the languages most commonly spoken by persons detained by the police therein, including minority groups, ought to feature strongly. Accordingly, we should not be surprised that the Committee recommended to the Liechtenstein authorities in 1995 that:

“...the form [setting out a person’s rights and the procedure applicable to him] should be available in the languages most frequently spoken by [detainees]...”<sup>31</sup>

Applied elsewhere, such a recommendation would mean that in Finland, for example, the relevant information might be issued, *inter alia*, in Russian, Swedish and

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<sup>28</sup> *Idem*, para 49.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid*. By the time of the CPT’s second periodic visit, in 1998, the information notices with which detainees in Irish police custody were furnished, were available “in no less than nine languages”: see Ireland II, para 25. See, similarly, UK I, para 13 (information forms to be made available in a “wide range” of languages); and Finland I, paras 42-3 (information to be given in an “appropriate range” of languages, since, at the time of the visit, it was available “apparently... only in Finnish” and, therefore, “incomprehensible” to foreign detainees).

<sup>31</sup> See Liechtenstein I, para 32.

Norwegian, as well as – as in all Parties – English, French and, arguably, German. Indeed, commendably, in their Response to the CPT’s first visit report, the Finnish authorities revealed that the booklet on the rights of detainees - which, they stated, they were in the process of preparing “on the basis of...CPT recommendations” - would be available in EC languages and in Russian and Estonian, “at least”.<sup>32</sup>

In other visit reports, the Committee has suggested, in addition, that:

“...the relevant form(s) used for informing detainees of their right to contact a member of their family, etc. be translated into a wide range of languages *and that an interpreter be made available if necessary to ensure that a detainee is informed of his rights...*”<sup>33</sup>

This is a welcome elaboration of the Committee’s rather spare fundamental position and conveys, it is submitted, a genuine sense of what the Committee believes is required of police officers in the present connection. It may, however, require of Parties a considerable financial commitment if it is to be rendered meaningful in practice.

### ***State party practice***

In examining Party practice on this, the safeguard from which, to all intents and purposes, all others flow, the CPT has encountered procedures of varying quality. Some Parties have made no provision at all; others, very good provision; others still, what can only be described as inchoate provision. Although it is simplistic to reduce perceived police procedure to categories of good, bad and mixed practice in this way,

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<sup>32</sup> See Finland Response I, CPT/Inf (93) 16, p 21.

<sup>33</sup> See Austria I, para 60, 2<sup>nd</sup> indent (emphasis added); and, in the same connection, Liechtenstein I, para 32; Turkey I, para 61; and Poland I, para 62.



for the purpose of illustrating the extent of the task faced by the Committee in seeking to effect improvements, it is a most convenient and economical conceit.

### *Poor practice*

Examples of systems which compare unfavourably with CPT precepts in this area are, it should be stated, few. Moreover, such systems would appear to be deficient only in a few - albeit important - respects. They include that which operated in Norwegian police establishments when visited in 1993. There, a CPT delegation observed:

“...apart from the oral notification of the right to be assisted by a lawyer, given immediately before the first interrogation, no...measure [informing detainees of their rights] appear[ed] to be taken”.<sup>34</sup>

Similarly, in the Hameenlinna and Turku City Police Departments, Finland, in May 1992, it was noted that:

“[n]o written information was available...”<sup>35</sup>.

In Luxembourg, in January 1993, gendarmerie officers interviewed admitted that:

“...ils n’informaient pas systematiquement les personnes retenues de nationalite etrangere de leur droit de contacter un agent consulaire”.<sup>36</sup>

### *Good practice*

Notwithstanding a general absence of provision in respect of non-English-speaking detainees in England and Wales in 1990, in its first UK visit report the CPT determined that it was “satisfied” that persons detained by the police in the

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<sup>34</sup> See Norway I, para 37.

<sup>35</sup> See Finland I, para 42 (*cf* Helsinki Central Police Department and Detoxification Centre: above, p 130). In their responses to the visit report, the Finnish authorities reacted very positively to the promptings of the CPT in this area: see Finland Follow-up report I CPT/Inf (94) 3, p 8; and Finland Response I, *op cit* n 32, above, at 20-21.

<sup>36</sup> See Luxembourg I, para 33.

jurisdiction are informed of both their right to notify a third party of their detention and their right of access to legal advice,<sup>37</sup> since its delegation “saw the form used for this purpose and noted also that the custody record opened for each detainee contained a statement to be signed by [him] attesting that he had been informed of his rights”.<sup>38</sup> The CPT was similarly satisfied, it appears, following its second periodic visit to the Party in May 1994. Then, it was clear, in the establishments visited detainees were furnished with information “both orally and in writing”.<sup>39</sup> Further, the written notices seen were both “clear and complete”.<sup>40</sup>

Contemporary practice in Scottish police establishments, however, offered less satisfactory provision. In those establishments visited, the delegation learned, the necessary information would be given to detainees “orally, but not in written form”.<sup>41</sup> Contrarily, in Northern Ireland, the CPT discovered in 1993, Codes of Practice issued under *PACE (NI) 1989* and the *EPA 1991* provide that information as to rights shall be given to a detainee, “including in the form of a written notice”.<sup>42</sup> The only disappointing aspect of this arrangement, the CPT noted subsequently, was the absence of any express reference on the written notice to a detainee’s right to request a medical examination.<sup>43</sup> However, he may be made aware of the right, albeit rather circuitously, from the written form, which refers expressly to his right to consult the Codes of Practice, “from which the right to be examined by a doctor [may] be ascertained”.<sup>44</sup> Notwithstanding this perceived deficiency, “[d]iscussions with detainees confirmed,” the Committee asserted, that police practice was “fully in

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<sup>37</sup> It appears, however, that, at the time of the visit, no information on the right to request a medical examination was given to detainees.

<sup>38</sup> See UK I, para 213.

<sup>39</sup> See, similarly, Ireland I, para 48.

<sup>40</sup> See UK III, para 43.

<sup>41</sup> *Idem*, para 296.

<sup>42</sup> See UK II, para 72.

<sup>43</sup> See, similarly, Ireland I, para 48; and Iceland II, para 25.

<sup>44</sup> UK II, para 72, note 8.

compliance” with the provisions of the Codes.<sup>45</sup> Further, it observed, positively, as in England and Wales, a person detained by the police in Northern Ireland is also “called upon to certify on his custody record that he has been informed of his rights”.<sup>46</sup>

In France, reform of the country’s *Code de Procedure Penale*, has prescribed that:

“...[t]oute personne placee en garde a vue doit immediatement etre informee des droits [d’informer un membre de sa famille, d’etre examine par un medecin et d’entrer en contact avec un avocat] ainsi que des dispositions relatives a la duree de la garde a vue...

...Mention de cet avis est portee au proces-verbal et emargee par la personne gardee a vue; en cas de refus d’emargement, il en est fait mention.

Les informations mentionees au premier alinea doivent etre communiqees a la personne...dans une langue qu’elle comprend”.<sup>47</sup>

Interestingly, this provision is strikingly similar to the CPT’s basic precept, as developed over time.<sup>48</sup>

### *Mixed practice*

Austrian law provides that anyone arrested in connection with an offence, whether administrative or criminal in character, is entitled to be informed by the arresting officer(s) of his rights.<sup>49</sup> According to police officers interviewed in 1990, however, in practice, the obligation to inform detainees, *inter alia*, of their right not to be held

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<sup>45</sup> *Idem*, para 72.

<sup>46</sup> *Ibid.* See, similarly, Ireland I, para 48.

<sup>47</sup> See France Response I, CPT/Inf (93) 2, para 121 (regarding Article 10 of *La loi no. 93-2 janvier 1993 portant reforme de la procedure penale renforce sensiblement les garanties des personnes gardees a vue*).

<sup>48</sup> See, similarly, Slovenia I, para 37 (regarding the terms of Article 4 of the country’s *Code of Criminal Procedure*).

<sup>49</sup> See Austria I, para 13.

incommunicado is observed merely “as a general rule”<sup>50</sup> - which admission was rendered all the more credible, it is submitted, by the receipt of allegations from a number of prisoners met during the visit.<sup>51</sup> At the same time, however, it was the case that the forms used by Austrian police officers to inform detainees of their right to contact a third party were available “in several languages”<sup>52</sup> and that among the “impressive” number of measures being taken or planned by the Austrian authorities to address identified shortcomings in the country’s criminal justice system was “the preparation of a new information notice for detainees explaining to them their rights”.<sup>53</sup>

German law in this area comprises, in essence, three tiers of guarantees. Regarding persons suspected of a criminal offence “who are the subject of a criminal inquiry”,<sup>54</sup> sections 136 and 163a of the country’s *Code of Criminal Procedure* provide that “before any interrogation... [they] must be informed of the offence of which they are suspected... [and of] their right of silence and their right to consult a lawyer”.<sup>55</sup> Laudable though the tenor of these provisions is, when measured against the CPT’s own precepts, the Code is notable for several significant omissions. First, it is clear that detainees are not entitled to be informed of all their rights, not even of all their fundamental rights, by the police. Second, the duty to inform arises not at the moment detention begins, as the CPT would prefer, but only before the commencement of any *interrogation*, which may, of course, be some time later. Finally, no account would appear to be taken of detainees who are not the subject of a criminal inquiry, but who have been apprehended for some other reason.

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<sup>50</sup> *Idem*, para 58.

<sup>51</sup> *Idem*, para 57.

<sup>52</sup> *Idem*, para 58.

<sup>53</sup> *Idem*, para 101 (8<sup>th</sup> indent).

<sup>54</sup> A “Beschuldigter.”

<sup>55</sup> See Germany I, App III, para 11.

To a certain extent, other provisions of the Code address this last point. Section 163b provides that criminal suspects apprehended merely “for the purposes of establishing their identity...must also be informed of the offence concerned”.<sup>56</sup> However, it is not clear from the CPT’s account of German law whether such detainees are entitled, in addition, to be informed of all their rights. Similarly, Sections 55 and 136(5) of the Code provide that persons “questioned as witnesses” by the German police “must be informed of their right of silence...if there is a risk that they or members of their family may be subject to criminal proceedings”.<sup>57</sup> At the same time, however, “[t]here is no requirement that they be informed of their right of access to a lawyer”.

### *Conclusion*

The CPT’s circumscription of the duty on police officers to inform a detainee of his rights is readily apprehended in its published work. It requires the police authorities expressly to inform a detainee without delay of all his rights, at the very least in written form, and to obtain the detainee’s signature attesting that he has been so informed or to explain the absence of any such signature. It also requires that account be taken of both the lay character of the vast majority of detainees and of the possibility of their being foreign nationals (the latter of which conceivably connotes the provision, where necessary, of an interpreter).

As far as State party practice is concerned, a perusal of visit reports demonstrates, yet again, that it is, to say the least, mixed. Only practice in England and Wales, it seems, offers anything which bares comparison with the Committee’s

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

fundamental precept, while, again, Finnish, Norwegian and Swedish law and practice fall short.<sup>58</sup> As things stand, therefore, the standards set by the CPT, simple though they may be, are still somewhat more advanced than Party practice and procedure in this area.

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<sup>58</sup> It may be conjectured, however, that the apparent frequency with which safeguards in police custody afforded by Scandinavian States fail to match CPT precepts may be the result more of such Parties candour and willingness to co-operate with the CPT, than that all other States parties, both individually and collectively, offer more comprehensive protection. It is also the case, of course, that the protection afforded by these former Parties is not deficient in every respect; it is deficient only in a few, albeit significant, respects. Many (more) serious deficiencies, as we have seen, have been identified elsewhere.

## The Interrogation of Detainees

### *Introduction: a general prohibition of ill-treatment*

In its report to the UK authorities following its *ad hoc* visit to Northern Ireland in July 1993, the CPT described the physical ill-treatment alleged to have been inflicted on persons detained in so-called Holding Centres in the period prior to its visit.<sup>1</sup> The "most common" allegations heard concerned "[s]laps, punches, pulling hair, repeated blows to the back of the head with the base of the hand and overturning the chairs on which detainees were sitting".<sup>2</sup> Two female detainees interviewed claimed to have been subjected to "physical forms of sexual harassment...touching breasts and rubbing legs..."<sup>3</sup> Pointedly, certain medical records seen by the visiting delegation in the course of the visit were "consistent" with many of the allegations heard.<sup>4</sup> "[V]arious forms of psychological ill-treatment"<sup>5</sup> were also alleged, the CPT observed, the "most serious" of which concerned:

"...threats...to arrange that persons detained or members of their families would become targets of a paramilitary group... threats to include compromising material in...interview notes unless the detainee [concerned] co-operated; misleading information concerning the legal position of members of the detainee's family; shouting and other forms of verbal abuse, including of a

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<sup>1</sup> The "Holding Centres" are establishments used for the questioning of persons detained under Northern Ireland's prevention of terrorism legislation. At the time of writing, they are in the process of being de-commissioned. In 1993, the CPT visited three such Centres: Gough Barracks Holding Centre, Armagh, Castlereagh Holding Centre, Belfast and the Strand Road Police Station, Londonderry (which, at the time, had not been used for questioning under the legislation for some months).

<sup>2</sup> See UK II, para 32. It is worth noting, however, that no person being held at the Centres just prior to or at the time of the visit made allegations of ill-treatment. The most recent allegations related to a period four months before the visit and "most" related to periods pre-dating the visit by a year or more.

<sup>3</sup> Ibid.

<sup>4</sup> *Idem*, para 33. Two cases feature at length in the report.

<sup>5</sup> Original emphasis.

sexual nature vis-à-vis women detainees; other types of intimidating behaviour, in particular banging the table in the interview room; [and] pressurising detainees to become police informers in exchange for their release".<sup>6</sup>

In its visit report, the CPT readily acknowledged that "tangible evidence of psychological ill-treatment is difficult to obtain...[especially] in the absence of any means of being able to hear what is said during the interview process". Nevertheless, it was of the opinion that its findings in the Holding Centres did "give rise to [a] legitimate concern" about the treatment of detainees therein: the "sheer number of allegations received, and their consistency as regards the types of ill-treatment employed and the authors",<sup>7</sup> it observed, were "striking".<sup>8</sup> "In the light of all the information at its disposal", the Committee indicated, it had been forced to conclude that persons arrested in Northern Ireland under the *PTA 1989* ran a "significant risk of psychological forms of ill-treatment during their detention at the holding centres and that, on occasion, resort [might] be had by detective officers to forms of physical ill-treatment".<sup>9</sup> For its own part, the Committee considered that:

"[t]he questioning of persons detained in relation to terrorist offences cannot be expected to be a pleasant process".<sup>10</sup>

Nevertheless, it maintained:

"...threats of death or serious injury (whether direct or oblique), threats to put 'dirt' in the interview notes unless information requested is provided, shouting

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<sup>6</sup> UK II, para 34.

<sup>7</sup> "[F]or the most part... members of detective units...[not] uniformed police officers with custodial duties...": *idem*, para 31.

<sup>8</sup> *Idem*, para 109.

<sup>9</sup> *Idem*, para 110.

<sup>10</sup> *Idem*, para 108.



into the ears of detainees or insulting them...is behaviour which has no proper place in the interrogation process".<sup>11</sup>

"Of course", it added, emphatically, "resort to physical violence would be equally unacceptable".<sup>12</sup> Although principally concerned with the interrogation of terrorist suspects, the Committee's opinions on the alleged conduct of officers in the Holding Centres towards persons in their charge are just as significant, it is submitted, in respect of the interrogation of other types of detainee. Accordingly, they will be treated as such for the purposes of this study and what follows must be seen in this light.<sup>13</sup>

### *The provision of guidance on the interview process*

As we shall see, the CPT is of the view that one of the best means of forestalling ill-treatment during interrogations is to furnish police officers with comprehensive guidance on the interview process. There are a number of reasons why such guidance is important. While, to a certain extent, axiomatic, they are, nevertheless, worth considering in detail:

#### *(i) In order to clarify the nature of the interview itself*

In Sweden, "as a rule", the Committee noted following its visit in 1991, an arrested person's defence counsel is entitled to sit with him during his interrogation by the police.<sup>14</sup> According to persons interviewed in the course of the visit, however, the

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<sup>11</sup> Ibid. This position, apparently, was "fully accepted by senior R.U.C. officers with whom the delegation spoke".

<sup>12</sup> Ibid.

<sup>13</sup> In this connection, see now Netherlands II, para 13 (regarding the – now prohibited - application of various forms of psychological pressure to criminal suspects – e.g. the showing of photographs of a victim's body and, occasionally, his/her family and the scene of the crime, the suggestion that a victim's family has received telephone threats - in the course of "intensive" interrogations lasting "several days").

<sup>14</sup> See Sweden I, para 26.

extent of such counsel's powers of intervention was a matter of dispute. Police officers, for their part, insisted that he was to play a "passive", not an "active", role.<sup>15</sup> The CPT chose not to take issue with this view, choosing, rather, to offer the less controversial opinion that "[t]his...matter...might usefully be clarified by instructions or guidelines".<sup>16</sup>

There is much merit, therefore, in the view of the CPT, in the provision of clear and precise guidance on interrogation procedure. Adherence to such guidance, it follows, logically, would obviate the kind of confusion and potential for dispute apparent in the uncodified Swedish system. In addition, the risk of the police being the object of vexatious claims on the part of persons formerly in their custody might be reduced if their conduct during interviews were the subject of greater circumscription – particularly if, as in Finland in 1998, any guidance formulated was also made available to detainees and their lawyers.<sup>17</sup>

*(ii) In order to prevent - or at least minimise the risk of - abuse*

Beyond bringing clarity to the interrogation process, guidelines may help to minimise the potential for abuse inherent in all custodial situations. In this respect, the manner in which, in the absence of formal guidance, police officers could exploit the poor regimes obtaining in the Finnish police establishments visited in 1992 in order to obtain information from detainees, invited strong CPT criticism. "[I]t was clear from conversations with many...remand prisoners", the Committee observed in its subsequent visit report, that the "routine" way in which they were obliged to spend "up to 23 hours each day alone in featureless cells...possibly for weeks on end", could be exploited by their interrogators: the "prospect of the police exercising their

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> See Finland II, para 40.

discretion to move them to the local remand prison - where inter alia they would be allowed to associate with other prisoners - was seen as an inducement to provide information".<sup>18</sup> "[S]uch a state of affairs", it declared unequivocally, "is not acceptable".<sup>19</sup>

*(iii) In order to reduce the risk of unintended or accumulative ill-treatment*

While valuable in preventing or reducing the likelihood of deliberate acts of ill-treatment by police officers, the formulation of precepts on interview procedure may also help eliminate more subtle - perhaps, even, unintended - kinds of ill-treatment. Accordingly, better circumscription of the character and duration of interviews than was afforded in the Codes of Practice to which officers in Northern Ireland's Holding Centres were subject in 1993, for example, might conceivably have reduced the "degree of psychological pressure amounting to ill-treatment" which the CPT considered their methods of interrogation could engender.<sup>20</sup> In the Centres:

"...detainees could be questioned for up to twelve hours a day, during six sessions of approximately two hours each, as follows: from 9am to 11am, then a fifteen minute break; from 11.15am to 1pm then a break for lunch from 1pm to 2pm; from 2pm to 4pm, then a fifteen minute break; from 4.15pm to 6pm, then a break of one hour for dinner from 6pm to 7pm; from 7pm to 9pm, followed by a fifteen minute break, and finally, from 9.15pm to 11pm".<sup>21</sup>

The questioning itself:

"...was conducted by two teams of two detectives operating in relays throughout the day - two officers always being present at each interview".<sup>22</sup>

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<sup>18</sup> *Idem*, para 24.

<sup>19</sup> *Ibid.*

<sup>20</sup> See UK II, para 75.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

This process "might continue for several days and, exceptionally, for up to seven days". It was described by the CPT as "intensive, particularly if applied over a prolonged period of time" and could, "depending on the individual concerned", be considered to constitute ill-treatment.<sup>23</sup> (It should be recalled in this connection that under the terms of contemporary prevention of terrorism legislation in Northern Ireland, with the authority of the Secretary of State, a person could be detained without charge for up to seven days.<sup>24</sup>) Surprisingly, the CPT neither recommended the creation of a less intensive interview procedure nor better circumscription of the guidelines to which interviews in the Centres were subject.<sup>25</sup> Rather, it sought to encourage greater care on the part of the Centres' Medical Officers when determining whether detainees were, in a psychological sense, "(still) fit to be interviewed", more especially, if "particularly vulnerable" – i.e. if juvenile, mentally ill or mentally handicapped.<sup>26</sup> These are, of course, laudable objectives - and useful adjuncts to the CPT's evolving body of standards on the role of medical doctors in protecting detainees against ill-treatment.<sup>27</sup> However, they fail precisely to address the concerns, voiced so forcefully by the CPT in its second UK visit report, about the character - particularly the intensity and duration - of the interview process itself and may be said to represent, therefore, an opportunity missed.

### ***State party practice: a general absence of formal guidance***

Where it is clear that a contracting Party has seriously considered the question what

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<sup>23</sup> Ibid.

<sup>24</sup> See above, p 76.

<sup>25</sup> See similarly Spain II, para 69, wherein the Committee noted, without taking the matter much further, that its findings in April 1994 had indicated that, "on occasion", detainees - "more particularly terrorist suspects" - could be interrogated for "lengthy periods".

<sup>26</sup> UK II, para 75.

<sup>27</sup> See generally above, Chapter 8.

guidance may be of use to police officers in the execution of their inquisitorial duties, the results can be striking. Visiting France in 1991, for example, the Committee was plainly impressed by the contents of circular No. 09600, drafted as long ago as 4th March 1971, which adumbrates various "mesures a prendre pour assurer le respect des garanties fondamentales de la personne humaine a l'occasion de la police judiciaire". In its subsequent visit report, the CPT quoted paragraph 13 of the circular in full, averring that it "deserves to be cited".<sup>28</sup> It is also worth quoting here, for it throws into sharp relief the kind of considerations to which, we may infer, in the view of the CPT, police officers ought to adhere in the discharge of their duties:

"Chaque officier et agent de police judiciaire doit combattre le reflexe qui consiste a rechercher avant tout l'aveu au lieu d'essayer de reunir des charges precises et de proceder a des constatations materielles susceptibles d'etablir les agissements delictueux des personnes mises en cause. Ce reflexe est de nature a entrainer le recours a des procedes d'intimidation ou de contrainte, pratiques non seulement immorales et illegales, mais susceptibles d'engager l'enquete dans une fausse direction. On n'insistera a cet egard jamais assez sur l'obligation imperative pour les enqueteurs de controler les aveux recus et les etayer par des preuves materielles".<sup>29</sup>

It has been the more common experience of the CPT, however, to encounter police officers who have been subject to no, or at most imprecise, guidance on the manner and environment in which they are required to conduct interrogations.<sup>30</sup> This absence - or imprecision - may be said to have devalued the presence in the domestic

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<sup>28</sup> See France I, para 47.

<sup>29</sup> Ibid.

<sup>30</sup> See, e.g., Austria I, para 65 (no guidelines at all); Malta I, para 89 (no guidelines; according to one officer interviewed, "every inspector has his own methods"); and Spain I, para 58 – now Spain V, para 49 (no formal rules or guidelines).

constitutions and/or Criminal Codes of the States parties concerned of specific provisions *inter alia* prohibiting and severely punishing the torture and ill-treatment of detainees by public servants, particularly since a general lack of guidance appears to vest in police officers:

"...a considerable degree of discretion on such matters as informing the detainee of the identity of those present during the interview, the maximum possible length of a given interview without a break, rest periods between interviews, the places in which an interview may take place, whether the detainee may be required to stand while being questioned, the interviewing of persons who are under the influence of drugs or alcohol, etc."<sup>31</sup>

Invested with such discretion, police officers are well placed, if so inclined, to abuse their position of authority. For instance, in December 1990, it was clear to the CPT that in Danish police establishments:

"...it lay with the police officers responsible for questioning [detainees] to assess the need to interrupt the interview according to the state of fatigue or hunger of the person concerned".<sup>32</sup>

Clearly, the risk of abuse of power in such circumstances is high - although the presence of a lawyer during interrogations, as provided for in Danish law<sup>33</sup> - could provide some check on police excesses.

The lack of guidance on interview procedure in a number of States parties to the ECPT contrasts sharply with their provision of often developed and thoroughgoing legal regimes in respect of, *inter alia*, the prohibition and punishment

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<sup>31</sup> See Spain I, para 58 (emphasis added).

<sup>32</sup> See Denmark I, para 129.

<sup>33</sup> Ibid.

of ill-treatment by law enforcement personnel. As well as proscribing overt acts of torture and ill-treatment by such personnel, these regimes, as encountered by the CPT, have, in the specific context of police interview procedure, sought to proscribe:

- (i) efforts on the part of police officers to compel interviewees to make a statement or confession;<sup>34</sup>
- (ii) recourse to coercion generally during interviews;<sup>35</sup>
- (iii) the use of "perfidious" or other unlawful means of questioning;<sup>36</sup>
- (iv) the exploitation of a detainee's exhaustion;<sup>37</sup>
- (v) the issuing of threats;<sup>38</sup> and
- (vi) the use of "physical constraint...medicines...or hypnosis".<sup>39</sup>

Positive obligations imposed on interviewing officers have included:

- (i) the duty to treat persons being questioned "in a calm and objective manner";<sup>40</sup>
- (ii) the duty to ask "clear and unambiguous questions";<sup>41</sup>
- (iii) the duty to afford interviewees "the opportunity for regular meals and sufficient rest"<sup>42</sup>
- (iv) the duty to inform detainees before their interrogation, *inter alia*, of the charges against them,<sup>43</sup> the fact that they will "not necessarily be released as a result of any admissions made"<sup>44</sup> and their right not to answer questions<sup>45</sup> as well as the duty to record the interrogation;<sup>46</sup>

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<sup>34</sup> See Denmark I, App 2, para 9; and, similarly, Netherlands I, para 49; and Slovenia I, para 38.

<sup>35</sup> Ibid. See also, Finland I, para 44; and Iceland I, para 38.

<sup>36</sup> Ibid. See also, Germany I, para 40; Norway I, para 38; and Iceland II, para 26.

<sup>37</sup> See Finland I, para 44; and Germany I, para 40.

<sup>38</sup> See Finland I, para 44; Norway I, para 38; and Iceland II, para 26.

<sup>39</sup> See Germany I, para 40; Norway I, para 38; and Italy I, para 51.

<sup>40</sup> See Finland I, para 44; and Norway I, para 38.

<sup>41</sup> See Iceland I, para 38.

<sup>42</sup> See Finland I, para 44; and, similarly, Iceland I, para 38 (now Iceland II, para 26); and Norway I, para 38.

<sup>43</sup> See Norway I, para 38; and, similarly, Denmark I, App 2, para 9.

<sup>44</sup> See Norway I, para 38.

<sup>45</sup> Ibid. See also Denmark I, App 2, para 9.

<sup>46</sup> See Netherlands I, para 49.

(v) the duty to note in writing in the interview record any breaks in examinations,<sup>47</sup> as well as the times when interviews begin and end;<sup>48</sup> and

(vi) the duty to inform interviewees of the name and identity number of the officers conducting the interview, if the detainee requests them.<sup>49</sup>

Before turning to consider identifiable CPT precepts in the area of interview practice and procedure, it should be noted that the formulation of guidance should comprise just one part of a general strategy to safeguard the detainee during questioning. This strategy ought, really, to commence with the training and education of police officers, of which instruction on interview procedure is merely one, albeit a fundamental, part; officers cannot be expected to operate effectively without having been instructed on appropriate interview technique.

### ***The Committee's basic precept: the formulation of codes of conduct***

At first sight, the CPT itself would appear to take a detached, even non-committal, view as to how best to conduct interviews with detainees, acknowledging that:

"[t]he art of questioning criminal suspects will no doubt always be based in large measure on experience".<sup>50</sup>

At the same time, however, it has stated, more firmly, that:

"...clear rules or guidelines should exist on the way in which police interviews are to be conducted".<sup>51</sup>

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<sup>47</sup> See Germany I, para 41; and Luxembourg I, para 35, note 2.

<sup>48</sup> See Iceland I, para 38; and, similarly, Belgium I, para 49; France I, para 48; and Luxembourg I, para 35, note 2.

<sup>49</sup> See Germany I, para 41.

<sup>50</sup> See Greece I, para 46; and, similarly, UK II, para 74; and UK III, para 298.

<sup>51</sup> See 2<sup>nd</sup> GR, para 39; and, similarly, Hungary I, para 50; and France I, para 48.



Further, it has insisted, even where some provision, ostensibly protective of interviewees, is made by a Contracting party, it nevertheless:

"...considers it essential for...very general provisions...to be supplemented by a formal code of conduct for interrogations setting out in detail the procedure to be followed on a number of specific points".<sup>52</sup>

Accordingly, the issuing of directives or similar guidance to officers is, it seems, insufficient. Such directives or guidance, the Committee holds, "cannot replace a code of conduct...established at the national level by the competent authorities".<sup>53</sup> In fact, so important to the CPT is codification in this area that when it has found that no domestic provision has been made at all, it has been markedly less measured. In circumstances such as these, it has stated, codes of practice should be adopted "as a matter of urgency".<sup>54</sup>

### *Justifying the basic precept*

We have already considered why, in a general sense, guidance on the interrogation of persons in police custody is of value in the prevention of ill-treatment. Regarding the formulation of codes of conduct in particular, the CPT has sought to stress, simply, that:

"...[they] help to underpin the lessons taught during police training".<sup>55</sup>

In addition, of course, codes of conduct afford national authorities an opportunity to

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<sup>52</sup> See Greece I, para 46.

<sup>53</sup> See Italy II, para 58.

<sup>54</sup> See Austria I, para 66; and Malta I, p 8 ("Summary of the CPT's main findings") and para 89.

<sup>55</sup> See, e.g., Poland I, para 56; and, similarly, Slovenia I, para 39; and Ireland I, para 50.

render all law and subordinate regulation on the questioning of detainees workable in practice.<sup>56</sup>

### *Developing the basic precept*

#### *The contents of codes of conduct*

To date, it is submitted, in developing guidance on the interrogation of detainees, the nature of the balance which the CPT has sought to strike between, on the one hand, experience and, on the other, codification, has not been made clear in its published work. However, in its first analysis of Norwegian law and practice in this area, it did acknowledge that it "fully concur[red]" with the view of the country's Minister of Justice, as expressed in a Circular of 2nd December 1985, that:

"[t]here are limits to what formal rules of police investigation can achieve as regards a proper balance between the respect due to persons questioned and the need to solve a case".<sup>57</sup>

"[N]evertheless", the CPT added, "certain aspects [of the interrogation procedure] should be covered by formal provisions".<sup>58</sup> Regrettably, the Committee failed to say anything more on the nature of the putative balance to be struck between pragmatism and formality. What is clear, however, is its belief that a number of important residual matters ought to be the subject of codification. As to those matters, the CPT's views are worth quoting in full. As might be expected, given its preventive mandate, any interview code, it believes, should contain, first, "a clear [and unequivocal<sup>59</sup>]

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<sup>56</sup> See, e.g., Belgium II, para 39.

<sup>57</sup> See Norway I, para 39.

<sup>58</sup> Ibid. In Norway, it should be noted, police officers are "expected" to follow a particular interrogation practice, elaborated, *inter alia*, in Prosecution Instructions: *idem*, para 38.

<sup>59</sup> See Ireland I, para 50.

prohibition of recourse to any form of ill-treatment",<sup>60</sup> as well as, equally predictably, the "threat" of ill-treatment.<sup>61</sup> In addition, it considers, such a code:

"...should deal *inter alia* with the following: the systematic informing of the detainee of the identity (name and/or a number) of those [police officers] present at the interrogation; the permissible length of an interrogation; rest periods between interrogations and breaks during an interrogation; places in which interrogations may take place; whether the detainee may be required to remain standing while being interrogated; the interrogation of persons who are under the influence of drugs, alcohol, medicine, or who are in a state of shock. It should also be required that a record be systematically kept of the time at which interrogations start and end, of the persons present during each interrogation and of any request made by the detainee during the interrogation".<sup>62</sup>

More specifically, the Committee believes that:

"[t]he position of specially vulnerable persons (for example, the young, those who are mentally disabled or mentally ill) should be the subject of specific safeguards".<sup>63</sup>

Clearly, the Committee has chosen not to elaborate an exhaustive set of guidelines. However, those cited above may be said to represent, inevitably, the more significant provisions of the code sought.

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<sup>60</sup> See UK II, para 74; and UK III, para 298.

<sup>61</sup> This, we can infer from the Committee's endorsement of Irish practice in this regard: see Ireland I, para 50.

<sup>62</sup> See, *inter alia*, Greece I, para 46; 2<sup>nd</sup> GR, para 39; Portugal I, para 50 (now Portugal II, para 59); Czech Republic I, para 34; Spain V, para 55; and Spain VI, para 32.

<sup>63</sup> *Ibid.* See also Poland I, para 57 (*cf* Polish law (para 56)); and Romania I, para 45 (*cf* Romanian law (para 44)).

### *Particular aspects of the recommended code*

Why the CPT should seek to encourage Contracting parties expressly to codify this particular corps of guidelines may be demonstrated by reference to Party practice in this area.

#### *- Length of interrogations*

In Germany, in December 1991, a CPT delegation observed that police officers were subject to "no specific rules on the maximum length of interrogations". According to officers interviewed, "prisoners could be questioned for up to twelve hours, on condition that they showed no signs of fatigue".<sup>64</sup> In its subsequent visit report, the CPT alluded to the absence of guidance on the matter, without, regrettably, suggesting what it would regard as a more satisfactory length of interrogation. We may be sure, however, that it considers questioning for up to twelve hours quite inappropriate.

A clearer - though far from authoritative - account of the CPT's view on the matter has emerged from its dialogue with the Icelandic authorities in the wake of its visits in 1993 and 1998. Police interrogations in Iceland are regulated by the country's *Criminal Procedure Act*, Section 66.2 of which provides, *inter alia*, that a person may not be questioned "for more than six hours at a time".<sup>65</sup> Although, in its first visit report, the CPT offered no opinion as to the merit of Section 66.2, merely asking – albeit with evident concern – whether, in Iceland, "a detained person could be interrogated for six hours *without any break whatsoever...*",<sup>66</sup> in its second report, it was prepared to state, more robustly, that, in its opinion, "only very exceptional circumstances [can] justify such a prolonged interrogation session without a break". Accordingly, it invited the Icelandic authorities "to revise Regulation No. 395/1997,

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<sup>64</sup> See Germany I, para 41.

<sup>65</sup> See Iceland I, para 38; and now Iceland II, para 26 (regarding Regulation No. 395/1997).

<sup>66</sup> *Ibid* (emphasis added).

so as to make clear that breaks from interviewing should in principle be made at shorter intervals than six hours".<sup>67</sup> Unfortunately, as in its first German visit report, the Committee did not suggest a more appropriate interview duration.

- *The questioning of juveniles*

As we have seen, the CPT considers that "the young" represent a "specially vulnerable" category of detainee and should, accordingly, "be the subject of specific safeguards".<sup>68</sup> In this connection, it should be recalled that the Committee has "welcome[d]" the formulation in some jurisdictions of a prohibition against the questioning of young persons in the absence of "an appropriate person and/or lawyer".<sup>69</sup>

- *Taking account of a detainee's state of mind: the questioning of persons affected by drugs, medication or alcohol*

Even in the absence of wilful acts of ill-treatment on the part of police officers, the use of certain routine, but unregulated, practices when interviewing detainees may threaten the latter's state of health and prove, ultimately, detrimental to the investigation concerned. In its first Austrian visit report, for example, the CPT expressed "concern...about the possible questioning of detainees suffering from the effects of drugs or alcohol".<sup>70</sup> Visiting the country in 1990, its delegation had gained the "impression" that one person spoken to had been questioned by the police "while he was experiencing withdrawal symptoms, without any previous medical consultation".<sup>71</sup> It may be inferred from this that the Committee considers that a medical examination of persons reasonably suspected of being in a state of withdrawal from drug or alcohol consumption - and, *a fortiori*, those who are still

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<sup>67</sup> See Iceland II, para 26.

<sup>68</sup> See above, p 153.

<sup>69</sup> See above, p 73.

<sup>70</sup> See Austria I, para 65.

<sup>71</sup> Ibid. The detainee concerned had also alleged that he had been ill-treated while being questioned: *idem*, para 46.

intoxicated – ought to precede and, presumably, in the event of adverse findings, prevent, their interrogation.

The Committee might also have indicated that when the police are seeking to question a person whom they reasonably suspect to be intoxicated or, as in Austria, suffering withdrawal symptoms following a period, or periods, of intoxication, a failure to seek and obtain a prior medical opinion as to his fitness for interview might undermine the whole interrogation process. Not only might the interview lack objective medical justification and, therefore, endanger the welfare of the detainee concerned; but, as a means of advancing the police investigation, evidence obtained from a medically unfit interviewee may, *ipso facto*, be flawed. As such, it may be of little worth to – and perhaps, even, mislead - the police. Indeed, in a clear threat to the administration of justice, it could, if relied on, undermine the very integrity of the investigation itself.

### ***Other features of the interview process relevant to the CPT's mandate***

#### ***The presence of 'witnesses' at interviews***

As might be expected, the formulation of codes of conduct, while, arguably, the most significant aspect of the discourse between the CPT and States parties on police interview procedure, is not the only one. Certain idiosyncrasies manifest in a number of national criminal justice systems examined by the Committee in the course of its work have induced from it clear expressions of interest and are, *ipso facto*, worth considering here. In Finland, Sweden and Iceland, for example, legislation on criminal investigation procedure provides for the presence of a witness during the interrogation of criminal suspects. In Finland, at the request of the person detained, a "credible and competent" witness may be present during interviews, except "[i]n cases

of urgency". However, interviews of suspects aged under 18 *must* be conducted in the presence of a witness.<sup>72</sup> In Sweden, "to the extent possible, a reliable witness commissioned by the investigating authority shall be present at examinations";<sup>73</sup> and, in Iceland, again as far as possible, an "articulate and reliable witness" should be present at police interrogations.<sup>74</sup>

Formal efforts like these to protect persons undergoing police interview are particularly laudable where - as was apparently the case in all three Parties - a detainee's right of access to a lawyer, especially at the pre-arrest stage of the criminal process, may be somewhat attenuated in practice.<sup>75</sup> In the view of the CPT:

"[c]ertainly, the presence of a witness during interrogation can represent an important safeguard [against ill-treatment]..."<sup>76</sup>

This assertion aside, the CPT omitted expressly to endorse the formal witness arrangements laid down in any of the three Parties concerned. Accordingly, while the tenor of its observation is approbatory, it would be precipitate to describe it as representing an incipient standard; the CPT has not yet suggested to other Parties that such procedures might usefully reinforce the safeguards *extant* in their own criminal justice systems - even where such safeguards are, in its view, flawed. Further, in practice, it appears, the notional impartiality of two of the three witness procedures concerned was, on close examination, somewhat vitiated. First, in Sweden, as we have already seen, the witnesses called upon were, by law, "commissioned by the investigating authority"; while, in Finland, according to both detainees and police

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<sup>72</sup> See Finland I, para 46 (citing Section 30 of the country's *Pre-Trial Investigation Act 1987*).

<sup>73</sup> See Sweden I, para 35 (citing Section 10 of Chapter 23 of the country's *Code of Judicial Procedure*).

<sup>74</sup> See Iceland I, para 41 (citing Section 72.2 of the country's *Criminal Procedure Act*).

<sup>75</sup> See, e.g., Finland I, paras 33 and 34; Sweden I, para 25; and Iceland I, paras 33 and 34. See also above, *inter alia*, pp 78 and 80.

<sup>76</sup> See Finland I, para 47.

officers interviewed in 1992, "the witness involved was usually a police officer".<sup>77</sup> This clearly raises questions as to the credibility of both procedures. Indeed, in the light of such practice, the CPT suggested to the Finnish authorities that:

"...in addition to being credible and competent [a witness] should also be demonstrably impartial. It is open to question whether a police officer can be considered to meet this latter criterion".<sup>78</sup>

### *The interview of remand prisoners by the police*

It is, of course, not only at the outset – that is, in the pre-charge or pre-arrest stage - of a criminal investigation that the police may wish to question a criminal suspect. Even after he has been charged with a criminal offence and, where it has been deemed necessary, remanded in custody for trial, the police may, quite legitimately, wish to interview him further. This questioning might relate either to the offence with which he has been charged or to other matters. In such circumstances, the question arises, to what kind of access should the police be entitled? The Committee, for its part, believes that a situation in which, for the purposes of further questioning, police officers retain "free access" to persons remanded in prison establishments, particularly where such persons are required to return to police premises for the duration, "lends itself to abuse". The removal of inmates from prison by the police, it has stated, should be "subject to the authorisation of a judge or public prosecutor".<sup>79</sup> Further, "from the standpoint of the prevention of ill-treatment", it has observed:

"it would be far preferable for further questioning of persons committed to prison to take place in prison rather than on police premises. The return of

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<sup>77</sup> Idem, para 46.

<sup>78</sup> Idem, para 47.

<sup>79</sup> See Norway I, paras 41 and 136; and, similarly, Iceland I, paras 42 and 164 (and now Iceland II, para 27, regarding the – unchanged – situation in 1998, almost five years after the first periodic visit).



prisoners to police premises for whatever purpose should only be sought and authorised when it is absolutely unavoidable...”<sup>80</sup>

### *The timing of interviews*

Section 24 of Finland's *Pre-Trial Investigation Act 1987*, provides, *inter alia*, that "[n]o one may be questioned [by the police] between 9.00 pm and 6.00 am without special cause".<sup>81</sup> In the report drawn up in the wake of its visit to the country in 1993, the CPT "welcome[d]" this provision,<sup>82</sup> a gesture that suggests, without being emphatic, that the precept might, ultimately, usefully supplement its own evolving corpus of standards on police interview procedure. In the same connection, visiting Spain in April 1994, a CPT delegation, we may infer from its subsequent visit report, was disturbed to find that "on occasion detained persons (and more particularly terrorist suspects)...have their formal statements taken during the night";<sup>83</sup> while, in the wake of its visit to the Netherlands Antilles in June 1994 and commenting on Section 41 of the country's *Code of Criminal Procedure* - which authorises the police to detain criminal suspects for questioning for a maximum of six hours, though longer if detained between the hours of 10 pm and 8 am<sup>84</sup> - the Committee sought to know, whether, as a consequence, questioning might take place at night,<sup>85</sup> a request which betrayed, it may be argued, a certain unease about the possibility.

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<sup>80</sup> See Czech Republic I, para 15.

<sup>81</sup> See Finland I, para 44.

<sup>82</sup> *Idem*, para 45.

<sup>83</sup> See Spain II, para 69.

<sup>84</sup> See Netherlands (NA) I, para 12.

<sup>85</sup> *Idem*, para 58.

### ***The environment in which interrogations take place***

As might be expected, the CPT is alarmed when it encounters interrogation rooms “of a highly intimidating nature”.<sup>86</sup> Such facilities, it considers, “have no place in a modern police service”.<sup>87</sup>

### ***The ease with which investigating officers can secure access to detention areas***

Visiting Brixton Police Station, England, in 1997, the CPT learned that it was “not unknown for detective officers to enter the custody suite”. In its subsequent visit report, it remarked that it would be “advisable” for police officers involved in the investigation of offences to avoid entering an establishment’s custodial areas.<sup>88</sup> Evidently, the Committee considers that a clear distinction should be drawn between the custodial and investigatory responsibilities of the police; personnel involved in the latter, it may be inferred, should not be able to secure access to detainees unless it is for the purpose of questioning, which activity should take place in an appropriate environment.

### ***Conclusion: the limitations of codes of practice***

Even where there exists in a State comprehensive regulation of - or, at least, guidance on - the interview process, it is, of course, always possible for domestic authorities, whether permissively or unwittingly, to allow situations to develop in which the will of a detainee may be broken in an unsatisfactory fashion, but where no putative code of conduct appears to have been violated. In such circumstances, the inherent

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<sup>86</sup> See, e.g., Turkey I, para 74 (regarding interview rooms seen in a number of police establishments visited in 1997. Unfortunately, the CPT omitted to describe the facilities in its subsequent visit report, although its critical reference to a “small, black and sound-proofed ‘identification room’” seen elsewhere in one of the establishments visited may indicate the kind of environment encountered).

<sup>87</sup> Ibid.

<sup>88</sup> See UK IV, para 63.

inflexibility of such codes is plain to see. The two following instances, it is submitted, offer interesting insights in this regard.

In their treatment, detention and questioning of both criminal and terrorist suspects, the security forces in Northern Ireland are, as we have seen, subject to a variety of Codes of Practice.<sup>89</sup> Yet, visiting in 1993, the CPT was deeply disturbed, certainly insofar as terrorist suspects were concerned, by the "sheer number...and...consistency" of allegations of physical and psychological ill-treatment made against such forces.<sup>90</sup> If proven, such alleged mistreatment may be considered, *ipso facto*, clearly to have breached specific provisions of the Codes of Practice. At the same time, however, and less obviously, various objectionable features of detention in the Holding Centres at the time of the visit, each one regrettable, though not, of itself, unconscionable, may be considered, cumulatively, to have caused detainees greater distress than discrete acts of deliberate ill-treatment. In this regard, the CPT proclaimed, rather forcefully, that:

"[e]ven in the absence of an overt act of ill-treatment, there is no doubt that a stay in a holding centre may be - and is perhaps designed to be - a most disagreeable experience. The material conditions of detention are poor<sup>91</sup> ...and important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained by the police.<sup>92</sup> ...To this must be added the intensive and potentially prolonged character of the interrogation process. The cumulative effect of these factors is to place persons detained at the holding centres under a considerable degree of psychological pressure.

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<sup>89</sup> Such Codes, developed under *PACE (NI) 1989* and the *EPA 1991*, it will be recalled, have been met with general - though far from unqualified - CPT approval: see above, *inter alia*, pp 75-6 and 136-7.

<sup>90</sup> See UK II, para 109.

<sup>91</sup> Castlereagh Holding Centre, in particular, was criticised in this regard.

<sup>92</sup> "[I]n particular", the CPT noted, "the possibilities for contact with the outside world are severely limited throughout the whole period of detention and various restrictions can be placed on the right of access to a lawyer".

The CPT must state, in this connection, that to impose upon a detainee such a degree of pressure as to break his will would amount, in its opinion, to inhuman treatment".<sup>93</sup>

Clearly, in such circumstances the immanent rigidity in drafting and application of otherwise laudable and comprehensive codes of conduct on interview procedure is exposed and their ultimate value in the protection of detainees rendered open to question. As means of systematising and regulating the questioning of persons detained by the police and the environment in which that questioning may take place and, consequently, as tools in the struggle to eliminate ill-treatment, such codes, it is submitted, do possess serious flaws and *lacunae*.<sup>94</sup> At the same time, however, it would be misconceived to view both their function and shortcomings so clinically; their formulation and implementation should be seen as simply one of a range of precepts, adherence to which ought better to protect persons detained and questioned by the police. As such, it may be stated, they supplement the CPT's corpus of standards most valuably.

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<sup>93</sup> See UK II, para 109.

<sup>94</sup> It has been observed that a number of States parties to the ECPT have expressed the view that codes of conduct, particularly as advocated by the CPT, are "unnecessarily formalistic": see Evans and Morgan (1998), p 290.

## The Electronic Recording of Police Interviews

### *Introduction: a general absence of provision*

While the CPT, as we have just seen, has done much to codify standards on the conduct of police interrogations, the question how best to record interviews with detainees is one that it has sought to explore in a quite separate and distinct way. Contemporary law and practice among States parties in this area may be said to vary from the very basic to - in very rare instances - near-conformity with the relevant CPT precepts. Further, in a number Parties, law and practice may be seen to diverge from such precepts, occasionally quite markedly. For instance, in Finland, where legislation expressly "authorise[s]" the electronic recording of police interrogations, a CPT delegation "found no evidence of the use of such techniques" when visiting in 1992.<sup>1</sup> A similar dissonance between law and practice was perceived in Germany, in December 1991,<sup>2</sup> Norway, in 1993<sup>3</sup> and, seemingly, Switzerland, in July 1991.<sup>4</sup> In many more Parties still, however, no legal or practical provision would appear to have been made at all.<sup>5</sup>

### *State party practice: the two extremes*

Among the most undeveloped recording techniques to have been observed by visiting CPT delegations were those employed by the Austrian and Maltese police forces, when scrutinised in 1990. In both Parties, it seems, police interviews with criminal

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<sup>1</sup> See Finland I, para 48. The authorising legislation referred to is section 39 of the *Pre-Trial Investigation Act* and section 17 of the *Decree on Pre-Trial Investigation and Coercive Criminal Means*, 17 June 1988/575.

<sup>2</sup> See below, p 164.

<sup>3</sup> See Norway I, para 40.

<sup>4</sup> See below, p 164.

<sup>5</sup> See, e.g., Greece I, para 47; Hungary I, para 52; and Spain II, para 71.

suspects were recorded "exclusively manual[ly]".<sup>6</sup> Similarly, in Germany, it was noted in December 1991, police interrogations were "usually recorded manually, even though the electronic recording of interrogations was permitted under...[existing] legal provisions (in particular the Code of Criminal Procedure)";<sup>7</sup> while, in Switzerland, earlier that same year, it was observed that police interrogations were "le plus souvent dactylographies" – although, "rarely", at the commissariat central de la police municipale de Berne, "it was possible electronically to record interrogations with the detainee's consent".<sup>8</sup>

By contrast, in England and Wales, the CPT noted in its first UK visit report, "[a] distinct code provides for the tape recording of most police interviews in relation to serious offences"<sup>9</sup> - a category which, "with effect from 1 December 1992", and subject to the consent of the detainee concerned, has included, "on a trial basis", terrorist offences.<sup>10</sup> According to the CPT, on the evidence of its delegation's visit in August 1990, adherence to the code among police officers "would appear to be the rule, subject to certain specific exceptions".<sup>11</sup> In Scotland, police officers asserted in 1994, "all interviews conducted by CID officers [are] tape-recorded";<sup>12</sup> while, in Northern Ireland, it was noted in 1993, the audio-tape recording of police interviews with persons arrested under *PACE (NI) 1989* – i.e. non-terrorist criminal suspects - was "standard practice".<sup>13</sup> However, there was no such recording of interviews with persons detained under *PTA 1989* - i.e. suspected terrorist suspects.<sup>14</sup>

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<sup>6</sup> See Austria I, para 67; and Malta I, para 90.

<sup>7</sup> See Germany I, para 43.

<sup>8</sup> See Switzerland I, para 127. In Greece, in 1993, the CPT learned, an electronic recording system was "not currently used": see Greece I, para 47.

<sup>9</sup> See UK I, para 18.

<sup>10</sup> See UK II, para 88; and UK III, para 44.

<sup>11</sup> See UK I, para 221. The exceptions referred to were not explained by the Committee.

<sup>12</sup> See UK III, para 300.

<sup>13</sup> See UK II, para 83.

<sup>14</sup> Ibid.

### *The CPT's basic precept and rationale*

Given such varied - and, on the whole, undeveloped - practice among States parties, it is no surprise that the CPT's preference for the electronic recording of police interviews has been frequently expressed in its published work. Such recording, it considers, represents:

"...another useful safeguard against the ill-treatment of detainees (as well as having significant advantages for the police)".<sup>15</sup>

These "advantages" were expounded in the Committee's second Spanish visit report, wherein, having reiterated its recommendation on the introduction of a system of electronic recording of interrogations made in its first such report,<sup>16</sup> it sought to emphasise the "legitimate interests of the law enforcement agencies" which such a system would serve. "In particular", it proclaimed:

"... it would provide a complete and authentic record of the interrogation process, thereby greatly facilitating the investigation of allegations of ill-treatment and the correct attribution of blame".<sup>17</sup>

The benefits of the electronic recording of interviews, both for detainees, in respect of the "reinforce[d]" protection against ill-treatment which it affords, and for police officers, in respect of their better protection against unfounded allegations of abuse, "is not seriously contested by anyone", the CPT has asserted elsewhere.<sup>18</sup> Thus, actuated by this sense of the appropriateness of electronic recording techniques, in,

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<sup>15</sup> See 2<sup>nd</sup> GR, para 39; and, similarly, Poland I, para 58; and Romania I, para 46.

<sup>16</sup> See Spain I, para 59. The recommendation was also contained in a letter sent to the Spanish authorities just prior to its second visit.

<sup>17</sup> See Spain II, para 71. See, in the same connection, Slovenia I, para 40; and Ireland I, para 51.

<sup>18</sup> See UK II, para 83 (a response to the protracted debate in Northern Ireland in 1993 as to the benefits and disadvantages of electronic recording).

*inter alia*, its first Austrian and Maltese visit reports, the Committee recommended that the national authorities:

"...explore the possibility of introducing a system of electronic recording of police interviews offering all appropriate guarantees".<sup>19</sup>

***Developing the basic precept: the provision of "appropriate guarantees"***

The CPT has offered a certain, limited guidance to Parties regarding its use of the term "all appropriate guarantees" to describe the kind of safeguards to which, it considers, the electronic recording of police interviews should be subject. To the Swedish authorities, for example, having learned from interviews with police officers in 1991 that the tape recording of interrogations lay "at their discretion", it suggested not only that the electronic recording of interviews should be "standard practice" in police establishments, but also that, by way of "appropriate guarantee", such recording might comprise:

"...a two-tape system, one tape to be sealed in the presence of the detainee, the other used as a working copy".<sup>20</sup>

It would be similarly "appropriate", it has suggested, to oblige the police to obtain the detainee's prior consent to the recording of his interrogation.<sup>21</sup> However, these instances aside, the CPT has yet to elaborate a comprehensive body of safeguards which might circumscribe any system devised for the recording of police interviews.

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<sup>19</sup> See Austria I, para 67; and Malta I, para 90. See, in the same connection, Denmark I, paras 130 and 143; and Belgium I, para 50.

<sup>20</sup> See Sweden I, para 34. See, similarly, Germany I, para 43; and France I, para 49.

<sup>21</sup> See, e.g., Greece I, para 47; Slovenia I, para 40; Switzerland I, para 127; and Romania I, para 46.



### ***Balancing potentially conflicting interests: the Northern Ireland experience***

It may be that the CPT has good reason for refraining generally from developing its basic precept. It may be that there is little to add to that which it has already elaborated: either a Party provides a system of electronic recording or it does not. It may be that the Committee's priority has been simply to encourage the adoption of appropriate systems among States parties, which, by and large, have not made any provision; in which case, little further elaboration is necessary at this juncture. At the same time, however, there have been instances when the Committee has been prepared both to consider in detail and to encourage the development of certain procedures in relation to particular situations obtaining in States parties.

One of the most interesting of these instances occurred in the wake of an *ad hoc* visit to Northern Ireland in 1993, during which contemporary law and practice on the tape-recording of police interviews was subject to particular scrutiny. Following its visit to England and Wales in 1990, the Committee had observed that the contemporary system for the tape recording of police interviews in respect of serious criminal offences in the jurisdiction "seemed to offer all appropriate safeguards".<sup>22</sup> Further, after its visit to Northern Ireland in 1993, it will be recalled, the CPT determined that the risk of the psychological - and, indeed, physical - ill-treatment of suspected terrorists by certain members of the security forces was "significant".<sup>23</sup> It will also be recalled that the Committee, in its subsequent visit report, averred that "[o]f course, tangible evidence of psychological ill-treatment is difficult to obtain, in

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<sup>22</sup> See UK I, para 221.

<sup>23</sup> See above, p 142 (referring to UK II, para 110).

the absence of any means of being able to hear what is said during the interview process".<sup>24</sup>

This observation was prompted by the visiting delegation's findings in respect of the interrogation of terrorist suspects in the country's Holding Centres. In this regard, in seeking to establish why the number and consistency of allegations of ill-treatment received by its delegation had been so "striking":

"[t]he fact that, unlike persons detained under *P.A.C.E. (N.I.)* no tape-recordings are made of interviews with persons detained under the *P.T.A.* must...be taken into account. At present there is no means whatsoever for anyone other than the detainee and his interviewers to know what is said during an interrogation".<sup>25</sup>

Consequently, the Committee reflected:

"...detective officers minded to resort to psychological forms of ill-treatment could...do so with virtual impunity".<sup>26</sup>

It might have been expected that in the light of these considerations, the CPT would only reluctantly have entertained arguments that sought to gainsay its preference for the introduction of the routine electronic recording of police interviews. What we find in its visit report, however, is an open-minded and sensitive discussion of a contentious subject. The Committee, for its part, stated that, without wishing to "rehears[e] all of the many arguments which have been advanced for and against electric recording",<sup>27</sup> it was prepared to consider the "central argument against" the procedure: i.e. that its introduction in the Holding Centres as standard practice:

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<sup>24</sup> Ibid (referring to UK II, para 35).

<sup>25</sup> See UK II, para 109.

<sup>26</sup> Ibid.

<sup>27</sup> Idem, para 83.

"...could enable paramilitary groups to monitor the content of interviews...in particular as a result of legal procedures involving the disclosure of...recordings in court".<sup>28</sup>

The "corollary" of this argument, the CPT suggested, "is that the introduction of electronic recording might well discourage suspects from providing valuable information to the security forces".<sup>29</sup> Generously, it acknowledged that, "[i]n the context of Northern Ireland, this argument should be given due weight". For, "[t]here can be no doubt that certain, if not all paramilitary groups operating in the Province possess both the organisational capacity to 'police' the interview process and, where they judge appropriate, the ruthlessness to exact severe retribution".<sup>30</sup> The Committee's choice of language here, while conciliatory, is revealing, it is submitted. Beyond contemporary Northern Ireland, we may interpolate, this argument should be given less, perhaps significantly less, weight; the risk of individual criminals monitoring and exploiting the content of electronically recorded interviews, and thereby discouraging others from furnishing the police with valuable information, does not outweigh the value of the procedure itself as a means of obtaining such information, it may be suggested.

Beyond this principal objection, a number of other arguments against the introduction of electronic recording techniques were advanced by police officers in the course of the visit. Again, the Committee treated them with indulgence, even when it found them less compelling. Thus, "the delegation was...given to understand" by officers interviewed that "certain intelligence information could be obtained in the course of an interview which would not necessarily be reflected in the interview

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<sup>28</sup> *Idem*, para 84.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

records (notes)".<sup>31</sup> The fact that such information had been obtained, the officers stated, "would not be revealed in the event of the interview notes being the subject of disclosure in...a civil action arising out of an allegation of ill-treatment". However, they insisted, "it would be revealed if a tape-recording of the interview was disclosed in court".<sup>32</sup>

"It is indisputable", the CPT acknowledged, in response, "that, in the course of an interview with a [terrorist suspect], sensitive information can be revealed which is of great utility to the security forces in the fight against terrorism, and [it] recognises the need to ensure that those who provide such information are not unnecessarily endangered".<sup>33</sup> However, it is also the case, it suggested, that, where interviews are electronically recorded, it is possible to deal with the problem of disclosure without undermining the integrity of the procedure. For example, it could be argued, as the visiting delegation itself did, that "a suspect who provided intelligence information would be unlikely to instigate procedures involving the disclosure of the tape recording";<sup>34</sup> while the prospect of disclosing potentially sensitive intelligence might be overcome if detainees were permitted "to request that an interview not be recorded".<sup>35</sup> Neither argument, it seems, mollified the officers interviewed. The first they appeared to consider naive, for, despite the undoubted sincerity of the CPT's efforts to intuit the future conduct of a suspect who has provided intelligence information, "[he] could", they insisted, "be instructed to begin...a procedure [in which the disclosure of the tape recording is required]".<sup>36</sup>

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<sup>31</sup> *Idem*, para 85.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Idem*, para 87.

<sup>34</sup> *Idem*, para 85.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

As for the second contention, the officers "advanced that allowing detainees to request that an interview not be recorded would not overcome the problem, as the fact that such a request was made might well itself subsequently be revealed (thereby jeopardising the position of the person concerned)".<sup>37</sup> "Nor were the police officers well disposed" to a third proposed solution to the problem of disclosure, which would involve the silent video recording of interviews, notwithstanding their "accept[ance] that the potential problem of police officers being identified to a wider audience could be overcome by technical means". Their objection was, again, the risk to suspects. For, "it was advanced that the possibility of a video recording which showed a too relaxed demeanour on the part of a suspect, or even the very fact that he had spoken with police interviewers [at all], being disclosed in court proceedings could jeopardise the suspect's position; and knowing this, the suspect might refrain from communicating with the interviewers".<sup>38</sup>

For its part, the CPT, while "recognis[ing] the need to ensure that those who provide [sensitive] information are not unnecessarily endangered" by the practical consequences of interrogation and disclosure procedures, considered that "the advantages which would flow from the introduction of electronic recording in terms of the prevention of ill-treatment during police interrogations and the protection of the police against unfounded allegations of ill-treatment must also be taken into account".<sup>39</sup> "This is all the more true", it asserted, "when the available evidence suggests [as it did in Northern Ireland in 1993] that the safeguards against ill-treatment already in place may not be proving fully effective".<sup>40</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> Idem, para 86.

<sup>39</sup> Idem, para 87.

<sup>40</sup> Ibid. The manner in which existing safeguards against ill-treatment by the security forces were found to be deficient in Northern Ireland at the time of the visit was discussed at paras 52-75 of the report.

Emolliently, in the wake of its visit to the jurisdiction, the Committee did offer the view that "[s]triking the right balance in this area is a delicate and complex matter".<sup>41</sup> Nevertheless, it continued, in the Holding Centres the "current absence of any form of electronic recording of interviews with persons detained under the *P.T.A.* places undue emphasis upon security considerations".<sup>42</sup> Consequently, it suggested a fourth "approach" to the problem of the disclosure of sensitive information in court proceedings and the threat to individuals posed thereby. Perfectly simple in construct and inviting no direct comment from the UK authorities in their Response to the visit report,<sup>43</sup> it "envisage[d] the introduction of electronic recording" of all police interviews, but:

"...subject to appropriate adjustments to the procedures on the disclosure of matters in court proceedings and the introduction of safeguards guaranteeing the material security of recordings".<sup>44</sup>

Seeking to justify developments of this kind, the CPT cited the introduction, on a trial basis, in England and Wales in 1992 of the audio-tape recording of all interviews with terrorist suspects, subject to their consent.<sup>45</sup> The Committee, for its part, while recognising that the situation in Northern Ireland was "not on all fours" with that in England and Wales, did consider that the results of the trial "could presumably offer some useful guidance" to the Northern Ireland authorities regarding the possible merit of such a procedure.<sup>46</sup> Further, it suggested, notwithstanding the circumstances obtaining in Northern Ireland at the time of the visit, measures like the electronic

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<sup>41</sup> *Idem*, para 88.

<sup>42</sup> *Ibid.*

<sup>43</sup> The Response focused on the general thrust of the Committee's proposals in this regard; it did not address the question of disclosure: see UK Response II, CPT/Inf (94) 18, para 29.

<sup>44</sup> See UK II, para 88.

<sup>45</sup> See further above, p 164.

<sup>46</sup> UK II, para 88.

recording of police interviews "could be implemented without undermining the capacity of the security forces...to combat terrorism".<sup>47</sup> Consistent with previous utterances, "at the same time", it continued, such measures would better equip members of those forces "to counter unjustified allegations of ill-treatment". As to the type of electronic recording "envisaged", the CPT averred that:

"... clearly an audio (with or without video) recording would be preferable from the standpoint of preventing ill-treatment and unfounded allegations of ill-treatment..."<sup>48</sup>

Further, in circumstances in which the authorities cannot or are, at least, reluctant to countenance audio recording, "even a silent video recording", it stated, "would represent an important step forward as compared to the present situation, at least insofar as physical ill-treatment is concerned".<sup>49</sup>

### ***Further safeguarding detainees: the video monitoring of police interviews***

The video recording of police interviews is a practice which the CPT considers has merit. In its first UK visit report, for example, having observed, as we have seen, that the tape recording of police interviews with persons suspected of serious criminal offences in England and Wales appeared, in 1990, to be carried out both as a rule and subject to all appropriate guarantees, it sought to know, further, whether the authorities planned to introduce the *video* recording of such interviews. Given this line of questioning, it may be conjectured that the Committee regards such a measure

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<sup>47</sup> *Idem*, para 111.

<sup>48</sup> *Idem*, para 88.

<sup>49</sup> *Ibid.*

as the logical next step in the development of safeguards against ill-treatment in police custody.

It need hardly be stated that ideal interview monitoring arrangements comprise *both* their video recording - in order to facilitate an immediate response to perceived ill-treatment - and their tape recording - in order to reinforce detainees' protection against such ill-treatment, to forestall the making of malicious and unfounded allegations of police abuse and, of course, as an evidential record of the interview itself.<sup>50</sup> It was in the light of such considerations that the CPT examined in some detail the closed circuit television ("CCTV") monitoring of interviews in Northern Ireland's Holding Centres, in the course of its visit to the province in 1993. The system had been introduced in 1980, the Committee learned, following expressions of "[c]oncern about the treatment of persons detained [in the Centres]".<sup>51</sup> Physically, the system's most striking feature was its image-only reproduction; it lacked any means of determining what was said during interviews.<sup>52</sup>

The system operated in the following way: each interview room was monitored by two, wall-mounted cameras linked to a screen in a central monitoring room. The monitoring room at Castlereagh Holding Centre, in which members of the visiting delegation spent "approximately 30 minutes", comprised, *inter alia*, "a bank of 40 small (13 x 18cm) black and white screens, two per interview room, as well as two other screens perched on an adjacent shelf for want of room".<sup>53</sup> The Code of

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<sup>50</sup> In Ireland, a specially-commissioned committee of inquiry (the "Martin Committee") has recommended that "as a safeguard towards ensuring that inculpatory admissions to the [police] are properly obtained and recorded... the questioning of suspects [should] take place before an audio-visual recording device": see Ireland I, para 52 (original emphasis). By the time of the Committee's second periodic visit, in 1998, pilot trials of such devices were underway. They would be introduced nationally, it learned, if they demonstrated "an effective and economic basis...for so doing": see Ireland II, para 26.

<sup>51</sup> See UK II, para 76.

<sup>52</sup> *Ibid.* The CPT, as we shall see, subsequently lamented the absence of an audio recording dimension.

<sup>53</sup> *Idem*, para 77.



Practice in accordance with which the CCTV monitoring system was used provided that when interviews take place, "it was obligatory for the system to be switched on, and for the monitoring room to be manned at all times by an officer of at least the rank of Inspector".<sup>54</sup> In practice, this officer was "apparently always" a uniformed, "as distinct from detective", officer (though this was not expressly provided for in the Code of Practice). He was "empowered to interrupt or even terminate an interview", which power, so far as the visiting delegation could ascertain from a perusal of the monitoring room's incident file and from remarks made by both detainees and detectives interviewed during the visit, was exercised "on occasion".<sup>55</sup>

The delegation's examination of the work carried out in the monitoring room at Castlereagh reveals much, it is submitted. Although "[o]nly a handful" of interviews were in progress at the time of its visit, it found that:

"...it was difficult to concentrate fully on the screens in operation for more than a few minutes at a time. Observing the screens quickly became a tedious and tiring experience, an effect which could only be amplified, the greater the number of interviews taking place. It was clear...that it would be unrealistic to expect a monitoring officer to keep his eyes fixed continuously to the screens throughout his time on duty. Further, constant surveillance of the images from a given interview room was only possible to the exclusion of surveilling (sic) others".<sup>56</sup>

These findings induced the Committee to produce a detailed critique of the Centre's monitoring mechanism. Although probable, the Committee averred, that "[a] diligent monitoring officer would...quite rapidly spot any sustained bouts of physical violence

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<sup>54</sup> *Idem*, para 76.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Idem*, para 77.

in an interview room...it [was] likely that he would see such an incident for the first time only some moments after it had begun".<sup>57</sup> Such reasoning was "borne out", the Committee claimed, "by certain entries in the monitoring room's incident file". "It follows", it continued, "that the present monitoring arrangements will often fail to assist in the attribution of blame for incidents of violence. Further, an isolated and/or surreptitious act of violence might well pass completely undetected".<sup>58</sup> In conclusion, it suggested, laconically, that the existing system of the silent imaging monitoring of interviewees:

"[c]learly...is not a foolproof means of detecting physical ill-treatment of [detainees]...or of preventing unjustified allegations of [such]...treatment".<sup>59</sup>

"Nevertheless", it continued, "it is far preferable to no system at all". Its principal virtue was to "enabl[e] action to be taken *immediately* to put a stop to ill-treatment during the interview process".<sup>60</sup> Consequently, it constituted "a useful safeguard in a place such as a detention and interrogation centre", where, because of the presence of terrorist suspects, "there will inevitably always be a higher risk of ill-treatment occurring than elsewhere".<sup>61</sup> Such a system "has little value", however, the Committee admitted, "as a means of detecting and preventing *psychological* ill-treatment".<sup>62</sup> In this connection, it is worth recalling the Committee's view that "tangible evidence of psychological ill-treatment is difficult to obtain in the absence of any means of being able to hear what is said during the interview process".<sup>63</sup> Overcoming such a difficulty ought to be straightforward, however. The visiting

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<sup>57</sup> *Idem*, para 78.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Idem*, para 90 (emphasis added).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Idem*, para 79 (emphasis added).

<sup>63</sup> See above, p 142.

delegation itself raised with police officers, as "one way of addressing this problem", the possibility of introducing a "sound relay" between the interview and central monitoring rooms in the Holding Centres.<sup>64</sup> To the objections of police officers interviewed that this would "give rise to technical problems and compromise security", the CPT gave short shrift, proclaiming that it found "[n]either of those arguments convincing".<sup>65</sup> As to the first, it remarked:

"[i]t would certainly be technically possible to install a sound relay from each interview room which could be activated by the monitoring officer vis-à-vis a particular interview room when he deemed it appropriate (e.g. if the demeanour of the interviewers or a detainee made him suspicious that the latter was being verbally abused or threatened; if the detainee or his lawyer had complained that the former had been verbally abused/threatened during an earlier interview)".<sup>66</sup>

As for the second objection, "it is difficult to believe", the Committee asserted, "that enabling the monitoring officer - a police inspector - to hear what is being said in an interview room would involve an appreciable security risk".<sup>67</sup> It was with evident assuredness, therefore, that the CPT subsequently recommended that the UK authorities introduce a sound relay between interview and monitoring rooms.<sup>68</sup> This link, it was convinced, with one *caveat*, would "further enhance" the existing system's evident capacity to bring an immediate end to ill-treatment during interviews.<sup>69</sup>

The *caveat* concerned the fact that "just as the CCTV monitoring system is not a foolproof means of detecting physical ill-treatment and preventing unjustified

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<sup>64</sup> UK II, para 80.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> *Idem*, para 90.

allegations of such treatment", the addition of a sound relay to the existing visual monitoring system would not render it "a foolproof means of detecting psychological ill-treatment and/or preventing unjustified allegations [thereof]".<sup>70</sup> For, "[w]ere psychological ill-treatment to be occurring in an interview room", the Committee stressed, "there might well be nothing on the CCTV screens to prompt the monitoring officer to make use of the sound relay". Further, to compound this practical problem, the officer "could in any event only listen attentively to one interview at a time".<sup>71</sup>

### *Conclusion*

On the evidence of visit reports, the CPT's precepts on the electronic recording of police interviews may be readily apprehended. In the interests of forestalling ill-treatment in police custody, as well as malicious allegations of such treatment, it would urge States parties to make provision for the audio-tape recording of interviews. However, the Committee's ultimate objective, it may be safely conjectured (though it has very rarely expressed it), is to see police interviews not only audio-tape recorded, but also video recorded. As for the safeguards which it considers ought to accompany such recording techniques, these, at present, comprise the need to obtain the detainee's prior consent to the recording and the use of two tapes, one of which should be sealed in the presence of the detainee, the other used as a working copy.

State party practice in this area would appear, on the whole, to be undeveloped, even among Parties whose domestic law makes provision for electronic recording techniques. In fact, only police interviews in England and Wales would appear systematically to be electronically recorded. There is little evidence that

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<sup>70</sup> *Idem*, para 81.

<sup>71</sup> *Ibid.*

interviews elsewhere are subject to the same degree of protection. If we are to look for reasons why, it may be that the introduction of such systems are considered by the local authorities to be inappropriate in their criminal justice cultures or, more likely, prohibitively expensive.<sup>72</sup> Whatever their justification, it is clear that the electronic recording of police interviews remains only a distant prospect in a considerable number, if not a majority, of Parties to the ECPT. This might account for the subtle alteration in the manner in which the CPT has sought to promote the precept in the course of its working life. In this regard, some commentators have rightly observed that the Committee has moved from its position of formally *recommending* that Parties “explore the possibility of making such recordings” (itself hardly a bullish assertion), to one in which it simply *invites* them to do so: “a clear down-grading” of its case.<sup>73</sup> Its approach, it seems, these commentators assert, is to suggest the use of electronic recording when it considers that the authorities “might be receptive to it”, without really ever pressing the matter strongly.

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<sup>72</sup> See, e.g., Spain Response III, CPT/Inf (96) 10, p 138 (wherein the Spanish authorities averred that the use of audio/video recording techniques is a “desirable objective”, but, “for budgetary considerations... is not feasible in the short run”).

<sup>73</sup> See Evans and Morgan (1998), pp 290-1 (and, in the same connection, Morgan and Evans (1999), pp 45-6).

## **Recording Events in Police Custody: the Use of Custody Registers**

### *Introduction: the CPT's basic precept*

Much of what the CPT regards as good practice in the recording of matters relevant to detention by the police was laid down in the early years of its operation. For instance, in its 2<sup>nd</sup> General Report, it recommended the keeping of:

“...a single and comprehensive custody record...for each person detained [by the police], on which would be recorded all aspects of his custody and action taken regarding them”.<sup>1</sup>

### *Justifying the basic precept*

In advocating the maintenance of comprehensive detention records for every person taken into police custody, the CPT is actuated by the dual belief that:

“...the fundamental safeguards granted to persons in police custody would [thereby] be reinforced (and the work of police officers quite possibly facilitated)”.<sup>2</sup>

As to the second, parenthetical justification, to police officers, of course, the diligent completion of detailed records may prove valuable in forestalling unjustified and time-consuming allegations of ill-treatment and, therefore, in ensuring that the performance of their public duties is not unnecessarily hindered.<sup>3</sup>

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<sup>1</sup> See 2<sup>nd</sup> GR, para 40.

<sup>2</sup> Ibid. See similarly Austria I, para 69; and Malta I, para 92.

<sup>3</sup> See, in this connection, Italy II, para 60.

### ***Developing the basic precept***

The CPT's basic formulation has been invoked in most visit reports.<sup>4</sup> In a number, however, it has been altered and supplemented in a variety of noteworthy ways.

### ***The scope of the custody record***

As to those “aspects of custody” deemed worthy of formal record, the Committee has offered the following, non-exhaustive list:

“... when deprived of liberty and reasons for that measure; when told of rights [and when such rights invoked or waived]; signs of injury, mental illness, etc; when next of kin/consulate and lawyer [and doctor<sup>5</sup>] contacted and when visited by them; when offered food; when interrogated; when transferred or released...items in the person’s possession...”<sup>6</sup>

Further, since it is the view of the CPT that custody records should contain “full details of any action or occurrence involving the detainee”,<sup>7</sup> we may be sure that a merely superficial account does not accord with its precepts. Accordingly, matters like the reason behind a detainee’s removal from remand prison at the instigation of the police and the holding of identification parades<sup>8</sup> should be dutifully recorded. In addition, and unsurprisingly, all “unusual” events which occur during custody, the Committee considers, should form part of an individual’s custody record.<sup>9</sup>

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<sup>4</sup> As at August 2000, only reports to the Governments of Liechtenstein and, surprisingly – given the CPT’s expressions of concern about other aspects of police custody therein – Greece and Turkey, had not invoked it.

<sup>5</sup> A provision added, *inter alia*, in France I, para 50; Czech Republic I, para 35; and Poland I, para 60.

<sup>6</sup> See 2<sup>nd</sup> GR, para 40; and, similarly, Romania I, para 48.

<sup>7</sup> See UK I, para 214.

<sup>8</sup> See Czech Republic I, para 15.

<sup>9</sup> See Germany I, para 45.

### ***The requirement to maintain records should not be circumvented***

On visiting the Criminal Investigation Department in Ljubljana, Slovenia, in February 1995, the CPT was “concerned to note that...the detention of a person was not always immediately recorded in the custody register”.<sup>10</sup> Indeed, on the day of the visit, “there appeared to be a backlog of seven detentions to be recorded”. Further, according to one “high-ranking” officer interviewed, no record at all would be kept “if the person concerned was released within six hours of arrest”. In response, in a crisp and trenchant recommendation, the CPT suggested that:

“...steps be taken to ensure that whenever a person is detained in a police establishment, for whatever reason (including for identification purposes) and for whatever length of time, the fact of his detention is recorded without delay”.<sup>11</sup>

Importantly for present purposes, this recommendation clearly indicates that appropriate recording should, in the view of the CPT, commence the moment detention begins; the Committee cannot countenance an accumulation of incomplete records.

### ***Recording all types of police custody***

In many visit reports, in characterising the moment when a person is “deprived of [his] liberty” as a recordable event, the CPT has used the term “arrest”.<sup>12</sup> This is unfortunate, it is submitted, since, in some State’s legal systems, the latter term connotes a particular moment in the criminal justice process occurring *some time after* the point of initial apprehension. It is, accordingly, too limiting a phrase to be of use

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<sup>10</sup> See Slovenia I, paras 42 and 95.

<sup>11</sup> Ibid.

<sup>12</sup> See, e.g., Italy I, para 53; Switzerland I, para 129; and Hungary I, para 53.



in a general formula of this kind; it fails to take account of situations in which, for example, a person is detained for the purpose merely of establishing his identity. The term “deprivation of liberty” would appear, by contrast, to encompass every kind of detention by the police and may be considered, therefore, more appropriately to circumscribe the requirements of the Committee in the present connection. Accordingly, it should resist using the term “arrest”, it is submitted, and apply its original formula more routinely. In this regard, the Committee has, occasionally and helpfully, used the more illuminating *portmanteau* term “apprehended/arrested” to describe the moment of deprivation of liberty and, therefore, the moment at which the first entry should be made in a person's custody register.<sup>13</sup>

***Specific junctures in the criminal justice process: charge, court appearance and transfer***

The moment when a suspect is charged with the commission of a criminal offence is one juncture in the criminal justice process which, in a number of visit reports, the CPT has added to its list of recordable incidents.<sup>14</sup> Further, to the final feature cited by the CPT in its original list - the moment of transfer or release of the person concerned - it has frequently added a third juncture of significance, namely, “when brought before the relevant judge”,<sup>15</sup> “competent magistrate”,<sup>16</sup> public prosecutor<sup>17</sup> or the “competent court”.<sup>18</sup> Elsewhere, the Committee has identified its somewhat inchoate reference in its original formula to the transfer of detainees as connoting, more specifically, the point at which a person is transferred to a *remand prison*.<sup>19</sup> It

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<sup>13</sup> See Norway I, para 42; and Sweden I, para 37.

<sup>14</sup> See, e.g., Malta I, para 92; Austria I, para 69; and Denmark I, para 132.

<sup>15</sup> See, *inter alia*, Hungary I, para 53; and Netherlands (NA) I, para 60.

<sup>16</sup> See Germany I, para 45; and San Marino I, para 34.

<sup>17</sup> See Iceland I, para 43.

<sup>18</sup> See Norway I, para 42.

<sup>19</sup> *Ibid.* See also Luxembourg I, para 37.

also connotes, as might be expected, any transfers back to police custody for further questioning.<sup>20</sup>

### *Inadequate State party practice*

Among States parties to the ECPT, practice on the maintenance of custody records may be considered to be variable, to say the least. For the most part, indeed, it has failed to match the CPT's own simple prescription.

### *The distribution of material over several documents*

One of the most commonly criticised procedures in visit reports has been the practice of recording information relating to a single detainee in two or more registers. For example, in some Parties, the Committee has observed, "some aspects of police custody [are] reflected in...reports of police interrogations...others in...custody registers",<sup>21</sup> and others still in nothing more formal than *ad hoc* registers.<sup>22</sup> Elsewhere, a detainee's information has been found to be "spread over a variety of documents"<sup>23</sup> or recorded on separate forms representing different stages in the custody process<sup>24</sup> or held partly on computer and partly manually.<sup>25</sup> In one notable instance, to the Committee's "surprise", information was found to be "spread over several registers" under a "complex" system "based on...different teams of officers...[with] each team opening its own register".<sup>26</sup>

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<sup>20</sup> See, e.g., Czech Republic I, para 14 (strikingly, perusal of official records at Prague-Pankrac Remand Prison in February 1997 revealed that one prisoner had been removed on the authority of the police – for an unspecified purpose - "some fourteen times" between April and June 1995).

<sup>21</sup> See Norway I, para 42; and, similarly, France I, para 50.

<sup>22</sup> See Netherlands (NA) I, para 59; Luxembourg I, para 37; and Belgium I, para 51.

<sup>23</sup> See Austria I, para 69; and, similarly, Czech Republic I, para 35 (a "proliferation of different forms"); Belgium II, para 41 (use of "diverse" registers and forms); and Romania I, para 47 (use of "several" documents).

<sup>24</sup> See Finland I, para 49; and, similarly, Poland I, para 59.

<sup>25</sup> See Iceland I, para 43.

<sup>26</sup> See Germany I, para 44.

### *Inconsistent completion of custody records*

Another seemingly common failing among Parties has concerned the rigour and consistency with which custody records are completed. In Danish police stations in December 1990, for example, only "certain aspects" of detention were routinely recorded; "no record was kept of... e.g. time when the arrested person was informed of his rights; request by the arrested person to have legal advice; time when a third party was informed of the person's arrest; requests for access to a medical doctor; [and] any waiving of his rights by the arrested person..."<sup>27</sup> The fundamental nature of these guarantees is striking and the Committee's highlighting of their absence, therefore, understandable.<sup>28</sup> They should feature routinely in all custody records.

In Italy, in March 1992, a delegation discerned "une difference sensible de situation entre les etablissements de la police et des carabinieri".<sup>29</sup> In the former, custody registers were maintained, albeit whose contents, it seems, were presented "de maniere sommaire"; in the latter, "[a] l'invers, aucun registre de ce type n'a ete presente".<sup>30</sup> However, such inconsistency notwithstanding, it cannot really be stated that the Committee has found many examples of particularly bad record-keeping practice among States parties. In fact, practice can fairly be described as poor in only a handful of instances. For example, in Spain, in April 1994, "particularly serious" record-keeping deficiencies were apparent in the detention area at the Guipuzcoa Civil Guard Headquarters, San Sebastian. There, the visiting delegation was informed, "no records whatsoever" were kept; "all custody information was kept by the investigating group or branch of the Civil Guard in different premises..."

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<sup>27</sup> See Denmark I, para 131.

<sup>28</sup> See, similarly, Malta I, para 91.

<sup>29</sup> See Italy I, para 52.

<sup>30</sup> Ibid. See now Italy II, para 59. See, similarly, Sweden I, para 36 (regarding the lack of care apparent in the completion of records in the police establishments visited in 1991, which contrasted sharply with the "impress[ive]" records of the 15 minute-interval cell checks viewed at Arlanda Airport Police Station in the course of the same visit).

Consequently, the Committee noted, it was "materially impossible to maintain accurate custody records",<sup>31</sup> a state of affairs rendered all the more execrable, it is suggested, by the fact that the CPT's recommendation on record-keeping practices, issued in the wake of its first periodic visit to the country in April 1991,<sup>32</sup> "had not been acted upon".<sup>33</sup> Interestingly, the situation appeared to contrast starkly with that obtaining in establishments run by the Basque Autonomous Police ("Ertzaintza").

### *Consequences of a failure to make appropriate provision*

In those police establishments visited in May 1990, the CPT observed in its first Austrian visit report, "no record [was] kept of certain important aspects of a prisoner's custody".<sup>34</sup> This would appear to have had significant consequences, principally - and most obviously - for the person concerned, but also for police officers themselves and, as it happened, the visiting delegation. For, as a result of contemporary practice, there existed no record of when meals were offered to and accepted by detainees,<sup>35</sup> which meant that for officers and the delegation alike, it was "impossible to check" the veracity of an allegation made by one detainee interviewed that he had received nothing to eat or drink between his being taken into police custody at midday and 10.30 pm, when he met the delegation.<sup>36</sup> Similarly, as a result of failures properly to complete records in police establishments visited in the Czech Republic in February 1997, the Committee remarked in its first visit report, "police officers were unable, on

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<sup>31</sup> See Spain II, para 76.

<sup>32</sup> See Spain I, para 65.

<sup>33</sup> Spain II, para 76.

<sup>34</sup> See Austria I, para 68.

<sup>35</sup> An omission also perceived in Spain and Switzerland during visits in 1991: see Spain I, para 64; and Switzerland I, para 128.

<sup>36</sup> Austria I, para 54. See, in the same connection, Norway I, para 24.

the basis of the information which had been recorded, to account for all of the movements of detainees who had recently been held in police custody".<sup>37</sup>

### *Good State party practice*

While it is possible to identify numerous instances of inconsistent and, occasionally, poor record-keeping practices in police establishments visited by the CPT, it is also possible to identify others in which, among other qualities identified, a particular conscientiousness on the part of officers in completing custody records has elicited from the Committee a certain satisfaction and, occasionally, praise.

### *England and Wales*

In 1990, during its first periodic visit to the UK, for example, the CPT observed that in the police stations visited, custody records were so "assiduously" maintained that "even a request by a detainee for a glass of water was recorded".<sup>38</sup> Further, a new record was opened for each person detained,<sup>39</sup> and, seemingly uniquely among Parties, notice boards were used "to keep track of the situation of each detainee (time of arrest; review of detention; time of charge; etc)".<sup>40</sup> Seeking to intuit the authorities' objective in erecting the latter, the Committee considered that it was "no doubt to ensure that police officers did not fall foul of any of the requirements laid down in [the country's] Police and Criminal Evidence Act".<sup>41</sup> A "very useful" - and, clearly, unforeseen - concomitant of their existence, it also noted, was their value "in the context of the [visiting delegation's] own activities".<sup>42</sup>

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<sup>37</sup> See Czech Republic I, para 35.

<sup>38</sup> See UK I, para 214.

<sup>39</sup> *Idem*, para 213.

<sup>40</sup> *Idem*, para 215.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

### *Northern Ireland*

Following its *ad hoc* visit to Northern Ireland in July 1993, the CPT observed that the manner in which custody records were apparently maintained by law enforcement officers in the jurisdiction, whether in respect of terrorist-related or non-terrorist-related offences, corresponded with its own precepts on the subject. Thus, it noted that for every person detained by the law enforcement authorities, a record was kept of:

“...all relevant aspects of [their] custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc.; when a friend or relative and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.)”.<sup>43</sup>

Further, like those viewed in the English police establishments visited in 1990, the records perused in 1993, the Committee stated, had been "scrupulously" completed by officers.<sup>44</sup>

### *The Netherlands and Hungary*

Visiting police stations in Amsterdam, Rotterdam and Volendam in the Netherlands, in September 1992, the CPT noted that the "principal" events of a person's detention were recorded on computer. As a consequence, it appears:

"[e]ach detainee was monitored individually from the moment he entered the premises to his departure (admission; appearance before the Deputy Crown

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<sup>43</sup> See UK II, para 73. See, similarly, Ireland I, para 53 (regarding custody records seen in police establishment visited in October 1993).

<sup>44</sup> Ibid. Similarly, records seen in the Irish establishments visited in 1993 were found to be "diligently" completed (see Ireland I, para 53). With one exception, this was also the case in 1998 (see Ireland II, para 27). See in the same connection Finland I, para 49.

Counsel; personal possessions; meals; distribution of bedding; controls by supervisory staff; time spent in recreational area; shower; exercise; police interviews; interview with a lawyer; visit by a doctor; date of appearance before the judge; etc)".<sup>45</sup>

The CPT, for its part, "welcome[d]" such recording techniques and, significantly, it is submitted, sought to know whether the system might be deployed "more widely" in the country.<sup>46</sup>

At the time of the Committee's periodic visit to Hungary in November 1994, the domestic police authorities were "in the process of introducing a computerised system [of record-keeping] to replace the manual registers which had been used to record certain features of detention [hitherto]..."<sup>47</sup> The CPT approved: "the new system", it stated, "clearly had the potential to provide a single and comprehensive custody record for each person detained".<sup>48</sup> In other words, we may interpolate, provided they satisfy its own proclaimed standards as adumbrated earlier in this chapter, computerised records, the Committee considers, may be said usefully to supplement existing methods of safeguarding detainees.

### ***Further, related precepts***

#### ***Obtaining the detainee's signature***

The CPT has supplemented its fundamental position on the maintenance of custody registers with the view that in respect of some recordable features - "for example,

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<sup>45</sup> See Netherlands I, para 51.

<sup>46</sup> Ibid.

<sup>47</sup> See Hungary I, para 53.

<sup>48</sup> Ibid.

items in the person's possession, the fact of being told of one's rights and of invoking or waiving them":

“the signature of the detainee should be obtained and, if necessary, the absence of the signature explained”.<sup>49</sup>

Accordingly, visiting English police stations in 1990, a delegation "noted", with satisfaction, that "the custody record opened for each detainee contained a statement to be signed by [him] attesting that he had been informed of his rights".<sup>50</sup>

### *Affording the detainee's lawyer access to custody records*

Given the peremptory language in which it is framed, the CPT would appear to be brook no denial of its view that:

"...the detainee's lawyer should have access to...a custody record".<sup>51</sup>

This injunction has been repeated throughout its published work. Moreover, the Committee believes, it should be heeded regardless of the manner in which the relevant information is recorded - which, for the most part, as we have seen, is manual. However, even in those few instances in which the records examined by visiting delegations have been computerised, it can clearly be inferred from the Committee's subsequent remarks that its adherence to its fundamental position remains unaltered. For instance, from the Dutch authorities, it sought to know

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<sup>49</sup> See, *inter alia*, 2<sup>nd</sup> GR, para 40; France I, para 50; and Germany I, para 45.

<sup>50</sup> See UK I, para 213. Evans and Morgan have noted that the CPT has laid less emphasis on this safeguard in reports on visits to a number of eastern European Parties: see Evans and Morgan (1998), p 287 and Morgan and Evans (1999), p 47. It is submitted, however, that the Committee has no need to be so moderate. Respect for this particular safeguard ought not to place an undue financial - or, *pace* Morgan and Evans, bureaucratic - burden on States.

<sup>51</sup> See, 2<sup>nd</sup> GR, para 40.



whether information held in the computer systems of the police stations visited in 1992 could be "made available to the detainee and his lawyer".<sup>52</sup>

*Specially appointed "custody officers"*

Although time-consuming, the scrupulous maintenance of detailed and accurate custody records for each person detained by the police is, as we have established, of great importance in the proper investigation of crime and the rebuttal of allegations of police ill-treatment. To entrust it to officers who must also carry out various other functions in their capacity as law enforcement personnel demonstrates great faith in their management abilities and risks creating a conflict between the interests of the criminal investigation and those of persons detained. The possibility that such a conflict may develop appears to have preoccupied the CPT during its visit to the Guipuzcoa Civil Guard Headquarters in San Sebastian, Spain, in April 1994. There, it was "concerned to hear that...some of the custodial duties were carried out by members of the investigating or operational group".<sup>53</sup> In other words, it may be inferred, officers responsible for investigating a particular crime also had custodial - and, concomitantly, protective - responsibilities in respect of those persons suspected of having committed it and brought to the Headquarters, *inter alia*, for questioning. Such responsibilities include, of course, the maintenance of individual custody registers. Having noted this state of affairs, the CPT suggested that:

“...the existence of a ‘custody officer’ (as distinct from an officer merely posted to the detention area), accountable for the well-being of detainees

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<sup>52</sup> See Netherlands I, para 51.

<sup>53</sup> See Spain II, para 77.

during the period of time spent under his custody, can greatly enhance the protection of detainees against ill-treatment".<sup>54</sup>

On the particularities of the custody officer's role, the Committee was silent, save in one, unsurprising respect: "in view of the special requirements involved", it suggested, the protection of detainees would be "particularly" enhanced if custody officers were "specifically selected and trained for the job".<sup>55</sup>

*The use of closed-circuit television ("CCTV") to monitor persons in custody*

Self-evidently, in order effectively to record events in police custody, the authorities must regularly monitor the welfare of persons in their charge. In this regard, the CPT recently "welcome[d]" the introduction of CCTV monitoring systems in certain police establishments in London.<sup>56</sup> Visiting one such establishment in 1997, a delegation witnessed a CCTV system in operation. It could monitor the entire custody suite - except the interior of cells and the establishment's showers - and the station yard. Further, vehicles used for the transportation of detainees to and from the station possessed a similar facility. In its report on the visit, the Committee sought to know whether the authorities planned to introduce the system nationwide,<sup>57</sup> from which request it may be inferred that it found the arrangement agreeable. It may be expected to promote such system's wider use in future visit reports.

Indeed, in its first Andorran visit report, regarding its delegation's discovery, in 1998, of the installation of a "sophisticated" CCTV system in the new premises of the Police Headquarters (which system included the use of infra-red cameras to

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> See UK IV, para 60. The development of such systems followed the publication of a special report, "Lessons from Tragedies", on deaths in police custody in the London area.

<sup>57</sup> Ibid.

facilitate night-time monitoring of detainees), the CPT offered much encouragement. However, it did express misgivings about the deployment of cameras inside every detention cell, particularly in light of the fact that cell doors in the establishment were fitted with large glass panels, which facilitated external supervision.<sup>58</sup>

### ***Conclusion***

The CPT's prescription on the manner in which events in police custody should be recorded is the straightforward one that a single record should be opened for each detainee in which all aspects of his custody are set out in comprehensive fashion. The duty to open such a record obtains the moment detention begins, regardless of how it is characterised in the domestic criminal justice system. Further, in respect of some recordable features, the detainee's signature should be obtained or its absence explained. It is also the case that a detainee's lawyer ought to enjoy access to his client's record. The rigour with which States parties adhere to these precepts may be said to vary. While the overwhelming majority of police establishments, it seems, make provision to record events in custody, a number do so only by means of several documents, and many of the records kept are not always scrupulously maintained. Further, the scope of custody records viewed has, on occasion, been called into question. As with other safeguards on police custody, some of the most developed recording practices may be found in the British Isles; while, the move towards computerised records in the Netherlands and Hungary has been greeted with approval by the CPT.

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<sup>58</sup> See Andorra I, para 28.

## Complaints and Inspection Procedures

### I. Providing an independent and effective complaints mechanism for persons in police custody

#### *Introduction: the basic precept and rationale*

"Naturally", the CPT asserted to the Greek authorities in the wake of its visit to the country in March 1993:

"one of the most effective means of preventing ill-treatment by public officials lies in the diligent examination by the prosecuting authorities and the courts of all complaints of such treatment brought before them and, where appropriate, the imposition of a suitable penalty".<sup>1</sup>

To act with such diligence and effectiveness, the Committee considered, would have a "very strong dissuasive effect" on officers who might otherwise be minded to engage in ill-treatment.<sup>2</sup> It is this sense that a meaningful system of complaints investigation possesses the potential to *forestall* the ill-treatment of detainees in police custody that informs all of the CPT's work in this area. It is worth noting in this connection that in 1993, the visiting CPT delegation determined that the risk of ill-treatment of certain categories of detainee by the Greek police was "significant" and that, "on occasion", recourse might be had to *severe* ill-treatment or torture.<sup>3</sup> At the same time, according

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<sup>1</sup> See Greece I, para 30 and, similarly, para 266. In the same connection, see Spain I, para 63 (now Spain VI, para 14); and Poland I, para 21.

<sup>2</sup> Ibid. See, similarly, UK I, para 182; Portugal I, para 19; and UK IV, para 9 (a large section - paras 9-58 - of the fourth published report to the UK authorities is devoted to the effectiveness of legal remedies for police misconduct in England and Wales).

<sup>3</sup> Idem, para 25.

to "several" prisoners met, the public prosecutor to whom they could complain "had displayed little interest in the matter".<sup>4</sup>

### *Developing the basic precept*

#### *A general failure to elaborate on the part of the CPT*

In its 2<sup>nd</sup> General Report, seeking to augment its catalogue of precepts on the protection of persons detained by the police, the CPT remarked, *inter alia*, that:

"...the existence of an independent mechanism for examining complaints about treatment whilst in police custody is an essential safeguard".<sup>5</sup>

This is a simple and unadorned statement; its practical requirements would seem to have been left for future elaboration. Such elaboration, it is submitted, should comprehend, *inter alia*, the composition of the body authorised to examine complaints (whether, for instance, serving or former police officers may be permitted to sit in adjudication); the extent of such body's investigative competence and powers; whether police officers may be appointed to carry out the necessary investigations; and the kinds of sanction available to the body in the event that a complaint is upheld. An opportunity to offer elaboration of this kind was missed by the CPT in its first Maltese visit report, wherein it proclaimed that it "fully share[d]" the view of the country's Deputy Prime Minister, who, in 1990, stated that "there was...no satisfactory procedure for examining complaints against the police" and that the creation of a "formal internal review procedure", with the possibility of reference to an

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<sup>4</sup> *Idem*, para 30.

<sup>5</sup> See 2<sup>nd</sup> GR, para 41. See also Finland I, para 51 (now Finland II, para 41); and Iceland I, para 44 (now Iceland II, para 28). The CPT, it should be noted, considers that access to similar complaints mechanisms should be possible in other custodial environments, too: see, e.g., 2<sup>nd</sup> GR, para 54 (regarding prisons); and 8<sup>th</sup> GR, para 53 (regarding psychiatric establishments). Space constraints, sadly, preclude further analysis of such mechanisms.

"independent body" in the event of an unsatisfactory outcome, was necessary.<sup>6</sup> The Committee, for its part, while recommending the establishment of such a "formal administrative procedure...at the earliest opportunity",<sup>7</sup> did not, unfortunately, go on to offer any opinion as to its content.

The kind of elaboration which the CPT might, at some point, offer may be indicated by the two following examples of State party practice:

*(i) Speed of response to a complaint*

Visiting Austria, in 1990, the CPT declared itself "impress[ed]" by the contents of an "important circular" issued by the Ministry of Justice to senior judicial figures and public prosecutors several months before the visit. The circular offered "instructions on the procedure to be adopted by the prosecuting authorities in the event of allegations of ill-treatment by the police". Significantly, it addressed Austria's obligations under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>8</sup> "If...allegations [of ill-treatment] are brought to their notice and do not seem manifestly unfounded", the circular provided:

"prosecutors are requested to take immediate action by initiating a judicial investigation in order to establish the facts...The investigation must be conducted on a priority basis in order to guarantee the right of the person concerned to impartial proceedings and protection from intimidation (in accordance with Articles 13 and 16 of the [UN] Convention) and also to determine whether the statements made are of the same nature as those

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<sup>6</sup> See Malta I, para 94.

<sup>7</sup> Ibid. See also para 16 and p 8 of the report.

<sup>8</sup> See Austria I, para 21.

referred to in Article 15 of that Convention (statements made as a result of torture)".<sup>9</sup>

***(ii) Avoiding contact between the complainant and police officers and staying proceedings against a person once a complaint is made***

Other features of the Austrian circular to be the object of particular CPT attention - and, arguably therefore, approval - include a request that judges and public prosecutors:

"ensure that the possibility of a transfer to police premises is no[t]...envisaged in the case of persons detained on remand [in prison establishments] who allege that they have been subjected to ill-treatment by the police";

and a recommendation that:

"[w]hen an inquiry is opened into allegations of ill-treatment by the police...the charges against the alleged victim be suspended until the inquiry has been completed, subject to the condition that this does not result in an extension of the period of detention on remand (if so, the inquiry must be conducted independently of the proceedings against the individual concerned)".<sup>10</sup>

In other respects, the CPT has been prepared to offer its views on the complaints process, from which, it is submitted, it may be possible to obtain some impression of what it considers represents a practicable mechanism for investigating complaints against the police.

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<sup>9</sup> Ibid (emphasis added). Interestingly, in the matter of *Qani Halimi-Nedzibi v Austria* (Communication No. 8/1991; UN DOC.CAT/C/11/D/8/1991), the UN Committee Against Torture determined that the Austrian authorities had unreasonably delayed investigating the Applicant's claim of torture when, in breach of Article 12, UNCAT, they had failed to act on an allegation for some 15 months.

<sup>10</sup> Ibid.

### *The need for independence*

That the CPT believes that police complaints procedures ought to be assured an independent and impartial status within domestic criminal justice systems is undeniable. Descriptions of such procedures by reference to such terms occur throughout its published work<sup>11</sup> and the question of the extent of their independence and impartiality in practice has frequently exercised the Committee. It should be noted, however, that the CPT is conscientiously even-handed in its approach to the question of independence, seeking to view it as much from the perspective of police officers against whom a complaint is made as from the perspective of the individual complainant, particularly in respect of the nature of any disciplinary proceedings to which the complaint may ultimately lead.

#### - *Achieving independence in practice*

In its first Austrian visit report, regarding Government proposals, issued in May 1990, to reform and "reinforce" the country's heavily criticised police disciplinary system, the CPT suggested that any such review should, *inter alia*:

"...envisage the participation of an independent person (e.g. a magistrate) in the decision making process..."<sup>12</sup>

For, such participation, it believed:

"...would both improve the intrinsic quality of the [disciplinary] procedure and enhance public confidence in its fairness".<sup>13</sup>

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<sup>11</sup> See, e.g., UK III, para 301.

<sup>12</sup> See Austria I, para 97 (2<sup>nd</sup> indent).

<sup>13</sup> Ibid.



- *A mechanism which must be independent in fact as well as in law*

From its observations to the Austrian authorities, it is clear that what the CPT desires above all else in any mechanism established to investigate complaints against the police is distance from the force being investigated. This explains why, when informed by the Finnish authorities in 1998 that formal responsibility for examining complaints of ill-treatment by police officers in the country lay with the National Public Prosecutor's Office, "assisted by the staff of the National Police Commissioner or, in any event, by the staff of police units other than those of the suspected police officers" – a development "welcome[d]" by the Committee as "more independent" than the previous mechanism – it nevertheless considered the Prosecutor's work to be vitiated by the fact that "under the new system the police are still in practice conducting inquiries into their own shortcomings".<sup>14</sup>

Similarly, in Sweden, while responsibility for the investigation of complaints against the police rests, ultimately, with a public prosecutor, the fact that "the necessary investigative work", the CPT learned in 1998, "is performed by police officers", renders the process, in its view, insufficiently independent. "[I]n order for the investigation of complaints against the police to be fully effective", it asserted in its subsequent visit report:

"the procedures involved must be, and be seen to be, independent and impartial. In this respect...it would be preferable for the investigative work concerned to be entrusted to an agency which is demonstrably independent of the police".<sup>15</sup>

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<sup>14</sup> See Finland II, para 42.

<sup>15</sup> See Sweden III, para 27. See, similarly, Iceland II, para 28 (wherein the CPT highlighted calls for a "truly external body, that is fully independent of the police"). Visiting England and Wales in 1997, the CPT was concerned to learn of a police complaints procedure throughout the operation of which the police maintain "a firm grip": the chief officer of the force against which a complaint is made retains "sole discretion" to determine whether to record the complaint in the first place; investigations are

The consequences of a failure to confer on an organ an appropriate degree of independence were eloquently spelt out by Lord Colville in his report "on the operation of the EPA in 1992", as quoted, with approval, by the CPT in its report on its visit to Northern Ireland in 1993. In 1992, the Committee noted, of the 395 complaints of ill-treatment of persons arrested under the *EPA 1991* made to the Independent Commission for Police Complaints for Northern Ireland ("the I.C.P.C."),<sup>16</sup> "[n]one...[had] resulted in disciplinary sanctions against police officers".<sup>17</sup> This outcome, the CPT declared, was "striking".<sup>18</sup> Accordingly, it could, it stated, "agree" with Lord Colville, who considered that:

"...if a disciplinary system<sup>19</sup> seldom if ever reaches an adverse decision about a person who works, after training, within a disciplined structure, it is more likely that the system is faulty than that nobody in that profession or discipline ever makes even the most minor mistake or commits some foible. The public do not believe it and lose confidence in the system. The profession or discipline loses more in efficiency and usefulness than its individual members gain by a perceived, or real immunity".<sup>20</sup>

It is important, therefore, that any procedure for the investigation of complaints against law enforcement personnel is demonstrably independent of them - as well as,

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"conducted and controlled" by officers, invariably drawn from the ranks of the force being investigated; and the assessment of the criminal and/or disciplinary implications of such investigations is made by the originating chief officer: see UK IV, paras 48-9 (referring to the CPT's very detailed exposition of the formal complaints system which operates in the jurisdiction at paras 16-25).

<sup>16</sup> For a description of the mandate of the I.C.P.C., see UK II, para 25.

<sup>17</sup> See UK II, para 92 (reflecting on the I.C.P.C.'s 5<sup>th</sup> Annual Report).

<sup>18</sup> Ibid.

<sup>19</sup> For present purposes, the term may be regarded as connoting also complaints mechanisms, since the one inheres in the other.

<sup>20</sup> UK II, para 93 (citing para 6.3 of Lord Colville's report). A loss of public confidence in the domestic police complaints system, occasioned, according to the CPT's interlocutors, by the infrequency with which officers are charged with an offence and/or disciplined notwithstanding the existence of evidence of wrongdoing, and marked by a preference to pursue grievances through the civil courts rather than established procedures, was also remarked on by the CPT following its visit to

it should be stated, given what we know of the CPT's views on the matter, of all other parties to the complaint.<sup>21</sup> Interestingly, it is not only public confidence in the procedure which may suffer if its independence cannot be demonstrated satisfactorily; according to Lord Colville, the "efficiency" and "usefulness" of the police force itself may be put at risk.

It is axiomatic that where an organ mandated to entertain complaints from persons detained or formerly detained by the police is, or is seen to be, closely aligned with the officers whom it is ostensibly monitoring, then the entire mechanism is vitiated. This would explain the CPT's alarm at hearing from one public prosecutor interviewed in the course of a visit to Romania in 1995 that when in receipt of a complaint against the police – which complaint, by law, he was duty-bound to investigate - his approach would be premised on the notion that “les policiers sont mes collegues. Je considererais cette allegation comme un mensonge d'un recidiviste”.<sup>22</sup>

### *The existence of a variety of avenues of complaint*

The CPT has written favourably about the apparent independence of Dutch police complaints procedures and, while it would be precipitate to describe the country's system as an exemplar for States parties to the ECPT, few other domestic systems, it

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England and Wales in September 1997: see UK IV, para 11 (and, for details of criticisms levelled at the “watchdog” Police Complaints Authority, para 50).

<sup>21</sup> See in this connection Ireland I, paras 54-5 – and now Ireland II, para 16 (regarding the composition of a police complaints disciplinary tribunal, one member of which was a senior officer in the police force to which the person facing charges belonged, and the two others drawn from the board which referred the complaint to the tribunal. Such an arrangement was “unlikely to be considered as impartial by either complainants or police officers”, the CPT averred, while the presence of serving officers on both the Complaints Board and disciplinary tribunal was “capable of damaging public confidence in the capacity of the complaints system to deal objectively with complaints about police conduct”). In England and Wales, the CPT observed recently, police disciplinary hearings are held “in private, usually with police officers acting as adjudicators, prosecutors and counsel for the defence” (see UK IV, paras 34 and 51). In order to be and be seen to be, impartial, it suggested, in consequence, on the panel hearing such disciplinary matters independent members should “preponderate” (idem, para 56).

<sup>22</sup> See Romania I, para 26.

is clear, have been so well received. Worth noting in particular in this regard is the Committee's view, expressed in its first report to the Dutch authorities, that there is merit in providing access to a *range* of complaints mechanisms. Visiting the country in 1992, a delegation learned that "[i]n addition to the usual judicial and administrative remedies" available to persons alleging ill-treatment by the police,<sup>23</sup> anyone wishing to complain about police activities could apply to so-called Complaints Commissions. These Commissions, the Committee stated, are "partially or entirely composed of lay persons" and are authorised to "conduct inquiries [into the substance of a complaint]...make recommendations to the Head of the police force in question (usually the Mayor)...[and] produce annual reports [on their activities]".<sup>24</sup> The Committee, for its part, declared itself "favourably impressed" by the "range" of complaints procedures available to persons alleging ill-treatment by the Dutch police.<sup>25</sup> It suggested, further, that the existence of an "extensive" number of avenues of complaint is:

"...an essential factor in preventing ill-treatment by the security forces".<sup>26</sup>

***Setting an investigation in motion: whether or not a formal complaint is necessary***

More often than not, an investigation into police ill-treatment is activated by means of a complaint, made formally or otherwise, by the alleged victim or by his family or legal representative on his behalf. However, there may be circumstances in which alleged victims or their families are unwilling or are unable to take the necessary

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<sup>23</sup> Although the CPT did not indicate precisely what these "usual" remedies were, it is worth noting that the "administrative remedies" referred to undoubtedly included the possibilities of applying to the National Ombudsman and the Complaints Committees of the country's two Houses of Parliament: see Netherlands I, para 54.

<sup>24</sup> Ibid. The CPT did not state who else might sit on a Commission which is only "partially" composed of lay persons. Neither did it state whether Commission recommendations enjoy any kind of normative force.

<sup>25</sup> Idem, para 160.

<sup>26</sup> Idem, para 55.

steps, notwithstanding the existence of evidence of sufficient probative value to justify such action. The question arises, therefore: should an objectively justifiable investigation into, *inter alia*, police ill-treatment be allowed to lapse for want of a formal initiating device? One would expect the CPT to answer in the negative and, without being express, it appeared to state as much in its first Portuguese visit report. Visiting Portugal in January 1992, a delegation was informed that "the prosecution of certain types of [police] ill-treatment was only possible on the basis of a *formal complaint* by a private citizen".<sup>27</sup> However, when interviewed, two local judges - "to whom detainees [were] presented immediately after a period of police custody" - claimed that they "regularly encountered...detainees who displayed injuries consistent with ill-treatment by the police". Most such detainees, they stated, were "apparently reluctant to make a written statement about the treatment they had received out of concern that it could prove to their detriment in the context of the criminal proceedings being brought against them".<sup>28</sup> If the judges were correct in their interpretation of contemporary attitudes towards Portugal's police complaints system, then, it is submitted, many investigations will have been stymied *ab initio*, rendering the process as a whole rather impotent and its credibility somewhat undermined.<sup>29</sup>

In the light of its delegation's findings, the Committee, in a gesture from which its views on the matter may be readily inferred, sought to know from the Portuguese Government:

"whether appropriate action can be taken [by the relevant authorities] upon information received which suggests that ill-treatment has occurred, *even in*

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<sup>27</sup> See Portugal I, para 19 (emphasis added).

<sup>28</sup> *Idem*, para 15.

<sup>29</sup> It is worth noting, however, that the country's Deputy Ombudsmen were of the view that the decline in the number of complaints of police ill-treatment was starting to reverse itself.

*the absence of a written statement by the alleged victim".*<sup>30</sup>

Whether or not, in the absence of a written statement, the CPT would wish for subsequent written confirmation from the alleged victim or his representative before an investigation may be authorised is not, unfortunately, readily apparent from its request. However, from remarks made recently to the Spanish authorities, it would appear that the Committee is of the view that no such confirmation is required; the authorities should initiate an investigation into possible police ill-treatment simply if there is sufficient evidence to justify it. For, in its sixth published visit report, seeking to emphasise ways in which domestic police complaints mechanisms may be rendered more effective, it suggested that:

“[e]ven in the absence of an express complaint, action should be taken if there are other indications (e.g. lesions recorded in a forensic medical report; a person’s general appearance) that ill-treatment might have occurred”.<sup>31</sup>

### *Re-activating prematurely terminated investigations*

Similar considerations of formality arise in circumstances in which an alleged victim of ill-treatment, having made a formal complaint, subsequently withdraws it or in which an investigation is discontinued in some other fashion. Again, some insight into the CPT's views on the matter may be obtained from its report on its visit to Northern Ireland in 1993. Therein, referring to the "total absence" of disciplinary sanctions imposed on police officers in cases adverted to in the fifth Annual Report of the ICPC, the Committee observed that "in the majority of cases (246), the

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<sup>30</sup> Portugal I, para 19 (emphasis added).

<sup>31</sup> See Spain VI, para 14.

investigation of the complaint was discontinued as a result of the complainant's 'failure to co-operate with the investigation'...<sup>32</sup>

This "problem" of the discontinuation of a "large number" of cases for want of co-operation left the CPT to lament that "[i]t is neither in the interests of the prevention of ill-treatment, nor in the legitimate interests of the [Royal Ulster Constabulary], that the investigation of allegations of ill-treatment should be thwarted in so many cases".<sup>33</sup> "[O]vercoming" such a problem, however, is clearly not easy, since the Committee offered no solutions; it simply sought to know whether the UK authorities were considering ways of addressing it.<sup>34</sup> More significantly, however, without being express, it did intimate that in its view, it should be possible to "re-activate" an investigation following the successful conclusion of any civil proceedings brought in connection with the alleged ill-treatment.<sup>35</sup>

***Barriers to prospective complainants: institutional inertia and the protection of police officers against false allegations of ill-treatment***

It has already been seen how, in Portugal, in 1992, according to two judges whose work brought them into close proximity with persons in police custody, potential complainants might be deterred from lodging a formal complaint against officers for fear that such action could prejudice the trial of the substantive charge(s) against them.<sup>36</sup> A reading of other visit reports would suggest that the problem of deterrence is neither confined to Portugal nor to the perceived prejudice of the criminal trial of the complainant. For example, in Greece, in 1993, according to a report drawn up by the Ministry of Public Order in the wake of the Committee's visit, a "special inquiry"

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<sup>32</sup> See UK II, para 92.

<sup>33</sup> *Idem*, para 96.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> See above, p 203.

into the interrogation methods employed at the Athens and Thessaloniki Police Headquarters<sup>37</sup> had revealed, *inter alia*, that the making of formal complaints against officers was "rare".<sup>38</sup> Responding, the Committee suggested that:

"...the fact that few formal complaints of ill-treatment are recorded is not necessarily a reliable guide as to the degree of risk of ill-treatment [at a particular establishment]. Detained persons who have been ill-treated will often hesitate before seeking to commence proceedings, out of fear of further prejudicing their legal situation or in the belief that such a step would be unlikely to prove successful".<sup>39</sup>

Indeed, it continued, "[n]umerous persons met by the delegation in the course of its visit...[had] stated that they had been discouraged by the police and/or by their own lawyer from pursuing a complaint of ill-treatment, it being argued that it would not be in their best interests".<sup>40</sup> Clearly, therefore, at the time of the visit, there existed, among detainees at least, a conviction, perhaps even cynicism, as to the futility of recourse to the domestic police complaints procedure. However, the apparent complicity of defence lawyers in police efforts to dissuade potential complainants is, perhaps, more worrying. It suggests the existence of a much deeper systemic malaise with the potential to prejudice the position of genuine victims of ill-treatment.

The situation perceived by the visiting delegation to Austria in 1990 perhaps more readily typifies the kind of institutional obstacles liable to be faced by potential complainants and against which the CPT must campaign if its precepts are to be given practical expression. There, notwithstanding the existence of a number of avenues of

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<sup>37</sup> Which inquiry had itself been prompted by the CPT's observations (on which see, generally, Greece I, paras 17-22).

<sup>38</sup> See Greece I, para 23.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.



redress available to alleged victims of police ill-treatment,<sup>41</sup> potential complainants could be deterred by the prospect of their having to face "counter proceedings... on the following grounds: defamation...the fact of having knowingly exposed a person to criminal proceedings or action by other authorities; or [the placing of] false evidence before a court or public authority".<sup>42</sup> It was the first of these grounds, that of defamation, which concerned the CPT.<sup>43</sup> According to both prisoners and certain police officers interviewed during the visit:

"the possibility - apparently frequently used - for police officers to bring criminal proceedings for defamation against someone who accuses them of ill-treatment often deters people who have been genuinely ill treated from lodging a complaint".<sup>44</sup>

Responding in balanced fashion, the CPT acknowledged that:

"...police officers, no less than anyone else, should have means of redress open to them when someone lays false accusations against them and thereby exposes them to the danger of unjustified prosecution".<sup>45</sup>

However, it continued, in furnishing police officers with a right to institute counter-proceedings against their accusers, it is important to ensure that:

"...the balance between competing, legitimate interests...is evenly established".<sup>46</sup>

In Austria, the CPT averred, this balance had "perhaps" not been struck.

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<sup>41</sup> See Austria I, para 19.

<sup>42</sup> *Idem*, para 20.

<sup>43</sup> The Committee voiced a similar concern in its first Norwegian visit report: see Norway I, para 44.

<sup>44</sup> Austria I, para 96.

<sup>45</sup> *Ibid.* See, similarly, Norway I, para 44.

<sup>46</sup> *Ibid.* See, similarly, p. 7 of the report, "Summary of the CPT's main findings" (5<sup>th</sup> sub-para); and Norway I, para 44.

Consequently, it was "of the opinion" that:

"...measures should be taken with a view to guaranteeing that persons who have been ill treated should not be discouraged from lodging a complaint".<sup>47</sup>

The Committee did not, however, suggest ways in which the balance and concomitant guarantee might be achieved,<sup>48</sup> save in one, tangential respect. It had, it stated, "taken note of the ongoing discussion" in the country concerning, *inter alia*, the concept of "an 'Ermachtigungsdelikt' (action *ultra vires*), the idea being that a police officer should seek authorisation from a superior authority before bringing defamation proceedings, failing which he would face a penalty".<sup>49</sup> Without actually expressing approval of such a formal check on the freedom with which defamation proceedings might be brought against a complainant, the Committee, it may be said, in this way, at least intimated that the notion possesses merit.

### ***Conclusion***

Drawing together the disparate evidence of CPT visit reports, it may be speculated that if it were to set out to devise a system for the investigation of complaints of ill-treatment against law enforcement personnel, that system would comprise, *inter alia*, the following: "a fully-fledged independent investigating agency"<sup>50</sup> (possessed, perhaps, of a judicial element<sup>51</sup>), incorporating guarantees of impartiality and

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<sup>47</sup> Ibid. The Committee sought information on the "measures envisaged in this field" by the Austria authorities.

<sup>48</sup> The Committee's report to the Norwegian authorities was similarly silent.

<sup>49</sup> Austria I, para 96.

<sup>50</sup> See UK IV, para 55.

<sup>51</sup> For instance, it was observed in 1997 that the functions of the Police Complaints Authority in the Isle of Man were performed by a retired senior judge and that, in contrast to England and Wales, there was no evidence of a lack of public confidence in the existing procedures: see UK IV, para 164.

protection from intimidation for alleged victims of ill-treatment, whose investigations would be activated immediately upon receipt of a complaint. That agency would, in addition, have the power to direct that disciplinary proceedings be initiated against officers and, “in the interests of bolstering public confidence”, would be authorised to remit a case directly to the prosecuting authorities in order that the latter may consider whether or not to institute criminal proceedings.<sup>52</sup>

Particular protection, reflecting their status, would be afforded persons detained on remand (for example, a prohibition on their being transferred to police premises and a – conditional - suspension of the charges against them). It would be the case further, it may be suggested, that the standard of proof required in complaints/disciplinary cases would be the civil one of a balance of probabilities, rather than the criminal one of beyond reasonable doubt;<sup>53</sup> and that the authorities would be obliged to render inadmissible in subsequent legal proceedings evidence obtained as a result of ill-treatment.<sup>54</sup>

As far as State party practice is concerned, it is difficult to get a sense of the nature and extent of police complaints mechanisms across Convention territory from visit reports. It is only really possible to determine to what extent those mechanisms which have been examined conform to CPT precepts. In this respect, the Committee’s principal concern, it appears, is the extent to which complaints procedures are and may be seen to be independent, particularly in respect of the police force the conduct of whose officers is being investigated. Other matters of concern

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<sup>52</sup> *Idem*, para 55 (reflecting on the rather attenuated powers of the Police Complaints Authority in England and Wales).

<sup>53</sup> See UK II, para 94 (as interpreted by Evans and Morgan in Evans and Morgan (1998), p 293, n 235); and now, more convincingly, UK IV, paras 54 (6<sup>th</sup> indent) and 164.

<sup>54</sup> See Portugal I, para 52.

include the readiness with which potential complainants may be dissuaded from pursuing a complaint, whether through fear of the consequences for themselves or of prejudicing their legal position or through a cynicism about the likelihood of their complaint being appropriately received and handled. The CPT, it is submitted, would do well to embark on a thorough examination of complaints mechanisms as they currently operate in States parties, for its coverage to date has hardly been comprehensive.

## II. The systematic inspection of police establishments

### *Introduction: the basic precept*

In its published work the CPT has frequently emphasised “[t]he need for effective control and supervision” of the activities of law enforcement agencies.<sup>55</sup> In the hope of encouraging such control and supervision and in terms reminiscent of its entreaties regarding the creation of independent and impartial police complaints mechanisms, it has asserted that:

“...it would be desirable for an independent person or body to be authorised to inspect on a regular basis the conditions of detention [obtaining in police establishments]”.<sup>56</sup>

Also reminiscent of its analysis of established police complaints procedures, the CPT has appeared most well-disposed towards the Dutch - and, as we shall see, UK - systems of inspection. As to the former, the CPT’s approbation would appear to derive above all from the fact that criminal investigations by the police are conducted “under the authority and control of the judicial authorities (principally the Crown Counsel)”.<sup>57</sup> Commenting on this arrangement in the wake of its visit in 1992, the Committee suggested that:

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<sup>55</sup> See, e.g., Turkey I, para 41.

<sup>56</sup> See, e.g., Malta I, para 93. It is worth noting that the Committee is of the view that similar mechanisms ought to exist in respect of other custodial establishments: see, e.g., 2<sup>nd</sup> GR, para 54 (regarding prisons); and 8th GR, para 55 (regarding psychiatric establishments). Again, unfortunately, space constraints preclude detailed analysis of these sibling arrangements.

<sup>57</sup> See Netherlands I, para 53. Similar arrangements, it is worth noting, obtain in Greece: see Greece I, para 49.

"...regular [and unannounced<sup>58</sup>] visits to police detention areas by the judicial authorities concerned could have a significant impact in terms of the prevention of ill-treatment".<sup>59</sup>

Visits like these, it believes, "should be seen as an intrinsic part of [such authorities'] duty to control and direct the work of the police in criminal proceedings".<sup>60</sup> Given the Committee's invocation of this formula in other published reports, too,<sup>61</sup> we shall take it as the point from which to begin our exploration of its precepts in this area.<sup>62</sup>

### *Breaching closed cultures*

The regular inspection of places of detention is significant, it is submitted, not only in respect of domestic efforts to create and maintain humane custodial environments, but also, less conspicuously, in respect of the kind of the co-operation which the CPT can expect to encounter when embarking on a visit. In Austria, in 1990, for example, its delegation was "sometimes met with reticence" when seeking to obtain access to establishments.<sup>63</sup> Although the Committee subsequently speculated that such

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<sup>58</sup> This addition to the formula was suggested in Spain II, para 72 (now Spain VI, para 29); and Romania I, para 26.

<sup>59</sup> Netherlands I, para 53. In other reports, the term "prosecuting or judicial authorities" has been used to describe the organ which, the CPT considers, should be mandated to visit police establishments: see, e.g., Netherlands (Aruba) I, para 230.

<sup>60</sup> See Poland I, para 24.

<sup>61</sup> See, e.g., Norway I, para 45; Greece I, para 49; Italy II, para 61; and Turkey I, para 41. Spanish police establishments, it seems, are subject to a regime of inspection similar to that created in the Netherlands, about which the CPT has also been enthusiastic, notwithstanding the Spanish judiciary's apparent failure fully to exploit it (as well as its constitutional role in the examination of complaints of police ill-treatment): see Spain I, paras 60-61; Spain II, paras 72, 73 and 208; Spain V, para 52; and now Spain VI, paras 15 and 30.

<sup>62</sup> It is worth noting that where provision has been made for the inspection of police establishments by senior police officers rather than an independent body, the CPT has been indulgent, encouraging their development, where necessary: see, e.g., Ireland I, para 56 and Ireland II, para 18. Its preference, however, it is clear, is for the creation of wholly independent inspectoral mechanisms: see Ireland I, para 57 and Ireland II, para 19.

<sup>63</sup> See Austria I, para 10.

reticence might have been partly attributable to the failure of central government to distribute to the appropriate agencies information on the Committee's activities – "especially in the case of the police, who were only vaguely, or not at all, aware of the CPT's visit and...role"<sup>64</sup> – it was, it claimed, "no doubt" also due to the fact that:

"...[Austrian] police officers are unaccustomed to such visits, the system currently in force not providing for inspection by independent external bodies".<sup>65</sup>

At the time of the visit, the "system" in operation appears to have provided for the monitoring of unconvicted criminal suspects by way of unannounced weekly visits from the competent President of the court of first instance.<sup>66</sup> By contrast, "no provision" had been made, the Committee observed, for the "systematic inspection by independent bodies outside the police" of the welfare of suspected administrative offenders.<sup>67</sup>

### *How the fundamental precept may be developed*

#### *The Dutch experience: independent experts*

In 1988, seemingly on their own initiative, the city authorities in Amsterdam established a "Commission for the Supervision of Police Cells". This Commission, "composed of independent experts",<sup>68</sup> was authorised to "supervise...the treatment of detainees and ensure...compliance with standards laid down by the municipality".<sup>69</sup> In fulfilling that remit, the Commission enjoyed "free access to places of detention" and

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<sup>64</sup> Ibid. The police force had been furnished with a Ministry of the Interior circular on the work of the Committee and the objects of its parent convention only three days in advance of the delegation's visit.

<sup>65</sup> Ibid.

<sup>66</sup> Idem, para 16.

<sup>67</sup> Idem, para 17.

<sup>68</sup> Unfortunately, the CPT did not explain this term in its first Dutch visit report.

<sup>69</sup> See Netherlands I, para 52. Prior to the CPT's visit in 1992, an "identical" commission had "apparently" been established in Rotterdam.

was entitled to interview both detainees and police officers.<sup>70</sup> It was, in addition, "empowered to give opinions to the Mayor<sup>71</sup> on all matters relating to police cells", including, it appears, the treatment of the occupants of such cells. The Commission was not mandated to entertain complaints about the police from individual detainees and was, consequently, obliged to work quite independently of the local body established for that purpose.<sup>72</sup> However, like that body, it was authorised to publish an annual report on its activities.<sup>73</sup> Thus, like the CPT, the Amsterdam Commission performed a "preventive function", representing:

"...an effective means of preventing the ill-treatment of persons held by the police and, more generally, ensuring satisfactory conditions of detention in places of detention".<sup>74</sup>

Having found much to commend in the work of the Commission,<sup>75</sup> in the wake of its visit in 1992 the CPT:

"...invite[d] the Dutch authorities to consider extending a supervisory system of this kind to all police and gendarmerie detention areas".<sup>76</sup>

It is worth remarking, in passing, that the mandate of the Amsterdam Commission strongly reflected that of the CPT itself. It would be surprising, therefore, if the CPT had offered anything other than high praise in the circumstances.

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<sup>70</sup> Ibid. The extent of police officers' obligation, if any, to co-operate with the Commission was not considered by the CPT in its visit report.

<sup>71</sup> Who, it will be recalled, often constitutes the Head of the local police force: see above, p 202.

<sup>72</sup> See Netherlands I, para 52.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> The Committee declared itself "favourably impressed" by it: *idem*, para 160.

<sup>76</sup> *Idem*, para 52.



### *The role of Lay Visitors in the UK*

As it did in the light of its delegation's experience in the Netherlands, on discovering points of congruence between its own work and similarly mandated domestic organs of inspection in England, Wales and Northern Ireland in 1990 and 1993, the Committee expressed much approval. In particular, it "learned with interest" of the system of lay visits to police stations which operates in England and Wales.<sup>77</sup> Established by Home Office Circular,<sup>78</sup> the lay visitor system provides for the appointment of:

"...ordinary members of the public...as independent observers, with the right to visit police stations without prior notice and to speak in private with detainees".<sup>79</sup>

A similar system operates in Northern Ireland, the existence of which, the CPT averred, in its second UK visit report, has "few parallels in other Western European countries" and "can only [be] commend[ed]".<sup>80</sup> Indeed, generally, it has insisted, the work of lay visitors, like that of the Amsterdam supervisory Commission, is:

"...capable of making an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, of ensuring satisfactory conditions of detention in police stations".<sup>81</sup>

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<sup>77</sup> See UK I, para 226.

<sup>78</sup> No. 12 of 1986.

<sup>79</sup> UK I, para 20. The right of organs of inspection to hold private discussions with detainees would now appear to constitute part of the CPT's body of precepts in this area: see Spain VI, para 29.

<sup>80</sup> See UK II, para 97. See also Dickson, Brice and O'Loan, Nuala, *Visiting Police Stations in Northern Ireland*, 45 Northern Ireland Legal Quarterly 1994, pp 210-18 ("Dickson and O'Loan (1994)").

<sup>81</sup> *Ibid.*

### ***The monitoring of particularly sensitive establishments***

As we have seen, unique in the UK's criminal justice system are the so-called "Holding Centres" situated in Northern Ireland.<sup>82</sup> Lay Visitors mandated to visit police establishments in the province are not authorised to carry out visits to such Centres. Rather, they are subject to a quite separate regime of inspection undertaken by the office of the Independent Commissioner for the Holding Centres,<sup>83</sup> whose "principal purpose", according to his terms of reference, is:

"...to provide further assurance to the Secretary of State [for Northern Ireland] that persons detained in Holding Centres are fairly treated and that both statutory and administrative safeguards are being properly applied".<sup>84</sup>

Further to this role as conduit to central government:

"[h]is appointment is...intended to reassure the public that the police have nothing to hide and that persons detained in Holding Centres are not being ill treated or denied their rights".<sup>85</sup>

In order to fulfil this mandate, the Commissioner is authorised, "on an unannounced basis":

"...[to] inspect the areas [in Holding Centres] where persons are detained or to which they have access, scrutinise custody records to ensure compliance with the Codes of Practice issued under the [Northern Ireland (Emergency Provisions) Act 1991] and conduct interviews with detained persons. It is [also] foreseen that his inspections shall include attention to the monitoring of interviews by CCTV and the electronic time stamping of interview notes".<sup>86</sup>

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<sup>82</sup> See, generally, above, p 141, n 1.

<sup>83</sup> See, generally, UK II, paras 24 and 98; and Dickson and O'Loan (1994), at 215 *et seq.*

<sup>84</sup> UK II para 98.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Idem*, para 99.

With one notable misgiving, concerning, as we shall see, the precise extent of the Commissioner's powers of intervention, the CPT has described the creation of his office as "a most positive development".<sup>87</sup> It may be said with some certainty, therefore, that his terms of reference comprise features which ought seriously to be borne in mind when identifying CPT standards in this area. It should also be noted in this connection that although the Holding Centres are products of the unique problems which have obtained in Northern Ireland for over 30 years now, the mechanisms by and the standards against which they are monitored may be said to possess universal qualities. Accordingly, regimes of inspection like that of the Independent Commissioner - or, for that matter, lay visitors - serve a purpose and operate in ways which may greatly assist the CPT in its efforts to identify ways of eliminating ill-treatment, regardless of the type of establishment in which organs like them are mandated to operate.

As to the nature of the access to detainees to which the Independent Commissioner in Northern Ireland is, by law, entitled, the CPT determined that it is "unclear" whether he may intervene "while interrogations are in progress".<sup>88</sup> The accuracy of this assessment was confirmed by the Commissioner himself in the course of the visit. However, he did point out that it was "open to him to request"<sup>89</sup> that an interrogation be halted in order that he might speak with a detainee - a right which, "in exceptional circumstances (when it was felt interruption would seriously prejudice an important police investigation)", he would be "invited to forego immediate[ly]",<sup>90</sup> unless, after observing the interview on the CCTV monitor, he was "of the opinion

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<sup>87</sup> *Idem*, para 100.

<sup>88</sup> *Ibid.*

<sup>89</sup> The Commissioner's powers were described no more robustly than that in the report.

<sup>90</sup> It will be recalled that a similar - though, seemingly, more highly circumscribed - bar can operate to delay CPT inspections by virtue of Article 9(1), ECPT: see, above, p 15.

that there were grounds for concern about the welfare of the person concerned", in which case he would be "granted immediate access to him".<sup>91</sup>

The CPT, for its part, clearly considered that there is merit in a system of inspection in which - in contrast to the situation in Northern Ireland - a visiting inspector may intervene *while interviews are in progress*. For, it described such a power as "[o]ne possible option" in the development of a more effective mandate for the Commissioner.<sup>92</sup> At the same time, however, it accepted that:

"...the presence of an external investigatory authority during police interrogations can prove to be a disruptive influence, without serving any useful purpose from the standpoint of ill-treatment".<sup>93</sup>

It is apparent from this even-handed and conscientious treatment of the Independent Commissioner's powers of intervention that the CPT considers that if he - and, by extension, other, similar inspectoral authorities - are to be, at once, effective and discreet, a balance must be struck between two potentially conflicting interests. As to the nature of that balance, important above all else, it seems, is the need to ensure that:

"...a means be found of enabling the Commissioner, *at his discretion, to hear for himself* what is said during police interviews at the Holding Centres".<sup>94</sup>

Without such a facility, the Committee considered, "it could prove difficult for the Commissioner effectively to advise the Secretary of State as to whether persons detained at the Centres are being fairly treated".<sup>95</sup>

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<sup>91</sup> UK II, para 99.

<sup>92</sup> *Idem*, para 101.

<sup>93</sup> *Ibid.* In what was, presumably, a glimpse into its own operational difficulties, the CPT ascribed this appreciation to its own experience.

<sup>94</sup> *Idem*, para 100 (emphasis added). This precept was put in recommendatory form at para 101 of the report.

<sup>95</sup> *Ibid.*

In order to achieve the necessary balance in practice, the CPT recommended that the British authorities install sound relay systems in the Holding Centres, linking interview rooms with a central monitoring room.<sup>96</sup> "[I]t could not reasonably be advanced", it suggested, "that such a measure could jeopardise security, or inhibit detainees from providing information to the police".<sup>97</sup> In similar vein, it suggested that the UK authorities might usefully consider granting the Commissioner access to the electronic recordings of police interviews with terrorist suspects.<sup>98</sup> As we have seen, at the time of the visit, while the audio tape recording of police interviews with non-terrorist criminal suspects appeared to be "standard practice", interviews with persons suspected of terrorist-related activities benefited from no such safeguard.<sup>99</sup>

### ***Conclusion***

Like its analysis of domestic police complaints mechanisms, the CPT's examination of police inspection procedures seems inchoate. Its precepts in the area, though welcome, lack specificity, referring simply to "independent persons or bodies" and "regular" inspections, without ever really addressing the nature, composition and powers of such organs or suggesting a timetable for visits. Fortunately, its examination of, *inter alia*, Dutch and UK practice in this area does illuminate certain aspects of the inspection regime from which it may be possible to predict how its standards are likely to develop. Nevertheless, further, detailed analysis of a safeguard which, in the light of its mandate, represents something fundamental to the CPT would be welcome.

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<sup>96</sup> *Idem*, para 101. See also para 80 of the report, and above, p 177.

<sup>97</sup> *Ibid.* Officers interviewed in 1993, it should be recalled, had complained of "technical problems" and "compromise[d] security" when the possibility had been raised with them: *idem*, para 80.

<sup>98</sup> *Idem*, para 102.

<sup>99</sup> *Idem*, para 83.

# PART III

## Standards on Imprisonment

## **The Development of CPT Standards on Imprisonment: An Introduction**

Self-evidently, the CPT "must examine many questions when visiting a prison".<sup>1</sup> Its principal concern, however, it has stated, is the ill-treatment of prisoners by custodial staff: it must, it maintains, "pay special attention" to allegations of such treatment.<sup>2</sup> In this regard, we should not lose sight of the fact that "all aspects [of prison life] are of relevance to the CPT's mandate", since:

"[i]ll-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources".<sup>3</sup>

Accordingly:

"[t]he overall quality of life in an establishment is...of considerable importance...[It] will depend to a very large extent upon the activities offered to prisoners and the general state of relations between prisoners and staff".<sup>4</sup>

The Committee's concerns, therefore, are genuinely far-reaching.

### ***Interrelationship of the particularities of prison life***

Although in what follows, we shall examine in turn a number of discrete features of prison life relevant to the CPT's mandate, much as the CPT itself does in its visit reports, it must always be borne in mind that it is only when examined collectively

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<sup>1</sup> See 2nd GR, para 44.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

that the effect of such features on prisoners' welfare can truly be gauged. To look at each one in isolation, therefore, is a rather artificial exercise, useful only for academic purposes. In practice, the overlap between many aspects of prison life is so great that deficiencies in any one area may strongly determine the quality of others. In examining the adequacy or otherwise of detainees' overall quality of life, therefore, matters like the material conditions in which they are accommodated and the regime to which they are subject are, in reality, inseparable.<sup>5</sup> This inseparability was most pointedly expressed in the Committee's first UK visit report, following its identification, in 1990, in a number of English prisons visited of:

"...a trinity of interrelated problems: overcrowding, lack of integral sanitation (which results in the 'slopping out' procedure) and inadequate regime activities for prisoners".<sup>6</sup>

Only by improving one element of this "potent mixture",<sup>7</sup> the Committee proclaimed, would it be possible to improve others.<sup>8</sup> For, as it has noted elsewhere, problems like these are "inextricably linked",<sup>9</sup> so inextricably linked in some instances, in fact, that "significant and lasting progress" in respect of one element (e.g. regime activities; staff-inmate relations) may be considered "dependent upon eradicating" another (e.g. overcrowding; poor material conditions of detention).<sup>10</sup>

### *Identifying precepts according to type of establishment*

Perusing its work, it is possible to identify certain precepts which the Committee

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<sup>5</sup> See, e.g., Hungary I, para 94 (regarding the quality of life obtaining in Budapest Remand Prison, Hungary, when visited in 1994).

<sup>6</sup> See UK I, para 36 and, further, paras 41 and 60.

<sup>7</sup> Idem, para 57.

<sup>8</sup> Idem, paras 58 and 62.

<sup>9</sup> See, e.g., Italy I, para 80.

<sup>10</sup> See, inter alia, Spain II, para 133; Portugal II, para 102; Ireland I, para 71; and UK III, para 342.



regards as applying mainly or, indeed, exclusively, to particular kinds of prison establishment. In this regard, it has suggested, *inter alia*, that different standards may apply to short-, as opposed to long-, stay establishments and to juvenile, as opposed to adult, detention centres. However, it is also fair to say that most precepts in the area of imprisonment may be regarded as applying with equal force in respect of every kind of prison establishment, without exception.

The Committee's linking of particular standards to particular kinds of custodial establishment has, to a certain extent, influenced the structure and content of the present work. Thus, distinctions will be drawn, where necessary, between those standards that may be considered particular to the detention of male prisoners and those particular to female ones; or between those uniquely applicable to the administrative detention of foreign nationals, and those more appropriate to the detention of suspected or convicted criminal offenders. Where the drawing of such distinctions may be considered unnecessary – because there is nothing subject-specific about the precept in question – it is proposed to illustrate it by reference to examples drawn from CPT analyses of all kinds of establishment.

### ***Fundamental principles***

Underlying all the precepts elaborated by the CPT in respect of the prison environment, are a number of principles of fundamental importance, generically philosophical in origin, though practical in application. These principles may be identified in or, at least, extracted from, the CPT's published work. For the CPT, it is safe to surmise - and, it is to be hoped, States parties to the Convention - they may be considered to represent irreducible core values in the detention and treatment of prisoners. They may be listed as follows:

1. **"The act of depriving someone of his liberty brings with it the responsibility for the State to detain him under conditions which respect the inherent dignity of the human person".<sup>11</sup>**

This may be regarded as the CPT's basic premise from whence springs much of the rest of its standard-setting work. The "aim" of adherence to its standards, it has stated, is to "ensur[e] that the physical and mental integrity of inmates is guaranteed".<sup>12</sup> As we shall see, on a number of occasions it has been prepared to upbraid national authorities for "not discharging...[this] fundamental responsibility".<sup>13</sup>

2. **A convicted prisoner, in spite of his imprisonment, "retains all civil rights which are not taken away expressly or by necessary implication".<sup>14</sup>**

The words quoted are those of Lord Wilberforce in the celebrated case of *Raymond v Honey*.<sup>15</sup> Restating this "well-known judicial pronouncement" in its first UK visit report, the CPT proclaimed that:

"...the fact of imprisonment does not deprive a person of all his rights".<sup>16</sup>

The Committee developed the *Raymond v Honey* principle subsequently, in its first Belgian visit report, wherein, under the heading "legal protection of detainees", it recalled the "innumerable complaints" received by its delegation and the "state of legal insecurity" palpable among inmates, in the various prisons visited in November 1993, as well as remarking on the absence in Belgian law of "formally recognised rights for prisoners".<sup>17</sup> In the light of such findings, it made two observations:

- (i) that a "minimum level of legal protection should be afforded detainees"; and
- (ii) that a "certain number of elementary legal rights should be recognised in law".<sup>18</sup>

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<sup>11</sup> See Greece I, para 95; and, similarly, Italy I, para 79; and Spain II, para 131.

<sup>12</sup> See Portugal II, para 181.

<sup>13</sup> See Greece I, para 272; and, similarly, Italy I, paras 79 and 187; and Spain II, para 131.

<sup>14</sup> See UK I, para 23.

<sup>15</sup> [1982] 1 All ER 756 at 759.

<sup>16</sup> See, similarly, Spain I, App II, para 14, regarding the provisions of the Spanish Constitution.

<sup>17</sup> See Belgium I, para 248.

<sup>18</sup> Ibid.

Thus, without offering much in the way of detail, the CPT established a most fundamental precept: that certain, essential rights of prisoners ought to be *formally guaranteed* in order that detainees may enjoy at least a minimum level of legal protection. Accordingly, whereas *Raymond v Honey* affirmed certain negative obligations on the part of the State (i.e. not to remove certain, basic civil rights of prisoners unless permitted to do so either expressly or impliedly<sup>19</sup>), the Committee's observations in its first Belgian visit report focused rather on a positive obligation of the State (namely, the duty to enshrine in law certain fundamental rights).

**3. All categories of prisoner are to be treated equally, whatever their status.**

This principle may be inferred in certain observations made by the CPT in its published work. Following its first visit to Spain in April 1991, for example, in the course of which it examined, *inter alia*, domestic prison inspection mechanisms, it sought to know whether the country's principal mechanism, that of the "supervisory judge", in fact "safeguard[s] the rights of *all* prisoners (i.e. both sentenced...and...on remand)".<sup>20</sup>

**4. An appropriate allocation of (financial) resources may be a prior condition of any improvement in the quality of prison life.**

This premise follows from the CPT's occasional prompting of national authorities to provide the "necessary financial support" for recommended or envisaged changes.<sup>21</sup>

It is a theme that emerges strongly in its published work. It noted in its first Bulgarian

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<sup>19</sup> Lord Bridge, indeed, asserted that a citizen's basic rights "can only be taken away by *express enactment*" (at 762) (emphasis added).

<sup>20</sup> See Spain I, para 186 (emphasis added). It should be noted, however, that, on account of their different legal statuses and circumstances, a certain differentiation between the treatment accorded, *inter alia*, remand and convicted prisoners may be perfectly justifiable. It may not be possible, for example, to furnish such prisoners with exactly the same kinds of regime. However, this is an area of study which lies outside the scope of the present work. Accordingly, for present purposes, it would be more accurate, perhaps, to talk of an equality of treatment insofar as the *protection against ill-treatment* of different categories of prisoner is concerned.

<sup>21</sup> See, e.g., Malta II, para 54.

visit report, for example, that officials at Stara Zagora Prison, when interviewed in 1995, had complained that a plan to refurbish the establishment had existed for the previous five years, but that its implementation had been "prevented" due to "a lack of financial resources".<sup>22</sup> For its part, the CPT observed that:

"[it] fully accepts that in times of economic difficulty, sacrifices have to be made... However, there are certain basic necessities of life the provision of which must be considered as a priority in institutions where the State has persons under its care and/or custody...Any failure to meet this requirement can lead rapidly to situations falling within the scope of the term 'inhuman and degrading treatment'.<sup>23</sup>

It is clear from these remarks that the CPT considers that, in depriving persons of their liberty, the State should take cognisance of certain fundamental human requirements, respect for which trumps all other considerations, and that, consequently, the necessary resources should be found to guarantee that respect, regardless of the general economic climate.

Following its delegation's visit to the poorly maintained Radnevo Psychiatric Hospital in the course of the same visit, the CPT also observed, less peremptorily, that beyond providing the "basic necessities of life", it may be acceptable for Parties to adopt an *incremental* approach to meeting standards and/or making improvements; that is to say, to effect change *as and when the finance is available*, possibly based on a pre-determined set of priorities. For, it is "[o]bvious", it maintained, that:

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<sup>22</sup> See Bulgaria I, para 124; and, similarly, paras 188, 192 and 194 (regarding Radnevo Psychiatric Hospital); and, elsewhere, Denmark II, para 88; and Germany II, paras 89 and 97-8.

<sup>23</sup> *Idem*, para 195.

"...as soon as economic circumstances permit, additional steps should be taken to improve living conditions in the wards and to return the hospital's premises in general to a satisfactory state of repair".<sup>24</sup>

In a more sophisticated form, this basic prescription requires of States parties that, when necessary, they "develop an appropriately-funded strategy for the progressive modernisation of the...prison estate", which strategy should, *inter alia*, "set firm deadlines for the entry into service of [any] additional accommodation...required to enable...[the] renovation work to be completed", and, in addition - and crucially - guarantee that the "necessary funds [are] made available to ensure that [the strategy] can be implemented".<sup>25</sup> Clearly, the CPT considers not only that improvements in the prison estate should receive appropriate financial support, but, less self-evidently, that that financial support should be dispensed in a considered and, where appropriate, carefully structured way, to the extent, even, that provision for its allocation should be made by reference to a determined hierarchy of priorities.

Of course, it should always be borne in mind - though, curiously, the CPT, for its part, has generally failed to emphasise the fact - that not all improvements are dependent on financial support for their successful implementation. Those that demand nothing more than an *attitudinal* change on the part of the prison authorities and staff, for example, are, undoubtedly, capable of being effected without financial consequence. This is a point to which we now turn.

**5. Serious economic and social difficulties "can never excuse deliberate ill-treatment".**

Sensitively, when visiting Bulgaria in Spring 1995, the CPT took cognisance of the

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<sup>24</sup> Ibid (emphasis added). See, similarly, para 203 of the report, regarding findings at Lovetch Neuropsychiatric Hospital.

<sup>25</sup> See Germany II, paras 99 and 187 (regarding post-re-unification problems in Berlin).

fact that the country was "currently facing extremely serious problems", notably a "simultaneous...grave economic crisis and an alarming increase in the crime rate". It was of the opinion, nevertheless, that the "negative repercussions" of these phenomena ought not to license the *deliberate* ill-treatment of detainees.<sup>26</sup>

**6. A place of detention should not have to accommodate categories of detainee for which it was not designated and/or designed.**

The CPT expressed itself most emphatically in this respect in its second Danish visit report. Therein, writing about Esbjerg Local Jail, which was the subject of a visit in 1996, and which, as its denomination suggests, was used principally for various kinds of short-term detention, it noted that the establishment was also obliged, in practice, to accommodate problematic prisoners transferred from the State Prisons.<sup>27</sup> Given the lengths of sentence being served by the latter and the material conditions and regime obtaining at Esbjerg at the time of the visit,<sup>28</sup> the CPT felt compelled to conclude that even if regime activities were "enhanced", the jail would "[still] not be in a position to offer appropriate activities to prisoners serving long sentences..."<sup>29</sup> Developing its theme and without leaving much room for doubt as to its "[m]ore general" position on the question, the Committee asserted that:

"...by their very nature, local jails [and, by implication, all establishments used for the short-term accommodation of detainees] are not in a position to provide an appropriate custodial environment for prisoners serving long sentences".<sup>30</sup>

It appeared to be actuated by similar considerations when reflecting on delegation visits to the two police prisons in Zurich, Switzerland, in July 1991. There, its

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<sup>26</sup> See Bulgaria I, para 5.

<sup>27</sup> See Denmark II, para 77.

<sup>28</sup> It was observed, *inter alia*, that some of the cells were cramped and regime activities limited: *idem*, paras 78-81.

<sup>29</sup> *Idem*, para 82.

<sup>30</sup> *Ibid.* See also para 146 of the report.

delegation had observed, the temporary accommodation of convicted prisoners waiting for places to be found in a more appropriate penal environment, had resulted in overcrowding.<sup>31</sup> The Committee, as might be expected, expressed the "hope" that the two prisons "rapidement... revenir a leur destination initiale, a savoir la detention par la police...de courte duree".<sup>32</sup> Worth noting, too, in this connection are the similar concerns of the CPT regarding the appropriateness of holding remand prisoners on police premises for "prolonged" periods of time.<sup>33</sup>

**7. Detention in smaller prison establishments should be avoided, as far as possible.**

The CPT's rationale for this particular conviction would appear to be that smaller establishments, by their very nature, are not disposed to offer satisfactory material conditions of detention and regime arrangements. This, at least, we can infer from its observations on the proposed fate of the Schwarzenburg district prison and other similar establishments in Switzerland, when visited in 1996. At Schwarzenburg - a "small" prison establishment situated in the Canton of Berne - the visiting delegation encountered only one detainee. He was found to be "dans un etat depressif et confessait un sentiment d'extreme solitude".<sup>34</sup> Although his material conditions of detention were "good", he was, notwithstanding his state of mind, not being permanently monitored and had been offered no out-of-cell activity at all, not even outdoor exercise. It is no surprise, therefore, that the CPT acknowledged, "with satisfaction", the purport of proposals to "reorganis[e]" the canton's prison estate. This reorganisation "prevoyait la fermeture des petits etablissements de detention accessoires, comme celui de Schwarzenburg, au profit de cinq prisons regionales".<sup>35</sup>

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<sup>31</sup> See Switzerland I, para 29.

<sup>32</sup> Idem, para 31.

<sup>33</sup> See Norway I, para 28 and Norway II, paras 7-13. See also below p 243.

<sup>34</sup> See Switzerland II, para 62.

<sup>35</sup> Idem, para 63.

The CPT "welcome[d]" the proposals and recommended that the reorganisation be accorded the "highest priority".<sup>36</sup> Clearly, therefore, its findings at Schwarzenburg were a source of profound disquiet. Indeed, given the situation obtaining at the time of the visit, it observed in its second Swiss visit report, the establishment's premises could be considered "peu compatibles avec une detention prolongee".<sup>37</sup>

### *Conclusion*

It has not been the intention of the present chapter to provide an exhaustive treatment of general standards on imprisonment. Its purpose, rather, has been to set out a number of the many underlying considerations to which, in the view of the CPT, States ought to give due weight in formulating and developing penal policy and thereby to serve as an introduction to the more detailed analyses of particular aspects of detention which follow. Such considerations may be regarded as inhering in many of the precepts examined below.

It has been stated before in this work, but it is nevertheless worth emphasising again, that, while much of the content of subsequent chapters concerns detention in *prison* establishments, a number of precepts relate also - sometimes exclusively - to other kinds of institution. Accordingly, although it is expedient to consider all precepts examined in this, Part III, of the present work under the designation *Imprisonment*, it is a conceit which may serve to mask the range and complexity of a number of them. However, in the text itself, it should be apparent just when detention in one of these other categories of establishment is in issue. The aim, overall, is to

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<sup>36</sup> Ibid. See also para 153 of the report.

<sup>37</sup> Idem, para 62.



provide the reader with an exhaustive account of CPT standards in the areas discussed, taking account, where necessary, of the different environments in which persons may be detained.

## Prison Overcrowding

### *Introduction*

The notion of prison overcrowding is a simple one to comprehend. Broadly, an establishment may be said to be overcrowded when it is “required to cater for more prisoners than it was designed to accommodate”.<sup>1</sup> It is overcrowded, in other words, when the number of detainees it holds exceeds its physical capacity so to do.

Calculating the number of detainees held in an establishment at any one time is a straightforward matter; calculating its physical (or occupational) capacity much less so: account must be taken, it is submitted, not only of more obvious factors, like the number and size of prison cells, but also of more abstruse considerations, like the effects on capacity of a prison’s age, design and penal purpose (whether, for example, it is intended for short-term or long-term accommodation) and the amount and character of out-of-cell time afforded detainees therein (since the nature and extent of out-of-cell activities may affect the tolerability of the cellular environment). There is nothing in its published work to suggest that the CPT uses any one method to quantify an establishment’s accommodation capacity. Rather, it would appear to determine the appropriateness of occupation levels on a more or less *ad hoc* basis, taking account of the particular circumstances obtaining in the establishment being visited. This may be a very sensible approach, since the variety of features which, as we have just seen, can affect a prison’s physical capacity may render a figure arrived at under any rigid formula open to question.

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<sup>1</sup> See 2<sup>nd</sup> GR, para 46.

### *Recent population trends*

Throughout its working life, prison overcrowding has remained one of the CPT's most compelling concerns. To the Irish authorities, for example, following its visit in 1993, it offered the general comment that "[o]vercrowding is a problem which bedevils many prison systems..."<sup>2</sup> This view is hardly surprising given the apparent trend over the last ten to fifteen years, among a number of States parties to the ECPT to make greater use of incarceration in the execution of penal policy. In 1996, for example, assessing progress made in the penal sphere since first visiting the UK in 1990, the CPT adverted to the "considerable rise" in the prison population seen in England and Wales "in recent times". At the time of this, its second, periodic visit, the population stood at 48,400 – "and was continuing to rise at a rate of 200 per month".<sup>3</sup> This figure was over 6,000 inmates greater than that predicted by the UK authorities in their Follow-up report to the Committee's first periodic visit.<sup>4</sup> Consequently, their assertion that "the average prison population and available accommodation will come into balance in 1995"<sup>5</sup> was "no longer valid".<sup>6</sup> Indeed, at the time of the visit, a "projected surplus" in the prison estate of 3,200 places<sup>7</sup> had, in fact, become a "shortfall" of 2,900.<sup>8</sup> By the time of the CPT's fourth visit to the jurisdiction, in September 1997, it was clear that the prison population in England and

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<sup>2</sup> See Ireland I, para 97.

<sup>3</sup> See UK III, para 75.

<sup>4</sup> See UK Follow-up report I, CPT/Inf (93) 9, para 48. It should be noted that this 6000 surplus figure was correct only insofar as the prison population for the year 1993-4 was concerned; the UK Government's population projection for the year 1995-6 – covering the period of the visit – was, in fact, 45,700, which yields a surplus of 2,700 inmates.

<sup>5</sup> See UK Response I, CPT/Inf (91) 16, p 14.

<sup>6</sup> See UK III, para 75 (and, similarly, para 79).

<sup>7</sup> See UK Follow-up report I, op cit, n 4 above, para 48. Again, the figure cited actually represents the surplus predicted for the year 1993-4; that predicted for 1995-6 was, as we have just seen, 2,700.

<sup>8</sup> See UK III, para 75.

Wales had “continued to rise, outstripping each successive revision of population predictions”.<sup>9</sup>

A similar picture emerged during the Committee’s first visit to Greece in March 1993. There, it was observed, “the number of prisoners [accommodated throughout the entire prison estate] had more than doubled over the last 12 years...whereas the official capacity of the prison system at the time of the delegation’s visit stood at 3900, the number of prisoners actually held amounted to 6700”.<sup>10</sup> An even greater – indeed, “exponential” – population rise, from around 200 to over 500 prisoners, was observed to have taken place on the island of Martinique over a similar period of time.<sup>11</sup>

The phenomenon of prison overcrowding is, therefore, a problem just as, if not more, compelling today than it was at the CPT’s inception. As recently as 1997, the Committee drew attention to the fact that during “several” visits made in the previous working year, its delegations had “once again” encountered this particular “evil”, leading to the impression that overcrowding still “blights penitentiary systems across Europe”.<sup>12</sup> Interestingly, the Committee has determined that overcrowding is “often particularly acute” in remand prisons. However, “in some countries”, it has insisted, the problem has “spread throughout” the entire prison estate.<sup>13</sup> Indeed, the problem may be considered “sufficiently serious” throughout Europe, it has asserted, as to justify “call[s] for cooperation at the European level, with a view to devising counter

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<sup>9</sup> See UK IV, para 70. By January 1998, the prison population had reached 62,970. Even HM Prison Service’s own annual audit of resources, published in July 1997, had concluded that “there is no realistic prospect of the prisoner population and available accommodation coming into balance in the foreseeable future”: *idem*, para 71.

<sup>10</sup> See Greece I, paras 94 and 272.

<sup>11</sup> See France (Martinique) I, para 25 (note 2).

<sup>12</sup> See 7<sup>th</sup> GR, para 12. Extrapolating from figures produced by the Council of Europe, some commentators have conjectured that “[i]t is likely that between one-half and two-thirds of all the prison systems in Europe contain some establishments that are overcrowded...”: see Evans and Morgan (1998), p 324.

<sup>13</sup> *Ibid.*

strategies”.<sup>14</sup> It has been “most pleased to learn” therefore that counter-offensive work has already begun “within the framework of the European Committee on Crime Problems”,<sup>15</sup> whose “successful conclusion”, it has expressed the hope, “will be treated as a priority”.<sup>16</sup>

### ***The particular significance of (prison) overcrowding in the work of the CPT***

As might be predicted, to the CPT “[o]vercrowding is an issue of direct relevance to [its] mandate;”<sup>17</sup> of such relevance, in fact, that on occasion during visits, it has considered it “the principal obstacle to providing better conditions of detention...”<sup>18</sup> Consequently, policies for its eradication, it has insisted, have a “pivotal role to play” in improving such conditions.<sup>19</sup>

### ***Extent of CPT tolerance***

Notwithstanding such firm expressions of principle, it is to be noted that, on occasion, the CPT has appeared prepared to tolerate a certain amount of overcrowding. During its first visit to Spain in April 1991, for example, it observed that the inmate population at Basauri Prison exceeded its “official” capacity by some 40%.<sup>20</sup> Although the resulting “cramped, occasionally very cramped” cellular conditions were “far from ideal” – the “majority” of inmates were being held two, three or four to a cell measuring in size between 10 and 18 sq.m. - they “could not fairly be

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<sup>14</sup> *Idem*, para 15.

<sup>15</sup> The European Committee on Crime Problems is a subordinate organ of the Committee of Ministers of the Council of Europe.

<sup>16</sup> See 7<sup>th</sup> GR, para 15

<sup>17</sup> See 2<sup>nd</sup> GR, para 46; and also 7<sup>th</sup> GR, para 13; and Spain I, para 117.

<sup>18</sup> See Portugal II, para 97; and, similarly, Italy II, paras 120 and 122.

<sup>19</sup> *Idem*, para 180. For an examination of such policies, see below, p 256 *et seq.*

<sup>20</sup> See Spain I, para 119. The establishment was found to be holding 285 prisoners, whereas its official capacity was a mere 210 (*idem*, para 88).

described as intolerable,” the Committee averred, particularly since prisoners enjoyed “considerable” out-of-cell time and freedom of movement within the establishment.<sup>21</sup> As a result, it seems, the CPT refrained from seeking an immediate reduction in the prison’s inmate population – something which it might have been expected to do were it unyielding in its opposition to prison overcrowding. Rather, it recommended a more measured, two-stage strategy, comprising efforts, first, to “contain” the overcrowding and, second, “in due course to reduce the inmate population”.<sup>22</sup>

The Committee adopted a similarly moderate approach in the face of overcrowding at Algeciras Prison encountered during the same visit. There, inmate numbers (the establishment was holding 252 prisoners at the outset of the visit<sup>23</sup>) exceeded the establishment’s official capacity (of 192) by approximately 30%<sup>24</sup> - though it had been much higher, apparently, “in the recent past”.<sup>25</sup> Again, notwithstanding these less than satisfactory physical conditions, the Committee only went so far as to recommend that the inmate population be “kept under 250 and as close as possible to 200”.<sup>26</sup> Interestingly, both these figures are greater than the establishment’s official capacity; indeed, the first – the prescribed upper limit of acceptability – is only marginally below the actual population levels observed during the visit.<sup>27</sup>

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<sup>21</sup> Ibid. See, similarly, Spain II, paras 125 and 130 (regarding findings in the Madrid Prison for Women in April 1994: availability of activities to prisoners offset “serious” levels of overcrowding). On the significance of both adequate out-of-cell time and freedom of movement in, at least, mitigating the effects of overcrowding, see below, pp 264-5.

<sup>22</sup> Ibid. See, further, below, p 261.

<sup>23</sup> Idem, para 88.

<sup>24</sup> Idem, para 120.

<sup>25</sup> According to the prison transfer register, the population had “peak[ed]” at 380, “double” its official capacity, 5 months before the visit; while overcrowding had remained “severe” until a matter of days before its commencement.

<sup>26</sup> See Spain I, para 123.

<sup>27</sup> For a further, similar expression of tolerance (regarding findings at the Court of First Instance Prison, Vienna, in May 1990), see Austria I, para 33.

Regarding the levels of overcrowding observed in Brixton, Leeds and Wandsworth Prisons in the UK in mid-1990, the CPT recommended, *inter alia*, the creation of :

“[a] ceiling...consisting of a certain percentage figure over the [official capacity], beyond which the acceptance of additional inmates...would be inadmissible”.<sup>28</sup>

Clearly, the CPT considers that there may be instances in which it is quite acceptable to exceed set population targets, even if the practical effect is to perpetuate prison overcrowding. Indeed, it appears that, on occasion, the CPT is prepared to countenance not inconsiderable levels of overcrowding. Unfortunately, from its published work, it is not possible to identify anything which resembles policy on the matter, analysis of which might enable one to predict in what circumstances it is likely to demonstrate tolerance.<sup>29</sup>

### ***The relevant prison population***

The manner in which “official” inmate capacities are calculated is also an issue of concern to the CPT. In this respect, visiting the prison of Puerto de Santa Maria II, Spain, in April 1991, it found that although the establishment’s actual population level of 954 was “slightly below its official capacity...it was probably the most overcrowded establishment seen by the delegation in Spain”.<sup>30</sup> In the Committee’s

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<sup>28</sup> See UK I, para 61. See, further, below, p 260.

<sup>29</sup> Indeed, contrarily, in its fourth published report to the UK authorities, the CPT expressed profound reservations about the practice of accommodating a number of prisoners above the prison estate’s certified normal accommodation – i.e. its uncrowded capacity – in order to create its “usable operational capacity” – i.e. “the degree of overcrowding which the Director General [of the Prison Service] judges to be the maximum safe level, taking account of both the physical constraints and the additional risks to control and security”. Such a practice, the Committee considered, could lead to a certain institutional acceptance of the phenomenon of overcrowding. Accordingly, this so-called “safe overcrowding”, it suggested, “should not be allowed to become the benchmark...”: see UK IV, paras 71-2 and 76.

<sup>30</sup> See Spain I, para 125.

view, “[t]his raise[d] the question of how the official capacity ha[d] been worked out”.<sup>31</sup>

Clearly, therefore, overcrowding does not only occur when, most obviously, the actual population in an establishment exceeds its official capacity, but may also arise, more illusorily, when that official capacity has been incorrectly calculated. On the evidence of published visit reports, worth noting in this connection, it is submitted, is the fact that the practice whereby an establishment’s “official” population capacity is, seemingly, increased beyond, sometimes considerably beyond, its “optimal” capacity – i.e. that which the establishment is physically capable of sustaining - is not necessarily one sought to be artfully concealed by prison authorities. On the contrary, such authorities have, on occasion, spoken with candour about admitted discrepancies between the two figures. For example, at the maison d’arret San Vittore, Italy, in March 1992, the prison director himself admitted that his establishment’s “optimal” capacity was some 800 detainees, while its “official” capacity was 1,295.<sup>32</sup> Similarly, visiting the Carabanchel Prison Complex, Spain, in April 1994, it was evident to a CPT delegation that the official capacity of 1,285 at the Madrid I Prison was exceeded somewhat by its “so-called ‘operating’ capacity” of 2,134, “plus 203 auxiliary places”; while, at the Prison for women, the establishment’s optimal capacity of 626 (plus 73 auxiliary places) was effectively double its official capacity of 369.<sup>33</sup>

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<sup>31</sup> Ibid. “Apparently”, it had been based, *inter alia*, on the premise that “standard” cells of 9 sq.m. may each accommodate 3 prisoners.

<sup>32</sup> See Italy I, para 67. The establishment’s actual population at the time of the visit was almost 2,000 detainees, a figure described by the CPT as “outrageous”: *idem*, para 77.

<sup>33</sup> See Spain II, para 98. In fact, when visited, the Madrid I Prison was accommodating 2,184 inmates and the Prison for Women 637 (plus “50 offspring up to the age of six”).



## ***Findings***

The recurrence of the “evil” of overcrowding in the CPT’s published work is striking. Naturally, its extent has varied from Party to Party and even between establishments within the same Party. For instance, during its first periodic visit to the UK in 1990 the Committee observed levels of occupation in prisons visited which varied from the satisfactory to the quite unacceptable. In both Wandsworth and Brixton Prisons “significant” levels of overcrowding obtained because official population capacities - of 1,275 and 729 inmates, respectively - were exceeded by actual population levels of 1,516 and 1,005.<sup>34</sup> Worse, at Leeds Prison, where an actual inmate population of 1,205 was “almost twice” the establishment’s certified capacity of 627, levels of overcrowding were said to have been “outrageous”.<sup>35</sup> By contrast, at Holloway Prison, one of two female prisons visited in 1990, an actual population of 473 was “somewhat less” than the establishment’s official capacity of 517.<sup>36</sup>

Elsewhere in Europe, prison establishments visited have been found to be, *inter alia*, “grossly overcrowded”.<sup>37</sup> For example, Greece’s Korydallos Prison for men, built to accommodate 480 prisoners, when visited in 1993, was found to be holding, at 1,410 inmates, “almost three times” as many.<sup>38</sup> Rather candidly, the Greek authorities, the Committee subsequently noted, “made no secret” of the fact that “overcrowding was a nationwide problem”.<sup>39</sup> Similarly, visiting Portugal, in May

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<sup>34</sup> See UK I, paras 37, 38 and 39.

<sup>35</sup> *Idem*, para 39. See, similarly, France I, paras 83, 91 and 97; Italy I, paras 77 and 186; Spain II, para 129; and France (Martinique) I, para 27.

<sup>36</sup> *Idem*, para 120. Interestingly, at the second female prison visited, while actual occupation levels did not exceed official capacity figures, inmates had been allocated in such a way as to produce a certain amount of overcrowding: *idem*, paras 128-131 and 232.

<sup>37</sup> See Greece I, paras 94 and 272; and Portugal I, para 71. Immigration detention facilities and police establishments, too, have been found to be “grossly overcrowded”: see Turkey I, paras 56 and 69, respectively.

<sup>38</sup> Greece I, paras 91 and 105.

<sup>39</sup> *Idem*, paras 94 and 272. See also in this regard, paras 91, 110 and 113 of the report (regarding Korydallos Prison for women, described as “severely” and “unacceptabl[y]” overcrowded); para 91 (regarding the Korydallos Prison Complex Psychiatric Unit – though *cf* para 178); and paras 92 and 117 (regarding Larissa Prison).

1995, the CPT was given to understand that overcrowding was an “ill which...affect[ed] the whole of the...prison system...”<sup>40</sup> Evidently, the problem had obtained for some time, for, during its first periodic visit, in January 1992, it had observed that the Judicial Police Group Prison, Lisbon, had been accommodating “almost twice the number of prisoners it was designed to hold” (i.e. 155, as opposed to a certified figure of 80).<sup>41</sup> On its return, “some three and a half years [later]” and “notwithstanding [its previous] recommendation...to reduce substantially” the number of persons held in the prison, it was clear to the Committee that the situation had, in fact, deteriorated: while the official capacity had remained static, actual occupation levels had risen to 169.<sup>42</sup>

Elsewhere, levels of overcrowding encountered have been such as to be “rarely observed” by the CPT;<sup>43</sup> “chronic”;<sup>44</sup> “extremely high”;<sup>45</sup> “extraordinary”;<sup>46</sup> “serious”;<sup>47</sup> and “completely unacceptable”.<sup>48</sup> Indeed, in one notable instance - on the island of Martinique (July 1994) – overcrowding, more particularly *predicted* overcrowding, was found to be so acute that the authorities had been forced to contemplate the opening of a brand new prison establishment, incomplete at the time

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<sup>40</sup> See Portugal II, para 97.

<sup>41</sup> See Portugal I, paras 54 and 71.

<sup>42</sup> Portugal II, para 76. For a similar deterioration at Linho Prison over the same period, see para 80 of the report. Further, returning to the country in 1996, Oporto Prison was found to be seriously overcrowded: see Portugal III, para 7.

<sup>43</sup> See Italy I, para 67 (regarding the maison d’arret San Vittore, Milan: above, p 237); and now Italy II, paras 65 and 96 (some 3 years after the CPT’s first visit, the actual population of the establishment had risen to 2,245).

<sup>44</sup> See France I, para 98 (regarding the levels of overcrowding obtaining throughout the entire French prison estate in 1991). However, *cf* France III, paras 76-79.

<sup>45</sup> *Idem*, paras 82 and 91 (regarding the maison d’arret de Marseille-Baumettes, France (1991), where the number of prisoners actually held (2,156) exceeded the establishment’s official capacity (1,534) by 40% (though see now France III, para 81); and, similarly, Portugal II, paras 90 and 91 (regarding Oporto Prison (1995): official capacity 500; actual numbers held 1,120).

<sup>46</sup> See Spain I, para 127 (regarding the women’s unit of the Prison of Puerto de Santa Maria II (1991): official capacity 46; actual population 72, a situation, the CPT learned, which was “not... exceptional”).

<sup>47</sup> See Slovakia I, paras 68 and 75 (regarding the “closed” section of Bratislava Prison, Slovakia (1995): actual population 750; official capacity 570).

<sup>48</sup> See Czech Republic I, para 49 (regarding the “cram[ing]” of up to 17 prisoners in unfurnished cells measuring less than 10 sq. m. in the “escort area” at Prague-Pankrac Remand Prison (1997)).

of the Committee's visit, with an already overcrowded prison population. Unsurprisingly, the CPT considered the prospect to be "highly regrettable".<sup>49</sup>

The existence of prison overcrowding – albeit in a less acute form – has also been noted in a number of other States parties, including Switzerland,<sup>50</sup> Germany,<sup>51</sup> Belgium,<sup>52</sup> Ireland,<sup>53</sup> Hungary,<sup>54</sup> Austria<sup>55</sup> and Romania.<sup>56</sup>

### *Effects of overcrowding*

Having briefly examined the extent of prison overcrowding among States parties to the ECPT, as revealed in published visit reports, it may be appropriate, now, to consider precisely how, in the Committee's view, the phenomenon may manifest itself in practice. What possible effects on the prison estate may overcrowding have? Simply stated, the Committee considers that:

"[a]ll the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly..."<sup>57</sup>

Thus, overcrowding may profoundly affect all aspects of prison life and may, accordingly be considered to represent one of the most serious impediments to the creation of a better quality of life in places of detention.<sup>58</sup> Its impact may be most

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<sup>49</sup> See France (Martinique) I, paras 29, 30 and 42.

<sup>50</sup> See, Switzerland I, *inter alia*, paras 14, 17, and 146; and Switzerland II, para 97.

<sup>51</sup> See, e.g., Germany I, para 61; and Germany II, paras 104 and 118.

<sup>52</sup> See, e.g. Belgium I, paras 81-3; and now Belgium II, para 82.

<sup>53</sup> See, e.g., Ireland I, para 97. Visiting for a second time, in 1998, the CPT was left with the impression that overcrowding was an "endemic feature" of the Irish prison estate: see Ireland II, para 57.

<sup>54</sup> See, e.g., Hungary I, para 87.

<sup>55</sup> See, e.g., Austria II, para 96.

<sup>56</sup> Where, in 1995, approximately 50,000 prisoners were being held in a prison estate whose official capacity was a mere 14,000 places: see Romania I, para 96.

<sup>57</sup> See 2<sup>nd</sup> GR, para 46. See also Spain I, para 117.

<sup>58</sup> See Ireland I, para 97.

acutely felt, however, in the following areas: a prison's physical environment; the prison regime; staff-inmate and inter-inmate relations; and prison services, particularly health care facilities. This assessment is borne out by the CPT's rather stark conclusion that:

“[a]n overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff...”<sup>59</sup>

It should be added that the CPT regards this list as “far from exhaustive”<sup>60</sup> and believes, more starkly still, that, ultimately:

“the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint”.<sup>61</sup>

Sadly, this is a conclusion to which the CPT has been led “on more than one occasion”.<sup>62</sup> It may be useful, therefore, briefly to examine some of the effects of prison overcrowding, as observed by the CPT, so that we might gauge just how far-reaching they may be.

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<sup>59</sup> See 7<sup>th</sup> GR, para 13.

<sup>60</sup> Ibid.

<sup>61</sup> See 2<sup>nd</sup> GR, para 46. See also Spain I, para 117. To the UK authorities, in its fourth published visit report, the Committee asserted that “it is a fundamental requirement that those committed to prison by the courts be held in safe and decent conditions. For so long as overcrowding persists, the risk of prisoners being held in inhuman and degrading conditions of detention will remain”: see UK IV, para 76.

<sup>62</sup> See 7<sup>th</sup> GR, para 13.

### *Overall quality of life*

Self-evidently, where authorities seek to accommodate more persons in an establishment than its physical capacity would ordinarily permit, they risk “imped[ing] the operation of all sectors of activity [therein]”, with the result that detainees’ “general quality of life [may be] considerably weakened”.<sup>63</sup> Conversely, of course, where that physical capacity is not exceeded, detainees’ quality of life is likely to be “much higher.”<sup>64</sup> Overcrowding, therefore, may be considered to undermine prison authorities’ capacity to meet their putative “fundamental” duty to detain persons in conditions which respect their inherent dignity.<sup>65</sup>

### *Effects on neighbouring establishments*

That fundamental duty may be seriously undermined when the repercussions of overcrowding are felt not only in the establishment immediately affected, but also in neighbouring establishments, obliged to accommodate any population overspill. This excess population may comprise categories of prisoner for whose detention the latter establishments were not designed. They may be left, therefore, not only overcrowded themselves – by virtue of an influx of prisoners from elsewhere – but with a detainee population for whose needs they may be ill-prepared to cater. For example, visiting Switzerland in July 1991, the CPT found that Zurich’s two police prisons, authorised to accommodate a variety of short-term detainees,<sup>66</sup> were having also to accommodate

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<sup>63</sup> See France I, para 102 (an opinion offered in respect of the maison d’arret, Nice, where in 1991, population levels exceeded by 200% the establishment’s official capacity.).

<sup>64</sup> See UK I, para 119 (regarding findings at Holloway Prison in 1990: above, p 238).

<sup>65</sup> See Greece I, paras 95 and 272.

<sup>66</sup> Namely, persons arrested or placed “en garde a vue”, temporary detainees, foreign detainees in the process of being expelled, persons sentenced to short terms of imprisonment or in transit and, exceptionally, young persons.

long-term prisoners due to “significant” overcrowding in the region’s cantonal and district prisons.<sup>67</sup> In consequence, they too had become overcrowded.<sup>68</sup>

More striking still, in the UK, in May 1994, “certain areas” of Liverpool Prison had become so overcrowded that neighbouring *police stations* were obliged to accommodate the excess population (at a rate of three detainees per cell).<sup>69</sup> It need hardly be stated that a police station is not an appropriate environment for the detention of prisoners expected to be held for long periods of time. Indeed, the CPT itself has sought to “stress that...police custody cells...are not suitable for periods of detention [for convicted/remand prisoners] lasting more than a few days”.<sup>70</sup> Prolonged periods of detention of such persons on police premises, it considers, “may lead to high risk situations”.<sup>71</sup>

Lastly and almost risibly, in Greece, where, as we have seen, Korydallos Men’s Prison was severely overcrowded when visited in March 1993, because the neighbouring Psychiatric Unit, though overcrowded itself,<sup>72</sup> offered “somewhat better” material conditions than the main prison building, a number of healthy prisoners had been emboldened to seek admission “by feigning mental illness”.<sup>73</sup>

### *Resource implications*

To accommodate more detainees than was originally intended in an establishment necessarily strains its resources. This fact was made abundantly clear during a visit to

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<sup>67</sup> See Switzerland I, para 12. An expansion of the Zurich district prison was authorised (and commenced) in 1991 (*idem*, para 21). However, the construction of a completely new prison had been rejected by referendum a decade earlier (para 29).

<sup>68</sup> *Idem*, para 14.

<sup>69</sup> See UK III, para 76. Interestingly, Liverpool Prison itself had not been forced to adopt such a rate of occupation.

<sup>70</sup> See Iceland II, para 70 (regarding the detention of a remand prisoner in a cell at Akureyri Police Headquarters in 1998); and, similarly, Netherlands II, para 29.

<sup>71</sup> See Netherlands (NA) II, para 56.

<sup>72</sup> See Greece I, para 91 (the Unit’s “envisaged” capacity was approximately 140; its population at the time of the visit, 240).

<sup>73</sup> *Idem*, para 178.

the Centre Penitentiaire de Luxembourg in January 1993. There, the authorities were having to accommodate an excess population of 100 detainees.<sup>74</sup> Consequently, finding the resources to furnish detainees, first, with sufficient food and, second, with adequate facilities and equipment had proved particularly difficult. In both respects, budgets had been calculated and allocated “en fonction de la capacite theorique initiale de l’etablissement”.<sup>75</sup> As a result of overcrowding, the prison authorities had been left with a food budget of 101 F/Lux. per detainee per day (as compared with an optimal budget of 130 F/Lux). Naturally, the CPT remarked, “any increase in the prison population would see this figure further reduced”.<sup>76</sup> Further, and hardly surprisingly, its delegation was “struck” by the “considerable” number of complaints received regarding the “quantity” of food provided daily.<sup>77</sup>

As for the prison’s stores of equipment, the delegation learned that there were no reserve stocks of mattresses, bedding and hand towels; that stocks of work clothes were “almost exhausted;” and that the practice of providing clothing for “indigent” detainees had had to be brought to an end.<sup>78</sup> Unsurprisingly, the Committee recommended that all the deficiencies observed be remedied “dans les meilleurs delais”.<sup>79</sup>

### *Adherence to national codes of conduct*

It is worth noting that in one instance in which prison overcrowding has been found to obtain nationwide, the Committee has considered the phenomenon to have “seriously

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<sup>74</sup> The establishment’s optimal capacity (“capacite theorique initiale”) was 270, its official capacity 350 and its population at the time of the visit 370: see Luxembourg I, para 40.

<sup>75</sup> *Idem*, para 64.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

undermined” government efforts to implement a “modern and progressive” code of basic rules for the treatment of prisoners.<sup>80</sup>

### *The physical environment*

The correlation between occupancy levels and the quality of the physical environment in places of detention was most succinctly expressed by the CPT in its first Belgian visit report. Therein, commenting on differences observed in the material environments of the maison pour peines and the maison d’arret at Lantin Prison in November 1993, it remarked that it had been “better” in the former due to the “simple fact” that it had been subject to no overcrowding.<sup>81</sup>

Elsewhere, more insistently, it has proclaimed that overcrowding, more particularly “severe” overcrowding:

“...cannot fail to have extremely negative repercussions on material, hygienic and psychological conditions of detention...”<sup>82</sup>

As to material conditions, the “negative repercussions” which, in the experience of the Committee, overcrowding may be considered to cause, have included, at Korydallos Prison for men in Greece, March 1993, “very poor” living space, “inadequate” ventilation<sup>83</sup> and a standard of cell cleanliness and hygiene found “wanting”.<sup>84</sup> In addition, the Committee remarked in its first Greek visit report, “[i]n many cells [viewed] prisoners [were] to all intents and purposes confined to their beds, there

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<sup>80</sup> See Greece I, para 94. The Code in question was adopted in 1989; clearly, it was still proving impossible to implement some 4 years later, at the time of the visit.

<sup>81</sup> See Belgium I, para 120.

<sup>82</sup> See Spain II, para 113.

<sup>83</sup> See, similarly, UK I, para 40 (regarding the consequences of overcrowding at Brixton, Leeds and Wandsworth Prisons); and Bulgaria I, para 122 (regarding Stara Zagora Prison, where ventilation was found to be “often prejudiced” by overcrowding).

<sup>84</sup> See Greece I, para 106; and, similarly, para 118 (regarding Larissa Prison); and Spain II, para 118 (regarding Madrid I Prison, April 1994). However, cf Slovakia I, para 79 (regarding the “generally clean and well maintained” Bratislava Prison, 1995).



being no room for other furniture”.<sup>85</sup> Worse, “[i]n some of the most overcrowded cells, there [were] more prisoners than beds”.<sup>86</sup>

In Belgium, where, in November 1993, the prison de St-Gilles was clearly subject to a similar shortage of beds, detainees had been “forced to sleep on mattresses placed on the ground”.<sup>87</sup> Further, as at Korydallos Prison, in the UK, in March 1990, at Brixton, Leeds and Wandsworth Prisons, the practice of holding three persons in cells of an acceptable size, really, only for one, had rendered prisoners “practically confined to their beds, their buckets and washing bowls taking up most of the spare floor space”. As a result, the CPT claimed, the installation of “[a]dditional cell furniture other than a small table or chair [was] out of the question”.<sup>88</sup> Similarly, when visited in April 1994, the so-called “double” cells (each measuring approximately 22 sq.m.) on the 1<sup>st</sup> floor of the 6<sup>th</sup> Gallery at the Madrid I Prison, Spain, were found to be accommodating “up to 10 prisoners” in two bunk and two three-tier beds. Consequently, “there was just enough space for a table, a few chairs and a cupboard”. Such conditions, the Committee stated, were “deplorable” and could “fairly be described as inhuman and degrading”.<sup>89</sup>

Other discernible effects on the physical environment occasioned by excessive cell occupancy levels encountered by the CPT have included:

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<sup>85</sup> Ibid. See, similarly, para 118 (dormitory overcrowding at Larissa Prison had meant that “[t]he space taken by beds [had] precluded the presence of tables and chairs...”).

<sup>86</sup> Idem, para 106.

<sup>87</sup> See Belgium I, para 138. See, similarly, France I, para 74 (regarding recourse to similar measures at the Centre de Retention Administrative de Nice, 1991); and Ireland II, para 49 (in 1998, according to the Irish authorities’ own figures, overcrowding in Mountjoy Prison had meant that an average of between 40 and 50 prisoners were obliged to sleep on mattresses on the floor).

<sup>88</sup> See UK I, para 40.

<sup>89</sup> See Spain II, paras 119 and 129. (By contrast, double cells on the ground floor of the 6<sup>th</sup> Gallery, each accommodating 5 working prisoners, offered “adequate” living space). Findings in Gherla Prison, Romania, in 1995, were even more shocking (e.g. a dormitory measuring 30 sq. m. was having to accommodate 26 detainees): see Romania I, para 106.

(i) a loss of privacy when using in-cell sanitary facilities, particularly where – as at the Centre Penitenciaire de Luxembourg (January 1993) – those facilities are separated from the rest of the cell only by a curtain or partition, rather than by means of a separate sanitary annex.<sup>90</sup>

(ii) a failure to guarantee access upon demand to out-of-cell sanitary facilities. In April 1991, at Algeciras Prison, Spain, one dormitory measuring 40 sq.m. was found to be “crammed” with 27 beds while “adjacent washing and sanitary facilities consisted [only] of 1 toilet, 1 shower and two washbasins”.<sup>91</sup> It is not difficult to imagine the problems of access confronting occupants of the dormitory in such circumstances.

(iii) difficulties in maintaining satisfactory standards of hygiene. In its first French visit report, the CPT remarked that the prospect of maintaining “good” standards of hygiene in the maisons d’arret in Marseilles and Nice could “only be compromised” by the high levels of overcrowding observed therein in late 1991.<sup>92</sup> “[D]urable progress in this regard can only be achieved”, it asserted, “by a significant freeing up”<sup>93</sup> of the two establishments.

One rather striking consequence of overcrowding-induced hygiene problems emerged from the CPT’s visit to Modelo Prison, Spain, in April 1994. Of “particular” concern to the visiting delegation, it remarked subsequently, in its second Spanish visit report, had been the “risk of transmission of pulmonary tuberculosis” in the establishment – notably in the light of the “rather dirty and unhygienic” condition of

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<sup>90</sup> See Luxembourg I, paras 62-3. See, similarly, UK IV, paras 73 (regarding the situation observed in Dorchester Prison in September 1997).

<sup>91</sup> See Spain I, para 124.

<sup>92</sup> See France I, para 111.

<sup>93</sup> The word used in the report is “desencombrement”.

“many” of its cells. Such a state of affairs was “scarcely surprising”, the Committee declared, given the “severe” levels of overcrowding obtaining at the time.<sup>94</sup>

(iv) obliging the prison authorities to “improvise and bring into play other areas [of an establishment] as detention facilities”.<sup>95</sup> A “most striking” illustration of this phenomenon was apparent in Larissa Prison, Greece, when visited in March 1993. There, a “dining room facility located within the kitchen area” had been requisitioned by the prison authorities in order to accommodate an extra 54 prisoners. “Resort to bunk beds,” the Committee observed, “meant that the maximum possible use had been made of the room available, with the result that the provision of tables and chairs had been possible.”<sup>96</sup> Indeed, “from the standpoint of living space,” it continued, prisoners occupying the improvised facility had been “better off than those held in...dormitories”. Nevertheless, it concluded, their conditions of detention were “totally inappropriate”. Similarly, also in Larissa, “a workshop had been converted into a dormitory for juvenile prisoners”. It was found to be accommodating 33 inmates quite “adequate[ly]” at the time of the visit.<sup>97</sup>

A more curious illustration of prison authorities’ capacity for improvisation was offered in the CPT’s first Belgian visit report. Therein, the Committee recalled that in the male prison at l’etablissement penitentiaire de St-Andries in November 1993, overcrowding had been so great that certain detainees on ordinary prison location had been obliged to share cells with prisoners subject to a regime of “strict cellular confinement”. As a result, the former had been forced to accept the latter’s

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<sup>94</sup> See Spain II, para 113.

<sup>95</sup> See Greece I, para 119.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

restrictions; an encumbrance which the CPT unsurprisingly characterised as “unacceptable”.<sup>98</sup>

(v) a marked deterioration in the atmosphere in cells. While such deterioration is a largely self-evident consequence of overcrowding, it is nevertheless worth considering just how serious it may be. At the maison d’arret Regina Coeli, Italy, in March 1992, for example, where floor space of just 9 sq.m. in the “chambres dortoirs” contained 6 beds, the atmosphere was found to be “particularly oppressive”.<sup>99</sup>

(vi) the denial of personalised living-space. Also at Regina Coeli, as a result of the pressure on living-space occasioned by overcrowding, the prison authorities had found it impossible to furnish detainees with the storage facilities necessary to keep their personal effects. Consequently, they had been forced to keep them, *inter alia*, “in cardboard boxes on the floor,” with the result that they were denied even the simplest of personal pleasures.<sup>100</sup>

(vii) the obstruction of improvement or renovation work in an establishment and/or to its regime. In the view of the CPT, levels of overcrowding may, occasionally, be so great – and other physical features so poor – as to render it “illusory” to imagine that significant and necessary changes to an establishment are possible and the quality of prison life improved.<sup>101</sup> During its second periodic visit to the UK, in 1994, for example, it became clear to the CPT that the “need to keep the maximum possible amount of space available to accommodate [a growing population of] prisoners” had

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<sup>98</sup> See Belgium I, para 95.

<sup>99</sup> See Italy I, para 63. It should be noted, however, that detainees obliged to stay in such cells did have access to “une piece de sejour” of the same dimensions.

<sup>100</sup> *Idem*, para 64. See, similarly, Turkey I, para 91 (overcrowding in the dormitories of Izmir (Buca) Prison in October 1997 had forced prisoners to store their clothes in boxes or to hang them between beds).

<sup>101</sup> See France (Martinique) I, paras 48 and 95.

caused “major renovation work” at Leeds, Liverpool and Wandsworth Prisons to be “delayed”.<sup>102</sup> One “early casualty” of these delays, it observed, was the December 1994 “target date” for the ending of the practice of “slopping out”.<sup>103</sup> This, it was convinced, would “not be met in any of the prisons visited”.<sup>104</sup>

### *The prison regime*

In truth, to date, the CPT has offered few examples of the way in which overcrowding may affect particular aspects of the prison regime. It has confined itself, principally, to more general observations. Thus, to the Greek authorities, it simply remarked that overcrowding at Larissa Prison, when visited in March 1993, had contributed to a “major disruption” of the prison regime.<sup>105</sup> Similarly, to the Spanish authorities, it suggested that the “already limited” regime activities offered at Basauri Prison in April 1991 had been “[i]nvariably...strained” by the establishment’s “cramped, occasionally very cramped” cellular conditions;<sup>106</sup> and that, at the Modelo and Madrid I Prisons, visited in 1994, the rather inadequate provision of out-of-cell activities had been “inextricably linked” to the presence of overcrowding.<sup>107</sup> As if to emphasise the link, regarding its findings at the Madrid I Prison, the Committee suggested that the “material infrastructure” necessary to sustain an appropriate programme of activities

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<sup>102</sup> See UK III, para 76.

<sup>103</sup> This target date had been intimated in the UK Government’s Response and Follow-up report to the CPT’s first periodic visit: see UK Response I, op cit, n 5 above, at para 7 and UK Follow-up report I, op cit, n 4 above, at para 60. “Slopping out” is a term used to describe the process whereby detainees defecate or urinate in buckets, pots or other receptacles and are periodically released from their cells in order to discharge them in an appointed facility. The process may be necessary in cells which are not equipped with integral sanitation: see, generally, 2<sup>nd</sup> GR, para 49. The Committee has characterised the practice as “degrading”: see, e.g., Ireland I, para 100.

<sup>104</sup> See UK III, para 76. See also paras 56 and 71 of the report. Visiting the Isle of Man Prison in late 1997, the CPT found that the practice of slopping out remained in operation in some cells (see UK IV, para 112). The Isle of Man, it should be noted, possesses its own legal and administrative system, the remit of which includes the formulation of policy on deprivation of liberty. Even in mid-1998, it seems, slopping out was a (very rare) feature of some English prison regimes: see Prison Reform Trust, *Prison Report*, 1998, Issue No. 43, at p 20 and Issue No. 44, at p 21.

<sup>105</sup> See Greece I, para 117. When visited, the establishment’s occupancy rate stood at over 200%. It also had a “serious” under-staffing problem.

<sup>106</sup> See Spain I, para 119.

<sup>107</sup> See Spain II, para 133. See similarly UK I, para 58.

“already existed”; it was simply that in order to render the programme sustainable in practice, the prison population would have to be kept within its official capacity.<sup>108</sup>

The point was just as trenchantly made to the Luxembourg authorities when, following its visit in 1993 and considering a project to construct a brand new prison adjacent to the Centre Penitentiaire,<sup>109</sup> the CPT sought to:

“souligner l’importance qu’il y a d’assurer, dans le cadre du projet de construction...l’adequation entre la capacite totale de l’etablissement et les infrastructures en matiere d’activites (travail, education, sports, etc.)”<sup>110</sup>

Elsewhere, the existence of overcrowding in an establishment has been closely linked by the Committee to a sense among prisoners of “a monotonous and purposeless existence”, so impoverished has the establishment’s regime become as a result of the problem.<sup>111</sup>

Given all this, it is not surprising that the CPT believes that an “improvement of regime activities is an objective which, to a large extent, is dependent on reducing overcrowding”:<sup>112</sup> “remove that and the problem of inadequate regimes – though it will not resolve itself – will at least become solvable.”<sup>113</sup>

Lastly in this connection – although not strictly a question of regime – it should be pointed out that where prison cells are overcrowded, self-evidently, “relationship-related difficulties” may follow.<sup>114</sup>

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<sup>108</sup> Ibid. When visited, the prison’s “official” capacity of 1,285 inmates was actually exceeded by almost 1,000: *idem*, para 98.

<sup>109</sup> See Luxembourg I, para 41.

<sup>110</sup> *Idem*, para 72.

<sup>111</sup> See Spain IV (regarding Ceuta Prison in 1997).

<sup>112</sup> See Portugal II, para 102. This conclusion was precipitated by the discovery of serious overcrowding in at least three of the four prisons visited during May 1995.

<sup>113</sup> See UK I, para 58.

<sup>114</sup> *Idem*, para 60 (regarding the practice of holding three detainees in cells intended only for one at Leeds and, “on occasion”, Brixton, Prisons (1990)).

## *Prison services*

### - *Reception arrangements*

As the CPT remarked to the UK authorities following its first periodic visit:

“[w]hen a prison is overcrowded, the efficiency of all its services will be adversely affected”.<sup>115</sup>

The Committee was prompted to make this observation in the light of the unsatisfactory state of the reception arrangements seen at Leeds, Wandsworth and Brixton Prisons. Explaining precisely how “adversely affected” these arrangements were at the time of the visit, the CPT noted that the “considerable” pressure under which reception staff were having to work by virtue of the excessive numbers of prisoners they were obliged to accommodate, had “inevitably undermined” their role in suicide prevention and the protection of potentially vulnerable prisoners.<sup>116</sup> This sense of the inadequacy of the reception arrangements examined was rendered all the more acute, it seems, by the suicide of a young male inmate during the delegation’s visit to Leeds Prison. He had previously been held in a single cell together with two other inmates.<sup>117</sup>

Reception arrangements at the Centre Penitenciaire de Fort-de-France, on Martinique (July 1994), have also been described as suffering as a result of overcrowding – though, clearly, the problem went much deeper than that. There, overcrowding, the Committee remarked in its first visit report, was such that “une separation stricte entre les prevenus et les condammes ne pouvait pas...etre assuree”.<sup>118</sup>

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<sup>115</sup> *Idem*, para 103.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Idem*, para 64.

<sup>118</sup> See France (Martinique) I, para 33. As to the level of overcrowding referred to here by the CPT, see above, p 233.

- *Prison health care services*

Prison health care services may become particularly strained when the establishment which they serve is overcrowded. Indeed, it is the view of the CPT that the provision of a satisfactory level of health care – which, it considers, is “always a demanding task” – may be “rendered all the more difficult” when a prison is, *inter alia*, overcrowded. For:

“[t]he physical and psychological well-being of a prisoner – already at risk by virtue of the very fact of incarceration – will be further prejudiced under such conditions. The health care services of the prison concerned will tend to become overwhelmed by day-to day requests for medical attention and have no time to pursue a health policy of a preventive nature.”<sup>119</sup>

Certainly, in the Centre Penitentiaire de Fort-de-France on Martinique, in 1994, preventive health care policies appeared to be seriously threatened by the accommodation of perfectly healthy detainees in the prison infirmary due to overcrowding elsewhere in the establishment. The visiting delegation learned that this was a “regular” occurrence, carried out at the direction of the prison director, not a member of the health care staff and without the latter’s prior consultation.<sup>120</sup>

Lastly in this connection, it is worth stressing that it is, of course, quite unacceptable to oblige patients to share beds and to render their living-space nugatory in the event of overcrowding, particularly in an environment in which infectious disease is prevalent. However, this, it seems, was precisely the effect of overcrowding in the prison hospital at Jilava, Romania, when visited in 1995.<sup>121</sup>

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<sup>119</sup> See Spain I, para 132.

<sup>120</sup> See France (Martinique) I, para 59.

<sup>121</sup> See Romania I, para 159.



## *Precepts on overcrowding*

### *Introduction*

Naturally, the CPT wishes to see a “permanent end” to the phenomenon of prison overcrowding. Understandably therefore, to those measures “designed to bring [this] about”, it accords a “very high priority.”<sup>122</sup> As we saw above, the CPT considers that the elimination of overcrowding, where it exists, leaves authorities free to address other deficiencies *extant* in a particular establishment or, indeed, in the prison estate generally. Accordingly, where overcrowding occurs, it has stated, “the priority of priorities must be – through one means or another – to reduce” it in the establishment(s) concerned. For, “if this is not achieved”, it believes, “attempts to improve conditions of detention [therein] will inevitably founder”.<sup>123</sup>

However, the Committee appears to have shrunk from tackling the problem of overcrowding in its entirety. It has limited its utterances on the matter, thus far at least, merely to the promotion of its reduction (and ultimate elimination) and not the means by which this might be achieved.<sup>124</sup> Accordingly, it remarked to the UK authorities, in the wake of its visits to Leeds, Liverpool and Wandsworth Prisons in May 1994 that “[i]t is not for the CPT to prescribe the manner in which [the problem should be addressed]”.<sup>125</sup> Nevertheless, the Committee has been prepared at least to *infer* certain solutions based, *inter alia*, on the experiences of and action taken by States parties themselves. It has also been quite prepared to recommend means by which the effects of overcrowding may be *mitigated*.

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<sup>122</sup> See, e.g., Portugal II, paras 98 and 180; and UK III, paras 79 and 369.

<sup>123</sup> See Greece I, para 122; and, similarly, Netherlands (NA) I, paras 94 and 167.

<sup>124</sup> However, *cf* below, p 258 *et seq*.

<sup>125</sup> See UK III, para 79.

## *Reducing and/or eliminating overcrowding*

### *Respect for official capacity figures*

In resisting overcrowding, the CPT has stated, prison authorities' "minimum objective" should be "to respect the official capacity of the establishment[s affected]".<sup>126</sup> Meeting this objective is not, however, it seems, imperative. The Committee demonstrated a certain flexibility on the matter, for instance, when, regarding levels of overcrowding encountered in the Lisbon Judicial Police Group Prison, Portugal, in January 1992,<sup>127</sup> it proclaimed that keeping the prison population within the limits of its official capacity (of 80) was merely something to be *preferred*,<sup>128</sup> in other words, it is submitted, something to which to aspire, not necessarily something to pursue as an article of faith.

It is, of course, only possible to strive to meet the "minimum objective" when there exist official capacity figures towards which to work. In late 1993 in Ireland, for example, the problem of overcrowding was found to be "complicated," *inter alia*, by the "lack of official capacity figures for prison establishments...no official limit had been set for the maximum number of prisoners who might be held in each establishment".<sup>129</sup> While the CPT did not expressly recommend the creation of such limits in its subsequent visit report – though, it did recommend the introduction of an "enforceable ceiling" on the inmate population of each prison<sup>130</sup> - its preference for their existence may be clearly inferred from the rather vexed tenor of its remarks to the Irish authorities. Thus, the starting-point in the struggle to contain prison

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<sup>126</sup> See Italy I, para 79 (a prescription offered in the light of the "outrageous" levels of overcrowding obtaining at the maison d'arret San Vittore, in March 1992: see above, p 237).

<sup>127</sup> See above, p 239.

<sup>128</sup> See Portugal I, para 76.

<sup>129</sup> See Ireland I, para 97.

<sup>130</sup> *Idem*, paras 98 and 187. Such ceilings cannot, however, be considered akin to official capacity figures: see further below, p 260.

overcrowding may be said to lie not in the effort to attain the “minimum objective” of meeting official population figures, but, where necessary, in the setting of those figures themselves.

### *The two types of precept*

As for measures designed to reduce and, ideally, eliminate overcrowding, in the view of the CPT – and notwithstanding its avowed reluctance to offer prescriptions – they comprise, essentially, two types: first, the creation of more prison places to accommodate expanding populations (i.e. “prison building programmes”); and, second, the formulation of policies intended to limit and/or regulate prison population levels. The genesis of both types is, perhaps, best illustrated by way of example.

During its first periodic visit to the UK in 1990, the Committee learned, *inter alia*, that an “important prison building programme” was underway, that “other [unspecified] policies, which could lead to a reduction in the number of persons being sent to prison, [were] under consideration”<sup>131</sup> and that, consequently, the authorities “hope[d] that by the mid-1990s the problem of overcrowding [would] be largely overcome”.<sup>132</sup> This hope was “shared” by the CPT.<sup>133</sup> However, in the light of findings made during its second periodic visit, almost four years later, the Committee could “only conclude, with regret, that such an assumption [was] no longer valid”.<sup>134</sup> Consequently, it considered that the UK authorities “must be prepared to make more radical efforts to address the problem of overcrowding”, noting, in passing, that:

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<sup>131</sup> See, similarly, France I, paras 98 and 99 (regarding the proposed construction of 25 new prisons and the introduction of “other measures” in 1991); Spain I, para 128 and Spain II, para 137 (regarding, the “expected” creation of 2,851 additional prison places in 1992); and Greece I, paras 94 and 272 (regarding a prison building/extension programme designed to increase national prison capacity by over 1,800 places, March 1993).

<sup>132</sup> See UK I, para 59.

<sup>133</sup> See UK III, para 79.

<sup>134</sup> *Ibid.*

“...in those European countries which enjoy uncrowded prison systems, the existence of appropriate policies to limit and/or modulate the number of persons being sent to prison has tended to be an important element in maintaining the prison population at a manageable level”.<sup>135</sup>

In the struggle to eliminate prison overcrowding therefore, it may be assumed that the formulation of policies to limit and/or regulate prison populations represents the CPT’s preferred approach. However, we should not thereby regard prison building programmes as having, in its view, no merit at all, only that it does not regard them as of themselves, a single or, at least, principal, panacea. Indeed, such a view may be inferred in the Committee’s 7<sup>th</sup> General Report. Therein, commenting on the “route” taken by “some” countries in tackling the problem of overcrowding by increasing the number of prison places,<sup>136</sup> it suggested that:

“[f]or its part, [it] is far from convinced that providing additional accommodation will alone offer a lasting solution”.<sup>137</sup>

“Indeed”, it continued, “a number of European States have embarked on extensive programmes of prison building, only to find their populations rising in tandem with the increased capacity acquired by their prison estates”. “By contrast”, it suggested, policies designed to limit and control prison numbers have, “in certain States”, made an “important contribution” to the fight against overcrowding.<sup>138</sup> These policies, it

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<sup>135</sup> Ibid. The CPT offered no examples of the countries referred to in this connection.

<sup>136</sup> To those examples cited above, at n 131, might be added, *inter alia*, Belgium (see Belgium I, para 86); the Netherlands Antilles (see Netherlands (NA) I, paras 66 and 95; and Portugal (see Portugal II, para 97).

<sup>137</sup> See 7<sup>th</sup> GR, para 14. See, similarly, Ireland II, para 59 (regarding the Irish authorities’ “ambitious” prison building plan which, in 1998, was scheduled to provide an additional 1,100 prison places by August 1999 and a further 900 by 2002).

<sup>138</sup> Ibid. See, in the same connection, Portugal II, paras 98 and 180 (in response to the Portuguese authorities’ expressed commitment to a “major” prison building/renovation programme); and now Portugal III, para 19 (regarding a proposed “Action Plan for the Prison System”, unveiled in April 1996, comprising, *inter alia*, “an enhanced role for non-custodial penalties” and a reduction of the

has stated elsewhere, should be “multifaceted” and comprise, *inter alia*, the introduction of new measures “at the legislators’ and sentencers’ level”.<sup>139</sup>

### *Developing the basic precept*

Although there appears little to add to the CPT’s fundamental position as to what, in its view, represent the best means of reducing and/or eliminating prison overcrowding, it has occasionally in its published work appeared to supplement that position in some incremental way.

#### - *Custodial sentence to be a punishment of last resort*

For instance, to some national authorities it has suggested that in determining what steps to take in order to bring prison populations into balance with available inmate accommodation:

“...reference might usefully be made to Committee of Ministers’ Recommendation R (92) 17 concerning consistency in sentencing, and more particularly to recommendation B 5(i), according to which ‘custodial sentences should be regarded as a sentence of last resort, and should therefore be imposed in cases where, taking due account of other relevant circumstances, the seriousness of the crime would make any other sentence clearly inadequate’”.<sup>140</sup>

To States parties whose penal policy is informed, it seems, by the spirit of recommendation B 5(i), the CPT has offered praise: “in a welcome departure from the situation observed...in many...other States which it visits”, it remarked to the

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average time spent on remand and hailed by the CPT as “amongst the most ambitious and promising [programmes] yet encountered by [it]”); and Romania I, para 98.

<sup>139</sup> See UK IV, para 77 (reflecting, the CPT explained, the conclusions of the 12<sup>th</sup> Council of Europe Conference of Directors of Prison Administration, held in November 1997). See, similarly, Netherlands (NA) III, para 26 (wherein the CPT observed that measures should be taken at the “statutory” level if prison overcrowding is to be satisfactorily dealt with).

<sup>140</sup> See, e.g., Czech Republic I, para 48; and Ireland II, para 59.

Swedish authorities in 1999, for instance, “none of the prisons visited [in February 1998]...suffered from overcrowding”; a state of affairs which, it was given to believe, was mirrored throughout the entire prison estate. “Apparently”, it continued, “this has been achieved by making greater use of alternatives to prison such as suspended sentences, conditional release, community service and other community-based sanctions”.<sup>141</sup>

If such alternatives to custodial sentences are to be more widely introduced and rendered effective, the argument runs, then national authorities must be prepared to consider the issuing of detailed sentencing guidance to judges. In this connection, it was with evident approval that the CPT, in its fourth published UK visit report, cited the terms of the Explanatory Memorandum to Recommendation R (92) 17, which provides, *inter alia*, that:

“[i]n view of the clear adoption by the Council of Europe of the policy of restraint in the use of imprisonment, this might be a topic suitable for legislative restrictions on sentencers. But, whatever the method used to implement the policy, it should be linked with more detailed guidance for judges. In order to ensure consistent answers to the question, ‘which varieties of offence are too serious for non-custodial sanctions?’, consideration should be given to the development of criteria”.<sup>142</sup>

In encouraging States parties to formulate strategies for the reduction of overcrowding, the CPT has also focused attention on the *remand* prisoner population, which may comprise a not insignificant proportion of the overall prison population.

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<sup>141</sup> See Sweden III, para 32. See in the same connection Spain VI, para 74 (regarding the authorities’ increased use of “open regimes” in prison establishments, weekend detention and alternatives to imprisonment, all of which, the CPT was encouraged to see in 1998, had led to a reduction in the prison population); and, similarly, Iceland II, para 40 (regarding the situation perceived during the visit of March/April 1998).

<sup>142</sup> See UK IV, para 77, n 32. See, similarly, Ireland II, para 59.

In this regard, it has suggested, “[d]ue account” should be taken of Committee of Ministers’ Recommendation R (80) 11 concerning custody pending trial, which sets out the general principle that:

“...no person charged with an offence shall be placed in custody pending trial unless the circumstances make it strictly necessary. Custody pending trial shall therefore be regarded as an exceptional measure and it shall never be compulsory nor be used for punitive reasons”.<sup>143</sup>

- *The creation of population “ceilings”*

Considering other alternatives to prison building programmes, to other Parties, with a view to “reinforc[ing]” the “status” of official capacity figures in prisons, the CPT has recommended the creation of a “ceiling...consisting of a certain percentage figure over the [official capacity], beyond which the acceptance of additional inmates...would be inadmissible”.<sup>144</sup> In the view of the Committee, adherence to such a mechanism “should prevent any future slide” into a situation in which overcrowding becomes intolerable.<sup>145</sup>

- *Involving other agencies in the execution of sentences*

To the UK authorities, in particular, the Committee has suggested that “the effectiveness of action to tackle [overcrowding]...might be enhanced by the active participation of agencies other than the Prison Service”.<sup>146</sup> While offering no elaboration, it may be possible that what the CPT was here referring to was a penal culture in the UK – perhaps unique among States parties to the ECPT<sup>147</sup> - in which the

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<sup>143</sup> Ibid (main text). See also Ireland II, para 59.

<sup>144</sup> See UK I, para 61.

<sup>145</sup> Ibid. On the island of Martinique, just such a “ceiling” has, it seems, been (judicially) created and, more importantly, enforced: see France (Martinique) I, para 28. However, cf Netherlands (NA) II, paras 20-21 (“unacceptable” occupancy levels found in Koraal Specht Prison in 1997, notwithstanding the introduction of a policy of capping the prison population).

<sup>146</sup> See UK III, para 79.

<sup>147</sup> See, e.g., Stephen Shaw, *The Role of NGOs in Assisting and Promoting the Work of the CPT*, in APT, *Acts of the Strasbourg Seminar (1995)*, pp 231-6.

active participation of a wide range of NGOs (whose objective is not only to monitor penal conditions, but to provide, *inter alia*, valuable rehabilitative and educational support for prisoners), combined with the work of more formal organisations, like HM Chief Inspector of Prisons and a network of social services, means that the infrastructure required if overcrowding is to be successfully resisted is, in fact, already in place.

- *Introducing a measured strategy for population reduction*

Regarding findings at Basauri Prison, Spain, where, in April 1991, despite a prison population at 140% of official capacity, physical conditions were “not...intolerable” and out-of-cell time “considerable”, the CPT, it will be recalled, recommended the implementation of a two-stage strategy to reduce overcrowding, comprising measures “designed to contain” the overcrowding and “in due course to reduce” the inmate population”.<sup>148</sup> If followed, a strategy like this, it is submitted, would be likely to prove less onerous to the authorities than one requiring, for example, the taking of *immediate* steps to reduce overcrowding. It has much to recommend it, therefore, particularly in circumstances in which overcrowding is so acute or the prison infrastructure so strained that to take more radical steps may not be practicable.

However, whether or not the CPT would be quite so generous in the absence of such mitigating features as satisfactory out-of-cell time and freedom of movement is not clear in its remarks to the Spanish authorities. For present purposes therefore, the approach recommended should be regarded as limited to the kinds of situation encountered at Basauri Prison; it would be presumptuous to suggest its wider application.

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<sup>148</sup> See Spain I, para 119. See also above, p 235.



### *Congenial State party policies*

Occasionally, without ever really expressing either approval or disapproval, the Committee has cited certain policies adopted by States parties with a view to reducing and/or regulating overcrowding. Thus:

(i) in March 1993, it has noted, “[a]t the same time” that they were formulating a major prison building/extension programme,<sup>149</sup> the Greek authorities were adopting or planning “various measures...which should help to reduce the prison population”. Among them were proposals to release prisoners conditionally “after the serving of 3/5 of [their] sentence, instead of 2/3 as had been the rule hitherto”; and the “conversion of a part of the sentence of some prisoners into a financial penalty”.<sup>150</sup>

However, while the early release of certain prisoners may, clearly, help reduce the prison population, the CPT is not without misgivings as to the propriety of the practice. In Ireland, in late 1993, for example, recourse to early release procedures, it observed, had merely “complicated” the existing “quandary” surrounding overcrowding.<sup>151</sup> There, the authorities:

“...[made] daily use of the executive power of the Minister of Justice to order the early release of prisoners...every evening each Governor [was] obliged to telephone the Department of Justice with the prison’s population for the day. If that figure [was] over a limit determined by the Department, the Governor [would] be informed during the following morning of the prisoners whom the Department wishe[d] to be released”.<sup>152</sup>

However:

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<sup>149</sup> See above, p 256, n 131.

<sup>150</sup> See Greece I, paras 94 and 272. See, similarly, Belgium I, para 86; and Netherlands (NA) II, para 20 (regarding the so-called “freedom train”).

<sup>151</sup> See generally above, p 255.

<sup>152</sup> See Ireland I, para 97.

“[t]he criteria used by the Department...to determine which prisoners to release were not known to staff in the prisons visited and this system...known as the ‘revolving door syndrome’...was widely regarded as operating in an arbitrary fashion”.<sup>153</sup>

Clearly therefore, the CPT is, to say the least, equivocal about the value of early release procedures in the fight against overcrowding. The possibilities of their lacking transparency and operating arbitrarily would appear to be of particular concern. Nevertheless, nothing in the Irish visit report – or, indeed, elsewhere, it may be said – suggests that the Committee is opposed to such procedures in principle. On the evidence available – and provided satisfactory safeguards are in place – there seems no reason why it should object to their use.

(ii) in Icelandic prisons, when visited in July 1993, “in order to avoid overcrowding”, the CPT has remarked, the authorities applied a “so-called ‘queuing system’”. What this meant in practice was that “[o]n average, about a hundred individuals who ha[d] been sentenced by the courts to terms of imprisonment remain[ed] at liberty, pending a summons from the Prison Service to serve their sentence”.<sup>154</sup>

(iii) where overcrowding obtains only in some of an establishment’s cells – the prison as a whole, remaining free of the problem – then, clearly, prisoner allocation procedures may be said to be deficient in some way. For example, at the Klagenfurt police prison, Austria - whose official capacity, in late 1994, was 95 detainees and whose actual population, 47<sup>155</sup> - it was observed that although the maximum capacity of certain multiple occupancy cells had been reached, other cells – “four in total” –

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<sup>153</sup> Ibid. The “syndrome” was said, in addition, to have made it difficult to plan regime activities in the prisons concerned.

<sup>154</sup> See Iceland I, para 51 (and now Iceland II, para 40).

<sup>155</sup> See Austria II, para 65.

remained empty.<sup>156</sup> Significantly, in the view of the CPT, the maximum capacities of certain of the cells had been incorrectly calculated. As a result, it considered that they were holding more prisoners than they could satisfactorily physically accommodate. Consequently, it recommended a “better distribution of detainees in relation to the number of cells available”.<sup>157</sup> It may be said, therefore, that, in the opinion of the CPT, in allocating detainees, prison authorities should consider how to make best use of available accommodation; it is not necessarily appropriate to fill one cell to capacity before starting to fill another – particularly where, in its view, cell capacity figures may be set too high.<sup>158</sup>

### *Mitigating the effects of overcrowding*

In circumstances in which it is impractical to envisage an immediate end to overcrowding, thought must be given to ways in which its effects might best be alleviated. It is clear from its published work that the CPT is exercised by this need – though, to date, it is submitted, its standards in this area have remained to a large extent undeveloped. Those (potential) standards which may be identified in its work are largely the product of inference and, accordingly, may be open to question. Nevertheless, they may comprise the nucleus of a workable code.

### *The provision of enhanced freedom of movement (and the development of other aspects of the prison regime)*

Visiting the maison d’arret Regina Coeli, Italy, in March 1992, the CPT observed that the “negative aspects” of overcrowding were “somewhat mitigated” by the authorities’ recourse, first, to an “open door” policy, under which, daily, between the

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<sup>156</sup> *Idem*, para 66.

<sup>157</sup> *Ibid.* See also para 163.

<sup>158</sup> See also below, pp 266-7.

hours of 8.30 am and 3.00 pm, inmates were guaranteed “free movement” in their accommodation wings; and, second, to a policy of association, under which detainees were permitted to visit other detainees between 5.00 pm and 6.30 pm.<sup>159</sup> The Committee clearly found such arrangements congenial<sup>160</sup> - even if, in other respects, notably regime activities and the management of inter-prisoner relations, the establishment was found to be deficient.

As at Regina Coeli, when visited in March 1993, some dormitories in the hospital at the Korydallos Prison Complex, Greece, offered “rather restricted” living space. This deficiency had been “palliated”, however, the CPT remarked in its first Greek visit report, by certain regime arrangements, namely, the provision of “ready” access to exercise yards and shower facilities.<sup>161</sup>

Thus, it may be said that the freedom to move about a prison establishment for a meaningful part of the day may be regarded by the Committee as an important tool in the struggle to neutralise the effects of overcrowding. The provision of “ready” access to outdoor exercise facilities and showers<sup>162</sup> and a (limited) freedom of association may also be regarded favourably in this connection.

### *The provision of enhanced work activities*

It may be said that where an overcrowded establishment is in a position to offer meaningful work - as well as, of course, other regime - activities to a significant proportion of its inmates, notwithstanding the strain on its resources occasioned thereby, the deleterious effects of overcrowding are likely to be alleviated. Thus, at the Centre de semi-liberte at Ducos on Martinique, where, in July 1994, the number of

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<sup>159</sup> See Italy I, para 72.

<sup>160</sup> See, in the same connection, Spain I, paras 119 and 126 (regarding the “considerable” out-of-cell time - and freedom of movement possible - for inmates of Spain’s Basauri and Puerto de Santa Maria II Prisons, April 1991).

<sup>161</sup> See Greece I, para 171.

<sup>162</sup> Though what this means in practice is not clear: upon demand?; once a day?; once every 36 hours?

beds available suggested that some 50 detainees might be accommodated in premises officially capable of holding only 16, the CPT observed that “the majority of detainees worked outside during the day”.<sup>163</sup> Though somewhat inscrutable, from the tenor of its remarks to the French authorities, it was clear that the Committee was pleased by the manner in which relief from such potential overcrowding might be brought to inmates at the Centre.

*A progressive improvement in regime as overcrowding is reduced*

Notwithstanding the last two points, it is unreasonable, it is submitted, to expect the negative effects of overcrowding to be readily alleviated by the simple expedient of developing one or more areas of the prison regime. It is less unreasonable however, to expect an improvement in regime – and presumably, therefore, in the quality of prison life generally – *concurrently* with a reduction in levels of overcrowding. The freeing up of prison accommodation should be considered as prefiguring or, indeed, accompanying the development of regime activities. It would appear to have been in this spirit that the CPT, in recommending to the Dutch authorities a “thorough examination” of the ways in which the regime in Koraal Specht Prison, Netherlands Antilles (June 1994), might be improved, suggested that:

“...fuller programmes [of activities] be progressively introduced as overcrowding is reduced”.<sup>164</sup>

*Prison authorities to use all available space to accommodate detainees*

Given the general levels of overcrowding obtaining in the maison d’arret Regina Coeli, Italy, when visited in 1992,<sup>165</sup> the CPT was “surprised” to find one section of

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<sup>163</sup> See France (Martinique) I, para 44.

<sup>164</sup> See Netherlands (NA) I, paras 97 and 168. See, similarly, UK I, para 62 (regarding the state of affairs in the three local prisons visited in August 1990); and Spain IV, para 31 (regarding findings in Ceuta Prison in 1997).

<sup>165</sup> See Italy, para 58 (official capacity: 871 detainees; actual population: “almost” 950).

the establishment, comprising some 34 cells, “virtually empty”.<sup>166</sup> (At the time of the visit three detainees occupied the section; and the relevant registers showed that the number of its occupants generally varied between one and six.) The Committee was told that confinement in the section concerned was restricted to disciplined and other isolated prisoners and that by order of the central prison authorities, it had to be kept free for certain other categories of detainee, “not otherwise defined”.<sup>167</sup> To the CPT, “such an approach is hardly reasonable when it is known that chronic overcrowding prevails in the rest of the establishment”. It added, parenthetically, that in other sectors of the prison “reserve” cells existed, capable of being used in emergencies.<sup>168</sup>

The CPT’s approach to the use made of available accommodation in prison establishments is, on the evidence of its experience at Regina Coeli, very clear: if the accommodation is free and the establishment concerned is otherwise overcrowded, then it ought to be used, regardless of its designated function.<sup>169</sup>

### *Increasing staff members*

In endeavouring to cope with an increased – and possibly increasing – prison population, the employment of, *inter alia*, more prison officers may be beneficial. Regulation of the prison environment and the organisation of regime activities may be enhanced thereby. It was doubtless in this spirit that the CPT “welcome[d]” the initiative taken by the Belgian authorities following its first periodic visit to the country in November 1993 – during which, it established that overcrowding affected

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<sup>166</sup> *Idem*, para 66.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> See, similarly, Turkey I, paras 91, 93 and 97, 1<sup>st</sup> indent (regarding the CPT’s recommendation to exploit “all...available prisoner accommodation” in the light of findings in 1997 that while overcrowding was widespread in the wing of Izmir (Buca) Prison accommodating “common law” prisoners, half the accommodation units in the wing reserved for convicted terrorists was left empty); and 103 and 110, 1<sup>st</sup> indent (regarding Mersin E-type Prison).

the entire Belgian prison estate<sup>170</sup> - to release the funds necessary to recruit 157 new officers and 19 additional administrative and nursing staff.<sup>171</sup>

### *Conclusion*

In contemporary Europe, it should be clear from the above analysis, the problem of prison overcrowding represents one of the most compelling of penal concerns. It is an indubitably widespread phenomenon, with deep historical roots. Very few Parties to the ECPT would appear to be immune from it; its effects are felt in western, southern, central and eastern, and parts of northern Europe. Only Scandinavian Parties, notably Sweden, where, as we have seen, the Government's approach to the matter has induced CPT approbation, appear to have contained the problem. Understandably, overcrowding is something about which the CPT has expressed a profound apprehension, particularly in the light of its view that it may give rise to inhuman or degrading treatment. Consequently, it is a principal concern when visiting places of detention. Where it exists, the Committee believes, its eradication or, more realistically perhaps, reduction, represents one of the key elements in any strategy to protect prisoners against ill-treatment.

Notwithstanding such concerns, the Committee has yet to formulate distinct precepts on the kinds of measure which, it considers, States parties could usefully adopt in order to reduce and, ultimately, eliminate the phenomenon. It acknowledges that the principal measures adopted by States in this regard comprise the creation of more prison places and/or the formulation of policies designed to limit and/or regulate the numbers of persons sent to prison. Its preference, clearly, is for greater efforts to be made in respect of the latter. However, it has taken few steps to elaborate its

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<sup>170</sup> See above, p 240.

<sup>171</sup> See Belgium I, para 130.

views. Nevertheless, it is possible to identify a number of potential precepts in its work based on its comprehensive analysis of Party practice. It has highlighted and, in some cases, commended, often idiosyncratic approaches to the problem and it clearly views such approaches as possessing a certain merit (e.g. the prospect of introducing early release procedures, *inter alia*, in Greece in 1993; the “queuing system” obtaining in Iceland also in 1993; the “open door” policies operating in maisons d’arret in Italy in 1992; and the implementation of “open regimes” and weekend detention in Spanish prison establishments in 1998). Further, it has referred, in approving terms, to other Council of Europe initiatives on the matter (notably Committee of Ministers’ Recommendation R (92) 17 regarding, in particular, the imposition of a custodial sentence as a measure of last resort). The topic, therefore, is one on which, demonstrably, CPT practice has been strongly influenced and, occasionally, led *inter alia* by that of Parties. To study it affords one an intriguing insight into the manner in which CPT standards may be formed. Accordingly, it is one feature of the Committee’s work to which we shall return.<sup>172</sup>

## **Overcrowding in combination with other institutional deficiencies**

### ***Introduction***

As we have seen, prison overcrowding is, of itself, a source of anxiety for the CPT. In combination with other environmental deficiencies, however, its effects, naturally, are compounded. Consequently, the Committee is “particularly concerned” when, in the course of a visit, “it finds a combination of overcrowding, poor regime activities

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<sup>172</sup> See below, p 492 *et seq.*



and inadequate access to toilet/washing facilities in the same establishment”.<sup>173</sup>

Indeed, such is the “inextricable link” between these three elements, the CPT has remarked, that:

“to assess [the problem of overcrowding] properly, it...needs to be seen in the light of the position [in the establishment concerned] as regards integral sanitation and regime activities”.<sup>174</sup>

As for the risks posed to the prison environment by the presence of all three phenomena, it considers that:

“each alone [would] be a matter of serious concern; combined they form a potent mixture. The three elements interact, the deleterious effects of each of them being multiplied by those of the two others”.<sup>175</sup>

Consequently, having observed, in the UK, in 1990, just how acute these “deleterious effects” may be, the Committee remarked that:

“[i]t is a generally recognised principle that people are sent to prison as a punishment, not for punishment. However, many prisoners met [in the three male prisons visited]...understandably perceived their conditions of detention as being in themselves a form of punishment”.<sup>176</sup>

As for the “cumulative effect” on prisoners of this “pernicious combination”<sup>177</sup> of conditions, in the view of the CPT, it is potentially “extremely detrimental”.<sup>178</sup> Indeed, “under certain circumstances,” it has insisted – and as might be expected,

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<sup>173</sup> See 2<sup>nd</sup> GR, para 50. See, similarly, Portugal II, para 95.

<sup>174</sup> See UK I, para 41

<sup>175</sup> *Idem*, para 57.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Idem*, para 229; and UK III, paras 78 and 368.

<sup>178</sup> See 2<sup>nd</sup> GR, para 50; and Portugal II, para 95. See also Bulgaria I, paras 113 and 239.

given its views on the possible effects of overcrowding alone<sup>179</sup> - “[i]t could be considered to amount to inhuman and degrading treatment”.<sup>180</sup> Accordingly, where the combination is present, it holds, the problem should be addressed “with the utmost urgency”.<sup>181</sup>

Before considering the particular combination of overcrowding, inadequate regime activities and poor sanitation in detail, it should be acknowledged that a pernicious combination of deficiencies can, not surprisingly, exist in other forms, too. In June 1994, at the Koraal Specht Prison in the Netherlands Antilles, for example, systemic overcrowding and an impoverished regime were found to exist in combination with a “poor level of cleanliness and hygiene” – which is not necessarily the same thing as poor sanitation.<sup>182</sup> As it happened, these three problems were “compounded” by a fourth deficiency, namely, the “generally run-down state of the establishment”.<sup>183</sup> “To subject prisoners to such conditions of detention”, the CPT averred subsequently, “amounts...to inhuman and degrading treatment”.<sup>184</sup> Accordingly, it sought to highlight its concerns by means of an immediate observation at the end of its visit.<sup>185</sup>

Similarly, visiting Portugal in May 1995, the Committee found in both the Oporto Judicial Police Prison and C Wing of Oporto Prison, that, *in addition* to the combination of shortcomings identified above, other “elements” rendered the position

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<sup>179</sup> See above, p 241.

<sup>180</sup> See Portugal II, para 95. In May 1995, those circumstances were found to obtain in Oporto Judicial Police Prison (*idem*, para 85 *et seq*), and in C wing of Oporto Prison (para 90 *et seq*). See also UK I, paras 57 and 229; UK III, paras 78 and 368; Bulgaria I, paras 113 and 239; and France I, para 93.

<sup>181</sup> See UK I, para 57.

<sup>182</sup> See Netherlands (NA) I, paras 65 and 165.

<sup>183</sup> *Ibid.* See similarly, France I, para 93 (regarding the material conditions of detention of the “majority” of detainees held in two accommodation blocks in the maison d’arret de Marseille-Baumette in late 1991, including the “bad general state of repair” of the cells viewed); and Ireland I, para 104 (regarding, the “dirty and dilapidated” cellular conditions in which a “considerable number” of prisoners in Mountjoy, Limerick and Cork Prisons and St. Patrick’s Institution were held in 1993).

<sup>184</sup> *Ibid.*

<sup>185</sup> *Idem*, paras 10 and 166.

of prisoners held therein “even more objectionable”. These elements comprised, at the Judicial Police Prison, a “complete denial” of outdoor exercise, and, in C Wing of Oporto Prison, an absence of “effective staff supervision,” which, the CPT contended, gave rise to a “potentially perilous environment”.<sup>186</sup>

### *Findings*

In its first UK visit report, under the heading “inhuman or degrading treatment arising from the conditions of detention”, the CPT, in describing material conditions observed in prisons visited in 1990, sought to remind the authorities that:

“[m]uch has been written, by Her Majesty’s Chief Inspector of Prisons and others, about the ills that currently beset local prisons in England. Prominence is always given to a trinity of interrelated problems: overcrowding, lack of integral sanitation (which results in the “slopping out” procedure) and inadequate regime activities for prisoners”.<sup>187</sup>

Hardly surprisingly, therefore, the visiting delegation “paid particular attention” to these questions when attending Brixton, Leeds and Wandsworth Prisons,<sup>188</sup> a degree of scrutiny still necessary some four years later when, making its second periodic visit and “fully conscious of the considerable efforts” made by the UK authorities to improve matters since its first, the CPT found, nevertheless, that “certain areas” of Leeds, Liverpool, Wandsworth and Barlinnie Prisons were “still...blighted” by the

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<sup>186</sup> See Portugal II, paras 95 and 179, (and also paras 89 and 94 of the report). See, similarly, Slovakia I, para 188 (in Bratislava Prison, Slovakia, in 1995, for the “great majority” of inmates seen, the denial of proper outdoor exercise had compounded problems of overcrowding and the absence of any regime, rendering their quality of life “very poor”).

<sup>187</sup> See UK I, para 36.

<sup>188</sup> Ibid. One of the two female establishments visited in 1990, Bulwood Hall Prison, also suffered from the “trinity” of problems: *idem*, para 129 *et seq.*

same combination of problems. Accordingly, “further action”, the Committee suggested, “[was] required”.<sup>189</sup>

### ***Effects on the prison environment***

It is probably true to say that many of the negative effects of prison overcrowding identified above also affect establishments subject, in addition, *inter alia*, to inadequate regime activities and poor sanitation. However, it is probably also true that a number of effects may be attributable, specifically, to the presence in an establishment of the particular concatenation of conditions with which we are concerned here – effects which cannot be attributed simply to one or other of the individual elements which together constitute the trinity.

### ***Overall quality of life in prisons***

It was the view of the CPT, following its visit to the UK in 1990, that “[t]he combination of excessively cramped accommodation, lack of integral sanitation and very limited out-of-cell time” obtaining in Leeds and Brixton Prisons in particular, had “result[ed] in totally unacceptable conditions of detention for the persons [affected]”.<sup>190</sup> More specifically, reflecting on the concept of “dynamic security,” which, at that time, was being “promoted” by the UK prison authorities and which comprised, *inter alia*, the treatment of prisoners “as individuals” and the development of good staff-inmate relations, the Committee suggested that:

“[o]f course, treating people as individuals and developing good relationships between staff and prisoners is not easy in an overcrowded prison in which the

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<sup>189</sup> See UK III, paras 78, 343 and 368. Indeed, at Barlinnie, the problem was compounded by the “poor state of repair” of many cells.

<sup>190</sup> See UK I, para 60.

facilities for providing purposeful activities for prisoners are inadequate”.<sup>191</sup>

Accordingly, it stated, “[t]he notion of dynamic security will become much more relevant to...prisons when overcrowding is reduced and regimes can be improved”.<sup>192</sup>

Rather trenchantly, the CPT noted in this respect that Holloway Prison, visited at the same time was not overcrowded. Thus, it seemed directly to connect the successful realisation of the concept of “dynamic security” with the absence of that combination of conditions which otherwise might inhibit it. For, at Holloway, free of the “threefold set of problems” encountered at the three male prisons visited and benefiting from “good” staff-inmate relations, there obtained, the CPT stated, a “much higher” general quality of life.<sup>193</sup>

#### *Prison medical services*

It goes without saying that, just as prison overcrowding renders the provision of satisfactory health care services a particularly onerous task,<sup>194</sup> “[i]n a prison that is overcrowded, does not provide prisoners with ready access to toilet facilities and offers very few regime activities, that task takes on herculean proportions”.<sup>195</sup>

Accordingly – and reflecting observations made in the specific context of overcrowding – the CPT has offered the view that a prisoner’s physical and psychological well-being “will be seriously prejudiced under conditions of this sort”; prison medical services will tend to be “overwhelmed” by daily requests for attention

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<sup>191</sup> *Idem*, para 85.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Idem*, para 119.

<sup>194</sup> See above, p 253.

<sup>195</sup> See UK I, para 141; and, similarly, Portugal I, para 113 (provision of satisfactory level of health care rendered “very difficult” by such conditions); Portugal II, para 121; Italy I, para 109 (“tres ardue”); and Ireland I, para 114 (“all the more difficult”).

and, able only to “react to events”, will have “no time to pursue a health policy of a preventive nature”<sup>196</sup> – “for example, regarding the prevention of epidemics”.<sup>197</sup>

Insofar as the UK is concerned, this was, the Committee has stated, “generally speaking, the situation...found [in 1990] at Brixton, Leeds and Wandsworth Prisons, in particular at the first two establishments”. By contrast, “[t]he position at Holloway Prison”, it noted, “was far better”.<sup>198</sup>

### *Suicide prevention policies*

Aside from more general effects on the quality of prison life and services, in the specific context of suicide prevention policies, the CPT has made it clear just how determinative to their success or failure is the presence in an establishment of the “trinity” of problems identified above. To the CPT:

“[t]he central plank of a suicide prevention programme in a prison...must be to address the problems of overcrowding, lack of integral sanitation and inadequate regimes. It may be true that the conditions found in many...prisons will rarely be the sole and unique cause of a suicide; however, for someone who is already predisposed to taking his life, they might often prove the last straw”.<sup>199</sup>

### *Precepts*

While, of course, very important, little need really be said here, it is submitted, about CPT precepts on policies for the elimination – or, at least, mitigation – of the

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<sup>196</sup> UK I, para 141. See also Ireland I, para 114.

<sup>197</sup> See Italy I, para 109.

<sup>198</sup> See UK I, para 142. Health care services at Bulwood Hall Prison were not examined in 1990 because the visiting team did not include a doctor.

<sup>199</sup> *Idem*, para 172. See also UK IV, para 140 (in the light of findings in the Isle of Man Prison when visited in 1997).

combination of overcrowding, poor sanitation arrangements and impoverished regime activities. For, many of them have already been considered in the specific context of overcrowding, and the remainder would best be addressed in sections devoted to the other two problems, neither of which falls within the scope of the present work. However, it may be worth emphasising what the CPT considers constitutes its priorities in this area. In this regard, to the UK authorities, regarding the “inextricabl[e] link” which, as we have seen, it determined existed between overcrowding and inadequate regime activities in several establishments visited in 1990, it suggested that:

“...the emphasis must be placed on eliminating overcrowding; remove that and the problem of inadequate regimes – though it will not resolve itself – will at least become solvable”.<sup>200</sup>

This brings us back to the phenomenon of overcrowding. Clearly, in the view of the CPT, where it exists, it may be said to be the one fundamental problem whose eradication may materially alter the way in and extent to which the quality of life generally in establishments may be improved. Indeed, it may prove impracticable to address other difficulties if problems of overcrowding have not first been attended to.

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<sup>200</sup> See UK I, para 58.

## The Use of Force and/or Instruments of Physical Restraint Against Persons Deprived of Their Liberty

### *Introduction*

In its 2<sup>nd</sup> General Report, the CPT averred that:

"[p]rison staff will on occasion have to use force to control violent [or disturbed<sup>1</sup>] prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high-risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards".<sup>2</sup>

Although the Committee was here referring to the use of force and/or instruments of restraint specifically in *prison* establishments, in what follows - and somewhat self-evidently - it will be clear that it considers that the same precepts ought to apply, *mutatis mutandis*, in respect of detention, *inter alia*, by the police, the immigration authorities and staff in juvenile detention centres and psychiatric establishments.

The consequences for detainees of the application of measures of force or restraint are axiomatic. "[I]nvariably", the Committee has stated:

"in those rare cases where the use of [force and/or] instruments of restraint is justified, this will... impinge upon the dignity of the detained person to whom such devices are applied".<sup>3</sup>

Further, when such measures are applied inappropriately, it holds, they may create

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<sup>1</sup> A phrase added by the Committee in Spain I, at para 98.

<sup>2</sup> See 2<sup>nd</sup> GR, para 53. See also UK III, para 310.

<sup>3</sup> See Germany II, para 166.



"serious hazards to the physical well-being of [persons]"<sup>4</sup> and, as we shall see, may be considered to constitute inhuman and degrading treatment and even torture.

### ***Grounds on which measures of force/restraint may be resorted to***

In the experience of the CPT, recourse to force and/or measures of restraint against detainees may be legitimised by national authorities on a number of grounds. Such measures have, for instance, been held to be lawful, *inter alia*, with a view to calming violent prisoners or those who, it is feared, may commit acts of self-harm or suicide<sup>5</sup> - that is, when they are considered "unavoidably necessary for [the detainee's] life or health or that of others".<sup>6</sup> They have also been legitimised in order to permit prison staff to carry out their duties or implement security measures "if it appears that there is no other way of achieving their purpose".<sup>7</sup>

### ***Methods of restraint***

The CPT has expressed opinions on a variety of methods of force and restraint techniques encountered during visits. Instances involving certain types of measure have recurred frequently; others, by contrast, have come as something of a surprise to visiting delegations. It is worth considering many of them here, as a preface to our examination of CPT precepts on the subject. It is worth noting, too, also in a prefatory sense, the terms of Rule 39, *EPR*, which provides that:

"The use of chains and irons shall be prohibited. Handcuffs, restraint-jackets and other body restraints shall never be applied as a punishment. They shall not be used except in the following circumstances:

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<sup>4</sup> See Greece I, para 202.

<sup>5</sup> See Denmark I, para 32.

<sup>6</sup> See Sweden I, para 127.

<sup>7</sup> See Germany I, para 18.

- a. if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise;
- b. on medical grounds, by direction and under the supervision of the medical officer;
- c. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority”.

The CPT’s fundamental view on the kinds of restraint technique which, it accepts, may legitimately be used in places of detention was succinctly expressed in its second German visit report. Therein, while accepting the routine attenuation of detainees’ dignity occasioned by the application of such devices, it averred that:

“...it is important to ensure that this effect is not aggravated by the nature of the restraints applied”.<sup>8</sup>

### *Handcuffs*

In March 1992, a CPT delegation visited the *maison d’arret* San Vittore, Italy, during which visit it witnessed the arrival of a number of detainees, each restrained by “very tight” irons and joined to the next man by chains. Indeed, so tightly fitted were the irons, it was observed, that when removed, several detainees were left with contusions on their wrists.<sup>9</sup> For its part, the CPT offered the view, subsequently, that if, “as a precautionary measure”, it is considered necessary to restrain a detainee during his

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<sup>8</sup> See Germany II, para 166.

<sup>9</sup> See Italy I, para 152.

transfer to and from establishments, then *appropriately applied* handcuffs ought to be the method adopted.<sup>10</sup> The Committee's inference here is clear, it is submitted: applied properly, handcuffs are an acceptable method of controlling detainees who, in the interests of security, are considered to require some form of restraint. Indeed, it has stated elsewhere that the use of plastic handcuffs in the enforcement of removal orders against foreign national detainees may be considered "unexceptionable".<sup>11</sup>

However, much depends, obviously, on the circumstances in which handcuffs are applied. For instance, visiting the Sasinkova Street Police Station, Bratislava, Slovakia, in 1995, a delegation witnessed two persons handcuffed to radiators. While the first detainee was able to sit on a bench, the second was found standing with his face to the wall, with "no opportunity" to sit down - an adjacent chair being used by a police officer acting as his monitor. He remained thus for two hours. Passing members of the public, moreover, could see both detainees.<sup>12</sup> Further, it appeared from the delegation's observations that the practice of handcuffing persons to radiators in police stations throughout Slovakia was "common". Indeed, a "certain number" of persons interviewed alleged that they had been restrained thus for several hours, in "painfully contorted" positions.<sup>13</sup> In the Committee's view:

"[h]andcuffing detained persons to radiators (or another object in a room) is a practice which should be avoided; proper custody facilities should be provided instead".<sup>14</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> See Germany III, para 12.

<sup>12</sup> See Slovakia I, para 35.

<sup>13</sup> Idem, para 15.

<sup>14</sup> Idem, paras 35 and 183. See, similarly, Romania I, para 88 (regarding the practice in a number of ill-equipped police establishments visited in 1995 of handcuffing detainees to chairs and other items of furniture); and Spain VI, paras 52 and 60 (wherein the CPT described the practice of handcuffing prisoners - "in a variety of positions" - to metal rings attached to beds in the segregation unit of Salto del Negro Prison in 1998 as "unacceptable").

Further, it considered:

"it is clearly unacceptable for persons to be kept handcuffed in full view of members of the public visiting the police station concerned and/or to be obliged to stand for lengthy periods".<sup>15</sup>

In a similarly striking instance, in late 1996, the CPT received a "number" of allegations from representatives of NGOs - "corroborated by convincing photographs and video images" - that Danish police officers "on occasion drag detainees to distant police vehicles by their handcuffed wrists, without providing any support to the arms and shoulders".<sup>16</sup> The physiological effects of prolonged suspension by the wrists, the CPT subsequently suggested to the authorities, is to cause "peripheral nerve damage of a potentially serious nature". Accordingly, it recommended that Danish police officers be given clear instructions that such a practice is unacceptable.<sup>17</sup>

The CPT has also had cause to deprecate the inappropriate use of handcuffs in *penal* environments. For instance, in its fourth UK visit report, it was prompted to criticise the practice, apparent during its delegation's visit in 1997, of applying handcuffs to disciplined prisoners in the Isle of Man Prison. Such prisoners, its delegation learned, remained handcuffed at all times when outside their cells, including when participating in outdoor exercise and apparently when receiving visits.<sup>18</sup> When interviewed about the measure, the prison Governor insisted that "there was nothing punitive about [it]; it was necessary to prevent escape..."<sup>19</sup> The CPT, for its part, "whilst recognising the force of that argument", observed that "the use of handcuffs over a prolonged period as a precaution against escape is not

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<sup>15</sup> Ibid.

<sup>16</sup> See Denmark II, para 14.

<sup>17</sup> Ibid. See also para 135 of the report.

<sup>18</sup> See UK IV, para 105.

<sup>19</sup> *Idem*, para 107.

acceptable. Other means can and should be found of countering such a risk".<sup>20</sup> It suggested further that:

"...the practice of routinely handcuffing prisoners when outside their cells is highly questionable, all the more so when it is applied for a prolonged period of time. It is axiomatic that handcuffs should never be applied as a punishment. Further, to be handcuffed when receiving a visit could certainly be considered as degrading for both the prisoner concerned and his visitor".<sup>21</sup>

Accordingly, it sought an "urgent review" of the practice.<sup>22</sup> The Committee was similarly emphatic in its sixth Spanish visit report following its delegation's discovery in 1998 that acutely agitated *psychiatric patients* in Las Palmas de Gran Canaria Prison might be handcuffed to their beds. "[A]s a matter of principle", it insisted, "the use of handcuffs to restrain psychiatric patients to their beds is completely unacceptable; other, more appropriate, means of restraint must be found".<sup>23</sup>

### *Wrist locks*

Like handcuffs, wrist locks, used appropriately, are a largely uncontroversial means of restraint. Visiting Brixton and Wandsworth prisons, England, in 1990, for example, delegations were able to witness the forcible removal of prisoners to segregation units.<sup>24</sup> In both instances, the detainees concerned were restrained by means of wrist locks.<sup>25</sup> In its report on the visit, the CPT remarked that it has "no criticism to make" of the wrist lock as a method of restraint; "applied correctly", it suggested, "it is no

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> In this regard, the CPT was alarmed to receive information that *all* prisoners placed in the establishment's segregation unit as a punishment or for reasons of good order and discipline would be handcuffed during outdoor exercise.

<sup>23</sup> See Spain VI, para 89.

<sup>24</sup> See UK I, para 88.

<sup>25</sup> *Idem*, para 89.

doubt an effective means of controlling someone who is being violent while at the same time of limiting injuries on all sides".<sup>26</sup>

### *Irons, chains and shackles*

In the course of visits to Butzow and Hamburg Remand Prisons, Germany, in April 1996, the CPT noted that when it was considered necessary, inmates could be attached to "restraint beds" and secured by means of "heavy metal shackles" around their hands and feet. These shackles, it was observed, "held [the detainees'] bodies, under strain, in an unnatural and potentially harmful position".<sup>27</sup> At Tegel Prison, in the course of the same visit, the Committee was shown a "prototype" of a new set of metal shackles, intended to replace the "leather straps" which had hitherto been used for the restraint of detainees. Designed by prison officers themselves, the shackles consisted of a pair of handcuffs and footcuffs, attached to loops on the side of a bed by short chains, "each of which ended in a yachting-style, quick-release clasp".<sup>28</sup> Clearly disturbed by its findings, the CPT suggested to the German authorities that "there are means of mechanically restraining a prisoner which are less humiliating" than those encountered during its visit. Accordingly, it recommended that recourse to metal shackles in German prisons be dispensed with.<sup>29</sup>

In the previous year, the Committee had been "concerned" to find similar immobilisation mechanisms being used in the psychiatric section of Lovetch Prison Hospital, Bulgaria. Although health care staff there had intimated that they had never had cause to use the irons concerned, they had suggested that they might occasionally

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<sup>26</sup> Ibid.

<sup>27</sup> See Germany I, para 165. So-called "body chains", apparently used – without authorisation – by Swedish prison service transport officers in 1998, also obliged detainees to remain in an unnatural position: see Sweden III, para 69.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

be used by security staff during the transfer of a patient.<sup>30</sup> The CPT's response was to the point:

"[n]eedless to say", it suggested, "to place a [psychiatric] patient (or, for that matter, any person deprived of his liberty) in irons [is] totally unacceptable".<sup>31</sup>

Unsurprisingly, it recommended the removal of the irons seen.

In other visit reports, the Committee has counselled the avoidance of irons which attach only to the feet. To the Belgian authorities, for example, regarding its delegation's discovery of the apparent use of shackles in one of the établissements de Defense Sociale<sup>32</sup> visited in 1997, it expressed "reservations". Attaching such instruments to a person's feet, it suggested in its subsequent visit report, "peut presenter un risque pour un patient tres agite".<sup>33</sup>

The CPT has, on occasion, invoked the *European Prison Rules* in support of its stance against the use of irons, chains and shackles. In its first Maltese visit report, for example, reflecting on the provisions of the country's contemporary Prison Regulations, it remarked that those regulations which permitted the use of irons were "in flagrant contradiction" with the Rules and, "more generally...grossly outdated".<sup>34</sup> When visited in 1990, the Maltese authorities, for their part, had sought to assure the Committee that the Regulations concerned had "fallen into desuetude", that new regulations were being prepared and that until their implementation, the prison authorities were being advised to "heed the European prison rules".<sup>35</sup>

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<sup>30</sup> See Bulgaria I, para 215.

<sup>31</sup> *Idem*, para 218.

<sup>32</sup> Such establishments are used for the accommodation of persons with a variety of psychiatric disorders.

<sup>33</sup> See Belgium II, para 231.

<sup>34</sup> See Malta I, para 17. See, in the same connection, Italy I, para 152.

<sup>35</sup> *Ibid.* On the relevant Rule (Rule 39), see above, p 278.

***Body belts, immobilising straps, leg locks, ligatures, etc.***

- ***Body belts***

In the Segregation Unit of Wandsworth Prison, England, in 1990, a CPT delegation inspected a method of restraint described as a "body belt". It consisted of a leather waist belt attached to which were two handcuffs. When applied, the arms would be held closely to the side of the body. The restraint was fitted, on request, to a member of the delegation, who felt "very cramped" as a consequence. It was observed that "wearing it could quite quickly become a most uncomfortable experience".<sup>36</sup> Under contemporary regulations, use of the belt for the purpose of controlling a prisoner could only be authorised by the prison Governor.<sup>37</sup> According to the Unit's detention register, the belt had been used on four occasions in 1990.<sup>38</sup> The CPT, for its part, considered that a body belt is:

"...a potentially dangerous form of restraint; it [might] often exacerbate rather than improve a prisoner's psychological state and might also entail physical risks for the prisoner. Use of [a] belt will rarely - if ever - be justified".<sup>39</sup>

However, reconciled to the fact that, notwithstanding its views, recourse to body belts remained lawful in England and Wales, the Committee recommended to the UK authorities that, "[f]or so long as (and to the extent that)" this remained so, a number of safeguards ought to apply - some of which, as we shall see, are capable of much broader application:

(i) body belts should be stored outside segregation units;

(ii) the issue and use of such belts ought always to be subject to the express

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<sup>36</sup> See UK I, para 92.

<sup>37</sup> *Idem*, para 93.

<sup>38</sup> *Idem*, para 92.

<sup>39</sup> *Idem*, para 93.



authorisation of the Governor or his deputy;

(iii) prisoners restrained by such belts ought to be subject to "constant and adequate" supervision by "appropriately trained" staff; and

(iv) body belts should be removed "at the earliest possible opportunity".<sup>40</sup>

- *Immobilising straps*

As a result of at least two encounters, the CPT's position regarding the use of straps attached to various parts of a person's body as a means of restraint is not a favourable one. In Greece, in March 1993, at the Attica State Mental Hospital, it was observed that the "standard method" of restraining disturbed patients was to immobilise them "by means of a padlocked strap on one arm and another strap on the opposite leg".<sup>41</sup> This "very incapacitating" method of restraint, the CPT noted, in its subsequent visit report, was used even on elderly patients and, in its view, "constitute[d] a potentially dangerous procedure for an agitated patient".<sup>42</sup> Witnessing its application on one occasion, its delegation had observed that the efforts of the patient so immobilised to free himself "placed him in a painfully contorted position". Indeed, the Committee averred, "confined in full view of other patients", his situation had been both "harassing and degrading...as well as distressing for the unwilling onlookers".<sup>43</sup>

The CPT expressed similar views following its visit to the Western Prison, Denmark, in December 1990. There, it found that beds in the designated "special security cells" - which beds were the only furnishings in the cells, it would appear - had been fitted with "leather bracelets designed to immobilise the hands along the

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<sup>40</sup> Ibid.

<sup>41</sup> See Greece I, para 253.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

body, a broad leather strap to immobilise the trunk and leather bracelets to immobilise the ankles".<sup>44</sup> Once restrained in this way, and notwithstanding the existence of alarm buttons on one side of each bed "within reach of the fingers", "no movement is possible", the CPT averred. "Any attempt to move the hands and feet proves painful because of the rubbing of the rough leather against the skin"<sup>45</sup>... Very soon, the various joints swell as the blood has more difficulty in circulating. To say the least, the position very quickly becomes highly uncomfortable".<sup>46</sup>

- *Leg locks*

The use by the Danish police for restraint purposes of a mechanism known as a "leg lock" was the subject of an exchange of correspondence between the CPT and the Danish authorities in the interregnum between the two periodic visits of 1990 and 1996.<sup>47</sup> As witnessed during the second of these visits, the application of this device involves the handcuffing of a person behind his back, the flexing of one of his legs across the other and the wedging of one foot behind the handcuffed wrists.<sup>48</sup> Following criticism from Amnesty International and discussions with senior police officers and police associations,<sup>49</sup> use of the device was suspended in mid-1994 by way of ministerial Circular. However, a number of other forms of leg-lock restraint remained unaffected by the Circular – albeit subject to an "exhaustive medico-legal review".<sup>50</sup>

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<sup>44</sup> See Denmark I, para 34.

<sup>45</sup> The leather wrist straps, indeed, appeared to be blood-stained to the visiting delegation.

<sup>46</sup> Denmark I, para 34. See also Greece I, para 253 (regarding the inappropriate use of ligatures made from gauze bandages as a means of restraint; they were said to have caused circulatory disorders – namely, cyanosis and hypothermia - in a young girl).

<sup>47</sup> See Denmark Response I, CPT/Inf (96) 14, pp 160 and 182-3.

<sup>48</sup> See Denmark II, para 13.

<sup>49</sup> See Denmark Response I, op cit, n 47 above, at p 182.

<sup>50</sup> See Denmark II, para 13.

Notwithstanding this suspension, during its second periodic visit, the CPT was "concerned" to learn that an official complaint had been made following the restraint of an individual by means of a "manual" leg lock.<sup>51</sup> As a result of its application, it seems, the person concerned had sustained a broken left leg and a shattered kneecap. The CPT, for its part, while not urging the complete withdrawal of the device as a means of restraint, did recommend that the Danish authorities "continue closely to monitor" instances in which leg locks are applied in order "to ensure that they are not, on occasion, being applied by police officers in an over-zealous fashion".<sup>52</sup>

- *Full-face helmets*

Under German law, officers of the Federal Border Guard (or "BGS") are, in exceptional circumstances, authorised to place a "full-face motorcycle helmet (without a visor)" on foreign national detainees against whom a removal order is being enforced. Examining the "detailed internal instructions" on the practice in the course of its visit in 1998, the CPT noted that use of such helmets is only permitted "when there is a risk of self-injury by a deportee or of a BGS officer being bitten". Further, their application may only be authorised by a senior officer and anyone to whom they are applied must be "permanently supervised, with a view to verifying that his respiratory functions [are] not hindered".<sup>53</sup> While concerned by the apparent failure on the part of the authorities at the time of the visit to provide for the recording of the use of the helmets, the CPT, in its subsequent report, offered no view as to their appropriateness as a means of restraint. We can only infer, therefore, that it considers their application to be unexceptionable.

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid. See also para 135 of the report.

<sup>53</sup> See Germany III, para 17.

## *Sedation*

The sedation of detainees is an issue of particular relevance in the treatment of mentally disturbed persons. It is not proposed to examine the use of such treatment here, however, because it may be more appropriately considered elsewhere, in the context of the use of force and legal restraint in particular circumstances - more precisely, in the treatment of psychiatric patients.<sup>54</sup> However, it is worth considering here the administration of sedatives or tranquillisers in *non-psychiatric* environments, in particular, as part of the process of expelling foreign nationals.

Under the heading "Mauvais traitements", in its first French visit report, the CPT recalled how, during its 1991 periodic visit, its delegation heard allegations of the injection of tranquillisers, under restraint, into persons on the point of expulsion from the country. Notwithstanding the comments of a senior police official, who claimed that so-called "contrainte chimique" had not been used for three years, other "credible" sources indicated that the practice still obtained, "although [resorted to only] exceptionally".<sup>55</sup> Subsequently, in its 7<sup>th</sup> General Report, the CPT referred to its receipt, during 1996, of a number of "disturbing" reports from "several" countries regarding the means of coercion employed in the expulsion of immigration detainees. Among the allegations received, it stated, were a number concerning the involuntary administration of tranquillisers.<sup>56</sup> Addressing such reports, the Committee sought to stress - in a formula which, it is proposed, should be regarded as its basic position on the question - that:

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<sup>54</sup> See, generally, below, p 314 *et seq.*

<sup>55</sup> See France I, para 69. See, similarly, Switzerland I, para 97 (regarding alleged expulsion procedures at the Centre d'enregistrement des requerants d'asile, Geneva, July 1991).

<sup>56</sup> See 7<sup>th</sup> GR, para 35.

"... any provision of medication to persons subject to an expulsion order must only be done on the basis of a medical decision and in accordance with medical ethics".<sup>57</sup>

On the administration of sedatives generally, the CPT has chosen not to express a preference for their use against a person's will over recourse to mechanical restraints in the treatment of agitated detainees, proclaiming that "[t]he choice...gives rise to a fundamental medical problem which it is not for the CPT to settle definitively".<sup>58</sup>

### *Cold water sprays*

The CPT's fundamental position on the use of cold water sprays to subdue agitated detainees is unequivocal: they are not to be countenanced. Thus, having learned, during a visit to the Youth Re-education Home, Hlohovec, Slovakia, in 1995, that in cases of "affected behaviour, drunkenness or aggressiveness", staff are authorised to give a detainee a "Scottish shower...i.e. 3 to 10 minutes of spraying with water in order to calm him down", the Committee offered the view that such practice is "not acceptable". It recommended that the Slovakian authorities "remove...[it] from the list of authorised means of coercion".<sup>59</sup>

In the event, however, that custodial authorities are seeking to quell a disturbance involving a *number* of detainees, from remarks made to the Finnish authorities in the wake of the alleged hosing of a detainee at Helsinki Central Prison in December 1997, it would appear that the CPT is prepared to make exceptions. For, how else is one to interpret its assertion that:

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<sup>57</sup> *Idem*, para 36. See, similarly, Spain IV, para 11 and Germany III, para 18 (following the receipt of allegations of the sedation of deportees in 1996 and 1998 respectively. In Germany, indeed, it was claimed that the sedation was carried out by non-medically qualified personnel).

<sup>58</sup> See Switzerland I, para 134.

<sup>59</sup> See Slovakia I, para 153. See, similarly, Germany I, paras 66 and 214 (regarding the alleged use of a cold water spray at Tegel Prison, Berlin, December 1991).

“...spraying with water a recalcitrant prisoner *who is not acting in concert with others* cannot be justified”<sup>60</sup>

The Committee has expressed particular concern about the use of cold water sprays on intoxicated detainees. For instance, the discovery, in 1996, of the “occasional” practice of placing intoxicated persons in “grilled” shower units and hosing them down with cold water – “in order to calm them down” – at two “sobering-up” centres in Poland, elicited from it the following response:

“To place intoxicated persons in a cage-like structure and spray them with cold water is a rather undignified procedure which could well be considered as degrading. Further, intoxicated persons have a tendency to lose body heat; consequently, spraying them with cold water is also inappropriate from a medical point of view”.<sup>61</sup>

Accordingly, it recommended that “resort no longer be had to this practice...”.

### *Incapacitating sprays*

The administration of sprays in order to subdue agitated detainees by rendering them incapacitated would appear to be regarded by the CPT as a recourse to arms or weapons on the part of law enforcement personnel. For instance, it has described the carrying of tear gas canisters by Maltese police officers as a breach of domestic regulations prohibiting, *inter alia*, the bearing of arms;<sup>62</sup> and has stated that among a “large range of weapons” seen in a prison “armoury” on Cyprus in 1992, were tear gas grenades and “personal protection” sprays.<sup>63</sup>

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<sup>60</sup> See Finland II, para 53 (emphasis added).

<sup>61</sup> See Poland I, para 187.

<sup>62</sup> See Malta I, para 78.

<sup>63</sup> See Cyprus I, para 114.

The Committee, it seems, is, in principle, opposed to the use of incapacitating gases or sprays in places of detention, as the following instances vividly illustrate. In Spanish law, it has noted, the various "means of coercion" which prison officers are authorised to use in the course of their duties include so-called "adequate" sprays (that is, "sprays having an adequate effect").<sup>64</sup> On examining such sprays in the course of visits to a number of prison establishments in April 1991, the Committee found them to contain, *inter alia*, CS gas.<sup>65</sup> Further, during one such visit, to Alcala-Meco/Madrid II Prison, the Committee heard allegations - regarding, it should be noted, historic, rather than contemporary, instances of ill-treatment - about the use of incapacitating gas against detainees as a prelude to beatings.<sup>66</sup>

In its view, such gases or sprays are means of coercion "which lend themselves to abusive use".<sup>67</sup> Moreover, with specific reference to the perceived situation in Spain, it suggested to the authorities that "prison officers in many other countries appear to be able to perform their duties quite effectively without having recourse to [restraint methods of this kind], in particular when it is a question of exercising control over individual prisoners".<sup>68</sup> Actuated by these sentiments, the CPT encouraged the Spanish authorities to "remove [incapacitating] sprays from the list of means of coercion that may be resorted to by prison officers".<sup>69</sup>

In its second Spanish visit report, the Committee sought to broaden the application of this precept, recommending not only that such sprays be "definitively

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<sup>64</sup> See Spain I, App II, para 21 (citing Article 123 of the Spanish *Prison Rules 1981*); and Spain II, para 105.

<sup>65</sup> Spain I, para 107.

<sup>66</sup> *Idem*, para 91.

<sup>67</sup> *Idem*, para 107.

<sup>68</sup> *Ibid.* Further CPT unease in this connection was apparent in Cyprus I, at para 114.

<sup>69</sup> *Ibid.*

removed" from the list of authorised means of coercion,<sup>70</sup> but also that their use "within all places of detention, whatever their nature, be prohibited".<sup>71</sup> More recently, however, it appears to have moderated its position slightly, averring to the French authorities, in the light of its receipt of a number of allegations regarding the use of tear gas at a juvenile detention centre during its visit in 1996, that:

"...the use of tear gas in order to control a recalcitrant detainee who is not acting in concert with other detainees is unjustifiable. Custodial staff should be trained in other control techniques in respect of such a detainee. More generally...only exceptional circumstances could justify the use of gas as a means of control inside places of detention".<sup>72</sup>

### *Truncheons and batons*

CPT precepts on the use of truncheons or batons in prison and other establishments may be reduced to two essential themes comprising, first, the wearing or carrying of such instruments by members of custodial staff; and, second, their use to quell disturbances.

#### - *The carrying of such instruments*

Visiting the Madrid Detention Centre for foreigners, Spain, in 1991, a CPT delegation observed that supervising police officers "carried long truncheons in full view of the detainees".<sup>73</sup> In the Committee's view, such practice is "hardly conducive to good [staff-inmate] relations". Accordingly, it subsequently recommended that the officers

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<sup>70</sup> See Spain II, para 105. Visiting in April 1994, the Committee learned that the use of incapacitating sprays had been "banned on a provisional basis" by the Spanish authorities three days before its delegation's arrival.

<sup>71</sup> Ibid. See also para 217 of the report.

<sup>72</sup> See France III, para 74. See, similarly, Czech Republic I, para 78 (wherein the CPT suggested that the use of incapacitating gas "[can] only be justified under very exceptional circumstances").

<sup>73</sup> See Spain I, para 71.



concerned refrain from carrying the truncheons, "or, at least, carry truncheons that can be and are hidden from view".<sup>74</sup>

Further, it need hardly be stated that the presence of items like baseball bats or (non-standard) wooden batons in an establishment is strongly deprecated by the CPT.<sup>75</sup>

- *The use of such instruments*

The "most common" type of disturbance at the Madrid Detention Centre for foreigners at the time of the Committee's visit - in the subduing of which, presumably, use of the aforementioned large truncheons was contemplated - was fighting among detainees. Regarding the management of such incidents, the CPT suggested to the Spanish authorities that:

"trained...officers should not need to have recourse to truncheons to deal effectively with [such incidents]".<sup>76</sup>

This view has been developed elsewhere. In the Committee's first Slovenian visit report, for instance, in the light of allegations and findings of ill-treatment regarding action taken by the authorities to quell disruptive behaviour in some of the penal establishments visited in February 1995,<sup>77</sup> the CPT urged the government to:

"...issue clear instructions to the effect that the use of batons as a means of dealing with aggressive behaviour or passive resistance is only permissible if

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<sup>74</sup> Ibid. See, similarly, 9<sup>th</sup> GR, para 27 (in the light of delegation findings in a "number" of juvenile detention establishments visited in the course of 1998); and Bulgaria I, paras 108 and 238 (regarding the perceived "tendency" of officers at Stara Zagora Prison, when visited in 1995, to "brandish truncheons in... detention areas").

<sup>75</sup> See, e.g., Finland II, para 54 (regarding the discovery of such instruments in Riihimaki Prison in June 1998; staff there described them as "only of symbolic significance in representing their authority").

<sup>76</sup> See Spain I, para 71. However, visiting the Barcelona Detention Centre for foreigners in April 1994, the Committee heard "a few" allegations that detainees were, "on occasion", struck with truncheons, particularly in the break-up of fights: see Spain II, para 84.

<sup>77</sup> See, generally, Slovenia I, paras 51-56 and 98-99.

absolutely necessary to safeguard the physical integrity of staff or other inmates or to prevent serious damage to property".<sup>78</sup>

It added, further, that:

"[i]t should be stated unambiguously that there can never be any justification for using batons against a prisoner who has been brought under control".<sup>79</sup>

Apparently, Slovenia's "Rules on the execution of the duties of prison officers concerning the use of means of coercion" provide, *inter alia*, that batons should not, *in principle*, be used in cases of passive resistance.<sup>80</sup>

### *Electric shock batons*

Without yet having insisted on their removal from premises visited,<sup>81</sup> the CPT, as might be expected, given the potential for their abuse, has been discomforted by discoveries, *inter alia*, on prison premises of instruments capable of administering electric shocks. For instance, on examining two metal cupboards used for the storage of "different means of coercion and associated equipment" at the prison of Puerto de Santa Maria I, Spain, in April 1991, a delegation found a number of long batons with such capabilities. One such baton had been fitted with batteries.<sup>82</sup> The CPT subsequently chose not to confront the authorities directly on the matter, rather, asking them simply, in what circumstances the batons' use could be authorised and

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<sup>78</sup> *Idem*, paras 57 and 100. See, in the same connection, Czech Republic I, para 41 (in the light of allegations of the use of batons against prisoners prior to the CPT visit of February 1997).

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Although see now Czech Republic I, para 78 (electric shock devices "should never be used in prison").

<sup>82</sup> See Spain I, para 108.

who might use them.<sup>83</sup> It has adopted a similar approach in respect of the use of such instruments by police officers.<sup>84</sup>

### *The use of or threat to use dogs*

Two years prior to the CPT's visit in 1996, the Main Bridewell Police Station in Liverpool, England, had been obliged to hold, in addition to criminal suspects, both remand and convicted prisoners due to a shortage of space in Liverpool Prison. These additional prisoners had been accommodated in an area administered by police officers from the so-called "Prison Dispute Control Unit" (or "P.D.C.U.").<sup>85</sup> When subsequently interviewed by the visiting CPT delegation, "[m]any" prisoners in the establishment alleged that fellow inmates had been ill-treated by police officers because their behaviour had been considered disruptive.<sup>86</sup> For his part, the Inspector in charge of the P.D.C.U. "openly welcomed" the establishment's "bad reputation" among prisoners, since, he claimed, it "facilitat[ed] the work of his officers". He held "similar" views about the presence in the custody area of a police dog handler and a large German shepherd dog: "this, he said, was a good way to 'threaten and control' the inmates".<sup>87</sup> The CPT, in turn, disagreed, proclaiming that:

"[i]t is axiomatic that to use a dog in such a manner cannot be considered acceptable".<sup>88</sup>

Thus, while not objecting to the use of police dogs *per se* by law enforcement agencies, the CPT does find objectionable their use in order to threaten and control

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<sup>83</sup> Ibid. See, similarly, Cyprus I, para 114 (regarding the "electric prods" seen in the Nicosia Central Prisons, November 1992).

<sup>84</sup> See, e.g., Bulgaria I, para 36; and Netherlands (NA) II, paras 43-4 (regarding allegations heard about and findings made in the Criminal Investigation Department at Rio Canario, in 1997).

<sup>85</sup> See UK III, para 18.

<sup>86</sup> Ibid. Details of the allegations may be found at paras 19 and 20 of the report. The CPT's conclusion as to the risk of ill-treatment in the establishment ("not inconsiderable") can be found at para 22.

<sup>87</sup> Idem, para 21.

<sup>88</sup> Ibid.

detainees. What concerns it most in this regard, it would appear, is the risk that the dogs might be used "inappropriate[ly]" – i.e. outwith the procedural constraints, if any, imposed on their handlers - thereby occasioning unnecessary injury to apprehended persons. For example, photographs seen by the visiting delegation to Denmark in 1996 "suggested", the Committee has stated, that allegations heard in the course of its visit that dogs were used too readily as a controlling device were well-founded; the photographs appeared to show that persons against whom dogs had been used had been bitten on the arms, legs and, in one case, genitals.<sup>89</sup> As it happens, the Danish authorities themselves have characterised the guidance given to police officers on the use of dogs as "inadequate" and have emphasised the need for a new code on the matter.<sup>90</sup>

*Immobilisation by mouth: the use of gags*

Examining the treatment of foreign nationals held in administrative detention in the United Kingdom during its periodic visit of May 1994, the CPT heard a "certain number" of allegations of ill-treatment concerning, for the most part, the use of gags and body belts on and physical force against, persons, under escort, prior to their expulsion.<sup>91</sup> One, now notorious, instance of such alleged ill-treatment expressly referred to by the Committee in its subsequent visit report was that involving Ms. Joy Gardner who was arrested, *inter alia*, by immigration officers in July 1993. She died four days later, "allegedly as a result of having been bound and gagged".<sup>92</sup> In the wake of Ms. Gardner's death, a "joint Home Office/Police Review of Removal Procedures in Immigration Cases Involving the Police" was instituted, the results of

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<sup>89</sup> See Denmark II, para 16.

<sup>90</sup> Ibid.

<sup>91</sup> See UK III, para 172.

<sup>92</sup> Ibid.

whose inquiries were passed on to the CPT. Among a list of recommendations on the use of restraint techniques contained therein, the CPT noted, "with satisfaction", in its third UK visit report, was a "complete end" to the use of techniques involving immobilising the mouth.<sup>93</sup>

***The carrying of firearms by persons in direct contact with prisoners***

In the Lisbon Judicial Police Prison, Portugal, in May 1995, it was "apparent" to a visiting CPT delegation that certain officers who enjoyed "direct contact" with prisoners carried firearms when on duty. "[N]o clear policy" on the matter appeared to exist, the Committee remarked subsequently - an absence seemingly reflected in other Portuguese establishments.<sup>94</sup> Commenting on this state of affairs, the Committee offered the view that:

"...the carrying of firearms by staff who are in direct contact with prisoners is a dangerous and undesirable practice. It could lead to high-risk situations for both prisoners and prison officers".<sup>95</sup>

Further, quoting with approval from the *European Prison Rules* on the subject, it proclaimed that:

"[e]xcept in exceptional circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been fully trained in their use".<sup>96</sup>

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<sup>93</sup> *Idem*, para 173. The Review's recommendation on the use of means of immobilising the mouth was subsequently accepted by the Home Secretary and included in revised guidance issued to all police forces: see UK IV, para 65, n 21.

<sup>94</sup> See Portugal II, para 148. See, similarly, Netherlands (NA) II, para 41 (regarding Koraal Specht Prison in December 1997).

<sup>95</sup> *Idem*, para 149.

<sup>96</sup> *Ibid*, citing Rule 63.3, *EPR*.

Consistent with this position, the CPT has also stated that the use of “explosive devices causing temporary blindness” as a means of coercion against prisoners “[can] only be justified under very exceptional circumstances”.<sup>97</sup>

***The wearing of riot gear by staff in contact with prisoners***

By virtue of section 4.2 of Scottish Prison Service Circular 79/1993, upon admitting a prisoner “and while...of the opinion that [he] poses an immediate threat to their safety”, Scottish prison officers are “entitled to use protective clothing and/or such control and restraint procedures as are compatible with the prevention of injury to staff or prisoners”.<sup>98</sup> As a consequence, until shortly before the CPT’s visit in May 1994, staff in one of Peterhead Prison’s small units for violent or disruptive prisoners had been “wearing protective clothing in all day-to-day contacts with every prisoner held there”. Even at the time of the visit, members of staff were wearing such equipment in their contacts with one (of four) prisoners held in the unit. The visiting delegation was able to observe the prisoner concerned being served lunch by three prison officers “wearing riot gear - including helmets with full face visors”. When interviewed, the officers, supported by the local branch of the Scottish Prison Officers Association, made it clear that they would “much prefer to wear this equipment during their dealings with all prisoners in [the unit] and could not guarantee that they would not revert to doing so after the delegation’s visit”.<sup>99</sup>

As to the effects of the practice on life in the unit, the CPT subsequently suggested to the UK authorities that staff-inmate relations there “could hardly have

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<sup>97</sup> See Czech Republic I, para 78 (referring to the provisions of domestic law in this area).

<sup>98</sup> See UK III, para 322.

<sup>99</sup> Ibid.

been worse...[The] practice certainly served to foster confrontational attitudes on the part of both staff and prisoners".<sup>100</sup> Accordingly, it sought to emphasise that:

"...it is quite unacceptable for riot gear to be worn by prison staff in their day-to-day contacts with prisoners".<sup>101</sup>

Regarding the practice's effects on life and relations outside the unit, the CPT offered the view that "it is quite unrealistic to expect staff who have been used to viewing inmates through the visor of a helmet to readily adapt to working with the same prisoners in an open and associative regime".<sup>102</sup> Unsurprisingly, it suggested that the policy of permitting prison staff to wear riot gear in all day-to-day contacts with certain prisoners be discontinued.<sup>103</sup>

### *The slapping of detainees*

The "few" allegations of the physical ill-treatment of prisoners at the hands of prison officers heard in Slovakia in June/July 1995 related to just one establishment, Leopoldov Prison, and concerned "hasty and harsh reactions such as slaps and truncheon blows..."<sup>104</sup> Examining six formal complaints alleging the excessive use of force at the prison, the CPT noted that in all six instances, the prison governor and supervising public prosecutor had determined that the force used had been "justified".<sup>105</sup> In one case, it was observed, a slap administered by an educator to a prisoner who had refused to obey instructions had been "deemed to be a legitimate use of force".<sup>106</sup> In this connection, to the visiting delegation both a senior member of

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<sup>100</sup> *Idem*, para 331.

<sup>101</sup> *Ibid.* See in the same connection Ireland II, para 90 (regarding a similar practice - part of the so-called "barrier-handling regime" - in the special unit at Portlaoise Prison in 1998).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Idem*, paras 333 (2<sup>nd</sup> indent) and 397. See, similarly, Ireland II, para 92.

<sup>104</sup> See Slovakia I, para 70.

<sup>105</sup> *Idem*, para 71.

<sup>106</sup> *Ibid.*

staff and the prison governor remarked that slapping was "not a normal practice" but that in the case in question, the educator's action had been considered "justified" since he had used "only moderate" force.<sup>107</sup> Responding, the CPT offered the view that:

"[i]t is undeniable that, in certain circumstances, the use of force may be necessary to control undisciplined prisoners; *however, slapping prisoners is not an appropriate response*".<sup>108</sup>

### ***Threats to place detainees in physically unsuitable environments***

While visiting Nicosia Central Prisons, Cyprus, in May 1996, a CPT delegation was told by a number of segregated detainees that they had been "threatened" with a move to another accommodation block, the cells of which were "very small" (4 sq.m.), deprived of any form of lighting, poorly ventilated and remote from the remainder of the prison complex.<sup>109</sup> In the view of the CPT:

"[t]o place a prisoner in such a cell, no matter what the grounds or for how short a period, *or to threaten him with such a measure, [is] unacceptable*".<sup>110</sup>

As it happens, the prison Director insisted to the visiting delegation that the cells had never been used – and, indeed, that there was no intention to use them - as prisoner accommodation, notwithstanding the presence of bedding in three of them. The CPT, in turn, suggested that the cells be "rendered unusable" for accommodation purposes.

### ***Exacting retribution against disruptive detainees***

Like the use of irons,<sup>111</sup> recourse to corporal punishment against agitated and/or disruptive detainees was, in principle, permitted by the Prison Regulations in force in

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<sup>107</sup> Ibid.

<sup>108</sup> Idem, para 72 (original emphasis).

<sup>109</sup> See Cyprus II, para 57.

<sup>110</sup> Ibid (emphasis added). See also Rule 37, *EPR*, which prohibits, *inter alia*, "punishment by placing in a dark cell... as punishment... for disciplinary offences".

<sup>111</sup> See above, p 284.



Malta when visited in 1990.<sup>112</sup> As it did in respect of the former, the CPT regarded the Regulations on corporal punishment to be "in flagrant contradiction" with the *European Prison Rules* "and more generally...grossly outdated".<sup>113</sup> In this regard, Rule 37 of the *EPR* provides, *inter alia*, that:

"...corporal punishment...shall be completely prohibited as [a] punishment...for disciplinary offences".

Even where there exist in establishments formal disciplinary procedures for dealing with violent and/or disruptive detainees and a punctilious staff to attend to them, in the immediate aftermath of a disturbance there is always a danger that an informal, unregulated system of punishment may be created. It was the possibility that such *ad hoc* systems of retribution might exist, it would appear, which preoccupied the CPT following an incident of hostage-taking in Herrera de la Mancha Prison, Spain, prior to its periodic visit in April 1991. When interviewed during the visit, two of the prisoners who had participated in the episode alleged, *inter alia*, that, having been overpowered - and the incident, consequently, brought to an end - they had been "severely beaten...subsequently confined to a cell for three to four days, without food or clothes, and handcuffed throughout to a bed without a mattress, at no time being released for the purpose of complying with the needs of nature".<sup>114</sup> In its subsequent report to the Spanish authorities, the CPT observed that:

"[a]fter serious acts of violence by prisoners, in particular those in which prison officers are taken hostage and/or injured, there will inevitably be a great temptation to exact summary retribution. However, the ability to resist that

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<sup>112</sup> See Malta I, para 17.

<sup>113</sup> *Ibid.* Even when it is clear that corporal punishment is no longer a feature of a Party's penal culture, the CPT nevertheless insists that the redundant provisions in the relevant penal code be removed: see UK IV, para 154 (regarding the range of sanctions provided for in the Isle of Man's Prison Rules - "today of purely historical interest").

<sup>114</sup> See Spain I, para 101.

temptation is precisely one of the hallmarks of a professional prison officer or law enforcement official".<sup>115</sup>

Further, commenting on an incident alleged to have taken place just before its delegation's visit in 1992 in a unit for prisoners subject to a restrictive regime in Demersluis Prison, the Netherlands, in which an inmate was said to have been "badly beaten" – i.e. kicked and punched while being held upside-down - by members of staff after he had punched a prison officer,<sup>116</sup> the CPT offered the view that:

"[r]egardless of the behaviour of the prisoner concerned - he freely admitted that he had punched a prison officer - a concerted attack of the kind described [by the inmates claiming to have witnessed it] could not under any circumstances be considered to be an acceptable response on the part of prison staff".<sup>117</sup>

### *Electro-convulsive therapy*

Although better characterised as a form of medical treatment *inter alia*, for psychologically disturbed detainees than as a means of restraint, the use of electro-convulsive therapy (or "ECT") on detainees may be considered in the context of the present analysis, it is submitted, since the CPT holds that many of the same procedural safeguards apply. Further, though less positively, many of the same injuries may be occasioned by its inappropriate application.

The CPT takes the view that "ECT...is a recognised [i.e. well-established and scientifically valid<sup>118</sup>] form of treatment for psychiatric patients suffering from particular disorders". At the same time, however, it considers that "care should be

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<sup>115</sup> *Idem*, para 102. See, similarly, UK III, paras 309 and 394 (regarding the perceived behaviour of prison officers in the aftermath of incidents in Scottish prisons (May 1994)).

<sup>116</sup> See Netherlands I, para 63.

<sup>117</sup> *Idem*, para 64.

<sup>118</sup> See Turkey I, para 178.

taken that ECT fits into the patient's treatment plan, and its administration must be accompanied by appropriate safeguards".<sup>119</sup> Of particular concern to the Committee in this regard is the administration of ECT in its "unmodified form (i.e. without anaesthetic and muscle relaxants)".<sup>120</sup> Visiting Bulgaria in 1995, it was informed that in both Radnevo and Lovetch Psychiatric Hospitals, ECT was practised in just such an unmodified form - albeit far less frequently than had previously been the case.<sup>121</sup> The Bulgarian authorities, for their part, insisted that, as administered in the "majority" of the country's medical establishments, ECT requires the "presence of an anaesthetist and...the use of anaesthetics and muscle relaxants; the situation...at Radnevo and Lovetch...was...due to financial, organisational and personnel problems".<sup>122</sup> In 1995, however, at Lovetch Prison Hospital, while ECT was not in fact administered, the delegation learned, due to the absence of the necessary equipment, the Chief Doctor was "clearly of the opinion that unmodified ECT was quite acceptable".<sup>123</sup>

As a form of medical treatment, the CPT seems prepared, in principle, to accept the use of ECT, believing that its application "can be indicated in certain cases".<sup>124</sup> In the light of its findings in Bulgaria in 1995, however, it declared that:

"...the practice of unmodified ECT can[not] be considered as acceptable. Apart from the risk of fractures or other untoward medical consequences, the process is as such degrading for both the staff and patients concerned".<sup>125</sup>

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<sup>119</sup> See 8<sup>th</sup> GR, para 39.

<sup>120</sup> Ibid.

<sup>121</sup> See Bulgaria I, para 185.

<sup>122</sup> Idem, para 187.

<sup>123</sup> Ibid. See, similarly, Turkey I, para 178 (regarding the suggestions of certain doctors met in the Bakirkoy and Samsun Hospitals in 1997 that "modified ECT might not be as effective as the treatment in its unmodified form").

<sup>124</sup> Idem, para 186.

<sup>125</sup> Ibid.

Indeed, it has stated subsequently that given such considerations, “ECT should always be administered in a modified form”.<sup>126</sup> Unsurprisingly, the Committee sought confirmation from the Bulgarian authorities that having followed its guidance on the issue, the use of unmodified ECT in the two establishments concerned - as well as in any other establishment where it had previously been practised – had been “eliminated”.<sup>127</sup>

On the safeguards which, in its view, should attend the use of ECT, the CPT has stated that:

“ECT must be administered out of the view of other patients (preferably in a room which has been set aside and equipped for this purpose), by staff who have been specifically trained to provide this treatment. Further, recourse to ECT should be recorded in detail in a specific register”.<sup>128</sup>

Seeking to justify the creation of such safeguards, the Committee has suggested that “[i]t is only in this way that any undesirable practices can be clearly identified by hospital management and discussed with staff”.<sup>129</sup> It is no surprise, therefore, that at both the Bakirkoy Mental and Psychological Health Hospital and Samsun Regional Psychiatric Hospital, Turkey, in 1997, it was alarmed to find that ECT “was given in the ward concerned, usually in the patient’s room... [I]n the prison ward at the Samsun Hospital, ECT was administered in full view of the other patients... it was clear that in

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<sup>126</sup> See 8<sup>th</sup> GR, para 39. The CPT has insisted, further, that it is “unaware of any scientific evidence to support” the view that unmodified ECT is more effective than modified ECT: see Turkey I, para 178.

<sup>127</sup> See Bulgaria I, paras 187 and 246. See now Bulgaria Follow-up Report I, CPT/Inf (97) 1, p 145 (use of unmodified ECT in the two establishments had been discontinued for a year; and the presence of an anaesthetist when ECT is administered is now guaranteed).

<sup>128</sup> 8<sup>th</sup> GR, para 39. As an example of practice which *almost* matches such strictures, see Finland II, para 131.

<sup>129</sup> *Ibid.*

other closed wards of that hospital, patients waiting to be given ECT would have sight of patients who had just been given that treatment”.<sup>130</sup>

Interestingly, at Bakirkoy, the visiting delegation was informed of a proposal to establish a “fully-fledged ECT centre within the establishment where all such therapy would be given”.<sup>131</sup> For its part, the CPT, in a gesture which must be interpreted as a further development of its standards in this area, suggested subsequently that:

“...a centralisation and standardisation of ECT procedures would be a most welcome development. Such a centre should ideally be equipped with full resuscitation equipment and have modern anaesthetic equipment, an up-to-date ECT machine which effectively measures and controls the dose of electricity, and a recovery room in which patients would stay before returning to their wards”.<sup>132</sup>

### *The use of force/restraint in particular circumstances*

Given the range of establishments with which the CPT is concerned in its work, it must perforce examine the application of force against and/or instruments of restraint on persons in many different environments. It would be appropriate, therefore, to consider whether and, if so, how, its precepts in this area vary according to the circumstances in which the force/restraint is applied. However, regardless of the environment or circumstances in which such measures are applied, it is the view of

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<sup>130</sup> See Turkey I, para 179. The Turkish authorities subsequently informed the Committee that a “separate room” had been set aside for the application of ECT at Samsun and “steps taken to ensure that such therapy is given there”.

<sup>131</sup> *Idem*, para 180 (original emphasis).

<sup>132</sup> *Ibid.*

the CPT, as might be expected, that they be applied “in a professional manner taking care to minimise all suffering and injury”.<sup>133</sup>

*Use of force/restraint by police officers at the time of apprehension and in the initial stages of custody*

From a perusal of the CPT's published work, the most common forms of ill-treatment alleged to have been perpetrated by police officers performing custodial duties have comprised the following: the inappropriate application of handcuffs,<sup>134</sup> slaps, blows and kicks administered *after* an apprehended person has been brought under control<sup>135</sup> - occasionally when being restrained in an unnatural or contorted position (e.g. hands handcuffed behind back, hands/ankles attached to items furniture<sup>136</sup>); blows from truncheons, batons<sup>137</sup> or other wooden, metal or plastic objects;<sup>138</sup> blows to the head or ears with heavy books;<sup>139</sup> and placement for long periods in a particularly uncomfortable position, "such as arms outstretched, knees bent, on tiptoe or kneeling on a chair".<sup>140</sup>

Some instances of alleged ill-treatment, if true, may conceivably have amounted to torture. The Committee has heard allegations, for instance, of asphyxiation, involving the placing of a plastic bag over a detainee's head, the open end of which is secured round his neck;<sup>141</sup> the administration of electric shocks from specially-designed instruments;<sup>142</sup> (threats of) immersion of a detainee's head in

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<sup>133</sup> See Switzerland I, para 132; and, similarly, regarding, specifically, the forcible removal of agitated prisoners, Ireland I, para 66.

<sup>134</sup> See, e.g., Finland II, para 13.

<sup>135</sup> See, e.g., Austria I, para 42 and, further, Austria II, *inter alia*, paras 14 and 17; UK II, paras 28-9; and Germany II, paras 11-14.

<sup>136</sup> See, e.g., Hungary I, para 17; Slovakia I, para 15.

<sup>137</sup> See, e.g., Hungary I, paras 17-20, 59 and 150; Portugal II, para 12.

<sup>138</sup> See, e.g., Bulgaria I, paras 18 and 23; Slovakia I, para 15; Switzerland II, para 13 (electric cord).

<sup>139</sup> See, e.g., Austria I, paras 42-4; Portugal II, para 12.

<sup>140</sup> See Slovakia I, paras 15 and 16 (vii).

<sup>141</sup> See Austria II, para 15; and Spain V, para 15 (a technique known as “la bolsa”).

<sup>142</sup> See Austria II, para 15. See also Bulgaria I, para 18.

water;<sup>143</sup> threats to use a firearm;<sup>144</sup> beatings on the soles of detainees' feet (known as *falaka*);<sup>145</sup> and attacks on detainees by police dogs.<sup>146</sup>

The CPT's response to allegations of ill-treatment at the time of arrest/apprehension - as well as, moreover, to the discovery of substantiating (especially medical) evidence - has been consistent:

"[it] fully recognises that the arrest of a criminal suspect is often a hazardous task, in particular if the person concerned resists arrest and/or is someone whom the [apprehending] officers have good reason to believe may be armed and dangerous. The circumstances of an arrest may be such that injuries are sustained by the person concerned (and possibly also by police officers), without this being the result of an intention to inflict ill-treatment. However, no more force than is reasonably necessary should be used when effecting an arrest [and transporting detained persons to a police station.<sup>147</sup>] Furthermore, once arrested persons have been brought under control, there can never be any justification for them being struck by police officers".<sup>148</sup>

In one recent report, the CPT has gone further and suggested that "[a]s regards more particularly the use of restraint techniques [in the course of a person's arrest], the use of such means should always be an exceptional procedure, applied for the shortest possible time".<sup>149</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> *Idem*, para 17. See also Slovakia I, para 15.

<sup>145</sup> See, e.g., Portugal II, para 12; Bulgaria I, paras 18-21 and 25-26; and Slovakia I, para 15.

<sup>146</sup> See, e.g., Slovakia I, paras 15 and 16 (v); Switzerland II, para 12.

<sup>147</sup> A clause added by the CPT at UK III, paras 280 and 389.

<sup>148</sup> See, *inter alia*, Hungary I, para 23; Denmark II, para 12; Sweden III, para 10; Poland I, para 20; and Spain VI, para 13. See also UK II, para 30 (regarding the work of the "security forces" in Northern Ireland).

<sup>149</sup> See UK IV, para 66 (a view proffered in the light of the CPT's examination of a number of cases in which restraint techniques employed by police officers seeking to effect an arrest had resulted in a person's death). On the safeguards which, in the view of the CPT, should attend the application of instruments of restraint - including the requirements of exceptionality and shortness of duration - see below, p 335 *et seq.*

The considerable pressures under which police officers must operate, particularly when effecting an arrest, have recently been acknowledged by the CPT. To the Irish authorities, having heard a number of allegations concerning the ill-treatment of persons detained by the Garda Siochana in 1998, some of which appeared to be related to events subsequent to the death of an officer in 1996 and others to an alleged assault on an officer, it supplemented its fundamental position on the use of force at the time of arrest as elaborated above, with the following observation and request:

“...it is clear that exposure to highly stressful or violent situations can generate psychological reactions and disproportionate behaviour. The CPT would like to be informed...whether any preventive measures have been taken with a view to providing support for members of the Garda Siochana who are exposed to such situations”.<sup>150</sup>

Clearly, the Committee considers that domestic authorities ought to be sensitive to the effect on police officers of their work in a potentially difficult and highly charged environment, sensitive in a way that they have perhaps failed to be hitherto.<sup>151</sup>

The CPT's anxiety about the use of force by the police at or shortly after the moment of apprehension has been made plain in other, less expected ways, too. To the Polish authorities, for example, regarding the fact that when a suspected drink-driver refuses to comply with his statutory requirement to provide a blood sample, staff in the country's "sobering-up" centres "would", it was discovered in 1996, "take it by force (if necessary with police assistance)", it proclaimed:

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<sup>150</sup> See Ireland II, para 15.

<sup>151</sup> On staff support structures generally in places of detention in which force/restraint may be used, see below pp 370-1.



“[t]he forcible taking of blood or other samples can lead to high-risk situations from the standpoint of ill-treatment. To avoid such situations, one might consider attaching adverse legal consequences to a refusal to give a sample required by law rather than proceeding to take the sample by force in the event of a refusal to provide it”.<sup>152</sup>

Lastly, regarding the possibility of the abusive use of force during interrogations in police custody, unsurprisingly, the CPT has stated that:

“...it is axiomatic that such acts [are] totally inadmissible: they would be in flagrant violation of both [States parties'] domestic law and international instruments binding upon [them]”.<sup>153</sup>

*Use of force against persons who are or who become violent or agitated in police custody*

Agitated detainees at Schoneberg Police Detention Centre, Germany, when visited in 1996, were said to be placed in a "tranquillising cell". In addition, however, they could be restrained by handcuffs (attached at both the wrists and ankles), should they remain agitated after such placement.<sup>154</sup> Records seen by the visiting delegation indicated that such restraints had, historically, been applied for up to an hour at a time.<sup>155</sup> In the view of the CPT, such procedures are "highly questionable". Accordingly, it recommended to the German authorities that:

“...in cases where a person in police custody is, or becomes, highly agitated, the police should immediately contact the competent doctor and act in accordance with his opinion”.<sup>156</sup>

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<sup>152</sup> See Poland I, para 195.

<sup>153</sup> See Hungary I, para 24.

<sup>154</sup> See Germany II, para 25.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid. See, similarly, Iceland II, paras 17 and 29 (with particular reference to intoxicated detainees).

The Committee's discomfort at the possibility of recourse to measures of restraint on police premises was apparent, too, it is submitted, in its report to the Polish authorities following its first ever visit to the country in 1996. Therein, referring to its delegation's discovery of "various items (e.g. a metal bed fixed to the floor of a cell, equipped with rings which would facilitate physical restraint; leather straps; straight jackets/body belts)" in a detention area close to the cells used by the Opole District Police Command, it offered the view that "the presence of [such items] in a police establishment is, to say the least, unusual".<sup>157</sup>

### *Application of force/restraint following disorder in prisons*

#### *- A general prohibition of ill-treatment*

While visiting Barlinnie Prison, Scotland, in May 1994, the CPT heard allegations concerning the ill-treatment of two prisoners in the course of their being transferred to the establishment's segregation unit. Both persons alleged that they had been beaten by prison officers, *inter alia*, while handcuffed in a prison van in transit from other establishments. In both cases, their medically recorded injuries were found to be consistent with their allegations.<sup>158</sup> Although the CPT found no evidence of a "generalised" problem of ill-treatment in Scotland's prison estate, it did feel that prisoners considered to be violent and/or disruptive may, "on occasion", be victims of such treatment, "especially in the aftermath of a major incident".<sup>159</sup> Accordingly, to the Scottish prison authorities, it issued the predictable, though, nonetheless, fundamental recommendation that they:

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<sup>157</sup> See Poland I, para 28.

<sup>158</sup> See UK III, paras 306 (and 393). See also para 307 of the report, regarding the alleged ill-treatment of another segregated prisoner, elsewhere, by staff wearing protective helmets.

<sup>159</sup> *Idem*, paras 309 and 394.

"deliver the clear message [to their subordinates] that the ill-treatment of prisoners is not acceptable under any circumstances and will be dealt with severely".<sup>160</sup>

In a recent visit report, the CPT brought its fundamental precepts on the use of force/restraint in prison establishments into line with that which, as we have just seen, it has promulgated for some time now in respect of the use of force by police officers at the time of arrest. Prison staff, the Committee acknowledges, "will, on occasion have to use force to control violent and/or recalcitrant prisoners and exceptionally may even need to resort to instruments of physical restraint". It also believes, however, that "the force used should be no more than is strictly necessary and, once prisoners have been brought under control, [that] there can be no justification for them being struck".<sup>161</sup>

- *Use of force once a detainee has been subdued*

As to the last point in this formula – viz., the use of force once a detainee has been brought under control – the CPT has, on occasion, been emphatic. In 1996, for example, a former detainee of the Sandholm Institution for Detained Asylum Seekers, Denmark, complained to a visiting delegation that following an altercation with staff, he had been forcibly restrained in an unnatural position and struck, sustaining a fracture to one arm. An internal investigation into the incident had concluded that no more force than is necessary had been used by the officers concerned in the circumstances and that the restraint techniques applied had been "performed

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<sup>160</sup> Ibid.

<sup>161</sup> See Spain VI, para 56.

correctly".<sup>162</sup> The CPT, however, was "unconvinced" by this official response to the incident and sought to emphasise to the Danish authorities that:

"...the prohibition of striking persons who have been brought under control applies equally in the penal as in the police sphere".<sup>163</sup>

- *The intervention of outside (security) forces in subduing prison disturbances*

Having received reports in the course of its 1992 visit that in the alleged ill-treatment of detainees at both Linho and Vale de Judeus Prisons, Portugal,<sup>164</sup> outside security forces - known colloquially as "intervention squads" - had been involved, the CPT sought to "stress" to the Portuguese authorities that intervention of this kind "can often engender a high risk of ill-treatment of detainees".<sup>165</sup> Consequently, it suggested that certain safeguards should apply when outside intervention is deemed necessary following prison disturbances, noting that:

"... it is especially important that [such situations] are subject to rigorous means of control. More specifically, it is desirable that any such interventions should take place in the presence of the civil and legal authorities responsible for public order".<sup>166</sup>

These civil and legal authorities, it is clear from remarks made by the Committee elsewhere, should be both "fully independent of the [outside intervention force concerned] and the prison and charged with observing and subsequently reporting upon the carrying out of the intervention".<sup>167</sup> Their presence, it holds, "will...have a

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<sup>162</sup> See Denmark II, para 48.

<sup>163</sup> *Idem*, paras 49 and 138. See, similarly, Germany II, paras 48 and 179; and Spain VI, para 56.

<sup>164</sup> For details of which alleged ill-treatment, see Portugal I, para 60.

<sup>165</sup> *Ibid.* See, similarly, Netherlands (NA) III, para 14 (regarding the deployment of police officers in Koraal Specht Prison in 1997, whose role it was to replace and continue the work of the prison's internal "riot squad" (the *Mobile Eenheid*)).

<sup>166</sup> *Ibid.* See also France I, para 87; and, similarly, Germany I, para 65; and Netherlands I, para 148.

<sup>167</sup> See Turkey I, para 87.

dissuasive effect on anyone minded to ill treat prisoners and enable unfounded allegations of ill-treatment to be refuted in a convincing manner”.<sup>168</sup>

Such precepts notwithstanding, the CPT’s preferred approach is “to avoid if at all possible that such interventions take place”. It favours the quelling of disturbances by “peaceful” means.<sup>169</sup> It is sufficiently realistic, however, to acknowledge that “from time to time an intervention by [outside agents] to deal with a prison disturbance will prove unavoidable”.<sup>170</sup> Such interventions, it believes, should be “limited to the direst of emergencies”.<sup>171</sup> Further, it is important, it insists, that in the course of such interventions, it is possible to identify individual officers. Corporate anonymity, the Committee believes, merely compounds the risk of ill-treatment.<sup>172</sup>

### *The restraint of mentally disturbed persons*

Whether to use means of restraint against detainees suffering, *inter alia*, from personality disorders who become agitated or violent is a question most often faced, quite obviously, by the management of establishments formally entrusted with the care of such persons. However, the need to use force/restraint against psychologically disturbed persons accommodated in *prison* establishments is something which, given the frequency with which it occurs,<sup>173</sup> ought not to be ignored in the present context – though it should always be borne in mind that the CPT is of the view that mentally ill prisoners ought always to be placed in establishments specifically adapted to care for

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<sup>168</sup> Ibid.

<sup>169</sup> Means which, of course, require the provision of suitable training for prison officers: see, e.g., Netherlands (NA) II, para 17 and now Netherlands (NA) III, para 20. See also below, p 360 *et seq.*

<sup>170</sup> Turkey I, para 87.

<sup>171</sup> See Netherlands (NA) III, para 40.

<sup>172</sup> See Netherlands (NA) III, para 14. The uniform of the police officers drafted into Koraal Specht Prison to replace the establishment’s own riot squad, as outlined above, at p 313, n 165, did not permit the identification of individual officers, the CPT observed in 1999.

<sup>173</sup> Throughout its published work the CPT has referred to situations in which visiting delegations have encountered mentally disturbed persons on prison premises.

them.<sup>174</sup> Accordingly, when the Committee averred to the Bulgarian authorities, following its visit in 1995, that "[i]n any psychiatric facility, the restraint of patients will on occasion be necessary [and that] this is a subject of particular concern to the CPT, given the potential for abuse and ill-treatment",<sup>175</sup> we can be sure that it holds precisely the same views on the application of restraint against mentally disordered persons detained in other establishments and that all appropriate precepts may be said to apply *mutatis mutandis* thereto.

- *The significance of good management*

While the appropriate management of staff in any custodial establishment is crucial to efforts to forestall the ill-treatment of detainees, whether resulting from the over-enthusiastic application of measures of restraint or from other conduct, the maintenance of what the CPT has termed "[p]roper managerial control" in psychiatric establishments may be considered of particular significance, given the dual therapeutic/custodial role of staff who work there. In terms of the balance to be struck between the two functions, as applied, in particular, to the use of instruments of restraint, the CPT is of the fundamental view, that:

"...management should ensure that the therapeutic role of staff in psychiatric establishments does not come to be considered as secondary to security considerations".<sup>176</sup>

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<sup>174</sup> See, *inter alia*, 3<sup>rd</sup> GR, para 43; Italy I, paras 118-9; and Denmark I, para 80. See also in this connection Rule 100.1, *EPR*, which provides that "[p]ersons who are found to be insane should not be detained in prisons and arrangements shall be made to remove them to appropriate establishments for the mentally ill as soon as possible".

<sup>175</sup> See Bulgaria I, para 216; and, similarly, Romania I, para 186; and, more generally, 8<sup>th</sup> GR, para 47.

<sup>176</sup> See 8<sup>th</sup> GR, para 31.

- *Recourse to force/restraint in inappropriate custodial environments*

In March 1993, visiting the ten isolation cells of the Psychiatric Unit at Korydallos Prison Complex, Greece, the CPT learned that persons placed there - "exclusively...severely disturbed prisoners" - would be "systematically strapped to their beds" and held thus "for several days".<sup>177</sup> Decisions on their transfer to such cells and the provision of medication to them would "often" be taken by unqualified health-care staff "without prior consultation of a doctor", who might not see the persons concerned until an elapse of two days.<sup>178</sup> In the view of the CPT, these kinds of arrangement are "totally unsatisfactory and, more specifically, could well exacerbate rather than relieve...a prisoner's mental state. They involve a clear risk of ill-treatment, albeit as a result of inadequate staff resources and/or lack of training rather than malevolence".<sup>179</sup> Consequently, it intimated that the Unit ought to be "upgrade[d]...into a fully-fledged psychiatric hospital facility" or, failing that, "cease to operate as a psychiatric facility [at all]", so that mentally ill prisoners might be transferred to another, "properly equipped" establishment.<sup>180</sup> Clearly, the CPT is concerned by the possibility that mentally disturbed persons may be subject to physical restraint in a penal - more specifically, non-hospital - environment, even where the facility in question may be formally designated to accommodate such persons.<sup>181</sup>

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<sup>177</sup> See Greece I, para 185.

<sup>178</sup> Idem, para 187.

<sup>179</sup> Idem, para 188.

<sup>180</sup> Idem, para 189.

<sup>181</sup> See also in this respect Italy I, paras 118-19 (regarding the accommodation in isolation units of two psychiatrically disturbed detainees seen by visiting delegations to the maisons d'arret Regina Coeli and Rebibbia in March 1992). It goes without saying that the CPT finds the restraint of agitated psychiatric patients in a physically dangerous environment quite unacceptable: see, e.g., Spain VI, para 110 (regarding the possibility that disturbed patients might be strapped to a fixed chair in a so-called "immobilisation" room at San Juan de Dios Psychiatric Hospital (1998). Bloodstains on the wall behind the chair - apparently caused by a restrained patient banging his head against it - the CPT remarked, "attested to the unsuitability of this facility").

- *The CPT's basic precept*

In Denmark, the Herstedvester Institution performs a "hybrid" detention role: simultaneously treating persons suffering, *inter alia*, from serious mental disorders and accommodating certain kinds of serious criminal offender. When visited in December 1990, over half the establishment's detainees were undergoing psychiatric/psychological treatment. Formally, however, it functioned under the aegis of the Ministry of Justice. Accordingly, its regime was "first and foremost" a prison regime.<sup>182</sup> "This dichotomy and the resultant ambiguity", the CPT observed in its subsequent visit report, "are sources of conflicts in decision-making on the treatment of [detainees]; the legal and therapeutic points of view often diverge...The outcome is a degree of uncertainty as to exactly what type of regime is to be applied to the prisoners".<sup>183</sup> Indeed, the visiting delegation "witnessed such a conflict - of a fairly violent kind in an emergency situation", between the establishment's governor and a psychiatrist concerning the placement in solitary confinement of an aggressive detainee and the physical restraint of another.<sup>184</sup> Commenting on this - and other problems brought about by the establishment's dual function - the CPT observed, *inter alia*, that:

"...the placement in solitary confinement of a mentally ill prisoner and the recourse to means of restraint can be considered as acceptable only if the treatment of such a prisoner is under the entire and sole responsibility of medical personnel".<sup>185</sup>

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<sup>182</sup> See Denmark I, para 75.

<sup>183</sup> *Idem*, para 76.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Idem*, para 80. See, similarly, Belgium II, para 232.



This, the CPT's basic position on the restraint of violent and/or agitated mentally disturbed detainees, has been elaborated in other reports. In its first Icelandic visit report, for example, it offered the view that such persons:

"...should be treated through close supervision and nursing support, combined, if considered appropriate, with sedatives. The use of means of physical restraint shall only rarely be justified and must always be either expressly ordered by a medical doctor or immediately brought to the attention of such a doctor for approval".<sup>186</sup>

Interestingly, when visited in 1993, Iceland's Sogn Institution for Mentally Ill Offenders operated a policy on the treatment of violent patients which appeared to reflect that sought by the CPT: when necessary, the visiting delegation was informed, the patient concerned would be "confined to his room and...kept under permanent supervision by staff. If necessary, tranquillisers might be administered. The use of means of physical restraint was formally prohibited...[I]n such cases the doctor would immediately be contacted and, if appropriate, his permission sought for the administration of tranquillisers".<sup>187</sup>

Further elaboration of the basic precept - particularly as regards the balance to be struck between the use of restraints and tranquillisers - was offered to the German authorities in the light of the Committee's findings regarding the treatment of patients suffering delirium tremens at Butzow Prison hospital unit in April 1996. Such patients, the visiting delegation learned, were placed in the intensive care unit and, if necessary, "immobilised in their beds by means of cloth straps attached to their hands

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<sup>186</sup> See Iceland I, para 156. See, similarly, Belgium I, para 200; and, more generally, 3<sup>rd</sup> GR, para 44. On the question of (medical) authorisation in the application of measures of physical restraint generally, see below, p 343 *et seq.*

<sup>187</sup> *Idem*, para 157. The CPT, for its part, "welcome[d]" the Institution's approach. For a similarly favourable comparison with the CPT's basic precept, see Italy I, para 117; and Poland I, para 136 (regarding practice in the Psychiatric Hospital at Wroclaw Remand Prison in 1996).

and feet and an abdominal belt". Their treatment "did not include the administration of appropriate medicines to control their acute state of confusion [which] inevitably affected the duration of the application of physical restraints".<sup>188</sup> For its part, the CPT observed that:

"...it is now widely recognised that to limit the treatment of delirium tremens<sup>189</sup> to physical restraints is clearly insufficient and potentially dangerous. The prompt administration of tranquillisers is an integral part of the therapy commonly employed in this type of treatment; this keeps resort to physical restraints to a strict minimum".<sup>190</sup>

Further development of the basic precept may be inferred in observations made by the Committee in the wake of its second visit to Malta in July 1995. There, it had observed, the use of instruments of physical restraint at Mount Carmel (psychiatric) Hospital had been "consigned to the annals of history" and replaced with a policy whereby "[p]atients considered to represent a danger to themselves or others were dealt with, in the first instance, by verbal persuasion, which failing, staff would administer a sedative injection before moving the person concerned to a single room". This development was "welcome[d]" by the CPT.<sup>191</sup>

- *The need for specially trained staff*

When interviewed in April 1994, members of staff at Santa Coloma Mental Hospital, Spain, told the CPT that "various injuries (mainly bruising and marks of handcuffs

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<sup>188</sup> See Germany I, para 136.

<sup>189</sup> And, it might be argued, *a fortiori*, more serious psychiatric disturbances.

<sup>190</sup> See Germany I, para 136. The CPT recommended that the policy at Butzow be "reviewed accordingly". Recourse to instruments of physical restraint in respect of agitated psychiatric patients has not been entirely discountenanced by the CPT, however; their use, it stated recently, "may exceptionally be justified": see Spain VI, para 89.

<sup>191</sup> See Malta II, paras 107 and 133. For a policy which, similarly, "favourably impressed" the CPT, see France I, para 170.

applied too tightly)" are "frequently" observed when disturbed persons are taken to hospital by the law enforcement agencies. Such persons are "nearly always handcuffed and often bound". Further, one detainee interviewed claimed to have been "beaten and dragged by the hair and clothes" - though no injuries were recorded on his arrival at hospital.<sup>192</sup> Reflecting on this state of affairs, the CPT observed that:

"[h]andling mentally disturbed persons will always be a difficult task and, whenever possible, this task should be given to specially trained staff".<sup>193</sup>

Whenever (untrained) *custodial* staff are permitted or are obliged to assist in the management of such persons, the Committee has remarked elsewhere, they should only do so "under the authority and close supervision of...[specially trained] health care staff".<sup>194</sup> Such a precept may be said to apply *a fortiori* when the *restraint* of mentally disturbed persons is being contemplated. Indeed, in the light of a patient's death at Rampton Special Hospital, England, alleged to have been caused by the application of control and restraint measures, some two years prior to its visit in May 1994,<sup>195</sup> the Committee offered the view that:

"[i]n a [mental health institution], health care staff will inevitably be confronted with agitated and violent patients. Appropriate training in the management of such situations is essential, in order to reduce the risk of the abusive use of force. Emphasis should be placed in this context on the various levels of response possible, of which resort to physical restraint is only one".<sup>196</sup>

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<sup>192</sup> See Spain II, para 205.

<sup>193</sup> Ibid.

<sup>194</sup> See Finland II, para 88 (responding to findings in June 1998 that members of custodial staff at Helsinki Central Prison were authorised to isolate psychiatric patients without obtaining the prior assent of health care staff).

<sup>195</sup> See UK III, para 241.

<sup>196</sup> *Idem*, para 242.

In England and Wales, the management and control of aggressive behaviour in psychiatric establishments is subject to a "number of important guidelines", enshrined in a Code of Practice. According to the CPT, however, when interviewed in 1994, "many" members of Rampton's health care staff had possessed "only a scant knowledge" of them. Accordingly, the training of such staff, it recommended, should aim to rectify this deficiency, particularly in the light of reports received by the visiting delegation that resort to physical control and restraint techniques in the establishment "tended to be the rule rather than the exception, when staff were faced with aggressive behaviour".<sup>197</sup>

#### *The medical treatment of detainees without their consent*

While strictly on the periphery of the practice of the use of force or measures of restraint against detainees, the administration of medical treatment to an individual without his consent may be considered worthy of examination here because of the element of involuntariness which it entails. We start from the axiomatic position that although the issue of the medical treatment of detainees without their consent may conceivably arise in any custodial environment, for obvious reasons, it is most likely to arise in the context of the detention of psychiatric patients. Consequently, much of what follows relates to the treatment of such persons. However, the precepts identified may be held to apply, it is submitted, irrespective of the custodial environment in which a person is held and, accordingly, should not be viewed narrowly.

In the view of the CPT, "in exceptional circumstances, there can be a sound clinical and ethical basis for the treatment of patients without their consent".<sup>198</sup> At the

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<sup>197</sup> Ibid.

<sup>198</sup> See Netherlands II, para 57.

same time, however, it considers that such treatment "require[es] an increased vigilance" on the part of the authorities, who should devise "very strict rules, offering to the patient all appropriate guarantees [against abuse]..."<sup>199</sup> To a large extent, the guarantees - both medical and legal - contemplated by the CPT in this regard reflect those which, it maintains, ought to obtain when force/restraint is applied against detainees generally. As such, they will be dealt with below.<sup>200</sup> However, in a number of important respects, very particular safeguards may be considered to be required in the present connection. They are worth examining briefly.

In Germany, Section 101 of the *Act Concerning the Execution of Prison Sentences* of 16 March 1976, as amended by the Act of 27 February 1985, provides, *inter alia*, that the medical treatment of prisoners without their consent may only be ordered by a doctor and is only permissible where there is danger to life or serious risk to the health of the prisoner concerned or others. Federal administrative instructions go further, requiring that the prisoner be informed of the need for treatment and its likely consequences in the presence of a witness, that this exchange and any relevant declarations by the patient be recorded and that the patient sign the record or that the reasons for any refusal to sign be noted.<sup>201</sup> Notwithstanding such safeguards, while visiting the Forensic Psychiatry Department in Straubing Prison in December 1991, a CPT delegation perceived shortcomings - which became "a source of disquiet" - in the recording of treatments administered to patients without their consent in accordance with Section 101. In this regard, a Parliamentary Committee of Inquiry had reported, in 1990, that, with the exception of one particular treatment, "it

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<sup>199</sup> See Switzerland I, paras 140 and 168 (with reference to para 134). Even the existence of a range of informal, practical measures in establishments in which involuntary medical treatment may be administered "cannot", it seems, "be a substitute for a formal legal and regulatory framework...": see Netherlands II, para 57 (regarding practice in the national psychiatric and forensic observation centre, Het Veer Prison, in November 1997).

<sup>200</sup> See p 335 *et seq.*

<sup>201</sup> See Germany I, App III, para 19.

had not been possible" to establish from the medical records of the study group of patients whether their treatments had been given with or without their consent.<sup>202</sup> Further, from discussions with the Department's head psychiatrist, it emerged that the authorities did not consider it appropriate, or even possible, to seek patients' consent "on a systematic basis".<sup>203</sup> In its subsequent visit report, the Committee's reaction was expressed succinctly. "The CPT", it stated:

"attaches great importance to the ethical requirement of the 'free and informed' consent of every patient to his treatment. Any derogation from this fundamental principle should be based upon clearly and strictly defined exceptional circumstances. In order to ensure complete openness in this regard, all relevant information must be carefully recorded".<sup>204</sup>

Accordingly, it recommended to the authorities that:

"...all treatment administered to patients be immediately recorded in their medical records, accompanied by an indication of whether or not the treatment is voluntary and any relevant declarations by the patients. In cases where treatment is administered without patients' consent, the reasons for doing so must be stated".<sup>205</sup>

As to the nature of the consent sought by the CPT, it suggested that it may only be considered free and informed "if it is given in the absence of threats or unreasonable pressure".<sup>206</sup> It also recommended further procedural guarantees, "in the interests of both patients and medical staff", like the requirement of an "on-site, independent

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<sup>202</sup> *Idem*, para 130.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Idem*, para 131. A more recent survey of the forensic psychiatric services at Straubing concluded that the recommendations made by the 1990 Committee of Enquiry regarding the recording of information "had been implemented": *idem*, para 132.

<sup>205</sup> *Ibid.* See also para 220 of the report.

<sup>206</sup> *Idem*, para 134.

second medical opinion" and the "transfer of the patient to a closed section of a psychiatric hospital outside the prison system".<sup>207</sup>

Subsequently, it has drawn many of these thoughts and precepts together to produce a formula which, it considers, should be adhered to when the medical treatment of psychiatric patients – and, by extension, other categories of detainee – is being contemplated:

“Patients should, as a matter of principle, be placed in a position to give their free and informed consent to treatment. The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorising treatment without his consent. It follows that every competent patient, whether voluntary or involuntary, should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances.

“Of course, consent to treatment can only be qualified as free and informed if it is based on full, accurate and comprehensible information about the patient’s condition and the treatment proposed; to describe ECT as “sleep therapy” is an example of less than full and accurate information about the treatment concerned. Consequently, all patients should be provided systematically with relevant information about their condition and the treatment which it is proposed to prescribe for them. Relevant information (results, etc.) should also be provided following treatment”.<sup>208</sup>

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<sup>207</sup> *Idem*, para 133.

<sup>208</sup> See 8<sup>th</sup> GR, para 41. The formula was paraphrased by the CPT in Turkey I, at para 224.

An example of what the CPT regards as inappropriate practice under this formula may be found in its first published Turkish visit report, wherein it noted that, as they stood in 1997, law and practice on the giving of informed consent to psychiatric treatment in the country were “underdeveloped. A form signed by the patient or his/her relatives upon admission – whereby they give their general consent to treatment – entitle[d] the medical staff to apply any form of treatment considered necessary, including ECT”.<sup>209</sup>

The formulation advanced in its 8<sup>th</sup> General Report may be regarded as developing that which the Committee set out much earlier, in its third such report, when elaborating a number of precepts on the provision of health care services in prisons. Then, in a very thorough analysis - ranging from the kind of information to which, in its view, prisoners (and, by extension, their families and lawyers) are entitled when medical treatment is being contemplated, to the approaches to be taken by the authorities in the event of a hunger strike<sup>210</sup> or when seeking to carry out medical research - it had suggested:

“Freedom of consent... [is a] fundamental right... of the individual...

“...Patients should be provided with all relevant information (if necessary in the form of a medical report) concerning their condition, the course of their treatment and the medication prescribed for them. Preferably, patients should have the right to consult the contents of their prison medical files, unless this is inadvisable from a therapeutic standpoint.

“They should be able to ask for this information to be communicated to their families and lawyers or to an outside doctor.

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<sup>209</sup> See Turkey I, para 224.

<sup>210</sup> In respect of which the CPT appeared to remain non-committal.



“...Every patient capable of discernment is free to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances which are applicable to the population as a whole.

“A classically difficult situation arises when the patient’s decision conflicts with the general duty of care incumbent on the doctor. This might happen when the patient is influenced by personal beliefs (eg. refusal of a blood transfusion) or when he is intent on using his body, or even mutilating himself, in order to press his demands, protest against an authority or demonstrate his support for a cause.

“In the event of a hunger strike, public authorities or professional organisations in some countries will require the doctor to intervene to prevent death as soon as the patient’s consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts.<sup>211</sup>

...As regards the issue of medical research with prisoners, it is clear that a very cautious approach must be followed, given the risk of prisoners’ agreement to participate being influenced by their penal situation. Safeguards should exist to ensure that any prisoner concerned has given his free and informed consent.

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<sup>211</sup> The CPT has also made it clear that to accommodate persons on hunger strike in an isolation unit is quite inappropriate: see France III, para 164.

“The rules applied should be those prevailing in the community, with the intervention of a board of ethics. The CPT would add that it favours research concerning custodial pathology or epidemiology or other aspects specific to the condition of prisoners.”<sup>212</sup>

“...The involvement of prisoners in the teaching programmes of students should require the prisoners’ consent.”<sup>213</sup>

As far as the procedure to be followed in the event of a proposed involuntary intervention is concerned, that developed under Dutch law would, in the light of the CPT’s apparent endorsement following its visit to the country in 1997, appear to offer something of a model. The “detailed” procedure laid down by the Netherlands’ *Hospital Order Placement (Nursing) Act 1997* provides for, *inter alia*:

“...an obligatory consultation...between the Director of the Clinic, the treating doctor, and the head of the department and, if the treatment relates to the mental health of the patient, the intervention of a psychiatrist; the subsidiarity principle (having first tried all other methods of voluntary treatment); recording in an ad hoc register and in the patient’s file, notification being made to the Ministry of Justice and to the Complaints Commission and, if need be, to the competent regional Health Inspector; etc.”<sup>214</sup>

### ***The restraint of prisoners who are receiving hospital treatment***

The transfer of prisoners to a civilian hospital in order to receive medical treatment may give rise to significant problems of security. The actions of some detaining

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<sup>212</sup> It is worth noting in this connection that Rule 27, *EPR* provides that “Prisoners may not be submitted to any experiments which may result in physical or moral injury”.

<sup>213</sup> See 3<sup>rd</sup> GR, paras 45-9.

<sup>214</sup> See Netherlands II, para 131.

authorities in this regard have, on occasion, concerned the CPT. For instance, visiting France in 1991, it learned that prisoners transferred to civilian hospitals for treatment, especially in Marseilles and Nice, were, throughout their stay, "attached to their beds with handcuffs by the police officers responsible for their security".<sup>215</sup> Further, the French authorities acknowledged that expectant mothers were similarly restrained, "[both] during labour and after giving birth".<sup>216</sup>

Regarding the routine practice of restraining hospitalised prisoners, the CPT subsequently averred that recourse to such measures must remain "exceptional". Regarding the restraint of pregnant women in particular, this, it proclaimed, was a "flagrant example of inhuman and degrading treatment"; "other means of effective surveillance [could] and must be found".<sup>217</sup> Accordingly, it recommended to the French authorities, first, that they take measures immediately "in order to guarantee that female detainees transferred to hospital to give birth are not attached to their bed"; and, second, that they refrain from applying restraint measures of this kind to any detainee sent for hospital treatment, "save in exceptional cases".<sup>218</sup>

In other visit reports, even this notion of exceptionality has been dispensed with. To the Spanish authorities, for example, regarding the practice of handcuffing or tying a sick prisoner to his bed during all or part of his stay in hospital, the CPT has recommended, simply and unequivocally, that steps be taken to ensure that hospitalised prisoners "are not physically attached to their hospital beds or other items

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<sup>215</sup> See France I, paras 90 and 220; and now France III, para 142 (regarding the findings of the periodic visit in 1996).

<sup>216</sup> Ibid.

<sup>217</sup> Ibid. See now 10<sup>th</sup> GR, para 27 (wherein the CPT averred that the shackling or otherwise restraining of female detainees to beds or other items of furniture while undergoing gynaecological examination or giving birth is "completely unacceptable, and could certainly be qualified as inhuman and degrading treatment. Other means of meeting security needs can and should be found").

<sup>218</sup> Ibid.

of furniture for custodial reasons".<sup>219</sup> Further, it has described the carrying out of medical examinations on persons secured by handcuffs in a non-custodial environment as "[an] ethically questionable practice...which [is] inimical to the construction of a proper doctor-patient relationship".<sup>220</sup> However, it may be that the Committee would regard such practice as appropriate in "exceptional" circumstances.<sup>221</sup>

As to the "other means of effective surveillance" of hospitalised prisoners referred to in its first French visit report, the CPT has expounded its views elsewhere. To the Luxembourg authorities, for example, following its visit in 1993, it suggested that the creation of "a custodial unit" within civilian hospitals might be "one possible solution" to the problem of maintaining security.<sup>222</sup> Indeed, the Committee continued, the two "chambres cellulaires" seen at the Centre Hospitalier de Luxembourg in the course of the visit offered a ready-made unit of this kind: their windows and door handles had been blocked up and gendarmes were permanently present in a small neighbouring room.<sup>223</sup> In such an environment, it averred, recourse to handcuffs or chains for restraint purposes - as authorised in an instruction to the Duchy's gendarmerie<sup>224</sup> - could not be justified. Accordingly, it sought an immediate cessation of the use of such instruments and an amendment of the relevant regulation.<sup>225</sup>

Lastly, it should be noted that the CPT has had occasion to describe the

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<sup>219</sup> See Spain I, para 150. More generally, see 3<sup>rd</sup> GR, para 36. Interestingly, visiting one hospital in the course of its second periodic visit to Spain in April 1994, the Committee was told that the restraint of patients was decided "solely on medical grounds...no patients were restrained or attached to items of furniture for custodial reasons": see Spain II, para 170. See now Spain IV, para 37. See also France III, paras 143 and 144 (2<sup>nd</sup> indent).

<sup>220</sup> See Netherlands II, para 76.

<sup>221</sup> See France III, para 143.

<sup>222</sup> See Luxembourg I, para 110. See also 3<sup>rd</sup> GR, para 36; and, similarly, Switzerland II, para 112; and Romania I, para 131 (following the discovery of three patients attached to their beds by a length of cable in the civilian hospital at Dej in 1995).

<sup>223</sup> Ibid.

<sup>224</sup> Idem, para 109.

<sup>225</sup> Idem, para 110.

presence of custodial staff at medical appointments or during the treatment of detainees in civilian hospitals as “not conforming to medical ethics”.<sup>226</sup> Rather, as it does in respect of the right to a medical examination for persons detained by the police,<sup>227</sup> it believes that such examinations or treatment should take place “out of the hearing and – except where medical or nursing staff ask for it in respect of a particular detainee – out of the view of [custodial staff]”.<sup>228</sup>

### *The restraint of administratively detained foreign nationals*

As we have seen, in its 7th General Report, the CPT referred to its receipt, during 1996, of "disturbing reports from several countries about the means of coercion employed in the course of expelling immigration detainees".<sup>229</sup> The Committee had heard allegations, in particular, of the "beating, binding and gagging" of such persons (as well as the administration of tranquillisers against their will).<sup>230</sup> Commenting on this state of affairs, the CPT remarked that:

"...it will often be a difficult task to enforce an expulsion order in respect of a foreign national who is determined to stay on a State's territory. Law enforcement officials may on occasion have to use force in order to effect such a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so.

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<sup>226</sup> See France III, para 142.

<sup>227</sup> See, generally, above, p 96.

<sup>228</sup> See France III, para 144, 1<sup>st</sup> indent.

<sup>229</sup> See above, p 289.

<sup>230</sup> See 7<sup>th</sup> GR, para 35. In fact, reports of this kind pre-date the CPT's 7<sup>th</sup> General Report by several years: see, e.g., Belgium I, paras 62-3 and 252; and Austria II, paras 29 and 159.

Further, the Committee must emphasise that to gag a person is a highly dangerous measure".<sup>231</sup>

Lastly in the present connection, it may be worth examining, briefly, the *safeguards* subject to which measures of restraint may be deployed during deportation procedures. In this regard, in 1997, at Schiphol Airport, Amsterdam, the CPT was pleased to learn of the introduction of a "detailed procedure...aimed at reducing to a minimum instances in which such means are used". The procedure comprised, *inter alia*:

"...[the] appointment of an official from the detained person's holding facility with responsibility for escorting him; [and] when indispensable, the progressive use of physical means of restraint, if necessary with medical supervision".<sup>232</sup>

Given the Committee's "welcome" of such provision, it may be safely conjectured that such practices constitute, in its view, part of an humane deportation procedure.

### ***The physical chastisement of juveniles***

At both detention centres for minors visited in the course of its second periodic visit to Portugal in May 1995,<sup>233</sup> detainees told the CPT that "an occasional slap" might be given by monitors to encourage "appropriate" behaviour among the boys. One such

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<sup>231</sup> *Idem*, para 36. See also Spain IV, para 11 (in the light of a number of alarming allegations of assault, sedation, gagging and binding heard in the course of visits to detention centres at Malaga and Melilla, in 1997: *idem*, paras 8-10); Sweden III, para 68; and, similarly, Germany III, para 16 (citing, with approval, the terms of a recently issued internal instruction on the enforcement of removal orders); and Belgium II, para 20.

<sup>232</sup> See Netherlands II, para 38.

<sup>233</sup> Namely, the Observation and Social Action Centre, Lisbon and the Padre Antonio de Oliveira Re-education Centre, Caxias.

monitor, indeed, was prepared to admit that the administration of a “‘pedagogic’ slap was not entirely unknown”.<sup>234</sup> Commenting on the practice, the CPT suggested that:

“[i]n the interests of the prevention of ill-treatment...it would be preferable for all forms of physical chastisement of children to be both formally prohibited and avoided in practice”.<sup>235</sup>

Rather, it considers, “[juvenile] inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures”.<sup>236</sup> Further, “[i]t is axiomatic”, it has asserted, “that publicly to humiliate a minor would be equally objectionable”.<sup>237</sup>

### *The legal regulation of measures of force/restraint*

#### *The importance of formal regulation*

As the CPT itself maintains, to render the use of measures of force or physical restraint subject to strict legal regulation may be considered necessary “[i]n view of the enhanced risk of ill-treatment” occasioned thereby.<sup>238</sup> The importance of such regulation to the CPT may be seen in its first Danish visit report, wherein, commenting on the treatment of psychiatric patients at the Herstedvester Institution in 1990, which treatment included the application of measures of force/restraint, it offered the view that:

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<sup>234</sup> See Portugal II, para 153.

<sup>235</sup> Ibid. See also para 184 of the report; and, generally, 9<sup>th</sup> GR, para 24. Morgan and Evans have criticised this “surprisingly muted” reaction on the part of the CPT, seeing in it a certain confusion and asking whether the CPT considers such chastisement to be ill-treatment or not (see Morgan and Evans (1999), p 77). Their criticism is redundant, it is submitted. What matters is the CPT’s belief that the practice should be both prohibited and avoided, regardless of how it may be labelled.

<sup>236</sup> See 9<sup>th</sup> GR, para 24.

<sup>237</sup> See Czech Republic I, para 87 (regarding complaints from girls detained in the Moravsky Krumlov Educational Institute in 1997 that they had been the subject of “prurient comments” from staff (para 86)).

<sup>238</sup> See Spain II, paras 204 and 227.

“...in such a sensitive area as the integrity of the individual, it is essential that rules affording prisoners all the appropriate guarantees should stipulate the procedure to be followed”.<sup>239</sup>

In the same connection, Rule 40, *EPR* provides, *inter alia*, that:

“The patterns and manner of use of...instruments of restraint...shall be decided by law or regulation”.

Contemporary Danish practice on the use of force/restraint was provided for, *inter alia*, by way of a circular which stipulated the kind of physical force that might be authorised against prisoners. The Committee noted that the wording of some of its provisions “[did] not appear entirely consistent”. Consequently, it suggested that the matter “be clarified”.<sup>240</sup> Indeed, even prior to the Committee’s visit, clarification in the form of “specific legislation” had been recommended by a Danish Ministry of Justice working party, which recommendation was subsequently endorsed by the CPT.<sup>241</sup> The aim of such clarification, the CPT considered, should be:

“...to limit the use of means of restraint to situations resulting from clearly defined exceptional circumstances”.<sup>242</sup>

The consequences of a failure adequately to circumscribe the circumstances in which the use of force and/or instruments of physical restraint may be authorised were neatly summarised in the CPT’s first Greek visit report. Therein, recalling how, when visiting a number of mental health establishments in March 1993, its delegation had found no evidence of instructions issued to staff on the use of instruments of restraint,

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<sup>239</sup> See Denmark I, para 77.

<sup>240</sup> *Idem*, para 22. Regulation on the use of force/restraint generally in Danish prisons, the CPT noted, is “detailed”: *idem*, App 2, paras 12-13.

<sup>241</sup> *Idem*, paras 37-8.

<sup>242</sup> *Ibid.* See also para 136 of the report.



“or of any guidance regarding the therapeutic expediency of such a measure”,<sup>243</sup> the Committee suggested that:

“[s]uch a situation, where the decision to use instruments of physical restraint is left to the discretion of...nursing staff<sup>244</sup> ...[means] that there is a serious risk of physical restraint being used in excess of requirements”.<sup>245</sup>

***The contents of policies regulating the use of force/instruments of restraint***

A failure to issue instructions, *inter alia*, on recourse to instruments of physical restraint was also apparent at the Ettelbruck neuropsychiatric hospital, Luxembourg, in January 1993. There, “[a]pparently”, as in Greece, “the decisions on recourse to these measures like their length were, more often than not, left to the initiative of the nursing staff”.<sup>246</sup> Consequently, the CPT recommended that a “detailed policy” be formulated on the question:

“...comprising notably: the types of case in which resort to these measures may be made; the objectives sought by them; their length and regular review; the existence of appropriate human contacts; the requirement for increased staff supervision”.<sup>247</sup>

This list of contents has been augmented in other visit reports. To the French authorities, for example, having noted in the course of its periodic visit in 1991 that the use of means of restraint at the Centre Hospitalier Specialise de Montfavet did not

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<sup>243</sup> See Greece I, para 255 and, similarly, para 282.

<sup>244</sup> Who, in the circumstances, were “untrained and numerically inadequate”.

<sup>245</sup> Greece I, para 255.

<sup>246</sup> See Luxembourg I, para 129.

<sup>247</sup> *Ibid.* See, similarly, Romania I, para 191 (in the light of similar findings at the Poiana Mare psychiatric hospital in 1995); Germany II, para 137; and Spain II, para 204 (1<sup>st</sup> indent). The CPT has issued a very similar recommendation in respect of the regulation of measures of solitary confinement and/or discipline: see further below, p 452-3.

appear to be subject to any particular regulation,<sup>248</sup> it recommended that an “exhaustive” policy be formulated, whose contents should include, in addition to those identified above, “specific recording procedures and medical supervision”.<sup>249</sup> To the Bulgarian authorities, regarding the use of leather straps in all three psychiatric establishments visited in 1995, the CPT suggested that a policy on restraint:

“...should make clear that initial attempts to restrain aggressive behaviour should, as far as possible, be non-physical (e.g. verbal instruction) and that where physical restraint is necessary, it should in principle be limited to manual control. Instruments of restraint should only be used as a last resort”.<sup>250</sup>

Finally and very specifically, from observations made in the wake of its periodic visit to Switzerland in February 1996, it would appear that any policy on restraint techniques should, the CPT considers, also deal with the use of police dogs in the course of an arrest.<sup>251</sup>

## ***Procedure and safeguards on the use of force/restraint against detainees***

### ***Introduction***

One of the most fundamental guarantees against the abusive use of force or the inappropriate application of measures of restraint against detainees is that which the CPT has, regrettably, had cause to emphasise perhaps more frequently than any other in its published work. It concerns the important role to be played by senior officers or

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<sup>248</sup> See France I, paras 200 and 227.

<sup>249</sup> *Idem*, para 203 (4<sup>th</sup> indent).

<sup>250</sup> See Bulgaria I, para 218; and, similarly, 8<sup>th</sup> GR, para 47.

<sup>251</sup> See Switzerland II, para 15. In the course of its visit, the CPT delegation met two detainees in Zurich who claimed – with some justification, it seems – to have been “severely bitten” by police dogs during their apprehension: *idem*, para 12.

management in places of detention – and, indeed, by central government<sup>252</sup> - in the prevention of ill-treatment. For, “it is up to [such authorities]”, it maintains, “to ensure that their subordinates carry out their responsibilities while respecting [all] laws and other relevant regulations and also international human rights instruments ratified by [their government]”.<sup>253</sup> Accordingly, such officials should take it upon themselves:

“...[to] remind their subordinates that ill-treatment is not acceptable and will be the subject of severe sanctions”.<sup>254</sup>

“This message”, the Committee holds, “should be recalled in an appropriate form<sup>255</sup> at suitable intervals”.<sup>256</sup> Strongly linked to it is a precept which the Committee has invoked almost as frequently, namely, that:

“...one of the most effective means of preventing ill-treatment lies in the diligent examination [by, *inter alia*, those senior officials] of all complaints made against members of law enforcement agencies and, when necessary, in the imposition of appropriate sanctions”.<sup>257</sup>

Such an approach, it believes, “will have a very important dissuasive effect” on officers minded to ill treat detainees, officers who “otherwise could gain the impression that they could act with impunity”.<sup>258</sup> What this requires in practice, it seems, is a commitment on the part of the national authorities, where necessary, to

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<sup>252</sup> See Italy II, para 73.

<sup>253</sup> See Romania I, para 24.

<sup>254</sup> See, e.g., Netherlands (NA) II, para 45; and Spain IV, para 47.

<sup>255</sup> Which form would include, it seems, a “formal declaration” issued directly by the relevant Government Minister: see Belgium II, para 14.

<sup>256</sup> Netherlands (NA) II, para 45.

<sup>257</sup> See, e.g., France III, para 24.

<sup>258</sup> See Italy II, para 24.

devolve certain disciplinary responsibilities away from central government into the hands of persons in positions of authority in custodial establishments.<sup>259</sup>

As regards the detainee who is the subject of measures of force or restraint, in the view of the CPT:

“... [he] must have available to him all appropriate guarantees, medical as well as legal, protecting him against the possibility of abuse”.<sup>260</sup>

It is of the opinion, further, that detainees should be able to avail themselves of such guarantees, *regardless of the type of force or restraint technique to which they are subject*. For instance, visiting a number of Scottish prisons in the UK in May 1994, a delegation noted that formal safeguards existed in respect of the use of body belts, “but that these would appear not to apply to the use of force in a more general sense”.<sup>261</sup> Consequently, the Committee recommended that the safeguards adumbrated in its visit report should be “available to all prisoners against whom any means of force (including control and restraint techniques) have been used”.<sup>262</sup>

These two fundamental precepts – i.e. that all appropriate safeguards should be available to every prisoner against whom force or restraint is used, regardless of the type of force/restraint deployed – we shall take as our starting-point in our examination of the various procedural guarantees sought by the CPT in this area.

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<sup>259</sup> See, e.g., Ireland II, para 39 (regarding the introduction of a new Disciplinary Code for Prison Officers in 1996, which vested the power to impose penalties in respect of recalcitrant prison officers in the Minister of State and not, as the CPT would appear to prefer, in the prison Governor: “delegation of greater responsibility and accountability to Governors in respect of staff”, it observed, “would be a positive development”).

<sup>260</sup> See Switzerland I, para 134.

<sup>261</sup> See UK III, para 310.

<sup>262</sup> UK III, para 310.

### *Force/restraint to be measures of last resort*

As we have seen, the CPT considers that in regulating the use of force/restraint techniques, the aim of the authorities should be to limit their use to situations arising from clearly defined, exceptional circumstances.<sup>263</sup> We should consider, therefore, those circumstances and the requirement of exceptionality. In this respect, the Committee's position may be simply stated: recourse to instruments of physical restraint, "whether for medical or non-medical reasons",<sup>264</sup> it insists, should be made:

"...only when all other methods of control fail or when justified on medical grounds..."<sup>265</sup>

In other words, the use of such instruments "should be the exception rather than the rule"<sup>266</sup> and may be considered, consequently, "very rarely justified".<sup>267</sup>

For their part, the *European Prison Rules* offer much greater precision as to the meaning of "exceptional circumstances". Rule 63.1, *EPR* provides, *inter alia*, that:

"[s]taff of...institutions shall not use force against prisoners except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations".

### *Proportionality*

Visiting the Kopenick Detention Centre for Foreigners, Germany, in April 1996, a CPT delegation heard "a few" allegations concerning the occasional "disproportionate

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<sup>263</sup> See above, p 333.

<sup>264</sup> See Germany II, para 161.

<sup>265</sup> See, e.g. Sweden I, para 130 (5<sup>th</sup> indent). Visiting Sweden in May 1991, the CPT was told that, consistent with this view, instruments of physical restraint are resorted to "very rarely" in the country's prison establishments. It found no evidence to the contrary: *idem*, para 129.

<sup>266</sup> See Spain I, para 98.

<sup>267</sup> See Luxembourg I, paras 130 and 166; and, in the specific context of the restraint of psychiatric patients, 3<sup>rd</sup> GR, para 44; and 8<sup>th</sup> GR, para 48.

use of force” against detainees in the application of control and restraint techniques.<sup>268</sup>

In one such case, the CPT noted in its subsequent visit report, a detainee had “exhibited medical signs...consistent with his claims that during a check made in a dormitory a few days before, he had been dragged outside, peremptorily handcuffed behind his back, thrown face down on the floor, punched in the face and kicked”.<sup>269</sup>

In a second case – pre-dating the delegation’s visit by several months - it was alleged that, after “repeatedly” calling staff, a detainee had been thrown face first onto his cell bed by several staff members, held in position by way of a foot pressed against the nape of his neck in order that handcuffs might be applied behind his back and, once so restrained, punched on the neck.<sup>270</sup>

These allegations elicited from the CPT the following response, which response it is proposed to regard as its fundamental position on the issue of proportionality:

“[t]here can be no doubt that custodial staff may occasionally have to use force to restrain violent or disturbed persons. However...no more force than is reasonably necessary should be used”.<sup>271</sup>

It has proclaimed elsewhere, slightly differently, that recourse to force and/or measures of restraint ought never to be “completely without justification”.<sup>272</sup>

Accordingly, in a reference to the kind of “modern intervention techniques” which, it considers, ought to feature in any response to a violent incident or

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<sup>268</sup> See Germany II, para 46.

<sup>269</sup> *Idem*, para 47.

<sup>270</sup> *Ibid.* Other sources alleged that staff had behaved similarly in January 1996, causing a detainee a number of injuries. For allegations and evidence of a similar - though not “systematic” - “overreact[ion]” on the part of custodial staff faced with violent, disturbed or disruptive behaviour, see, *inter alia*, Spain I, paras 95-6; and UK I, para 86. See also Slovenia I, paras 52-5 and 99 (regarding the similar conclusions of a domestic inquiry into the use of force against detainees following an incident at a juvenile detention centre in January 1995).

<sup>271</sup> *Idem*, para 48. See, similarly, Iceland II, para 43.

<sup>272</sup> See Slovenia I, para 55.

disturbance in a place of detention, it has proclaimed that “[s]uch techniques do not include meeting violence with violence”.<sup>273</sup>

The position of the CPT in this regard reflects that of the *European Prison Rules*, Rule 63.1 of which provides, *inter alia*, that “staff who have recourse to force must use no more than is strictly necessary...”

### ***The application of instruments of restraint as a punishment***

The CPT, as we have seen, acknowledges that following a serious act of violence by a detainee, especially one in which members of custodial staff have been injured, the temptation to exact “summary retribution” may be “great”. At the same time, however, it considers that the ability to resist such retribution is “precisely one of the hallmarks of a properly-trained and professional prison officer”.<sup>274</sup> Reinforcing such antipathy towards retribution, and in the specific context of the application of restraint techniques, the Committee has stated, on numerous occasions, that:

“...instruments of restraint...should never be applied, or their application prolonged, as a punishment”.<sup>275</sup>

In fact, it is to the credit of a number of States parties that this precept already exists in their regulatory frameworks.<sup>276</sup>

### ***Length of application of restraint measures***

Rule 40, *EPR* stipulates, *inter alia*, that:

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<sup>273</sup> See Netherlands (NA) II, para 17.

<sup>274</sup> See above, pp 302-3.

<sup>275</sup> See, e.g., 2<sup>nd</sup> GR, para 53; Spain I, para 98 (4<sup>th</sup> indent); and, in respect of the restraint of psychiatric patients in particular, 3<sup>rd</sup> GR, para 44; and 8<sup>th</sup> GR, para 48. The Committee has formulated an analogous precept in respect of the (prolonged) isolation/discipline of detainees: see below, p 454.

<sup>276</sup> See, e.g., Denmark I, para 32; UK I, para 93; Norway I, para 114; and Malta II, para 77. In the same connection, see also Rule 39, *EPR*, cited above, at pp 278-9.

“...instruments [of restraint] must not be applied for any longer time than is strictly necessary”.

The CPT, for its part, is of the same view, averring that, once applied:

“...instruments of restraint should be removed at the earliest possible opportunity”.<sup>277</sup>

While this expression leaves no room for doubt as to the Committee’s feelings on the matter, what it does not make clear is what the Committee regards as too great a duration. To a large extent, of course, circumstances determine duration; for, if a detainee continues to show signs of agitation even after restraint measures have been applied, then their continued application would seem, *prima facie*, justified. However, in the light of the anecdotal evidence available in its published work, we may be fairly sure that the CPT considers that there exists a point beyond which to continue to restrain a person becomes an inhuman and degrading act – or worse - regardless of his state of mind. For instance, visiting the prison of Puerto de Santa Maria I, Spain, in 1991, the Committee learned of one prisoner who, prior to its visit, had been isolated and handcuffed for some 29 hours, save for “brief periods” for feeding and complying with the needs of nature, because of his perceived aggressiveness. He committed suicide the following day.<sup>278</sup> In its subsequent report, the CPT averred that the application of restraint measures for such a length of time is “totally unacceptable”,<sup>279</sup> and, in a gesture from which its views on the significance of the incident may be clearly inferred, recommended that the provisions of Article 5 of the country’s Prison Rules – which stipulates that “[n]o prisoner shall be subjected to torture or ill-

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<sup>277</sup> See, e.g., 2<sup>nd</sup> GR, para 53; 3<sup>rd</sup> GR, para 44; 8<sup>th</sup> GR, para 48; and UK III, para 310.

<sup>278</sup> See Spain I, para 97.

<sup>279</sup> *Ibid.*



treatment...or be the subject of unnecessary harshness in the application of the rules”<sup>280</sup> - be “fully complied with”.<sup>281</sup>

Elsewhere, the Committee has observed that “cases where means of physical restraint need to be applied to a prisoner for more than twenty-four hours will be rare”<sup>282</sup> and that the application of instruments of restraint “for some fifteen hours overnight” may be considered “prolonged”.<sup>283</sup> Visiting Germany in April 1996, it noted that, under Federal law,<sup>284</sup> the application of such instruments in the country’s prisons for periods in excess of three days “must be notified to a superior authority”.<sup>285</sup> To the CPT, “[t]his would appear to suggest that instruments of restraint could legally be applied for a period of days at a time”.<sup>286</sup> Consequently, it sought to emphasise that:

“...in its view, the application of instruments of restraint for a period of days can never be justified”.<sup>287</sup>

Accordingly, it recommended that the German authorities “take steps to ensure that such a situation cannot occur”.<sup>288</sup> In the same way, the Committee has “on occasion encountered psychiatric patients to whom instruments of physical restraint have been applied for a period of days...” In the light of such findings, it has proclaimed

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<sup>280</sup> *Idem*, App II, para 4.

<sup>281</sup> *Idem*, para 98.

<sup>282</sup> See Iceland I, para 128. Icelandic law provides that restraint measures may be applied to remand prisoners for a maximum of 24 hours, unless the Prison Administration authorises a longer period. See, in the same connection, Italy I, para 117 (regarding the application of restraint measures “throughout the night” at the maison d’arret San Vittore, Italy, in March 1992).

<sup>283</sup> See Spain VI, para 53 (regarding the handcuffing to beds – without mattresses – of occupants of the segregation unit at Las Palmas de Gran Canaria Prison in 1998). Interestingly, later in the report, the CPT characterised such duration as “excessive”: *idem*, para 60.

<sup>284</sup> Specifically, a Federal Instruction issued under Section 88 of the country’s *Prison Law*.

<sup>285</sup> See Germany II, para 162.

<sup>286</sup> *Ibid.* (See, similarly, Greece I, para 185: restraint “for several days” possible in certain isolation cells visited in March 1993). Notwithstanding German law, the visiting delegation found that, in practice, “in most cases”, measures of restraint might be applied “for a maximum of a few hours”.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*

emphatically that “such a state of affairs cannot have any therapeutic justification and amounts, in its view, to ill-treatment”.<sup>289</sup>

*Authorising the use of force or instruments of physical restraint*

In the authorisation of the use of force or measures of restraint against detainees, it seems clear from an examination of the CPT’s published work that a distinction should be drawn between the kind of authorisation appropriate to the application of such measures against mentally-ill detainees and that appropriate to their application against other categories of detainee.

- *psychiatric patients*

As we have seen, in every Greek psychiatric establishment visited in March 1993, the decision to use instruments of physical restraint, the CPT perceived, was left to the discretion of an “untrained and numerically inadequate” nursing staff.<sup>290</sup> Consequently, in an effort to minimise the risk of excessive recourse to restraint techniques in such establishments, the CPT recommended, *inter alia*, that:

“measures of...physical restraint [should be] applied only on the express instruction of a doctor or immediately brought to the attention of a doctor for approval”.<sup>291</sup>

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<sup>289</sup> See 8<sup>th</sup> GR, para 48; and, similarly, Italy II, para 142 (following the discovery that a patient at the centre d’observation neuropsychiatrique de San Vittore had been restrained for 51 hours shortly before a visit in 1995); and Spain VI, para 89 (regarding the possibility that acutely agitated patients at Las Palmas de Gran Canaria Prison could be restrained for up to two days, when visited in 1998).

<sup>290</sup> See above, p 334. See, similarly, Luxembourg I, para 129. A certain confusion as to responsibility, *inter alia*, for the restraint of detainees was also apparent in Belgium in 1993: see Belgium I, para 199.

<sup>291</sup> See Greece I, paras 256 (3<sup>rd</sup> indent) and 282. See also Belgium I, para 201 (3<sup>rd</sup> indent); Luxembourg I, para 130; 3<sup>rd</sup> GR, para 44; and now 8<sup>th</sup> GR, para 48.

This precept, it is worth noting, the Committee holds to be “axiomatic”.<sup>292</sup> Further, it may be inferred from the Committee’s observations elsewhere that the “express instruction” or “approval” given by a doctor should be more than merely oral. For instance, visiting the Santa Coloma Mental Hospital, Spain, in 1994, a CPT delegation found no evidence in the files or nursing notes of two restrained patients seen of a specific medical order authorising the measures taken. Indeed, to the Committee’s evident concern, it appeared generally in the establishment that the responsible doctor would give such an order verbally, “usually over the phone”.<sup>293</sup>

Without actively encouraging the Spanish authorities to introduce a policy of written authorisation,<sup>294</sup> the Committee’s observations do suggest, it is submitted, that it would much rather a more formal approach have been adopted by staff at Santa Coloma than that which appeared to obtain at the time of the visit. Thus, it may be stated, in the view of the CPT, the express authorisation – arguably written in nature – of a doctor is a pre-condition of the humane restraint of mentally-ill detainees.

- *prisoners*

To the UK authorities, regarding the use of body belts in prisons in England and Wales in 1990, the Committee suggested, *inter alia*, that their issue and use should be subject to the express authorisation, not of a doctor, but of the prison Governor or his deputy.<sup>295</sup> Similarly, among the range of safeguards relating to the application of restraint measures in Norwegian prisons “welcome[d]” by the CPT in the wake of its 1993 visit, were the requirements, first, that a “placement order” be made by the

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<sup>292</sup> See Cyprus I, paras 137 and 172.

<sup>293</sup> See Spain II, para 203.

<sup>294</sup> In its visit report, the CPT merely reiterated the recommendation just quoted above: *idem*, paras 204 (2<sup>nd</sup> indent) and 227.

<sup>295</sup> See above, pp 285-6.

prison Director - or, in emergencies, his representative; and, second, that placements on security beds for periods exceeding 24 hours or in security cells for periods exceeding three days, be notified to the Central Prison Administration.<sup>296</sup> This position of the CPT would seem to accord with the provisions of the *European Prison Rules*, which, as we have seen, stipulate that certain instruments of restraint may be used exceptionally, “by order of the director” – albeit subject to an immediate consultation with a medical officer<sup>297</sup> – and whose Rule 63.1 provides, *inter alia*, that “[s]taff who have recourse to force...must report the incident immediately to the director of the institution”.

***The medical examination and supervision of physically restrained detainees***

- ***The importance of medical examinations in the prevention of ill-treatment generally***

The inherently greater risk of ill-treatment occasioned by the use of force or instruments of restraint in places of detention is an issue which has been considered already.<sup>298</sup> What has so far merely been touched on, however, is the role of the medical doctor in forestalling such ill-treatment.<sup>299</sup> In the view of the CPT:

“[t]he potential importance of the role which could be played by doctors appointed to carry out forensic tasks should...be emphasised. The findings of such doctors will carry considerable weight in legal and/or disciplinary proceedings...”<sup>300</sup>

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<sup>296</sup> See Norway I, para 115.

<sup>297</sup> See above, p 279.

<sup>298</sup> See above, p 332.

<sup>299</sup> However, see above, p 119 *et seq.* (regarding the forensic role of doctors in the context of police custody).

<sup>300</sup> See Portugal II, paras 32 and 171; and Cyprus II, para 17.

In Portuguese police practice, it would appear, this “potential importance” is overlooked. According to both the Director and the Head of the Medico-Legal Clinic at the Lisbon Institute of Forensic Medicine when interviewed in May 1995, forensic doctors are “only occasionally” called upon to examine persons who allege ill-treatment by the Portuguese police.<sup>301</sup> Further, they admitted, there is “often a significant time-lag” between the alleged incident of ill-treatment and the issuing of a forensic examination order by the competent judge, as a result of which “any identifiable marks or injuries which might have been attributable to ill-treatment will often have healed”.<sup>302</sup>

The Committee subsequently remarked that “it is...essential that [forensic doctors] be closely involved in cases of alleged ill-treatment by the police”.<sup>303</sup> For our purposes, however, their importance in other custodial environments, too, cannot be overlooked and must be considered just as important. Indeed, actuated by considerations of this kind, it would appear, later in the same visit report the Committee observed that:

“[p]rison health care services can make a significant contribution to the prevention of ill-treatment of detained persons, through the systematic recording of injuries and, when appropriate, the provision of general information to the relevant authorities...”<sup>304</sup>

It added that:

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<sup>301</sup> Ibid. Apparently, there had been only six instances of such intervention in the year prior to the Committee’s visit.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Idem, para 118. See also 3<sup>rd</sup> GR, para 60; Germany II, para 138; Spain VI, para 91; and, regarding the role of prison health care services in detecting (and preventing) the ill-treatment of persons formerly held in *police custody*, Austria II, para 27; and Poland I, para 22.

“[i]nformation could also be forwarded on specific cases, though as a rule such action should only be undertaken with the consent of the prisoner concerned”<sup>305</sup>.

Of course, in substantiating a claim of ill-treatment – including the disproportionate use of force or instruments of physical restraint – a detainee will inevitably encounter difficulties if the recording of injuries by health care staff is anything but “systematic” and the forwarding of information to the relevant authorities inadequate. In Austria, in 1994, for instance, a delegation encountered one detainee at the Wien-Josefstadt Prison who claimed that in the course of his initial medical examination he had made allegations of police ill-treatment. It was observed, however, that although injuries had been recorded in his medical file, no mention had been made of his claims.<sup>306</sup> Similarly, at a Viennese police establishment, a delegation noted from records kept that for the few weeks prior to and during its visit, out of thirteen persons whose medical examinations had yielded evidence of lesions “and other medical symptoms (sometimes... serious)”, in only one case had the cause of such injuries been recorded.<sup>307</sup> Further, in the case of another Austrian detainee, the delegation learned that although injuries observed during his medical examination on admission to prison - allegedly caused by police officers at the time of his arrest<sup>308</sup> - had been recorded in the relevant file, no transmission of his case to the relevant authorities seemed to have taken place.<sup>309</sup>

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<sup>305</sup> Ibid. See, similarly, Belgium II, para 177.

<sup>306</sup> See Austria II, para 27. See, similarly, Germany II, para 138 (regarding the recording of inmates' claims at Butzow Prison, April 1996).

<sup>307</sup> Ibid. At Hamburg Remand Prison, Germany (April 1996), not only the causes, but even the injuries themselves, it would appear, were not recorded systematically: see Germany II, para 138 (and, similarly, Netherlands I, para 122).

<sup>308</sup> Idem, para 17.

<sup>309</sup> Idem, para 27.

It is possible to say that, in the light of experience, the CPT has formulated the following precepts on the role of (forensic) doctors in the prevention of ill-treatment in places of detention, which precepts, although pertaining to particular custodial situations, have the potential, it is submitted, to be more broadly applied:

(a) that, “whenever a public prosecutor or investigating judge receives a complaint of ill-treatment...or observes that someone brought before him could have been a victim of ill-treatment, he should immediately request a forensic medical examination of the person concerned and bring the matter to the attention of the relevant public prosecutor”.<sup>310</sup>

Interestingly, the Committee has recently appeared to formulate a reciprocal obligation on the part of doctors, who, it has recommended, “should inform the competent prosecutor [or, presumably, investigating judge] on each occasion that they find signs of violence suggestive of ill-treatment during the medical examination of a detainee”.<sup>311</sup> The transmission of such information, it believes, axiomatically, should be done “with [the] utmost urgency, to ensure that the [judicial authorities] are in possession of all relevant information”.<sup>312</sup>

(b) that “persons taken into police custody who are subsequently released without being brought before a public prosecutor or judge should be able independently to solicit a medical examination/certificate from the relevant forensic doctor/institute”,<sup>313</sup>

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<sup>310</sup> See Cyprus II, paras 17 (1<sup>st</sup> and 2<sup>nd</sup> indents) and 101; and, similarly, Portugal II, paras, 33 and 171; and Poland I, para 23.

<sup>311</sup> See Romania I, para 41; and, similarly, Italy II, para 26 (2<sup>nd</sup> indent).

<sup>312</sup> See Spain VI, para 92.

<sup>313</sup> See Cyprus II, paras 17 (1<sup>st</sup> and 2<sup>nd</sup> indents) and 101; and Portugal II, paras 33 and 171.

(c) that the medical certificate drawn up after each forensic examination - or, the CPT has also asserted, following the admission or return of every detainee to prison - should contain:

- i. an account of statements made by the detainee which are relevant to the medical examination (including his own description of his state of health and any allegations of ill-treatment);
- ii. an account of objective medical findings based on a thorough examination,<sup>314</sup> and
- iii. the doctor's conclusions in the light of i. and ii.<sup>315</sup>

“It is axiomatic”, the Committee has stated, that “the same approach should be followed whenever a prisoner is medically examined following a violent episode in prison [whatever its origin]”<sup>316</sup> – which episodes include, clearly, incidents in which force or instruments of restraint are applied to an agitated detainee.<sup>317</sup> “In addition”, it has remarked, “the detainee must be able to obtain on demand a medical certificate describing [any] injuries recorded”.<sup>318</sup> In other instances, this duty to furnish the detainee (and his lawyer) with a medical certificate has been characterised as absolute; no request from the detainee is required. Any certificate drawn up in the wake of an examination *must* be made available to him as a matter of policy.<sup>319</sup>

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<sup>314</sup> The taking of photographs of the relevant parts of the detainee's body may also be appropriate: see Netherlands (NA) III, para 15.

<sup>315</sup> See, e.g., Cyprus II, para 17 (3<sup>rd</sup> indent); Austria II, para 27; and Germany II, paras 139 and 193. This precept, it should be noted, unsurprisingly reflects that formulated by the CPT in respect of the medical examination of persons detained by the police: see above, p 110.

<sup>316</sup> See Germany II, paras 139 and 193; and, similarly, 3<sup>rd</sup> GR, para 6; Poland I, para 126; and Belgium II, para 179.

<sup>317</sup> See, e.g., Netherlands I, para 122.

<sup>318</sup> See Belgium II, para 179.

<sup>319</sup> See, e.g., France III, para 25.



- *The medical examination of detainees against whom force or measures of restraint have been used*

Regarding, specifically, the use of force and/or instruments of physical restraint in places of detention, the CPT is of the view that:

“[a] prisoner against whom any means of force have been used should have the right to be immediately examined and, if necessary, treated by a medical doctor. This examination should be conducted out of the hearing and preferably<sup>320</sup> out of the sight of non-medical staff, and the results of the examination (including any relevant statements by the prisoner and the doctor’s conclusions) should be formally recorded and made available to the prisoner [and his lawyer]”.<sup>321</sup>

These provisions need little, if any, explanation (they are, of course, reminiscent of the Committee’s views on the right of persons in police custody to secure a medical examination<sup>322</sup>). It should be added, however, that the Committee does not consider a medical examination to have been *immediate* if it takes place two days or *a fortiori* six days after the incident giving rise to it.<sup>323</sup>

A detainee’s entitlement to a medical examination becomes particularly relevant, of course, once measures of force or restraint cease to be applied. As to his entitlement *during* such application, the CPT considers that:

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<sup>320</sup> I.e. unless the doctor requests otherwise: see, e.g. Norway I, para 120 (2<sup>nd</sup> indent).

<sup>321</sup> See, *inter alia*, 2<sup>nd</sup> GR, para 53; and UK III, para 310.

<sup>322</sup> See above, pp 96-7.

<sup>323</sup> See Cyprus II, paras 54 and 56. See, similarly, Spain I, para 101 (examination “several days” after alleged ill-treatment); and Slovenia I, para 55 (domestic inquiry found it “astonishing” that a medical examination had taken place the day after an incident involving the use of force). Cf Denmark I, para 36 (it is “compulsory” under Danish law to call a doctor immediately after use of force/restraint); and Sweden I, para 127 and Iceland I, para 129 (Swedish and Icelandic law oblige a doctor to examine a prisoner to whom a physical restraint has been applied “as soon as possible” after such application).

“a prisoner to whom an instrument of restraint is applied should be kept under constant and adequate custodial surveillance or medical supervision, as the case may be”.<sup>324</sup>

It would appear, therefore, that, for so long as force and/or restraint are applied to a detainee, the CPT is content to see supervision undertaken either by medical staff or - presumably, medically unqualified - custodial staff, provided, in either case, that such supervision is “constant and adequate”. However, such a view would appear to be inconsistent with that which the Committee has elaborated on the slightly different question of who determines when force or restraint is to be applied. In that regard, as we have seen, it considers that leaving it to the discretion, *inter alia*, of untrained staff may lead to the application of force or instruments of restraint “in excess of requirements”.<sup>325</sup> Clearly, if there is a danger of excessive reliance on force/restraint when the decision to apply such measures rests with unqualified staff, then, it must also be the case that that same danger exists when the *supervision* of restrained persons is left to such persons.

As to the regularity with which medical checks ought, in the view of the CPT, to be made on physically restrained detainees in order that they may be considered “constant and adequate”, it has remained largely silent. However, there is arguably a hint of a precept in its first Norwegian visit report. In Norwegian prisons, the CPT observed in 1993, one of a “series” of safeguards to which the application of restraint measures was subject was a medical examination every 24 hours.<sup>326</sup> Given that the Committee “welcome[d]” *en bloc* the various guarantees elaborated by the Norwegian

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<sup>324</sup> See, e.g., Sweden I, para 130 (6<sup>th</sup> indent); Spain I, para 98 (2<sup>nd</sup> indent); and, similarly, Denmark I, paras 38 and 136 (requirement of the “strictest possible” medical supervision or custodial surveillance).

<sup>325</sup> See above, p 334.

<sup>326</sup> See Norway I, para 115.

authorities in this area, we may conclude that it was quite content with such an arrangement. It is surprising, however, that the CPT was not more critical of the arrangement, for, it will be recalled that its precepts on the duration of physical restraint measures do not readily accommodate its application for a period of 24 hours or more.<sup>327</sup>

### *The general supervision of physically restrained detainees*

Beyond the question of the medical supervision of physically restrained detainees there lies that of their supervision in a custodial sense – though, as might be expected (and as we have already seen), there is some overlap between the two practices. The practical consequences of an absence of effective supervision by custodial staff may be seen in the allegations of prisoners interviewed in Denmark in December 1990. These prisoners had had direct experience of the country's system of "special security cells" (cells furnished only with a bed, to which prisoners might be strapped).<sup>328</sup> They alleged, "in particular", that occupants of such cells could be "left alone strapped to the bed for long periods, sometimes a whole night, despite calls for assistance".<sup>329</sup> As a result, the Committee heard - "several times" - "prisoners had [had] no other choice but to comply with the needs of nature in...bed".<sup>330</sup>

The starting-point for any examination of CPT precepts in this area, it is submitted, is the statement in its 2<sup>nd</sup> General Report that:

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<sup>327</sup> See above, pp 340-3.

<sup>328</sup> See Denmark I, para 31.

<sup>329</sup> *Idem*, para 33.

<sup>330</sup> *Ibid.*

“[i]n those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision”.<sup>331</sup>

The rationale for such rigorous supervision is axiomatic: if supervision is “constant and adequate”, the CPT considers, custodial staff are better able to “anticipate crises”<sup>332</sup> and thereby minimise the risk of causing unnecessary harm to persons subject to measures of restraint.

The Committee’s basic precept has been expounded in other published reports. In this regard, as we have seen, the CPT considers that the supervision to which restrained prisoners should, in its view, be subject, may be either custodial or medical, as the case may be;<sup>333</sup> it need not be both, it seems. Further, from remarks made to the Icelandic authorities in the wake of its visit in July 1993, it may be inferred that the Committee considers that adequate supervision also requires not only the monitoring of restrained detainees, but the provision of “support”, where necessary.<sup>334</sup> The nature of such support, however, it did not specify.

Among the range of safeguards enshrined in Norwegian law on the use of restraint in prisons and “welcome[d]” by the CPT following its visit in 1993 were two of relevance in the present connection. The first provided for the making of “at least hourly visual checks” on prisoners held in security cells; and the second for “constant staff attendance” following a detainee’s confinement to a security bed.<sup>335</sup> The CPT was particularly struck by the second of the two safeguards, a reaction that may

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<sup>331</sup> See 2<sup>nd</sup> GR, para 53. See also UK III, para 310; and, similarly, Sweden I, para 130 (4<sup>th</sup> indent) (requirement of “close supervision”); Germany II, para 161 (“appropriate supervision”); and Iceland I, para 128 (“staff should be permanently present”).

<sup>332</sup> See, Italy I, para 172.

<sup>333</sup> See above, p 351.

<sup>334</sup> See Iceland I, para 128.

<sup>335</sup> See Norway I, para 115.

connote endorsement (though, as a potential standard, it adds little to the basic precept elaborated above). As to the first, it offered the view that “more frequent” visual checks on prisoners confined to a security cell would be appropriate.<sup>336</sup>

Thus, we may be sure that in developing its basic precept in this area, the CPT considers that any visual checks carried out on restrained detainees ought to be conducted more frequently than once every hour (though how more frequently it is not clear). In its first Danish visit report, however, it cited, with approval, a suggestion made by a Ministry of Justice working party on the use of the country’s “special security cells” that observations made of restrained detainees should be recorded in detail every quarter of an hour.<sup>337</sup> It may very well be, therefore, that the CPT would consider the carrying out of visual checks on physically restrained detainees at least once every 15 minutes as a most appropriate gesture.

The frequency with which custodial staff are able to monitor restrained detainees may be considered particularly important when the *location* of restraint or security cells is in issue. We shall shortly see how detrimental to the supervision of detainees it is in the view of the CPT to locate such cells away from staff quarters or surveillance points. Little need be said in the present connection, therefore, other than to emphasise just how difficult is the task of monitoring physically restrained detainees “constant[ly] and adequate[ly]” when staff must travel some distance to discharge their duties.

It should be evident from the preceding paragraphs that the nature of the surveillance sought by the CPT in safeguarding the well-being of restrained detainees is not at all clear in its published work. It perhaps came closest to a definitive statement on the matter in its first Danish visit report wherein, as we have seen, it

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<sup>336</sup> Ibid.

<sup>337</sup> See Denmark I, paras 37 (sub-para (i)) and para 38.

considered “some important suggestions” made by a Ministry of Justice working party. One such suggestion – which, it would appear, the Danish authorities had not acted on at the time of the visit in 1990 – sought:

“...the continued surveillance...of the [restrained] prisoner by an appropriately trained prison officer exclusively assigned to the task either from outside the cell or inside”.<sup>338</sup>

For its part, the CPT recommended that the working party’s proposal “be implemented”.<sup>339</sup>

The supervisory practice operating at the Rheinau psychiatric clinic, Switzerland, in July 1991, may also be worth mentioning, in passing, as an example of good practice in the supervision of restrained detainees. There, a delegation observed, each day’s work and measures taken in relation to inmates (including recourse or threat of recourse to force and measures of restraint) were “made the subject of a meeting of medical staff at which all...questions were discussed and steps to be taken determined”.<sup>340</sup>

### ***Recording incidents involving the use of force or instruments of physical restraint***

We have already considered the recording of the application of force or measures of physical restraint against detainees in the context of their medical supervision.<sup>341</sup>

What we have not done so far, however, is to examine the question more broadly, as a matter of custodial record.

The consequences of a failure adequately to record details of recourse to force and/or instruments of restraint have been highlighted by the CPT in a number of visit

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<sup>338</sup> See Denmark I, para 37 (sub-para (i)).

<sup>339</sup> *Idem*, paras 38 and 136.

<sup>340</sup> See Switzerland I, para 134.

<sup>341</sup> See above, pp 349 and 350.

reports. To the German authorities, for example, following a visit to the solitary confinement section in Tegel Prison's Psycho-Neurological Unit in December 1991, the Committee remarked, that "it [had] not [been] possible to establish from the records [kept]...how often use was made of instruments of physical restraint".<sup>342</sup> Similarly, having visited the Lisbon Judicial Police Group Prison, Portugal, in May 1995, the CPT observed that staff interviewed had admitted that inmates could occasionally be transferred to reception cells at night to "cool off" without any record being made of the fact and that if they were returned to a normal cell or dormitory before the following morning, senior staff "would not even be informed orally".<sup>343</sup> "Clearly", the CPT averred, "such a situation is open to abuse".<sup>344</sup> The practice, it stated, significantly, "indicat[ed]...the existence of unofficial quasi-disciplinary practices" at the establishment.<sup>345</sup>

Other recording omissions deemed worthy of comment by the CPT have included failures to record details of an individual's state of health or of any medical treatment administered as a result of his restraint;<sup>346</sup> a failure to provide any clear indication as to the frequency of observations made during the application of restraint measures;<sup>347</sup> failures to indicate "with precision" the duration of an individual's restraint;<sup>348</sup> and a failure to stipulate that prior medical authorisation to a measure has been obtained.<sup>349</sup>

Findings like these have prompted the CPT to observe that:

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<sup>342</sup> See Germany I, para 142. See, similarly, Bulgaria I, para 213 (regarding the perceived consequences of recording practice at the Radnevo Psychiatric Hospital in 1995).

<sup>343</sup> See Portugal II, para 72.

<sup>344</sup> Ibid.

<sup>345</sup> Idem, para 176.

<sup>346</sup> See Netherlands I, paras 63 and 122.

<sup>347</sup> See Spain II, para 203.

<sup>348</sup> See Belgium I, para 199; and, similarly, Bulgaria I, para 213.

<sup>349</sup> See Spain II, para 203.

“[i]t goes without saying that the scrupulous recording of any use of...instruments of physical restraint is a fundamental safeguard against possible abuse and, more generally, represents an essential tool of good management”.<sup>350</sup>

Accordingly, it has recommended that custodial authorities:

“...take appropriate steps to ensure that...any use of instruments of physical restraint, whether or not this is in a medical context, is duly recorded, with a reference to the grounds and the length of time involved”.<sup>351</sup>

This formulation may be taken to represent the CPT’s fundamental understanding of the recording duties of custodial authorities when using force and/or measures of restraint against detainees. In this respect, it helpfully develops its rather spare original formulation, which suggested, simply, that:

“...a record should be kept of every instance of the use of force against prisoners”.<sup>352</sup>

The rationale for such scrupulous record-keeping is simple: not only is full recording necessary, the CPT considers, “[i]n view of the enhanced risk of ill-treatment in situations involving the use of instruments of physical restraint”;<sup>353</sup> but it also “greatly facilitate[s] both the management of...incidents [in which such measures are applied] and the insight into the extent of their occurrence”.<sup>354</sup> Further, it considers, “[t]he proper recording and monitoring of potentially hazardous treatments...is [the] only...way that undesirable practices can be clearly identified by hospital

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<sup>350</sup> See Germany I, para 143. The Committee has justified the assiduous recording of recourse to measures of solitary confinement in exactly the same way: see below, p 462.

<sup>351</sup> Ibid. See also para 199 of the report.

<sup>352</sup> See, e.g., 2<sup>nd</sup> GR, para 53; and UK III, para 310.

<sup>353</sup> See, e.g., Spain II, paras 204 and 227.

<sup>354</sup> See Bulgaria I, para 219; and 8<sup>th</sup> GR, para 50.



management and discussed with staff, who may possibly be out of step because of misunderstandings, etc".<sup>355</sup> Thus, assiduous recording-keeping would have obviated the kind of confusion observed at Hamburg Prison, Germany, in April 1996, where a record purporting to relate to an inmate's detention in a soundproofed "immobilisation" cell failed to disclose whether or not means of restraint had been applied to him and, if so, for how long. Staff interviewed by the CPT "could not remember the details of the case" and the inmate himself was not available for comment, having been transferred to another prison.<sup>356</sup>

What the Committee considers is required of custodial authorities in the recording of recourse to various security measures is, it seems, the following:

(i) that in each establishment in which recourse to force and/or instruments of physical restraint is possible a "central register" containing "full particulars of each case in which [such measures] have been used" should be opened.<sup>357</sup> This register, the CPT has suggested, should be used exclusively to record these particulars and for no other purpose. Accordingly, it should offer a complete record, which exists in addition to and independently of, that contained in a detainee's own medical file and any other relevant document, such as a general medical register.<sup>358</sup> Indeed, the CPT has often remarked that:

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<sup>355</sup> See Turkey I, para 181.

<sup>356</sup> See Germany II, para 163.

<sup>357</sup> See Norway I, para 120 (4<sup>th</sup> indent). In Norwegian law, seemingly, prison authorities are *duty-bound* to record the use of security cells and means of restraint in a "special register": *idem*, para 115. See, similarly, Spain I, para 106, Spain II, paras 106 and 217 and now Spain VI, para 58 (wherein the Committee noted that, while the Spanish authorities had, as a result of its intervention, ordered the creation of central registers in prison establishments, when visited in 1998, no such establishment had put the order into practice); and Sweden I, para 130 (9<sup>th</sup> indent).

<sup>358</sup> See Bulgaria I, paras 219 and 251 (regarding the poor recording practices highlighted at paras 213-215 of the report); and similarly, Slovakia, para 154.

“...every instance of resort to [security] measures [should] be entered in a register *specifically established for that purpose*”.<sup>359</sup>

In respect of the restraint of mentally disturbed detainees, it has recommended, more precisely, that:

“...any use of...physical restraint in respect of a patient should be recorded in *both* the patient’s file and in an appropriate register...”<sup>360</sup>

(ii) that entries made in any register created in order to record recourse to measures of force/restraint should include the times at which such measures are applied and removed, the circumstances in which they are applied, the reasons for resorting to them, the name of the doctor who orders or approves them, the outcome of their application and an account of any injuries sustained by detainees and/or staff.<sup>361</sup> In respect specifically of the application of ECT, this record, the CPT has stated, should indicate, in addition, the amount of electricity and drugs administered to the patient concerned.<sup>362</sup>

(iii) (possibly) that every quarter of an hour details of visual checks made on restrained detainees should be recorded.<sup>363</sup>

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<sup>359</sup> See, e.g., Germany II, para 58 (emphasis added) and, similarly, para 182. At the Kopenick Detention Centre for Foreigners in 1996, the CPT established that “[t]he application of security measures vis-à-vis detainees was [merely] noted in a report which was entered in the centre’s incident register”. See, similarly, Iceland I, para 133 (regarding the complete absence of registers at Litla-Hraun and Sioumuli Prisons, when visited in July 1993).

<sup>360</sup> See, e.g., Cyprus I, paras 137 and 172 (and Cyprus II, para 94) (emphasis added). Cf practice at the Athalassa Psychiatric Hospital in 1992, where incidents involving recourse to physical restraint “were not specially recorded, other than by an entry in the daily nursing report”. By 1996, a register had been devised to record the use of “loose canvas restraint jackets” – though not, it seems, the use of seclusion. See also 3<sup>rd</sup> GR, para 44; and, similarly, 8<sup>th</sup> GR, para 50.

<sup>361</sup> See Bulgaria I, para 219; Germany II, para 164; Belgium II, para 169; and, more generally, 3<sup>rd</sup> GR, para 44; and 8<sup>th</sup> GR, para 50.

<sup>362</sup> See Turkey I, para 181.

<sup>363</sup> See above, p 354 and Denmark I, paras 37 (sub-para (i)) and 38.

### *Staffing matters*

In the application of security measures against detainees, the role of custodial staff is, axiomatically, of crucial importance. Among the most significant features of their role in this respect are the following: the nature and extent of training provided in the use of security measures; the numbers and quality of staff entrusted with their application and supervision; the nature of staff-inmate relations; staff perceptions of the management of establishments; and the role of superior officers. It is worth considering each of these features in turn.

#### *- Training in the use of force and restraint techniques*

The CPT's response to findings – sometimes, even, merely allegations – of ill-treatment in the course of its work is, invariably, to emphasise to States parties the importance of a properly trained and equipped custodial staff. For, while the creation of a thoroughgoing legal regime offering detainees a range of safeguards against abuse is, it considers, “important” in the struggle to eliminate ill-treatment in places of detention, “[it] will never be sufficient”:

“...the best possible guarantee against ill-treatment is for its use to be unequivocally rejected by...officers. It follows that the provision of suitable education on human rights questions and of adequate professional training is an absolutely essential component of any strategy for the prevention of ill-treatment”.<sup>364</sup>

Such training, the Committee considers:

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<sup>364</sup> See, e.g., Poland I, para 19; Belgium II, para 17; and, similarly, Ireland II, para 41 (wherein the CPT remarked that “[t]here is arguably no better guarantee against ill-treatment than a properly trained prison officer, capable of adopting an appropriate attitude in his relations with inmates”).

“...should be pursued at all levels<sup>365</sup>...and be ongoing. It should seek to put across and develop two points. First, that all forms of ill-treatment are an affront to human dignity and as such are incompatible with both [the domestic] law [of States parties] and with the values enshrined in many international instruments ratified and binding upon [such Parties]. Second, that the resort to ill-treatment is a fundamentally flawed method of obtaining reliable evidence for combatting crime. Further, particular attention should be given to training in the art of handling, and more especially speaking to, persons...i.e. interpersonal communication skill...”<sup>366</sup>

Visiting Denmark in 1990, the CPT heard from a number of sources of two instances in which, it was claimed, two individuals of African origin had been seriously ill-treated while detained in the Police Headquarters Prison and, in one instance, the Western Prison, Copenhagen. Specifically, it was alleged that certain warders at the Police Headquarters Prison, “before beating [a] young man, [had] covered his face with a garment” and that another individual had been “severely beaten with truncheons...and subsequently strapped to a cell bed”. In both instances, the Danish Ministry of Justice had initiated judicial investigations.<sup>367</sup> The CPT was “struck by the similarity” of these allegations. “They suggest”, it stated in its subsequent visit report, “that there might be a problem of communication with nationals of states whose languages are little known or not known at all, especially when the behaviour

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<sup>365</sup> I.e. it should be provided for “all ranks and categories” of officer: see Ireland I, para 76 (1<sup>st</sup> indent).

<sup>366</sup> See Poland I, para 19; and Belgium I, para 17. See, similarly, France III, para 19 (in the light of very serious allegations and findings of ill-treatment in police establishments in the country in 1996); and Romania I, para 23 (regarding findings of serious ill-treatment, even torture, in police establishments in 1995).

<sup>367</sup> See Denmark I, paras 19-20.

of the individuals concerned, for a variety of reasons – for example, a failure to understand the reasons for their detention – is disturbed”.<sup>368</sup>

The Committee acknowledged that Danish prison staff are provided with training courses, run “in consultation with the Danish Red Cross and other bodies dealing with refugees and asylum seekers”. Nevertheless, it “share[d] and support[ed]” and sought practical expression of the view of the Governor of Copenhagen Prisons that:

“...specific training courses should be made available for...staff...designed to enable them to deal with emergency situations and provide desperate or emotionally highly disturbed individuals with the necessary help”.<sup>369</sup>

This view also finds expression in Rule 63.2, *EPR*, which provides that:

“[s]taff shall as appropriate be given special technical training to enable them to restrain aggressive prisoners”.

The consequences of a failure adequately to train custodial staff in techniques of restraint and control may be readily predicted. Visiting the *Unite pour Malades Difficiles* at the *Centre Hospitalier Specialise de Montfavet*, France, in 1991, for example, the CPT learned that techniques in the prevention and management of violence “did not appear to be taught to nurses” working there. It is no surprise, therefore, that when asked about the management of agitated patients, one such nurse remarked that “[i]f I were to find myself face to face with a violent patient, I would react just as I would in the street”. Consistent with this candour, visiting Committee

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<sup>368</sup> *Idem*, para 21.

<sup>369</sup> *Ibid.* The use of outside experts in the provision of such training is important to the CPT: see *Ireland I*, para 76 (1<sup>st</sup> indent) and now *Ireland II*, para 41 (2<sup>nd</sup> indent).

members heard “several” allegations of “impulsive reactions (slaps, etc.)” on the part of staff.<sup>370</sup>

Another predictable consequence of the provision of inadequate or unsuitable training in the art of handling violent or agitated detainees is a problem which has been identified already in another context, namely, the creation of “a serious risk of physical restraint being used in excess of requirements”.<sup>371</sup> For example, at the Attica State Mental Hospital for children, Greece, in March 1993, where gauze ligatures attaching one patient to a bed were found to be “obviously too tight” and to have caused circulatory disorders, staff alerted to the problem were said to have been “unaware of the ill-effects which could result from partial obstruction of blood circulation”.<sup>372</sup> Consistent with this level of ignorance, in no Greek mental health establishment visited in 1993, it appears, was there any evidence of instructions issued on the use of instruments of physical restraint or guidance given “regarding the therapeutic expediency of such a measure”.<sup>373</sup>

A similar ignorance appears to have lain behind staff behaviour manifested during an incident at Radece Re-education Centre for Young Persons, Slovenia, in January 1995, in which, according to the authorities, when interviewed one month later, prison officers had met the disruptive behaviour of certain inmates with repeated baton blows.<sup>374</sup> Further, an internal inquiry had concluded that:

“...force had been used prematurely and...the means employed...disproportionate...[O]n occasion, the use of force had been completely without justification...one young person [had] received two blows

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<sup>370</sup> See France I, para 200.

<sup>371</sup> See Greece I, para 255.

<sup>372</sup> *Idem*, para 253.

<sup>373</sup> *Idem*, para 255.

<sup>374</sup> See Slovenia I, paras 52-3 and 99. According to medical information seen by the visiting delegation, six young persons had displayed injuries consistent with the infliction of multiple baton blows: *idem*, para 54.

from officers using batons after he had been brought under control; a second...[had been] hit with a baton while being searched although, apparently, 'he did not resist the search'; and a third... 'against whom means of coercion had already been used' and who [had] refused to get up the following morning, [had been] 'dragged out of bed' and 'struck twice with a baton' ".<sup>375</sup>

Intimating how appropriately trained prison officers would have behaved in the same circumstances, the inquiry had asserted that:

"[i]t would have been more appropriate if staff working with the young persons had attempted to convince them [to desist] before the intervention...[the young persons concerned] could have been restrained by using physical force only, [although]... more time and effort would have been required".<sup>376</sup>

It should be noted in this connection that the CPT considers that:

"[a]n aptitude for interpersonal communication should be a major factor in the process of recruiting [*inter alia*] prison officers and that, during the induction and in-service training of such officers, considerable emphasis should be placed on acquiring and developing interpersonal communication skills".<sup>377</sup>

"The possession of such skills", it maintains, "will often enable a prison officer to defuse a tense situation and thereby avoid the need to have recourse to physical force". Interestingly, notwithstanding the Slovenian inquiry's findings, prison officers interviewed by the visiting delegation stated that "in-service training

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<sup>375</sup> *Idem*, para 55 (and, similarly, para 99).

<sup>376</sup> *Ibid.*

<sup>377</sup> See, *inter alia*, Slovenia I, para 59; Spain I, para, 104; and France III, para 19 (2<sup>nd</sup> indent).

during the last few years had led to a decrease in the use of batons and other similar instruments of restraint; more particularly, training in control and restraint techniques (i.e. physical force as opposed to handcuffs, batons and tear gas) had apparently led to a decrease in an unruly manner”.<sup>378</sup>

The CPT has stated further in this connection that:

“[u]n enseignement des techniques de control physique des patients violents permettrait de reduire sensiblement le risque d’emploi abusif de la force, et le danger pour toutes les personnes impliquees.

“L’existence d’un manuel d’instruction et un entrainement appropriie accompagnes de discussion [in addition to any existing internal regulation]...apporteraient au personnel un sentiment de securite psychologique en presence de situations difficiles ou d’incidents serieux ainsi qu’une liberte plus grande de choisir entre diverses reactions modulees”.<sup>379</sup>

In this way the Committee offered its perspicuous vision of the value of education in ensuring the appropriate application of security measures.<sup>380</sup> Of course, as we have seen, the value of suitable instruction may manifest itself in other ways, too, in the view of the CPT. We know, for instance, that it considers that “one of the hallmarks of a properly-trained and professional prison officer” is the ability to resist the temptation to exact summary retribution against detainees after serious acts of violence, especially those in which prison officers are injured.<sup>381</sup>

As to the *contents* of any training regime created with a view to equipping custodial staff with the skills necessary to manage agitated or violent detainees, the

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<sup>378</sup> See Slovenia I, para 57.

<sup>379</sup> See France I, para 200 and also para 204 (4<sup>th</sup> indent).

<sup>380</sup> See also in this connection – though much less comprehensively – Luxembourg I, para 131.

<sup>381</sup> See above, pp 302-3.



CPT has suggested that they should comprise “both non-physical and manual” control techniques.<sup>382</sup> In an echo of its remarks to the French authorities quoted above, it has sought to justify this approach by proclaiming that:

“[t]he possession of such skills will give staff a greater freedom of choice between various levels of response when confronted by difficult situations. As a result, the risk of injuries to [detainees] or staff will be reduced”.<sup>383</sup>

This, in turn, the CPT’s reasoning runs, is likely to lead to a decrease in the number of complaints of ill-treatment lodged by detainees.<sup>384</sup> As to the control techniques themselves, the CPT has sought to emphasise that these should be such as to:

“...enable a violent prisoner to be controlled rapidly but which at the same time limit injuries on all sides.”<sup>385</sup>

In this connection, it has promoted the acquisition of two skills in particular: namely, “verbal communication techniques [and] postural techniques”.<sup>386</sup> To these two it has added others – albeit tangentially – in other visit reports. For instance, it has, on occasion, called for the study of “behavioural management techniques” among custodial personnel.<sup>387</sup>

The production of instruction manuals on the use of control and restraint techniques and the training of prison officers as so-called Control and Restraint Instructors are measures taken by national authorities which have been welcomed by

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<sup>382</sup> See, e.g., Bulgaria I, para 218; Finland II, para 136; and, more generally, 8<sup>th</sup> GR, para 47. Elsewhere, the Committee has referred – presumably synonymously - to “modern intervention techniques”, which techniques, as might be expected, do not include “meeting violence with violence”: see Netherlands (NA) II, para 17 and now Netherlands (NA) III, para 20.

<sup>383</sup> Ibid. See, similarly, Romania I, para 191.

<sup>384</sup> See Spain VI, para 59.

<sup>385</sup> See Spain I, para 203. The Committee went on to recommend that Spanish prison officers be given “special technical training” in restraint methods.

<sup>386</sup> See, e.g., Belgium I, para 201 (1<sup>st</sup> indent) - and now Belgium II, para 170; Greece I, para 256 (5<sup>th</sup> indent); and Luxembourg I, para 131.

<sup>387</sup> See, e.g., Germany II, para 50.

the CPT as positive developments in promoting the appropriate handling of disturbed detainees. Such measures, it has stated, “have an important part to play in minimising the risk of injury to prisoners, in particular in situations where it may be necessary for inmates to be moved by force from one area of an establishment to another”.<sup>388</sup>

- *Staff: inmate ratios*

While visiting the UK in 1990, the CPT heard a number of allegations from prisoners that prison officers used excessive force when dealing, *inter alia*, with disputes between inmates or “suspected irregularit[ies]” during visits.<sup>389</sup> “More specifically”, it was alleged, prisoners could be physically assaulted by staff while being moved from the scene of an incident to a segregation unit and even once in the unit itself.<sup>390</sup> Commenting on such allegations, the CPT stated that it was “not convinced” that there was a “systematic over-reaction” on the part of prison officers handling such incidents. “However”, it suggested, “there might on occasion be a greater use of force than was reasonably required by the circumstances”.<sup>391</sup> Significantly, it went on to suggest that:

“[s]taffing levels are an important factor in this context. A very low staff/inmate ratio will inevitably lead to prison officers being extremely concerned about the possibility of losing overall control. Under such circumstances, when an incident arises staff will be anxious to subdue it as rapidly as possible, in order to avoid the danger of it spreading; consequently, there will be a significant risk of excessive use of force. When, on the other

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<sup>388</sup> See Ireland I, para 75.

<sup>389</sup> See UK I, paras 86 and 228

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

hand, there is a reasonably good staff/inmate ratio, officers will feel more confident about taking a less hurried approach and attempting to talk out the incident”.<sup>392</sup>

It is clear, therefore, that the CPT considers that staff: inmate ratios should be sufficiently high, first, to minimise the risk of excessive use of force in the suppression of a violent incident or disturbance and, second, to facilitate a measured, negotiated outcome.

- *Staff-inmate relations*

The CPT has sought to emphasise that in the course of a visit it “observes carefully the prevailing climate within an establishment”.<sup>393</sup> Accordingly, it holds as a general tenet of its corpus of standards on the treatment of detainees that:

“[t]he fostering of constructive as opposed to confrontational relations between prison staff and inmates will serve to lower the tension inherent in any prison environment and by the same token significantly reduce the likelihood of violent incidents and associated ill-treatment”.<sup>394</sup>

The consequences for the management and control of potentially disruptive detainees of poor staff-inmate relations has been made plain by the CPT. It felt compelled, for example, to “express serious concern” about the “considerable tension” perceptible in the prison of Puerto de Santa Maria I, Spain, when visited in April 1991. Acknowledging that “the development of constructive prison staff-inmate relations will be extremely difficult in an establishment that is used to accommodate prisoners

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<sup>392</sup> *Idem*, para 87. See also in this regard Greece I, para 255 (where nursing staff in a psychiatric establishment is, *inter alia*, “numerically inadequate having regard to the number of patients in its care”, there exists a “serious risk of physical restraint being used in excess of requirements”).

<sup>393</sup> See 2<sup>nd</sup> GR, para 45.

<sup>394</sup> *Ibid.* See also Spain I, para 104.

considered as dangerous”, it nevertheless felt that:

“such relations are all the more important in such an establishment in view of the fact that a good internal climate is a necessary prerequisite for the maintenance of effective control and security”.<sup>395</sup>

“In short”, therefore, “the CPT wishes to see a spirit of communication and care accompany measures of control and containment [in places of detention]. Such an approach”, it considers, “far from undermining security in the establishment, might well enhance it”.<sup>396</sup> The creation of such a balance, however, may require patience. In Butzow Prison, Germany, for example – where, in April 1996, inmates alleged that some months before the CPT’s visit, prisoners had been struck by prison officers, including with truncheons, while handcuffed to a bed – the Governor readily admitted that “staff recruited a long time ago had not yet entirely assimilated the changes which have taken place in the prison system since reunification” and that “[m]ore efforts...had to be made in the area of vocational training and education”. “Now”, he said, “it was necessary to create a good climate in the establishment and to motivate staff to establish positive relations with prisoners”.<sup>397</sup> In its subsequent visit report, the CPT, for its part, asserted that “[t]he delegation’s on-site observations [had] confirmed the accuracy of this analysis”.<sup>398</sup>

The Committee is also of the view that very careful thought is required in the formulation of “rules and practices capable of generating a climate of tension between staff and [detainees]...” In this regard, it has stated, “[t]he imposition of fines on staff

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<sup>395</sup> See Spain I, para 195. Relations between staff and management in the establishment were also found to be tense, the “[u]nderlying” cause of which, the CPT surmised, was the “fundamental issue” of the prison regime.

<sup>396</sup> See 2<sup>nd</sup> GR, para 45.

<sup>397</sup> See Germany II, paras 80-81.

<sup>398</sup> Ibid.

in the event of an escape by a [detainee] is precisely the kind of measure which can have a negative effect on the ethos within [an]... establishment".<sup>399</sup>

- *The creation of suitable staff support structures*

Following the much-criticised events at the Radece Re-education Centre for Young Persons, Slovenia, just prior to the CPT's visit in February 1995,<sup>400</sup> the country's Minister of Justice determined, *inter alia*, to replace the establishment's Director and certain senior members of staff, "with the stated objective of enabling newly appointed staff to manage the establishment in a sensitive and humane manner, and to assist other members of staff in developing their full potential in the performance of their duties".<sup>401</sup> While "welcom[ing] this decisive response" on the part of the authorities, the CPT was concerned that staff at the Centre felt, "on occasion not [to be] fully supported by the authorities responsible...at the Ministry of Justice". Indeed, they appeared to "doubt...whether their concerns would be taken into account in the reorganisation of the establishment".<sup>402</sup> Accordingly, the Committee encouraged the Slovenian Government to:

"[find] effective means...to ensure that the concerns of staff of all grades are taken into account by the new management of the establishment and by the relevant authorities at the Ministry of Justice".<sup>403</sup>

Clearly, in minimising the risk of the ill-treatment of detainees – especially in the application of force or instruments of physical restraint following a violent incident or disruption, as at Radece – the CPT is certain that a willingness on the part of senior management to listen to and respect the concerns of custodial staff is essential.

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<sup>399</sup> See 8<sup>th</sup> GR, para 31.

<sup>400</sup> See above, pp 363-4.

<sup>401</sup> See Slovenia I, para 56.

<sup>402</sup> Ibid.

<sup>403</sup> Idem, paras 60 and 99.

An absence of appropriate support for custodial staff required to work in environments in which they are likely, even expected, on occasion, to use force and/or instruments of restraint, may have profound consequences. In the view of the CPT:

“...l’exposition permanente a des situations de tension, voire de violence, peut entrainer des reactions psychologiques et comportementales disproportionnees ...pour les membres des forces de l’ordre”.<sup>404</sup>

Lastly in the present connection, in the interest of completeness, it should be recalled that the CPT has stated on a number of occasions that persons in positions of authority (i.e. prison governors, officials at the Ministry of Justice, etc.) should:

“...deliver the clear message [to custodial staff] that the ill-treatment of prisoners is unacceptable and will be severely punished”.<sup>405</sup>

- *The calibre of staff working with potentially violent or agitated detainees*

One reason why custodial staff may too readily resort to force or instruments of physical restraint when faced with disruptive detainees is the simple one of their being ill-suited to the task. The provision of appropriate training may, of course, go a long way towards equipping staff with the necessary expertise. However, such training can never entirely disguise human flaws of character and insensitivity. Visiting Bulgaria in 1995, for instance, a delegation heard allegations of the ill-treatment of patients by staff, especially orderlies, at Radnevo Psychiatric Hospital. Such acts – “notably slaps” - could occur, it was claimed, when patients failed to take prescribed medication or were disobedient. In a linked contention, several members of staff “expressed concern about both the low calibre of persons recruited as orderlies and

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<sup>404</sup> See France III, para 23.

<sup>405</sup> See, generally, above p 336.

the practice of using patients to fill vacant orderly posts”.<sup>406</sup> Notwithstanding such questionable recruitment practices, the visiting delegation heard “relatively few” allegations of ill-treatment and noted that staff-patient relations at the hospital “seemed on the whole to be good”. Further, “effective action” - i.e. dismissal - had been taken in one recent case of physical ill-treatment. It may have been for such reasons that the Committee refrained from making a “specific” recommendation on the matter.

However, it did feel that “certain remarks of relevance to the issue of preventing physical ill-treatment at Radnevo” were necessary.<sup>407</sup> In this regard, it stated that it “shared” the concern of hospital staff regarding the calibre of persons recruited as orderlies, “in particular bearing in mind that it was the practice for two interlinked wards (often accommodating a total patient population in excess of 100) to be staffed at night by 1 nurse and 2 orderlies (one on each ward)”. Under such circumstances, the Committee insisted, “[e]ffective supervision of the orderlies’ activities is clearly not possible...”<sup>408</sup> Consequently, it recommended that:

“...steps be taken to ensure...that candidates for posts of orderlies...are properly screened prior to their recruitment...[and] that orderlies receive adequate training before being assigned to ward duties, in particular at night”.<sup>409</sup>

It expressed further “misgivings” about the practice – mirrored, incidentally, in the psychiatric section of Lovetch Prison Hospital - of using “healthy” patients to fill vacant orderly posts. In this regard, it recommended that:

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<sup>406</sup> See Bulgaria I, para 183.

<sup>407</sup> Ibid.

<sup>408</sup> Idem, para 210.

<sup>409</sup> Ibid.

“...the appointment of patients or prisoners as orderlies in a health establishment [should] be seen as a measure of last resort...if such appointments are inevitable, the activities of such orderlies should be supervised on an on-going basis by qualified health-care staff”.<sup>410</sup>

Similarly, the Committee had “strong doubts” about the “advisability” of the arrangement at Radnevo whereby staff could “call for the support of a group of patients from the alcoholics’ ward in the event of acutely disturbed behaviour occurring during periods of low staff attendance in the wards (i.e. between 1.30 pm and 7.20 am)”. In the Committee’s view, “[t]he existence of such a system [was] a clear indication that staffing levels in the hospital [were] insufficient”. Consequently, it recommended that:

“...resolving episodes of acutely disturbed behaviour [should] be the responsibility of qualified health-care staff, not fellow patients”.<sup>411</sup>

Such an approach – or, at least, one resembling it – appeared to have been given practical effect by the UK authorities when the country was visited in 1990. Witnessing the removal of prisoners under force to segregation units at both Wandsworth and Brixton Prisons, a CPT delegation saw how, in both instances, the segregation unit staff “immediately took...charge of the prisoner[s] from the wing staff who had brought [them] to the unit[s]”. This, the Committee subsequently observed, was a “sensible approach” – although, in practice, its delegation learned, it was “not always possible to adhere strictly to th[e] procedure”, with the result that wing officers could become involved in the “location and settling down

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<sup>410</sup> *Idem*, para 211.

<sup>411</sup> *Idem*, para 212.



procedures”.<sup>412</sup> Nevertheless, the CPT’s expression of approbation here is sufficient, it is submitted, to permit the identification of the essence of what is, potentially, one of its most fundamental precepts in this area: namely, that violent or agitated detainees should be placed in the hands of *specially-designated* - and, necessarily therefore, specially-trained - members of custodial staff *as soon as circumstances permit* after the violence or agitation erupts; reliance on staff not so designated should be minimised – and should be resorted to, presumably, only *in extremis*.

### *Miscellaneous matters*

To end the present analysis of CPT standards on the use of security measures against detainees, we shall consider several precepts – or, at least, incipient precepts – which do not fit easily into any of the categories already elaborated.

- *Access to official complaints mechanisms*

Although a rather self-evident extension of its views on complaints mechanisms in places of detention generally, it is worth noting that the CPT is particularly concerned to encourage the creation of and appropriate access to “effective” avenues of complaint for prisoners against whom means of coercion have been used.<sup>413</sup>

- *Before taking the decision to use force or instruments of physical restraint, the custodial authorities should take account of a detainee’s medical condition*

It ought to be the case that if all the procedural guarantees identified above – in particular, that of obtaining medical authorisation – are adhered to when security measures are in the contemplation of custodial authorities, the medical condition of the detainee to whom they are to be applied becomes a material, even determinative,

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<sup>412</sup> See UK I, para 89.

<sup>413</sup> See, e.g., Czech Republic I, para 79.

consideration. The following instance, however, demonstrates the need to reinforce the principle, it is submitted. At the Prison of Puerto de Santa Maria II, Spain, in April 1991, a CPT delegation was struck by the treatment of one inmate who, despite having been diagnosed as an epileptic, had been placed in an isolation cell following an outburst of aggressive behaviour and handcuffed by his hands and feet to the cell bed – “the latter action being taken with the consent of a prison doctor”. In the Committee’s view, “[t]his was a procedure that carrie[d] great risks for a person with such a medical condition”.<sup>414</sup>

- *Post-disturbance procedure*

While visiting HM Young Offender Institution and Remand Centre, Feltham, England, in May 1994, the CPT learned of a past dispute between inmates which had culminated in the application of control and restraint measures. One of the inmates concerned, it appears, had received injuries while being overpowered.<sup>415</sup> However, while such an outcome is regrettable, it is what happened subsequently which is of greater interest in the present connection, for, “[t]he delegation received a positive impression of the manner in which [it had been] subsequently handled, from both the administrative and...medical points of view”. Of “particular” interest in this regard, the CPT remarked in its third UK visit report, was the institution of “an inquiry...undertaken by the Governor and the local police”.<sup>416</sup>

It would appear, therefore, that the Committee favours the establishment of some means of inquiry following incidents in which the application of force and/or measures of restraint has been deemed necessary by the authorities, particularly if such application has occasioned injury. As to the nature of such inquiry, the CPT has

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<sup>414</sup> See Spain I, para 97.

<sup>415</sup> See UK III, para 130.

<sup>416</sup> Ibid.

said little. Clearly, it did not object to the character of that which had been established at Feltham, involving the Governor and the local police. However, from observations made following its visit to Denmark in 1996, it would appear that its preference is for an *external* investigation (in which, presumably, a considerable degree of independence is manifest). In Denmark, it will be recalled, the visiting delegation met a detainee who claimed to have been ill-treated - and, indeed, injured - by prison officers at the Sandholm Institution some months before the visit. An “internal management investigation” had concluded that the force used by the officers, while regrettable, had been reasonable in the circumstances and applied correctly.<sup>417</sup> For its part, the CPT remained “unconvinced by this response to the... incident”. It considered it “regrettable that only an internal investigation [had been] conducted into the events”.<sup>418</sup> Consequently, it recommended that the Danish authorities commission an external inquiry.<sup>419</sup>

- *Management of restraint/security cells*

It goes without saying that in order truly to be effective and to minimise the risk of excessive recourse to force and/or instruments of restraint, it should be clear to all concerned just who is responsible for the management of cells in which persons may be restrained. The consequences of a failure sufficiently to identify those so responsible may occasion unnecessary confusion – or, worse, provide the obscurity necessary to shield the perpetrators of ill-treatment from detection. The risk to the welfare of detainees to which such possibilities give rise can be easily imagined. For instance, visiting the “cellule psychiatrique” (known as “ISO.C”) in the Centre medico-chirurgical (“CMC”) at the prison de St-Gilles, Belgium, in November 1993,

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<sup>417</sup> See above, pp 312-13.

<sup>418</sup> See Denmark II, para 48.

<sup>419</sup> *Idem*, para 49.

the CPT found that the arrangements made as to the responsibility for the premises and the placement therein of patients were “ambiguous”: “[a]pparently, the cell could be used for the placement both of detainees from the prison de St-Gilles and patients from the CMC, in both instances under the responsibility of the respectively competent doctor”.<sup>420</sup> As a result, in the case of one restrained person seen, medical staff were unable to indicate the precise reasons for and start-time both of his original placement and of the subsequent application of measures of restraint.<sup>421</sup> With regard to the prevention of ill-treatment and the preservation of his dignity, therefore, it remained uncertain precisely how long he had been held thus.

### ***Conclusion***

Recourse to force and/or measures of restraint may be necessary in every kind of custodial environment. Further, this need may manifest itself in many different ways. The first part of this chapter was devoted to the various restraint techniques deployed by custodial authorities in order to subdue agitated or violent detainees or to quell disturbances, of which some, like the appropriate application of handcuffs, the CPT approves, while others, like the – rare – use of electric shock batons (for instance, in some Spanish and Cypriot prisons visited, it seems), or irons and shackles (found to be used, *inter alia*, in certain German prisons and Belgian and Bulgarian psychiatric establishments), it clearly abhors. Subsequently, the use of force/restraint in particular circumstances was considered and detailed CPT precepts were identified in respect of the following:

- the use of force by police officers in the course of apprehending persons and, thereafter, in the event of violence or agitation on police premises (following

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<sup>420</sup> See Belgium I, para 199.

<sup>421</sup> *Ibid.*

allegations and findings of ill-treatment, *inter alia*, in Hungary and Slovakia, and indeed torture, *inter alia*, in Austria, Spain, Portugal and Turkey);

- recourse to force in prison establishments (on which CPT standards are very much consistent with those elaborated on the use of force by the police; indeed, they emerge from similar allegations and findings - most notably the use of outside intervention forces to subdue prison disturbances in Portugal and the Netherlands Antilles);

- the restraint of mentally disturbed persons (concerning, *inter alia*, the balance to be struck between the therapeutic and custodial roles of staff in psychiatric establishments, the environment in which restraint techniques may be applied (as elaborated *inter alia* in Greek and Italian reports), the crucial role of medical staff in the application of such techniques (Denmark), the importance of sedation in controlling disturbed psychiatric patients (Iceland; Germany) and the need to provide appropriate training for staff who work in such environments (Spain; the UK));

- the medical treatment of detainees without consent (on which, it must be stated, the CPT offers very thorough analysis indeed following findings, *inter alia*, in Germany);

- the restraint of hospitalised detainees (regarding, *inter alia*, the restraint of expectant mothers (France), the medical examination of restrained detainees (the Netherlands) and ways of guaranteeing the security of the environment in which the medical examination and treatment of detainees takes place (Luxembourg; Romania));

- the restraint of administratively detained foreign nationals (concerning, notably, procedure on and safeguards attending, the expulsion of such persons, developed in the wake of visits *inter alia* to Austria, Belgium, France and Germany); and

- the physical chastisement of juveniles (concerning, most notably, the Committee's proclaimed *preference* for the complete prohibition of such measures (Portugal)).

In examining safeguards attending the use of force and instruments of restraint, we considered, *inter alia*, the need for formal regulation (Denmark; Greece), as well as the contents of policies formulated thereunder; the exceptional nature of such measures (in this regard Swedish prison practice has been particularly commended by the CPT); the requirement of proportionality in their application (Germany; the Netherlands); the prohibition of their use as a punishment (a principle given expression, *inter alia*, in Danish and Norwegian law); the duration of their application; the need for (medical) authorisation (Greece; Belgium; the UK); the need to monitor restrained detainees, both in a medical and in a general custodial sense (Sweden; Spain; Iceland); the particular recording requirements when force/restraint is applied; and a number of staffing matters (notably the provision of training in the use of restraint techniques, staff-inmate relations and staff support structures).

The study was completed with a brief look at a number of miscellaneous precepts which supplement the body of standards elaborated by the CPT generally in this area. Clearly, the Committee has devoted much effort to formulating detailed and sensitive precepts on force/restraint techniques, many of which have emerged from its analysis of particular circumstances encountered in the course of visits. These precepts are, as a consequence, reflective and judicious. Their reach is broad and thoroughgoing and is difficult to criticise (a general failure to state how often examinations, both medical and general, should be made of restrained persons, hardly amounts to a significant *lacuna*). In sum, there is much to commend in the CPT's work in this area; it may be said to have developed a thoughtful and well-crafted corpus of standards.

## The Application of Solitary Confinement (and Related Security) Measures in Places of Detention

### *Introduction: grounds on which solitary confinement may be sought or imposed*

The separation of individual detainees from their fellow captives is a measure to which custodial authorities - whether in prisons, police stations, psychiatric establishments, juvenile detention centres, *etc.* - may resort for any one of a number of reasons. Most obviously, it may be imposed as a means of discipline. In the experience of visiting CPT delegations, however, it has taken, in addition, numerous other forms:

(i) The imposition on *remand prisoners* of restrictions on contact with other detainees and/or the outside world (affecting, *inter alia*, family visits, correspondence, detainees' supervision and access to newspapers, radio and television) has been legitimised by some Parties "in the interests of [a criminal] investigation" or - presumably synonymously - "to the extent that the investigation of the case would be served thereby". Thus, restrictions may be used as a means, *inter alia*, of forestalling collusion with and/or efforts to exert influence over, other persons connected with an investigation.<sup>1</sup>

In some States parties, the solitary confinement of remand prisoners is – or, at least, has been, until recently – “systematic”<sup>2</sup> or “routine”.<sup>3</sup> The CPT, for its part,

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<sup>1</sup> See, e.g., Denmark I, App 2, para 11; and Norway I, para 58. See further below, pp 386 *et seq* and pp 464-5. The related question of the incommunicado detention of criminal suspects held in police custody is dealt with above, in Chapter 6.

<sup>2</sup> See Iceland I, para 60 (though *cf* paras 61 and 167); and now Iceland II, para 49 (at Litla-Hraun State Prison in 1998 “nearly all remand prisoners were still being placed in solitary confinement for investigation purposes”).

<sup>3</sup> See Norway I, para 59.

while accepting that “it might be necessary, in certain cases, to impose restrictions on remand prisoners’ contacts with others in order to safeguard the interests of justice”,<sup>4</sup> regards such *systematic* imposition as exceptionable.<sup>5</sup> Such practice, it may be argued, betrays an absence of thought on the part of the custodial authorities, who appear mechanically to assume that the interests of the investigation *automatically* demand such measures.

(ii) Removal from association may also be authorised for a person’s own protection: where, for example, he is or fears becoming, the victim of intimidation or violence<sup>6</sup> or is subject to the control or excessive influence of other detainees.<sup>7</sup> In this connection, at the Western and Horsens State Prisons, Denmark, in late 1996, the CPT was told that incidents of “inter-prisoner intimidation/violence” were a “feature of life”. The Governor of the former admitted that the prison had “recently been plagued by a series of [such] attacks on a scale, and of a ferocity, which he had never previously encountered”.<sup>8</sup> In both prisons, the visiting delegation observed, approximately 30% of the inmate population was either being held in voluntary solitary confinement or had requested to be so held. Although such inmates’ regimes were “much more restrictive” than those enjoyed by prisoners held on “normal” location, interviews with staff and inmates indicated that, “for a variety of reasons (including fear of ‘strong’ inmates and/or inability to pay drug-related debts), this was considered to be

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<sup>4</sup> *Idem*, para 65. See also Norway II, para 19.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, e.g., UK I, para 26; and, similarly, Finland I, para 68. Interestingly, Finnish prison regulations provide that where a sentenced prisoner is segregated for his own protection, the authorities must attempt to place him in an environment *other than* an isolation unit.

<sup>7</sup> See, e.g., Italy I, para 143 (3<sup>rd</sup> indent).

<sup>8</sup> See Denmark II, para 51.



an attractive option by almost one third of inmates at each prison. Indeed, at Horsens...there was a 'waiting-list' of inmates who had made such requests".<sup>9</sup>

Similarly, the CPT considered that the "frequent and severe acts of violence" between inmates – e.g. beatings and, occasionally, slashing of the face or body with a knife, often in connection with drug-related debts – alleged to occur at Helsinki Central Prison, Finland, when visited in May 1992, could conceivably account for the "high number" of prisoners (about 15% of the total population, according to staff) seeking voluntary segregation there at any one time. The fact that this violence, the Committee claimed, "sometimes went undetected," that even if it was discovered, "little effective action" was taken, that there existed "a low level of [staff] supervision" of activities and that some staff "openly admitted" that they had not received even basic training in the tasks which they were expected to perform, undoubtedly compounded the palpable fear of these "pelkolas" ("the fearful ones").<sup>10</sup>

(iii) Segregation may be resorted to when "it appears desirable, for the maintenance of good order or discipline";<sup>11</sup> for example, where, in the absence of proof that a formal disciplinary offence has been committed by a detainee, the detaining authorities "possess...knowledge...that he has caused, is causing or is likely to cause, trouble or subversion"<sup>12</sup> or is acting as a "bad influence" on fellow detainees.<sup>13</sup>

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<sup>9</sup> Ibid. See, in the same connection, Iceland II, para 95 (regarding the consequences of inter-prisoner violence at Litla-Hraun State Prison, March/April 1998).

<sup>10</sup> See Finland I, paras 60-1. By June 1998, the number of persons seeking voluntary segregation in the establishment had risen to 20%. Further, at Riihimäki Central Prison, the figure was 25% and comprised both "fearful ones" and "most fearful ones": see Finland II, paras 57 and 58.

<sup>11</sup> See UK I, para 26. See, similarly, Germany I, App III, para 14.

<sup>12</sup> Idem, para 188. See, similarly, UK III, para 317 (a "disruptive" – and, therefore, segregated – prisoner is one "who is considered to pose a serious threat to the management or stability of a prison through subversion and/or disruption and is substantiated by a record of appropriate intelligence and information"); and Netherlands I, para 66.

<sup>13</sup> See Germany I, App III, para 14; and, similarly, Norway I, para 69 (sub-para c).

(iv) It may be sought or imposed not only when a detainee is considered to represent a danger to himself or others,<sup>14</sup> but also when his conduct is thought to represent a danger to “objects”<sup>15</sup> – particularly if such conduct is recurrent or repetitive.<sup>16</sup>

(v) Further, seclusion may be resorted to when it is considered necessary to prevent escape<sup>17</sup> or the commission of (serious) criminal acts<sup>18</sup> – especially if drug-related;<sup>19</sup> on grounds of national security<sup>20</sup> (*inter alia*, where “escape would be highly dangerous to the public or to the police or to the security of the State”<sup>21</sup>); temporarily, when a detainee becomes, *inter alia*, intoxicated<sup>22</sup> or is affected by withdrawal symptoms or so-called “body-pack syndrome” (i.e. when he has concealed drugs within his body by means of the ingestion of sachets);<sup>23</sup> pending a disciplinary hearing (when it is considered necessary in order to avoid jeopardising the investigation);<sup>24</sup> for “observation purposes” on a detainee’s arrival in an establishment;<sup>25</sup> in the aftermath of a disturbance or riot;<sup>26</sup> following a detainee’s transfer from another establishment (which transfer is made, *inter alia*, in the interests of good order and discipline);<sup>27</sup> and when other disciplinary sanctions have proved ineffective.<sup>28</sup>

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<sup>14</sup> See, e.g., Sweden I, App III, para 16.

<sup>15</sup> See Portugal I, App 3, para 11 and main text, para 64.

<sup>16</sup> See, e.g., Norway I, para 69; Belgium I, para 101 (3<sup>rd</sup> indent); and Spain I, App II, para 19.

<sup>17</sup> See, e.g., Sweden I, App III, para 16 and main text, para 86; and Portugal I, App 3, para 11 and main text, para 64.

<sup>18</sup> See Sweden I, App III, para 16; and Bulgaria I, para 167.

<sup>19</sup> See, e.g., Norway I, para 69 (sub-para b).

<sup>20</sup> See Iceland I, para 123.

<sup>21</sup> See UK III, para 111.

<sup>22</sup> See Sweden I, App III, para 16; and, in the same connection, Finland I, para 68.

<sup>23</sup> See Greece I, para 182.

<sup>24</sup> See Sweden I, App III, para 16; and, in the same connection, UK III, para 352.

<sup>25</sup> See Netherlands I, para 135 (2<sup>nd</sup> indent).

<sup>26</sup> See, e.g., Belgium I, para 101 (3<sup>rd</sup> indent).

<sup>27</sup> See UK III, para 111.

<sup>28</sup> See Belgium I, para 228.

It is worth noting that consistent with a number of these grounds, in its 2<sup>nd</sup> General Report the CPT accepted as legitimate grounds for solitary confinement, in addition to that of discipline:

“discipline-related/security reasons (eg...the interests of “good order” within an establishment)...‘dangerousness’ or...‘troublesome’ behaviour...the interests of a criminal investigation; at [a prisoner’s] own request...”<sup>29</sup>

(vi) Grounds much less commonly encountered by the CPT include, in German law, “reasons inherent in the prisoner’s person”;<sup>30</sup> in Bulgarian law, following the imposition of (and subsequent moratorium on) a death sentence,<sup>31</sup> and, in Slovakian law - in respect of juvenile detainees who, *inter alia*, exhibit aggressive behaviour, attempt escape or use alcohol - “educational” purposes.<sup>32</sup>

(vii) Moreover, segregation has been considered necessary – particularly in prison establishments – in circumstances in which a person’s behaviour *prior to* his detention has given rise to particular concern. For example, where he is convicted of a crime of a “caractere exceptionnellement violent...[ou]...ayant cause une grande inquietude dans la societe”.<sup>33</sup> Some authorities, indeed, have gone so far as to create small detention units within existing establishments specifically designed to accommodate detainees “who present an extreme risk for society and/or the penal environment, and for whom existing security measures do not seem sufficient”.<sup>34</sup>

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<sup>29</sup> See 2<sup>nd</sup> GR, paras 55-6.

<sup>30</sup> See Germany I, para 81 (2<sup>nd</sup> indent). The CPT’s request for “clarification” of this provision would suggest that it is puzzled and not a little troubled by it.

<sup>31</sup> See Bulgaria I, paras 111-12 and 167.

<sup>32</sup> See Slovakia I, para 156. As encountered in 1995, however, the educational quotient of such isolation was questionable: *idem*, para 159.

<sup>33</sup> See Belgium I, para 101 (1<sup>st</sup> indent). See, in the same connection, Italy I, para 144; and Italy II, para 77 (regarding the practice of segregating detainees on account of suspected links with organised crime).

<sup>34</sup> *Idem*, para 102 (regarding the “Quartiers de Securite Renforcee” established in Belgian prisons).

(viii) Unique to the Northern Irish prison estate – which, in July 1993, was accommodating large numbers of persons convicted of terrorist-related offences, in addition to “ordinary” convicted criminals - is a ground of isolation which has evolved directly out of the exigencies of the “Troubles”. In Northern Irish gaols, the visiting delegation observed, convicted terrorist offenders could benefit from the same regime - characterised as “reasonable” by the CPT<sup>35</sup> - as ordinary criminal offenders *provided* that they agreed to serve their sentences in establishments “free from paramilitary influence”.<sup>36</sup> If they insisted on serving their sentences in the so-called “Maze” Prison, where, at the time, such influence was rife, even, arguably, institutionalised, they could spend up to 28 days in the assessment unit “locked in their cells for 23 hours a day or more, being released only to slop out and wash”.<sup>37</sup> Prisoners might be subjected to this “very restricted” regime, interviewees stated, in order to “persuade” them to choose to serve their sentences in a prison other than the Maze. The authorities admitted, however, that it was “relatively uncommon” for persons convicted of terrorist offences to make such a choice: in the six weeks preceding the CPT’s visit, only two prisoners had done so; and it was estimated that in an average year, only about 10% of “loyalist” and 2% of “republican” prisoners would follow suit.<sup>38</sup> These same interlocutors sought to rationalise recourse to the restrictive measures by reference to the length of sentence which might be served by convicted terrorists: “the benefit to each individual prisoner who did choose not to go to the Maze Prison”, they claimed, “justified the restrictions placed upon certain other prisoners... for two to four weeks”.<sup>39</sup>

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<sup>35</sup> See UK II, para 130.

<sup>36</sup> *Idem*, para 131.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* As to the meaning of the terms “loyalist” and “republican”, as applied in the context of Northern Ireland’s recent tribulations, see, *inter alia*, para 9 of the report.

<sup>39</sup> *Ibid.*

(ix) Another – potentially controversial – ground of segregation encountered by the CPT is that of ill health. In Greek law, for instance, a prison director is authorised to order that a prisoner suffering from an infectious disease may be confined in a “special cell” until the infection abates. If he fails to recover, “transfer...to a specialist state hospital for treatment” may be deemed necessary.<sup>40</sup>

(x) Regarding, specifically, mentally disordered detainees, recourse to measures of isolation have been authorised, *inter alia*, in the event of “une agitation majeure” or “une serieuse depression”.<sup>41</sup>

### ***Use of restrictions/solitary confinement by police officers in order to advance a criminal investigation***

One of the grounds of isolation invoked by States parties which has been expressly deprecated by the CPT in its published work and which may, accordingly, be worth examining in detail, is that of advancing a criminal investigation. Such a possibility exercised CPT delegations to Norway in both 1993 and 1997. As we have seen, Norwegian courts may, “to the extent that the investigation of the case would be served thereby”, rule that a person remanded in custody in connection with a criminal offence be subject to any one of a number of specified restrictions.<sup>42</sup> However, the “general impression” gained by the CPT delegation which visited in 1993 was that “the imposition of restrictions lay, in reality, in the hands of the police [and not the courts] and that they made liberal use of this possibility”.<sup>43</sup> In the view of “[m]any” prisoners interviewed – as well as “certain” prison officers and health workers – the

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<sup>40</sup> See Greece I, para 132 (note 4). See also in this connection Italy I, p 48 (note 9).

<sup>41</sup> See France I, para 170 (regarding the treatment of persons in the Service Medico-Psychologique Regional at the maison d’arret de Marseille-Baumettes, October/November 1991).

<sup>42</sup> See above, p 380.

<sup>43</sup> See Norway I, para 60.

regime to which solitarily confined remand prisoners were subject was “psychologically oppressive”: “[s]everal” persons met suggested that the police “tended not only to use restrictions to safeguard the interests of justice”, as the relevant legislation permits, “but also exploited them as a means of exerting pressure on detainees with the aim of advancing their enquiries”. “In particular,” it was alleged, “police officers in charge of...investigations had explicitly stated that...measures would be eased or lifted if [detainees] co-operated with the police”.<sup>44</sup>

Noting that “the use of threats, pressure, false information and promises is expressly forbidden by [Norway’s] Prosecution Instructions”,<sup>45</sup> and, as we have seen, accepting that “it may be necessary, in certain cases, to impose restrictions on remand prisoners’ contacts with others in order to safeguard the interests of justice”,<sup>46</sup> the CPT nevertheless sought to impress on the authorities its view that:

“...under no circumstances would it be acceptable to apply restrictive measures of this kind in order to exert psychological pressure on a detainee”.<sup>47</sup>

However, visiting Norway for a second time in March 1997, with the express intention of examining, *inter alia*, the solitary confinement of remand prisoners by court order,<sup>48</sup> the Committee met “many” detainees who, like their predecessors, “expressed the belief that the purpose of restrictions was to exert psychological pressure on them, that restrictions were most common when the police had a weak case and that, even if it had not been explicitly stated by the police, restrictions would be eased or lifted in response to co-operation with the[m]”.<sup>49</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> *Idem*, para 65. See also Norway II, para 19.

<sup>47</sup> Ibid.

<sup>48</sup> See Norway II, para 1. The visit was an *ad hoc* one, whose “primary aim” was to “verify on the spot the situation of detained persons in Norway”, especially in the light of the Government’s failure “to dispel all the CPT’s concerns... in this area” (para 20).

<sup>49</sup> *Idem*, para 34.

In its first visit report, the CPT asked the Norwegian authorities whether police exploitation of the procedure for the solitary confinement of remand prisoners “as a means of exerting pressure...with the aim of advancing their enquiries”, would constitute a breach of the relevant provisions in the Prosecution Instructions.<sup>50</sup> In their reply, the CPT observed in its second visit report, the authorities stated that:

“an investigator may advise suspects that if they continue to refuse to make a statement then the police will petition for a ban on or surveillance of correspondence and visits or an extension thereof. The investigator may inform suspects of the *prosecutal* (sic) consequences that will result from their stand. Suspects may also be informed that the restriction will be loosened if they co-operate”.<sup>51</sup>

According to a “senior police official” interviewed during the Committee’s second visit, this statement of position accurately represented police practice in this area. He added that adherence to section 92 of the country’s *Code of Criminal Procedure* – which forbids the making of promises to or the coercion of, detainees – does not mean that it is unlawful for police officers to offer to relax or lift restrictions in response to co-operation with them.<sup>52</sup> However, the Norwegian authorities did acknowledge that the exploitation of “information on the use on or surveillance of correspondence and visits would constitute a violation of the Prosecution Instructions when used without ‘procedural basis’ for petitioning for or repealing such a ban or surveillance”.<sup>53</sup> Further, they declared, it was “unacceptable to use restrictive measures to create

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<sup>50</sup> See Norway I, para 60 (and, subsequently, Norway II, para 34).

<sup>51</sup> See Norway II, para 34 - quoting directly from Norway Response I, CPT/Inf (94) 12, p 16 (original emphasis).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid (quoting from Norway Response I, op cit, n 51 above, at p 17).

psychological pressure on persons charged with an offence” – a gesture “welcome[d]” by the CPT.<sup>54</sup> “Nevertheless,” the Committee maintained:

“[it had] misgivings as regards [the authorities’] opinion...that the police may legitimately invoke the possibility of imposing, relaxing or lifting restrictions when questioning suspects...To advise someone that a failure to co-operate will lead to the imposition (or continuation) of restrictions or, conversely, that willingness to co-operate will lead to the relaxation or lifting of restrictions, would appear – at first sight at least – to correspond closely to the concepts of ‘coercion’ or ‘promises’ [prohibited by Section 92 of the CCP]”.<sup>55</sup>

“Further,” it continued:

“the distinction which the Norwegian authorities seek to make between information on the use of restrictions which is provided with – as opposed to information which is provided without – ‘procedural basis,’ opens the door to abuse. This approach could clearly encourage the police to seek to justify the imposition (or the continuation) of restrictions even in cases when they know that due consideration for the investigation does not require such a measure”.<sup>56</sup>

“[I]n the light of these observations,” the CPT concluded, the Norwegian authorities ought to “review” the substance of the Prosecution Instructions.<sup>57</sup> Clearly, therefore, the Committee considers that recourse or the threat of recourse *inter alia* to solitary confinement by the police as a means of exerting a certain psychological pressure on detainees in order to advance their inquiries is unacceptable.<sup>58</sup> This view would

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<sup>54</sup> *Idem*, para 37 (quoting from Norway Response I, *op cit*, n 51 above, at p 16).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> See, in the same connection, Italy II, para 93 (regarding the CPT’s suspicion in 1995 that segregation was being used by the authorities “as a means of psychological pressure with a view to prompting [a detainee’s] dissociation [from organised crime] or collaboration [with the police]”).



appear to reflect the purport of the *European Prison Rules* in this area, Rule 91 of which provides that:

“Without prejudice to legal rules for the protection of individual liberty or prescribing the procedure to be observed in respect of untried prisoners, these prisoners, who are presumed to be innocent until they are found guilty, shall be...*treated without restrictions other than those necessary for the penal procedure and the security of the institution*”.<sup>59</sup>

### ***Disciplinary and non-disciplinary segregation***

It is worth noting, in passing, that in some States parties, the practice of punishing detainees for a breach of discipline by means of their solitary confinement has been discontinued<sup>60</sup> - although the discretion to separate them for reasons related, *inter alia*, to good order and discipline has been retained.<sup>61</sup> The CPT, for its part, has expressed no opinion as to the merit of such desuetude. By contrast, however, contemplating the use of segregation beyond the disciplinary (and security) sphere, it has observed that:

“...the placement of prisoners in non-voluntary solitary confinement for other than disciplinary or security reasons is a questionable practice, even when it is said that that measure is being effected for the long term good of the prisoner concerned”.<sup>62</sup>

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<sup>59</sup> Emphasis added.

<sup>60</sup> See, e.g., Sweden I, App III, para 17.

<sup>61</sup> *Idem*, para 131.

<sup>62</sup> See UK II, para 132. The Committee offered this opinion in the light of its delegation's findings in 1993 that segregation was being used by the authorities in order to “persuade” convicted terrorist offenders to choose to serve their sentences in an establishment “free from paramilitary influence”: see, generally, above, p 385.

### *Possible effects of isolation*

The imposition of restrictions on a detainee – in particular, his solitary confinement – occasions certain dangers, especially in respect of his personality. Such dangers were highlighted by the Committee of Ministers of the Council of Europe in Recommendation No. R (82) 17 on the custody and treatment of dangerous prisoners.<sup>63</sup> Therein, the possible “deleterious effects” of isolation are listed as:

“...decreased mental efficiency, depression, anxiety, aggressiveness, neurosis, negative values, altered biorhythms”.<sup>64</sup>

Further, the Recommendation suggests:

“[i]n the most serious instances prisoners [may] regress to a merely vegetative life”.<sup>65</sup>

As for the prognosis of a detainee exposed to such dangers, “[g]enerally”, the Recommendation states:

“the impairment may be reversible but if imprisonment, especially in maximum security, is prolonged, perception of time and space and self can be permanently and seriously impaired – [which condition might be characterised as] ‘annihilation of personality’”.<sup>66</sup>

This view seems to have been shared by specialists in the field of psychiatry and psychology encountered by visiting CPT delegations. For example, in Iceland in 1993, one delegation learned, the (now discontinued) practice of systematically isolating remand prisoners for “extended” periods – “often several months and in rare

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<sup>63</sup> The recommendation was adopted by the Committee of Ministers on 24<sup>th</sup> September 1982 at the 350<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>64</sup> See para 43 of the Recommendation, quoted by the CPT in Spain I, para 109 and Switzerland I, para 50.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

cases more than a year”<sup>67</sup> – had been criticised previously by a domestic committee established in order to examine prisons, prison policy and future developments. This committee had concluded in respect of segregation practice in one establishment in particular, namely Sioumuli Prison, *inter alia*, that:

“psychiatrists, psychologists and other specialists have stressed that solitary confinement...has a harmful effect on prisoner’s mental and physical health, particularly in the case of those detained for long periods”.<sup>68</sup>

The results of similar research carried out in Denmark in the early 1990s were published in May 1994. Among them was the claim that:

“...remand in custody in solitary confinement versus non-solitary confinement involves the risk of harmful effects on mental health...there is a greater probability that those in solitary confinement develop mental problems and are transferred to prison hospitals for mental reasons than those who are not placed in solitary confinement”.<sup>69</sup>

Interestingly, however, the same study found “no proven link between the *length* of judicially-ordered solitary confinement and prisoners’ mental health”.<sup>70</sup> Rather, it concluded:

“...the harmful effects of solitary confinement are not in general such as to result in abnormalities in the cognitive functions, e.g. concentration and memory”.<sup>71</sup>

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<sup>67</sup> See Iceland I, para 60.

<sup>68</sup> Ibid (note 3).

<sup>69</sup> See Denmark II, para 55. See also “Supplementary information provided by the Danish authorities in response to the letters of the President of the CPT”, in Denmark Responses I, CPT/Inf (96) 14, pp 161-190 at 164.

<sup>70</sup> Ibid (emphasis added).

<sup>71</sup> Ibid. See also Denmark Responses I, op cit, n 69 above, at p 165. The issue of the duration of solitary confinement measures is considered in detail below, at p 455.

The CPT, for its part, welcomed the Danish study's commission.<sup>72</sup> However, in the course of its second visit, in 1996, a "considerable" number of doctors, lawyers, prison staff and other persons who enjoyed "frequent contact" with solitarily-confined remand prisoners "expressed considerable surprise at the study's principal conclusion". "In their experience", they observed, segregated prisoners "frequently exhibited lapses in concentration, memory loss and impaired social skills".<sup>73</sup> These observations, the Committee suggested, were "borne out by [its] own findings":

"[m]any prisoners subject to judicially-ordered solitary confinement complained of symptoms including anxiety, depression, inability to concentrate, irregular sleeping patterns, nausea and persistent headaches".<sup>74</sup>

"In one particular case," it observed:

"...the delegation's psychiatric expert was of the opinion that symptoms such as impairment of concentration, depressive mood and suicidal thoughts could be attributed to the inmate's lengthy placement in solitary confinement".<sup>75</sup>

Consequently, it concluded that, "notwithstanding the [Danish study's] principal conclusion":

"there remain serious grounds for concern about the effects upon remand prisoners' mental health of [placement] in judicially-ordered solitary confinement for prolonged periods".<sup>76</sup>

Further illustrations of the effects on the human psyche which may be induced – or, where apparent already – aggravated by the (prolonged) application of solitary

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<sup>72</sup> *Idem*, para 56.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

confinement-type measures may be found, *inter alia*, in the CPT's first Swedish visit report wherein, the Committee conjectured, the isolation of inmates encountered at Kronoberg Remand Prison in August 1994 had "either provoked or aggravated" "symptoms of psychiatric disturbance, including anxiety and self-injury; self-destructiveness and possible psychosis".<sup>77</sup> However, perhaps the most profound effects of solitary confinement thus far witnessed by visiting delegations were found among isolated remand prisoners in Norway in the course of visits in 1993 and 1997. Several striking cases of physical and psychological distress were apparent in the groups concerned. "In at least two" cases in 1993, for example, the visiting delegation's psychiatric expert identified "serious medical implications" arising from the judicially-ordered confinement of persons subject to a criminal investigation. The first concerned a foreign detainee who had been held in Oslo Prison for almost four weeks and who claimed to be "under considerable pressure from the police to corroborate certain statements". Having been completely denied contact with others since his arrest, the prisoner "manifested a state of despair and a strong suicidal inclination". He also evinced "clear symptoms of psychosomatic disorders (severe occipital pains, vomiting, insomnia, fear of not waking in the morning, etc)". Further, he was found to be "severely depressed and...receiving counselling and psychiatric attention with appropriate medication".<sup>78</sup> In the expert's view, "the prisoner's state of mental health [was] seriously affected by the complete isolation imposed on him, and specifically by lack of contact with his family". "[A]ggravating" his condition, he suggested, was the prisoner's "uncertainty" as to the duration of his isolation.<sup>79</sup> Moreover, he stated, "[his] depressive state could not be attributed simply to the fact

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<sup>77</sup> See Sweden I, para 38.

<sup>78</sup> See Norway I, para 64.

<sup>79</sup> As to the possible procedural requirement of certainty of duration of segregation measures, see below, p 455.

that it was the first time that [he] had been imprisoned”. As it happens, these views were “fully supported by the prison doctor’s opinion on the person concerned”.<sup>80</sup>

A second instance concerned a “seriously depressed” detainee who had been remanded to Ila Prison and who had “developed a psychosis” after six weeks of judicially-ordered isolation. In the prison doctor’s view, the risk of the prisoner’s suicide had been “so great” that he had “judged it necessary to contact [his] lawyer and the investigating police officer”.<sup>81</sup> As a result, the prisoner had been “promptly transferred” to a specialised psychiatric clinic, albeit “after a final police interrogation”.<sup>82</sup>

In the course of its second (*ad hoc*) visit to Norway, in March 1997, the CPT encountered a number of remand prisoners at Bergen Prison who were the subject of various kinds of restriction (e.g. surveillance of or, indeed, a complete ban on, mail and visits; “total...isolat[ion]” from other prisoners in the establishment; confinement to cells for 23 hours a day, with outdoor exercise, taken alone, being the only out-of-cell activity).<sup>83</sup> Some prisoners seen had been subject to these kinds of restriction for “prolonged” periods.<sup>84</sup> Although interviewed separately, when asked about the effects on them of the various restrictions applied, “many” of the detainees described “similar” experiences, namely:

“fatigue, insomnia, loss of appetite, nausea, headaches, crying fits and bouts of depression becoming more acute as the solitary confinement continued. Some...mentioned suicidal thoughts; almost all referred to the distress consequent upon not being allowed contacts with family and friends. Foreign

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<sup>80</sup> See Norway I, para 64.

<sup>81</sup> Apparently, under Norwegian Prison Regulations, it is for the police to decide whether to act on a medical opinion that a particular restriction should be modified on the basis of its effect on a person’s physical or psychological health.

<sup>82</sup> Norway I, para 64.

<sup>83</sup> See Norway II, para 22.

<sup>84</sup> On the possible meaning of the term “prolonged” as used by the CPT, see below, p 455.

detainees who could not speak Norwegian or English were disturbed by the fact that their communication problems exacerbated their difficulties".<sup>85</sup>

These descriptions, the CPT stated, were "corroborated" by prison staff in daily contact with the detainees concerned, by social workers and by medical personnel.<sup>86</sup>

At Oslo Prison – where the regime of prisoners subject to restrictions was found to be "identical" to that at Bergen, albeit, supplemented by a weekly half hour visit to the prison library<sup>87</sup> - the "vast majority" of persons interviewed described experiences "similar" to those identified above.<sup>88</sup> The case of one such detainee was highlighted by the CPT. He was elderly and "of Turkish origin," and had been the subject of restrictions for over six months by the time he met the delegation. His situation was rendered "all the more difficult", it was observed, by problems of communication with staff. In his report, written after some four months of such isolation, the prison doctor had recorded that:

"patient suffers...constant headaches (tension headaches), sleeps badly (is constantly waking up), has lost many kilos (more than 10), has poor appetite. He is encountering increasing concentration problems, due to isolation. His symptoms are on the increase and can be seen as a consequence of his protracted isolation. If he continues to stay in isolation, there will be a risk of permanent health damage".<sup>89</sup>

Perusing the medical files of other prisoners subject to restrictions at Oslo, the visiting

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<sup>85</sup> Norway II, para 23. See, similarly, Netherlands II, para 68 (consequences of exposure to the regime in the country's special security units (November 1997) included "feelings of helplessness...disturbance of normal identity...powerlessness...leading to regression...anger...directed against self...communication difficulties...depersonalisation symptoms").

<sup>86</sup> Ibid.

<sup>87</sup> Idem, para 27.

<sup>88</sup> Idem, para 28.

<sup>89</sup> Ibid.

delegation found “[further] evidence of harm being caused” by their application. In one case, the prison doctor had recorded that a detainee had become “obliged to take regular daily doses of medicine (neuroleptic drugs and anti-depressants) in order to bear up under the restrictions”. Nevertheless, he had still had trouble sleeping “despite this medication” and had required sleeping medicine in addition. Accordingly, the doctor had considered his treatment to be a “disproportionate measure against [him]”.<sup>90</sup> Indeed, “[c]ontrary to the situation at Bergen”, the Oslo Prison doctor had “had no hesitation in informing the police/judicial authorities about the situation of some of the most vulnerable prisoners”. “In certain cases”, the CPT noted, “he had written to the...authorities informing them that the condition of the prisoner [concerned] could be considered to result from placing him in prolonged solitary confinement and that if this were to continue, it could pose a serious risk of irreparable damage to the prisoner’s health”.<sup>91</sup> The visiting delegation, for its part, had been:

“left in no doubt that in some cases, illness [had been] a direct consequence of prolonged isolation by court order”.<sup>92</sup>

Accordingly, referring to the “significant number” of remand prisoners subject to restrictions encountered in both 1993 and 1997, the Committee observed in its second report to the Norwegian authorities that its findings had “shown that such restrictions can provoke in certain...persons...suffering and sometimes damage to health”.<sup>93</sup> Significantly, it added that this state of affairs had not been disputed by those with

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<sup>90</sup> *Idem*, para 29. As to the issue of proportionality in the application of measures of isolation, see further below, pp 453-4.

<sup>91</sup> *Idem*, para 30.

<sup>92</sup> *Idem*, para 29.

<sup>93</sup> *Idem*, para 35.



whom the delegation had spoken in 1997, “be they judges, police and prison officers or medical staff”.<sup>94</sup>

The CPT, it should also be noted, is aware that the effects of isolation may be felt by a greater number of detainees than those directly affected by it. For:

“...when a sizeable proportion of the inmates of an establishment are not allowed to have contact with other prisoners, the enforcement of this rule can have a knock-on effect of a negative nature on all the prisoners”.<sup>95</sup>

For instance, at Stockholm Remand Prison, Sweden, where, in May 1991, 50% of persons held on remand were subject to restrictions “of one kind or another”,<sup>96</sup> “all prisoners were prohibited from speaking with others during outdoor exercise and all...had their cell door flaps closed, in order to avoid prisoners subject to restrictions from entering into contact with other inmates”.<sup>97</sup> The effects on the establishment generally of this arrangement, given the high proportion of the prison population involved, are not hard to imagine.<sup>98</sup>

### *Fundamental principles*

The CPT’s fundamental position on the isolation of detainees has been simply stated on numerous occasions. In examining the application of restrictions to detainees, it has proclaimed:

“...[it] pays particular attention to prisoners held, for whatever reason...under conditions akin to solitary confinement...[for] the application of a solitary

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<sup>94</sup> Ibid.

<sup>95</sup> See Sweden I, para 65.

<sup>96</sup> Idem, para 63.

<sup>97</sup> Idem, para 65.

<sup>98</sup> It is worth noting that over three years later, a similar proportion (45%) of the prison population at Kronoberg were subject to restrictions. According to the Director of the establishment, the figure “fluctuate[d] between 45 and 50%”: see Sweden II, para 22.

confinement-type regime...is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment...”<sup>99</sup>

The Committee has developed this fundamental position elsewhere. To the Dutch authorities, for example, it has averred that:

“[i]n every country there will be a certain number of so-called ‘dangerous’ prisoners (a notion which covers a variety of individuals<sup>100</sup>) in respect of whom special conditions of custody are required. This group of prisoners will (or at least should, if the classification system is operating satisfactorily) represent a very small proportion of the overall prison population...However, it is a group that is of particular concern to the CPT, in view of the fact that the need to take exceptional measures concerning such prisoners brings with it a greater risk of inhuman treatment than is the case with the average prisoner”.<sup>101</sup>

It continued:

“[s]taff who work with such prisoners have the difficult task of reconciling the often conflicting demands which their presence can place upon a prison establishment. This is well described in the following extract from the Explanatory Memorandum to the Recommendation (No. R (82) 17) on the custody and treatment of dangerous prisoners adopted by the Committee of Ministers of the Council of Europe on 24 September 1982:

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<sup>99</sup> See 2<sup>nd</sup> GR, para 56; and, similarly, France I, para 140; and Portugal I, para 63.

<sup>100</sup> For present purposes, the notion should be understood to comprehend persons segregated on most, if not all, of the grounds elaborated above.

<sup>101</sup> See Netherlands I, para 89. See also Spain I, para 109; Switzerland I, para 50; and Turkey I, para 81.

'40. Control and custody have to be acknowledged but, simultaneously, human dignity and acceptability of conditions and social positiveness have also to be recognised. Control of something that potentially imperils both the internal prison community and the larger external community interfaces with moderation to be exercised over incidence and duration as well as level of maximised custody'''.<sup>102</sup>

This rather inelegant provision may be said to represent, in its rather sententious way, the CPT's understanding of the fundamental duty of custody and care owed by detaining authorities to persons whom they have solitarily confined. A less unintelligible expression of the content of this duty is to be found at paragraph 43 of the Explanatory Memorandum, wherein it is proclaimed that:

“[h]uman dignity is to be respected notwithstanding criminality or dangerousness and if human persons have to be imprisoned in circumstances of greater severity than the conventional, every effort should be made, subject to the requirements of safe custody, good order and security and the requirements of community well-being, to ensure that the living environment and conditions offset the deleterious effects...of the severer custodial situation”.<sup>103</sup>

For its part, the CPT has asserted that:

“...the placement [in isolation] of [detainees] without their consent carries with it the responsibility of ensuring their physical, mental and social well-being”.<sup>104</sup>

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<sup>102</sup> Ibid.

<sup>103</sup> Quoted in Spain I, para 109 and Switzerland I, para 50.

<sup>104</sup> See Greece I, paras 203 and 284. The observation in fact related to a number of visits to psychiatric establishments in March 1993. Its import, however, is much broader, it is submitted. Further, it may be said to be just as applicable to persons whose separation is voluntary (although it should be recalled

Further, echoing the tenor of paragraph 43, it has proclaimed that:

“...il est important que les autorites fassent tout ce qui est en leur pouvoir pour contrecarrer les possibles effets negatifs, pour la personnalite, d’une detention a long terme dans une unite de securite maximale. Un effort continu de soutien et de motivation devrait etre entrepris, meme envers des [detenus] manifestant de prime abord, la volonte de ne pas cooperer”.<sup>105</sup>

### ***Particular responsibilities of the authorities towards segregated detainees***

In the last section the fundamental duty of custody and care, which, in the view of the CPT, should be owed by detaining authorities to persons isolated on their authority (with or without the latter’s consent) was identified. However, the Committee’s belief in the existence of other, related responsibilities is also evident in its published work. They are examined, briefly, here.

#### ***The decision to segregate should be based on an assessment of each individual case***

At the Mount Carmel (psychiatric) Hospital, Malta, in July 1995, a delegation found that “certain categories” of patient would be “systematically” segregated. These categories included persons referred to the establishment from the Corradino Correctional Facility (the island’s only civil prison) and those referred by the courts for psychiatric assessment. Notwithstanding the “close...supervis[ion]” of such persons by hospital staff, the CPT remarked:

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that the detention of such persons falls outside the scope of the CPT’s mandate). In the context of its first visit to Greece, the CPT felt that despite recent efforts “in partnership with the European Community,” the authorities were “not yet in a position to meet this responsibility vis-à-vis a large proportion of psychiatric patients”.

<sup>105</sup> See Italy I, para 106.

“...[it] had reservations about whether it is appropriate to seclude patients on the basis that they fall into a particular category, rather than on the merits of each individual case”.<sup>106</sup>

Clearly, the Committee would prefer to see the development of procedures informed by the latter precept than by the more rigid former one.

***The accommodation together of different categories of isolated detainee should be avoided as far as possible***

While visiting Hamburg Remand Prison in April 1996, a CPT delegation observed that one particular detention unit was being used to accommodate a variety of segregated prisoners: namely, persons considered by the police to be alcoholics or drug addicts (of whom there were eight at the time of the visit); persons identified as at risk of committing suicide or causing self-injury (numbering six); prisoners who had been involved in violent incidents or who had behaved threateningly (numbering two); and a “small number” of prisoners subject to judicial restrictions.<sup>107</sup> The Unit’s regime was extremely poor: occupants were afforded no purposeful activities, were denied human contact and, with the exception of persons in the last category, were forced to spend 24 hours a day in their cells “with little or nothing to occupy them”.<sup>108</sup> In the light of such findings, the CPT suggested, rather moderately, that:

“[t]he provision of appropriate activities [had] undoubtedly [been] hampered by the heterogeneous nature of the persons held in the Unit”.<sup>109</sup>

It illustrated its view in the following way: its delegation, it stated, had found suspected alcoholics and drug addicts held in secure conditions “which were not

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<sup>106</sup> See Malta II, para 105.

<sup>107</sup> See Germany II, para 147.

<sup>108</sup> Idem, para 148.

<sup>109</sup> Idem, para 149.

proportionate to the risk presented by the withdrawal symptoms from which they were suffering”; a “tendency” which had manifested itself, *inter alia*, in their being denied outdoor exercise.<sup>110</sup> “Similarly,” it continued, “prisoners involved in violent incidents or threatening behaviour could find themselves placed under a special observation regime rather than subjected to formal disciplinary procedures (with their attendant safeguards).<sup>111</sup> “In short”, it concluded:

“the treatment of persons detained in [the] unit...seemed to be premised upon a combination of medical and security imperatives...the poverty of the regime offered to inmates was largely the result of an unsatisfactory compromise between those competing claims”.<sup>112</sup>

Clearly, the CPT was troubled by the inflexible application of the same impoverished regime to every detainee accommodated in the unit. Such an approach, it is submitted, does not permit any account to be taken of the individual requirements of detainees and reflects a failure to consider the merits of each case discretely. The inference to be drawn from the Committee’s remarks is clear: custodial authorities should avoid accommodating many different types of segregated detainee together (so far as possible), lest the regime to which they are subject is compromised thereby.<sup>113</sup>

### ***Freedom to discriminate between different categories of segregated detainee***

Linked to the question of the particular responsibilities owed by custodial authorities to isolated persons in their charge is the question whether and, if so, to what extent, they may distinguish between various categories of secluded detainee in respect of the

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> *Idem*, para 150.

<sup>113</sup> See, in the same connection, *Netherlands II*, para 48 (wherein the CPT proclaimed that “It is far from clear... that the accommodation of... widely-differing categories of prisoners is consistent with the stated purpose of [a] Unit [for prisoners deemed to represent control and management difficulties”).

treatment to which such persons are entitled. From a perusal of published visit reports, it would seem that there exist two distinct precepts in this area:

(i) that no distinction is to be drawn between segregated detainees as to the *rights and safeguards* (and notwithstanding point (ii) below, in certain circumstances, material conditions and regime activities) to which such detainees are entitled, regardless of the reason for their segregation.

Of course, certain procedural safeguards, like the rights to a formal hearing and to contest a segregation measure cannot be regarded as necessary when the isolation is *requested* by the detainee.

(ii) that, insofar as material conditions and regime activities are concerned, it may be acceptable to discriminate between persons segregated for punishment purposes and those segregated for other reasons.

As to the first point, while examining the Finnish prison estate in May 1992, the Committee encountered a small number of prisoners “subject to the terms of the Dangerous Recidivists Act”.<sup>114</sup> These prisoners, convicted of serious, often violent, offences, were serving “indeterminate” sentences in “preventive” detention,<sup>115</sup> and were often subject to a solitary confinement-type regime “for very long periods”.<sup>116</sup> In its subsequent visit report, the Committee sought to “emphasise” that its observations on the solitary confinement of detainees generally in Finland (which observations concerned, *inter alia*, material conditions of detention, regime activities, legal safeguards and medical supervision), should “apply equally to prisoners classified under the Dangerous Recidivists Act who are held in solitary

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<sup>114</sup> See Finland I, para 77.

<sup>115</sup> Ibid.

<sup>116</sup> *Idem*, para 78.

confinement”.<sup>117</sup> The Committee’s inference here is clear, it is submitted: to discriminate between the entitlements of two different categories of segregated detainee cannot, without difficulty, be justified.<sup>118</sup>

Similarly, the CPT questioned the practice of differentiating between the nature (and quality) of regime activities offered detainees occupying the maximum security unit at the Rebibbia maison d’arret pour femmes, Italy, in March 1992. Most detainees there had been convicted of offences related to terrorism and were serving long sentences.<sup>119</sup> They had been separated into two distinct “zones”: the first accommodating detainees who had “renounced the armed struggle” (characterised as “dissociees”); the second those who had refused to do so (“irreductibles”), together with others charged with similar offences and awaiting judgment. While material conditions in the two zones were “identical”, the visiting delegation noted, the regimes of the two sets of detainees differed markedly: the first group enjoyed complete freedom of movement throughout their “zone” between 8 am and 8 pm daily, could mix in a “well-equipped” association room, undertake paid work or English language courses, make (exclusive) use of a small gymnasium and cultivate a garden.<sup>120</sup> The second group, by contrast, did not benefit from an “open door” regime and their activities were “limited” to outdoor exercise and association for a maximum of 5 hours a day.<sup>121</sup> Unclear as to the reasons which lay behind discrimination of this kind between detainees accommodated in the same maximum security unit, the CPT sought from the Italian authorities a “detailed” explanation.<sup>122</sup>

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<sup>117</sup> Ibid.

<sup>118</sup> See, similarly, Luxembourg I, paras 55-6 (regarding the apparent distinction drawn in national law as to (i) the formal guarantees available to detainees isolated on grounds of discipline and those isolated because “reputed to be dangerous”; and (ii) the medical supervision available to detainees placed in a punishment cell and those subject to a “regime cellulaire strict”).

<sup>119</sup> See Italy I, para 103.

<sup>120</sup> Idem, para 104.

<sup>121</sup> Idem, para 105.

<sup>122</sup> Ibid.



As to the second point, it is evident from remarks made in several visit reports that the CPT is prepared to countenance greater austerity in material conditions and regime in respect of persons segregated as a punishment than in respect of persons segregated on other grounds. For example, in the course of a number of visits to Spain, it has encountered a so-called “prisoner grading system” under which prisoners may be allocated different types of regime on the basis of their perceived compatibility with good order and discipline in an establishment. Those prisoners regarded as dangerous or unadapted to an ordinary prison regime are placed in Grade 1, a category which is itself sub-divided into three parts. The most restrictive regime is that of prisoners placed in Grade 1(1) who are obliged to spend 22 hours a day, alone in their cells, forbidden to associate with other prisoners when out of their cells, only permitted to work or study in-cell and subject to a restricted visit entitlement. The regime of prisoners categorised as Grade 1(2) is “relaxed somewhat”, out-of-cell time being extended to four hours; while Grade 1(3) prisoners enjoy a regime “much closer to that of an ordinary prisoner” – rather unsurprisingly, given its perceived status as a “stepping stone” to Grade 2 status.<sup>123</sup>

Visiting various Spanish prison establishments in April 1991, the CPT observed that the conditions of prisoners subject to Grade 1(1) and (2) regimes “varied from establishment to establishment, and on occasion from prisoner to prisoner in the same establishment” – a point “underlined”, it remarked subsequently, by certain prisoners interviewed.<sup>124</sup> Regarding one such prisoner, “[i]nterestingly,” the CPT averred, his Governor “took pains to point out that [he] was not undergoing punishment.” “This explanation,” it continued, “was necessary as the difference between the prisoner’s situation and that of a prisoner placed in solitary confinement

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<sup>123</sup> See Spain I, para 110.

<sup>124</sup> *Idem*, para 111.

as a punishment was not immediately evident”: both were held in the same section of the prison and were therefore obliged to endure “comparable” material conditions. Their regimes could be distinguished only insofar as out-of-cell time was more generous for the Grade 1(1) prisoner – two hours daily, as opposed to the punished prisoner’s one.<sup>125</sup>

A “common feature” of every establishment visited, the CPT noted, was the “penury” of regime activities afforded Grade 1(1) and (2) prisoners. “[P]ractically all” such prisoners met, it stated in its visit report, possessed “only borrowed books and on occasion a radio as sources of diversion”. Indeed, in one prison, such was the extent of this “enforced idleness”, it remarked, that Grade 1 prisoners interviewed there “expressed a feeling of having been abandoned”.<sup>126</sup> This situation, it observed, was “all the more serious” given the length of time that prisoners might be classified as Grade 1(1) or (2) (a “significant proportion” of such prisoners interviewed had been so classified for over a year, “and some for considerably longer”).<sup>127</sup> In summarising its findings, the CPT suggested, disapprovingly, that:

“[t]he strictest forms of Grade 1 regime observed by the delegation [were] scarcely distinguishable from solitary confinement as a punishment; moreover, unlike the latter, they [were] not subject to a maximum time limit”.<sup>128</sup>

It continued:

“[t]he delegation met certain Grade 1 prisoners who had for very long periods been subject to a regime of isolation and were held under austere material

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<sup>125</sup> Ibid.

<sup>126</sup> Idem, para 112.

<sup>127</sup> Ibid.

<sup>128</sup> Idem, para 113. See also Spain II, para 222.

conditions of detention with little or nothing by way of activity; in the CPT's view, this constitutes inhuman treatment".<sup>129</sup>

Accordingly, it sought to stress:

"...the generally recognised principle that people are sent to prison as a punishment, not for punishment".<sup>130</sup>

Further, it recommended that steps be taken by the Spanish authorities, "as a matter of urgency", to ensure, *inter alia*, that:

"...the material conditions of detention of a prisoner held in isolation as a result of his Grade 1 status are *clearly better than those of a prisoner undergoing solitary confinement as a punishment*".<sup>131</sup>

Similarly, having visited the segregation unit of Korydallos Men's Prison, Greece, in March 1993 – each 7 sq.m. cell of which was furnished only with a bed, an Asian toilet and, occasionally, a washbasin<sup>132</sup> - the CPT offered the view that conditions of detention therein were "on the whole acceptable for prisoners undergoing the disciplinary sanction of confinement in a special cell".<sup>133</sup> They were "far less suitable", however, it stated, "for prisoners subject to segregation for non-disciplinary reasons" – especially when so segregated for any length of time.<sup>134</sup>

Lastly in this connection, it is worth noting that the CPT has observed, emphatically, that:

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid. See also Spain II, para 222.

<sup>131</sup> Ibid (emphasis added). See now Spain IV, para 39.

<sup>132</sup> See Greece I, para 133.

<sup>133</sup> Idem, para 135.

<sup>134</sup> Idem, para 136. At the time of the visit, the unit was being used to accommodate persons segregated for both disciplinary and non-disciplinary reasons (para 133). See also para 139 of the report (regarding the similarly furnished and unsatisfactorily lit segregation unit at Larissa Prison: "...adequate for persons undergoing cellular confinement as a punishment...").

“...il est import de souligner que la sanction du placement en regime cellulaire strict est tout a fait distincte du placement en cellule de punition”.<sup>135</sup>

## ***Material conditions of detention in segregation cells***

### ***Introduction***

The issue of the material conditions of detention in which, in the view of the CPT, segregated persons ought to be accommodated may be seen, in many respects, to be an adjunct of its corps of precepts on material conditions in places of detention generally, since many of the same standards self-evidently apply.<sup>136</sup> Unfortunately, space constraints do not permit a detailed examination of general material conditions of detention in the present work. Consequently, neither do they permit a thorough examination of the conditions in which, in the view of the CPT, segregated detainees should be held. At the same time, however, because the solitary confinement of detainees lends itself to different – or, at least, modified – standards, it may be worth taking the time to consider some of the CPT’s more salient precepts.

It should also be pointed out, even if it is something of an axiom, that the precepts identified here also apply, *mutatis mutandis*, to the detention of persons in punishment cells. For, although the question of discipline may be seen, in many respects, to warrant quite separate treatment, insofar as the physical environment in which punished detainees may be held is concerned, there seems little need, it is submitted, to consider the question afresh, so marked is the overlap with solitary confinement generally. All the same, it may be useful to sub-divide the present study

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<sup>135</sup> See Luxembourg I, para 47.

<sup>136</sup> For example, all cells used for the seclusion of detainees, for whatever reason, the CPT believes, should be furnished with a bed/means of rest and their occupants should be able to gain access to a toilet on demand: see, e.g., Romania I, para 190 (2<sup>nd</sup> indent).

into sections devoted, *inter alia*, to the accommodation of those persons segregated on grounds of discipline and those segregated for other reasons since, as we have already seen to a certain extent and as we shall see further, the CPT does seek to distinguish the two categories in one fundamental respect. We shall begin, however, by considering a range of principles that may be considered to apply regardless of the ground(s) on which a detainee's isolation is sought or imposed.

### ***Material conditions of detention generally***

The starting-point for any analysis of the Committee's views on the physical environment in which, it considers, secluded persons should be held is to recognise that its approval or disapproval do not turn merely on the quality of material conditions *per se*; they also turn, crucially, on the length of time for which persons may be held in such conditions. Thus, having visited segregation units at Leeds, Liverpool and Wandsworth Prisons, England, in May 1994, it drew subtle distinctions as to the suitability of placement therein based on a combination of the quality of the physical environment (and, where appropriate, regime) available to inmates and the possible lengths of time for which they might be held there. In all three prisons, the Committee observed, the material conditions and regime seen in the units were such as to "render them quite unsuitable for lengthy periods of detention".<sup>137</sup> More precisely, it suggested that the units' "very restrictive" living conditions could be considered "inadequate" for placements of "several weeks" under Rule 43 of England and Wales' *Prison Rules*;<sup>138</sup> "seriously deficient" for prisoners spending a month on

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<sup>137</sup> See UK III, para 119.

<sup>138</sup> Rule 43 provides for the non-voluntary removal from association of detainees either for the maintenance of good order and discipline or in the interests of the prisoner concerned.

transfer from other prisons; and “wholly unacceptable” for the “medium term” detention of high security prisoners.<sup>139</sup>

It would seem, therefore, that, to the CPT, the suitability of any environment used for segregation purposes may be determined, to a certain – perhaps even significant – extent, by the length of time for which persons may be placed therein. In creating such environments, it may be inferred, the authorities should take account – to a degree which, it may be argued, they have hitherto failed to do – of the anticipated duration of placements.

Turning to specific aspects of the physical environment, it is possible to identify certain features which, if not, strictly speaking, particular to the solitary confinement of detainees, are at least accorded a significance above and beyond that which is accorded them in respect of detention on ordinary location.

#### ***Material hazards to health***

The CPT has stated that the presence in isolation rooms of fittings that “could easily be used by a disturbed [detainee] to hurt him/herself” may render the rooms “hardly suitable for accommodating disruptive detainees”.<sup>140</sup> Accordingly, having visited the security cell in Litla-Hraun Prison, Iceland, in July 1993, whose broken window, the Committee stated, “represented a potential hazard”, it sought to “underline the importance of avoiding such material hazards, *in particular in a security cell*”.<sup>141</sup>

Similarly, each of the isolation rooms of pavilion Z at the Attica State Mental Hospital for children, Greece (March 1993) – to which the CPT sought to draw “[s]pecial attention” in its first visit report – were found to possess, *inter alia*, barred

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<sup>139</sup> UK III, para 119.

<sup>140</sup> See Cyprus II, para 91.

<sup>141</sup> See Iceland I, para 131 (emphasis added).

windows, metal doors (the lower part being solid, the upper part fitted with bars) and “unprotected” radiators. In its view, “[t]he risk of injury to patients confined there[in] was very high”.<sup>142</sup> Consequently, it recommended that “the requisite physical improvements” be made to the rooms “without delay...to ensure that isolation of patients is carried out under acceptable material conditions” and – more significantly for present purposes – “in conformity with suitable safety standards”.<sup>143</sup>

At Rampton Special Hospital, England, in May 1994, one seclusion room visited was found to possess bars on its windows and an “over-soft” plastic mattress. It also lacked any call system. To the CPT, these “poor” conditions “posed a threat to the physical integrity of patients at risk (for example, a danger of suffocation from the over-soft mattress)”.<sup>144</sup>

In an effort to avoid furnishing isolation cells in such a way as to create material hazards to health, the authorities at Leeds, Wandsworth and Liverpool Prisons, England, all visited at the same time as Rampton, had – with the apparent approval of the CPT – equipped their segregation/disciplinary cells, *inter alia*, with cardboard tables and chairs.<sup>145</sup> In the view of the CPT, this positive state of affairs contrasted sharply with that obtaining in two other cells (used to hold violent or disturbed prisoners) in the segregation unit at Leeds. These cells each contained “a hefty wooden block...bound with iron bands”, which, staff claimed, was used as seating.<sup>146</sup> To the Committee, such blocks represented a “potential danger to disturbed prisoners who may be intent on self-injury”. Further, it suggested, their presence in

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<sup>142</sup> See Greece I, para 251.

<sup>143</sup> *Idem*, para 256 (1<sup>st</sup> indent).

<sup>144</sup> See UK III, para 268.

<sup>145</sup> *Idem*, paras 108 and 109.

<sup>146</sup> *Idem*, para 108.

the cells was “all the more surprising” given the existence of the - clearly preferable - cardboard furniture in neighbouring cells.<sup>147</sup>

Similarly, the use of “toughened glass screens” in the “special management division” of Corradino Correctional Facility, Malta, in July 1995,<sup>148</sup> while not the subject of CPT comment, may be considered much safer than ordinary glass in the detention, *inter alia*, of disciplined prisoners, prisoners considered to represent a threat to the safety or security of the establishment and prisoners segregated for their own protection.

Elsewhere, the presence in seclusion cells of “numerous sharp corners” and “breakable ceramic” toilet bowls<sup>149</sup> and protruding radiators<sup>150</sup> has given rise to CPT concern.

### *Call systems*

The absence of call systems in rooms used for the seclusion of detainees is another issue of acute significance in the segregation of disturbed, disruptive and/or violent detainees. The need for rapid means of communication with staff is particularly important in circumstances in which contact with others is restricted or even denied. In this respect, having visited disciplinary quarters “in a state of advanced construction” at the prison de St-Gilles, Belgium, in November 1993, where, *inter alia*, “no trace” of the installation of any call system was apparent, the CPT sought to impress on the Belgian authorities the need for such a facility in this kind of

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<sup>147</sup> Ibid.

<sup>148</sup> See Malta II, para 65.

<sup>149</sup> See Iceland II, para 125. The potential problems caused by such features were exacerbated at the time of the CPT’s visit, in 1998, it seems, by the prohibition on the use of restraint in the establishment concerned, which prohibition, the Committee stated, rendered it “difficult to prevent a juvenile from harming him – or herself...”

<sup>150</sup> See Belgium II, para 168.



environment.<sup>151</sup> Similarly, examining segregation arrangements at the Turku Prison Mental Hospital, Finland, in May 1992, the CPT was concerned to find that although all four of the establishment's isolation rooms had been fitted with call systems, none was working.<sup>152</sup> It recommended that they be rendered operative "as a matter of urgency".<sup>153</sup>

It is worth noting, however, that the CPT has demonstrated a certain flexibility on the matter. Visiting Martinique, in July 1994, for example, it noted that none of the four cells which together comprised the disciplinary area of the centre pénitentiaire de Fort-de-France possessed call systems. However, there was a constant staff presence in the area, which, it seems, the Committee was prepared to accept as an appropriate alternative arrangement.<sup>154</sup>

### *Ease of surveillance and access*

Closely linked to the issue of the presence or absence of call systems in cells or rooms used for the seclusion of detainees is that of the ease with which members of staff responding to a call may reach the rooms concerned. The question calls for consideration, *inter alia*, of the location of isolation rooms *vis-à-vis* staff quarters, surveillance points and/or medical facilities. The importance of location was demonstrated by the CPT in its first Cypriot visit report, wherein it remarked that in 1992, rooms used *inter alia* to accommodate disruptive patients at Athalassa Psychiatric Hospital had not been equipped with call systems and had been "located a long way from the staff quarters".<sup>155</sup> As a result, it suggested, "given their location

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<sup>151</sup> See Belgium I, para 235 (and now Belgium II, para 192). See, similarly, Hungary I, paras 132 and 133 (2<sup>nd</sup> indent) (regarding the equipping of the disciplinary cells seen at Tokol Prison and Remand Centre for Adolescents, in November 1994).

<sup>152</sup> See Finland I, para 120.

<sup>153</sup> *Idem*, para 122 (1<sup>st</sup> indent).

<sup>154</sup> See France (Martinique) I, para 81. However, *cf* below, p 415.

<sup>155</sup> See Cyprus I, para 131.

and their state of...equipment...the rooms...[had been] hardly suitable for accommodating disruptive patients”.<sup>156</sup>

Similarly, having reviewed segregation facilities in a number of adult prisons in Greece in March 1993, the CPT offered the general view that:

“...all cells in segregation units [should] be equipped with a call bell *and*...a member of staff [should] always be present in such units when they hold prisoners”.<sup>157</sup>

Regarding the proximity of disciplinary/isolation cells to other detention areas in an establishment, the Committee has considered worthy of note the fact that Belgium’s St-Andries men’s prison disciplinary area, when visited in November 1993, was situated “far from other men’s detention units” (although it was close to the establishment’s “Quartier de Securite Renforcee”, which accommodated prisoners considered dangerous).<sup>158</sup> Its remote location undeniably rendered all the more significant the complete absence of call systems in the area.<sup>159</sup> At the St-Andries women’s prison, five isolation/disciplinary cells were found to be similarly located: i.e. “far from the women’s detention units,” in the basement of the establishment.<sup>160</sup> However, more positively, unlike the cells for men, each such cell possessed an “interphone...fixed to the ceiling”.<sup>161</sup>

Elsewhere, “noteworthy also,” the CPT has remarked, is the fact that in the Unite pour Malades Difficiles at the Centre Hospitalier Specialise de Montfavet,

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<sup>156</sup> Ibid.

<sup>157</sup> See Greece I, para 140 (emphasis added).

<sup>158</sup> See Belgium I, para 233.

<sup>159</sup> Ibid. See, similarly, para 230 of the report and now Belgium II, para 191 (regarding certain punishment cells viewed at Lantin Prison).

<sup>160</sup> Idem, para 234.

<sup>161</sup> Ibid.

France, in October/November 1991, men's isolation cells were not "*a proximate immediate du local de l'infirmier de permanence*".<sup>162</sup>

Generally, facilitating access to isolation cells is not an issue that the CPT has considered in any depth. However – disregarding the vexed question of intrusion and personal privacy – it cannot be doubted that the installation of closed circuit television cameras and monitors in the communal areas of segregation units and the fitting of electrically-operated cell doors<sup>163</sup> are measures capable of rendering the surveillance of segregation cells much easier, regardless of their location. Where such facilities are not installed – and even where they are, it may be argued – it is necessary, the CPT considers, to ensure that, for observation purposes, all parts of a seclusion room are visible from the outside.<sup>164</sup>

#### *An appropriate means of rest*

Given the increased amount of time likely to be spent in-cell each day by segregated detainees,<sup>165</sup> the question whether or not isolation cells are furnished with an appropriate means of rest may be said to possess particular significance. In this respect, the Committee has observed, rather quizzically, that in Dob Prison, Slovenia, in February 1995, inmates undergoing solitary confinement as a punishment were forbidden to lie down on their beds during the day.<sup>166</sup> (A similar prohibition had apparently been in force in the past at Ljubljana Prison, but had been discontinued by the time of the CPT visit.)

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<sup>162</sup> See France I, para 198 (emphasis added).

<sup>163</sup> See Malta II, para 65 (regarding the "special management division" at Corradino Correctional Facility, newly-renovated at the time of the CPT's visit in July 1995).

<sup>164</sup> See Finland II, para 134 (regarding isolation rooms seen at Muurola Psychiatric Hospital in June 1998).

<sup>165</sup> See, further, below, p 428.

<sup>166</sup> See Slovenia I, para 83.

Visited in November 1994, the disciplinary cells in Budapest Remand Prison, Hungary, were found to be equipped, *inter alia*, with folding wooden beds.<sup>167</sup> However, the Prison's disciplinary regime demanded that the beds be unclipped from the wall only between the hours of 8 pm and 4 am (when the day began).<sup>168</sup> While not addressing the question directly, implicit in the CPT's subsequent invitation to the Hungarian authorities "to explore the possibility of attenuating the rigour" of the disciplinary regime obtaining in the establishment,<sup>169</sup> it may be argued, was a concern to see the adoption of a more flexible approach as to use of the beds.

It need hardly be stated, of course, that seclusion cells used for the overnight accommodation of detainees should, the CPT considers, be furnished with mattresses and blankets.<sup>170</sup>

### *Cell design*

Although the design of cells used for the seclusion of detainees cannot be said, on the evidence of published visit reports, particularly to preoccupy the CPT, it is worth noting, in passing, just how "very impressed" it was with improvement work being carried out in the Division d'Attente at the Penitencier du Bochuz, Switzerland, in February 1996. There, much to its approval, it seems, each detainee subject to a regime "de securite renforcee" was placed, "in effect," in a *double* cell, one part of which he used as his bedroom, the other as a room in which he engaged in regime activities.<sup>171</sup>

Cells possessed of these characteristics may be said to represent something of

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<sup>167</sup> See Hungary I, para 132.

<sup>168</sup> *Idem*, para 134.

<sup>169</sup> *Ibid.*

<sup>170</sup> See, e.g., Poland I, para 165, 2<sup>nd</sup> indent (regarding the provision of bedding in the "transit" cells at the Correctional establishment and Home for detained juveniles in Swidnica in 1996).

<sup>171</sup> See Switzerland II, para 83.

an ideal to the CPT. Where practicable, one feels, it would encourage their construction. After all, double cells offer an environment in which a range of work, educational and leisure activities may be undertaken without materially compromising that seclusion which constitutes the essence of a regime of isolation.

### *Cell size*

The CPT has characterised as “adequate” or “acceptable” for individual occupancy living space in isolation cells of between 6.5<sup>172</sup> and 9.5<sup>173</sup> sq.m; as less satisfactory, living space of approximately 5 sq.m;<sup>174</sup> and as “not acceptable for use [even] as overnight accommodation”, isolation rooms measuring “a mere” 3.6 sq.m.<sup>175</sup> Cells measuring 4.2 sq.m. and described as “very small” have been said by the CPT to be “not suitable” for the accommodation of prisoners placed in solitary confinement for non-disciplinary reasons and “unsuitable” – “for other than short periods of time”<sup>176</sup> - for the detention, even, of disciplined prisoners.<sup>177</sup>

### *Maintaining human dignity*

Although it is axiomatic that material conditions of detention in isolation cells ought, in the view of the CPT, to be such as to ensure that the dignity of the person placed therein remains unaffected, it is worth pointing out that, as recently as 1998, it had cause to deprecate the practice of stripping a prisoner naked before segregating him in a bare cell, even though the authorities may have acted from the most humanitarian of

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<sup>172</sup> See Slovakia I, para 135.

<sup>173</sup> *Idem*, para 132.

<sup>174</sup> *Ibid.* See, similarly, Germany II, para 96 (regarding isolation cells measuring “only” 5.5 sq.m).

<sup>175</sup> *Idem*, para 157 (and, similarly, para 196).

<sup>176</sup> By which the CPT may mean periods of 1-2 days: see Iceland II, para 56.

<sup>177</sup> See Finland I, para 128.

motives. Even persons at risk of self-injury or suicide, it considers, ought at least to be provided with tear-proof clothing and bedding.<sup>178</sup>

Elsewhere, the Committee has described itself as “not at all convinced by the practice of placing...[juvenile detainees] in isolation rooms in underclothes...or... pyjamas...”<sup>179</sup>

***Appropriate material conditions of detention in cells used for the segregation of persons on non-disciplinary grounds***

It is clear from a perusal of published visit reports that what the CPT regards as an “acceptable” physical environment in which to accommodate segregated detainees may differ according to whether the segregation is actuated by disciplinary or non-disciplinary motives. Clearly, it may be inferred, persons segregated other than as a punishment are, in its view, entitled to expect a better quality of environment than those undergoing the disciplinary sanction of isolation. Given this distinction, it may be useful to consider, here, the kind of environment to which, the CPT believes, detainees isolated on *non-disciplinary* grounds should be entitled. It is a belief that is, perhaps, best illustrated by way of example.

Visiting Finland in May 1992, a delegation examined the isolation unit of Helsinki Central Prison, about whose material conditions (and regime) the Committee later stated it had “serious reservations”.<sup>180</sup> “Most” of the unit’s cells “contained only a platform bed and a lavatory – both made of concrete”. Further, though four of the cells had been converted in order to accommodate prisoners “thought to be especially dangerous and likely to be held in solitary confinement for extended periods” – with

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<sup>178</sup> See Finland II, para 102 (regarding the practice of stripping naked suicidal or self-mutilating prisoners and placing them in an “observation cell” at Riihimaki Central Prison, June 1998).

<sup>179</sup> See Luxembourg II, para 33. Staff interviewed in 1997 claimed that the practice was premised on security considerations.

<sup>180</sup> See Finland I, para 69.

the result that conditions of detention therein were of a “slightly higher” standard – no cell in the unit possessed any storage space. Consequently, the “limited range” of personal possessions which inmates were permitted to keep “tended to be left strewn on the floor”.<sup>181</sup>

Hygiene in “[m]any” of the cells was poor and some were “extremely dirty.” The condition of in-cell lavatories, in particular, “left a great deal to be desired”. They could only be flushed from outside the cell, it appears; and prisoners interviewed alleged that requests for this to be done were “frequently ignored” by staff.<sup>182</sup> “In short,” the CPT concluded, material conditions of detention in the unit were “poor”.<sup>183</sup> Consequently, it suggested that:

“...those prisoners not undergoing cellular confinement as a disciplinary punishment [should] be accommodated in cells which contain the same equipment as that found in *ordinary* cells...”<sup>184</sup>

Suitable “ordinary” cells, the CPT suggested, existed elsewhere in the establishment:

“[m]ost of the cells [on normal location were] of a reasonable size (up to 9 sq.m.), acceptably furnished (bed, table, chair, wardrobe and bookshelf) and benefited from adequate lighting and sanitation, [though] it would be preferable for sanitation facilities to be partitioned off from the living areas in the cells”.<sup>185</sup>

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<sup>181</sup> *Idem*, para 70.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Idem*, para 71.

<sup>184</sup> *Ibid.*, 2<sup>nd</sup> indent (emphasis added). See, similarly, Greece I, para 136, 1<sup>st</sup> indent (regarding cells seen in the segregation unit of Korydallos Men’s Prison in March 1993).

<sup>185</sup> *Idem*, para 80.

Detainees isolated on non-disciplinary grounds, therefore, are, in the view of the CPT, entitled to the same standard of material environment as detainees held on normal location.<sup>186</sup>

There would appear, however, to be one exception to this general principle: at Linho Prison, Portugal, in January 1992, while material conditions observed in “most” cells in the Discipline Unit were “little different” from those found in the main accommodation blocks, the standard of accommodation afforded by four “bar-fronted” segregation cells, a visiting delegation observed, was “distinctly lower”. These cells were “very small (scarcely 4 sq.m.)” and their fittings “spartan...only...a bed and slopping-out bucket”.<sup>187</sup> Due to their bar-fronted design, the CPT suggested subsequently, prisoners held in the cells might be “observed continuously in safety”. Consequently, they were probably “suitable for use as a temporary holding area for prisoners exhibiting violent behaviour”. However, it added, “they represent[ed] an unduly harsh environment in which to place those undergoing disciplinary sanctions”. It recommended, therefore, that their use for this last purpose be avoided.<sup>188</sup>

This is the one instance in which, thus far in its work, the CPT has been prepared to countenance more austere conditions of detention in respect of persons segregated on non-disciplinary grounds (in this case, good order) than in respect of persons segregated for reasons of discipline. It is, of course, an instance that is very precisely circumscribed, requiring, *inter alia*, cells of a particular (and, nowadays, uncommon) design and detention of short duration only. Indeed, had it not been for the cells’ design, one may speculate, the CPT might not have been so

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<sup>186</sup> By 1998, it should be noted, the deficiencies identified in the unit at Helsinki appeared to have been rectified: see Finland II, para 63.

<sup>187</sup> See Portugal I, para 136.

<sup>188</sup> Ibid. Visiting the establishment for a second time, in May 1995, the CPT observed, again with disapproval, that the four cells were still being used to accommodate disciplined prisoners: see Portugal II, para 139.



accommodating; it is precisely because the cells facilitated continuous and safe observation that their other material deficiencies were, to a certain extent, overlooked.<sup>189</sup>

***Appropriate material conditions of detention in cells used for the solitary confinement of disciplined detainees***

Having viewed units used to accommodate persons segregated for punishment purposes in the various Spanish prisons visited in April 1991, the CPT observed that:

”[t]he general atmosphere and conditions were – *as one would expect* – more austere than in the normal units, but were not unacceptable as a punishment regime”.<sup>190</sup>

This observation, it is submitted, conveys the essence of the CPT’s position as to the quality of material environment which it considers appropriate for the detention of persons segregated on disciplinary grounds. Thus, provided they are not “unacceptable” – as measured against its own criteria – material conditions in disciplinary cells, it believes, may be “more austere” than those in “normal” units (which means, in practice, therefore, “more austere” than cells used for segregation on non-disciplinary grounds).

Interestingly, in its early working life, the Committee appeared prepared to accept greater austerity of conditions in *all* segregation cells, not simply, as it appears to do now, in those used to accommodate punished detainees. Visiting segregation units at Brixton, Leeds and Wandsworth Prisons, England, in 1990, for instance, it found the obtaining atmosphere and physical environment, “*as one would*

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<sup>189</sup> However, *cf* Greece I, para 139 (austere conditions in otherwise conventionally designed isolation cells regarded as adequate, both for the solitary confinement of punished prisoners *and* for the “temporary” holding of prisoners representing a “control problem”).

<sup>190</sup> See Spain I, para 194 (emphasis added.)

*expect...more austere than on the wings, but not unacceptable*".<sup>191</sup> In offering this judgment, the Committee seemed to draw no distinction between cells used for the segregation of prisoners as a punishment and those used for segregation on non-disciplinary grounds – other than to mention, in passing, that “[t]he precise conditions of detention of each prisoner [seen] varied according to his status (removal from association; cellular confinement as a punishment)”.<sup>192</sup> It did conclude, however, that “[i]n no case did [conditions] appear to the delegation to be excessively harsh”.<sup>193</sup>

We are forced to conclude, therefore, that at this early juncture, the CPT felt no need to distinguish punishment from non-punishment cells in material terms: it was simply expected that *all* segregation cells might reasonably be more austere than ordinary cells. Only later in its work did the CPT begin to draw the kind of subtle distinctions identified above.

The question remains, however, what standard of material environment does the CPT regard as acceptable in respect of punishment cells? The following example may offer some guidance. At the end of its visit to Switzerland in July 1991, a CPT delegation issued an Article 8(5) observation regarding, *inter alia*, the conditions of detention observed in two security cells visited in the basement of Berne regional prison. Although of quite adequate size for individual occupancy (8.75 and 14.29 sq.m.), the cells were furnished merely with a “concrete plinth” (on which had been placed an uncovered foam mattress) and a toilet. Natural light filtered into the cells “very insufficiently” through observation holes. Their security had been reinforced via the installation of a grill behind their doors and the surveillance of occupants facilitated by the presence of a camera. Both occupants of the cells at the time of the

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<sup>191</sup> See UK I, para 91 (emphasis added).

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

visit were naked and, according to the delegation, “in a state of advanced excitation and disturbance”.<sup>194</sup>

Much to the approbation of the CPT, the Swiss authorities reacted “immediately” to the observation, commencing an inspection of the premises the day after the CPT’s departure and transmitting to the Head of the delegation, a month later, its findings, along with preliminary proposals for change.<sup>195</sup> These proposals were followed within weeks by a “complementary report”, which elaborated on the renovation work underway. The CPT, for its part, welcomed the authorities’ intention to replace the cells’ frosted windows with ones made from reinforced, but transparent, glass. Nevertheless, it suggested, the cells’ general condition - even taking account of their renovation, it seems - could not be considered good enough to render them suitable for anything other than the *discipline* of detainees (and even then, “for short periods” only).<sup>196</sup>

Thus, we are afforded an insight into the kind of austerity regarded as acceptable by the CPT in respect of the (short-term) detention of detainees solitarily confined on disciplinary grounds. It should be made clear, of course, that disciplinary cells, just like any other, ought, in its view, to be of “appropriate” dimensions and possess “adequate” lighting, heating and ventilation.<sup>197</sup>

If anything, conditions of detention in the eight punishment cells located in two basements at Lantin Prison, Belgium, when visited in November 1993, were worse than those at Berne. Dismissed as “unacceptable” by the CPT, the only satisfactory feature of the first set was their size (at “a little less than” 10 sq.m).

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<sup>194</sup> See Switzerland I, para 17.

<sup>195</sup> *Idem*, para 18.

<sup>196</sup> *Idem*, para 20. See also para 146 of the report.

<sup>197</sup> See, e.g., Bulgaria I, para 165. It is worth recalling in this connection that Rule 37, *EPR* provides, *inter alia*, that “...punishment by placing in a dark cell...shall be completely prohibited as [a] punishment...for disciplinary offences”.

These cells were furnished “very spartanly,” possessing only a concrete plinth and a toilet. A tiny, sealed window was “supposed” to allow natural light and fresh air to enter and the artificial light provided was “mediocre.” As a result, they were “almost dark” - all light in one, indeed, was entirely absent. Central heating was unavailable in three of the cells and in “several”, the toilets did not work. No cell possessed a call system – “a lacuna,” the CPT remarked subsequently, “all the more significant given that these cells were far from any surveillance post”. “Finally,” it observed, “all cells, like mattresses and covers, were in a state of repellent filthiness”.<sup>198</sup> Cells in the second basement were of “more restricted” dimensions (about 6 sq.m.) Levels of both natural and artificial light, as well as fittings, were “identical” to those in the first basement. Again, no call system existed and the cells’ state of filthiness was “just as offensive”. “Further, [they] emitted an obnoxious odour”.<sup>199</sup>

Unsurprisingly, the Committee considered that “significant improvements” were necessary and that, until effected, the cells should not be used at all. Specifically, it declared:

“[i]t would be desirable that such improvements include the installation of a table and chair, if necessary, permanently fixed [to the floor]”.<sup>200</sup>

Among the range of CPT precepts on material conditions of detention in prison (and other) establishments identifiable in its published work, this particular one, it may be stated, is unique to punishment cells. It represents a development, in the most incremental way, of the CPT’s basic view that lower material standards may be expected of this category of cell.<sup>201</sup> It is worth noting, however, that the Committee

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<sup>198</sup> See Belgium I, para 230.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid. See now Belgium II, para 191. By 1997, some of the offending cells had been decommissioned, and others improved - though not entirely satisfactorily.

<sup>201</sup> See, in the same connection, *inter alia*, idem, paras 233-5 (regarding disciplinary/reflection cells viewed in both the men’s and women’s prisons at St-Andries, each of which, in 1995, contained

does not regard the precept as applying, for obvious reasons, to *padded* isolation cells.<sup>202</sup> Indeed, it has conscientiously sought to distinguish the requirements of security and disciplinary cells in this regard. To the Luxembourg authorities, for example, it suggested that their continuing refusal, in 1997, to equip disciplinary cells at the Centre Penitenciaire with tables and chairs on the ground that “such equipment...can be dangerous for the detainee and for staff” was “hardly convincing”. While such an approach, the Committee stated, may be appropriate in a security cell, “specially equipped to accommodate a disturbed or depressive detainee for a very short period”, it cannot, it insisted, be justified in respect of punishment cells, in which a detainee may spend long periods of time.<sup>203</sup>

Where detainees have been secluded in nothing more than a “bare room” (i.e. one furnished only with a mattress and chamber pot), the CPT has been prepared, understandably, to broaden its basic precept in this area, and to demand a “suitably equipped” environment, possessing “at least” a bed (in addition to a table and chair).<sup>204</sup> Further, it should be noted that the Committee considers that detainees undergoing cellular confinement as a punishment are no less entitled to mattresses, at least at night, than any other category of detainee.<sup>205</sup>

From observations made in other published reports, it may be possible to infer the existence of other CPT standards on the nature of the material environment afforded in punishment cells. In its first Belgian visit report, for instance, the

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nothing more than a concrete block with 4 metal bars to which shackles might be attached, and a toilet); France (Martinique) I, paras 81-3 (regarding disciplinary cells viewed at the centre penitenciaire de Fort-de-France in July 1994, seemingly furnished with nothing more than an Asian-style toilet and, at night, a mattress); and Bulgaria I, paras 164-5 (regarding cells seen in the “totally unacceptable” disciplinary unit of Stara Zagora Prison, in March/April 1995).

<sup>202</sup> See Ireland I, para 153.

<sup>203</sup> See Luxembourg II, para 53.

<sup>204</sup> See Portugal II, paras 162, 164 (2<sup>nd</sup> indent) and 186; and, similarly, Norway I, para 123; and Ireland I, paras 151 and 153.

<sup>205</sup> See, e.g., Hungary I, paras 132 and 133 (1<sup>st</sup> indent); and Bulgaria I, paras 163-5.

Committee wrote of its delegation's encounter, in November 1993, with a detainee sentenced to three days' isolation in one (of two) punishment cells located in the maison d'arret at Lantin Prison, which measure had been immediately preceded by his placement for some five days in a so-called "bare" cell. Of particular concern to the delegation, it seems, was the detainee's complaint that on being placed in the isolation cell, he had not been furnished with a clean cover.<sup>206</sup> His further complaints that he had been obliged to wear the same prison clothes since first being placed in the bare cell and of his being denied a shower for a week were also considered noteworthy.<sup>207</sup>

The visiting delegation itself observed that he was "forced to eat in conditions of extreme insalubrity", that he had been provided with no toothbrush, and that, for the purposes of washing, he had been furnished merely with a small basin of cold water.<sup>208</sup> It was directly from this environment, it discovered, that the detainee had been transferred to the Palais de Justice to appear before the juge d'instruction.<sup>209</sup>

Commenting on its delegations' findings, the CPT remarked that:

"...to detain a person in such conditions and, in addition, not to allow him to present himself suitably to a magistrate, constitutes degrading treatment".<sup>210</sup>

It went on to request that the Belgian authorities "see to it" that the detainee's experience is not repeated.<sup>211</sup> In the identification of CPT standards on the segregation of detainees for punishment purposes, therefore, it may be argued that the various features of detention about which the detainee at Lantin complained or which

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<sup>206</sup> See Belgium I, para 232.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid. According to the CPT, Belgian law provides that detainees required to appear before a judge may wear their own clothes or, if this is not appropriate, "decent" clothing furnished by the establishment in which they are detained.

<sup>211</sup> Ibid. The (alleged) practice of placing detainees for several days in "bare" – or "reflection" – cells prior to their placement in a punishment cell was also raised by the CPT with the Belgian authorities: *idem*, para 237.

were observed directly by the visiting delegation in 1993 ought not to obtain, in its view, in cells used for punishment purposes.

## *The segregation regime*

### *Introduction*

The CPT, as we have seen, is prepared to countenance a lower quality of regime in respect of detainees segregated for disciplinary reasons than in respect of detainees segregated on other grounds.<sup>212</sup> More generally, however, its precepts on isolation regimes may be said to be predicated on the principle that, as distinct from the issue of material conditions of detention:

“...in reality...the very sense of isolation will inevitably limit, if not exclude, the participation of [isolated] detainees in *ordinary* regime activities”.<sup>213</sup>

This view was proffered to the French authorities in an effort, it seems, to temper their laudable ambition – as expressed, *inter alia*, in the country’s *Code de Procedure Penale* – that persons segregated in French prisons ought to benefit from an “ordinary” prison regime.<sup>214</sup> Indeed, the CPT’s own observations in the country in late 1991, it remarked, had merely “confirmed” the impracticable nature of this particular provision.

At the other extreme, equally unsustainable is a regime whose practical application results in an almost complete denial of activities for segregated detainees. In Switzerland, in February 1996 (as in 1991), for example, a delegation found that regime activities for isolated inmates at the Berne regional prison were so impoverished that the “large majority” of them were compelled to remain confined to

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<sup>212</sup> See above, pp 406-9.

<sup>213</sup> See France I, para 142 (emphasis added).

<sup>214</sup> Ibid.

cells for weeks, even months.<sup>215</sup> Acknowledging that the prison's physical configuration was such as to limit the development of sophisticated activities for prisoners, the CPT was, "[n]evertheless," emphatically of the view that:

"...security considerations do not constitute a sufficient reason to deprive detainees of any form of activity".<sup>216</sup>

As to the balance to be struck between the positions adopted by the Committee in its French and Swiss visit reports, it has recommended on one occasion that, in imposing restrictions on detainees, the competent authority should:

"...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)..."<sup>217</sup>

It is important, for example, that in restricting a detainee's contact with others, the persons with whom the detainee may not communicate are clearly specified. If this is not done, the Committee has pointed out, then the detainee may be rendered, to all intents and purposes, subject to an (unnecessary) total communication ban.<sup>218</sup>

### *Types of restriction*

Although we are principally concerned with the question of the solitary confinement of detainees, it is worth noting that recourse to isolation represents just one – albeit the most extreme – restrictive measure among a number which may be applied to detainees, with or without their consent. Other restrictions to which, in the experience of the CPT, detainees may be subject, include the prohibition - or, at least, the

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<sup>215</sup> See Switzerland II, para 61.

<sup>216</sup> Ibid.

<sup>217</sup> See Norway II, para 36 (2<sup>nd</sup> indent).

<sup>218</sup> Idem, para 33.



supervision - of visits, correspondence and telephone calls, save for visits, correspondence and telephone calls involving a “public authority” or (public) defence lawyer. In addition, they may be denied access to newspapers, radio and television and may have conditions attached to their association entitlements (such as requiring the prior consent of the authorities). Further, all such restrictions may be regarded as applying to particular segregated persons (such as remand prisoners) or segregated persons in general.<sup>219</sup> As to restrictions on particular regime activities, in addition to the curbing – or even complete denial – of opportunities for association, custodial authorities may seek, *inter alia*, to limit participation in group work or leisure activities or to restrict or suspend outdoor exercise entitlement.<sup>220</sup>

While stipulating the kinds of restriction which may legitimately be applied to persons deprived of their liberty, domestic legislation may also circumscribe the extent to which the detaining authorities are free to impose them. One such limitation we have already met: namely, the duty not to impede written and oral communication between a detainee and, *inter alia*, his lawyer.<sup>221</sup> Others referred to in CPT visit reports include prohibitions against restricting detainees’ hygiene, health, food and clothing requirements, access to personal effects – provided that security is not compromised thereby – books, periodicals and radios, religious freedom and entitlements to outdoor exercise and close family visits.<sup>222</sup>

### ***Tailoring the restriction to the detainee***

Some national authorities have determined that in the application of restrictions,

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<sup>219</sup> See, e.g., Norway I, para 58 (and, similarly, Norway II, paras 22 and 31); Sweden I, App III, para 12 and main report, para 63; and Denmark I, App 2, para 11.

<sup>220</sup> See, e.g., Germany I, App III, para 14.

<sup>221</sup> See above, pp 78 and 82.

<sup>222</sup> See Italy I, para 146. These limitations, as provided for in Italian law in 1992, were “welcome[d]” by the CPT.

account should be taken of the category of detainee to which they are to be applied. They consider that it may be inappropriate to impose certain restrictions on certain types of detainee. In 1990, in the Netherlands, for example, a number of “reinforced security units” (or “EBIs”) was established, each intended to accommodate a small number of prisoners considered to represent an “extremely high escape risk” or “pronounced management and control problems”. At the same time, a so-called “carrousel system” was introduced, under which occupants of the units were transferred from one EBI to another every six months. The regime applicable in all such units was said to be a “normal restricted group” regime.<sup>223</sup>

One year later, however, the Dutch prison authorities determined that it was “unwise to hold prisoners with such widely different characteristics in the same units” since the approach required in respect of prisoners representing an extremely high escape risk “could not be identical to that required for hard-to-control prisoners, who needed more individualised treatment”. Consequently, “different, smaller units, in theory subject to an individualised, highly structured, restricted group regime” were established in order to accommodate the latter category of detainee.<sup>224</sup>

### *Restrictions designed to act as incentives to good behaviour*

One of the most interesting systems of restrictions thus far examined by the CPT was that operating at HM Young Offender Institution and Remand Centre, Feltham, England, when visited in May 1994. Although characterised by the authorities as a “[g]eneralised incentive scheme”, the establishment’s so-called “points and levels” system was, it appears, little more than a highly intricate disciplinary regime. Having

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<sup>223</sup> See Netherlands I, para 66.

<sup>224</sup> *Idem*, para 67.

heard concerns about its operation “from a number of sources”, the visiting delegation was minded to examine it “particularly closely”.<sup>225</sup>

Inmates subject to the system were classified according to one of five levels, each level connoting a different regime. Level 3 represented the “starting” – or “observation” – level, applicable to all newly arrived inmates. Under it, detainees were entitled to two hours out-of-cell time a day, “for recreation, sport, etc”.<sup>226</sup> Promotion to a higher level depended on the acquisition of a certain number of points (awarded for satisfactory behaviour) in any one week; poor conduct resulted in demotion to a lower level. The number of points awarded was “based entirely on the judgement of the staff in each unit, who were responsible for assessing inmates’ conduct”.<sup>227</sup>

The visiting delegation was “particularly concerned” by the regime applicable to inmates “downgraded” to level 1, both in the “ordinary” units and in one particular unit used to accommodate identified bullies.<sup>228</sup> In the ordinary units, inmates subject to a level 1 regime would be:

“...confined to their cells, alone, for up to 23 hours a day, with only in-cell activities [to occupy them]: reading, writing, listening to the radio and education (if the individual concerned was still of compulsory school age). All forms of group activity, such as sport, recreation and games were prohibited. However, the inmates were authorised to receive visits. One hour of activity was allowed per day within the unit; this hour had to be devoted to cleaning the cell, showering and making authorised telephone calls. The cells were inspected daily.

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<sup>225</sup> See UK III, para 132.

<sup>226</sup> *Idem*, para 133.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

“This situation...could last for up to three weeks, at the end of which the young person was either moved up to a high level or returned to the admission unit with a view to being transferred to another unit”.<sup>229</sup>

The regime to which identified bullies were subject was very similar. It was “very restrictive” and might obtain for a considerable period of time. A stay of five weeks was considered to be the minimum period necessary to pass from levels 1 to 3. At the time of the visit, one detainee had been subject to such a regime for three months (the remaining six detainees, for periods ranging from two months to a few days). Some had spent time in the unit previously.<sup>230</sup>

In addition to spending up to 23 hours a day confined to their cells, occupants of the unit were obliged to wear prison clothes. Further, those subject to a level 1 regime were permitted to keep two books in their cell; those at level 2, four books; and those at level 3, six. Detainees promoted to level 2 were permitted to keep objects like a portable radio and cassettes. At levels 2 and 3, detainees were authorised to work in their cells – “dismantling headphones for an airline” – or to clean and tidy the unit outside the cells. At level 3, sporting activities were possible. Basic toiletries, such as soap and shampoo, were rationed according to the level.<sup>231</sup> Each inmate in the unit was permitted one hour’s activity per day: a compulsory half hour for the cleaning of cells (which, as we have seen, were inspected daily) and showering; and a half hour’s outdoor exercise in a yard “surrounded by a high wall”, which yard had been designed to accommodate high security prisoners.<sup>232</sup> As for opportunities to make contact with other persons, inmates were authorised to receive

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<sup>229</sup> *Idem*, para 134.

<sup>230</sup> *Idem*, para 135.

<sup>231</sup> *Idem*, para 136.

<sup>232</sup> *Ibid.*

visits and make telephone calls, “subject to prior approval”. Otherwise, human contacts were “very limited. Although each inmate was allocated a prison officer to advise him, the latter only intervened when requested to do so by the inmate. As a result, human contacts were mainly confined to contacts with the unit’s staff, when cells were being inspected or inmates were taken out of their cells”.<sup>233</sup>

Life for identified bullies, the CPT concluded, was “very militaristic”.<sup>234</sup> Indeed, it suggested, each one of them (like persons held at level 1 in the ordinary units) was subject to a regime “akin to...solitary confinement”.<sup>235</sup> Any detainee forced to submit to such a regime for any length of time (i.e. from “several weeks...[to] several months”), it insisted, could not be said to have obtained “appropriate” mental and physical stimulation.<sup>236</sup>

Commenting generally on the provision of “generalised incentive schemes” in juvenile detention centres like that operating at Feltham, the Committee has proceeded cautiously, averring, without indicating approval or disapproval, that:

“[i]t is not for the CPT to express a view on the socio-educative value of such schemes. However, it pays particularly close attention to the content of the base-level regime being offered to juveniles subject to such schemes, and to whether the manner in which they may progress (and regress) within a given scheme includes adequate safeguards against arbitrary decision-making by staff”.<sup>237</sup>

The CPT’s prevarication on the value of rewards-based schemes is surprising. For, it is very unlikely to consider that they should be premised exclusively on the need to

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<sup>233</sup> *Idem*, para 137.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Idem* para 138.

<sup>236</sup> *Ibid.* On the desirability of such stimulation in the CPT’s recommended segregation regime, see below, p 440.

<sup>237</sup> See 9<sup>th</sup> GR, para 32.

provide incentives to good behaviour and to punish poor behaviour. It may be that it considers that they should possess some other, objectively justifiable merit, like an educative or re-socialising purpose, something which is hinted at, but left undeveloped in the remarks just quoted.

***State party efforts to justify the imposition of restrictions***

The rationale behind the application of restrictive regimes was succinctly summarised in the provisions of a circular in force at Peterhead Prison, Scotland, when visited, like Feltham, in May 1994. Circular 79/1993 (pertaining to the different entitlements of various categories of segregated detainee) provides that:

“the ‘quality of life’ within [Peterhead’s disruptive/dangerous prisoners unit] will be positioned so as to be more attractive than [its] separate [punishment] cells unit, but less than mainstream prisons so as not to provide a disincentive for return”.<sup>238</sup>

Like the application of the “points and levels” system at Feltham, therefore, this provision suggests that some prison authorities view a restricted prison regime as just one - carefully conceived - part of a “quality of life” continuum. At its most austere, the continuum may be represented by the spartan lifestyle applied, *inter alia*, to punished prisoners; at its most congenial, by the basic (or optimum) conditions provided for on “normal” location. Progression along the continuum may be considered to be a matter of incentive, a desire to escape austerity for relative comfort.<sup>239</sup>

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<sup>238</sup> See UK III, para 326.

<sup>239</sup> See, in the same connection, Iceland II, paras 60-3 (regarding the regime obtaining in the ‘drug-free unit’ at Litla-Hraun State Prison in 1998. Interestingly, the CPT called for the establishment of a “clear and formal procedure” to guide the movement of prisoners between categories of regime); and para 128 (regarding the “grading system” in operation at the Studlar Diagnostic and Treatment Centre for

## *Consequences of exposure to a solitary confinement-type regime*

### *- Effects on detainees generally*

The possible and perceived effects on detainees of placement in conditions akin to solitary confinement have already been considered in some detail.<sup>240</sup> In addition, it may be worth considering, more specifically, the possible effects of particular segregation *regimes* (rather than, say, material conditions of detention or lengths of isolation). A most striking illustration of such effects may be found in the Committee's first Danish visit report. Therein, referring to the judicially-authorized practice of isolating persons remanded in custody in the course of a criminal investigation, the CPT stated that a "unanimous complaint" of the prisoners met in December 1990 concerned the "harshness" of the regime of "total isolation" imposed on them. These complaints had been "corroborated by statements from other interested circles (doctors, prison nursing staff, other prison staff, lawyers, non-governmental organisations etc)". Such a regime, the Committee felt:

"...could ultimately lead to the individual's psychological destruction".<sup>241</sup>

A detainee subject to this regime would be "locked up in his cell for up to 23 hours out of 24". He would be allowed one hour's open air exercise a day, "still in isolation", but, "[n]o form of activity with other prisoners..." Consequently, "[a]part from contacts with...prison staff" – said by members of staff themselves, to be "few and far between...because of the pressure of...work" – and "some" contacts with the prison chaplain and "instructor," an isolated detainee would be effectively "cut off from any direct human contact". Even attendance at religious services - "including at

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Juveniles); and Luxembourg II, para 20 (regarding the "systeme de cotation" in place in the country's Centres Socio-Educatifs de l'Etat in 1997).

<sup>240</sup> See above, p 391 *et seq.*

<sup>241</sup> See Denmark I, para 24.

Christmas time” - it was alleged, would be forbidden.<sup>242</sup> A detainee’s correspondence and visits would be “subject to authorisation and supervision by the police authorities” (with the exception of visits from his legal advisor) – restrictions which were “apparently very frequently applied... [might] even be continued after the period of solitary confinement ha[d] ended” and were said to be “particularly resented” by detainees. Authorised visits would take place “either in... prison in the presence of a prison warder, or at [a] police station in the presence of a police officer”. “[S]everal” complaints were heard regarding the “infrequency” of such visits, of which two examples were given: one in which just four visits had been authorised over a four month period of isolation; and one in which fortnightly half-hour visits over a period of five months had been permitted.<sup>243</sup>

Having visited prisoners serving life sentences in the Netherlands Antilles in 1994, the CPT concluded that such persons were vulnerable to a similar psychological effect to that evinced by detainees in Denmark. Under the relevant legislation, life sentence prisoners would be “placed in specially designated facilities and...would have no contact with other prisoners”.<sup>244</sup> Although, in material terms, the four prisoners subject to such restrictions encountered at Koraal Specht Prison, the Committee noted in its visit report, “could be considered to have a privileged status within the sentenced prisoners’ section”,<sup>245</sup> the regime to which they were subject was “very restrictive”. Their “lack of physical mobility,” it appears, was “particularly striking”.<sup>246</sup> In this respect, although cell doors in the special unit remained open between the hours of 7 am and 6 pm, “in principle,” the Committee stated, the four

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<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> See Netherlands (NA) I, para 90 (quoting section 53 of decree No.18 of 1958).

<sup>245</sup> Notwithstanding the fact that their sanitary facilities “left much to be desired”.

<sup>246</sup> *Idem*, para 92.



prisoners “never left the unit,” other than to take delivery of meals or objects ordered from the prison canteen. “On rare occasions”, they might leave it and watch television in a corner of the courtyard located in the sentenced prisoners’ section. Their own exercise, however, was taken within their unit in an area “completely surrounded by bars”. They were offered no work or other form of activity – though the prison management had permitted two of them to begin work in the prison kitchen. The remaining two “spent their days reading, listening to the radio or playing board games with other inmates of the sentenced prisoners’ section, through the bars separating the unit from the rest of the section”.<sup>247</sup> In the view of the CPT:

“[h]aving regard, *inter alia*, to the length and indeterminate nature of their sentence, the conditions of detention of the prisoners in the life-sentence unit, particularly those who did not work, **could be considered to be inhuman**; they involved an appreciable risk of deterioration of the mental state of those prisoners and effects of a psychosomatic nature”.<sup>248</sup>

- *Consequences for the custodial environment*

While the principal concern of the CPT in the present connection is the welfare of the detainee subject to restrictions, it has also demonstrated an acute awareness of the damage that may be wrought by the application of isolation regimes, both on the custodial environment generally and an establishment’s internal atmosphere in particular. For instance, at the Kopenick Detention Centre for Foreigners, Germany, in April 1996, a delegation observed that:

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<sup>247</sup> *Idem*, paras 90-91.

<sup>248</sup> *Idem*, para 92 (original emphasis). Psychosomatic effects were apparent, too, in Portlaoise Prison, Ireland, in 1998, where interviews with the six occupants of the special unit revealed “a consistent association of psychological symptoms which appeared to have been induced by the regime”. The “symptom profile” displayed by the prisoners, it was noted in the subsequent visit report, comprised “aggressive behaviour directed against self and others, regressive behaviour (withdrawal from social interaction), and difficulties in verbal expression (logorrhoea)”. Further, two of the inmates manifested “depressive tendencies”, as well as disturbed concentration and confusion: see Ireland II, para 91.

“[t]he high degree of security...justified by concerns about escapes, suicides and self-mutilation...had a bearing upon the tense atmosphere observed. Security measures had an oppressive effect on daily life: detainees only had items which were strictly necessary in their dormitories [with the result that items like shoelaces, belts and watches were confiscated] and were obliged to ask members of staff to deal with even the simplest requests (e.g. gaining access to their personal effects, boiling a kettle, opening a window, lighting a cigarette). Inevitably, this situation caused friction: detainees were annoyed and frustrated and the staff were irked by incessant requests, feeling that they had been relegated to the role of ‘dogsbody’”.<sup>249</sup>

While detainees at Kopenick were not, strictly speaking isolated, the kind of restrictions to which they were subject may be considered akin to those which might conceivably be applied to anyone so detained. Indeed, the findings of an internal study into the Centre’s future, carried out prior to the CPT visit, appeared to show that the authorities were very much aware of this fact, for the study “warned against the dangers of conflating the security measures inherent in all places of detention with those required for prisoners considered to be dangerous”.<sup>250</sup>

A quite different effect to that reported at Kopenick appears to have been occasioned by the application of restrictions to inmates at Kronoberg Remand Prison, Sweden, at the time of the CPT’s visit in 1994. There, the 45% of the remand population to whom restrictions were applied were said to have enjoyed out-of-cell time (excluding outdoor exercise) of no more than three to four hours a week.

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<sup>249</sup> See Germany II, paras 53 and 69.

<sup>250</sup> Ibid.

Consequently, despite a total prison population of approximately 250, the prison, it was observed, remained “eerily silent... at most times of the day”.<sup>251</sup>

### *General principles on isolation regimes*

An oft-cited consideration which may be said to underpin every CPT precept on the regime activities to which, in its view, segregated detainees should be entitled is one which, it has asserted, is “generally acknowledged,” namely, that:

“...all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities”.<sup>252</sup>

This principle has been re-stated and refined in the light of experience. To the Polish authorities in 1998, for example, the Committee highlighted the “greater risk of inhuman treatment than in the case of the average prisoner” which is occasioned by the imposition of a solitary confinement-type regime.<sup>253</sup> Accordingly, it counselled the taking of “considerable care” in applying restrictions.<sup>254</sup> To the Hungarian authorities, it has indicated the “dangers inherent in this area” by reference to paragraphs 40 and 43 of the Explanatory Memorandum to Recommendation No. R (82) 17 of the Committee of Ministers,<sup>255</sup> the contents of which were considered earlier.<sup>256</sup> Lastly, to the UK authorities, it has suggested that these dangers are “even greater in the case of juveniles and young adults”.<sup>257</sup> Actuated by principles like

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<sup>251</sup> See Sweden II, para 19.

<sup>252</sup> See, e.g., Finland I, para 73; and, similarly, Portugal I, para 68; and Slovakia I, para 137.

<sup>253</sup> See Poland I, para 145.

<sup>254</sup> See, similarly, UK IV, para 156 (regarding the impoverished regime to which certain prisoners segregated for reasons of good order and security were subject in the Isle of Man Prison, when visited in 1997; “great care must be taken”, the Committee stated, “to counter the negative effects of such a situation”).

<sup>255</sup> See Hungary I, para 136.

<sup>256</sup> See above, p 391.

<sup>257</sup> See UK III, para 138; and, more generally, below, p 470.

these, the CPT has determined that the regime activities to which *all* segregated detainees are, in its view, entitled should comprise, in essence:

“...purposeful activities and appropriate human contact”.<sup>258</sup>

These features are important, it believes:

“...in order to counteract the effects of being placed in solitary confinement”.<sup>259</sup>

This skeletal basic precept has been developed over time – though, not always helpfully. To the Norwegian authorities, for example, the Committee has suggested that the activities and human contact which it is seeking to foster should be made available to prisoners who have been or it is envisaged will be, subject to restrictions “for extended periods”.<sup>260</sup> Precisely what the CPT means by the term “extended periods” and what, if any, kinds of activities and human contact it feels ought to be made available to persons subject to restrictions for *less than* such periods was not made clear in its observations. Indeed, it may be significant in this connection that in reiterating its recommendation in its second Norwegian visit report, published some three years after its first, the Committee made no reference to this temporal contingency.<sup>261</sup>

Also to the Norwegian authorities, having learned, in March 1997, that the treatment of detainees subject to restrictions at Bergen Prison was neither guided by “clear directives or policy” nor co-ordinated by prison management – with the result

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<sup>258</sup> See, e.g., Finland I, paras 112 and 241 and 168 and 244; France I, para 142; and Switzerland I, paras 52 (5<sup>th</sup> indent) and 148.

<sup>259</sup> See Denmark II, para 61; and, similarly, Germany I, paras 104 and 216 (wherein the CPT noted that the isolation regime obtaining in the establishments visited in 1991 “[did] not provide the stimulation required to avert damaging changes in [detainees’] social and mental faculties”).

<sup>260</sup> See Norway I, paras 65 (3<sup>rd</sup> indent) and 143.

<sup>261</sup> See Norway II, para 19. Some commentators have suggested that in formulating segregation regimes, compensating out-of-cell activities should be provided “in proportion to the level of restrictions to which prisoners are subject”: see Morgan and Evans (1999), pp 56-7.

that the provision of regime activities tended to depend very much on the initiative of personnel – the CPT called for, *inter alia*, greater co-operation among staff.<sup>262</sup> In this way, it clearly hoped, the activities and human contact afforded might be rendered more meaningful.

As to the particularities of the CPT's basic precept, a study of its published work to date yields the following efforts at elaboration:

**(i) “purposeful activities”**

It is the Committee's view that:

“[t]he existence of a satisfactory programme of activities is just as important – if not more so – in a [segregation] unit than on normal location. It can do much to counter the deleterious effects upon a prisoner's personality of living in the bubble-like atmosphere of such a unit”.<sup>263</sup>

At the same time, however, it is prepared to accept that “it is far from easy to offer a programme of activities to inmates...kept segregated from other inmates”.<sup>264</sup>

Attempting to balance these concerns, isolated prisoners, it considers:

“...should, within the confines of their...detention unit, enjoy a relatively relaxed regime...[be] allowed to move without restriction within what is likely to be a relatively small physical space; [be] granted a good deal of choice about activities, etc.) by way of compensation for their [more] severe custodial situation”.<sup>265</sup>

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<sup>262</sup> *Idem*, paras 24 and 38. As to the significance of a lack of directives or policy in respect of the *regulation* of segregation measures, see below, p 451.

<sup>263</sup> See Poland I, para 145; and, in the same connection, Netherlands II, para 61. The CPT, it should be noted, made this observation in the context of its analysis of the detention in both countries of “dangerous” prisoners. However, many of the precepts which flow from it may be considered equally applicable, it is submitted, in respect of the seclusion of other categories of detainee.

<sup>264</sup> See Netherlands II, para 98.

<sup>265</sup> See Poland I, para 145; Netherlands II, para 61; and, similarly, Ireland II, para 89. Again, the Committee's assertion related to the seclusion of “dangerous” prisoners.

As far as the activities themselves are concerned, these, the Committee believes, should be “as diverse as possible”<sup>266</sup> and - self-evidently - “stimulating”.<sup>267</sup> They should comprise “work, preferably with vocational value; education; sport and recreation”.<sup>268</sup> Where necessary, it maintains, out-of-cell time should be “increased” in order to accommodate such variety.<sup>269</sup> Further, such activities, it has stated, should be “adapted” where necessary,<sup>270</sup> a feature which, until the Committee offers further elaboration, conceivably requires either that the range of activities provided be flexible (i.e. be able to accommodate changes in the prison environment) or, perhaps, that they be tailored to the particular needs of the individual detainee concerned. Where detainees have been segregated on account of their poor behaviour and attitude, their programme of activities, the CPT has recommended, should be such as to “enabl[e] them to demonstrate the progress required for reintegration into an ordinary detention unit”.<sup>271</sup>

- *The importance of outdoor exercise*

Of particular importance in any programme of activities afforded persons subject to a restricted regime is, the CPT maintains, the provision of appropriate outdoor exercise. As early as its 2<sup>nd</sup> General Report, it sought to “emphasise that **all prisoners without exception** (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily”.<sup>272</sup> This entitlement, it considers, constitutes “a minimum fundamental guarantee”,<sup>273</sup> its absence from any

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<sup>266</sup> Ibid. See, similarly, UK III, para 356 and Netherlands (NA) I, para 98, 2<sup>nd</sup> indent (“varied”).

<sup>267</sup> See Cyprus II, paras 63 and 108.

<sup>268</sup> See UK III, para 356; and Netherlands (NA) I, para 98 ( 2<sup>nd</sup> indent). Interestingly, this precept closely resembles that promulgated by the CPT in respect of detainees held on “normal” location: see, *inter alia*, 2<sup>nd</sup> GR, para 47.

<sup>269</sup> UK III, para 356.

<sup>270</sup> See Italy I, para 140.

<sup>271</sup> See Slovakia I, paras 101 (2<sup>nd</sup> indent) and 191.

<sup>272</sup> See 2<sup>nd</sup> GR, para 48 (original emphasis). Provision for “every” prisoner to benefit from outdoor exercise is also made in Rule 86, *EPR*.

<sup>273</sup> See Belgium II, para 188.

restricted regime is, accordingly, “unacceptable”.<sup>274</sup> The Committee has offered the same opinion in a variety of ways on occasions since.<sup>275</sup>

The duration of such daily exercise, it has stated, should be “a minimum of one hour”,<sup>276</sup> and it should take place “in areas sufficiently large to enable [detainees] to exert themselves physically”.<sup>277</sup> It is worth noting in this last connection that it is the general view of the CPT that “[i]t is...axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather”.<sup>278</sup>

- *The provision of suitable reading material*

Like the entitlement to outdoor exercise, that of access to suitable reading material is regarded by the CPT as crucial to the well-being of segregated persons. *All* prisoners held in seclusion cells, it considers, “[should] have access to reading matter”.<sup>279</sup> The reading material provided, it has stated, should be “varied”.<sup>280</sup> It need hardly be stated that the provision of appropriate reading material is particularly important when the isolated detainee is a minor.<sup>281</sup>

- *Work activities*

In a reference to the kind of work activities to which, in its view, prisoners subject to

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<sup>274</sup> See Luxembourg II, para 33.

<sup>275</sup> See, e.g., Turkey I, para 160 (*cf* Turkish penal practice in 1997).

<sup>276</sup> See Netherlands II, para 98. In 1997, isolated remand prisoners at the King Willem II Detention Centre for Foreigners, the CPT learned, enjoyed a mere half hour outdoor exercise daily, the remaining 23.5 hours being spent in-cell.

<sup>277</sup> *Ibid.* At the Detention Centre in 1997, exercise took place in “a small metal cage”. See also Belgium II, para 202, 2<sup>nd</sup> indent (regarding the “sometimes sordid” conditions in which segregated detainees’ outdoor exercise was found to take place at Lantin, Saint-Gilles and Mons Prisons in 1997 (para 201)); and, similarly, France III, para 155.

<sup>278</sup> See 2<sup>nd</sup> GR, para 48.

<sup>279</sup> See Netherlands (NA) I, para 114 (*cf* practice in the men’s disciplinary unit at Koraal Specht Prison in 1994); and now Netherlands (NA) II, para 37.

<sup>280</sup> See Hungary I, para 134. In 1994, the only reading material permitted detainees subject to a disciplinary regime at Budapest Remand Prison was the Bible (see similarly Germany I, para 160). By contrast, at Tokol Prison disciplined detainees could borrow books from the prison library.

<sup>281</sup> See, e.g., Portugal II, paras 164 and 186; Turkey I, para 125; and Poland I, 167.

a special security regime (i.e. dangerous or violent prisoners) in the Netherlands were entitled when visited in 1997, the CPT observed in its second Dutch visit report that:

“...it is clear that security considerations may preclude many types of work activities which are found on normal prison location. Nevertheless, this should not mean that only work of a tedious nature is provided for prisoners...”<sup>282</sup>

In this respect, it referred to the terms of paragraph 87 of the Explanatory Memorandum to Recommendation No. R (82) 17 of the Committee of Ministers of the Council of Europe, which lists a number of activities that may be considered both “uniquely suitable for reinforced security units, and satisfying for prisoners”. Although more immediately relevant to the regimes considered appropriate for dangerous detainees or those considered an escape risk, the Committee’s remarks deserve to be mentioned here, it is submitted, since the same considerations may be held to apply, *mutatis mutandis*, in the seclusion of other categories of detainee.

**(ii) “human contact”**

In order to be “appropriate”, contact with others, it may be inferred from CPT visit reports, should comprise more than that which is inherent (and necessary) in every custodial environment (i.e. more than just contact with staff – *inter alia*, during routine inspections, on distributing food and on removal from cells for washing and exercise purposes – and visits from relatives and/or lawyers).<sup>283</sup> Indeed, even

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<sup>282</sup> See Netherlands II, para 61. On the regime which obtained at the time of the visit, see para 62 of the report. In the same connection, see Poland I, para 145; and Ireland II, para 89.

<sup>283</sup> See Germany I, para 76; Luxembourg I, para 50; and Belgium II, para 201. The provision of enhanced human contact is, of course, critically important when the segregation of detainees for extended periods is in the contemplation of the authorities, e.g. following the isolation of high security or dangerous prisoners or the prolonged detention of persons on remand.



detainees who eschew human contact should be encouraged to develop it, it seems. Visiting Peterhead Prison, Scotland, in May 1994, for instance, the CPT met one prisoner who had been solitarily confined in a unit built specifically for him since 1978. Without, apparently, showing much regard for his wishes to remain isolated and notwithstanding his “very good” material conditions of detention, “interesting” regime and apparent “genuine...content[ment]”, the CPT said of the fact that his only human contact was with the unit’s staff that efforts should be made “to provide [him]...with an enhanced range of appropriate human contact”.<sup>284</sup>

Clearly, in the view of the CPT, every segregated detainee – including persons perceived to be dangerous or deserving of a high security classification – should, in principle, enjoy what it regards as suitable contact with others, even if the detainee concerned appears not to be troubled by or even to court isolation. Such contact, the Committee believes, may be guaranteed in any one of a number of ways:

- (i) by granting isolated detainees the freedom to associate with other persons held in the same segregation unit,<sup>285</sup> by way of *inter alia* enhanced opportunities for group-oriented work and exercise (so far as such opportunities are compatible with the increased constraints inevitably occasioned by the act of separation),<sup>286</sup>
- (ii) by the deployment of additional personnel<sup>287</sup> (by which the CPT means, presumably, not merely custodial staff, but also social workers, activities’ organisers, prison visitors and even medical and psychiatric staff);

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<sup>284</sup> See UK III, paras 328 and 332.

<sup>285</sup> *Idem*, para 356. See also Poland I, para 145; and Netherlands II, para 61 (regarding the separation of ‘dangerous’ prisoners).

<sup>286</sup> See Switzerland II, para 84.

<sup>287</sup> See Norway II, para 24.

(iii) (where only a small number of detainees may be isolated at any one time), by inviting detainees from elsewhere in the establishment to take part, voluntarily, in activities organised for those segregated.<sup>288</sup>

As far as staff-inmate relations in seclusion units are concerned, “[s]pecial efforts”, the CPT believes, “should be made to develop a good internal atmosphere...The aim should be to build positive relations between staff and prisoners. This is in the interests not only of the humane treatment of the unit’s occupants but also of the maintenance of effective control and security and of staff safety”.<sup>289</sup> Consequently, in a reflection of its views on the qualities required of staff obliged to use force or measures of restraint against detainees, it has suggested that “[s]uccess in this area requires that the staff assigned to work in such units must be very carefully chosen. They should be appropriately trained, possess highly developed communication skills and have a genuine commitment to working in a more than usually challenging environment”.<sup>290</sup> Further, in the development of appropriate staff-inmate relations in segregation units, it is important, the CPT believes, that there be *direct* contact between staff and prisoners. Accordingly, it is critical of situations in which there is “scarcely any” such contact, particularly where what contact there is takes place through screens or grills, or where inmates remain strictly separated from staff even during activities such as education and sport.<sup>291</sup>

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<sup>288</sup> See Norway I, para 73.

<sup>289</sup> See Poland I, para 145; and Netherlands II, para 61. (In this respect, compare findings in the Netherlands in 1992, when staff attitudes in one seclusion unit visited were “markedly antagonistic...indeed...openly contemptuous” (Netherlands I, para 85), with those in 1997, when relations were “much improved...informal and evidently relaxed...foster[ing] a much more positive atmosphere” (Netherlands II, para 44)). See also Ireland II, para 89.

<sup>290</sup> See Poland I, para 145; and Ireland II, para 89.

<sup>291</sup> See Spain VI, para 68 (regarding the situation observed in the special units at both Jaen and Madrid V Prisons in 1998. In addition, it was noted, there was little, if any, direct contact during medical consultations, as well as during interviews with the director and other senior staff. However, the situation in the establishments’ closed units was, it seems, “somewhat better”: *idem*, para 69).

The human dimension of solitary confinement has been considered by the CPT in other ways, too. For instance, the configuration of cells, it considers, should not be such as to limit human contact. In Straubing Prison, Germany, in December 1991, cells set aside for solitary confinement, a visiting delegation noted, with interest, were “so designed that from within...no human contact with other prisoners was possible. Once inside...with all the doors closed, prisoners could not hear any of the usual prison sounds”.<sup>292</sup> Located at the intersection of the wings of a building and reached through a door opening on to a corridor (which served as a form of antechamber and contained showers), two segregation cells were located in each corridor. “In principle,” the CPT observed subsequently, “there were no guards in the corridors and the occupants of the cells had no opportunities for visual or other forms of sensory contact with other prisoners or prison officers”. “Thus”, it concluded, “apart from intermittent dealings with staff and occasional visits from relatives or lawyers, these prisoners were effectively isolated from all forms of human contact”.<sup>293</sup>

Clearly, the inappropriate location and design of isolation cells (as well as the manner in which they are staffed), are matters of some concern to the CPT since they vitiate something which it considers crucial to the humane segregation of detainees: that is to say, the need for contact with others.

### ***General responsibilities of the custodial authorities***

Although all precepts identifiable in the work of the CPT in the present connection by definition create responsibilities for detaining authorities, most of them relate to specific aspects of the isolation regime. For our purposes, therefore, they may be

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<sup>292</sup> See Germany I, para 75.

<sup>293</sup> Ibid.

dealt with discretely, in sections devoted, *inter alia*, to the contents of the isolation regime, safeguards applicable in its application and ways in which the differing needs of segregated detainees may be catered for. At the same time, however, a number of *general* responsibilities may be identified which defy categorisation. By way of supplementing the present examination of CPT precepts on the particularities of isolation regimes, therefore, we shall briefly consider its views on the role of the custodial authorities generally in the segregation of detainees.

- *Duty to provide guidance to personnel involved in the isolation of detainees*

To the Danish authorities, regarding the rather controversial practice of (almost routinely) segregating remand prisoners for the purposes of a criminal investigation,<sup>294</sup> the CPT suggested, in its first visit report, that:

“...the police be given detailed instructions as regards recourse to prohibitions/restrictions concerning prisoners’ correspondence and visits...”<sup>295</sup>

- *Contents of segregation regimes to be expressly stated*

If authorities are to furnish staff involved in the isolation of detainees with “detailed instructions”, then, logically, one of the most important pieces of information that may be provided concerns the *content* of segregation regimes. It may be speculated that it was this kind of consideration which prompted the CPT, in the wake of its visit to the segregation unit – “apparently used for both disciplinary confinement and other segregation purposes”<sup>296</sup> – at Korydallos Men’s Prison in 1993, to recommend to the Greek authorities that:

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<sup>294</sup> See, generally, above, p 380.

<sup>295</sup> See Denmark I, para 29 (4<sup>th</sup> indent).

<sup>296</sup> See Greece I, para 133.

“...the respective regimes applicable...to persons held in the...unit be expressly laid down”.<sup>297</sup>

- *Different regimes ought to be conceived for different categories of segregated detainee*

One obvious reason why the regimes to which isolated detainees are subject ought, in the view of the CPT, to be “expressly laid down” is to avoid confusion – especially where, as at Korydallos, as we have just seen, more than one category of detainee may be held in an isolation unit at any one time.<sup>298</sup> When visited, no detainee was being held in the establishment’s segregation unit as a punishment; however, a number of transvestite prisoners, it was observed, had been held there, at their own request, for several months; and other prisoners were being held, involuntarily, on other - imprecise - grounds, certain of whom “appeared to have psychological or psychiatric problems”.<sup>299</sup> In seeking a clear expression of the contents of the segregation regimes applicable in the unit, significantly, it is submitted, the CPT sought to draw a distinction between:

“...the...regimes applicable, on the one hand, to persons undergoing disciplinary confinement and, on the other hand, to persons held in the segregation unit for other reasons...”<sup>300</sup>

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<sup>297</sup> *Idem*, para 136, 2<sup>nd</sup> indent.

<sup>298</sup> As to the CPT’s views on the holding of different categories of detainee in the same segregation unit, see above, pp 402-3.

<sup>299</sup> See Greece I, para 134. As to CPT views on the segregation of mentally disordered persons generally, see *inter alia* below, pp 466-7.

<sup>300</sup> *Idem*, para 136 (2<sup>nd</sup> indent).

## ***Safeguards and procedure in the application of measures of solitary confinement***

### ***Procedures applicable to disciplinary and non-disciplinary segregation***

In the application of restrictions – including the seclusion – of detainees for breaches of discipline, the CPT is of the view that:

“[i]t is...in the interests of both prisoners and [custodial] staff that clear...procedures be both formally established and applied in practice...Disciplinary procedures should provide prisoners with a right to be heard on the subject of the offences it is alleged they have committed, and to appeal to a higher authority against any sanctions imposed”.<sup>301</sup>

The importance of establishing and applying appropriate disciplinary procedures has not been lost on the CPT: “any grey zones in this area”, it considers, “involve the risk of seeing unofficial (and uncontrolled) systems developing”.<sup>302</sup>

It is also the case, as we have seen and as the CPT acknowledges, that “[o]ther procedures often exist, alongside the formal disciplinary procedure, under which a prisoner may be involuntarily separated from other inmates for discipline-related/security considerations”. These procedures, it has stated:

“...should also be accompanied by effective safeguards. The prisoner should be informed of the reasons for the measure taken against him, unless security considerations dictate otherwise, be given an opportunity to present his views on the matter, and be able to contest the measure before an appropriate authority”.<sup>303</sup>

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<sup>301</sup> See 2<sup>nd</sup> GR, para 55. On the procedure recommended for the disciplining of juvenile detainees – which procedure does not differ materially from that recommended in respect of other categories of detainee – see, generally, 9<sup>th</sup> GR, para 35.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

It is proposed to examine each feature of these recommended procedures in turn. In addition, a number of other safeguards, which, the CPT believes, should attend the application of measures of solitary confinement (and, where appropriate, other types of restriction) will be considered. The first of these latter safeguards we turn to now.

*The need for a detailed policy on recourse to seclusion and related measures*

Visiting Bergen and Oslo Prisons, Norway, in 1997, the CPT learned that there existed “no clear directives or policy” on the treatment of detainees subject to restrictions.<sup>304</sup> Consequently, it recommended that such treatment “be governed by detailed directives”.<sup>305</sup> Unfortunately, the Committee offered little guidance as to the content of such directives, other than to suggest that they address the provision of purposeful activities and appropriate human contact and aim to protect prisoners from harm. From other visit reports, however, it would appear that such directives should, in addition, make clear the legal bases on which prisoners may be segregated and the criteria employed in determining the appropriateness of imposing restrictions.<sup>306</sup>

The Committee has been more forthcoming in the context of the segregation of *psychiatric* patients. On the use of seclusion in psychiatric establishments, it has declared:

“...there must always be a detailed policy...including in particular: the types of cases in which it may be used; the objectives sought; its duration and the need for regular reviews; special recording and medical supervision

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<sup>304</sup> See Norway II, paras 24 and 30.

<sup>305</sup> *Idem*, para 38.

<sup>306</sup> See Cyprus I, para 98 and Cyprus II, para 76; and, similarly, Ireland II, paras 87 and 92 (wherein the CPT observed that the “barrier-handling regime” which was operating in the special unit at Portlaoise Prison when visited in 1998 – see further above, p 300, n 101 – enjoyed no legal basis; it had apparently been introduced after discussions between senior officials at the Ministry of Justice, Equality and Law Reform and the Prison Officers’ Association. Immediate steps should be taken, the CPT averred, in order to place the regime on a firm legal basis).

procedures; the existence of appropriate human contact; the need for staff to be especially attentive”.<sup>307</sup>

The correspondence of these provisions with those recommended by the CPT in respect of policies developed on the use of force/restraint against detainees is worth noting.<sup>308</sup> Further, given their uncontroversial content, there seems no reason, it is submitted, why the CPT should refrain from promoting policies of this kind in respect of other kinds of establishment. It is important, of course, that any policy developed should be capable of being effectively implemented in practice. Accordingly, its provisions, the Committee considers, should be widely disseminated and not over-ambitious in scope.<sup>309</sup>

### ***Proportionality***

“The principle of proportionality”, the CPT considers:

“requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned”.<sup>310</sup>

Accordingly, it is inappropriate, it believes, to impose a sanction of isolation on a prisoner for a relatively minor breach of prison discipline;<sup>311</sup> while, in seeking to apply restrictions on remand prisoners’ contact with the outside world, the prosecuting authorities, it has stated, should seek to apply only those restrictions which are “strictly necessary in the interests of the criminal investigation”, and the

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<sup>307</sup> See UK III, para 266 (and, similarly, Romania I, para 190 (3<sup>rd</sup> indent)). See also below, p 466. In England and Wales in 1994, the CPT observed, just such a policy existed by virtue of the combination of a Code of Practice issued under the *Mental Health Act 1983* and a “policy statement” issued by the Special Hospitals Services Authority.

<sup>308</sup> See above, p 334.

<sup>309</sup> See UK III, para 267.

<sup>310</sup> See 2<sup>nd</sup> GR, para 56; and, similarly, France III, para 158; and Norway II, para 18.

<sup>311</sup> See Spain VI, para 94.



courts, in considering the appropriateness of such restrictions, should “take due account of whether the particular restrictions requested...are proportional to the needs of the criminal investigation concerned”.<sup>312</sup> Clearly, therefore, in the view of the CPT, in the furtherance of a criminal investigation, the authorities should not seek and the courts should not impose restrictions *systematically*.<sup>313</sup>

In some reports, the Committee has sought more than mere respect for the principle of proportionality and has insisted that recourse to seclusion and its prolongation should be made “only in exceptional circumstances”;<sup>314</sup> in other words, only when it is “absolutely essential”.<sup>315</sup>

### *Application of solitary confinement as a punishment*

Rather infrequently in its published work, the CPT has addressed the question whether segregation may be applied to a detainee for punitive ends. Encountering isolation regimes which appear to have had no other purpose than to punish those to whom they were applied, particularly on account of their actual or potential duration, it has formulated the following response:

“...while the application of a segregation regime for a prolonged period could, in exceptional cases, be necessary for reasons linked to order and security, the application of such a measure as a punishment is not acceptable”.<sup>316</sup>

Regarding, specifically, the solitary confinement of psychiatric patients, such confinement, the Committee considers, understandably, “should never be used as a punishment, or [its] use prolonged for that purpose”.<sup>317</sup>

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<sup>312</sup> See Sweden II, para 27 (1<sup>st</sup> and 4<sup>th</sup> indents) and now Sweden III, para 40.

<sup>313</sup> See Denmark II, para 58.

<sup>314</sup> See Sweden I, para 68 (1<sup>st</sup> indent); and, similarly, Germany I, para 81.

<sup>315</sup> See Norway II, para 19.

<sup>316</sup> See Belgium II, para 197; Luxembourg I, para 53; and UK IV, para 156.

<sup>317</sup> See, e.g., Greece I, para 256; and below, p 467.

### *Length of seclusion*

The CPT's fundamental position on the duration of solitary confinement is an uncomplicated one: "all forms of solitary confinement", it insists, "should be as short as possible".<sup>318</sup> It considers, further, at least in respect of the segregation of juvenile detainees, that in formulating policy on the application of measures of seclusion, "the maximum possible duration...be formally laid down..."<sup>319</sup> There seems no reason, it is submitted, why the same precept ought not to apply in respect of the isolation of other categories of detainee.

What the CPT regards as lengthy or prolonged segregation can really only be determined by reference to its findings in the course of visits. In this connection, it has characterised measures of seclusion lasting anywhere between two months and one year as "generally"<sup>320</sup> or "very"<sup>321</sup> long and that lasting "for weeks and, on occasion, for months", as "prolonged"<sup>322</sup> (a description which it has also used, it is worth noting, in respect of the seclusion of juvenile detainees for periods of "ten days or more"<sup>323</sup>). Further, the Committee has called for the *substantial* reduction of periods of segregation lasting up to 56 days.<sup>324</sup>

### *The provision of information to a detainee*

Rule 36.3, *EPR* provides, *inter alia*, that:

"No prisoner shall be punished unless informed of the alleged offence..."

For its part, when it suggests that a person who is the object of a proposed order for

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<sup>318</sup> See, e.g., 2<sup>nd</sup> GR, para 56.

<sup>319</sup> See Poland I, para 167 (3<sup>rd</sup> indent); and Portugal II, para 164 (4<sup>th</sup> indent).

<sup>320</sup> See Luxembourg I, para 48; and, similarly, Italy I, para 140; and Denmark II, para 58.

<sup>321</sup> See Spain VI, para 89.

<sup>322</sup> See Bulgaria I, para 168.

<sup>323</sup> See Italy II, para 169 (concerning what was regarded as the *sanction* of seclusion imposed on self-harming detainees in one establishment visited).

<sup>324</sup> See UK IV, para 154.

seclusion or the renewal of such an order should be informed of the reason(s) for the measure (security considerations permitting), the CPT has in mind the provision of *written* reasons; oral notification, it has made clear, is insufficient.<sup>325</sup> Further, as might be expected, this information must be provided “in a straightforward language”<sup>326</sup> and be sufficiently detailed as to be meaningful. Accordingly, to furnish the detainee concerned with a one page pre-printed form on which ticks have been placed in boxes corresponding to the restrictions which are to be applied is unacceptable.<sup>327</sup> Rather, the written information provided, the Committee holds, should refer, *inter alia*, to the ground(s) on which it is proposed to segregate (e.g. the breach of discipline which it is alleged the detainee has committed), the sanction which is likely to be imposed (or the types of restriction sought by the authorities in the context of non-disciplinary segregation), the procedure which is to apply to his case and the avenues of appeal open to him in the event that the restrictions are ultimately imposed.<sup>328</sup>

Justifying this precept, the CPT has suggested that the provision of appropriate information to detainees “will enable them, among other things, to make effective use of the remedies available for contesting the decision”.<sup>329</sup> As for the security requirements – or, in the case of the proposed segregation of a remand prisoner, the requirements of the criminal investigation - which, it accepts, may legitimately preclude the provision of information to a detainee, these, the CPT has stated, must be “compelling”.<sup>330</sup>

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<sup>325</sup> See Spain I, paras 115 and 116 (1<sup>st</sup> indent). See in the same connection Ireland II, para 81 (1<sup>st</sup> indent). In none of the prisons visited in Ireland in 1998, the CPT remarked, were inmates who were the subject of a disciplinary charge given advance notice in writing of the charge(s) against them: *idem*, para 80.

<sup>326</sup> See Denmark II, para 59 (3<sup>rd</sup> indent).

<sup>327</sup> See Sweden II, para 26.

<sup>328</sup> See Italy II, para 152.

<sup>329</sup> See, e.g., Germany I, para 82; and, similarly, Spain I, para 116.

<sup>330</sup> *Idem*, para 83 (1<sup>st</sup> indent).

### *Entitlement to a hearing*

Rule 36.3, *EPR* provides, *inter alia*, that:

“No prisoner shall be punished unless...given a proper opportunity of presenting a defence”.

It is the view of the CPT, as was adumbrated above, that any detainee against whom the imposition or renewal of measures of segregation are being contemplated, including in circumstances in which the segregation is for non-disciplinary reasons:

“...be given an opportunity to present his views on the matter to the relevant authority before any final decision on placement in, or renewal of, solitary confinement is taken...”<sup>331</sup>

Moreover, in hearing a detainee’s views, the relevant authority, it has stated, should respect the principles of natural justice.<sup>332</sup> Accordingly:

(i) in disciplinary matters, a detainee should be given “sufficient” time to prepare his defence;<sup>333</sup>

(ii) those officials who are requesting the imposition of restrictions should be “obliged to specify the particular restrictions which they intend to apply”;<sup>334</sup>

(iii) the adjudicating authority should be “particularly attentive to the effects of the restrictions on the mental and physical health of the [detainee] concerned; where

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<sup>331</sup> See, e.g., *Germany I*, para 83 (2<sup>nd</sup> indent).

<sup>332</sup> See *UK I*, para 234. This precept is of particular relevance, of course, in the *disciplining* of detainees. However, the CPT’s remarks to the UK authorities suggest, it is submitted, that it ought to be adhered to when segregation for other, albeit discipline-related, reasons is being contemplated.

<sup>333</sup> See *Ireland II*, para 81 (1<sup>st</sup> indent). This precept inheres in the notion, considered above, that a person should be given advance written notice of the charge(s) against him.

<sup>334</sup> See *Sweden II*, para 27 (2<sup>nd</sup> indent).

appropriate, [it] should seek a medical opinion before imposing or renewing such restrictions”;<sup>335</sup>

(iv) in the disciplining of detainees, “il serait souhaitable que, dans certains cas au moins (notamment lorsque les faits reproches revêtent un caractère de particulière gravité susceptible d’entraîner les sanctions disciplinaires les plus élevées), le détenu puisse être en droit de bénéficier de l’assistance d’un conseil au cours de la procédure disciplinaire, y compris lors de l’audition disciplinaire. Par ailleurs, des dispositions devraient aussi être prises pour que des détenus qui le nécessitent, puissent bénéficier de l’assistance d’un interprète”.<sup>336</sup>

On this last point, the CPT has stated, further, that the assistance of an interpreter should be available to a detainee not just at the hearing itself, but, like the assistance of legal counsel, prior to it, in the preparation of his case.<sup>337</sup> It should also be noted in the present connection that Rule 36.4, *EPR* provides that, “where necessary and practicable prisoners shall be allowed to make their defence through an interpreter”;

(v) in disciplinary proceedings, the detainee against whom it is proposed restrictions are to be applied or renewed should be permitted to call witnesses on his behalf and contest the evidence against him<sup>338</sup> (including the possibility of cross-examining witnesses called by those bringing the charge(s)<sup>339</sup>);

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<sup>335</sup> See Norway II, para 36 (4<sup>th</sup> indent).

<sup>336</sup> See Belgium II, para 190; and, similarly, UK IV, para 153..

<sup>337</sup> See France III, para 151. Cf French law in 1996.

<sup>338</sup> See Italy II, para 152 (2<sup>nd</sup> indent).

<sup>339</sup> See Ireland II, para 81 (2<sup>nd</sup> indent). Cf practice in the Irish prisons visited in 1998: *idem*, para 80.

(vi) during adjudications, a detainee should be permitted to remain seated and have the facility to take notes.<sup>340</sup> Accordingly, he should not be obliged, *inter alia*, to remain standing between two officers while being questioned by the adjudicating authority;<sup>341</sup>

(vii) the manner and conduct of the hearing should – axiomatically - be appropriate to the occasion. Thus, the prevailing atmosphere should be conducive to calm, reasoned debate and displays of vindictiveness and mockery towards the detainee should be avoided;<sup>342</sup>

(viii) in disciplinary proceedings, if found guilty of a breach of discipline, a detainee should be permitted to be heard in mitigation of punishment;<sup>343</sup>

(ix) hearings on disciplinary matters should be held promptly after the alleged breach of discipline. The CPT has indicated that by prompt it means within 48 hours of the event giving rise to the breach.<sup>344</sup>

### ***Right to appeal against the decision to seclude or to renew seclusion***

There is little to add to the CPT's basic prescription in this regard, other than to emphasise its view that the body to which any appeal may be made following the imposition of restrictions should be entirely independent of the authority which initially imposed them.<sup>345</sup> As to the identity of the appellate authority, the CPT has recommended in the context of its analysis of disciplinary procedures in juvenile detention centres that it should comprise, first, the Director of the Centre, in respect of

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<sup>340</sup> Ibid (4<sup>th</sup> indent).

<sup>341</sup> Idem, para 80.

<sup>342</sup> See France III, para 152.

<sup>343</sup> See Ireland II, para 81 (3<sup>rd</sup> indent). Cf practice in the prisons visited in 1998.

<sup>344</sup> See Austria II, para 142.

<sup>345</sup> See, e.g., Sweden II, para 25.

sanctions imposed by “educators” (relating, presumably, to minor infractions of discipline), and, second, the competent judge, in respect of sanctions imposed by the Director.<sup>346</sup> There seems no reason, it is submitted, why the same principles, creating both an internal and external avenue of appeal, should not apply in respect of other categories of (disciplined) detainee.

The *European Prison Rules*, for their part, offer little guidance on the appeal process, stipulating simply that “access to and the authority of the appellate process” shall be “provided for and determined by the law or by the regulation of the competent authority”.<sup>347</sup>

#### *The need for regular reviews of placements in segregation*

In safeguarding the welfare of detainees against whom measures of seclusion have been taken, the CPT considers that:

“...the position of a prisoner held in solitary confinement for an extended period should be subject to a full review (including a psychiatric assessment) at least every three months”.<sup>348</sup>

A “full” review, it has made clear, connotes more than the mere completion of a report by custodial staff for the benefit of senior management in an establishment.<sup>349</sup> Further, to extend the review period beyond the recommended three months is not something which the CPT readily countenances. In its second Swiss visit report, for example, it rejected the asseverations of certain cantonal authorities on the matter who, in their response to its first visit report, had discountenanced a three month

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<sup>346</sup> See Portugal II, para 163 (2<sup>nd</sup> indent). It may be significant in this connection that when applying the sanction of seclusion to juveniles, custodial authorities, the Committee considers, should notify the competent judge: *idem*, para 164 (1<sup>st</sup> indent).

<sup>347</sup> See Rule 35.d, *EPR*.

<sup>348</sup> See, e.g., Finland I, para 74 (3<sup>rd</sup> indent).

<sup>349</sup> See UK III, para 139.

review period on the basis, *inter alia*, that Recommendation No. R (82) 17 of the Committee of Ministers of the Council of Europe “ne fixe pas de delai precis en la matiere”. The Committee, for its part, found this reasoning unpersuasive and suggested that a maximum three month review period is important “donne les effets nocifs qu’un tel placement peut avoir sur le detenu concerne”.<sup>350</sup>

As for the assessment which, the Committee maintains, should comprise an integral part of the review process, this has been described most commonly in visit reports as a “medico-social opinion”.<sup>351</sup> It amounts, in essence, to a “psychological and psychiatric assessment” of the detainee who is the subject of the review.<sup>352</sup>

#### *The medical examination of secluded detainees*

“The mental and physical state of all prisoners placed in solitary confinement”, the CPT maintains, “must be the subject of special attention”.<sup>353</sup> Accordingly, it is an “essential safeguard” that such persons be able to request a medical examination. Consequently, following the application of any measure of solitary confinement, the Committee has stated:

“...whenever the prisoner concerned, or a prison officer on the prisoner’s behalf, requests a medical doctor, such a doctor should be called without delay with a view to carrying out a medical examination of the prisoner. The results of this examination, including an account of the prisoner’s physical and mental condition as well as, if need be, the foreseeable consequences of continued

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<sup>350</sup> See Switzerland II, para 87.

<sup>351</sup> See, e.g., France III, para 162; and Poland I, para 146.

<sup>352</sup> See Slovakia I, para 145.

<sup>353</sup> See Germany I, para 79.



isolation, should be set out in a written statement to be forwarded to the competent authorities”.<sup>354</sup>

The *European Prison Rules*, interestingly, provide for medical intervention at two significant junctures. First, they stipulate, at Rule 38.1:

“[p]unishment by disciplinary confinement and any other punishment which might have an adverse effect on the physical or mental health of the prisoner shall only be imposed if the medical officer after examination certifies in writing that the prisoner is fit to sustain it”.

The CPT, for its part, has not, to date, formulated any view on the kind of procedure adumbrated by the *EPR* here.<sup>355</sup> Second, at Rule 38.3, they stipulate that:

“[t]he medical officer shall visit daily prisoners undergoing [the] punishments [referred to at Rule 38.1] and shall advise the director if the termination or alteration of the punishment is considered necessary on grounds of physical or mental health”.

Again, the CPT has yet to touch on this particular role of prison doctors.

### ***Recording the application of measures of segregation***

“It is axiomatic”, the CPT has proclaimed, “that a scrupulous record of all placements in isolation, whatever the reasons for the measure, is a fundamental safeguard against any possible abuse and, more generally, an essential tool of good management”.<sup>356</sup> In the absence or inadequate completion of segregation records, it has indicated, it will

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<sup>354</sup> See 2<sup>nd</sup> GR, para 56; and Germany I, para 81. As to the entitlement to request a medical examination as it is held to apply to segregated juvenile detainees, see 9<sup>th</sup> GR, para 40.

<sup>355</sup> However, the Committee does, it will be recalled, encourage authorities to base their decision to *continue* segregation on a “medico-social” opinion: see above, p 461.

<sup>356</sup> See UK III, para 219.

be difficult or impossible for the authorities (and, of course, the CPT itself), *inter alia*, to ascertain the grounds on which detainees are isolated,<sup>357</sup> the frequency with and lengths of time for which seclusion cells are used,<sup>358</sup> medical information particular to the cells' occupants<sup>359</sup> and the manner and frequency with which those occupants are monitored.<sup>360</sup> Further, it will be difficult to verify allegations of ill-treatment relating to the use of such cells.<sup>361</sup>

It is important, therefore, in the view of the CPT, that formal registers are opened in which are recorded full details of all persons held in segregation cells - "whether or not this is in a medical context"<sup>362</sup> - including the date and time of their entering and leaving the cell, the grounds on which they have been secluded, the circumstances in which the measure was applied and their destination on leaving the cell.<sup>363</sup> The Committee is of the view, further - albeit in respect of the isolation of *psychiatric patients* only, it seems - that, as with the application of measures of restraint, mention of recourse to a measure of solitary confinement should be noted not only in this central register, but also in the detainee's own file.<sup>364</sup>

It is also worth noting in the present connection that the CPT has sought to encourage prison authorities to "maintain a consolidated record of all disciplinary proceedings and decisions, which can be scrutinised by prison managers, officials of the Prison Administration and inspectoral bodies".<sup>365</sup>

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<sup>357</sup> See Greece I, para 134.

<sup>358</sup> See UK III, para 354.

<sup>359</sup> See Greece I, para 182.

<sup>360</sup> *Idem*, para 186.

<sup>361</sup> See Ireland I, para 84.

<sup>362</sup> See Germany I, para 143.

<sup>363</sup> See Greece I, para 140; and Iceland I, para 133. See also below, p 467.

<sup>364</sup> See Belgium I, para 201 (4<sup>th</sup> indent); and Netherlands II, para 126 (1<sup>st</sup> indent).

<sup>365</sup> See Finland II, para 96.

### *The segregation of particular categories of detainee*

#### *- Remand prisoners*

Although the imposition of restrictions on criminal suspects (including remand prisoners) by prosecuting authorities in the advancement of a criminal investigation has already been considered in some depth,<sup>366</sup> and although much of the foregoing analysis on safeguards may be held to apply to the isolation of persons detained on remand, a perusal of CPT visit reports indicates that a number of other precepts, particular to remand detention, may be identified in the present connection. We shall consider those precepts here.

The CPT begins from the premise that “it [pays] particular attention to the solitary confinement of remand prisoners by court order, which [is a measure that] can continue for extended periods”.<sup>367</sup> From this, it has developed its fundamental view, which is that:

“[while] recognis[ing] that, in certain circumstances, it may be necessary to impose restrictions on contacts between a remand prisoner and other persons...such restrictions must only be for the purpose of protecting the interests of justice (in particular, to avoid collusion, threats to others or interference with evidence)”.<sup>368</sup>

It has also insisted, further, that “it would not be acceptable for inmates to be held, as a matter of routine, in solitary confinement during their first four weeks on remand”.<sup>369</sup>

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<sup>366</sup> See above, p 386 *et seq.*

<sup>367</sup> See Denmark II, para 54.

<sup>368</sup> See Iceland I, para 64.

<sup>369</sup> See Norway I, para 65. *Cf* Norwegian practice in 1993 (para 59).

Regarding the periodic review of restrictions imposed on remand prisoners, the Committee has suggested that this be linked to the review of remand in custody generally. Thus, it has recommended that:

“...in the context of each periodic review of the necessity to continue remand in custody, the necessity to continue a placement in solitary confinement is fully considered as a separate issue, bearing in mind the general principle that all placements in solitary confinement should be as short as possible”.<sup>370</sup>

Understandably, the Committee also considers that the question whether or not to impose or prolong restrictions should be “carefully scrutinised by the competent court immediately after a decision to remand in custody...has been taken”.<sup>371</sup> The decision, therefore, should rest ultimately with the *courts*, not with the police or prosecuting authorities (which means, in practice, that “prisoners subject to restrictions [should] have an effective right of appeal to a Court or another independent body in respect of particular restrictions applied by a public prosecutor”<sup>372</sup>).

While the duration between reviews is necessarily determined by the length of the remand review period – though anything in excess of three months would not be countenanced, it is submitted – the Committee has expressed the view that, insofar as segregated remand prisoners are concerned, “a review...be carried out at least every four weeks”.<sup>373</sup>

- *HIV-positive detainees*

The CPT’s approach to the isolation of HIV-positive detainees – as well as, it should be noted, persons carrying the hepatitis B virus – may be simply stated:

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<sup>370</sup> See Denmark II, para 59 (4<sup>th</sup> indent); and, similarly, Sweden II, para 27 (6<sup>th</sup> indent).

<sup>371</sup> See Norway II, para 36 (1<sup>st</sup> indent). *Cf* perceived practice at Bergen and Oslo Prisons in 1997: *idem*, para 33.

<sup>372</sup> See Sweden II, para 27 (5<sup>th</sup> indent).

<sup>373</sup> See Norway II, para 36 (3<sup>rd</sup> indent).

“Although the CPT recognises the problems of integration of HIV-positive prisoners with the rest of the prison population – arising from a lack of experience, insufficient information and fear on the part of other prisoners and staff – it wishes to emphasise that there is no medical justification for the segregation of an HIV-positive prisoner who is well”.<sup>374</sup>

Accordingly, it has recommended that prison authorities “actively pursue a policy of keeping prisoners who are seropositive (HIV or hepatitis B) on normal prison location”.<sup>375</sup>

- *Mentally disturbed detainees*

The CPT has asserted on more than one occasion that, despite its “long history”:

“...there is a clear trend in modern psychiatric practice in favour of avoiding the seclusion of violent or otherwise unmanageable [psychiatric] patients”.<sup>376</sup>

Indeed, it has been “pleased to note” that such practices are being “phased out in many countries”<sup>377</sup> and that it is “generally accepted that the long term seclusion of patients is highly undesirable”.<sup>378</sup> Nevertheless, “for so long as seclusion remains in use” in psychiatric establishments, it believes:

“...it should be the subject of a detailed policy spelling out, in particular: the types of cases in which it may be used; the objectives sought; its duration and the need for regular reviews; the existence of appropriate human contact; the need for staff to be especially attentive”.<sup>379</sup>

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<sup>374</sup> See Poland I, para 129 and, in respect of the isolation of persons suffering from “chronic viral hepatitis”, para 131. See also 2<sup>nd</sup> GR, para 56.

<sup>375</sup> See Cyprus I, para 92.

<sup>376</sup> See Malta II, para 105; and, similarly, France III, para 187.

<sup>377</sup> See 8<sup>th</sup> GR, para 49; and, in the same connection, Turkey I, para 221.

<sup>378</sup> See Spain VI, para 89.

<sup>379</sup> 8<sup>th</sup> GR, para 49. See also Belgium II, para 232; and Ireland II, para 105.

Further, “every instance” of such seclusion, like the application of physical restraint against psychiatric patients,<sup>380</sup> it has stated:

“...should be recorded in a specific register established for this purpose (as well as in the patient’s file). The entry should include the times at which the measure began and ended, the circumstances of the case, the reasons for resorting to the measure, the name of the doctor who ordered or approved it, and an account of any injuries sustained by patients or staff”.<sup>381</sup>

Lastly in the present connection, the CPT has stated emphatically that:

“...isolation must never be used as a punishment [against psychiatric patients] or prolonged to this effect”.<sup>382</sup>

Accordingly, it has criticised segregation cells in psychiatric establishments possessed of a “distinctly carceral aspect”.<sup>383</sup>

- *Detainees considered a suicide risk*

Persons who have been identified as at risk of self-mutilation or suicide should not, the CPT believes, be held in conditions akin to isolation. In particular, they should not be confined in cells “with easy access to means of killing themselves (cell window bars, broken glass, belts or ties, etc.)”.<sup>384</sup> Rather, they should be “subject to special precautions...should benefit from counselling, support and appropriate association, and should, for as long as necessary, be kept under a special observation scheme”.<sup>385</sup>

Further, the environment in which such persons are held should be “salutary”.<sup>386</sup>

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<sup>380</sup> See above, p 359.

<sup>381</sup> See 8<sup>th</sup> GR, para 50; and, similarly, Ireland II, para 105.

<sup>382</sup> See Belgium II, para 232; and, in the same connection, Romania I, paras 188 and 190 (1<sup>st</sup> indent).

<sup>383</sup> See Ireland II, para 106 (regarding six rooms used for the seclusion of patients at The Central Mental Hospital, Dundrum, in 1998).

<sup>384</sup> See Finland I, para 109.

<sup>385</sup> Ibid. See, similarly, Germany I, para 141.

<sup>386</sup> See Hungary I, para 118.

Accordingly, it should not be, *inter alia*, very small and “oppressive”, which features, the Committee believes, are “hardly conducive to improving the psychological state of a desperate person”.<sup>387</sup>

The seclusion of suicidal detainees was examined in some depth by the CPT in one of its most recently published visit reports. Concerned by the fate of two young offenders in the Isle of Man Prison in the course of its visit in 1997, both of whom were considered to be at high risk of suicide, and who had been, as a consequence, secluded in a so-called “strip cell”,<sup>388</sup> the Committee set out the following detailed formulation, which, with some justification, it clearly proposed to regard as its definitive view on the matter:

“The appropriate manner in which to manage a prisoner assessed as being suicidal will vary according to the particular circumstances of each case. However, there is today a widespread consensus that unfurnished accommodation should only be used exceptionally. It is hard to imagine a measure less likely to have a positive effect on a suicidal person’s state of mind than to place him on his own in a barren environment. Such a measure could only be justified in an emergency situation and should last for as short a time as possible”.<sup>389</sup>

Regarding the absence of mattresses in the cells concerned,<sup>390</sup> the CPT averred that:

“[t]o deprive a suicidal person placed in a strip cell of a mattress can only exacerbate the deleterious effects of the measure. The argument that this is necessary to prevent suicide is totally unconvincing. There are mattresses

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<sup>387</sup> *Idem*, para 119.

<sup>388</sup> *I.e.* a cell which is bare of all furnishings, including in this particular instance, mattresses.

<sup>389</sup> See UK IV, para 136.

<sup>390</sup> The prison authorities offered two “divergent” explanations as to the mattresses’ absence. On the one hand, they claimed, the denial was necessary on account of the detainees’ perceived suicidal

with technical characteristics such that a ligature cannot be made from them. Even if a mattress of this type is not available – nor a room deprived of all means (bars, handles, etc.) capable of being exploited by a prisoner for the purpose of hanging himself – to deprive a suicidal person of a mattress for days is indefensible from a clinical standpoint; under such circumstances, alternative measures (e.g. a special observation scheme) should be introduced at the earliest opportunity”.<sup>391</sup>

It continued:

“[t]he denial of a mattress to a prisoner placed in a strip cell after having been assessed as suicidal but who is subsequently cleared for return to normal location is no less objectionable. There are good grounds for wishing such a prisoner to decide for himself to return to normal location rather than having to return him forcibly. The application of a restricted regime may well be a useful tool when managing such a situation.<sup>392</sup> However, the enjoyment of something so basic as the proper means to sleep should never be one of the bargaining chips. Similarly, the legitimacy of continuing to hold under strip conditions (even with a mattress) a prisoner who has been cleared for return to normal location is highly questionable”.<sup>393</sup>

The placement procedure in the Isle of Man Prison was also the subject of CPT comment in the report. In this regard, it was at pains to stress that:

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tendencies. On the other, they suggested, it represented a deliberate attempt to persuade the detainees to return to normal location: *idem*, para 135.

<sup>391</sup> *Idem*, para 136.

<sup>392</sup> This is an interesting assertion. It suggests that the CPT is prepared to accept that restrictions may be used as an incentive to alter behaviour (in this case, to encourage a return to a normal regime). As we have seen, however, it has been less forthcoming on the use of restrictions to encourage good behaviour among detainees, which use, of course, has strong disciplinary connotations (see above, p 431 *et seq*).

<sup>393</sup> See UK IV, para 137.



“...the placement of a suicidal person in an unfurnished cell should be decided by a doctor or be brought immediately to the attention of a doctor for his approval. Further, for so long as the person concerned is kept in the unfurnished cell as a clinical intervention, the management of his situation must be the exclusive responsibility of a doctor, and health care staff should follow closely the evolution of the prisoner’s condition”.<sup>394</sup>

This formulation, extensive and detailed, supplements very usefully the CPT’s body of precepts in this area.

- *Juveniles*

The CPT is, understandably, particularly anxious about the possible damage occasioned to young persons by segregation regimes. To the Slovakian authorities, for example, regarding allegations heard at the Youth Re-education Home in Hlohovec in 1995 that inmates might spend up to five days in isolation without leaving their isolation rooms – except when using toilet or washing facilities – and might be denied reading material, the CPT averred that:

“...such a deprivation of physical exercise and intellectual stimulation for a period of days is not acceptable for any detained person, *and can be particularly harmful for young people*”.<sup>395</sup>

Writing recently about the disciplining of misbehaving juvenile detainees, the CPT stated that it is:

“...particularly concerned about the placement of juveniles in conditions resembling solitary confinement, a measure which can compromise their

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<sup>394</sup> *Idem*, para 138.

<sup>395</sup> See Slovakia I, para 159 (emphasis added). See, similarly, Turkey I, para 123 (regarding findings in the disciplinary unit of Izmir Reformatory for Juveniles in October 1997 – though *cf* para 124).

physical and/or mental integrity. The Committee considers that resort to such a measure must be regarded as highly exceptional”.<sup>396</sup>

It might be said, however, that this constitutes, in essence, the view of the Committee on the application of measures of isolation generally; it is not particular to the detention of young persons. Indeed, in indicating the kind of safeguards which it considers ought to attend the segregation of juveniles, it is clear that there is little, if any, difference between these and those which, it believes, should attend the segregation of other categories of detainee. For present purposes, therefore, unless otherwise indicated in this text,<sup>397</sup> it is proposed to regard all identifiable CPT precepts on the isolation of juvenile detainees as applying to the isolation of all other detainees, regardless of type, notwithstanding the Committee’s understandable and particular concern about the segregation of the former.

### ***Conclusion***

Like its approach to the use of force and instruments of restraint in places of detention, the CPT’s approach to the application of measures of solitary confinement (and other, related restrictions) is thorough and far-reaching. Necessarily, therefore, this chapter has followed suit. It opened by setting out a number of the grounds on which Parties may seek to impose, *inter alia*, measures of seclusion, before looking in detail at one such ground, namely, the use of seclusion/restrictions by the police in the advancement of a criminal investigation (in respect of which Norwegian police practice has been found to be both striking and discomfoting). There followed an

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<sup>396</sup> See 9<sup>th</sup> GR, para 35. See, similarly, Czech Republic I, para 96 (following claims made in February 1997 that inmates at the Moravsky Krumlov Educational Institute might be subject to isolation “last[ing] several days” as a punishment (para 95)); and Luxembourg II, para 30.

<sup>397</sup> See, e.g., above, p 455 (regarding the Committee’s recommendation that national authorities formally lay down the maximum possible duration of measures of isolation applied to juveniles) and pp 459-60 (regarding the proposed two-stage appeal process in juvenile detention centres).

extensive section on the possible effects of isolation, which, it is clear, may be profound and disturbing for the individual affected - as, indeed, it may be for the establishment in which he is detained, particularly if a large proportion of its inmates are isolated (findings in Iceland, Denmark, Sweden and Norway, notably in the context of remand detention, are particularly noteworthy in this regard). Subsequently, identifiable CPT precepts on the practice of segregation were examined, the most fundamental of which is the need for custodial authorities to respect the human dignity of every isolated detainee, notwithstanding their dangerousness, disruptiveness or high security classification (a point made with particular emphasis, *inter alia*, to the Dutch, Spanish and Swiss authorities). Flowing from this fundamental precept are, it has been argued, others, such as the need for the authorities to base their decision to segregate on an assessment of each individual case (and not to isolate persons *systematically*, as appeared to be the case in a Maltese psychiatric hospital visited in 1995); the need to avoid accommodating different categories of isolated detainee together, as far as possible (a precept prompted by findings in Germany and the Netherlands); and the – admittedly somewhat less easily apprehended – efforts on the part of the Committee to circumscribe the extent to which the authorities may discriminate between different categories of isolated detainee (principally, its view that no distinction should be drawn between isolated detainees in terms of their entitlement to basic safeguards (Finland; Italy), but that some distinction between detainees segregated for punishment purposes and those segregated for other reasons may be acceptable insofar as their material conditions and, arguably - though less certainly - regime are concerned: a precept which emerged from the CPT's detailed consideration of the "prisoner grading system" operating in Spanish prisons in 1991 and 1994).

The Chapter then went on to consider CPT precepts on the physical environment in which secluded detainees may be accommodated, both in a general sense (concerning, *inter alia*, the effect of duration of placement on the appropriateness of material conditions, the need to avoid material hazards to health (following findings in Iceland, Greece and the UK), the importance of call systems in segregation cells (Belgium; Finland), the ease with which custodial staff can gain access to and monitor the occupants of such cells (Cyprus), the requirement of an appropriate means of rest (Slovenia; Hungary; Poland) and the need to safeguard the dignity of secluded detainees (Finland; Luxembourg)); and, specifically, regarding perceptible differences in the requirements of persons separated on non-disciplinary grounds (whose cells should, the CPT holds, resemble those on ordinary location (Finland)) and persons separated as a punishment (in respect of whom, it concedes, more austere conditions may be provided (Spain)).

On the segregation regime, we examined briefly the content and appropriateness of regimes designed to encourage detainees to improve their behaviour (the “generalised incentive scheme” operating in HM Young Offender Institution, Feltham, England, when visited in 1994, being a particularly interesting example); the possible consequences, both for the detainees affected and the custodial environment, of exposure to segregation regimes (with findings in Denmark, the Netherlands Antilles, Germany and Sweden being worthy of note); and concluded by identifying precepts on the provision of purposeful activities for secluded persons (including access to outdoor exercise, suitable reading material and work activities) and the imperative to maintain appropriate human contact.

Like recourse to force and/or instruments of restraint in places of detention, the application of measures of solitary confinement (and other restrictions), the CPT considers, should be attended by a range of safeguards. These safeguards include the

need to formulate a detailed policy on seclusion (contrast Norwegian prison practice in 1997 with that of the UK authorities in respect of psychiatric patients in 1994), the requirement of proportionality in the application of segregation measures, the need to apply such measures for as short a period of time as possible, the circumscription of the procedure which precedes their application (comprising the provision of written information to persons in respect of whom a measure is proposed (*cf* Irish practice in 1998), their entitlement to a hearing (where, again, Irish practice has been found wanting) and their right of appeal), the need for regular reviews of placements (*cf* practice in a number of Swiss cantons in 1996), the appropriateness and content of medical examinations and recording procedures.

Finally, we considered precepts on the segregation of particular categories of detainee, namely, remand prisoners (in respect of whom practice in a number of northern European countries has been the object of particular CPT attention), HIV-positive detainees, mentally disturbed prisoners (regarding whose isolation a very positive trend is beginning to emerge throughout Europe, it appears), detainees perceived to be at risk of suicide (on whose segregation the CPT very recently had cause to comment to the UK authorities) and juveniles.

The CPT's approach to the formulation of standards in this area has been methodical and comprehensive. As with its standards on the use of force/restraint, it is significant, it may be stated, that a number of its precepts on seclusion have emerged from its analysis of particular situations encountered in the course of visits or in preparing for such visits. This approach, it is submitted, lends to the standards set a patina of credibility, underscoring them by reference to real events and domestic practices. They cannot be perceived, therefore, as being proposed blanket-fashion and didactically. More generally, this sensitive and thorough approach can only encourage greater trust in and respect for the CPT among its State party interlocutors.

# PART IV

## Conclusion

## Conclusion

In the foregoing analysis of CPT standards, a number of themes were examined. A number of others, however, remain unexplored. They have been omitted not because they are any less deserving of analysis (some, indeed, like material conditions and regime activities in places of detention, warrant very detailed consideration, so important are they to the welfare of persons detained therein), but because the disciplines of a Doctoral thesis do not permit their inclusion.

It is now ten years since the CPT commenced its regime of visits and, concomitantly, the compilation of its corpus of standards. It may be appropriate therefore to attempt an evaluation of its standard-setting initiative, to ask whether it has formulated a realistic corpus of standards and whether it is reasonable to anticipate adherence to its precepts across Convention territory, as the Committee would clearly wish. It is worth considering further whether those standards, as expressed today, convey a sense of evolution: has their formulation remained static and inflexible or has the Committee sought to adapt its precepts as circumstances have changed, to reflect, for example, shifts in attitude in respect of the relationship between custodial and non-custodial sentencing practices or national immigration policy or - and of particularly compelling concern to the CPT, this - the accession to the ECPT of a number of central and eastern European States, possessed of a quite different set of political, economic and cultural priorities to their western European counterparts?

### *The extent of the CPT's task: the variable nature of Party practice*

Although this work has not attempted an exhaustive analysis of CPT standards or their impact on Party practice, it has examined sufficient areas of CPT concern, it is submitted, to gain a sense of the extent to which that practice accords with the standards set and the amount of work required in order to achieve wider conformity. This examination has yielded interesting results; indeed, in some respects, certain patterns in State practice may be discerned. Regarding safeguards in police custody, it is clear, for example, that Maltese law and practice possess a number of significant *lacunae*. In Malta (visited in both 1990 and 1995), none of the three “fundamental” safeguards, it appears, are expressly guaranteed, and police practice in respect of other safeguards – including the duty expressly to inform detainees of their rights at the outset of detention, the implementation of a code of conduct on interrogations,<sup>1</sup> the maintenance of comprehensive custody records and the operation of effective complaints and inspection procedures<sup>2</sup> - is deficient in a number of important respects. Other States parties which, to varying degrees, appear consistently to have failed to meet CPT prescriptions in this area, include Austria,<sup>3</sup> Spain and, surprisingly, the Netherlands and a number of Scandinavian States, notably Sweden and Finland – although, contrarily, such States have, in other respects, developed practices which offer greater circumscription than that sought by the CPT.<sup>4</sup> It should be emphasised, however, that apparent deficiencies in the law and practice of these latter States has more often concerned a failure to make express

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<sup>1</sup> When visited in 1995, a “most satisfactory” draft code had been drawn up, but had not been brought into effect: see Malta II, para 37.

<sup>2</sup> Neither of which procedures, it would appear, have been introduced in Malta: see Malta II, paras 42-3.

<sup>3</sup> However, *cf* Austrian law and practice on the enhanced protection afforded juveniles in police custody: above, p 72.

<sup>4</sup> The attendance of “witnesses” at police interviews in Sweden, Finland and Iceland (see above, pp 156-8) is a case in point.



legislative provision, rather than a failure effectively to offer a right or safeguard in practice.

By contrast with the number of instances of poor or unsatisfactory Party practice on detention in police custody, instances of entirely acceptable practice are rare. The development of Codes of Practice on a range of aspects of police custody in the various jurisdictions of the UK are as close as the CPT has yet come to a finding of good provision. That is not to say that notable examples of good practice cannot be found elsewhere. In France, for example, guidance on the conduct of interviews has long been provided; in the Netherlands, custody records are now held on computer and far-reaching, independent inspection mechanisms have been established in a number of cities; and in Switzerland, Portugal and France (again), corps of medical staff, independent of the police and permanently on call, authorised to carry out examinations of apprehended persons, have either been created or proposed. Nevertheless, it is clear that if the CPT is to see improvements made in the range of protections afforded persons detained by the police in all States parties, much work remains to be done.

It is also clear, in the penal sphere, that efforts to tackle prison overcrowding will have to be redoubled if the phenomenon is to be satisfactorily addressed across Convention territory. Overcrowding remains one of the CPT's most compelling concerns. It is, indeed, arguably more compelling now than it was at its inception, particularly in light of the accession to the ECPT of a number of central and eastern European States, which, in some instances, have brought with them profound and long-established prison overcrowding problems. Generally, efforts on the part of Parties to reduce and/or eliminate prison overcrowding may be considered to have been far from urgent and resolute; indeed, on occasion, they have been desultory, little more than

rhetoric. Nevertheless, the policies adopted by the Swedish authorities in this area ought to be commended, while other notable efforts have been made, *inter alia*, by the Governments of Iceland and, to a lesser extent, Belgium.

The analysis of the use of force and/or measures of restraint against detainees<sup>5</sup> has shown that a variety of methods are deployed by police officers and custodial staff to subdue agitated or violent detainees, many of which the CPT considers unsatisfactory *per se*. Further, the application of those whose use it finds acceptable (e.g. handcuffs) it has had occasion to criticise on account of the manner in which they have been applied. The use of force by police officers when apprehending an individual and the physical restraint of mentally disturbed persons are areas of particular concern and few Parties have been subject to no CPT comment or recommendation in these – and, indeed, a number of other – areas. It would, perhaps, be inappropriate, therefore, to single out particular Parties as offering instances of especially poor or inadequate practices. However, it cannot be doubted that CPT visits to central and eastern European Parties are likely to yield interesting results in this connection.

Similarly, the use of seclusion by States parties - whether in the course of a criminal investigation or in prisons as a disciplinary sanction or for reasons of good order and security or in psychiatric establishments in the event of agitation or violence – has prompted very detailed CPT analysis. The inappropriate use of solitary confinement (and other restrictions) by the police in order to apply psychological pressure on criminal suspects has invited CPT censure, notably in reports to the Norwegian and Italian

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<sup>5</sup> Which analysis did not examine in any depth the notion of the deliberate ill-treatment, including torture, of detainees, allegations and findings of which do feature, often quite strongly, in the CPT's published work, particularly in the context of detention by the police (which, it is clear, occasions greater risk of ill-treatment than detention in prison – and indeed other – establishments): see, e.g., both public statements on Turkey, reports on the numerous visits to Spain between 1991 and 1998 and the first Cypriot visit report.

authorities, while the separation of “dangerous” prisoners from the general penal population has been the subject of extensive comment in reports, *inter alia*, to the Dutch, Spanish and Polish Governments. Further, individual segregation regimes have been examined in detail in the course of visits to England and Wales (in the particular context of a young offenders’ institution) and Spain.

What this analysis of a range of CPT standards and accompanying Party practice illustrates is just how varied such practice is in every area of CPT concern. While this makes academic analysis of the nature, evolution and impact of its precepts an interesting, though inexact, exercise, it renders the work of the Committee in the promotion of its standards, as well as the operation of its delegations in the field particularly difficult. In this regard, it will be intriguing to see how both its *modus operandi* and the manner in which it gives expression to its precepts alter, if at all, in this, its second, decade of operation, particularly if its efforts to effect change appear to it to be being frustrated.

### ***CPT standards: a general sense of stasis***

It is clear from a perusal of the CPT’s published work that many of its standards have changed little since first being expressed in early visit and general reports. Its second and third annual reports, for instance, laid down a range of precepts on detention in police and prison establishments, and it is probably fair to say that in the intervening years, subject to a number of modest amendments, reflecting *inter alia* the variety of custodial situations encountered by visiting delegations, those precepts have altered little.

This may be to do the CPT and its Secretariat a disservice. It may be that in some instances, few changes have been necessary, so fundamental and universal and so

exhaustively formulated are the principles in issue. The putative duty not to return foreign national detainees to countries where there are substantial grounds for believing that they would run a real risk of being tortured or ill-treated<sup>6</sup> is not a precept that the CPT would ever wish to qualify in any way.<sup>7</sup> Further, it may be that the formulation of detailed precepts on certain custodial matters would take the Committee into areas that lie outside its mandate (which, it will be recalled, is to examine the treatment of detainees with a view to strengthening, if necessary, their protection against ill-treatment) and, therefore, which it may justifiably leave unexplored. Is there, for example, any need for it to consider in any depth the social rehabilitation of prisoners, as it has, on occasion, been minded to do?<sup>8</sup>

It may also be the case that the Committee has in fact made alterations to established precepts in the course of its life but that these are easily missed by the disinterested observer – though not by the CPT’s State party interlocutors. The apparent downgrading of the importance which it attaches to the electronic recording of police interviews, as noted above,<sup>9</sup> is a case in point. Such subtle amendments do create difficulties for the analyst, who may be unable to determine what practical impact, if any, a slight alteration in the Committee’s position on a particular issue has had or who, conversely, aware that modest changes in tenor may be found in its work, is driven to distraction in his efforts to discern in the texts of published reports gentle shifts in emphasis and nuance, with the result that he accords an unwarranted and misleading significance to mere changes in expression from one report to another.

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<sup>6</sup> See, e.g., 7<sup>th</sup> GR, para 32.

<sup>7</sup> Although States parties themselves may very well interpret the terms “substantial” and “real”, as used in the formula, in different ways.

<sup>8</sup> See Portugal I, paras 95-6.

<sup>9</sup> See p 179.

In sum, notwithstanding their comprehensive scope, there remains a sense of incompleteness about CPT precepts as currently formulated. This is disappointing given the perceived inadequacy of the *European Prison Rules* in contemporary Europe.<sup>10</sup> Does this apparent stasis signify that the Committee's standards have already attained the point of highest development, that they represent fully mature principles? Or does it, rather, indicate the attainment of a natural plateau, beyond which it would be fruitless to climb until respect among States parties for the principles already developed is universal or at least extensive? Only analysis of future reports will tell.

### *Impact of CPT standards*

#### *Impact on State party law and practice*

In the field, CPT delegations (comprising Committee members, experts and members of the Secretariat) have been extremely well received, by politicians, civil servants and NGOs alike. Visits are regarded as being carried out efficiently, with a sense of purpose, by a small group of appropriately specialist individuals. The reports which follow are perceived to be professionally prepared, on the whole accurately to represent domestic law, practice and observations made during the visit and to offer balanced and appropriate prescriptions. Anecdotally, the Committee is said to be performing a "valuable job", using methods that represent "a model for other monitoring bodies, domestic and international, to follow".<sup>11</sup>

It would be naïve, however, to suggest that positive developments in criminal justice and penal policy among States parties to the ECPT subsequent to a visit are the

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<sup>10</sup> See Evans and Morgan (1998), p 349.

<sup>11</sup> Idem, pp 353-4 and 355.

direct result of CPT intervention. Many other factors – not least pressure for change from within States - are clearly involved. However, this does not mean that it is impossible to detect any CPT influence on domestic policy. For instance, Mr. Andrew Coyle, former Governor of Brixton Prison, intimated at a seminar on the work of the Committee organised by the Association for the Prevention of Torture in Strasbourg in 1994 that criticisms in the CPT's first UK visit report helped bring about the closure of the prison's notorious F Wing. Evidence of more thoroughgoing influence, however, is difficult to discern.<sup>12</sup>

The principal problems confronting the CPT in seeking to influence domestic policy are essentially of its own making – or at least the result of the way in which the Convention is drafted. The Committee serves no judicial or quasi-judicial function. There is no guarantee that its findings will ever enter the public domain and therefore public and political discourse.<sup>13</sup> When they are made public – which event may take place a long time after the events to which they relate<sup>14</sup> - they are expressed in arid terms and, for the overwhelming majority of Parties, a foreign language.<sup>15</sup> Further, there remains always, of course, the stigma of being an external organ of inspection, with a truly unprecedented interventionist mandate.<sup>16</sup> Is it any wonder, therefore, that CPT

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<sup>12</sup> Although Evans and Morgan, for their part, offer a very striking illustration of CPT effectiveness. On the evidence of successive visit reports and their own observations, they contend, CPT intervention played a not insignificant part in precipitating an effective response on the part of the Cypriot authorities to findings of serious ill-treatment of suspects in police custody in 1992: see Evans and Morgan (1998), pp 206 and 344.

<sup>13</sup> It is fortunate that the publication of the majority of visit reports has been authorised by Parties.

<sup>14</sup> Authorisation for the publication of the first Spanish and Cypriot visit reports, for example, was only obtained some five years after the visits concerned.

<sup>15</sup> CPT reports are written in French or English, the two working languages of the Council of Europe (although a number of its general reports have now been translated into a range of eastern European languages).

<sup>16</sup> For instance, on the day that the CPT's report on its 1997 visit to the UK was published (13<sup>th</sup> January 2000), Ms. Molly Meacher, Chair of the Police Complaints Authority of England and Wales, asserted that the Committee was perceived as a group of outsiders with a limited knowledge of domestic police and penal systems. She illustrated her point by claiming that statistics used by the Committee, notably in its

influence on domestic criminal justice and penal policy, at least on the evidence of its body of visit reports, is only peripheral?

Accordingly, while the CPT may find it possible to secure modest changes to the custodial environment (the removal from service of a number of very small cubicles in Stockholm Central Police Station very shortly after the Committee's visit in 1991<sup>17</sup> is an example of a measure whose adoption was arguably precipitated by CPT observations), large-scale structural change, affecting large numbers of establishments or the general purport of criminal justice and penal policy is unlikely to flow directly from CPT intervention.

It is also the case that in order fully to appreciate the true nature and extent of CPT standards, one must be prepared to read every published report, or at least a sufficient number to ensure that all aspects of deprivation of liberty that fall within the purview of the Committee's mandate have been dealt with. It is highly unlikely, however, that civil servants, politicians and even NGOs in any one Party systematically read each document published in Strasbourg; they are likely to read only those which are of immediate relevance to their own Party, perhaps even only those parts of documents which impinge on their particular area of interest or expertise (home affairs, immigration, health, *etc.*).<sup>18</sup> This makes it very difficult to perceive CPT recommendations, comments and requests for information as part of a discrete and identifiable body of precepts. They are likely to be seen, rather, as an inchoate and unconsolidated mass of observation, complaint and injunction, relating to a very particular set of circumstances.

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first draft of the visit report - which the Authority had seen - were inaccurate (*The World Tonight*, BBC Radio 4, 13<sup>th</sup> January 2000). The report, it should be noted, devotes much space (paras 9-58) to the effectiveness of legal remedies for police misconduct in England and Wales.

<sup>17</sup> See Sweden Response I, CPT/Inf (92) 6, p 5 (regarding CPT criticism expressed in Sweden I, para 18).

<sup>18</sup> See further in this connection 10<sup>th</sup> GR, para 2.

Consequently, if the Committee is to see its corpus of standards promulgated *qua* corpus, it seems very likely that it will be obliged to undertake the task of consolidation itself (and be prepared, of course, regularly to update any elaborated code).

### ***Impact on ECHR jurisprudence***<sup>19</sup>

As was seen in Chapter 3 above, the preventive work of the CPT has grown out of Article 3, ECHR and the jurisprudence developed thereunder and is designed to enhance the protection of detainees afforded thereby. Unlike the European Commission and Court of Human Rights,<sup>20</sup> which are reactive, intervening only upon receiving complaints of breaches, *inter alia*, of Article 3, ECHR from individuals or States, the CPT intervenes *ex officio*, in a non-judicial capacity, in order to assist States parties to strengthen detainees' protection against ill-treatment. Further, the CPT has much more latitude in its use of terminology. In describing situations encountered in the course of visits, it is not bound to use only the terms or the interpretations of terms developed by the Strasbourg organs; such terms and interpretations are considered by the Committee merely as points of reference or departure. Consequently, the relationship between the two systems is a potential source of conflict and confusion, particularly in light of the fact that contact between the two is practically unavoidable, so great is the overlap between their spheres of interest. This overlap will inevitably grow as the frequency with which published CPT

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<sup>19</sup> This is in no way intended to be a full account of the actual or potential impact of CPT standards on the work of the Strasbourg organs. Much more comprehensive analyses may be found, *inter alia*, in Peukert, Wolfgang, *The European Convention for the Prevention of Torture and the European Convention on Human Rights*, in Morgan and Evans (1999), pp 85-102; and Murdoch, Jim, *CPT Standards within the Context of the Council of Europe*, also in Morgan and Evans (1999), pp 103-136.

<sup>20</sup> It should be noted that the dual Commission and Court procedure has now been replaced by a single Court following the entry into force of the Eleventh Protocol to the ECHR. However, for the purposes of the present work, reference shall be made to the Commission as a recipient of applications alleging violations of the ECHR since it has, historically, had occasion to refer to CPT visit reports in its decisions.



reports are invoked before the new Court increases, an incipient trend prefigured, as we shall see, by developments in recent years.

In some respects, it should be noted, the CPT appears quite content to rely on ECHR jurisprudence. The Explanatory Report to the ECPT, for instance, establishes the principle that the term “‘deprivation of liberty’ is to be understood within the meaning of Article 5 [ECHR] as elucidated by the case law of the European Court and Commission of Human Rights”.<sup>21</sup> Consistent with this view, in its 7<sup>th</sup> General Report the Committee cited the judgment of the Court in *Amuur v France*<sup>22</sup> as “vindicating” its assertion that a stay in a transit or “international” zone in an airport “can, depending on the circumstances, amount to a deprivation of liberty within the meaning of Article 5(1)(f) of the [ECHR], and that consequently such zones fall within the Committee’s mandate”, notwithstanding the fact that, as the CPT’s interlocutors have had occasion to point out, persons placed in such zones – principally persons refused entry to a country – are free to leave them at any moment by taking any international flight of their choice.<sup>23</sup>

Insofar as the reciprocal side of the relationship is concerned, it seems that CPT findings and observations may become used by the new Court for evidential purposes. It is, of course, not duty-bound to take cognisance of them. In *Delazarus v UK*,<sup>24</sup> the Applicant sought to rely, *inter alia*, on the contents of the CPT’s first UK visit report in complaining that his treatment and conditions of detention in Wandsworth Prison

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<sup>21</sup> See Explanatory Report, para 24.

<sup>22</sup> *Amuur v France*, Judgment of 25<sup>th</sup> June 1996, Reports of Judgments and Decisions of the European Court of Human Rights 1996-III-827.

<sup>23</sup> See 7<sup>th</sup> GR, para 25. The Committee has also referred to the provisions of Article 8, ECHR (as well as Article 9 of the UN Convention on the Rights of the Child) in respect of the treatment of administratively detained foreign national detainees, emphasising that “it is important to avoid any splitting up of the family unit, except where absolutely necessary...families of asylum seekers [should] remain together as far as possible”: see, e.g., Denmark I, para 56.

<sup>24</sup> *Delazarus v UK*, App No 17525/90, Comm Dec, 16<sup>th</sup> February 1993 (unpublished).

constituted inhuman and degrading treatment contrary to Article 3, ECHR. The visit report, it will be recalled, determined that conditions of detention in the gaol when visited in 1990 – which visit took place during the Applicant’s stay – were “very poor”. It referred to a “pernicious combination of overcrowding, inadequate regime activities, lack of integral sanitation and poor hygiene” and concluded that “the overall environment... amounted... to inhuman and degrading treatment”.<sup>25</sup> The Application was declared inadmissible as manifestly ill-founded, but is nevertheless significant because the Commission did not discountenance the relevance of the visit report in the context of the complaint. It merely sought to distinguish the CPT’s concerns, namely the *general* conditions of detention obtaining in the establishment at the time of the visit, from its own, which was to consider the *particular* situation of the applicant before it.<sup>26</sup> In this regard, the Commission stated, the Applicant was unable to avail himself of CPT criticisms regarding the unsatisfactory levels of overcrowding obtaining in the prison, since, for the duration of his stay, he had been accommodated in a single cell - which fact had undoubtedly also alleviated the difficulties occasioned by the absence of integral sanitation.<sup>27</sup>

It is worth noting that, notwithstanding the different competences of the CPT and the Strasbourg organs, it is of course possible for an individual to be both the object of a CPT visit *and* to bring an application under the ECHR, since the intervention of the

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<sup>25</sup> See above, p 270, quoted at p 4 of the Commission’s Decision on Admissibility, op cit, n 24, above.

<sup>26</sup> This distinction potentially limits the value of CPT visit reports to both Applicants and the Strasbourg institutions, since the CPT, as we have seen, is constrained from publishing data from which individual detainees’ identities may be ascertained, without the latter’s consent, while the Commission and Court are only competent to consider the circumstances particular to Applicant(s) before them.

<sup>27</sup> See p 11 of the Commission’s Decision on Admissibility, op cit, n 24, above. The Commission also appeared to accept the probative relevance of CPT findings in *Raphaie v UK*, App No 20035/92, Comm Dec, 2<sup>nd</sup> December 1993 (unpublished) (Application declared inadmissible as time-barred).

former does not preclude the latter.<sup>28</sup> Indeed, there is nothing to prevent the CPT from furnishing the new Court with allegations of the ill-treatment of particular individuals received in the course of its work. In its 7<sup>th</sup> General Report, for instance, it observed that:

“[a]ny communications addressed to the CPT in Strasbourg by persons alleging that they are to be sent to a country where they run a risk of being subjected to torture or ill-treatment are immediately brought to the attention of the European Commission of Human Rights. The Commission is better placed than the CPT to examine such allegations and, if appropriate, take preventive action”.<sup>29</sup>

Subsequent to *Delazarus*, the Commission more conspicuously took cognisance of CPT observations in reaching decisions as to admissibility, even though such observations necessarily concerned general conditions of detention.<sup>30</sup> Further, the Court made passing reference to CPT published work in adjudging that one particular Applicant had been the victim of torture.<sup>31</sup> References like these, it seems, are of use in a contextual sense, as

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<sup>28</sup> Article 17(2), ECPT provides that “Nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights...”

<sup>29</sup> See 7<sup>th</sup> GR, para 33.

<sup>30</sup> See, e.g., *LJ v Finland*, App No 21221/93, Comm Dec, 28<sup>th</sup> June 1995 (unpublished) (in which the Commission determined that there had been no breach of Article 3, though in so doing it took account of observations made in the CPT’s first Finnish visit report and the Finnish Government’s interim and follow-up reports); *Tosunoglu v Greece*, App No 21892/93, Comm Dec, 12<sup>th</sup> April 1996 (unpublished) (Application declared inadmissible since the conditions on which the Applicant sought to rely fell short of the Article 3 threshold. Observations made in the CPT’s first Greek visit report regarding prevailing conditions at Larissa Prison in 1993 were noted by the Commission in reaching its Decision); and *Peers v Greece*, App No 28524/95, Comm Dec, 21<sup>st</sup> May 1998 (unpublished) (Application declared admissible and express reference made in the Commission’s decision to CPT findings in respect of Korydallos Prison). See, now, *A.D.D.B. v Netherlands*, App No 37328/97, Court Decision of 5<sup>th</sup> September 2000 (unpublished), wherein the new Court, in declaring admissible an application for breaches *inter alia* of Articles 3 and 8, ECHR, referred under the heading “Relevant international material” to findings in the three published Netherlands Antilles visit reports, as well as to the authorities’ most recent response.

<sup>31</sup> See *Aydin v Turkey*, Judgment of 27<sup>th</sup> September 1997, Reports of Judgments and Decisions of the European Court of Human Rights 1997-VI-1866 (referring to the two Public Statements issued in respect of Turkey in 1992 and 1996, the contents of which were relied on by the Applicant in support of her complaint, which reliance, it is worth noting, was mentioned by the Commission in its report on the matter: see *Aydin v Turkey*, App No 23178/94, Comm Rep, 7<sup>th</sup> March 1996). See, more recently, *Akkoc v Turkey*, Judgment of 10<sup>th</sup> October 2000 (unpublished) (wherein the Court referred, in addition, to CPT precepts on the independent medical examination of detainees in finding a violation of Article 3, ECHR: at para 118).

objective and impartial indicia of the circumstances obtaining in an establishment at the time of incidents giving rise to an application or as means of illustrating that the conditions of detention or the conduct of custodial staff about which an applicant complains were not confined to him/her. However, they are not determinative; they comprise just one of a number of considerations taken into account by the Strasbourg organs, the extent of whose influence will vary from case to case.

To date, the case of *Aerts v Belgium* represents the most developed use of CPT visit reports. Therein, the Applicant alleged that his treatment in the psychiatric wing of Lantin Prison had been inhuman and degrading on account of the detrimental effects to his psyche occasioned by exposure to the prevailing conditions and irregular medical care. Following its visit to the prison in 1993,<sup>32</sup> the CPT had criticised the standard of care afforded patients on the wing concerned, remarking that it “fell, in every respect, below the minimum level acceptable from an ethical and humanitarian point of view”.<sup>33</sup> Its remarks were useful since they afforded objective evidence of the situation of the Applicant, who, due to mental disorder, was unable to provide clear evidence himself. The Commission narrowly found that there had been a breach of Article 3.<sup>34</sup> The Court, however, did not follow suit, averring that the Applicant had failed to demonstrate that he *himself* had suffered adversely from the conditions of which he complained, or at least,

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<sup>32</sup> The visit took place very shortly after the Applicant had been transferred to a more suitable establishment.

<sup>33</sup> See *Belgium I*, para 191.

<sup>34</sup> *Aerts v Belgium*, App No 25357/94, Comm Rep, 20<sup>th</sup> May 1997, at 81-2. The minority suggested that the CPT’s failure to describe the situation on the wing concerned in terms which brought it within the ambit of Article 3 – namely, “inhuman or degrading” – helped to demonstrate that the Article 3 threshold had not been crossed. It has been seen, however, that the CPT does not consider that it is constrained to use Article 3 terminology in describing its findings. In the light of this view, the contention of the minority is a little misleading, it is submitted.

had not suffered sufficiently adversely to justify an application for breach of Article 3.<sup>35</sup> Nevertheless, the CPT's description of the conditions on the affected wing was significant, it appears, since it indicated that continued detention therein might conceivably have taken detainees' treatment across the Article 3 threshold. It was simply that in his particular circumstances, the Applicant had not been able to prove that the threshold had been crossed.

In *Aerts*, we again see the fundamental difference between the concerns of the CPT and those of the Court (the Commission, it may be argued, exceeded its competence in finding as it did). The Court focused, correctly, on the circumstances of the individual applicant; the CPT, for its part, on the general conditions obtaining in the wing concerned. While important in a probative sense, therefore, the value of CPT reports in substantiating applications under the ECHR and in assisting the new Court in reaching its determinations may be limited; the nature of their respective competences does not readily permit reference in individual applications to general circumstances – unless, of course, the applicant can prove that he himself was adversely affected by such circumstances.<sup>36</sup>

As far as the CPT is concerned, however, this distinction of competences has significant advantages. If the Court is unable readily to avail itself of evidence of general, systemic failures on the part of States when censuring them, then the CPT

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<sup>35</sup> *Aerts v Belgium*, Judgment of 30<sup>th</sup> July 1998, Reports of Judgments and Decisions of the European Court of Human Rights 1998-V-1939. The Court did, however, appear to accept the CPT's conclusion that the care afforded the Applicant had fallen below the "minimum level acceptable from the ethical and humanitarian point of view".

<sup>36</sup> In this regard, see, now, *Magee v UK*, Judgment of 6<sup>th</sup> June 2000 (unpublished), wherein the new Court remarked that it had "examined" the findings and recommendations of the CPT on detention conditions obtaining in the Castlereagh Holding Centre in 1993 (see UK II) and had concluded that the Applicant should have been granted access to a lawyer in the initial stages of his custody as a "counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators". The denial of such access amounted to a breach of Article 6 ECHR, it averred (at para 43 of the judgment).

remains the only Council of Europe-inspired mechanism whose findings in respect of particular establishments (or parts of establishments) or particular categories of detainee or even entire national systems may be regarded as authoritative - and, it is to be hoped, influential - in highlighting areas of concern. The question must be asked, therefore: in the light of its unique position, should the CPT feel constrained to interpret Article 3, ECHR consistently with the old Commission and the Court? If it does, then it may be expected that its findings will be invoked more and more in applications under the Human Rights Convention. If it does not – and given the language used by it on occasion, this seems the most likely possibility<sup>37</sup> – then, while its reports may be perceived to be, rightly or wrongly, of limited value in actions before the Court, the CPT may be able to forge for itself a distinct and influential role in safeguarding the welfare of detainees in Council of Europe member States, all the while, perhaps, helping to alter in some incremental way understandings and interpretations of concepts like “torture”,<sup>38</sup> “inhuman” and “degrading”. The ECPT may be in this respect a creative mechanism, supplementing the protective machinery of the ECHR in potentially interesting ways.<sup>39</sup>

### *Application of CPT standards*

Analysis of its published work indicates that the CPT has sought to promulgate its fundamental precepts consistently throughout its working life. In visit reports, few, if

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<sup>37</sup> It will be recalled that the Committee seeks to establish “a degree of protection which is greater than that upheld by the European Commission and European Court of Human Rights”: see 1<sup>st</sup> GR, para 5.

<sup>38</sup> Although contemporary understandings of torture are quite fixed and clear and unlikely to alter much.

<sup>39</sup> In this connection, see Murdoch’s very interesting disquisition on the way in which it may be possible for the CPT to fill the gaps in the standards developed under Article 5, ECHR jurisprudence in order to establish a range of precepts on pre-trial procedure in police custody, without in any way coming into conflict with the norms developed by the Commission and Court, in *CPT Standards within the Context of the Council of Europe*, in Morgan and Evans (1999), pp 103-136, at 130-134. Murdoch envisages a “dovetailing” of the two systems in order to create a “more complete” European code of criminal procedure.

any, differences in language are to be found regarding the manner in and emphasis with which such precepts are expressed. Moreover, in interview, Committee members themselves have expressly disavowed any variable or relative application of standards based, *inter alia*, on financial, cultural and/or political differences between Parties.<sup>40</sup>

The texts of visit reports, however, suggest that this refusal to countenance differences in the application of standards is a little misplaced. In practice, there appears to have emerged what has been characterised as a doctrine of “variable geometry”, relating to the CPT’s expectations of the achievement of its standards: “a doctrine, in effect, of same standards, different pace...”<sup>41</sup> As might be expected, this doctrine has emerged in particular, albeit rather tentatively it may be argued, following the accession of a number of central and eastern European States to the Convention. To the Bulgarian authorities, for example, in the light of protestations in 1995 that “certain budgetary problems” would leave psychiatric hospitals “in an unfavourable financial position for a long period of time”,<sup>42</sup> the CPT remarked that:

“... [it] fully accepts that in times of economic difficulty, sacrifices have to be made... However, there are certain basic necessities of life the provision of which must be considered as a priority in institutions where the State has persons under its care and/or custody...”<sup>43</sup>

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<sup>40</sup> See Evans and Morgan (1998), p 349 (referring to the authors’ very revealing interview with the Bureau of the CPT).

<sup>41</sup> Ibid. As Evans and Morgan point out, the existence of a doctrine of variable geometry has been acknowledged by the first President of the CPT, who has remarked that, after much debate in its early years, the Committee ultimately settled on a policy whereby standards would be judged in the light of the “specific history and degree of economic development of each state”. Consequently, although certain fundamental issues (such as what constitutes “inhuman” treatment) would remain constant, local circumstances – and their effect on the “prevailing mentality” in a Party - would be taken into account in the formulation of recommendations: see Cassese (1996), pp 27-8.

<sup>42</sup> See Bulgaria I, para 194.

<sup>43</sup> Idem, para 195. The basic necessities referred to include adequate food and heating and appropriate medication.

“A failure to meet this requirement”, it continued, “can lead rapidly to situations falling within the scope of the term ‘inhuman and degrading treatment’”. Accordingly, sufficient budgetary resources should be made available, it suggested, to “ensure” the provision of those basic necessities. Significantly however, the Committee added that “[o]bviously, *as soon as economic circumstances permit*, additional steps should be taken” with a view to effecting further, less compelling improvements.<sup>44</sup>

Undeniably, therefore, a policy has emerged by virtue of which the CPT, while making it clear that the implementation of its standards by all Parties, regardless of circumstance, is its desired objective, is prepared to distinguish the way in and timetable according to which those standards should be given practical effect, which distinction is based on prevailing local conditions.<sup>45</sup> The terms used to express such a distinction are interesting: some improvements - notably efforts to reduce overcrowding - it considers, should be taken “immediately”; others, it believes, require of authorities “serious efforts...as soon as possible”; others “vigorous steps”; others still should be “accorded a high priority”; while some merely require the giving of “more attention”.<sup>46</sup>

### ***Setting standards for a diverse and diversifying continent***

In the light of the unanticipated speed with which large numbers of central and eastern European States have acceded to the ECPT and the likelihood of further such accessions - as well as the possible incorporation of certain, non-European States once the First

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<sup>44</sup> Ibid (emphasis added). See in the same connection *idem*, para 203 and para 62 (regarding provision in Bulgarian police establishments); and Romania I, paras 71 (also regarding provision in police establishments), 124 (regarding provision in prisons) and 179 (psychiatric hospitals).

<sup>45</sup> Evans and Morgan, for their part, consider the CPT’s acceptance of a “‘two speed’ or culturally relative Europe” as “to some extent inevitable”: see Evans and Morgan (1998), p 351.

<sup>46</sup> See Bulgaria I, para 125.



Protocol to the ECPT enters into force - the level at which CPT standards are pitched has taken on a particular significance. It is clear from the analysis in Chapter 3 that the CPT considers itself free, in practice, to draw on the provisions of any number of international instruments relevant to its mandate and the jurisprudence developed thereunder as sources for its standard-setting work. It has stated, recently, for example, that, in certain respects, its own standards may be regarded as “complementary” to those which have emerged under the aegis of other international instruments,<sup>47</sup> and that, accordingly, in formulating precepts on women in places of detention, it has been led and influenced by standards developed under the ECHR, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.<sup>48</sup>

It is clear, too, that ECHR jurisprudence, notably that developed under Article 3, is an important point of reference, while good State party law and practice, offers a most immediate and compelling source on which to draw. In fact, it would appear from a close scrutiny of published reports that reference to State practice is an especially potent expedient for the Committee, useful in order to illustrate a particular precept or to reinforce a particular point of view. The CPT’s rather spare general formulation on policies to reduce and, ultimately, eliminate, prison overcrowding, considered above, in Chapter 15, for example, may be considered to have been augmented by principles drawn from various national laws and practices which accord with its basic premise and which are cited by it in visit reports. Similarly, approbatory references to the comprehensive

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<sup>47</sup> See 10<sup>th</sup> GR, para 22.

<sup>48</sup> Ibid.

provisions of Codes of Practice developed, *inter alia*, in England and Wales in order better to protect persons detained by the police may be said to illumine a number of CPT precepts and to demonstrate just how readily such precepts may be realised in practice. Lastly in the present connection, reference might usefully be made to a very particular instance in which, it is plain, the CPT was influenced by State practice across Convention territory in the formulation of the precept concerned. Regarding the treatment of imprisoned expectant mothers, “[i]t is axiomatic”, it proclaimed recently, “that babies should not be born in prison *and the usual practice in Council of Europe member States seems to be, at the moment, to transfer pregnant women prisoners to outside hospitals*”.<sup>49</sup> Clearly, the CPT’s preference, it may be inferred, is for such transfers to be authorised in the event that a pregnant woman is imprisoned, and the determining factor, it seems, is contemporary Party practice.

If the CPT is to become truly effective, therefore, and bring about fundamental and lasting change on a wide range of custodial matters in States across Europe (indeed, with the accession to the ECPT of the Russian Federation, across the Eurasian landmass), it must develop ways of drawing together all these disparate influences, allowing them to diffuse and coalesce, until, ultimately, its desired objective, *viz.*, the creation of common standards of protection for persons deprived of their liberty in all Parties<sup>50</sup> – including, conceivably, States beyond Europe - crystallises. Its standards, therefore, are not international or European in the sense of their deriving directly from standards *extant* in international or European human rights law. They are truly international and truly European in that they emerge from a fertile mixture of precepts contained in and

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<sup>49</sup> See 10<sup>th</sup> GR, para 27 (emphasis added).

<sup>50</sup> See above, p 47.

developed under a range of international instruments, binding and otherwise, as well as, significantly, the provision made by the States whose practices it monitors.

In this regard, it is possible, clearly, to agree the content of certain common standards in the prevention of ill-treatment (the duty not to return persons to countries where there are substantial grounds for believing that they run a real risk of torture or ill-treatment, referred to above, is a case in point), notwithstanding differences, sometimes profound, between States' cultural and political traditions and, most significantly, economic development. Much less easy, it is submitted, is to secure consensus on many other matters which fall within the CPT's sphere of interest or which it has interpreted as falling within that sphere. As we have seen, even determining the content of its "fundamental" safeguards against ill-treatment in police custody can prove contentious and provoke strong reaction.

Perhaps the Committee would be advised, therefore, to formulate bespoke standards, to tailor its recommendations to specific circumstances, even to specific cases. To a certain extent, as we have seen, it has achieved this – though how consciously is a moot point – in the context of its elaboration of standards on the use of force/restraint and the application of measures of solitary confinement in places of detention. In respect of both these areas of concern, a number of precepts may be considered to have emerged from the Committee's analysis of particular situations encountered in the course of visits (for instance, in the context of solitary confinement, the use made of the country's Prosecution Instructions by Norwegian police officers in order to exert psychological pressure on criminal suspects; or, in respect of the use of force, the systematic deployment of outside security forces in the event of prison disturbances, *inter alia*, in Portugal). Some commentators favour this approach very strongly, asserting that:

“...CPT reports would command greater attention, both domestically and internationally, if [they] established more precisely and on a case by case basis precisely how the adoption of its recommendations would make it less likely that particular forms of ill-treatment would occur in specific, identified contexts. Moreover, given the pressures of time and cost, the CPT should be prepared to prioritise its recommendations in order to assist the state to prepare a useful and realistic plan of action, the response and development of which could be monitored in detail. In short, the CPT should furnish each state party with something akin to a custom-made programme tailored to its particular circumstances and needs rather than the off-the-peg set of recommendations which are currently made”.<sup>51</sup>

There would be much merit in such an approach, it is submitted. It would undoubtedly enhance and focus the dialogue between the Committee and States parties and render the CPT’s standard-setting work potentially more efficacious. At the same time, it would not preclude the formulation of general, though not immutable, principles as guidelines of potentially universal appeal. There is nothing inconsistent, it is submitted, in developing, concurrently, tailored recommendations and general guidance. The one complements the other: tailored recommendations may be considered a most appropriate means of preventing ill-treatment (which, after all, is what the CPT is mandated to do) in particular circumstances; while the formulation of general guidance marks a not insignificant step towards the development of uniform standards.

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<sup>51</sup> See Morgan and Evans (1999), p 27.

If the CPT is ever to achieve this last objective, it is important that it conscientiously seeks to develop flexible principles. Its mandate is to prevent ill-treatment, not to secure rigid conformity with an exhaustive body of precepts. If the former can be achieved without the latter, then the CPT will have served its purpose; there will be no need for it to seek the adoption of the same principles everywhere. Accordingly, its standards “should not be allowed to become ends in themselves: they are at best means to an end”.<sup>52</sup>

This view does not, it is hoped, invalidate the purport of this thesis, the object of which is to identify and, if possible, expound the Committee’s evolving corpus of standards. It merely places the CPT’s standard-setting work in some kind of context and indicates how it might be exploited in the fulfilment of its preventive mandate. That work remains crucial to the effective functioning of the CPT. Accordingly, though its “measuring rods” are arguably inchoate and occasionally ill-defined, their promulgation through the medium *inter alia* of its visit and general reports represents, it is submitted, a most significant and commendable advance in the protection of detainees against ill-treatment. At the same time, however, the Committee should be encouraged to exploit the undoubted trust in its work and good will shown towards it by States parties in order to formulate a distinct and authoritative code of standards, recourse to which - by visiting delegations and local authorities alike - should be vigorously promoted, notwithstanding the inherent prescriptive limitations of the CPT’s mandate.

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<sup>52</sup> Ibid.

# APPENDIX

CPT Documents

**TABLE A**

**CPT VISIT REPORTS**

<b>COUNTRY</b>	<b>CITATION IN THE TEXT</b>	<b>DOCUMENT</b>	<b>DATE OF VISIT</b>	<b>CPT REFERENCE</b>	<b>DATE OF PUBLICATION</b>
Andorra	Andorra I	First Report to the Andorran Government	27.05.98-29.05.98	CPT/Inf (2000) 11	20.07.00
Austria	Austria I	First Report to the Austrian Government	20.05.90-27.05.90	CPT/Inf (91) 10	03.10.91
	Austria II	Second Report to the Austrian Government	26.09.94-07.10.94	CPT/Inf (96) 28	31.10.96
Belgium	Belgium I	First Report to the Belgian Government	14.11.93-23.11.93	CPT/Inf (94) 15	14.10.94
	Belgium II	Second Report to the Belgian Government	31.08.97-12.09.97	CPT/Inf (98) 11	18.06.98
Bulgaria	Bulgaria I	First Report to the Bulgarian Government	26.03.95-07.04.95	CPT/Inf (97) 1	06.03.97
Cyprus	Cyprus I	First Report to the Cypriot Government	02.11.92-09.11.92	CPT/Inf (97) 5	22.05.97
	Cyprus II	Second Report to the Cypriot Government	12.05.96-21.05.96	CPT/Inf (97) 5	22.05.97
Czech Republic	Czech Republic I	First Report to the Government of the Czech Republic	16.02.97-26.02.97	CPT/Inf (99) 7	15.04.99
Denmark	Denmark I	First Report to the Danish Government	02.12.90-08.12.90	CPT/Inf (91) 12	03.10.91
	Denmark II	Second Report to the Danish Government	29.09.96-09.10.96	CPT/Inf (97) 4	24.04.97
Finland	Finland I	First Report to the Finnish Government	10.05.92-20.05.92	CPT/Inf (93) 8	01.04.93
	Finland II	Second Report to the Finnish Government	07.06.98-17.06.98	CPT/Inf (99) 9	11.05.99
France	France I	First Report to the French Government	27.10.91-08.11.91	CPT/Inf (93) 2	19.01.93
	France II	Second Report to the French Government	20.07.94-22.07.94	CPT/Inf (96) 2	23.01.96
	France III	Third Report to the French Government	06.10.96-18.10.96	CPT/Inf (98) 7	14.05.98
France (Martinique)	France (Martinique) I	First Report to the French Government (Martinique)	03.07.94-07.07.94	CPT/Inf (96) 24	24.09.96
Germany	Germany I	First Report to the German Government	08.12.91-20.12.91	CPT/Inf (93) 13	19.07.93
	Germany II	Second Report to the German Government	14.04.96-26.04.96	CPT/Inf (97) 9	17.07.97
	Germany III	Third Report to the German Government	25.05.98-27.05.98	CPT/Inf (99) 10	27.05.99
Greece	Greece I	First Report to the Greek Government	14.03.93-26.03.93	CPT/Inf (94) 20	29.11.94
Hungary	Hungary I	First Report to the Hungarian Government	01.11.94-14.11.94	CPT/Inf (96) 5	01.02.96
Iceland	Iceland I	First Report to the Icelandic Government	06.07.93-12.07.93	CPT/Inf (94) 8	28.06.94
	Iceland II	Second Report to the Icelandic Government	29.03.98-06.04.98	CPT/Inf (99) 1	16.02.99

<b>COUNTRY</b>	<b>CITATION IN THE TEXT</b>	<b>DOCUMENT</b>	<b>DATE OF VISIT</b>	<b>CPT REFERENCE</b>	<b>DATE OF PUBLICATION</b>
Ireland	Ireland I	First Report to the Irish Government	26.09.93-05.10.93	CPT/Inf (95) 14	13.12.95
	Ireland I	Second Report to the Irish Government	31.08.98-09.09.98	CPT/Inf (99) 15	17.12.99
Italy	Italy I	First Report to the Italian Government	15.03.92-27.03.92	CPT/Inf (95) 1	31.01.95
	Italy II	Second Report to the Italian Government	22.10.95-06.11.95	CPT/Inf (97) 12	04.12.97
Liechtenstein	Liechtenstein I	First Report to the Government of Liechtenstein	14.04.93-16.04.93	CPT/Inf (95) 7	23.05.95
Luxembourg	Luxembourg I	First Report to the Government of Luxembourg	17.01.93-25.01.93	CPT/Inf (93) 19	12.11.93
	Luxembourg II	Second Report to the Government of Luxembourg	20.04.97-25.04.97	CPT/Inf (98) 16	03.12.98
Malta	Malta I	First Report to the Maltese Government	01.07.90-09.07.90	CPT/Inf (92) 5	01.10.92
	Malta II	Second Report to the Maltese Government	16.07.95-21.07.95	CPT/Inf (96) 25	26.09.96
Netherlands	Netherlands I	First Report to the Dutch Government	30.08.92-08.09.92	CPT/Inf (93) 15	15.07.93
	Netherlands II	Second Report to the Dutch Government	17.11.97-27.11.97	CPT/Inf (98) 15	29.09.98
Netherlands (Aruba)	Netherlands (Aruba) I	First Report to the Dutch Government (Aruba)	30.06.94-02.07.94	CPT/Inf (96) 27	03.10.96
Netherlands (Netherlands Antilles)	Netherlands (NA) I	First Report to the Dutch Government (Netherlands Antilles)	26.06.94-30.06.94	CPT/Inf (96) 1	18.01.96
	Netherlands (NA) II	Second Report to the Dutch Government (Netherlands Antilles)	07.12.97-11.12.97	CPT/Inf (98) 17	10.12.98
	Netherlands (NA) III	Third Report to the Dutch Government (Netherlands Antilles)	25.01.99-29.01.99	CPT/Inf (2000) 9	25.05.00
Norway	Norway I	First Report to the Norwegian Government	27.06.93-06.07.93	CPT/Inf (94) 11	21.09.94
	Norway II	Second Report to the Norwegian Government	17.03.97-21.03.97	CPT/Inf (97) 11	05.09.97
Poland	Poland I	First Report to the Polish Government	30.06.96-12.07.96	CPT/Inf (98) 13	24.09.98
Portugal	Portugal I	First Report to the Portuguese Government	19.01.92-28.01.92	CPT/Inf (94) 9	22.07.94
	Portugal II	Second Report to the Portuguese Government	14.05.95-26.05.95	CPT/Inf (96) 31	21.11.96
	Portugal III	Third Report to the Portuguese Government	20.10.96-24.10.96	CPT/Inf (98) 1	13.01.98
Romania	Romania I	First Report to the Romanian Government	24.09.95-06.10.95	CPT/Inf (98) 5	19.02.98
San Marino	San Marino I	First Report to the Government of San Marino	25.03.92-27.03.92	CPT/Inf (94) 13	12.10.94
Slovakia	Slovakia I	First Report to the Slovakian Government	25.06.95-07.07.95	CPT/Inf (97) 2	03.04.97
Slovenia	Slovenia I	First Report to the Slovenian Government	19.02.95-28.02.95	CPT/Inf (96) 18	27.06.96
Spain	Spain I	First Report to the Spanish Government	01.04.91-12.04.91	CPT/Inf (96) 9	05.03.96
	Spain II	Second Report to the Spanish Government	10.04.94-22.04.94	CPT/Inf (96) 9	05.03.96



COUNTRY	CITATION IN THE TEXT	DOCUMENT	DATE OF VISIT	CPT REFERENCE	DATE OF PUBLICATION
	Spain III	Third Report to the Spanish Government	10.06.94-14.06.94	CPT/Inf (96) 9	05.03.96
	Spain IV	Fourth Report to the Spanish Government	21.04.97-28.04.97	CPT/Inf (98) 9	19.05.98
	Spain V	Fifth Report to the Spanish Government	17.01.97-18.01.97	CPT/Inf (2000) 3	13.04.00
	Spain VI	Sixth Report to the Spanish Government	22.11.98-04.12.98	CPT/Inf (2000) 5	13.04.00
Sweden	Sweden I	First Report to the Swedish Government	05.05.91-14.05.91	CPT/Inf (92) 4	12.03.92
	Sweden II	Second Report to the Swedish Government	23.08.94-26.08.94	CPT/Inf (95) 5	03.04.95
	Sweden III	Third Report to the Swedish Government	15.02.98-25.02.98	CPT/Inf (99)	25.02.99
Switzerland	Switzerland I	First Report to the Swiss Government	21.07.91-29.07.91	CPT/Inf (93) 3	27.01.93
	Switzerland II	Second Report to the Swiss Government	11.02.96-23.02.96	CPT/Inf (97) 7	26.06.97
Turkey	Turkey I	Report to the Turkish Government*	05.10.97-17.10.97	CPT/Inf (99) 2	23.02.99
	Turkey PS I	First Public Statement		CPT/Inf (93) 12 Appendix 4	Issued 15.12.92
	Turkey PS II	Second Public Statement		CPT/Inf (96) 34	Issued 06.12.96
United Kingdom	UK I	First Report to the United Kingdom Government	29.07.90-10.08.90	CPT/Inf (91) 15	26.11.91
	UK II	Second Report to the United Kingdom Government	20.07.93-29.07.93	CPT/Inf (94) 17	17.11.94
	UK III	Third Report to the United Kingdom Government	15.05.94-31.05.94	CPT/Inf (96) 11	05.03.96
	UK IV	Fourth Report to the United Kingdom Government	08.09.97-17.09.97	CPT/Inf (2000) 1	13.01.00

\* As at 18<sup>th</sup> August 2000, Turkey had been visited by the CPT on nine occasions. However, only one visit report (relating to the most recent of those visits) has been published. It is cited in the text as "Turkey I" for ease of reference.

**TABLE B**  
**CPT GENERAL REPORTS**

<b>CITATION IN THE TEXT</b>	<b>REPORT</b>	<b>CPT REFERENCE</b>	<b>DATE OF PUBLICATION</b>
<b>1<sup>st</sup> GR</b>	<b>1<sup>st</sup> General Report on the CPT's Activities covering the period November 1989 to December 1990</b>	<b>CPT (91) 3</b>	<b>20.02.91</b>
<b>2<sup>nd</sup> GR</b>	<b>2<sup>nd</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1991</b>	<b>CPT/Inf (92) 3</b>	<b>13.04.92</b>
<b>3<sup>rd</sup> GR</b>	<b>3<sup>rd</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1992</b>	<b>CPT/Inf (93) 12</b>	<b>04.06.93</b>
<b>4<sup>th</sup> GR</b>	<b>4<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1993</b>	<b>CPT/Inf (94) 10</b>	<b>10.08.94</b>
<b>5<sup>th</sup> GR</b>	<b>5<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1994</b>	<b>CPT/Inf (95) 10</b>	<b>03.07.95</b>
<b>6<sup>th</sup> GR</b>	<b>6<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1995</b>	<b>CPT/Inf (96) 21</b>	<b>05.08.96</b>
<b>7<sup>th</sup> GR</b>	<b>7<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1996</b>	<b>CPT/Inf (97) 10</b>	<b>22.08.97</b>
<b>8<sup>th</sup> GR</b>	<b>8<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1997</b>	<b>CPT/Inf (98) 12</b>	<b>31.08.98</b>
<b>9<sup>th</sup> GR</b>	<b>9<sup>th</sup> General Report on the CPT's Activities covering the period 1 January to 31 December 1998</b>	<b>CPT/Inf (99) 12</b>	<b>30.08.99</b>
<b>10<sup>th</sup> GR</b>	<b>10<sup>th</sup> General Report on the CPT's Activities covering the Period 1 January to 31 December 1999</b>	<b>CPT/Inf (2000) 13</b>	<b>19.08.00</b>

## TABLE C

### OTHER CPT DOCUMENTS

DOCUMENT	CPT REFERENCE	DATE OF PUBLICATION/ ADOPTION
<b>Text of the Convention and Explanatory Report</b>	<b>H (87) 4 and CPT/Inf (91) 9</b>	<b>07.07.87</b>
<b>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Rules of Procedure</b>		<b>16.11.89. Amended 08.03.90, 11.05.90, 09.11.90, 31.01.91 and 20.09.91</b>
<b>Some Issues concerning the interpretation of the ECPT</b>	<b>CPT/Inf (93) 10</b>	<b>03.05.93</b>
<b>Historical background and main features of the Convention</b>	<b>CPT/Inf (89) 2</b>	-
<b>Text of Protocols No.1 and 2 to the ECPT</b>	<b>CPT/Inf (93) 17</b>	<b>06.10.93</b>
<b>Information on the ECPT: (A) Signatures and Ratifications of the Convention (B) Declarations and Notifications</b>	<b>CPT/Inf (93) 18</b>	<b>26.11.93</b>
<b>Information on the European Committee for the Prevention of Ill-treatment</b>	<b>CPT/Inf (94) 2</b>	<b>01.06.94</b>
<b>Information on the ECPT: (A) Signatures and Ratifications of the Convention (B) Signatures and Ratifications of Protocol No.1 (C) Signatures and Ratifications of Protocol No.2 (D) Declarations and Notifications</b>	<b>CPT/Inf (94) 14</b>	<b>12.09.94</b>

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\* Parenthetical references to the works listed in this bibliography indicate the manner in which they are cited in the text of this thesis.

