

Evolution of the CPT's Standards Since 2001

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Abstract

After twenty years of existence, the European Committee for the Prevention of Torture and inhuman and degrading treatment or punishment (CPT) continues to build on its standards as regards the places of detention it visits and other issues under its mandate. This article explores some of the main developments since 2001 and examines some of the challenges ahead. Since 2001, technological and social changes in Europe, as well as new case law of the European Court on Human Rights, have been key forces in broadening the range of topics covered by CPT standards; these now include issues such as impunity, surgical castration and guardianship. An important issue to reflect on for the future is that the CPT, contrary to twenty years ago, now has to share its field of operations with the United Nations Subcommittee for the Prevention of Torture and may, in the near future, have to contend with the European Union as well.

1. Introduction

This year the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) celebrates its twentieth year of existence. In that period, the Committee carried out 277¹ visits in total to all of the forty-seven member States of the Council of Europe. On average, States were visited five times, though visits to some States significantly surpassed that number: there were twenty-three visits to Turkey and an equally imposing nineteen visits to Russia.

According to its founding treaty, the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment (ECPT), the CPT '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.'² In other words, the CPT is a monitoring body with an additional preventive task, which it exercises by making recommendations to the States it visits to improve the

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¹ As of 25 October 2009. It is worth noting that although 47 European States have now ratified the Convention that establishes the CPT, ratifications came piecemeal and so the number of countries to be visited has been steadily increasing since the CPT's first two decades.

² European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS no 126, Strasbourg, 26.XI.1987, Article 1. Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>. Last accessed 6 December 2009.

situation of persons deprived of their liberty.³ As has been pointed out in the literature on the establishment of the CPT,⁴ its work was not expected to have a great impact on the signatory States; the ECPT intended to set an example for the rest of the world, which, at the time, was negotiating the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT), including a proposal (sponsored by Costa Rica) to create a monitoring mechanism (the future Subcommittee for the Prevention of Torture).⁵

However, the adoption of the ECPT was remarkably well-timed; just after the ECPT came into force, the Soviet Union dissolved, after first having lost its grip on its satellite states in Central and Eastern Europe. With the exception of Belarus, all these (new) States rapidly became members of the Council of Europe and, as a condition for membership, were requested to ratify the ECPT. By means of its frequent visits to these new State Parties, combined with its statutory powers of unimpeded access to places of detention, to information and to persons deprived of their liberty,⁶ the Committee was well placed to contribute significantly to the necessary reform of law enforcement, psychiatry and the penitentiary system: a role not initially foreseen by the ECPT.

Nevertheless, perhaps surprisingly for the drafters of the ECPT, longstanding Council of Europe member States, such as France, Greece, the Netherlands (in particular as regards the Dutch Antilles), Spain, Turkey and the United Kingdom also received an above average number of CPT visits.

2. The Development of the CPT's Standards

The CPT aims to make recommendations in a consistent manner, derived from uniform standards applicable to all States Parties to the ECPT. Given the CPT's broad mandate, such standards have been developed on a wide range of topics and on all the different institutions accommodating persons deprived of their liberty.

The CPT is not the only actor developing standards on detention matters. In fact, there are many, ranging from national inspectorates to professional associations and international organisations. Occasionally, these standards may be in conflict, due to the fact that they often serve dissimilar objectives and stem from different origins. In the Council of Europe area, the European Court of Human Rights, as the interpreting body of the European Convention on Human Rights (ECHR), generally has the final word. However, even the authority of the European Court of Human Rights has its limits and, at times, conflicts between standards in Europe remain. For instance, in its report on Portugal, the UN Commission against Torture stated that Portugal should consider relinquishing the use of taser weapons as their impact 'on the physical and mental state of

³ ECPT, Explanatory Report, para. 13 and 18, see fn.2; First General Report on the CPT's activities covering the period November 1989 to December 1990, CPT Doc. CPT/ Inf (91) 3, 20 February 1991, para. 4.

⁴ Malcolm D. Evans and Rod Morgan, *Preventing Torture. A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Oxford University Press, 2001), pp.316-317, 364-365.

⁵ Rod Morgan and Malcolm Evans, *Combating torture in Europe* (Strasbourg: Council of Europe Publishing, 2001), p.21.

⁶ ECPT, Article 8. See fn.2.

targeted persons would appear to violate Articles 1 and 16 of the Convention [on Torture]'.⁷ The CPT, for its part, recognises the potential abuse of these devices and insists on clear deployment instructions, with a high threshold for their deployment and adequate oversight.⁸ However, the CPT has refrained from qualifying the use of tasers as a potential violation of the ECHR.

Twenty years ago, in its early years, few areas under the CPT's mandate were covered by international (legal) standards (including European Court of Human Rights case law) sufficiently precise and comprehensive to serve as a reference for use in the CPT's work.⁹ The main and foremost exception concerned prisons, which have always received considerable attention from international organisations and professional bodies.¹⁰ In other areas, such as in respect of centres for the detention of aliens, CPT's standards often had to be developed from scratch.

In 'Combating Torture in Europe',¹¹ published in 2001, two close observers of the CPT's work, Rod Morgan and Malcolm Evans, predicted that the Committee had moved on from its 'formative stage' and they suggested that, consequently, the CPT's standards would remain fairly stable in the years to come. This assumption appears to be correct as far as it concerns detention conditions in certain types of establishments. One of the likely causal factors behind this stability is the exhaustion of types of institutions for the CPT to visit; the list of institutions visited by the CPT has not significantly changed in the 20 years of the Committee's existence, as the CPT identified the full range of places under its mandate almost from the outset. From its first visit (to Austria in 1990), the CPT visited prisons, police establishments, psychiatric hospitals and alien detention facilities. In the same year, in Malta, military detention facilities were added to the list of places to be visited and, from 1992 (when the CPT visited Cyprus) onwards, this list was extended to include social care homes (in *casu*, a home for elderly persons with disability). Finally, around 2000, the list was extended to include international airport zones.

Nevertheless, by incrementally altering existing standards in order to adapt to the changing environment and to growing insight, the CPT standards have become more refined. For instance, in the course of the years, the CPT has progressively accentuated the distinction between prisons, police stations, and alien detention centres by recommending that administratively detained aliens sleep in proper beds and are given sheets, instead of blankets, during warm summer months.¹²

⁷ Consideration of reports submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, UN Doc. CAT/C/PRT/CO/4, Committee against Torture, 39th session, Geneva, 5-23 November 2007.

⁸ In its 19th Annual Report, the CPT announced that its ad hoc working group on the use of electro-shock and directed energy weapons in detention-related situations has pursued an examination of this subject, and that the issue could be addressed in a substantive section of the 20th General Report. For now, the CPT's position on tasers can be found in various reports, including Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008, CPT Doc. CPT/Inf (2009) 30, para. 12-13.

⁹ CPT, First General Report on the CPT's activities, para. 95. See fn.3.

¹⁰ Dirk van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy*, (Oxford: University Press, 2009), p.1-9.

¹¹ Rod Morgan and Malcolm Evans, *Combating torture in Europe* (Council of Europe Publishing, 2001), p.10.

¹² CPT, Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007, CPT Doc. CPT/Inf (2008) 3, para 32.

3. Developments Since 2001

Besides refining its existing standards, since 2001 the Committee has also significantly broadened the area covered by its 'jurisprudence'. To some extent, this is a reaction to the technical and social developments in the Council of Europe region. For instance, besides the use of taser/electro-shock devices mentioned above, some European States have introduced high-tech measures of a similar nature, such as shock belts, to control and restrain prisoners who are considered to have an elevated risk of escape.¹³ Other technology-induced changes that have led to new CPT standards include the use of long distance court interviewing in the UK.¹⁴

Events with a major impact on society (particularly the events of 11 September 2001 and the enhanced irregular migration to the European Union, which also affects its bordering States) have led the CPT to pay greater attention to detained asylum seekers and irregular migrants (especially in the Mediterranean area) and also persons suspected of, or sentenced for, 'terrorist' offences.

Perhaps more importantly, experience has led the CPT to believe that perpetrators of acts of torture and other forms of ill-treatment are all too often not held to account for their actions. During visits, CPT's delegations have regularly observed that very clear allegations of ill-treatment are not being investigated properly (or, indeed, at all)¹⁵; for instance, in some cases, the CPT has observed that forensic medical examinations had been carried out in an unprofessional manner or with persons with clear injuries left out.¹⁶ In other cases, penalties imposed in proven cases of ill-treatment could not be considered a deterrent.¹⁷ From the CPT's point of view,

the credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity[.]¹⁸

For this reason, there is a growing tendency to address issues related to impunity in CPT visit reports.

¹³ CPT, Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, CPT Doc. CPT/Inf (2006) 20, para. 127.

¹⁴ For instance, Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 6 December 2007, CPT Doc. CPT/Inf (2008) 27, para. 8.

¹⁵ For example, CPT, Report to the Government of 'the former Yugoslav Republic of Macedonia' carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 26 October 2001, CPT Doc. CPT/Inf (2003) 3, para. 34.

¹⁶ For example, CPT, Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 August to 9 September 2005, CPT Doc. CPT/Inf (2006) 41, para. 52-56.

¹⁷ For example, CPT, Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 May to 3 June 2005, CPT Doc. CPT/Inf (2006) 24, para. 53-54.

¹⁸ CPT, Fourteenth General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004, CPT Doc. CPT/Inf (2004) 28, para. 25.

Particularly relevant for the CPT is the broadening of the European Court of Human Rights' interpretation of Article 5 of the ECHR. The 'Explanatory report to the European Convention' specifies that 'deprivation of liberty', as defined in Article 1 of the ECPT, should be understood in the context of Article 5 of the ECHR.¹⁹ It is standing jurisprudence that the European Court of Human Rights, when determining whether or not a person is deprived of his or her liberty, considers the factual situation of the person concerned, and not the legal title of the placement.²⁰ This involves an individual case-by-case assessment 'to be decided on its own particular "range of factors"'. In its recent case law, the European Court of Human Rights concluded that, even though a person may have been admitted to a care establishment as a voluntary patient, under certain conditions this patient may still be regarded as a person deprived of his or her liberty under Article 5. This may, for instance, be the case when the patient does not have the opportunity to leave the care institution when he or she wishes,²¹ or when health care staff exercise complete and effective control over the care and movements of the patient.²²

By means of such case law, certain *de jure* voluntary patients came (more firmly) under the CPT's mandate: in particular, patients placed in a care institution against their will by a guardian, as well as certain voluntary patients held in closed care establishments or otherwise restrained in their movements. In other words, the European Court of Human Rights' case law made it possible for the CPT to carry out visits to care institutions where such 'voluntary patients' are accommodated.²³ In the view of the CPT, the necessity of visiting care institutions where persons are, *de facto*, detained has been overwhelmingly demonstrated. In 2006, a CPT delegation visited social care homes in the Czech Republic where it met two young men with mental disabilities who had reportedly displayed sexually inappropriate behaviour towards other young men in their dormitory. On proposals from the social care homes, and with the agreement from the young men's guardians, they were surgically castrated.²⁴ This case demonstrates that, in some of the Council of Europe's member States, the safeguards surrounding the institute of guardianship should be reviewed urgently, as advocated by some non-governmental organisations.²⁵ Also in 2006, in Romania, a CPT delegation found that five voluntary patients, admitted to a psychiatric

¹⁹ 'The notion of "deprivation of liberty" for the purposes of the present Convention is to be understood within the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the European Court and Commission of Human Rights. However, the distinction between "lawful" and "unlawful" deprivation of liberty arising in connection with Article 5 is immaterial in relation to the Committee's competence.' See fn.2.

²⁰ For instance, in *Ashingdane v. United Kingdom* the Court stated that 'In order to determine whether circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.' *Ashingdane v. United Kingdom*, application no 8225/78, 7 European Court of Human Rights 528.

²¹ For instance, in *Storck v. Germany* the applicant, formally a voluntary patient, was locked up in a closed ward under continuous supervision and control of the staff, and was not free to leave the hospital. After an escape, the applicant was brought back by the police. Under these circumstances, the Court considered her to be deprived of her liberty. *Storck v. Germany*, application no. 61603/00, (2005) European Court of Human Rights 406.

²² For instance, in *H.L. v. the United Kingdom* the decisive factor was that 'health care professionals treating and managing the applicant exercised complete and effective control over his care and movements'. *H.L. v. the United Kingdom*, application no 45508/99, (2004) European Court of Human Rights 471.

²³ In some State Parties these visits were initially not without difficulties. See, for instance, CPT, Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT Doc. CPT/Inf (2007) 32, para. 7.

²⁴ CPT, Report to the Czech Government on the visit to the Czech Republic, para. 153. See fn.23.

²⁵ For instance, the Mental Disability Advocacy Center (MDAC): <http://www.mdac.info/>.

hospital for so-called social reasons, participated in a biomedical research programme involving antipsychotic medication without being aware of the potential consequences of the administration of such non-authorised drugs.²⁶

3.1 *Medical matters and the CPT*

Perhaps the most striking development since 2001 is the altered attitude of the CPT as regards examining medical interventions. From its inception, the Committee has been outspoken about the conditions under which medical interventions are carried out. In 1997, the CPT considered that Electro Convulsion Treatment (ECT), though well-established in modern psychiatry, could be considered a form of degrading treatment when administered in an unmodified form.²⁷ However, until fairly recently, the CPT preferred not to assess the content of a medical intervention carried out on a person deprived of his/her liberty.²⁸ The CPT's approach to medical interventions was unmistakably formulated in the 1991 report on Spain when the Committee stated that

As was made clear from the outset of the correspondence on this subject, the CPT's concerns were not related to the very principle of force feeding but rather to the precise practical and medical conditions under which any force feeding was being carried out.²⁹

For some reason this approach changed: in the last few years, on at least two occasions, the CPT assessed a medical intervention.³⁰ In one case, the CPT considered the situation of a prisoner who had been repeatedly forcibly fed by the Spanish authorities in the course of his hunger

²⁶ Response of the Government of Greece to Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007, CPT Doc. CPT/Inf (2008) 4, para. 173-174.

²⁷ CPT, Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Turkey from 5 to 17 October 1997, CPT Doc. CPT/Inf (1999) 2, para. 178.

²⁸ CPT, Report to the Turkish Government on the visits to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 16 December 2000 and 10 to 15 January 2001 and from 18 to 21 April and 21 to 24 May 2001, CPT Doc. CPT/Inf (2001) 31, para. 33. 'As was acknowledged in the preliminary observations dated 29 January 2001, the issue of the artificial feeding of a hunger striker against his/her wishes is a delicate matter about which different views are held The CPT understands that the World Medical Association is currently reviewing its policy on this subject. To date, the CPT has refrained from adopting a stance on this matter. However, it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship. Consequently, the Committee has considerable reservations as regards attempts to impinge upon that relationship by imposing on doctors managing hunger strikers a particular method of treatment'.

²⁹ It concerns allegations of forcible feeding of incarcerated members of 'Grupos de resistencia antifascista primero de octubre' on hunger strike: Response of the Spanish Government to Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 14 June 1994, CPT Doc. CPT/Inf (96) 10, para. 205.

³⁰ It may well have been that alterations to the CPT's internal organisation, in the form of the establishment of the CPT's medical group in 2004, played an instrumental role in focusing the CPT's attention on certain medical interventions.

strikes.³¹ In another report, the CPT examined the application of surgical castration to sexual delinquents who were detained in a prison and in psychiatric hospitals in the Czech Republic.³²

So far, the CPT has taken a cautious approach vis-à-vis medical interventions, which is rather similar to the manner in which the European Court of Human Rights tends to address such matters. The Court's approach is based on the concept of 'therapeutic necessity':³³ if a State Party can demonstrate that a certain medical intervention could be considered medically necessary, a violation of Article 3 is not likely to arise. This was also the approach taken by the CPT in the case of the forcibly fed hunger striker mentioned above. After setting out its criteria, including the criterion of medical necessity,³⁴ the CPT concluded that, in its opinion, 'the criterion of medical necessity can be considered to be satisfied within the specific legal framework in Spain. Moreover, the actual treatment was executed in a hospital under appropriate conditions'.³⁵ For the CPT, when examining a medical intervention, Article 3 of the ECHR remains the reference point; in other words, it is not under the CPT's mandate to decide on primacy among conflicting fundamental rights, such as the right to life versus the right to physical integrity, which is at the core of the ongoing discussion about forced feeding of hunger strikers.

In the case concerning the surgical castration of sexual offenders outlined above, the concept of medical necessity held a prominent place in the CPT's assessment. The Committee indicated that it had severe doubts as to the medical necessity, and even medical validity,³⁶ of this intervention.³⁷ Furthermore, from the point of view of the CPT, as a principle, measures taken to counter re-offending should never be based on presumed efficacy alone, particularly when these measures concern irreversible medical interventions; a narrow focus on lowering re-offence rates may open the door for serious human rights abuses, such as physical mutilation. The Committee

³¹ CPT, Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 15 January 2007, CPT Doc. CPT/Inf (2009) 10.

³² CPT, Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 March to 2 April 2008, CPT Doc. CPT/Inf (2009) 8.

³³ *Herczegfalvy v Austria*, application no 10533/83, (1992) European Court of Human Rights 48.

³⁴ 'If a decision is taken to force-feed a prisoner on hunger strike, in the CPT's view, such a decision should be based upon medical necessity and should be carried out under suitable conditions that reflect the medical nature of the measure. Further, the decision-making process should follow an established procedure, which contains sufficient safeguards, including independent medical decision-making. Also, legal recourse should be available and all aspects of the implementation of the decision should be adequately monitored. The methods used to execute force-feeding should not be unnecessarily painful and should be applied with skill and minimum force. More generally, force-feeding should infringe the physical integrity of the hunger striker as little as possible. Any resort to physical constraint should be strictly limited to that which is necessary to ensure the execution of the force-feeding. Such constraint should be handled as a medical matter. Force-feeding a prisoner without meeting the standards set out above could very well amount to inhuman or degrading treatment'. CPT, Report to the Spanish Government on the visit to Spain, para. 14. See fn.31.

³⁵ See CPT, Report to the Spanish Government on the visit to Spain, para. 34. See fn.31.

³⁶ Surgical castration does not have a place in the authoritative 'Standards of care for the Treatment of Adult Sex Offenders' drawn up by the International Association for the Treatment of Sex Offenders, despite attempts made by, in particular, Czech sexologists to have it included.

³⁷ See CPT, Report to the Czech Government on the visit to the Czech Republic, para. 44: 'Surgical castration is a mutilating, irreversible intervention and cannot be considered as a medical necessity in the context of the treatment of sex-offenders. The intervention removes a person's ability to procreate and has serious physical and mental consequences.' See fn.32.

concluded that, in its view, surgical castration of detained sex-offenders ‘amounts to degrading treatment’.³⁸ The CPT does not stand alone in its rejection of surgical castration. In 1985, the Supreme Court of South Carolina in *State v. Brown* stated that voluntarily surgical castration, as a condition of a suspended sentence and probation, was unconstitutional under the state constitution as it considered castration to be a form of mutilation.³⁹

4. What Next?

As long as the world does not stop changing, the CPT will have to reinvent itself on an ongoing basis. Undoubtedly, in the years to come, new issues will arise on which the Committee will have to form an opinion. Although it is difficult to predict how the CPT standards will develop, some trends are already visible. For instance, it is clear that States Parties will continue to reflect on measures to reduce the re-offending rates of sexual offenders. Some of these measures will certainly be of interest to the CPT. Also, the growing concern as regards life imprisonment without parole may, at some point, require the Committee’s attention.

Perhaps more importantly, the landscape in which the CPT operates is altering rapidly. It took years of intensive lobbying before the CPT could be established; now, international monitoring of detention conditions appears to be fully accepted. Not only has the United Nations Subcommittee for the Prevention of Torture started to operate, including in the Council of Europe region, but the European Union (EU) is currently reflecting on monitoring the implementation, in practice, of its legal instruments in the area of Justice and Home Affairs. Given the EU’s *acquis* in this area, it is difficult to imagine that, *inter alia*, conditions of detention will not become part of such assessment. The Council of Europe and, particularly in this context, the CPT should both play a role in this process. Moreover, now that the Lisbon Treaty has entered into force, it may well be that the EU, and in particular the European Commission, will become an even more important interlocutor for the CPT on matters such as irregular immigration and asylum: indeed, perhaps these bodies will be even more important than States Parties on some matters. These are all developments that may, sooner or later, have an impact on both the CPT’s mode of operation and its capacity to continue to develop and update its standards.

³⁸ See CPT, Report to the Czech Government on the visit to the Czech Republic, para. 44. See fn.32.

³⁹ Lystra Batchoo, ‘Voluntary Surgical Castration of Sex Offenders’, (2007) *Brooklyn Law Review* 72(2), p.705.