EUROPEAN MASTER'S DEGREE IN HUMAN RIGHTS AND DEMOCRATISATION

UNIVERSITY OF COIMBRA

A "JOINT VENTURE" AGAINST TORTURE: THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Academic Year 2002-2003

ABSTRACT

In the closed places of detention, voices are difficult to be heard and abhorrent acts easy to be concealed. The birth of the European Committee for the Prevention of Torture (CPT), a novel mechanism based on inspection visits to places of detention, came to satisfy the need for more effective promotion of the rights of those deprived of their liberty and to strengthen the existing system of judicial protection against ill treatment afforded by Article 3 of the 1950 European Convention on Human Rights (ECHR). The present thesis relates the non-judicial/proactive work of the CPT to the judicial/reactive activities of the European Court of Human Rights, with a view to explore the scope for complementarity between these two Council of Europe bodies in the field of detainees' protection. It is to be hoped that placing the CPT's far-reaching standards within the legally binding ECHR system will prove beneficial to human dignity and conducive to the enhanced protection of persons deprived of their liberty.

TABLE OF CONTENTS

INTRODUCTION

There exists today a body of internationally accepted norms and values in the field of human rights that establish what is acceptable State practice and place responsibility on the State for peace, security and respect for human rights, including freedom from torture and ill treatment. Yet a contradiction persists: although governments have agreed that the prohibition of torture should be absolute and universal, there are still many among them who continue to practice or tolerate this insidious crime, inflicted on the weaker by the stronger, by those in power to those under their power.

Torture can take many forms and be used for different purposes by different actors, but the great majority of surveys, reports and statistics into patterns of torture today suggest that the most common victims of this practice are convicted prisoners and criminal suspects[1]. There are a number of reasons for this. Prisoners are among the most marginal of social groups, particularly vulnerable to neglect and abuse. The prevalence of torture against them may be under-reported, as the victims are held in places surrounded by secrecy, justified in the name of security and have generally less access to complaint mechanisms. Moreover, violence against offenders or suspects is generally seen as a more or less "inherent" element in everyday police and custodial practice, for the protection of the interests of the society and for the punishment of those that undermine these interests. Indeed, popular mobilization against torture or ill treatment often ends at the prison gates.

One could argue that the incidence of torture is not to be found inside European borders but is rather a phenomenon that more obviously endures in far-off places under authoritarian regimes or military dictatorships. This may in part be true, in the sense that today in Europe we are no longer confronted with atrocious and extreme practices that date back to forms of treatment carried out in medieval times. However, torture does take place, even in the European continent, albeit in modified, more subtle and inconspicuous guises: use of psychological tactics designed to wear suspects down, deprivation of sleep, mock executions or threat of death, prolonged isolation in circumstances of sensory deprivation, beating on the soles of the feet,

[1] See, for example, Amnesty International, *Take a Step to Stamp Out Torture*, London, Amnesty International Publications, 2000, p. 12.

suspension of the body, use of physically stressful constant standing and so on. The essential feature of these practices is that normally they leave no visible mark. But even when a particular purpose (e.g. to elicit information) is absent, there is often resort to unintentional forms of mistreatment, such as neglect to provide adequate medical care, very poor living conditions in prison cells, overcrowding coupled with poor sanitation and the like. In any case and in whatever form, torture is always and absolutely unacceptable: no circumstance can ever be invoked to justify its use.

For all the above reasons, the work of the **European Committee for the Prevention of Torture** (hereinafter the "CPT" or the "Torture Committee") in improving the protection of persons deprived of their liberty in Europe deserves particular attention. The CPT was created under the **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** (ECPT)[2], with the mandate to visit places of detention of any kind in Contracting States in order to examine the treatment of persons deprived of their liberty and to prevent incidents of torture and other forms of ill treatment from taking place. The visits are periodic but can also take place *ad hoc* in response to serious allegations of an urgent problem in a particular country. The Member States are required to co-operate with the members of the Committee, allow them access to all places and provide them with any information they may request. The CPT enjoys an extensive range of powers: it has unlimited access to any place of detention, including the right to move inside such places without restriction, it may communicate freely with any person whom it believes can supply relevant information (including detainees) and it can carry out unannounced visits. However, the Committee has no judicial functions and aims rather at the prevention than the repression of torture. After each visit, it prepares a report of its findings and makes recommendations to the State Party concerned. These reports are confidential, unless the State itself requests their publication or the Committee decides to make a public statement in the face of a State's failure to cooperate or refusal to implement the Committee's recommendations[3]. It is now the rule rather than the exception for a country to allow the publication of the respective report.

[2] Reproduced in Appendix 1 of the present thesis.
[3] In the fourteen years of its operation, the CPT has used its power to make a public statement four times: twice with respect to Turkey (in 1992 and 1996) and twice with respect to the Chechen Republic (in 2001 and 2003).

The birth of this new European institution was seen as a useful addition to an existing web of initiatives relating to the treatment, or rather the limits on ill treatment, of persons deprived of their liberty. At the international level, the **United Nations** (UN) has contributed greatly to the process of standard setting for the protection of detainees, starting in 1955 with the adoption of the Standard Minimum Rules for the Treatment of Prisoners and over the years adopting several other important international instruments, such as the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration Against Torture, 1975), the Code of Conduct for Law Enforcement Officials (1979), the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984)[4], the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Principles on the Investigation of Torture, 2000), etc[5]. Particular mention should be made of the role of the UN Special Rapporteur on Torture, who, since 1985, has examined questions relevant to torture, reported on its frequency and extent all over the world, and made recommendations to the UN Commission on Human Rights[6].

[4] The UNCAT, binding on States Parties, occupies a significant niche in the struggle against torture. It contains a definition of torture, sets out its absolute prohibition and requires States to take effective measures for its complete eradication. An important step towards the prevention of torture was made on 18 December 2002, with the adoption by the UN General Assembly of the Optional Protocol to the UNCAT, establishing a visiting mechanism, similar to the CPT, on the international level. The Optional Protocol was opened for signature and ratification on 4 February 2003. To enter into force it will require 20 ratifications.

[5] Most of these instruments are reproduced in the UN publication *Human Rights. A Compilation of International Instruments*, Volume I (First Part), New York and Geneva, Office of the United Nations High Commissioner for Human Rights, 1997. They are also available on-line on the UN human rights website at http://www.unhchr.ch. For a list of the main international and regional instruments providing for the prohibition and prevention of torture, see Appendix 5 of Amnesty International's *Combating Torture: A Manual for Action*, London, Amnesty International Publications, 2003. See also, International Rehabilitation Council for Torture Victims (IRCT), *International Instruments and Mechanisms for the Fight Against Torture*, 3rd ed., Denmark, IRCT, 2001.

[6] For a description of the Special Rapporteur's methods of work, see Rodley, N.S., *The Treatment of Prisoners Under International Law*, 2nd ed., Oxford, Oxford University Press, 1999, pp. 145-150.

In the framework of the **Council of Europe**, there are a number of non-binding instruments relevant to the treatment of those in detention, notably the European Prison Rules (1973)[7] and the European Declaration on the Police (1979)[8]. However, it is the **Convention for the Protection of Human Rights and Fundamental Freedoms** (European Convention on Human Rights or ECHR, 1950)[9] that occupies a prominent place in the effective promotion of human rights in general and the protection of rights of detained persons in particular. The most salient feature of the Convention is that it provides for a procedure whereby individuals are given the right to lodge a complaint before the **European Court of Human Rights**[10], against the State having jurisdiction over them, alleging violation of one or more of the provisions set out in the Convention. While the supervisory system established by the ECHR has achieved important results in defining and protecting a wide range of rights in the detention context, it was considered within the Council of Europe that this system could be usefully supplemented by a non-judicial machinery of a preventive and confidence-building character. That was one of the reasons for the elaboration of a new Convention and the establishment of a Committee "whose task would be 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"[11].

Thus, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force in 1989 and the Torture Committee performed its very first visit in May 1990. Since then, it has produced an impressive number of detailed visit reports, containing useful information on conditions in places of detention in Member States and far-reaching recommendations as to how situations can be improved. The question then arises how this "corpus of standards" developed

[7] Recommendation No. R (87) 3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987.
[8] Resolution 690, adopted by the Parliamentary Assembly of the Council of Europe on 8 May 1979.
[9] Reproduced in Appendix 2 of the present thesis.
[10] Pursuant to Protocol No. 11 to the ECHR, which came into force in November 1998, a single, full-time Court replaced the European Commission and Court of Human Rights, the two original supervisory organs of the Convention. For an overview of the basic features of the ECHR reform, see Drzemczewski, A., Meyer-Ladewig, J., *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994*, in «Human Rights Law Journal», vol. 15, no. 3, 1994, pp. 81-86.
[11] *Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf/C (89) 1, para. 13.

by the CPT in the course of its successful operation relates to other existing norms in the field of detainees' protection. The present thesis will try to contribute to the exploration of this issue, by discussing one aspect of it, namely the interrelationship between the non-judicial work of the CPT and the judicial activities of the European Court on Human Rights.

This focus underlines the following observation: recently, there is a growing tendency for the European Court of Strasbourg to refer to reports by the CPT in its decision-making. This leads in turn to the raising of a number of questions that the following study will go on to explore: what is the precise relevance of the CPT findings to the final judgment of the Court? To what extent and in which manner do these findings influence the conclusion reached? Taking into account the fundamentally different character of these two bodies, what are the challenges posed by the CPT to the Court? Is there a risk of overlap or conflict between these two procedures or is the one complementing the other?

Chapter One of this study poses the principal question: are these two sets of machinery complementary or are they competing with each other? Is their relationship as clearly demarcated as the drafters of the ECPT wished it to be or is there a degree of mutual influence upon each other? **Chapter Two** will then discuss the basic lines of approach adopted by each body to Article 3 of the ECHR, the most relevant Convention Article for the activities of the CPT and the most likely source of disagreement between the two institutions. In turn, **Chapter Three** will sketch out the approach taken by the CPT and the Court in two particular areas of torture prevention, namely the development of procedural safeguards for detainees and the response to cases of torture or ill treatment. Finally, on the basis of this comparative analysis, some conclusions will be drawn as to the growing scope for complementarity between the CPT and the Human Rights Court and the practical effects of such a process.

Concerning methodology, the main sources on which this study was based were (a) the relevant case-law of the ECHR supervisory machinery[12] and (b) documents produced by the CPT, in particular its visit reports authorized for publication and the

[12] Available on the website of the European Court on Human Rights, at http://www.echr.coe.int.

annual General Reports on its activities[13]. Although there is not much literature dealing with the specific subject of CPT-Court relations, a considerable number of studies have been written about the origins, content and application of the ECPT and these have been consulted as useful background information, in addition to the wealth of material produced on the Human Rights Convention and its supervisory bodies. Finally, constructive comments made by persons related in one way or another with the work of the Torture Committee, but always in full accordance with the strict code of confidentiality, proved extremely useful in giving to the present work a more dynamic and critical approach. I would like to take the opportunity here and express my gratitude to my supervisor, Prof. Teresa Beleza, herself a member of the CPT on behalf of Portugal, for her inspiration and encouragement to deal with the specific topic, as well as to Mr. Mark Kelly, former member of the CPT Secretariat, for his focused remarks and helpful suggestions. Many thanks to Mr. Patrick Müller, responsible for the CPT's "Documentation Centre", for providing me with useful references and to Mr. Ireneu Cabral Barreto, Judge of the European Court of Human Rights, for giving me further clarifications about the work of the Court.

[13] Available on the website of the CPT, at http://www.cpt.coe.int.

CHAPTER ONE

EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND EUROPEAN COURT OF HUMAN RIGHTS: SEPARATE OR COMPLEMENTARY?

From the very beginning of the drafting of the ECPT, there was a strong desire to distance the new Committee from the control mechanisms of the ECHR and to guard against any possibility of it exercising judicial-style functions that would stray into the spheres of activity of the European Court or Commission. This distinction is made clear by the CPT itself in its First General Report, adopted in 1991, which summarizes the main features of the Committee, particularly in relation to the ECHR[14]. Hence, it is stressed that "the CPT is not a judicial body empowered to settle legal disputes concerning alleged violations of treaty obligations" but rather "a mechanism designed to prevent ill-treatment from occurring… Consequently, whereas the Court's activities aim at 'conflict solution' on the legal level, the CPT's activities aim at 'conflict avoidance' on the practical level"[15].

However, the passage of time showed that these two mechanisms could not conduct their work without affecting each other and their interrelationship proved to be more complex than originally envisaged. After a brief account of the *travaux préparatoires* to the ECPT, the present chapter will attempt to discern cases where the work of the Committee and the Court is brought into very close proximity and to pass some comments on this two-way relationship.

1.1. ORIGINS OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE

The origins of the ECPT[16] lie in the efforts of Jean-Jacques Gautier[17], a retired Swiss lawyer and banker, who had the idea of developing a mechanism based on visits that

[14] This has subsequently been used as a Preface added to the first periodic report transmitted to a state.
[15] *First General Report on the CPT's activities covering the period November 1989 to December 1990*, CPT/Inf (91) 3, para. 2.
[16] For a more detailed examination of the background to the ECPT, see Decaux, E., *La Convention Européenne pour la Prévention de la Torture et des Peines ou Traitements Inhumains ou Dégradants*, in «Annuaire Français de Droit International», vol. 34, 1988, p. 618, Cassese, A., *A New Approach to*

would assist in the prevention of torture. He was inspired by the long-standing practice of the International Committee of the Red Cross (ICRC) of conducting visits to places in which prisoners of war are detained and, if necessary, making recommendations for the improvement of the conditions found. The ICRC operates on the basis of a specific mandate, received from the States bound by the Geneva Conventions of 1949 and the 1977 Protocols Additional to the Geneva Conventions[18]. The principle of confidentiality between the ICRC and the local authorities is considered essential for the achievement of the preventive goal of the Committee. Gautier's idea was to extend the list of places-to-be-visited where persons were deprived of their liberty and to make states parties to the eventual convention automatically bound to accept visits by the international body it would set up. The principle of confidentiality would be maintained but in the event of non-cooperation or non-improvement in a serious situation the established body would have the power to publish its findings, thus creating a sort of "sanction" for uncooperative governments.

This proposal formed the basis of a Draft Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)[19]. The Draft was jointly prepared by the Swiss Committee

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Human Rights: The European Convention for the Prevention of Torture, in «American Journal of International Law», vol. 83, no. 1, 1989, pp. 130-153 and Evans, M., Morgan, R., *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Oxford, Clarendon Press, 1998, pp. 106-141. See also *Explanatory Report to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf/C (89) 1, paras. 1-11.

[17] For the role of Jean-Jacques Gautier, see Vargas, F., *History of a Campaign*, in International Commission of Jurists/Swiss Committee Against Torture, *Torture: How to Make the International Convention Effective*, 2nd ed., Geneva, ICJ/SCAT, 1980.

[18] See common Article 10/10/10/11, Geneva Conventions for the Protection of Victims of War, August 12 1949. The Geneva Conventions are applicable primarily in international armed conflicts, but over the years the ICRC developed a practice, according to which it can conclude special agreements with the state concerned, to gain access to places of detention, even in peacetime. In case of internal armed conflicts, the ICRC can also offer its services to the conflicting parties and, with their consent, it can have access to places of detention. On ICRC practice see, *inter alia,* Schindler, D., *The International Committee of the Red Cross and Human Rights*, in «International Review of the Red Cross», no. 208, 1979, pp. 3-14 and Bugnion, F., *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre,* 2e éd, Genève, CICR, 2000.

[19] International awareness of the problem of torture during the 1970s stimulated the United Nations General Assembly to adopt the 1975 UN Declaration Against Torture and the Convention itself in 1984. Upon receiving the 20th ratification, the CAT entered into force on 26 June 1987. For an account of the drafting of the UNCAT see Rodley, N.S., *The Treatment of Prisoners Under International Law*, Oxford, Oxford University Press, 1999, pp. 18-74. See also Burgers, J.H., and Danelius, H., *The UN Convention Against Torture: A Handbook to the Convention Against Torture and Other Cruel,*

Against Torture (SCAT) and the International Commission of Jurists (ICJ) and submitted in April 1980 by the Government of Costa Rica for eventual consideration to the Commission on Human Rights, the body called upon to draft the UNCAT[20]. In the meantime and since consideration of the Draft Optional Protocol was deferred until after the adoption of the Convention itself[21], the focus of attention shifted from the UN to the Council of Europe, a regional organization which commended itself as the locus for the experiment, due to the relative homogeneity, at that time, of most of its Member States, as well as to the rarity of situations characterized by widespread allegations of torture in the region[22]. In 1983, the Council's Parliamentary Assembly called on the Committee of Ministers to adopt the ICJ/SCAT Draft Convention[23]. The matter was transferred to the Steering Committee for Human Rights[24], which in turn referred it to the Committee of Experts for the extension of the rights embodied in the ECHR. Following further considerations and debates, the resulting text of the ECPT was adopted on 26 June 1987 and opened for signature on 26 November 1987. It came into force on 1 February 1989, after receiving the seven requisite ratifications[25]. As of the time of this writing, 44 of the 45 members of the Council of Europe have ratified the ECPT.

Several questions and concerns were raised by the various committees charged with elaborating the Convention. For example, was an instrument of the kind needed at all in a region such as Europe where incidents of torture and inhuman or degrading treatment were relatively rare? Would the new Convention not slow down or even jeopardize efforts within the UN for the adoption of the Draft Optional Protocol? Perhaps most importantly, would the newly established Committee simply duplicate activities undertaken by organs and authorities operating in the same sphere? This last concern focused particularly on the (then) two supervisory organs of the ECHR, the

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Inhuman or Degrading Treatment or Punishment, Dordrecht, Martinus Nijhoff Publishers, 1988, pp. 31-113.

[20] Cassese, A., *A New Approach*…, op.cit, p. 131.

[21] Vargas, F., op.cit., 1980, p. 46.

[22] Rodley, N.S., op.cit., p. 162.

[23] Recommendation 971 (1983) on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment.

[24] The Steering Committee for Human Rights is a body of government experts on human rights from Member States of the Council of Europe, responsible directly to the Committee of Ministers.

[25] Ironically, Turkey, the country that later proved to be the most reluctant to publish CPT reports, was the first to ratify the Convention. The other six were: Ireland, Malta, Sweden, the United Kingdom, Luxembourg and Switzerland.

Commission and the Court: would there be a risk of overlap or conflict between the two procedures, especially concerning interpretation of Article 3?

The utility of the new instrument could not but be established by the affirmation of various respectable NGOs, according to which inhuman and degrading treatment, as well as, in some isolated cases, torture itself, was being practiced by several member states of the Council of Europe[26]. However, even with respect to states not then known to be engaging in human rights violations of this type, the Convention would serve a useful purpose, as prevention is always better than cure. Given the very serious and abhorrent nature of such practices, no state can afford complacency regarding the likelihood of occurrences of torture or inhuman or degrading treatment. Furthermore, there was the belief that the new Convention could serve as a "prototype for testing the validity and practicality of the system at the regional level before it came to be implemented at the more difficult universal level, pursuant to Costa Rica's Draft Optional Protocol"[27].

Attention was also drawn to the fact that the ECHR itself already made provision for fact-finding visits[28], thus, it was argued, the creation of the new body would lead to unnecessary duplication[29]. This criticism was ill-founded since a fact-finding visit under the ECHR can take place only in the context of the examination of an application[30]. Indeed, the Commission (and now the Court) can intervene only *ex post facto* and not until all domestic remedies have been exhausted. In contrast, the new Committee, acting with a view to preventing violations of Article 3 from occurring,

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[26] See for example, Amnesty International, *Report on Torture*, London, A.I., International Secretariat, 1973; Amnesty International, *Torture in Greece: The First Torturers' Trial*, London, A.I., International Secretariat, 1977; Amnesty International, *Torture in the Eighties*, London, A.I., International Secretariat, 1984; Amnesty International, *Turkey: Torture and Deaths in Custody*, London, A.I., International Secretariat, 1989.

[27] Cassese, A., *A New Approach*…, op.cit, p. 133.

[28] Former ECHR Article 28.1 (now Article 38.1) provided: "In the event of the Commission accepting a petition referred to it: (a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission".

[29] See Cassese, A., *A New Approach*…, op.cit, p. 135 and Evans, M., Morgan, R., *The European Convention for the Prevention of Torture: Operational Practice*, in «International and Comparative Law Quarterly», vol. 41, part 3, 1992, p. 591.

[30] Krüger, H., *The Experience of the European Commission of Human Rights*, in Ramcharan, B. (ed.), *International Law and Fact-Finding in the Field of Human Rights*, The Hague, Martinus Nijhoff Publishers, 1982, p. 158.

can conduct visits of inspection on a regular basis that would fall beyond the remit of a fact-finding visit under the ECHR.

Nevertheless, the greatest concern of the framers of the Convention was that the new body might produce interpretations of Article 3 of the ECHR in variance with the Court's jurisprudence on the matter[31]. Indeed, the precise relation between the new Convention and Article 3 proved to be one of the major points of controversy. The problem arose in the first place mainly due to a direct reference to Article 3 in the text of the draft Convention[32]. Several proposals were put forward in order to alleviate the danger of a possible clash between the new Committee[33] and the ECHR supervisory organs. Some argued that the reference to Article 3 be removed altogether, while others suggested the establishment of a formal link between the new body and the ECHR judicial mechanisms, that would emphasize the primacy of the Court as the custodian of the ECHR standard[34].

The final text of the Convention and the accompanying Explanatory Report point to the policy that was finally adopted: stressing the preventive and non-judicial function of the new Committee with the aim of distancing it from the purely judgmental nature of the European Commission and Court of Human Rights. As such, Article 17, para. 2 of the ECPT explicitly provides that the Convention is not to be construed "as limiting or derogating from the competence of the organs of the European Convention on Human Rights". The Explanatory Report adds that the new Committee is to respect the established competence of the Court and Commission of Human Rights and is not to concern itself with matters raised in proceedings before them or formulate interpretations of the ECHR provisions, particularly Article 3[35]. With its task being purely preventive, the Committee will carry out fact-finding visits and, on the basis of information so obtained, make non-binding recommendations with a view to

[31].See Cassese, A., *A New Approach*…, op.cit., pp. 135-137.
[32] Article 1 of the Parliamentary Assembly draft provided that the aim of the Convention was "…better to ensure respect for and observe Article 3 of the ECHR…", thus rendering it the legal basis upon which the work of the new body would be founded (see Evans, M., Morgan, R., *Preventing Torture*…, op.cit., note 65, p. 119).
[33] During the drafting process, even the precise name of the new body was unclear: first, it was referred to as the "Commission" and later as the "Committee", following the view of the European Commission of Human Rights and the European Court that did not think it appropriate for the new body to undermine the authority of the existing institutions (idem, pp. 119-120).
[34] For a full account of the different suggestions put forward and their rationale, see idem, pp. 118-122.
[35] *Explanatory Report to the ECPT*, op.cit., paras. 17, 27 and 91.

strengthening the protection of persons deprived of their liberty from torture and inhuman or degrading treatment or punishment[36].

In this framework of limiting the scope of the Committee's functions to pure prevention and thereby distancing it from the sphere of competence of the Commission and the Court, it was decided to include a reference to Article 3 in the Preamble of the Convention. This would serve as a point of reference and a general framework within which the new body could concern itself with situations liable to give rise to cases of torture or inhuman or degrading treatment or punishment[37]. In this way, the framers of the Convention hoped to "strike a balance and keep the work of the new body at a suitable distance from the judicial application of Article 3, whilst at the same time keeping it safely within its orbit. Similarly, it was thought that the non-judicial preventive function could be emphasized by inserting the word 'Prevention' into the Convention's title"[38].

The Explanatory Report also states in paragraph 92 that "the cardinal importance of the rights of individual petition under Article 25 of the European Convention on Human Rights remains undiminished", thus alleviating any fears that a person whose case had been examined by the Committee could be barred from lodging a petition under the ECHR[39]. The logic followed here seems to be that since the task of the Committee is (or at least was wished to be) quite distinct from that of the European Commission for Human Rights, there is no reason why both procedures should not be taken up simultaneously.

Concerns over the possible impact of the new body on the ECHR seem also to lie behind the final decision on the composition of the Torture Committee. Article 4, para. 2 of the ECPT stipulates that: "The members of the Committee 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 area covered by the

[36] Idem, para. 25.
[37] Idem, para. 22.
[38] Evans, M., Morgan, R., *Preventing Torture*…, op.cit., p. 121.
[39] Former ECHR Article 27.1 (now Article 35.2) provided: "The Commission shall not deal with any petition submitted under Article 25 which… (b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information".

Convention". As indicated in the Explanatory Report, the Committee can include not only lawyers but also persons with "experience in matters such as prison administration and the various medical fields relevant to the treatment of persons deprived of their liberty"[40]. Although the same paragraph explains that this has the aim of increasing the effectiveness of the dialogue between the Committee and the States and facilitating concrete suggestions from the Committee, it is difficult to avoid the impression that the emphasis upon the new body comprising experts in the fields covered by the Convention, rather than being made up of human rights specialists (by which was meant lawyers) was probably intended to ensure that the new mechanism did not seek to operate in a judicial fashion and thus compete with the Commission[41].

It is, therefore, clear that the aims and mechanisms of the two instruments are quite different. While the mechanism established by the ECHR is judicial with the power to issue binding judgments in the context of a petition, the mechanism established by the ECPT is mainly preventive with the power to issue non-binding recommendations, on the basis of which a dialogue can develop. The task of the Court is to ascertain whether breaches of the Convention on Human Rights have occurred, while the task of the CPT is to prevent those breaches from occurring in the first place. The different mandates also explain the different composition of the two bodies: the one consisting of lawyers specializing in the field of human rights, the other consisting of members with various backgrounds, such as lawyers, medical doctors, psychiatrists, experts in penitentiary questions, criminologists, etc. Nevertheless, CPT-Court relations are not as distinct as this official picture may suggest: they work in a common field and within a common organization, and as such a certain degree of reciprocal influence has been unavoidable.

1.2. THE "INTERPLAY" BETWEEN THE TWO BODIES

In carrying out its functions, the CPT has the right to avail itself of legal standards and their interpretation by the competent authorities contained not only in the ECHR but also in a number of other relevant human rights instruments. At the same time, while it is not bound by the case-law of judicial or quasi-judicial bodies acting in the same

[40] *Explanatory Report to the ECPT*, op.cit., para. 36.
[41] Evans, M., Morgan, R., *Preventing Torture*…, op.cit., p. 125.

field, it may use it as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries[42]. However, instances do exist when the CPT is to take account of the interpretative work under the ECHR.

For example, the ECPT provides that "each Party shall permit visits… to any place within its jurisdiction where persons are deprived of their liberty by a public authority"[43]. The Explanatory Report makes it clear that "the notion of 'deprivation of liberty'… is to be understood within the meaning of Article 5 of the ECHR as elucidated by the case law of the European Court and Commission of Human Rights"[44]. Thus, in its Seventh General Report, the CPT made reference to the judgment of the Court in *Amuur v. France* as confirming its constant position that a stay in a transit or "international" zone of an airport can, depending on the circumstances, amount to a deprivation of liberty within the meaning of Article 5 (1) (f) ECHR, and that consequently such zones fall within the CPT's mandate[45]. The Committee felt vindicated by the judgment in this case[46], which concerned four asylum-seekers held in the transit zone at Paris-Orly Airport for 20 days. The Court stated that "the mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty…" and concluded that "holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty"[47].

Unsurprisingly, the CPT failed to mention the view of the Commission on Human Rights, which, for the same case, had previously concluded that no deprivation of liberty had occurred, since the degree of physical constraint was not substantial

[42] *First General Report…*, op.cit., para. 5.
[43] ECPT Article 2.
[44] *Explanatory Report to the ECPT*, op.cit., para. 24. The same paragraph also states that "the distinction between 'lawful' and 'unlawful' deprivation of liberty arising in connection with Article 5 is immaterial in relation to the Committee's competence". This was done to ease initial concerns that the reference to the Art.5 case law might give the misleading impression that this distinction between lawful and unlawful deprivations of liberty was somehow relevant to the Convention or, worse still, might suggest that the Convention should only apply in relation to places where persons were "lawfully" deprived of their liberty (see Cassese, A., *A New Approach*…, op.cit., p. 143).
[45] *Seventh General Report on the CPT's activities covering the period 1 January to 31 December 1996*, CPT/Inf (97) 10, para. 25.
[46] "On more that one occasion, the CPT has been confronted with the argument that such persons are not 'deprived of their liberty' as they are free to leave the zone at any moment by taking any international flight of their choice", idem.
[47] *Amuur v. France,* App. 19776/92, Judgment, 25 June 1996, paras. 48-49.

enough[48]. This is indicative of the erratic boundaries drawn between "deprivations" of liberty and "restrictions" on liberty under the jurisprudence of ECHR Article 5. Furthermore, it should be born in mind that the Court is preoccupied with whether particular facts amount to a "deprivation of liberty". In the present case, for example, the Court found that the length of time the applicants were held at the airport as well as the lack of procedural safeguards converted a mere restriction on liberty into a deprivation of liberty[49]. Although this decision marks a further advance in the protection accorded by Article 5, the CPT cannot be expected to strictly follow such jurisprudence in determining what is meant by "deprivation of liberty" when conducting its visits, because it would then be excluded from visiting, for example, transit areas of airports in which individuals are kept for periods less than 20 days. Fortunately, the CPT seems unwilling to allow its mandate to be restrained and from the very beginning of its operation it has discussed in many country reports the holding conditions in transit rooms for aliens, without consideration of Strasbourg jurisprudence[50]. It seems, therefore, that the practical effectiveness of paragraph 24 of the Explanatory Report is particularly limited in that the CPT has decided to focus on the *de facto* nature of deprivation of liberty rather than on its legal standing[51].

Additionally, the CPT has noted on a number of occasions that local police authorities had taken steps to ensure that the legality of police custody was in accordance with Article 5(3) of the ECHR, which provides for a prompt review by a judge shortly after the arrest[52]. The CPT has also referred to Article 8 of the ECHR when considering the detention of asylum seekers, underlining the importance of avoiding splitting up the family unit[53]. Also relevant to Article 8 are the Committee's recommendations as far

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[48] *Amuur v. France,* Commission's Report, 10 January 1995, paras. 44-50.
[49] *Amuur v. France*, op.cit., para. 43.
[50] E.g. *Report to the Austrian Government on the visit to Austria carried out by the CPT from 20 May 1990 to 27 May 1990*, CPT/Inf (91) 10, paras. 89-93; *Rapport au Gouvernement de la Belgique relatif à la visite effectuée par le CPT en Belgique du 14 au 23 novembre 1993*, CPT/Inf (94) 15, paras 58-60; *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the CPT from 15 to 31 May 1994*, CPT/Inf (96) 11, paras. 177-195.
[51] This is further confirmed by the recent visits of the CPT to homes for elderly persons, even where such persons are not subjected to any placement-like measures. See *Report to the German Government on the visit to Germany carried out by the CPT from 3 to 15 December 2000*, CPT/Inf (2003) 20, paras. 152-157.
[52] *Report to the authorities of the Kingdom of the Netherlands on the visit to Aruba carried out by the CPT from 30 June to 2 July 1994*, CPT/Inf (96) 27, para. 181.
[53] *Report to the Danish Government on the visit to Denmark carried out by the CPT from 2 to 8 December 1990*, CPT/Inf (91) 12, para. 56.

as censorship of prisoners' mail is concerned[54], which seem to follow the line already established by the respective case-law of the Court[55].

Another issue that brings the work under the ECHR into very close proximity to that of the CPT is extradition or expulsion cases. As established in *Soering v. UK*, a state would violate Article 3 if it deported or extradited an individual to another country where "substantial grounds have been shown for believing that the person concerned… faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment"[56]. This is clearly a preventive function of the Court, similar to the one operated by the CPT. Though the Committee is becoming increasingly concerned with the possibility that aliens might be returned to a country where they are threatened with treatment contrary to Article 3[57], it has observed that the ECHR organs are "better placed than the CPT to examine such allegations and, if appropriate, take preventive action"[58]. Thus, any communications addressed to the Committee in Strasbourg by persons alleging that they are to be sent to a country where they run the risk of being subjected to torture or ill treatment should immediately be brought to the attention of the European Court of Human Rights[59]. It seems that the CPT, uncertain of its role in this regard, (as ultimately, evidence of any failure to meet the requirements of Article 3 may not always be found in the country being visited but in the countries to which persons are supposed to return, not to mention that the latter countries may often not be a party to the ECPT) came to the conclusion that the "preventive" mechanism developed upon the ECHR's "judicial" mandate is better placed to achieve a preventive outcome than the mechanisms the CPT has developed under its own preventive mandate[60].

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[54]For example: *Report to the Irish Government on the visit to Ireland carried out by the CPT from 26 September to 5 October 1993*, CPT/Inf (95) 14, para. 163 and *Report to the Maltese Government on the visit to Malta carried out by the CPT from 16 to 21 July 1995*, CPT/Inf (96) 25, para. 75.

[55] See for example, *Campbell v. the United Kingdom*, App. 13590/88, Judgment, 25 March 1992.

[56] *Soering v. the United Kingdom*, App. 14038/88, Judgment, 7 July 1989, paras. 90-91.

[57] For example, the Committee frequently asks questions during the course of visits about the procedures adopted to ensure that this does not happen (see *Report to the Government of Greece on the visit to Greece carried out by the CPT from 14 to 26 March 1993,* CPT/Inf (94) 20, para. 51) and it wishes to satisfy itself that "officials entrusted with handling such cases have been provided with appropriate training and have access to objective and independent information about the human rights situation in other countries" (see *Seventh General Report…*, op.cit., para. 34).

[58] Idem, para. 33.

[59] Idem.

[60] Evans, M., Morgan, R., *CPT Standards: An Overview*, in Evans, M., Morgan, R., *Protecting Prisoners. The Standards of the European Committee for the Prevention of Torture in Context*, Oxford, Oxford University Press, 1999, p. 53.

A further area where the work of the Torture Committee seems to overlap with that of the Court concerns visits of an *ad hoc* nature[61]. These are visits the Committee may wish to organize "as appear to it to be required in the circumstances"[62]. What exactly these circumstances are is unclear and in all instances the Committee "enjoys discretion as to when it deems a visit necessary and as to elements on which its decision is based"[63]. Thus, the Committee is free to assess communications from individuals or groups of individuals and to decide whether to exercise its functions based upon such communications, though it is reminded that it should not be concerned with the investigation of individual complaints (for which provision is already made, e.g. under the ECHR)[64].

Here too, the efforts made to differentiate the preventive function of the CPT from the judicial nature of the Court are more than obvious. Nevertheless, it appears that, once again, in practice this distinction is slender –especially from the standpoint of a Member State. Indeed, whenever an *ad hoc* visit focuses on a specific case or cases of alleged ill treatment, and where the Committee concludes that ill treatment has occurred or probably has occurred, the State concerned may feel that it is becoming the object of a judicial determination. Although the CPT has always stressed the vital role of *ad hoc* visits for its operation[65], it would be improper for it to initiate such a visit on the basis of a single grave allegation of ill-treatment in a country where, as far as can be judged, there are few such allegations and many or most of the safeguards recommended by the CPT are in place. The situation is different, though, where allegations of grave abuses are the pattern and fundamental safeguards are lacking. In these cases, the CPT should "verify on the spot whether or not those allegations are well-founded" but still its purpose is "not the minute and punctilious establishment of whether or not serious abuses have actually occurred" –that is a judicial finding; it

[61] It is true that the precise classification of visits as periodic, *ad hoc* or follow-up is unclear and has indeed little practical significance. For example, by describing it as an *ad hoc* visit, the Committee was able to conduct what was, in effect, a periodic visit to Turkey in September 1990, much earlier than would otherwise have been the case. Visits to Romania in 1995 and Russia in 1998 are technically *ad hoc* since they did not form part of the pre-announced visits for those years but, for practical purposes, they were periodic in nature.
[62] ECPT, Article 7 (1).
[63] *Explanatory Report to the ECPT*, op.cit., para. 49.
[64] Idem.
[65] For the mechanism of CPT *ad hoc* visits, see Evans, M., Morgan, R., *Preventing Torture*…, op.cit., pp. 167-174.

should rather "look into the general conditions surrounding the alleged abuses and, if need be, suggest ways of both stopping the abuses in the immediate and of preventing their reoccurrence in the future"[66].

Closely related to *ad hoc* visits is the question of information gathering in order for the CPT to embark on a visit. Unlike the European Court, the Committee is not dependent on being petitioned through applications from states or individuals for action; it has been set up to prevent ill treatment and may act on the basis of information from any number or kind of sources. In deciding when, where and how to visit a member state, it may proactively scan mass media sources or gather official reports. It may also react to information received from other official sources, national or inter-governmental, NGOs and individual informants, both those who claim to be the victims of ill treatment or those who act on their behalf[67]. Shortly after the commencement of its activities, the CPT established "working relations" with several bodies directly relevant to its operation, among which the European Commission and European Court of Human Rights[68]. However, the CPT has said nothing about the nature of these "working relations", confirming once again its reputation as a highly secretive institution. Indeed, due to the strict –but also essential– confidentiality rule pertaining to every aspect of its operation, the Committee gives no indication about the sources and nature of the information it receives nor any other form of feedback[69]. It is, therefore, extremely difficult to find out what sort of information the CPT receives from the European Court or to what extent the CPT relies on such information in determining whether to conduct a visit[70].

Less difficult to discern is the flow of information from the Torture Committee to the European Court and this is going to be the subject of the remainder of this chapter. This information, in the form of published CPT reports, has provided and continues to

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[66] *First General Report…*, op.cit., paras. 45-46.
[67] See Evans, M., Morgan, R., *Preventing Torture*…, op.cit., pp. 179-184.
[68] *First General Report…*, op.cit., para. 42.
[69] The Committee has described its relations with information providers as "one-way process" (idem, para. 43)
[70] It should be noted here that not even the 1997 Report from the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the Council of Europe on "strengthening the machinery of the ECPT" made any mention of contacts with the ECHR supervisory mechanism, though it highlighted links with other Council of Europe bodies, such as the CLAHR and the Monitoring Committee of the Council, and with the CAT (Doc. 7784, 26 March 1997).

provide the Court with useful evidence for the determination of a legal claim and helps set the context in which specific allegations are examined. In the beginning, the tendency of the Court to draw on CPT reports was scarce and its approach a bit cautious but as the years passed and the Torture Committee came to assert itself as a well-respected and efficient mechanism in the field of protecting persons deprived of their liberty, the Court seems to have become more receptive towards this kind of information. Some examples will be used to illustrate this trend.

One of the first references to CPT reports appeared as early as in 1993, in the case of *Klaas v. Germany*, concerning allegations of a disproportionate use of force by the police while the applicant was being arrested on a drink-driving offence. The Court concluded that there was insufficient evidence that the police used excessive force but in his Dissenting Opinion, Judge Pettiti argued that the Court failed to "take sufficient account of a number of data that are… of great assistance when assessing the facts". These included, *inter alia*, "the reports of the European Committee for the Prevention of Torture", which "are fairly damning of several police forces, [and] all are pleas for help to lawyers in the context of the ECHR…"[71]. He seems to have believed that these reports could help support the general tenor of the claim, viz. that the use of excessive force was common whilst effecting arrests.

However, the first sustained attempt on the part of the applicants to draw on CPT reports occurred in *Delazarus v. the United Kingdom*[72] and *Raphaie v. the United Kingdom*.[73] In these cases, the applicants relied on the findings of the CPT report on its first visit to the UK when denouncing the conditions in British prisons. Both applications were declared inadmissible by the Commission, the former as being manifestly ill founded and the latter for non-observance of the six months rule[74]. The CPT had indicated that it considered the cumulative effect of "overcrowding, lack of integral sanitation and inadequate regime activities" to amount to inhuman and degrading treatment[75]. In *Delazarus*, whereas the Commission recognized that the

[71] *Klaas v. Germany*, App. 15473/89, Judgment, 22 September 1993, Dissenting Opinion of Judge Pettiti.
[72] *Delazarus v. the United Kingdom*, App. 17525/90, Commission's Decision, 16 February 1993.
[73] *Raphaie v. the United Kingdom*, App. 20035/92, Commission's Decision, 2 December 1993.
[74] See ECHR Article 35.
[75] *Report to the United Kingdom Government on the visit to the United Kingdom carried out by the CPT from 29 July 1990 to 10 August 1990*, CPT/Inf (91) 15, para. 57.

conditions in the prison where the applicant was held were extremely unsatisfactory and in urgent need of improvement, it made it clear that its competence was to deal with cases it had before it and not with the general situation of prisoners at the said establishment. The applicant had been held in a single cell in the segregation unit and so he could not complain of overcrowding (one of the elements which, in the CPT's view, combined to produce the violation). Furthermore, this fact should have reduced the difficulties created by the lack of integral sanitation in the cell[76]. It is clear that in this case the Commission distinguished the circumstances the CPT report had described from those that directly pertained to the applicant and therefore avoided having to translate the observations of the CPT into a finding under the ECHR[77].

In the later case of *Aerts v. Belgium,* the appellant claimed that general conditions and lack of regular medical or psychiatric care, during his detention pending trial in the psychiatric wing of Lantin Prison, had resulted in a deterioration in his mental health and that, in sum, his treatment had been inhuman and degrading within the meaning of Article 3 of the ECHR. This wing had been visited by the CPT in the course of a visit to Belgium in November 1993 and in its subsequent report, the Committee denounced the lack of adequate medical care[78]. The majority of the Commission concluded that these conditions now amounted to a violation of Article 3[79]. On the other hand, the minority found it significant that the CPT had chosen not to describe the conditions as inhuman or degrading and took this as an indication that they did not cross the minimum threshold[80]. Just over a year later, the case was brought before the Court, which concluded that there had not been a breach of Article 3. The Court thought that these admittedly unsatisfactory living conditions did not seem to have

[76] *Delazarus v. the United Kingdom*, op.cit., para. 12.
[77] Though a direct answer as to the weight to be given to CPT findings was avoided in *Delazarus*, it is noteworthy that the Commission did not exclude use of CPT reports, in contrast to a singular lack of sympathy shown in earlier decisions where prisoners had, unsuccessfully, sought to rely upon a failure to observe the European Prison Rules (see for example *Eggs v. Switzerland*, App. 7341/76, Commission's Decision, 11 December 1976 and *X v. Germany*, App. 7408/76, Commission's Decision, 11 July 1977, discussed in Murdoch, J., *CPT Standards and the Council of Europe*, in Evans, M., Morgan, R., *Protecting Prisoners*…, op.cit., p. 127).
[78] Para. 191 of the CPT report stated: "L'annexe psychiatrique, bien qu'accueillant des patients nécessitant une observation et/ou des soins psychiatriques, ne possède ni le personnel, ni les infrastructures d'un milieu hospitalier psychiatrique. A tous égards, le niveau de prise en charge des patients placés à l'annexe psychiatrique était en-dessous du minimum acceptable du point de vue éthique et humain", CPT/Inf (94) 15.
[79] *Aerts v. Belgium*, App. 25357/94, Commission's Report, 20 May 1997, paras. 81-83.
[80] Idem, *Opinion Dissidente*, para. 28.

had such serious effects on the applicant's mental health as would bring them within the scope of Article 3[81].

Further examples exist that point to the potential relevance of CPT findings in cases examined under the ECHR. In 1993, the Committee visited the Koridallos prison complex in Greece, concluding that most inmates were faced with "a monotonous and purposeless existence… quite inconsistent with the objective of social rehabilitation"[82]. Sections from this report were appended to the Court's judgment in *Peers v. Greece*, a complaint concerning the general conditions at the Koridallos prison. A breach of Article 3 was found, but in reaching its conclusions, the Court relied more on the findings of the Commission's delegates, who had visited the relevant sections of the prison in June 1998, than on the CPT's observations[83].

In certain circumstances, however, it seems that the Court is more willing to rely on the CPT's findings. In *Dougoz v. Greece*, reference was again made to an extract from the above-mentioned Greek report, regarding the police headquarters in Athens where the applicant was held whilst awaiting expulsion[84]. The Court stressed that, although it had not itself conducted an on-site visit, the conclusions of the CPT offered an adequate factual corroboration to the applicant's allegations in that "the cellular accommodation and detention regime in that place were quite unsuitable for a period in excess of a few days, the occupancy levels being grossly excessive and the sanitary facilities appalling"[85]. The Court took also note of the fact that in 1997 the CPT again visited the above establishment and the detention center in which the applicant was originally held and felt it necessary to renew its visit to both places in 1999[86].

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[81] *Aerts v. Belgium*, App. 25357/94, Judgment, 30 July 1998, para. 66.
[82] *Report to the Government of Greece*…, op.cit., para. 108.
[83] The Court noted in particular: "As regards ventilation… the delegates' findings do not correspond fully with those of the CPT, which visited Koridallos Prison in 1993 and submitted its report in 1994. However, the CPT's inspection took place in March, whereas the delegates went to Koridallos Prison in June, a period of the year when the climatic conditions are closer to those of the period of which the applicant complains. Furthermore, the Court takes into account the fact that the delegates investigated the applicant's complaints in depth, giving special attention, during their inspection, to the conditions in the very place where the applicant had been detained. In these circumstances, the Court considers that the findings of the Commission's delegates are reliable" (*Peers v. Greece*, App. 28524/95, Judgment, 19 April 2001, para. 70).
[84] *Dougoz v. Greece*, App. 40907/98, Judgment, 6 March 2001, para. 40.
[85] Idem, para. 46.
[86] Idem, para. 47.

Considering all the above, the Court then concluded that the conditions of detention of the applicant amounted to degrading treatment contrary to Article 3.

In the more recent case of *Lorsé and Others v. the Netherlands*, concerning the detention regime to which the first applicant was subjected in a maximum security prison, the Court accepted the description of the conditions obtaining in the said institution as established by the CPT during its visit to the Netherlands from 17 till 27 November 1997 and even agreed with the Committee that the situation there was problematic and gave cause for concern[87]. However, the Court did not fail to draw attention to the fact that the finding of an Article 3 violation depended "on an assessment of the extent to which he [the applicant] was personally affected"[88] –and not on an assessment of the conditions in and of themselves. Indeed, this is a fundamental difference between the mandates of the two bodies: whereas the Court is competent to deal with the case before it and determine the effects on the applicant of the conditions complained, the CPT describes the nature of the conditions in general and is more concerned with systemic issues.

In addition to cases concerning general conditions of detention, CPT findings are also used to add authority to allegations of ill treatment and help foster a climate in which some evidential shortcomings could reasonably be minimized. In *Aydin v. Turkey*, the Court, concluding that the applicant had been the victim of torture, referred, *inter alia*, to the two CPT's Public Statements on Turkey[89]. These expressed the view that the practice of torture and other forms of ill treatment of persons in police custody was "widespread"[90] and constituted "a common occurrence"[91]. The precise relevance of the CPT's findings to the conclusion is unclear, but "they seem to serve generally to support the thrust of the allegations by indicating a belief that such incidents are indeed widespread"[92].

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[87] *Lorsé and Others v. the Netherlands*, App. 52750/99, Judgment, 4 February 2003, para. 69.
[88] Idem, para. 65.
[89] *Aydin v. Turkey*, App. 23178/94, Judgment, 25 September 1997, paras. 49-50.
[90] *Public Statement on Turkey of 15 December 1992*, CPT/Inf (93) 1, para. 21.
[91] *Public Statement on Turkey of 6 December 1996*, CPT/Inf (96) 34, para. 10.
[92] Peukert, W., *The European Convention for the Prevention of Torture and the European Convention on Human Rights*, in Evans, M., Morgan, R., *Protecting Prisoners*…, op.cit., p. 91.

In recent years, there has indeed been an increase in cases involving disputes of fact between the parties and in which there has been, for various reasons, no domestic consideration of the applicant's complaints[93]. In these cases then, concerning especially Articles 2 and 3 of the European Convention, fact-finding becomes of great importance. It is in this respect that the role of the CPT can prove particularly valuable, since it can acquire first-hand evidence of physical or mental ill treatment and pass reliable comments on the conditions of detention it meets. Certainly, attempts have been made by the Court to help with this task. Rule 42 of the Rules of Court provides in para. 2 that "the Chamber may, at any time during the proceedings, depute one or more of its members or of the other judges of the Court to conduct an inquiry, carry out an investigation on the spot or take evidence in some other manner". Nevertheless, the general feeling seems to be that the Court's investigative power, as it stands now, is not enough; witness in the fact that if the proposals made by an internal working group of the European Court dealing with the Rules are adopted by the plenary Court, Rule 42 will soon be replaced by a whole set of new rules[94].

Moreover, even in situations where delegates of the Court are sent on an on-site inspection to a country in order to establish the facts, CPT reports are still used by the Court to support the assertion that a situation is indeed unacceptable. For example, in the recent cases of *Aliev v. Ukraine* and *Nazarenko v. Ukraine*, where the applicants complained of their conditions of detention while on death row in Simferopol Prison, the Court made extensive reference to the CPT's findings during its visits to death row facilities in Ukraine, in the years 1998, 1999 and 2000[95], despite the fact that delegates of the Court had themselves visited Simferopol in 1999. What is even more important is that, in finding that the conditions of detention violated Article 3 in both cases, the Court referred explicitly to the weight it accorded to the CPT's observations, stating: "In common with the observations of the CPT concerning the subjection of death row prisoners in Ukraine to similar conditions, the Court considers

[93] Hannum, H. (ed.), *Guide to International Human Rights Practice*, 3rd ed., New York, Transnational Publishers, 1999, p. 150.
[94] Interview with the Judge of the European Court of Human Rights Ireneu Cabral Barreto on 23 June 2003.
[95] *Aliev v. Ukraine*, App. 41220/98, Judgment, 29 April 2003, paras. 92-100; *Nazarenko v. Ukraine*, App. 39483/98, Judgment, 29 April 2003, paras. 94-102.

that the detention of the applicant in unacceptable conditions of this kind amounted to degrading treatment in breach of Article 3 of the Convention" [96].

In the light of the above, it would be safe to conclude that, although CPT's views certainly cannot dictate the views of the Court, there seems to be a wide-spread acceptance of the work and findings of the Torture Committee when examining the situation of persons deprived of their liberty. In turn, embarking on such a process gives rise to several questions as to the extent to which emerging CPT standards compare with existing ECHR norms and whether the former have a substantial impact on the latter. Answering these questions will be the task of the following chapters.

[96] *Aliev v. Ukraine*, op.cit., para. 148; *Nazarenko v. Ukraine*, op.cit., para. 141. It is interesting that the Court used identical language in four other similar cases lodged against Ukraine, concerning also prisoners held on death row but in establishments **never** visited by the CPT (see, *Poltoratskiy v. Ukraine*, App. 38812/97, Judgment, 29 April 2003, para. 145; *Kuznetsov v. Ukraine*, App. 39042/97, Judgment, 29 April 2003, para. 125; *Khokhlich v. Ukraine*, App. 41707/98, Judgment, 29 April 2003, para. 178; *Dankevich v. Ukraine*, App. 40679/98, Judgment, 29 April 2003, para. 141).

CHAPTER TWO

COMPARING THE STANDARDS: ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The very essence of the work of the Torture Committee is the prevention of "torture" and "inhuman or degrading treatment or punishment", state action also specifically prohibited under Article 3 of the European Convention on Human Rights. Nevertheless, neither instrument defines what is meant by this prohibition and so one must turn to the interpretative work of the organs established by them. It is clear from the Explanatory Report to the ECPT that no restriction is placed upon the CPT's approach to Article 3 of the ECHR. The document stresses that Article 3 will constitute "a point of reference"[97] for the Committee, in the sense that it will be merely a reflection of the broader norm prohibiting torture and inhuman or degrading treatment or punishment[98]. It is also pointed out that the case law developed under this article will be nothing more than "a source of guidance"[99] for the Committee. This means that the CPT is free to develop its own understanding of the terms and scope of Article 3, which, to a lesser or greater extent, might not follow that of the Court.

Such an absence of boundaries upon the jurisdictional competence of the CPT in relation to Article 3 would not be particularly problematic if the two bodies of the Council of Europe performed their functions unaffected by each other. The truth, however, is that they work in close proximity, within the same organization and in a common field, and inevitably impact upon each other to some degree. In consequence, the potential challenges and the risks for potential clashes are evident when the Court is called upon to consider the relevance of the CPT's work to its own, a tendency which, as shown in the previous chapter, is becoming all the more frequent.

Three possible situations may therefore arise: first, where CPT and ECHR standards in interpreting Article 3 are broadly similar; second, where ECHR standards are

[97] *Explanatory Report to the ECPT*, op.cit., para. 22.
[98] Idem, para. 26.
[99] Idem, para. 27.

higher than those developed by the CPT; and third, where the CPT is more demanding than the Court. Before going on to reach some conclusions from the comparison between these standards, it is necessary to sketch out the basic lines of approach adopted by the two mechanisms in relation to Article 3. First, the question of the use of the key terms "torture", "inhuman" and "degrading" will be examined and then the focus will move to three main subject-matter areas where Article 3 has been invoked before the Court and which are also of great concern to the Torture Committee.

2.1. DEFINING THE TERMS

The function of the CPT may well lie in the assistance it can offer to states in order to prevent violations of Article 3 from occurring in the first place. However, this is far from actual reality. The fact is European states do sometimes subject detainees to acts or conditions contrary to Article 3 and inevitably the CPT is often faced with evidence of torture or inhuman or degrading treatment. The question then arises, what terminology does the Committee use to describe such practices of ill treatment. As has already been stressed, the Committee is not limited by the terms found in Article 3 of the ECHR or, indeed, in any other international instrument[100]. Consequently, it is free to use these terms in a manner not necessarily consistent with that used by the Court. It can develop its own autonomous understanding, provided only that it does not adjudge that a violation of the ECHR has been committed. Nevertheless, one cannot but make the correlation between the CPT's use of the terminology and Article 3. This is especially true for the European Court of Human Rights when it comes to consider the relevance of the CPT's work and has to interpret the language used by the Committee for its own functions. Moreover, if the CPT describes a particular practice as amounting to "torture" or certain conditions as being "inhuman" or "degrading", this may stimulate the lodging of applications under the ECHR in order to test the proposition. It is interesting therefore to know how the two bodies have used these terms, especially because their views may not always coincide.

[100] Para. 5 of the *First General Report* says that the CPT "is not bound by the case-law of judicial or quasi-judicial bodies acting in the same field, but may use it as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries".

2.1.1. The Court

A complex jurisprudence has emerged around these terms, underlining both the fundamental character of rights protected by Article 3[101] and also the subjective nature of the standards attached to them. In order for conduct to be embraced by the prohibition, it must "attain a minimum level of severity"[102]. This threshold test will apply whatever the category of conduct at issue and if it is reached, then the differentiation between torture, inhuman treatment or punishment or degrading treatment or punishment is a matter of the degree of intensity of suffering. Whether the minimum level of severity has been attained is relevant and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and the sex, age and health of the victim[103]. The treatment need not necessarily be deliberate[104]. The societal aspect may also be a factor, albeit this may allow too much room for relativity. For example, in the well-known case of *Denmark, Norway, Sweden and the Netherlands v. Greece* (the *Greek* case), the Commission said that "a certain roughness of treatment of both police and military authorities is tolerated by most detainees and even taken for granted… This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them"[105].

The three substantive concepts of Article 3 are viewed as being primarily differentiated in terms of degree. The Commission first distinguished the degrees of prohibited conduct in the above-mentioned *Greek* case, saying that torture always embraced inhuman and degrading treatment and that inhuman treatment always

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[101] In *Labita v. Italy* (App. 26772/95, Judgment, 6 April 2000), the Court emphasized the absolute nature of the Article 3 prohibition in the following terms: "Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation... The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct" (para. 119). The Court has used identical language on a number of occasions.

[102] *Ireland v. the United Kingdom*, App. 5310/71, Judgment, 18 January 1978, para. 162.

[103] Idem.

[104] *Labita v. Italy*, op.cit., para. 120.

[105] The *Greek* case, discussed in Duffy, P.J., *Article 3 of the European Convention on Human Rights*, in «International and Comparative Law Quarterly», vol. 32, 1983, p. 318.

embraced degrading treatment[106]. Most elements of the definition of the three concepts are to be found here but the Strasbourg organs further developed the distinctions between the levels of prohibited conduct in the later complaint of *Ireland v. the United Kingdom*, concerning the five interrogation techniques applied by the United Kingdom Government against terrorism suspects in Northern Ireland. Thus, "torture" is "deliberate inhuman treatment causing very serious and cruel suffering"; "inhuman treatment" involves "the infliction of intense physical and mental suffering"; and "degrading treatment" is such as to "arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"[107]. It goes without saying that the appraisal of the circumstances of each case, in order to establish if the requisite conditions are met, is a matter of judicial discretion.

A. Torture

In very few cases, due to the serious nature of the ill treatment in question, have the Strasbourg organs come to the conclusion that torture has taken place. In the Greek case, mentioned above, the Commission characterized as torture or ill treatment such acts as falanga[108], electric shocks, severe beatings of all parts of the bodies of the victims, mock executions and threats to shoot or kill the victims[109]. In the same case, it was also established that torture may be non-physical and can cover "the infliction of mental suffering by creating a state of anguish and stress by means other that bodily assault"[110]. The Commission also qualified the five interrogation techniques that were called into question in *Ireland v. the United Kingdom* as torture: forcing suspects to stand against a wall for hours in extremely uncomfortable positions, covering their heads with dark hood during interrogations, subjecting them to intense noise, depriving them of sleep and feeding them on a diet reduced to the minimum.

[106] The *Greek* case, discussed in Rodley, N.S., op.cit., p. 77.
[107] *Ireland v. the United Kingdom*, op.cit., para. 167.
[108] Falanga is defined as "the beating of the feet with a wooden or metal stick or bar, which, if skillfully done, breaks no bones, makes no skin lesions and leaves no permanent and recognizable marks but causes intense pain and swelling of the feet" (from the *Greek* case, discussed in Ovey, C., White, R., *Jacobs and White, The European Convention on Human Rights*, 3rd ed., Oxford, Oxford University Press, 2002, p. 61).
[109] Idem.
[110] The *Greek* case, discussed in Duffy, P. J., op.cit., p. 317.

The Court, rather to the surprise of many[111], concluded that these techniques did not amount to torture, though they did constitute inhuman and degrading treatment. It is clear from this judgment that the Court pitched the threshold for torture very high, considering that suffering of a particular intensity and cruelty should be shown before torture could be established. The Court has been slow to follow the lead of the Commission in concluding that certain practices amount to torture but it has now done so in a series of cases against Turkey, including "Palestinian Hanging" in *Aksoy v. Turkey*[112] and rape and severe ill treatment in *Aydin v. Turkey*[113]. The closest to a breakthrough is the case of *Selmouni v. France*, paradigmatic of the dynamic interpretation afforded to Article 3. The Court concluded, unanimously, that the physical and mental violence inflicted upon the applicant caused severe pain and suffering that was particularly serious and cruel and was properly categorized as torture. The Court went on to stipulate that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future", asserting that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"[114]. This is, indeed, a more than welcome development in the Court's jurisprudence, which manifested a greater willingness to categorize conduct as torture and left room for the potential lowering of the current Article 3 threshold in the future.

B. Inhuman Treatment

Paradoxically, the notion of inhuman treatment or punishment is, from a theoretical perspective, the least well developed of the three categories. On the one hand, it stands as a residual category into which acts not crossing the threshold and amounting

[111] Ovey, C., White, R., op.cit., p. 63.
[112] *Aksoy v. Turkey*, App. 21987/93, Judgment, 18 December 1996, paras. 58-64. The applicant had been stripped naked, with his arms tied together behind his back and suspended by his arms, a practice known as "Palestinian Hanging".
[113] *Aydin v. Turkey*, op.cit., paras. 80-87. Other cases where findings of torture have been made include: *Tekin v. Turkey,* App. 22496/93, Judgment, 9 June 1998; *Ilhan v. Turkey,* App. 22277/93, Judgment, 27 June 2000; *Salman v. Turkey*, App. 21986/93, Judgment, 27 June 2000; *Dikme v. Turkey,* App. 20869/92, Judgment, 11 July 2000; *Akkoç v. Turkey*, Apps. 22947/93 and 22948/93, Judgment, 10 October 2000.
[114] *Selmouni v. France*, App. 25803/94, Judgment, 28 July 1999, para. 101.

to torture will fall. On the other hand, it is used as a point of reference when determining whether treatment is to be deemed degrading, in the sense that the level of suffering reached is not sufficient to be categorized as inhuman[115]. It should be noted, though, that the terms "inhuman" and "degrading" are often invoked in conjunction with one another. In the *Greek* case, the Commission defined "inhuman treatment" as being "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable"[116]. However, an examination of the subsequent case-law under Article 3 leads to the conclusion that – luckily, one might add– the Commission and the Court did not rigorously adhere to the above definition but adopted a more liberal approach. Thus, as early as in 1976, the Commission held that the "withholding of an adequate supply of food and drinking water and of adequate medical treatment" [117] amounted to inhuman treatment. It seems that the initial requirement of the "intent" to ill treat –as induced by the inclusion of the word "deliberately" in the definition of inhuman treatment– was soon considered not to be a decisive element in categorizing conduct as inhuman. Clearly, what mattered most was not the possible intention of the persons failing to provide food and medical care to willfully inflict suffering on those deprived of that treatment but rather the objective fact that the treatment was not provided.

C. Degrading Treatment

Treatment has been held by the Court to be degrading because it is such as to arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing him. The question of whether the purpose of the treatment was to humiliate or debase the victim is a factor further to be taken into account, but the absence of any such purpose cannot conclusively rule out a violation of Article 3[118]. It is often said that "degrading treatment or punishment" is the weakest form of Article 3

[115] Evans, M., Morgan, R., *Preventing Torture*…, op.cit., p. 93.
[116] The *Greek* case, discussed in Duffy, P. J., op.cit., p. 318.
[117] *Cyprus v. Turkey*, Commission's Report, 10 July 1976, paras. 395-405, discussed in Cassese, A., *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in Macdonald, R.St.J., Matscher, F., and Petzold, H. (eds), *The European System for the Protection of Human Rights*, Dordrecht, Martinus Nijhoff Publishers, 1993, p. 246.
[118] *Peers v. Greece*, op.cit., para. 74.

violation[119], yet the proscribed practice must reach a certain minimum level of severity before it is covered by the Article and, in any event, must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[120]. The way the Court's opinion has developed in relation to the interpretation of "degrading treatment" in Article 3 is important as it demonstrates that the Convention is not a static instrument but instead must be interpreted in the light of present-day conditions. This was made clear in the *Tyrer* case, where it was stressed that the Court "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field"[121], thus concluding that judicial corporal punishment was degrading within the meaning of Article 3.

2.1.2. The CPT

In the course of its practice, the Torture Committee has developed its own "jurisprudence", a term used by Malcolm Evans and Rod Morgan[122] to describe the corpus of usages of the key terms "torture", "inhuman" and "degrading" and the corpus of standards which the Committee has promulgated in successive country reports and, in summary form, annual general reports[123]. When the CPT began its work, special rules and safeguards already existed, developed at both the universal and regional level to ensure that the basic human rights of detained people were protected. However, the Committee concluded that despite this wealth of material, "no clear guidance can be drawn from it for the purpose of dealing with specific situations encountered by the Committee"[124]. Therefore, it set about developing some " 'measuring rods', in the light of the experience of its members and of a careful and well-balanced comparison of various systems of detention"[125]. In a number of its general reports, the CPT has described some of the substantive issues which it pursues

[119] See, for example, Gomien, D., Harris, D., Zwaak, L., *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg, Council of Europe Publishing, p. 111.
[120] *Kudla v. Poland*, App. 30210/96, Judgment, 26 October 2000, para. 92.
[121] *Tyrer v. the United Kingdom*, App. 5856/72, Judgment, 25 April 1978, para. 31.
[122] Respectively, Professor of Public International Law and Professor of Criminal Justice at Bristol University (UK), who have written numerous publications on the subject.
[123] Evans, M., Morgan, R., *Preventing Torture*…, op.cit., p. 364.
[124] *First General Report*..., op.cit., para. 95.
[125] Idem.

when carrying out visits to places of deprivation of liberty. The Committee hopes in this way to give a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters[126]. Nevertheless, the CPT has not given any public indication of its reasoning as regards the use of terminology and although it is possible to deduce certain criteria from the published reports, these are neither always coherent nor unambiguous and may indeed feed into a wide range of interpretations of how the Committee is using the terms.

A. Torture

The word "torture" has figured in relatively few country reports and is often linked with "severe ill-treatment". It is not clear where the line has been drawn between these two terms: does the use of "severe ill-treatment" signify a belief that the practice concerned has the potential of being understood as an act of torture, but that other reasons, contextual or evidential, militate against its being so described in the particular case? Or perhaps this choice is influenced by the desire of the Committee to refrain from using the exact terms of Article 3, in order to avoid a potential clash with the Court, although it does indeed think that the practice in fact amounts to torture? The next question then is: what is the threshold that must be crossed before the CPT can describe an act as constituting torture? Different suggestions have been put forward as to where this threshold lies and as to what the CPT considers torture. For example, the First President of the Torture Committee, Antonio Cassese, has expressed the view that, for the CPT, torture is "any form of coercion or violence, whether mental or physical, against a person to extort a confession, information or to humiliate, punish or intimidate that person"[127]. He also goes on to conclude, based on his personal experience, that "torture is carried out in the police stations and gendarmeries of certain countries; prison authorities and other state-run detention

[126] The "substantive" sections drawn up to date –which deal with police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens legislation, involuntary placement in psychiatric establishments and juveniles and women deprived of their liberty- have been brought together in a document entitled, *The CPT Standards – "Substantive" Sections of the CPT's General Reports*, CPT/Inf/E (2002) 1.

[127] Cassese, A., *Inhuman States: Imprisonment, Detention and Torture in Europe Today*, Cambridge, Polity Press, 1996, p. 47.

centers never use such cruel methods"[128]. The view that torture is exclusively a police phenomenon is shared by Bent Sørenson[129], Vice President of the CPT from 1989 till 1995, but not by Malcolm Evans and Rod Morgan, who, drawing on the CPT's report from its first visit to Spain (where allegations of ill treatment in a prison were found to amount to torture[130]), do not include this element in the way they define torture. Their suggestion is that the CPT considers torture to be "the premeditated (as opposed to casual or heat-of-the-moment), purposive infliction of severe pain, generally involving the use of specialized techniques or instruments, with a view to extracting information or confessions or the attainment of other specific ends"[131]. They seem to believe that the term "torture/severe ill treatment" is generally reserved for the less ambiguous, specialized or "exotic" forms of violence, such as suspension of the victim, electric shocks to sensitive parts of the body, beating of the soles of the feet (falanga), hosing with pressurized cold water,[132] as opposed to what can be termed "conventional" violence, such as blows with fists, feet, batons or other weapons. For example, in the course of its first visit to Hungary, the Committee heard "numerous" and "remarkably consistent" allegations that detainees had been "struck with truncheons, punched, slapped or kicked by police officers"[133]. Despite the fact that these allegations concerned purposive infliction of a considerable degree of violence and were supported by medical evidence, the Committee did not employ the terms "severe ill treatment" or "torture" in its report.

However, such practices might now be described as constituting torture. The thresholds of the Committee should not, and in fact cannot, be static, and recent

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[128] Idem, p. 66.
[129] He has written that "torture is generally perpetrated during police investigation, while inhuman and degrading treatment occurs more frequently in prisons" (Sørenson, B., *Prevention of Torture and Inhuman or Degrading Treatment or Punishment: Medical Views*, in Association for the Prevention of Torture (APT), *Implementation of the ECPT, Acts of the Strasbourg Seminar, December 1994*, Geneva, APT, 1995, p. 259).
[130] *Report to the Spanish Government on the visit to Spain carried out by the CPT from 1 to 12 April 1991*, CPT/Inf (96) 9, para. 91.
[131] Evans, M., Morgan, R., *CPT Standards: An Overview*, in Evans, M., Morgan, R., *Protecting Prisoners*…, op.cit., p. 36.
[132] For a list of practices that the CPT has characterized as torture, see *Report to the Spanish Government*…, op.cit., para. 19; *Report to the Government of Cyprus on the visit to Cyprus carried out by the CPT from 2 to 9 November 1992*, CPT/Inf (97) 5, para. 15; *Public Statement on Turkey of 15 December 1992*, CPT/Inf (93) 1, para. 5.
[133] *Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 1 to 14 November 1994*, CPT/Inf (96) 5, para. 17.

published reports point to a more inclusive attitude. In these reports[134], under the heading of "Torture and other forms of physical ill-treatment", the Committee observes that it has received numerous allegations of ill treatment, some of which were so severe that they could be considered to amount to torture. Then, a number of practices concerning these allegations are recorded, such as slaps, punches, and kicks on various parts of the body, beatings with batons and other hard objects, falanga, suffocation with gas masks or plastic bags, electric shocks, sleep deprivation for prolonged periods and mock executions. The reports do not explicitly discuss which of these forms of ill treatment they consider to be torture. Indeed, this approach might suggest that the Committee, especially in the light of the judgment in *Selmouni v. France*[135], does not want to commit itself by labeling specific incidents as torture but prefers to "keep its options open" and simply enumerate the types of ill treatment that took place, without categorizing them.

B. Inhuman or Degrading Treatment

The CPT has used these terms both separately and together and it is not very clear whether this should mean to reflect any significant variation in the degree of treatment encountered. It has been suggested, however, that it is unlikely for the CPT to want to attribute distinct meanings to the words "inhuman" and "degrading" and that, in certain contexts, the former should be taken as encompassing the latter[136]. What is rather obvious from the reports published thus far is that the Committee does not ever appear to have employed these terms to refer to physical ill treatment but has reserved them for describing aspects of custodial living conditions or aspects of the detention regime[137]. This stands in contrast to the use of "inhuman or degrading" by the

[134] See for instance, *Rapport au Gouvernement de la République de Moldova relatif à la visite effectuée en Moldova par le CPT du 10 au 22 juin 2001*, CPT/Inf (2002) 11, paras. 22-23; *Rapport au Gouvernement de la République de l'Albanie relatif à la visite effectuée en Albanie par le CPT du 22 au 26 octobre 2001*, CPT/Inf (2003) 11, para. 8; *Report to the Government of "the Former Yugoslav Republic of Macedonia" on the visit to "the Former Yugoslav Republic of Macedonia" carried out by the CPT from 15 to 19 July 2002*, CPT/Inf (2003) 5, para. 9.

[135] See *supra*, note 114

[136] See Evans, M., Morgan, R., *Combating Torture in Europe. The Work and Standards of the European Committee for the Prevention of Torture*, Strasbourg, Council of Europe Publishing, 2001, p. 64.

[137] For an account which may reflect the Committee's thinking on its approach to the categorization of treatment as "inhuman" or "degrading", see Evans, M., Morgan, R., *Preventing Torture*…, op.cit., pp. 241-247.

European Court, where these terms refer to instances of ill treatment, either physical or psychological, which fall short of torture. The Committee has adopted a cumulative view of living conditions, so that conditions that might not in themselves be deemed inhuman and degrading become so when combined with other factors. For example the combination of overcrowding, poor regime activities and inadequate access to toilet/washing facilities in the same establishment have on several occasions been judged to amount to inhuman and degrading treatment[138]. However, the Committee has also stressed that the level of overcrowding in a prison might be so acute as to be in itself inhuman or degrading from a physical standpoint[139]. Within the scope of these terms might also fall situations that involve an inadequate level of health care in prison[140], the continuous moving of a prisoner from one establishment to another[141] or the use of solitary confinement[142].

There are also instances where the CPT uses just the word "degrading". In these cases, the term appears to be used to describe practices considered to be of a humiliating nature, such as the practice of "slopping out"[143], the requirement from those suspected of "body packing" (swallowing drug-filled condoms) to defecate in a toilet, known as the "throne", in the center of a special room and under direct observation[144], denying female detainees equal access to regime activities[145] or the

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[138] E.g. *Rapport au Gouvernement de la République de l'Italie relatif à la visite effectuée en Italie par le CPT du 15 au 27 mars 1992,* CPT/Inf (95) 1, para. 77; *Report to the Portuguese Government on the visit to Portugal carried out by the CPT from 14 to 26 May 1995,* CPT/Inf (96) 31, para. 95. In the case of Portugal the Committee found that overcrowding, lack of integral sanitation and an absence of organized out-of-cell regime activities, combined with interprisoner violence and intimidation, could constitute inhuman and degrading conditions. This suggests that one of the elements of the combination that may lead to a finding of inhuman and degrading treatment could also be the breach of the general duty of care, on the part of custodial authorities –a duty to which the CPT attaches particular importance.

[139] *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, CPT/Inf (92) 3, para. 46.

[140] *Third General Report on the CPT's activities covering the period 1 January to 31 December 1992*, CPT/Inf (93) 12, para. 30.

[141] *Second General Report*…, op.cit., para. 57.

[142] Idem, para. 56.

[143] This is the process by which prisoners occupying cells lacking integral sanitation, use buckets or other receptacles to meet the calls of nature and are periodically released from their cells in order to empty their buckets at some central facility. See *Report to the Irish Government on the visit to Ireland carried out by the CPT from 26 September to 5 October 1993,* CPT/Inf (95) 14, para. 100; *Report to the United Kingdom Government on the visit to the United Kingdom and the Isle of Man carried out by the CPT from 8 to 17 September 1997,* CPT/Inf (2000) 1, para. 112.

[144] *Rapport au Conseil Fédéral Suisse relatif à la visite effectuée en Suisse par le CPT du 11 au 23 février 1996*, CPT/Inf (97) 7, para. 56.

[145] *Tenth General Report on the CPT's activities covering the period 1 January to 31 December 1999,* CPT/Inf (2000) 13, para. 25.

failure to provide them with sanitary towels[146] and handcuffing prisoners during visits[147].

It should also be mentioned that the Committee sometimes says that custodial conditions "**could** be said to amount to inhuman and degrading treatment" or that are "**akin** to inhuman and degrading treatment"[148] [emphasis added] but does not say categorically that they are considered as such. There are two possible explanations for the use of such language: either it is implied that the conditions lie close to the threshold, without in fact crossing it, or that the Committee is again taking a cautious approach that avoids using the terms "inhuman" and "degrading" in a manner which might prompt a clash with the Court[149].

2.1.3. Comparison: Problems and Prospects

The difficulty mainly lies in using the same labels for different purposes. While it could be said that no particular discrepancy is noted between the two bodies as to their interpretation of the term "torture", a contrast does exist regarding the use of the expression "inhuman or degrading treatment". The CPT has used this to describe aspects of custodial living conditions and of the prison regime, while the Court's approach has been mainly one of degree: a treatment is inhuman or degrading when it is serious enough to cross the minimum threshold but not so gross as to reach the label of torture.

Nevertheless, such and other differences between the two mechanisms are to be expected in light of their different characters. On the one hand, the CPT is not tied to terminology and its aim is not to make juridical assessments. It is not even necessary or vital for its mandate to distinguish clearly between situations that might amount to either torture or to less grave, but still serious, violations taking the form of inhuman or degrading treatment. On the other hand, the Court has substantive treaty provisions

[146] Idem, para. 31.
[147] *Report to the United Kingdom Government… from 8 to 17 September* 1997, op.cit., para. 107.
[148] See, for example, *Report to the Government of Greece on the visit to Greece carried out by the CPT from 14 to 26 March 1993*, CPT/Inf (94) 20, para. 202; *Report to the Slovak Republic on the visit to Slovakia carried out by the CPT from 9 to 18 October 2000*, CPT/Inf (2001) 29, para. 92.
[149] Evans, M., Morgan, R., *Combating Torture in Europe…*, op.cit., p. 65.

to apply and interpret, which will culminate in a legally binding finding as to whether a State has breached its obligations under Article 3. It would be wrong to suggest that the one approach is right and the other wrong: it is rather that the approach taken by the Court to Article 3 has been the product of choice and that it is not inevitable that the CPT should adopt precisely the same approach when developing its preventive mandate[150].

However, unclear and fine distinctions in language, that often characterize CPT reports, may become a source of confusion. The case of *Aertz v. Belgium* (discussed in Chapter One) clearly illustrates this point: in that instance, approximately half of the members of the Commission interpreted the CPT's findings as implying that the conditions of detention in the psychiatric hospital where the applicant was held were in violation of Article 3; the other half of the Commission made the exact opposite interpretation. It is therefore important for the CPT to reach a higher degree of coherence when drawing its conclusions. At the same time, the Commission should have been more cognizant of the different approach of the CPT to the key terms of Article 3.

2.2. SPECIFIC AREAS OF CONCERN

Article 3, one of the most important but also most challenging provisions of the European Convention on Human Rights, has produced a voluminous case-law, ranging from the use of force during arrest[151], interrogation or police detention[152] to corporal punishment in police station[153] or school[154], deportation to other states[155] and discriminatory treatment[156]. It is impossible to summarize this huge case-law in the following paragraphs, thus only elements that are relevant to the CPT's mandate will be examined. For practical reasons, the standards of the Court and the CPT have been categorized under three main headings: "ill-treatment during arrest and police

[150] Evans, M., Morgan, R., *Preventing Torture*…, op.cit., p. 74.
[151] *Klaas v. Germany*, App. 15473/89, Judgment, 22 September 1993.
[152] *Ribitsch v. Austria*, App. 18896/91, Judgment, 4 December 1995.
[153] *Tyrer v. the United Kingdom*, App. 5856/72, Judgment, 25 April 1978.
[154] *Costello-Roberts v. the United Kingdom*, App. 13134/87, Judgment, 25 March 1993.
[155] *Jabari v. Turkey*, App. 40035/98, Judgment, 11 July 2000.
[156] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Apps. 9214/80, 9473/81, 9474/81, Judgment, 28 May 1985.

detention", "conditions of detention" (including both material holding conditions and health care issues) and "prison regime" (that is, the way prisoners are treated as a matter of organizational practice).

2.2.1. The Court

It is true that the Court and –prior to the entry into force of Protocol No. 11– the Commission have interpreted the provisions of Article 3 very cautiously, wanting in this way to preserve its serious character against possibly inappropriate applications or trivial complaints[157]. This holds especially true for the three main subject-matter areas considered below. However, a new and broader approach to Article 3 seems to be taken recently and a number of innovations have been introduced in the previous established case-law.

A. Ill Treatment During Arrest and Police Detention

In several cases brought before the Commission and the Court, detainees have complained that they have suffered from sufficient degree of ill treatment to constitute a violation of Article 3. The approach adopted by the supervisory organs of the ECHR in the specific context of detention seems to place less weight on the surrounding circumstances and to focus more on the mere fact of the use of physical force. As the Court noted in *Ribitsch v. Austria*: "In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3"[158]. This formula, which has been endorsed on numerous occasions, now forms the basis of the Court's (and earlier the Commission's) approach in cases concerning allegations of ill treatment of detainees. It does not mention the gravity of the injuries sustained but relates to their cause.

[157] For a strong criticism on the "narrow" views of the Commission and the Court with regard to Article 3, see Cassese, A., *Prohibition of Torture*…, op.cit., pp. 231-241.
[158] *Ribitsch v. Austria*, op.cit., para. 39.

Furthermore, evidential issues frequently arise in the context of applications concerning allegations of ill treatment during detention, since it is difficult to establish the facts in these kind of cases which offer almost unlimited opportunity for both groundless accusations by detainees and cover-ups by police officers. Although the ECHR organs have required a very high standard of proof ("beyond reasonable doubt") of a State's failure before condemning the State under the Article, due attention has also been given to the fact that the victim may very well be in a weaker position than the State with relation to the collection and presentation of evidence. As was established in the *Tomasi v. France* case, if an individual enters a center of detention in good health and leaves it with injuries, it falls then to the State to provide a plausible explanation for the cause of the injuries, failing which Article 3 will apply[159]: the onus of proof is thus reversed, for it is incumbent on the respondent government to produce evidence casting doubt on the victim's account of events[160]. Thus, in *Ribitsch v. Austria*, the Court was not convinced by the explanation of the government as to how the applicant's injuries were caused while in police custody and subsequently, it found a violation of Article 3.

However, another case illustrates the limits of the benevolent approach taken towards to those in custody. In *Klaas v. Germany*, the applicant claimed that she had been ill-treated in the course of being arrested in connection with an alleged drink-driving incident. She suffered bruising, was rendered unconscious for a short period when she banged her head on a window ledge and received a serious long term injury to her left shoulder. The Court decided that there had been no breach of Article 3 on the grounds that the domestic courts had all concluded that the injuries could have been the result of her resisting arrest and that the arresting officers had not used excessive force. Since it was not the task of the Court to substitute its assessment of the facts for that of the domestic courts and no new material had been introduced to cast doubt on their findings, it was concluded that there was no violation of Article 3[161]. The manner in

[159] *Tomasi v. France*, App. 12850/87, Judgment, 27 August 1992, paras. 109-110.
[160] Some commentators qualify this phenomenon as a "reversal of the burden of proof" (e.g. Evans, M., Morgan, R., *The European Convention for the Prevention of Torture: 1992-1997*, in «International and Comparative Law Quarterly», vol. 46, part 3, 1997, p. 670), while some others deem more appropriate the term "reversal of the risk of non-persuasion" (e.g. Suntinger, W., *CPT and Other International Standards for the Prevention of Torture*, in Evans, M., Morgan, R., *Protecting Prisoners*…, op.cit., p. 160).
[161] *Klaas v. Germany*, op.cit., paras. 29-30.

which the Court dealt with the case of *Klass* not only highlights the difficulties in proof that often arise in such complaints but perhaps also indicates the adoption of a different approach when assessing violations which occur whilst in detention rather than during arrest[162].

Moreover, it is now clear that where an individual makes a credible assertion that he has been subjected to ill treatment by agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation, capable of leading to the identification and punishment of those responsible[163]. This view found express confirmation in the Court's judgment in the case of *Assenov and Others v. Bulgaria*, in which the Court found a procedural breach of Article 3 due to the inadequate investigation made by national authorities into the first applicant's complaint that he had been severely ill-treated by the police. The Court observed that, if it were not the case that Article 3 embodied such a procedural aspect, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and that it would be possible for agents of the State to abuse the rights of those within their control with virtual impunity[164].

B. Conditions of Detention

Conditions of imprisonment are a frequent source of individual complaints under the ECHR but it has proved extremely difficult to bring such complaints within the scope of Article 3 protection. In practice, only extremely unsatisfactory holding conditions seem to violate this provision. However, a series of recent cases considered by the

[162] This distinction becomes even more obvious in the case of *Hurtado v. Switzerland* (Commission's Report, 8 July 1993, discussed in Evans, M., Morgan, R., *Preventing Torture*…, op.cit., pp. 102-103), where the Commission decided that the circumstances of the applicant's arrest (use of a stun-grenade which caused the applicant to defecate in his trousers, plus physical injury) did not give rise to a breach of Article 3, whereas a violation was found in respect of the fact that he had not been provided with clean clothes for an initial period in custody and had not been examined by a doctor for eight days.
[163] See, for example, *Tomasi v. France*, op.cit., para. 109; *Selmouni v. France*, op.cit., para. 87; *Labita v. Italy*, op.cit., para. 131; *Poltoratskiy v. Ukraine*, op.cit., para. 125.
[164] *Assenov and Others v. Bulgaria*, App. 24760/94, Judgment, 28 October 1998, paras. 102-103.

Court suggests that a more demanding view is being taken of the requirements of Article 3 in this context. In *Peers v. Greece*[165], the applicant complained of the conditions of his detention at Koridallos Prison in Greece. The Court concluded that confinement in a cell with no ventilation and no window at the hottest time of the year in circumstances where the applicant had to use the toilet in the presence of another and was present while the toilet was being used by his cell-mate diminished his human dignity and amounted to degrading treatment. The Court has consistently stressed that the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to such distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured[166]. Furthermore, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant[167].

It also seems that the Court is becoming more and more sensitive towards prisoners whose state of health gives cause for concern. In *Price v. United Kingdom*[168], the conditions in which a thalidomide victim was kept in prison were found to amount to degrading treatment. The applicant had been committed to prison for seven days for contempt of court; she was detained both in a police cell and in prison for three and a half days. She was seriously disabled by her condition and used a wheelchair. The Court concluded that the conditions of her detention in which she was dangerously cold, risked developing sores because her bed was too hard or unreachable and was unable to get to the toilet or keep clean without the greatest of difficulties amounted to degrading treatment. In the more recent *Mouisel v. France* case[169], the Court unanimously found a violation of Article 3, on account of the conditions of treatment and continued detention of a person suffering from an incurable illness.

[165] *Peers v. Greece*, App. 28524/95, Judgment, 19 April 2001.
[166] See *Kudla v. Poland*, op.cit., paras. 93-94.
[167] See *Dougoz v. Greece*, op.cit., para. 48.
[168] *Price v. United Kingdom*, App. 33394/96, Judgment, 10 July 2001.
[169] *Mouisel v. France*, App. 67263/01, Judgment, 14 November 2002.

C. Prison Regime

A number of cases have also questioned aspects of the prison regime, such as the use of solitary confinement as a means of punishment. It has been established that solitary confinement in itself is not contrary to Article 3[170] but can, in certain circumstances, amount to inhuman or degrading treatment. These circumstances will depend "on the stringency of the measure, its duration, the objective pursued and its effect on the person concerned"[171]. However, it is pointed out that "complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; this constitutes a form of inhuman treatment which cannot be justified by the requirements of security"[172]. However, no case of this kind, involving the use of a total sensory and social isolation, has yet come before the Court. This is hardly surprising, since this type of isolation is an extreme one and it is highly unlikely that it is ever carried out –at any rate not among Council of Europe members. Far more frequent are cases where the detainee is removed from association with other prisoners for security, disciplinary or protective reasons. In this respect, the furthest point reached so far by the Strasbourg organs is the statement that "prolonged solitary confinement is undesirable, especially where the person is detained on remand"[173].

Another aspect of the detention regime frequently complained of involves prisoner strip-searches. The Court has found that strip-searches may be necessary on occasions to ensure prison security or to prevent disorder or crime. For example, in the case of *McFeeley et al. v. United Kingdom*, the applicants complained of being subjected to "close body searches", that is, the searching of prisoners while naked, including examination of the rectum with the aid of a mirror[174]. The Commission held that such searches did not amount to degrading treatment, having regard to the substantial security threat involved in the IRA killing campaign against prison officers[175]. However, strip-searches not based on any concrete security need or applicant behaviour can constitute inhuman or degrading treatment. Thus, in two recent cases

[170] See, for example, *Lorsé and Others v. the Netherlands*, App. 52750/99, Judgment, 4 February 2003, para. 63.
[171] Idem, para. 63.
[172] *Dhoest v. Belgium*, App. 10448/83, Commission's Report, 14 May 1987, para. 117.
[173] Idem, para. 116.
[174] *McFeeley et al. v. United Kingdom*, App. 8317/78, Commission's Report, 15 May 1980, para. 58. The same case indicates that the wearing of prison clothes is not degrading (paras. 45 and 51).
[175] Idem, paras. 57-62.

lodged again the government of the Netherlands in connection with the regime applied in a maximum security prison, the Court found that, in a situation where the applicants were already subjected to a great number of control measures and in the absence of convincing security needs, the practice of systematic strip-searching amounted to a violation of Article 3[176].

2.2.2. The CPT

The Torture Committee is a specialized body with the specific mandate to visit places of detention and contribute to the better protection of persons deprived of their liberty. It is therefore logical for the standards applied by the Committee to range beyond the standards set by the ECHR mechanisms. This was made explicit in the First General Report of the Committee, which stated that "for the CPT to accomplish its preventive function effectively, it must aim at a degree of protection 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"[177]. During its almost fourteen years of experience, the CPT has managed to develop a substantial and detailed body of standards, deriving from first-hand experience of the reality of custodial practice. It is beyond the scope of this thesis to examine these standards in full detail[178] and only certain important areas will be dealt with below.

A. Ill Treatment During Arrest and Police Detention

The CPT has repeatedly stressed that "in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill

[176] *Van Der Ven v. the Netherlands*, App. 50901/99, Judgment, 4 February 2003, paras. 61-63 and *Lorsé and Others v. the Netherlands*, op.cit., paras. 73-74.
[177] *First General Report*…, op.cit., para. 51.
[178] For a more or less complete account of the CPT's standards developed through the end of 2000, see Evans, M., Morgan, R., *Combating Torture in Europe. The Work and Standards of the European Committee for the Prevention of Torture*, Strasbourg, Council of Europe Publishing, 2001. See also Association for the Prevention of Torture (APT), *Handbook on the European Committee for the Prevention of Torture*, Brochures 5 and 6, available at http://www.apt.ch/pub/download.htm.

treatment is greatest"[179]. That is why the Committee, as primarily and foremost a preventive mechanism, attaches particular importance to the application of fundamental safeguards against the ill treatment of persons deprived of their liberty[180]. The CPT recognizes that the arrest of a criminal suspect may often be a hazardous task and that the circumstances of an arrest may be such that injuries are sustained by police officers, without this being the result of an intention to inflict ill treatment. However, no more force than is strictly necessary should be used when affecting an arrest. Furthermore, once arrested persons have been brought under control, there can be no justification for them being struck by police officers[181]. Apart from physical ill treatment, recourse to psychological forms of ill treatment are also of concern to the CPT, which has strongly condemned practices that may have a harmful psychological effect on persons in police custody, such as blindfolding them during periods of interrogation[182].

B. Conditions of Detention

This is an area where the CPT has, arguably, developed the most specific and elaborated standards, mainly due to the very nature of its visit-based operation, which brings the Committee into direct contact with the physical conditions of detention. Of course, the standards applied vary depending on the type of institution and the overall situation in the place and the country concerned, but the CPT seems to take the general view that "the decision to deprive somebody of his liberty entails a correlative duty upon the state to provide decent conditions of detention"[183]. Thus, the CPT pays particular attention to cell size and overcrowding[184], hygiene and sanitation[185],

[179] *Sixth General Report on the CPT's activities covering the period 1 January to 31 December 1995*, CPT/Inf (96) 21, para. 15; *Twelfth General Report on the CPT's activities covering the period 1 January to 31 December 2001,* CPT/Inf (2002) 15, para. 41.
[180] These preventive safeguards, which have proved to be the source of some controversy between the CPT and the European Court on Human Rights, will be looked at in more detail below.
[181] *Report to the Portuguese Government on the visit to Portugal carried out by the CPT from 19 to 30 April 1999*, CPT/Inf (2001) 12, para. 29.
[182] *Twelfth General Report*…, op.cit., para. 38.
[183] *Report to the Andorran Government on the visit to Andorra carried out by the CPT from 27 to 29 May 1998*, CPT/Inf (2000) 11, para. 39.
[184] This problem has been dealt with in various General Reports of the Committee (e.g. *Second General Report*…, op.cit., para. 4; *Seventh General Report*..., op.cit., paras. 12-15; *Eleventh General Report on the CPT's activities covering the period 1 January to 31 December 2000*, CPT/Inf (2001) 16, para. 28) and particularly in its visit reports to states with high incarceration rates and few public expenditure

quantity and quality of prisoners' food[186], as well as ventilation, heating, lighting and the furnishing of cells to include a bed, mattress, cupboard, table and chair[187]. The Committee has also considered in significant detail the question of health care services in prison[188], an unsurprising outcome of the substantial number of members and experts with medical backgrounds.

C. Prison Regime

The CPT believes that "a satisfactory programme of activities (work, education, sport, etc.) is of crucial importance for the well-being of prisoners. This holds true for all establishments, whether for sentenced prisoners or those awaiting trial"[189]. Thus, it contends that the latter should be able to spend at least eight hours each day out of their cells, engaged in purposeful activity of a varied nature, irrespective of how good material conditions might be within the cells; in the case of sentenced prisoners, regimes should be even more favourable[190]. The Committee also stresses the importance of exercise: all prisoners, including those undergoing cellular confinement, should have at least one hour of exercise in the open air every day, in spacious conditions and, whenever possible, protected from inclement weather[191].

With regard to the use of disciplinary measures, the CPT insists that all applications of force and all uses of restraints, as well as all impositions of punishments, should be fully recorded[192]. It pays particular attention to the use of solitary confinement and believes that the principle of proportionality should apply, in the sense that a balance must be struck between the requirements of the case and the application of a solitary

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resources (e.g. *Report to the Slovenian Government on the visit to Slovenia carried out by the CPT from 16 to 27 September 2001,* CPT/Inf (2002) 36, para. 151).

[185] *Second General Report*…, op.cit., para. 49.

[186] *Rapport au Gouvernement de la République française relatif à la visite effectuée par le CPT en France du 6 au 18 octobre 1996*, CPT/Inf (98) 7, para. 93.

[187] *Report to the Authorities of the Kingdom of the Netherlands on the visit to the Netherlands Antilles carried out by the CPT from 26 to 30 June 1994*, CPT/Inf (2002) 36, para. 96.

[188] See *Third General Report on the CPT's activities covering the period 1 January to 31 December 1992*, CPT/Inf (93) 12.

[189] *Second General Report*…, op.cit., para .47.

[190] Idem.

[191] Idem, para. 48.

[192] Idem, para. 53.

confinement-type regime[193]. The Committee is highly critical concerning the application of such measures, which may have harmful consequences for the person concerned, and has recommended various measures designed to ensure that restrictions are judicially and specifically authorized, that they are justified and reviewed and, when applied, are for as the shortest time possible, and are ameliorated by prisoner-staff contact and out-of-cell activity[194].

The CPT has also set in detail its views on the nature of the regime which should be offered to prisoners held in special security units. It recommends, *inter alia*, that such prisoners should enjoy a relatively relaxed regime by way of compensation for their severe custodial situation, that special efforts should be made to build positive relations between staff and prisoners and that a programme of diverse activities – including varied and stimulating work activities of low risk, adequate for high security settings– should be provided[195].

2.2.3. Comparison: Problems and Prospects

While it could be said that CPT recommendations are broadly in line with the respective case-law of the Court in the sphere of physical or psychological ill-treatment, they seem to reflect a more critical and stringent approach as far as conditions of detention and prison regime are concerned. Due to its special mandate and multi-disciplinary membership, the CPT has been able to recognize the crucial importance of accommodation and regime on the well-being of individual prisoners. The Commission and the Court, on the other hand, have been long unwilling to place such issues on their agendas. Of course, there are some explanations for this narrower attitude.

First of all, the absolute and legal nature of the prohibition against torture and inhuman or degrading treatment imposes a demanding threshold test before an Article 3 violation can be established. Then, especially in discussion of general holding

[193] Idem, para. 56.
[194] See, for example, *Report to the Swedish Government on the visit to Sweden carried out by the CPT from 23 to 26 August 1994*, CPT/Inf (95) 5, paras. 21-27.
[195] *Report to the Netherlands Government on the visit to the Netherlands carried out by the CPT from 17 to 27 November 1997,*CPT/Inf (98) 15, para. 61.

conditions of detention, the competences of judicial bodies are not unlimited: they have substantial hurdles to face in moving from the arena of civil and political liberties into that of economic and social rights when adjudging a case. Further, upholding application in this area would entail the risk of attracting a huge influx of applications, "which in turn could swamp available resources and place an impossible burden on the new Court which, as with the former Commission, is ill-suited to such fact finding and investigation"[196].

Nevertheless, and despite existing barriers, the ECHR jurisprudence with regard to Article 3 seems to have recently taken a dramatic turn: now, in a number of cases, conditions of detention and prison regime aspects have been found to amount to a breach of Article 3. Apparently, the need to bring about an improvement in the holding situation for what may be tens of thousands of detainees took precedence over considerations as discussed above. Even with respect to the newcomers in the Council of Europe, namely Eastern and Central European countries facing difficult socio-economic problems in the course of their transition, the Court has been unequivocal: as it stressed in a series of recent applications lodged against Ukraine, concerning *inter alia* holding conditions for prisoners awaiting execution, "lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention which it [the Court] has found… to be unacceptable in the present case"[197].

The contribution of the CPT in this respect should not be sidestepped or underestimated. Indeed, as evidenced by the use of CPT reports in the decision-making of the Court, the assessments made by the Committee in the course of its preventive work have helped in advancing arguments of incompatibility with Article 3. For example, in the above mentioned Ukrainian cases, the Court took note of the observations of the CPT concerning the subjection of death row prisoners in Ukraine to conditions similar with those alleged and agreed with the Committee that

[196] Peukert, W., *The European Convention*..., op.cit., p. 126.
[197] See, e.g. *Aliev v. Ukraine*, op.cit., para. 151.

unacceptable conditions of this kind amounted to degrading treatment in breach of Article 3 of the Convention[198].

Furthermore, the Court seems prepared to lend weight to the general standards developed by the CPT. For example, in its 2002 judgment in the case of *Kalashnikov v. Russia*, the Court questioned whether cellular accommodation could be regarded as attaining "acceptable standards", adding: "In this connection, the Court recalls the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the CPT') has set 7 m^2 per prisoner as an approximate, desirable guideline for a detention cell (see the 2nd General Report – CPT/Inf (92) 3, para. 43)"[199]. It should be noted that the Court included this reference notwithstanding the fact that, at the time of the judgment, none of the CPT's reports on any of its visits to Russia had been made public[200].

It also seems to be clear that, even in cases where the European Court of Human Rights does not necessarily fully agree with an opinion expressed by the CPT, that opinion will be accorded due consideration and afforded considerable weight. Thus, in its judgment in the case of *Oçalan v. Turkey*, the Court spent some time actively engaging with the concerns expressed by the CPT regarding the applicant's relative social isolation, before concluding that "while it shares the CPT's concerns about the long-term effects of the applicant's social isolation, the Court finds that the general conditions in which he is being detained… have not reached the minimum level of severity necessary to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention"[201]. There is, therefore, the potential for CPT reports to prompt review of previous jurisprudence and since the Committee advocates conditions that go well beyond the base threshold, this translates into progressive extension of the protection afforded by Article 3 to persons deprived of their liberty.

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[198] Idem, para. 145.
[199] *Kalashnikov v. Russia*, App. 47095/99, Judgment, 15 July 2002, para. 97.
[200] The first CPT report on a visit to Russia to be published appeared on 30 June 2003 (see *Report to the Russian Government on the visit to the Russian Federation carried out by the CPT from 2 to 17 December 2001*, CPT/Inf (2003) 30).
[201] *Oçalan v. Turkey*, App. 46221/99, Judgment, 12 March 2003, para. 236.

CHAPTER 3

PREVENTING TORTURE AND ILL TREATMENT: SAFEGUARDS AND REDRESS FOR VICTIMS

According to Walter Suntinger, a comprehensive approach to the prevention of torture or mistreatment involves four elements: (a) that which is to be prevented (the concept of torture and other forms of ill treatment); (b) the overall conditions necessary for places of detention not to be or to become inhuman or degrading; (c) the safeguards which must be introduced in order to reduce the risk of abuse; (d) the reaction to torture and other forms of ill treatment in terms of investigation, complaint mechanisms and sanctions[202]. In the previous chapter, we examined the first two elements of this approach, namely the understanding of the terms "torture", "inhuman" and "degrading" treatment by both the CPT and the Court, and their attitude towards general conditions of detention. In turn, the present chapter will discuss and compare the approach taken by the two bodies as regards the last two elements of torture prevention: the development of procedural safeguards and the response to cases of torture or ill treatment.

3.1. BASIC SAFEGUARDS FOR THE PREVENTION OF TORTURE OR ILL TREATMENT

In all jurisdictions, the police are given special powers to apprehend, temporarily detain and question criminal suspects, as well as other categories of persons, such as witnesses, persons of uncertain identity, persons held under immigration regulations or for various breaches of public order and so on. This power granted to the police is judged necessary for the good functioning of the society –and the CPT could not agree more[203]. At the same time, however, and in order for the police to be prevented from using their powers oppressively, it is necessary to put in place certain safeguards that will reduce the risk of abuse of persons detained in police custody.

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[202] Suntinger, W., *CPT and Other International Standards for the Prevention of Torture*, in Evans, M., Morgan, R., *Protecting Prisoners…*, op.cit., pp. 137-138.
[203] See *Twelfth General Report…*, op.cit., para. 33.

The Torture Committee has attached particular importance to the development of such safeguards. These were initially laid down in the Second General Report[204] of the Committee and again in its Twelfth General Report[205], in light of new situations encountered and experience gathered through visits. Also, the role of the Human Rights Convention in providing significant procedural protection to individuals suspected of crimes or who have otherwise been deprived of their liberty should not be disregarded. The rich and varied case-law developed under Article 5 and 6 is of particular relevance. These provisions, concerning the right to liberty and security and the right to a fair trial, lay down fundamental principles, such as access to justice, the presumption of innocence and equality of arms. It should be noted, however, that vast areas of pre-trial procedure are left largely uncharted[206] and it is against this background that the experience of the CPT can provide a useful addition to the work of the European Court.

3.1.1. The Three Fundamental Rights

From the outset of its activities, the Committee has advocated a "trinity of rights" for persons detained by the police: the right of access to a lawyer; the right to inform a relative or third party about the fact of custody; and the right to medical examination by a doctor of one's choice. These are, in the CPT's opinion, "fundamental safeguards against the ill treatment of detained persons, which should apply as from the very outset of deprivation of liberty"[207].

The CPT has repeatedly stressed that, "in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill treatment"[208]. Access to a lawyer implies the right to talk to him in private but if in exceptional cases it is felt necessary to place restrictions upon access to a

[204] *Second General Report…*, op.cit., paras. 36-43
[205] *Twelfth General Report…*, op.cit., paras. 32-50.
[206] Some additional principles, which supplement Article 5 and 6 as regards the rights of the individual against whom criminal proceedings have been brought, appear in Articles 2, 3 and 4 of Protocol No. 7 to the ECHR.
[207] *Second General Report…,* op.cit., para. 36.
[208] *Sixth General Report…*, op.cit., para. 15.

particular lawyer of the detainee's choice, then access to another independent lawyer should be arranged[209]. The CPT also recognizes that exceptions might have to be placed to the exercise of the right of the detainee to notify a third party on the fact of his detention. However, "such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards"[210]. As far as the right of access to a doctor is concerned, it is stressed that if a person requests a medical examination, a doctor should always be called without delay, while police officers should not seek to filter such requests[211].

It should be noted that, though the main thrust of these standards has generally been endorsed, their detailed prescription by the CPT has encountered greater open resistance from state parties than almost all other CPT standards[212]. The Committee itself has confirmed that in a number of countries there is considerable reluctance to comply with the recommendation that the right of access to a lawyer be guaranteed from the very outset of custody[213]. This non-responsive attitude on the part of state parties may partly rely on the practice endorsed under the ECHR, which does not always coincide with the line followed by the CPT. For example, in its *interim* response to the CPT's report from its visit to Switzerland from 11 to 23 February 1996, the Swiss government expressed strong criticisms to the CPT's advocacy of the right of access to a lawyer and to a doctor of one's own choice from the outset of custody, drawing upon the Court's judgment in *John Murray v. the United Kingdom*[214] and on the *travaux préparatoires* of the proposed protocol to the ECHR on the rights of those deprived of their liberty[215].

Nevertheless, it is clear that the Court is prepared to be influenced by the opinion reached by the CPT. In *Magee v. the United Kingdom*, the Court took the view that the applicant "should have been given access to a solicitor at the initial stages of the

[209] *Twelfth General Report*…,op.cit., para. 41.
[210] Idem, para. 43.
[211] Idem, para. 42.
[212] Evans, M., Morgan, R., *Combating Torture in Europe*…, op.cit., p. 74.
[213] *Twelfth General Report*…, op.cit., para. 41.
[214] *John Murray v. the United Kingdom*, App. 18731/91, Judgment, 8 February 1996. At para. 63, the Court stated that the right of the accused to be assisted by a lawyer already at the initial stages of police interrogation "may be subject to restrictions for good cause".
[215] CPT/Inf (97) 7, pp. 101 and 103, discussed in Evans, M., Morgan, R., *Combating Torture in Europe*…, op.cit., p. 91, note 3.

interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators"[216]. In reaching this conclusion, the Court drew in part on the CPT's report on the Castlereagh Holding Centre, Northern Ireland, in which it set out the prevailing conditions and stated that "to impose upon a detainee such a degree of pressure as to break his will would amount, in its opinion, to inhuman treatment"[217].

In *Akkoç v. Turkey*, the Court stressed the importance of independent and thorough examinations of persons on release from detention and commented: "The European Committee for the Prevention of Torture has also emphasized that proper medical examinations are an essential safeguard against ill treatment of persons in custody. Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations. The practice of cursory and collective examinations, illustrated by the present case, undermines the effectiveness and reliability of this safeguard"[218].

3.1.2. Other Procedural Safeguards

The CPT takes the logical view that "rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are expressly informed of their rights without delay and in a language which they understand"[219]. The ECHR, on the other hand, does not endorse such an obligation: it only guarantees the right of anyone who is arrested to be informed promptly, in a language he understands, the reasons for his arrest and any charge against him[220].

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[216] *Magee v. the United Kingdom*, App. 28135/95, Judgment, 6 June 2000, para. 43.
[217] *Report to the Government of the United Kingdom on the visit to Northern Ireland carried out by the CPT from 20 to 29 July 1993*, CPT/Inf (94) 17, para. 109 and para. 30 of the *Magee* judgment.
[218] *Akkoç v. Turkey*, Apps. 22947/93 and 22948/93, Judgment, 10 October 2000, para. 118.
[219] *Twelfth General Report*..., op.cit., para. 44.
[220] ECHR, Article 5 (2).

The CPT has also dealt with the duration of police custody, which, according to its opinion, should be relatively short[221]. The Committee has repeatedly deplored the practice of using police stations for prolonged custody[222] and has recommended that if the authorities decide that it is unrealistic to provide appropriate level of facilities and regime activities, the use of police accommodation should cease[223]. Guarantees concerning the maximum permissible length of police custody are found in Article 5 (3), which elaborates and supplements the obligation of the State towards a person lawfully detained or arrested to bring him before the competent legal authority[224]. According to the Court's case-law, a period of four days and six hours falls outside the strict constraints as to time permitted by Article 5 (3)[225]; however, a longer period can be justified, if basic safeguards against abuse are in place[226].

Closely linked to limitations on the duration of custody is the right to challenge the legality of one's detention. The CPT considers this an essential safeguard against abuse, since "bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill treated to lodge a complaint"[227]. The right of *habeas corpus* is also guaranteed in Article 5 (4) of the ECHR as one of the basic requirements for the protection of personal liberty. It is beyond the scope of the present thesis to examine the complex issue of *habeas corpus* in detail but its fundamental importance is indeed demonstrated by the wealth of case-law on the various aspects of this right[228].

Another issue, which lies at the heart of torture prevention, is the way the questioning of criminal suspects is conducted. The CPT regularly calls for the drawing up of clear rules or guidelines in this respect and has pressed the case for the electronic recording

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[221] *Twelfth General Report…*, op.cit., para. 47.
[222] See, for example, *Report to the Finnish Government on the visit to Finland carried out by the CPT from 10 to 20 May 1992*, CPT/Inf (93) 8 , paras. 52-53.
[223] Idem, para. 25; see also, *Rapport au Gouvernement de la Roumanie relatif à la visite effectuée par le CPT du 24 septembre au 6 octobre 1995*, CPT/Inf (98) 5, para. 70, where the CPT recommends a complete re-examination of the system of pre-trial detention.
[224] ECHR, Article 5 (1) (c).
[225] See *Brogan and Others v. the United Kingdom*, Apps. 11209/84, 11234/84, 11266/84, 11386/85, Judgment, 29 November 1988, para. 62.
[226] See, for example, *Brannigan and McBride v. the United Kingdom*, Apps. 14553/89, 14554/89, Judgment, 26 May 1993, para. 66.
[227] *Twelfth General Report…*, op.cit., para. 45.
[228] On this matter, see Trechsel, S., *Liberty and Security of Person*, in Macdonald, R.St.J., Matscher, F., and Petzold, H. (eds), op.cit., pp. 319-332.

of police interviews[229]. The Committee is also concerned with the atmosphere of the interrogation room and has said, for example, that "rooms entirely decorated in black and equipped with spotlights directed at the seat used by the person undergoing interrogation… have no place in a police service"[230]. Furthermore, the CPT considers of utmost importance that law enforcement officials fully understand and adhere to "the precise aim of such questioning", which should be the discovery of the truth about matters under investigation and not the extraction of a confession "from someone already presumed, in the eyes of the interviewing officers, to be guilty"[231]. Although not specifically mentioned in the ECHR, the Court has inferred the right to remain silent under police questioning and the privilege against self-incrimination from Articles 6 (1) and 6 (2)[232]. However, these immunities are not absolute[233] and the Court, especially when interpreting the right to presumption of innocence under Article 6 (2), seems to have taken a very narrow and formalistic view[234].

A further question, closely linked to interrogation procedures, is the admissibility of evidence obtained through use of improper methods. It is self-evident that a criminal justice system which places a premium on confession evidence creates incentives for officials involved in criminal investigation –and often under pressure to obtain results– to use physical or psychological coercion. For this reason, the CPT believes that in the context of the prevention of torture and other forms of ill treatment, it is of fundamental importance to develop methods of crime investigation that reduce reliance on confessions or other evidence and information obtained via interrogations, for the purpose of securing convictions[235]. The Human Rights Court has also found that the use of self-incriminating materials obtained under compulsion violates Article 6 of the Convention[236].

Finally, the CPT stresses the importance of the training of law enforcement personnel –which should also include education on human rights matters[237]. In addition, the

[229] *Twelfth General Report…*, op.cit., para. 36.
[230] Idem, para. 37.
[231] Idem, para. 34.
[232] See *John Murray v. the United Kingdom*, op.cit., para. 45.
[233] Idem, para. 47.
[234] Gomien, D., Harris, D., Zwaak, L., op.cit., p. 182.
[235] *Twelfth General Report…*, op.cit., para. 35.
[236] *Saunders v. the United Kingdom*, App. 19187/91, Judgment, 17 December 1996, paras. 67-76.
[237] *Second General Report…*, op.cit., para. 59.

Committee takes the view that the proper monitoring of custody areas is an integral component of the duty of care assumed by the police, and thus appropriate steps should be taken to ensure that persons in police custody are always in a position to readily enter into contact with custodial staff[238]. However, this is not enough: additional inspection of police establishments by an independent authority, in the form of regular and unannounced visits, is considered necessary for the prevention of ill treatment[239].

3.2. THE REACTION TO TORTURE OR ILL TREATMENT

Although it is important to take steps to ensure that acts of torture or mistreatment occur as infrequently as possible, it is equally important to provide effective means of redress for victims: in addition to providing compensatory justice to victims, redress can also have a dissuasive effect on those who might be tempted to commit similar acts and can thus help limit the risk of repetition. Redress is indeed a multifaceted notion. "It is not just compensation; it is not just rehabilitation; it is not only legal action for bringing the perpetrators before a court. It is all of those together, plus the wide recognition that harm has been done and that society as a whole must assess and recognize the facts and their deeper effects in the social and political tissue"[240]. Some of the activities commonly associated with redress are the prosecution and punishment of perpetrators, as well as the right to reparation for torture victims.

The Torture Committee has always understood that prevention must be accompanied with redress for victims of torture. Though it is not in a position to provide redress itself, the CPT certainly considers it within its preventive mandate to ensure that there are adequate systems of accountability. Thus, the Committee insists on the existence of effective mechanisms for tackling police misconduct[241], in the sense that any investigation into possible ill treatment by law enforcement officials should be capable of leading (a) to a determination of whether force used was or was not

[238] *Twelfth General Report…*, op.cit., para. 48.
[239] Idem, para. 50.
[240] Babassika, I., *The Impact of Redress on the Prevention of Torture*, Workshop on NGO Empowerment in Preventing Torture in South-Eastern Europe, Athens, 21 and 22 October 1999.
[241] E.g. *Report to the Icelandic Government on the visit to Iceland carried out by the CPT from 29 March to 6 April 1998*, CPT/Inf (99) 1, para. 28; *Report to the Swedish Government on the visit to Sweden carried out by the CPT from 15 to 25 February 1998*, CPT/Inf (99) 4, para. 11.

justified under the circumstances, and (b) to the identification and, if appropriate, punishment of those concerned[242]. Further, investigations of possible police misconduct should be conducted in a prompt and reasonably expeditious manner. It is also imperative that the persons responsible for carrying out such investigations should be truly independent from those implicated in the events[243].

It is true that the CPT's concern that ill treatment be investigated has increased over time and the Committee now regularly seeks information on the relevant mechanisms in the countries visited, recommending that establishment of such systems be explored where they do not exist, that they be established where there is evidence of ill treatment having occurred and examining the guarantees of their objectivity and independence where they already exist[244]. Questions are also raised when there is a stark mismatch between the number of complaints investigated and the resulting number of disciplinary sanctions taken[245]. Recently, the Committee has developed another complementary approach in this respect, arguing that even in the absence of an express complaint, action should be taken if there are other indications that ill treatment might have occurred (e.g. visible injuries, a person's general appearance or demeanor, etc.)[246].

The questions of investigation and complaint mechanisms are also dealt with in the ECHR. There is a comprehensive obligation to combat and prevent torture, flowing from Article 3 of the Convention, coupled with the general obligation to respect and ensure the rights enshrined therein and guarantee an effective remedy[247]. As the Court stated in *Aksoy v. Turkey*: "The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the

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[242] *Preliminary Observations made by the Delegation of the CPT which visited Sweden from 27 January to 5 February 2003*, CPT/Inf (2003) 27.
[243] Idem.
[244] Evans, M., Morgan, R., *Combating Torture in Europe…*, op.cit., p. 82. It is interesting to contrast this opinion with an earlier view of the same authors, criticizing the CPT for having developed "fewer standards with respect to the accountability of custodial authorities than might have been expected"(see, Evans, M., Morgan, R., *Preventing Torture…*, op.cit., p. 293).
[245] E.g. *Report to the Government of the United Kingdom on the visit to Northern Ireland…*, op.cit., paras. 92-93.
[246] *Report to the Turkish Government on the visit to Turkey carried out by the CPT from 5 to 17 October 1997*, CPT/Inf (99) 2, para. 44; *Report to the Latvian Government on the visit to Latvia carried out by the CPT from 24 January to 3 February 1999*, CPT/Inf (2001) 27, para. 20. See also *Twelfth General Report…*, op.cit., para. 45.
[247] ECHR, Articles 1 and 13.

prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture"[248]. In the same case, it was also established that "payment of compensation where appropriate" follows on from Article 13[249].

The European Court has regularly declared that it is limited to ordering financial compensation and is not empowered to order other remedial measures because "it is for the State to choose the means to be used in its domestic legal system to redress the situation that has given rise to the violation of the Convention"[250]. Therefore, in the case of finding a violation of the ECHR, the Court has not indicated to the respondent State concrete measures of reparation and means of preventing further violations but has limited itself to affording just satisfaction under Article 50 –now slightly amended as Article 41– of the ECHR. Nevertheless, the respondent State is obliged by international law to change a law or practice found incompatible with the Convention to comply with its Article 1 obligation to secure the rights and freedoms guaranteed.

The CPT, on the other hand, does not give any "judgments" but formulates recommendations. In the absence of performing any judicial functions, it can and does suggest immediate or short-term measures (such as, administrative action, for example) or even such measures as educational strategies and legislative improvements[251]. Of course, such recommendations do not have a binding effect; however, a State which does not seriously take them into account leaves itself open to the risk of being accused by way of interstate or individual application under the ECHR of violating Article 3, or of being publicly reprimanded by a public statement under Article 10 (2) of the ECPT. Therefore, as well as having their own individual potency, both instruments can combine to provide enhanced protection of detained persons against all forms of ill treatment.

[248] *Aksoy v. Turkey*, op.cit., para. 98.
[249] Idem.
[250] *Zanghi v. Italy*, App. 11491/85, Judgment, 19 February 1991, para. 26.
[251] See *First General Report*…, op.cit., para. 50.

CONCLUSIONS

After fourteen years of peaceful co-existence, the European Court of Human Rights and the European Committee for the Prevention of Torture have demonstrated that they can interact in a complementary rather than competitive way. Their relationship is certainly recoprocal: on the one hand, the jurisprudence developed under the European Convention on Human Rights obviously plays a part in the way the CPT conducts its work; on the other hand, the European Convention for the Prevention of Torture provides a useful, non-judicial system of review that supplements the activities of the Council of Europe's reactive judicial machinery. However, as the above analysis has attempted to show, the flow of information and influence seems to be primarily and foremost from the CPT to the Human Rights Court.

The European Court of Human Rights has been making reference to CPT reports in its judgments for a considerable period of time but an examination of the Court's recent case law, especially under Article 3, reveals that this tendency is becoming all the more frequent. The spread of knowledge about the activities carried out by the Committee was accompanied by attempts on the part of applicants to rely on CPT findings in order to advance complaints of incompatibility with ECHR guarantees. Whereas at the beginning a direct answer as to the weight attached to CPT observations was avoided (see, for example, the 1993 Commission's Decision in *Delazarus*), the passing of time showed that the Strasbourg machinery is now prepared to rely to a considerable extent on the CPT's views (see, for example, the 2003 Court's judgment in the *Ukrainian* cases).

Such a development was probably not envisaged by the drafters of the ECPT who, concerned about possible conflicts between the two Council of Europe bodies, were keen to put a clear division line between their spheres of competences. Hence, it was made clear, from the very outset, that the main features of the CPT were fundamentally different from those of the Court: the new Committee should have "its eyes on the future rather than the past"[252], aiming at the prevention of ill treatment and not at the determination of claims *ex post facto*. It was logical, therefore, for the Court to want to avoid involving itself too much with this new mechanism, whose basis and

[252] *First General Report…*, op.cit., para. 6.

tasks were very different from its own. Gradually, however, the Court adopted a more receptive attitude towards the CPT, not least due to the successful operation of the Committee, which came to assert itself as "a major player on the international human rights stage"[253]. Indeed, it is widely acknowledged that CPT's recommendations command respect and enjoy a high level of institutional credibility. Academic analyses[254] give evidence that most States co-operate closely with the Committee, effectively supporting the "on-going dialogue". Moreover, the very fact that the overwhelming majority of States allows the publication of CPT reports attests to the accuracy and veracity of the facts contained in them.

Recent judgments of the Court, containing explicit references to CPT reports, dispel any doubts as to the widening scope of the Committee's influence on the Court's jurisprudence. Thus, the Court has accepted that the CPT's findings provide a factually accurate description of the conditions of detention which are at issue (as in *Dougoz v. Greece*) and in certain circumstances, the opinion reached by the CPT as to the seriousness of the situation described seems to have an impact on the decision-making of the Court (as in *Lorsé and Others v. the Netherlands*). Of perhaps greater importance is that the Court has given signs that it is prepared to take into serious consideration the general "corpus of standards" developed by the CPT, even in cases where there is no public visit report specific to the country against which the application has been brought (as in *Kalashnikof v. Russia*). This is an indication confirming the view that "the preventive standards advanced by the CPT today provide markers for what potentially represent possible breaches of legal standards tomorrow"[255].

The significance of such a development becomes even greater, upon consideration of the different standards articulated by the two mechanisms. Due to its special mandate, the CPT has produced standards that go beyond the standards developed under the more closely circumscribed functions of the Court. As the comparative analysis showed, differences exist in the way the two bodies make use of the key terms

[253] Evans, M., Morgan, R., *Combating Torture*…, op.cit., p. 155.
[254] See, for example, idem, pp. 155-159.
[255] Evans, M., Morgan, R., *Torture: Prevention Versus Punishment?*, in Scott, C. (ed.), *Torture As Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Oxford-Portland Oregon, Hart Publishing, 2001, p. 144.

contained in Article 3 ("torture", "inhuman" and "degrading" treatment), as well as in their approach towards conditions of detention and aspects of the prison regime. In this respect, the CPT has helped in advancing a broader understanding of what comprises ill treatment and the Court has now started taking a more dynamic approach to Article 3, demonstrating a willingness to bring under the scope of this Article issues such as material holding conditions and prisoner strip-searches. As far as procedural safeguards are concerned, the CPT has been the primary contributor, thanks again to the preventive nature of its mandate. Of course, the Court has not been inactive either and has provided many pertinent safeguards with the right to personal liberty (Article 5 of the ECHR) and the minimum guarantees of a fair trial (Article 6 of the ECHR) being of particular importance; however, its approach has been inconsistent and many issues have not yet been touched. Thus, in this field too, the experience of the CPT can prove particularly useful for the Court.

Despite this apparent impact of CPT standards upon the Court's jurisprudence, it should not be forgotten that the underlying aims of the two mechanisms are quite different: as was stressed many times in the present thesis, the CPT is geared towards preventing ill treatment from occurring, whereas the Court is empowered to determine whether alleged violations of the Human Rights Convention have occurred. Their character and composition differ too: the one is a non-judicial, persuasive mechanism, consisting of members with various backgrounds, the other is a judicial, sanctioning body, consisting of lawyers specializing in human rights. It follows that their working methodologies will be different too: on the one hand, the CPT is attentive to any "indicator" or "early sign" pointing to possible future abuses, thus collecting evidence with different levels of probability; on the other hand, the Court, having to interpret specific legal provisions and issue binding judgments, is obliged to adhere to more stringent rules and demand incontrovertible evidence. Finally, a clear distinction exists in the way these two mechanisms try to promote change: the CPT engages in an process of "quiet diplomacy"[256] with the States, makes non-binding recommendations and, in exceptional circumstances, resorts to its only means of "sanction", the issuing of a public statement in relation to a country that refuses to co-operate or improve the

[256] This term is used by Bank, R., in *International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?*, in «European Journal of International Law», vol. 8, no. 4, 1997, p. 635.

situation in the light of the Committee's suggestions; the Court, on the other hand, has the power to deliver legally binding decisions upon the States and order the award of compensation if it finds a breach of the Convention.

Many pages could be written about the advantages and disadvantages of each approach and a great deal more could be said in the context of discussions about proactive versus reactive mechanisms, soft-law versus hard-law actors, persuasion versus coercion and so on. Such an attempt, however, would go beyond the scope of this thesis. What is made clear from the analysis undertaken in the previous pages is that the existing differences between the Torture Committee and the Court cannot and should not exclude co-operation. As long as the Court keeps its high standards of evidence and gives due consideration to the specific circumstances of the case it has before it, there is no reason why it should not make use of CPT findings, as far as relevant.

The implications of such a process are two-fold. First, it is one more factor attesting to the effectiveness of the Committee: since CPT reports are relied to by such an authoritative body as the Court of Human Rights, this means that they are to be respected and taken into serious account by the States. The more that CPT standards figure in the decisions of the Court, the greater will be the normative force acquired and the authority placed upon the work of the Committee. Secondly, and perhaps more importantly, placing the CPT's broader and more "generous" standards within the framework of the legally binding ECHR system means better and more effective protection of persons deprived of their liberty, for the simple reason that governments are liable to pay more attention to a finding of a violation of the Human Rights Convention than they are to a recommendation in a CPT report.

In sum, if combined, these two mechanisms can promote an ever-tightening system for the eradication of any kind of mistreatment that offends human dignity, whether under the label of "torture" or of "inhuman" or "degrading" treatment. Bearing in mind that the need to protect the human rights of persons deprived of their liberty remains undiminished, the combined role of the Committee for the Prevention of Torture and the European Court of Human Rights can prove largely beneficial for the improvement of the lives of thousands of detainees throughout Europe.

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APPENDIX 1

EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Strasbourg, 26.XI.1987

Source: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152), which entered into force on 1 March 2002.

The member States of the Council of Europe, signatory hereto,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling that, under Article 3 of the same Convention, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment";

Noting that the machinery provided for in that Convention operates in relation to persons who allege that they are victims of violations of Article 3;

Convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits,

Have agreed as follows:

Chapter I

Article 1

There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, 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.

Article 2

Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.

Article 3

In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other.

Chapter II

Article 4

1 The Committee shall consist of a number of members equal to that of the Parties.

2 The members of the Committee 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.

3 No two members of the Committee may be nationals of the same State.

4 The members shall serve in their individual capacity, shall be independent and impartial, and shall be available to serve the Committee effectively.

Article 5 [257]

1 The members of the Committee shall be elected by the Committee of Ministers of the Council of Europe by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly of the Council of Europe; each national delegation of the Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

Where a member is to be elected to the Committee in respect of a non-member State of the Council of Europe, the Bureau of the Consultative Assembly shall invite the Parliament of that State to put forward three candidates, of whom two at least shall be its nationals. The election by the Committee of Ministers shall take place after consultation with the Party concerned.

2 The same procedure shall be followed in filling casual vacancies.

3 The members of the Committee shall be elected for a period of four years. They may be re-elected twice. However, among the members elected at the first election, the terms of three members shall expire at the end of two years. The members whose terms are to expire at the end of the initial period of two years shall be chosen by lot by the Secretary General of the Council of Europe immediately after the first election has been completed.

4 In order to ensure that, as far as possible, one half of the membership of the Committee shall be renewed every two years, the Committee of Ministers may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than four years but not more than six and not less than two years.

5 In cases where more than one term of office is involved and the Committee of Ministers applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary General, immediately after the election.

Article 6

1 The Committee shall meet in camera. A quorum shall be equal to the majority of its members. The decisions of the Committee shall be taken by a majority of the members present, subject to the provisions of Article 10, paragraph 2.

2 The Committee shall draw up its own rules of procedure.

3 The Secretariat of the Committee shall be provided by the Secretary General of the Council of Europe.

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[257] *Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152).*

Chapter III

Article 7

1 The Committee shall organise visits to places referred to in Article 2. Apart from periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances.

2 As a general rule, the visits shall be carried out by at least two members of the Committee. The Committee may, if it considers it necessary, be assisted by experts and interpreters.

Article 8

1 The Committee shall notify the Government of the Party concerned of its intention to carry out a visit. After such notification, it may at any time visit any place referred to in Article 2.

2 A Party shall provide the Committee with the following facilities to carry out its task:

a access to its 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.

In seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics.

3 The Committee may interview in private persons deprived of their liberty.

4 The Committee may communicate freely with any person whom it believes can supply relevant information.

5 If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned.

Article 9

1 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 national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress.

2 Following such representations, 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 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.

Article 10

1 After each visit, the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the Party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.

2 If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter.

Article 11

1 The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential.

2 The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party.

3 However, no personal data shall be published without the express consent of the person concerned.

Article 12[258]

Subject to the rules of confidentiality in Article 11, the Committee shall every year submit to the Committee of Ministers a general report on its activities which shall be transmitted to the Consultative Assembly and to any non-member State of the Council of Europe which is a party to the Convention, and made public.

Article 13

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

Article 14

1 The names of persons assisting the Committee shall be specified in the notification under Article 8, paragraph 1.

2 Experts shall act on the instructions and under the authority of the Committee. They shall have particular knowledge and experience in the areas covered by this Convention and shall be bound by the same duties of independence, impartiality and availability as the members of the Committee.

3 A Party may exceptionally declare that an expert or other person assisting the Committee may not be allowed to take part in a visit to a place within its jurisdiction.

Chapter IV

Article 15

Each 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.

Article 16

The Committee, its members and experts referred to in Article 7, paragraph 2 shall enjoy the privileges and immunities set out in the annex to this Convention.

Article 17

[258] *Text amended according to the provisions of Protocol No. 1 (ETS No. 151).*

1 This Convention shall not prejudice the provisions of domestic law or any international agreement which provide greater protection for persons deprived of their liberty.

2 Nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by the Parties under that Convention.

3 The Committee shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto.

Chapter V

Article 18 [259]

1 This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2 The Committee of Ministers of the Council of Europe may invite any non-member State of the Council of Europe to accede to the Convention.

Article 19 [1]

1 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 18.

2 In respect of any State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance, approval or accession.

Article 20 [1]

1 Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21

No reservation may be made in respect of the provisions of this Convention.

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[259] *Text amended according to the provisions of Protocol No. 1 (ETS No. 151).*

Article 22

1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of receipt of the notification by the Secretary General.

Article 23 [260]

The Secretary General of the Council of Europe shall notify the member States and any non-member State of the Council of Europe party to the Convention of:

a any signature;

b the deposit of any instrument of ratification, acceptance, approval or accession;

c any date of entry into force of this Convention in accordance with Articles 19 and 20;

d any other act, notification or communication relating to this Convention, except for action taken in pursuance of Articles 8 and 10.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, the 26 November 1987, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Annex

Privileges and immunities

(Article 16)

1 For the purpose of this annex, references to members of the Committee shall be deemed to include references to experts mentioned in Article 7, paragraph 2.

2 The members of the Committee shall, while exercising their functions and during journeys made in the exercise of their functions, enjoy the following privileges and immunities:

a immunity from personal arrest or detention and from seizure of their personal baggage and, in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind;

b exemption from any restrictions on their freedom of movement on exit from and return to their country of residence, and entry into and exit from the country in which they exercise their functions, and from alien registration in the country which they are visiting or through which they are passing in the exercise of their functions.

3 In the course of journeys undertaken in the exercise of their functions, the members of the Committee shall, in the matter of customs and exchange control, be accorded:

a by their own Government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;

[260] *Text amended according to the provisions of Protocol No. 1 (ETS No. 151).*

b by the Governments of other Parties, the same facilities as those accorded to representatives of foreign Governments on temporary official duty.

4 Documents and papers of the Committee, in so far as they relate to the business of the Committee, shall be inviolable.

The official correspondence and other official communications of the Committee may not be held up or subjected to censorship.

5 In order to secure for the members of the Committee complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

6 Privileges and immunities are accorded to the members of the Committee, not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions. The Committee alone shall be competent to waive the immunity of its members; it has not only the right, but is under a duty, to waive the immunity of one of its members in any case where, in its opinion, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.

APPENDIX 2

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOL No. 11

Rome, 4.XI.1950

Source: http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS no. 146) has lost its purpose.

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1[1] – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I[261] **– Rights and freedoms**

Article 2[1] **– Right to life**

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a in defence of any person from unlawful violence;

b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3[262] **– Prohibition of torture**

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

Article 4[1] **– Prohibition of slavery and forced labour**

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this article the term "forced or compulsory labour" shall not include:

a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d any work or service which forms part of normal civic obligations.

Article 5[1] **– Right to liberty and security**

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a the lawful detention of a person after conviction by a competent court;

b the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

[261] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[262] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6[263] – Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7[264] – No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8[1] – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

[263] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[264] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9[1] – Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10[1] – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11[265] – Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12[1] – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13[1] – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14[1] – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15[1] – Derogation in time of emergency

1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

[265] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16[1] – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17[266] – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18[1] – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II[267] – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1 The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2 The judges shall sit on the Court in their individual capacity.

3 During their term of office the judges shall not engage in any activity which is incompatible with their independence**,** impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

1 The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

2 The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23 – Terms of office

1 The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.

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[266] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[267] New Section II according to the provisions of Protocol No. 11 (ETS No. 155).

2 The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.

3 In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.

4 In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.

5 A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6 The terms of office of judges shall expire when they reach the age of 70.

7 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24 – Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25 – Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26 – Plenary Court

The plenary Court shall

a elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;

b set up Chambers, constituted for a fixed period of time;

c elect the Presidents of the Chambers of the Court; they may be re-elected;

d adopt the rules of the Court, and

e elect the Registrar and one or more Deputy Registrars.

Article 27 – Committees, Chambers and Grand Chamber

1 To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2 There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.

3 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28 – Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29 – Decisions by Chambers on admissibility and merits

1 If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.

2 A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.

3 The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31 – Powers of the Grand Chamber

The Grand Chamber shall

1 a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and

b consider requests for advisory opinions submitted under Article 47.

Article 32 – Jurisdiction of the Court

1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria

1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2 The Court shall not deal with any application submitted under Article 34 that

a is anonymous; or

b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3 The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention

1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2 The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37 – Striking out applications

1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

a the applicant does not intend to pursue his application; or

b the matter has been resolved; or

c for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case and friendly settlement proceedings

1 If the Court declares the application admissible, it shall

a pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

b place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.

2 Proceedings conducted under paragraph 1.b shall be confidential.

Article 39 – Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40 – Public hearings and access to documents

1 Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2 Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

1 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2 A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

1 The judgment of the Grand Chamber shall be final.

2 The judgment of a Chamber shall become final

a when the parties declare that they will not request that the case be referred to the Grand Chamber; or

b three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

c when the panel of the Grand Chamber rejects the request to refer under Article 43.

3 The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments

1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47 – Advisory opinions

1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 – Reasons for advisory opinions

1 Reasons shall be given for advisory opinions of the Court.

2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3 Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III[268,269] – Miscellaneous provisions

Article 52[1] – Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53[1] – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54[1] – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55[1] – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56[270] – Territorial application

1[271] Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2 The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3 The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4[2] Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

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[268] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[269] The articles of this Section are renumbered according to the provisions of Protocol No. 11 (ETS No. 155).

[270] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

[271] Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

Article 57[1] **– Reservations**

1 Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2 Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58[1] **– Denunciation**

1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3 Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4[272] The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59[273] **– Signature and ratification**

1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2 The present Convention shall come into force after the deposit of ten instruments of ratification.

3 As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

[272] Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

[273] Heading added according to the provisions of Protocol No. 11 (ETS No. 155).