

Symposium
The European Torture Committee after Five Years:
An Assessment

The Work of the Council of Europe's Torture Committee

*Jim Murdoch**

I. The Torture Convention and the Committee for the Prevention of Torture

A. Introduction

For the most part, places of detention in Europe have ceased being places of state-authorized infliction of man's inhumanity to man. Yet physical conditions and institutional regimes of confinement of individuals continue to raise substantive and procedural human rights guarantees. The treatment of detainees, convicted prisoners and confined mental health patients provides a litmus test of the extent to which a State gives precedence to human dignity above practical considerations such as security and good order. Since 1945, several global and regional instruments have attempted to enhance the protection of those deprived of their liberty,¹ the most recent (and potentially most significant) of which is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,² now in force in 24 Member States of the Council of Europe,³ and shortly to be

* Senior Lecturer, School of Law, University of Glasgow, Scotland.

1 For example, the UN's Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and provisions contained in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and People's Rights, and the Inter-American Convention on Human Rights. Non-binding instruments include the UN's Standard Minimum Rules for the Treatment of Prisoners, and the Basic Principles for the Treatment of Prisoners. See generally N. Rodley, *The Treatment of Prisoners under International Law* (1987).

2 For the background to the Convention see Novak, 'Die Europäische Konvention zur Verhütung der Folter: Regelmäßige Besuche von Haftanstalten durch Europäisches Komitee zur Verhütung der Folter ab 1989', 15 *EuGRZ* (1988) 537; Novak, 'The Implementation of the European Convention for the Prevention of Torture: Acts of the Strasbourg Seminar', 10 *HRLJ* (1989) 131 et seq; and K.P. Sommermann, *Der Schutz der Menschenrechte im Rahmen des Europarates* (1990).

3 As at November 4th 1993, the Convention has been ratified by Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein,

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opened to States which are non-members for accession.⁴ The Committee for the Prevention of Torture (more usually referred to as the 'Torture Committee' or as the 'CPT') has published three annual reports, and it is now possible to offer an early and tentative assessment of its operational framework, its attempts at standard-setting, and the extent to which it complements or indeed challenges other Council of Europe initiatives such as the European Convention on Human Rights and the European Prison Rules. The article will not, however, go beyond this: in particular, it will not relate the Convention to other examples of regional or international instruments for the protection of prisoners. The focus will be distinctly European.

The task of the CPT is 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons' from torture, inhuman or degrading treatment,⁵ that is, in the words of the CPT, to strengthen 'the *cordon sanitaire* that separates acceptable and unacceptable treatment or behaviour'.⁶ In this respect, 'the Torture Committee' is somewhat a misnomer: the focus is upon all aspects of detention, not merely the most extreme which could amount to 'torture'. And its operation modifies somewhat the description suggested by the French Foreign Minister, Roland Dumas, of the CPT as *les casques bleus des droits de l'homme*;⁷ this stresses its multinational composition but not its *modus operandi* which is more that of an undercover squad than a high-profile, front-line fighting unit. However, in the present international climate the description does perhaps unwittingly hint at a body charged with a vital task but one calling for more resources than have been provided for the full achievement of objectives.

Effectiveness is promoted by two fundamental and inter-related principles, cooperation and confidentiality. When ratifying the Treaty, States agree to a general duty to cooperate with the Committee in its work,⁸ and more particularly, to permit the Committee to visit 'any place within its jurisdiction where persons are deprived of their liberty by a public authority',⁹ unless there are 'exceptional circumstances' justifying the national authorities in making representations against a proposed

Luxembourg, Malta, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Czechoslovakia signed the Convention at the end of 1992, but only a matter of days before it split into the Czech and Slovak Republics. The Committee of Ministers subsequently decided in June 1993 that these two States were to be regarded as signatories to the Convention as from January 1st 1993.

4 By virtue of Protocol No. 1, Doc. CPT/Inf (93) 17, opened for signature in November 1993.

5 Art. 1. Under Arts. 6(1) and (2), the Committee draws up its own Rules of Procedure, meets *in camera*, and takes decisions by simple majority (with the quorum being equal to the majority of its members), except in relation to the making of a public statement on a State's failure to cooperate or take steps to improve detention conditions when a two-thirds majority is needed.

6 *First General Report*, Doc. CPT (91) 3, para. 3.

7 Cf. Cassese, *Le Monde diplomatique*, September 1991.

8 Art. 3. Each State must notify the details of the authority responsible for receiving communications and of any 'liaison officer' appointed: Art. 15.

9 Art. 2. Article 20 further provides that States may agree to extend the application of the CPT to any other of its territories either at the time of ratification or thereafter.

visit.¹⁰ Access implies unlimited access by members, experts and interpreters,¹¹ to any place of detention, unrestricted movement within any place of detention,¹² free communication with any person whom it believes may be able to provide information¹³ (including the right to private interview with any detainee¹⁴), and the availability of whatever other information it requires to discharge its tasks.¹⁵ 'Deprivation of liberty' for the CPT is any *de facto* restriction on the freedom of movement¹⁶ in contrast to the more restrictive interpretation taken in interpreting the European Convention on Human Rights,¹⁷ and thus the CPT will not consider the legal status of a 'place of detention' unless its status is likely to affect the treatment of inmates, as in the case of a psychiatric institution.¹⁸

By and large, access has not posed major problems, although reports suggest that cooperation at ministerial or high civil-service rank invariably is better than that found at the prison or police station; and the greater the assistance at ministerial level, the greater the likelihood of positive reception in prisons or police stations. Obstructions such as delay or denial in according access¹⁹ are put down to lack of awareness or understanding of the CPT, and annual reports continue to call for the dissemination of information on its aims and methods.²⁰ The most serious challenge to date to the very principle of free access arose during the preparations for a visit²¹ when the issues were whether visa requirements could be imposed, and whether reasons for refusing entry to experts and other individuals assisting the CPT need be given.²² Clearly this problem principally arises in the case of Turkey, which still has

10 Under Art. 9(1) representations may only be made on the grounds of national defence, public safety, or serious disorder in the place of detention; upon the medical condition of a prisoner; or that an urgent investigation into a serious crime is in progress. Yet the making of such does not act as a veto upon any proposed visit. Art. 9(2) provides that the CPT and national authorities must consult each other immediately to ascertain the particular situation and decide what arrangements are necessary.

11 Art. 7(2). Art. 14(3) states that exceptionally, a State may declare that any expert or other person assisting the CPT may not take part in a visit.

12 Art. 8(2)(c).

13 Art. 8(4).

14 Art. 8(3).

15 Art. 8(2)(d); the CPT must have regard to any rules of domestic law or professional ethics in seeking such information.

16 E.g., *Austrian Report*, Doc. CPT/Inf (91) 10, paras. 89-93, which discusses special transit rooms for aliens.

17 E.g., *Nielsen case*, ECHR (1988) Series A, No. 144; *X v. Federal Republic of Germany*, (1981) DR 24, 158. Cf. Trechsel, 'The Right to Liberty and Security of the Person', 1 *HRLJ* (1988) 88 at 96; Murdoch, 'Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence' 42 *ICLQ* (1993) 494 at 495-99.

18 *Danish Report*, Doc. CPT/Inf (91) 12, para. 74.

19 E.g., *Maltese Report*, Doc. CPT/Inf (92) 5, para. 10; *Swiss Report*, Doc. CPT/Inf (93) 2, paras. 6 & 7. Problems mainly concern police premises, although on occasion judges and public prosecutors have failed to cooperate: *Third General Report*, Doc. CPT/Inf (93) 12, paras. 3 & 4, and 6.

20 Cf. the repeated encouragement to States to make known to all relevant authorities and staff the CPT's existence, powers and purpose: *First General Report*, *supra* note 6, at para. 41; *Second General Report*, Doc. CPT/Inf (92) 3, para. 21.

21 *First General Report*, *supra* note 6, at paras. 74-77.

22 See Arts. 8(2) and 14(3).

visa requirements for holders of British and Irish passports. Subsequent inter-governmental discussions led to a working compromise but no firm decision.²³

Visits and the subsequent reports to States are surrounded by confidentiality which also extends to any information obtained, discussions during meetings, and recommendations made,²⁴ subject to two exceptions. A State may request publication of the report and any comments it may have on the report,²⁵ and if a State refuses to cooperate or to improve matters in the light of recommendations made, the CPT may decide (after allowing the State the opportunity to make known its views) to make a public statement on the matter.²⁶ The only public statement to date concerned police detention conditions in Turkey, and followed two *ad hoc* visits in 1990 and 1991 and a periodic visit in 1992. The statement was agreed upon in the face of a direct request to suppress it, and after the views of the Turkish authorities were made known.²⁷ In releasing the statement, the CPT expressed regret at the State's continuing failure to take steps to implement recommendations to deal with the widespread infliction of torture.²⁸ Both the use of the *ad hoc* visit procedure and the public statement are likely to be infrequent and adopted only in the most exceptional circumstances, and can be taken as symptomatic of severe problems in the 'ongoing dialogue' between the CPT and national authorities. The Turkish saga illustrates above all the CPT's nerve, and its ability to follow through its task. However, it may be an atypical experience, as the work of the CPT is likely to be routine, interrupted only rarely by the spectacle of high drama.

While initially confidentiality was deemed necessary to secure State cooperation, it has been the Member States themselves that have allowed light to be shed on the inner workings and thoughts of the CPT by generally agreeing to authorize publication of reports of visits. Had this not been so, then what such 'routine' entails would only have been hinted at in annual reports,²⁹ and in various addresses and

23 Entry visas were ultimately granted. See *Some Issues Concerning the Interpretation of the European Convention for the Prevention of Torture, etc.*, Doc. CPT/Inf (93) 10, 5, 11. The Ministers' Deputies' Rapporteur Group on Legal Cooperation which reported that it was unable to agree that exemption from visa requirements was implied by the Convention, that only States could in any case give an authoritative interpretation, and that practical problems could be overcome by the issue of multiple entry visas. The CPT continues to maintain that visa requirements are excluded by the treaty: see *Some Issues Concerning the Interpretation of the European Convention for the Prevention of Torture, etc.* *ibid.*, at 9-14.

24 Arts. 10(1), 11(1), 13 and 14(2).

25 Art. 11(2); but under Art. 11(3) no data referring to an individual may be published without the express consent of the individual.

26 Art. 10(2); a majority of two-thirds of the membership of the CPT is required in such a case.

27 The decision to take steps to issue a public statement was made at the plenary meeting of the CPT at the end of September 1992; the views of the Turkish authorities were received some six weeks later. See *Third General Report, supra* note 19, at para. 10.

28 *Public Statement on Turkey* Doc. CPT/Inf (93) 1, paras. 21 and 37. See further Tanka, 'The Public Statement on Turkey', 4 *EJIL* (1993) 115; Parmentier, 'Spotlight on Turkey', 11 *Netherlands Quarterly of Human Rights* (1993) 131.

29 Which are made under Art. 12 to the Committee of Ministers and transmitted to the Consultative Assembly.

articles by members or experts.³⁰ This general willingness to authorize publication of country reports was perhaps not envisaged by the framers of the Convention, but has been warmly welcomed by the CPT.³¹ To date, eight of the nine country reports for 1990 and 1991 (that is, all bar the Spanish) and two of the 1992 reports have been published.³² In addition, several governmental responses have been made public, along with two follow up reports.³³ Is confidentiality in practice really necessary for cooperation? There may now be some moral pressure on States to authorize publication since otherwise there may be a suggestion that something particularly grim is being hidden. To be sure, publication of visit reports advances the CPT's aims in that information as to workings and approaches dispels the whiff of mystery and consequent suspicion which surrounds any organization whose workings are not properly understood; indeed, States may be prompted into taking action to pre-empt likely CPT criticism after reading what has been found in other countries. But should the Committee continue to wear a cloak of confidentiality, no matter how threadbare? The emphasis in the Convention fails to capture the current mood in prison services generally of encouraging outside awareness and understanding. On the other hand, it may be better to encourage any State which practises torture on a systematic basis to subject itself to CPT scrutiny; it may indeed be unwise for such a State to allow international investigation, but if it does so, is likely to find guarantees of confidentiality to its liking. It may be better to leave the question of publication of country reports to moral pressure rather than amendment by subsequent Protocol.

B. The CPT at Work

1. Human Resources

The considerable burden of visitation, reporting and supervision falls upon the membership of the CPT supported by *ad hoc* 'experts', interpreters, and the permanent Secretariat. The issue of membership is considered more fully in an

30 Such statements must have been made in conformity with CPT Rules on confidentiality and cleared by the Secretariat. See, e.g., Cassese, 'Our Ultimate Weapon: The Public Statement', *Forum*, May 1991, 14; 'Interview with Nadia Gevers Leuven-Lachinsky, Member of CPT', 4 *Netherlands Quarterly of Human Rights* (1991) 389. A valuable and important article, co-authored by an expert appointed to assist the Committee, is Evans and Morgan, 'The European Convention for the Prevention of Torture: Operational Practice', 41 *ICLQ* (1992) 590.

31 *Second General Report*, *supra* note 20, at para. 25.

32 Reports to the Governments of Austria, Doc. CPT/Inf (91) 10; Denmark, Doc. CPT/Inf (91) 12; United Kingdom, Doc. CPT/Inf (91) 15; Sweden, Doc. CPT/Inf (92) 4; Malta, Doc. CPT/Inf (92) 5; France, Doc. CPT/Inf (93) 2; Switzerland, Doc. CPT/Inf (93) 3; Finland, Doc. CPT/Inf (93) 8; Germany, Doc. CPT/Inf (93) 13; and the Netherlands, Doc. CPT/Inf (93) 15.

33 Responses of the Governments of Austria, Doc. CPT/Inf (91) 11; United Kingdom, Doc. CPT/Inf (91) 16; Sweden, Doc. CPT/Inf (92) 4; France, Doc. CPT/Inf (93) 2; Switzerland, Doc. CPT/Inf (93) 4, together with Annexes; Germany, Doc. CPT/Inf (93) 14; and Finland, Doc. CPT/Inf (93) 16. Follow-up Report from the Swedish Government, Doc. CPT/Inf (93) 7; Follow-up Report of the United Kingdom Government, Doc. CPT/Inf (93) 9.

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article which follows this one.³⁴ This has not been without controversy. Briefly, the issues have centred upon how to ensure an orderly renewal of membership as terms of office expire,³⁵ upon the form of decision-making,³⁶ and – more crucially – upon the quality of appointments to the Committee. The choice facing the drafters of the Convention was whether visits should be carried out by members whose appointments could be influenced by national authorities, or, whether they should be made by experts,³⁷ since the burden of visits would be time-consuming,³⁸ and it would be difficult to find members with necessary expertise.³⁹ Those proposing the former believed that this would help ensure State cooperation, and this consideration finally triumphed. Yet the tension between political expediency and functional efficiency has continued.

Most of the Committee's members have been male, leading the CPT to encourage the appointment of more women for their 'psychological sensitivity and fair-mindedness'.⁴⁰ Furthermore, just under half of the CPT's initial membership had reached their sixtieth birthday when appointed, although the schedule of visits demands a high degree of physical stamina to cope with the punishing schedule of visits which can last from early in the day to well into the night. More crucially, there is no easy way in practice to ensure that nomination or selection of individual members is restricted to those with the necessary occupational backgrounds, or that the collective composition of the Committee is genuinely multi-disciplinary. Some appointments have raised questions of ability and qualifications. Putting it bluntly, 'analysis of the composition of [visiting delegations to countries] suggests that not all Torture Committee members are considered to be equally valuable to conduct inspections'.⁴¹ The CPT has called for more doctors and experts in penitentiary systems to be appointed,⁴² although some greater degree of coordination of Member States' nominations seems to be in hand.⁴³ Occupational backgrounds are dominated by law, medicine, politics, and the civil service, although it has been questioned whether a public service background is really appropriate, bearing in

34 Evans, Morgan, 'The European Torture Committee: Membership Issues', 5 *EJIL* (1994) 249.

35 The threat of a 'revolving doors' membership is likely to be avoided by the ratification of Protocol No. 2, opened for ratification on 4 November 1993, Doc. CPT/Inf (93) 17.

36 The Rules of Procedure, Rules 10 and 14 provide that decisions will be made in full plenary, with administrative decisions or those relating to the overall direction of work to be taken by the President and two vice-presidents; *First Annual Report*, *supra* note 6, at paras. 14-15.

37 Possibly full-time experts: cf. Novak, 'Die Europäische Konvention zur Verhütung der Folter', *supra* note 2, at 539, who suggests engaging a wide pool of part-time experts, having regard to the special needs of each mission.

38 Members spend about 3 months per year on CPT business. The International Commission of Jurists, the International Committee of the Red Cross and the Swiss Committee Against Torture all argued for the appointment of experts to discharge the task of carrying out visits.

39 Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', 83 *AJIL* (1989) 130 at 147.

40 *First General Report*, *supra* note 6, at paras. 87-88.

41 Evans and Morgan, *supra* note 30, at 604.

42 *First General Report*, *supra* note 6, at paras. 87 and 88; *Second General Report*, *supra* note 20, at paras. 26 and 27.

43 Cf. *Third General Report*, *supra* note 19, at para. 23.

mind the need to stress the independence and impartiality of membership.⁴⁴ This point, however, is met in other ways. A procedural rule designed to alleviate any appearance of bias provides that the 'national' member does not take part in any visit to his own State.⁴⁵

Whatever the final intention of the drafters, the CPT has not been slow to make use of its power to appoint part-time 'experts'⁴⁶ to assist with training, develop resource materials⁴⁷ and, more controversially, participate in visits. Here, the CPT seems uncertain as to their proper role: whether the giving of limited and restricted guidance to members,⁴⁸ or as near-equals and substitutes making good missing but necessary expertise, and thus extending the role of 'expert' beyond that originally intended.⁴⁹ One expert has described his position as 'ambiguous', with a 'wide divergence between a strict interpretation of [the Convention] and the practice of the Committee' in that visiting delegations often make considerable use of experts, even to the extent of authorizing them to interview inmates alone.⁵⁰ Up to three experts can accompany delegations whose median size (including members, experts and Secretariat staff) is only seven. Beyond deciding that, 'as a rule', experts should not assist delegations visiting States of which they are a national,⁵¹ the issue has been left somewhat in limbo. It concerns means versus ends: the *de facto* expert-member is currently a vital ingredient in ensuring effectiveness. On the other hand, any development of a new corpus of standards governing places of detention by the CPT raises questions as to whose standards are in reality being applied, since the exact scope of expert influence is not clear. The CPT can claim neither the authority of a judicial body, as can the European Court of Human Rights, nor of a politically-responsive body, as can the Consultative Assembly and the Committee of Ministers in differing ways. It may still be important to disguise the substance of practice behind the legitimacy of form.

The Secretariat in these circumstances provides backbone to a disparate and constantly changing membership assisted by part-time experts. The rather low initial staffing level, comprising a Committee Secretary, an Administrative Official, and three support staff, was simply insufficient for the Committee to achieve effectiveness,⁵² and lobbying has virtually doubled this provision.⁵³ Yet resources

44 Cf. Novak, *supra* note 37, at 539.

45 Rules of Procedure, Rule 37(2). Similarly, under Rule 38(2) a visiting delegation will not generally be assisted by an expert who is a national of the State being visited.

46 Art. 7(2).

47 *First General Report*, *supra* note 6, at paras. 35 and 37.

48 Cf. *ibid.*, at para. 88: '[T]he participation of persons [from medical and penitentiary backgrounds] at all stages of the Committee's work would prove beneficial; this is only possible through membership of the Committee.'

49 *Second General Report*, *supra* note 20, at para. 27.

50 Evans and Morgan, *supra* note 30, at 605-7.

51 Rules of Procedure, Rule 37(2).

52 *First General Report*, *supra* note 6, at para. 90; *Second General Report*, *supra* note 20, at paras. 14 and 34.

53 The current Secretariat comprises a Committee Secretary, three Administrative Officers, two Principal Administrative Assistants (one for administrative and budgetary questions, one for

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continue to lag behind requirements. A recurrent theme in all three annual reports has been the curtailment of the programme of visits because of a shortage of Secretariat personnel.⁵⁴ Furthermore, reports to countries are currently being transmitted some nine months after the conclusion of a visit, rather than within the target of six months, largely due to a 'bottleneck of work' within the Secretariat.⁵⁵ The level of manpower has barely been sufficient to get the CPT up and running. The aim is to have each State receive a visit every two years,⁵⁶ with reports being forwarded within six months of each visit,⁵⁷ and follow-up reports and information to be forwarded to and considered by the CPT. This is fundamental if the continuous or 'ongoing dialogue' between Committee and States is to be achieved, and the preventive nature of the work of the CPT is to succeed. In this, the position of the Secretariat is pivotal. The great risk is that the Committee does not proceed beyond the tasks of inspection and reporting: that it has no time to follow-up and to reflect. Yet it will have taken some four years (rather than the three first envisaged) to carry out the first round of visits to all Member States, and the dialogue with States through follow-up reports is but beginning. The decision not to appoint full-time experts and members is being felt most acutely. However, without additional resources Secretariat overload is on the cards.

2. Visits to Places of Detention

Visits to countries may either be periodic or *ad hoc*. Ad hoc visits are made if these 'appear to [the CPT] to be required in the circumstances',⁵⁸ and thus give the Committee some flexibility in responding to situations which call for additional or prompt investigation. To date, two such visits have been made to Turkey, and one to Northern Ireland. Otherwise, there is little in the Convention to give guidance as to the carrying out of visits,⁵⁹ and initially there was some readiness to modify and to rewrite rules of procedure in the light of experience.⁶⁰ The first schedule of visits was determined by drawing lots,⁶¹ but how countries will be chosen in future once the first round of visits has been completed in 1993 has still to be decided. With the

documentation and information), a Senior Clerk, and two Secretaries; another two appointments are in the pipeline: *Third General Report, supra* note 19, Appendix 2B and para. 27.

54 The planned visits to Spain in 1990, Portugal in 1991, and Luxembourg in 1992 were each postponed: *First General Report, supra* note 6, at para. 54; *Second General Report, supra* note 20, at para. 17; *Third General Report, supra* note 19, at para. 1.

55 *First General Report, supra* note 6, at para. 54; *Second General Report, supra* note 20, at para. 17; *Third General Report, supra* note 19, at paras. 1, 13 and 26, *ibid.*

56 *First General Report, supra* note 6, at para. 89; *Second General Report, supra* note 20, at para. 29, *ibid.*

57 *First General Report, supra* note 6, at para. 71.

58 Art. 7(1).

59 Cf. Art. 7(2) which simply provides that at least two members will take part in each visit as a general rule.

60 The CPT's Rules of Procedure were adopted on 16 November 1989, and have been amended on five occasions. The 1991 Report referred to the Rules as now being 'quite stable': *Second General Report, supra* note 20, at para. 11.

61 *First General Report, supra* note 6, at para. 19.

exception of Hungary, the countries to be visited in 1994 have all been visited before. One of the intended visits is a follow-up visit to Turkey; another is a visit to the United Kingdom postponed from 1993. Notification to States has something of the form of a ritual. The countries to be visited are announced at the end of the preceding year⁶² and made public by a press release which is intended to trigger the receipt of information from non-governmental organizations. The second, more formal, notification comes about two weeks before the start of the visit and contains details of the composition of the delegation and requests for meetings to be arranged. However, a deliberate attempt is made to retain an element of surprise, and the CPT will disclose the names of some of the institutions to be visited only a few days before arrival. The choice of establishment is likely to be determined by the particular issue or issues the CPT is pursuing at the particular time, and is certainly influenced by communications received from non-governmental organizations. The CPT's 'staple diet' continues to be detentions in police custody and prisons, but the 1991 report gave notice that in future years its agenda will include detention of the mentally ill, aliens and minors,⁶³ and in 1992 health care services in prison were also examined.⁶⁴

Depending upon the size of the country, a visit will last between one and two weeks,⁶⁵ with the delegation consisting of between five and nine individuals drawn from the membership, experts and Secretariat staff, plus additional interpreters if required.⁶⁶

Visits start with meetings with ministers and high-ranking government officials, followed by discussions with relevant non-governmental organizations.⁶⁷ The delegation then splits up and visits separate places of detention but will meet up on a regular basis to share observations. The CPT is free to interview any persons deprived of their liberty in private, subject only to the right of national authorities to make representations against such interviews on grounds *inter alia* of medical condition or urgent interrogation relating to a serious crime.⁶⁸ How inmates are chosen to meet with delegations is not discussed in reports and practice obviously varies.⁶⁹ The CPT does not consider it acceptable to transfer certain detainees prior to an announced visit,⁷⁰ and indeed it may be appropriate to arrange an *ad hoc* visit

62 Rules of Procedure, Rule 31(2). Art. 15 provides that notification is to be made to liaison officers.

63 *Second General Report*, *supra* note 20, at para. 4; cf. *Third General Report*, *supra* note 19, at para. 2.

64 *Third General Report*, *ibid.*

65 *First General Report*, *supra* note 6, at para. 61.

66 *Ibid.*, at para. 55.

67 For example, the non-governmental organizations visited in the UK included *inter alia* the British Medical Association, the Howard League, Justice, the National Association for the Care and Resettlement of Offenders, the National Council for Civil Liberties (now Justice), and the Prison Reform Trust. *United Kingdom Report*, *supra* note 32, at para. 7.

68 Arts. 8(3) and 9(1).

69 In some institutions it appears that governors will suggest names of inmates who have expressed an interest in meeting members of the delegation, while during the course of a visit other inmates may come forward.

70 *Second General Report*, *supra* note 20, at para. 22.

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in order to interview a particular individual.⁷¹ Before departure, the delegation will hold a final series of meetings with ministers and officials at which 'some tentative first impressions' are given.⁷² Such observations are informal unless the CPT decides to 'immediately communicate observations to the competent authorities'⁷³ as it has done on at least two occasions, where it deemed it necessary to highlight concern at holding conditions calling for urgent action.⁷⁴

The 'common working tools' (that is information on institutions, practices, and techniques for conducting visits which the CPT is building up)⁷⁵ in part encourages the involvement of third parties and the promotion of an 'ongoing dialogue' with State authorities. Several devices are utilized in drilling for knowledge. First, information can be requested from State authorities on places of detention⁷⁶ or in relation to other matters 'necessary for the Committee to carry out its task',⁷⁷ and country reports invariably request further knowledge from State authorities on local procedures and practices and substantive law. These should perhaps be seen not as indications of lack of preparation or insufficient thoroughness during missions, but as attempts by it to prompt domestic investigation and dialogue with the CPT. Second, the CPT has the right 'to communicate freely with any person whom it believes can supply relevant information'.⁷⁸ The extent to which persons deprived of their liberty make contact is not discussed in any of the annual reports, but the CPT has suggested in a country report that the authorities should consider adding the President of the CPT to the approved list of persons to whom prisoners' letters are to be forwarded without examination.⁷⁹ Finally, the CPT has established working relations with national human rights pressure groups and other international institutions.⁸⁰ Each of these provides the CPT with fruitful sources of information,⁸¹

71 Evans and Morgan, *supra* note 30, at 602.

72 *First General Report*, *supra* note 6, at paras. 64-67, at 67.

73 Art. 8(5).

74 *Second General Report*, *supra* note 20, at para. 23; cf. *French Report*, at para. 7, *Swiss Report*, at para. 17, *supra* note 32.

75 *First General Report*, *supra* note 6, at paras. 34-6; the documents remain confidential, and have not yet been made public.

76 Art. 8(2)(b) provides that full 'information on the places where persons deprived of their liberty are being held' must be given. The *First General Report*, *supra* note 6, at para. 40 notes that all parties were asked for this information in November 1989, but some parties had still not complied with the request more than a year later. It is not clear the extent to which national constitutional arrangements (for example, involving fragmentation of authority for policing) is to blame. Central government may not hold details of all police detention facilities if the police function is the responsibility of State, municipal or local government.

77 Art. 8(2)(d).

78 Art. 8(4).

79 *Finnish Report*, *supra* note 32, at para. 136.

80 In particular, with the Council of Europe's European Commission and European Court of Human Rights, the UN's Committee against Torture, Special Rapporteur on Refugees and High Commissioner for Refugees, the International Committee of the Red Cross, and in addition with unnamed non-governmental organizations. See *First General Report*, *supra* note 6, at para. 42; *Third General Report*, *supra* note 19, at paras. 17-18.

81 Although the *First General Report*, *supra* note 6, at paras. 43 and 44 notes that 'the flow of information' is very much 'a oneway process' since rules of confidentiality prevent disclosures by the CPT.

sources which are set to increase as knowledge and understanding of the CPT grows.⁸²

The CPT can also be used as a device for furthering the lot of detainees in indirect ways. Prison officers may voice criticisms of prison management while both groups in turn may target ministers and officials; and the government department responsible for prisons may find an adverse report from the CPT of assistance in promoting its case for greater funding. Indeed, visits from the CPT may be positively welcome.⁸³ The CPT appears to be willing to play along if this may improve conditions.⁸⁴

The end result is a kaleidoscope of impressions and observations which are pulled together into a report containing findings, requests for information, and recommendations for action. An outline report prepared by the delegation's head will be discussed before the delegation leaves the country, and responsibility for drafting the various sections will be allocated.⁸⁵ Here, again, the involvement and influence of the experts are likely to be as great as those of the members.⁸⁶ The report is expected to be completed without delay so that it can be discussed, finalized and adopted in a plenary session, thereby ensuring its transmission to national authorities within six months.⁸⁷ Thereafter, the 'ongoing dialogue' is encouraged by requesting the State to give an account of any legislative and administrative measures and any implementation of recommendations made, through an interim report and then a final report within six and twelve months respectively.⁸⁸ It is perhaps too early a stage for any assessment of how States are responding in practice since so few of the follow-up reports have been published. However the CPT has expressed general satisfaction with these follow-up reports, which suggests that recommendations are being carefully studied.⁸⁹ In turn, the CPT will respond with its own observations⁹⁰ although there does not seem to be any provision in the Convention permitting these comments to be made public.

82 Cf. *Second General Report*, *supra* note 20, at para. 10.

83 Cf. *Cassese*, *supra* note 30, at 14: 'Great Britain [sic] has a national prison inspectorate ... [giving] us access to a number of excellent critical reports... We therefore had to ask ourselves whether on the spot visits were really called for. However, it was our British colleagues themselves who insisted on a "European" visit, on the grounds that "your opinion could be constructive".'

84 See, for example, approval given to suggestions by prison governors to improve training of staff or to provide new accommodation for inmates. *Danish Report*, *supra* note 32, at paras. 21 and 54.

85 *First General Report*, *supra* note 6, at para. 68.

86 *Evans and Morgan*, *supra* note 30, at 608.

87 Although currently reports are taking nine months.

88 *First General Report*, *supra* note 55, at para. 32.

89 *Third General Report*, *supra* note 19, at para. 15.

90 This aspect of the work of the CPT is at an early stage. The first observations were made in 1992 in respect of the Maltese, Swedish and United Kingdom follow-up reports, and during the first half of 1993 in response to the Austrian and French reports. See *Third General Report*, *supra* note 19, at para. 7.

II. The CPT and Existing Human Rights Protection

A. The CPT and the European Prison Rules

The Torture Convention reflects the recognition that the protection of persons deprived of their liberty may be more effectively served by directing attention 'more to the root causes of human rights violations',⁹¹ than just seeking redress for the symptoms. Other non-judicial initiatives promoted by the Council of Europe have included various proposals dealing with penal matters⁹² and the enhancement of the professionalism of prison staff.⁹³ In particular, the European Prison Rules⁹⁴ provide an outline for good governance and practice by specifying 'treatment objectives and regimes' and highlighting the importance of the recruitment and training of personnel, and by establishing minimum standards for establishments. In addition, the European Convention of Human Rights provides persons deprived of their liberty with the opportunity to challenge aspects of the detention regime in terms of compatibility with legal norms. How then, does the Torture Committee fit within this wider European picture? The question is of some importance given the CPT's declaration that it is moving towards the development of its own 'measuring rods' which may in time lead to the 'gradual compilation of a corpus of standards'. The Committee has taken this initiative because it has found that existing European and international instruments and case-law often produce no clear guidance when applied to specific situations, 'or at least that more detailed standards are needed'.⁹⁵ This significant development thus raises the issue of how these CPT standards fit in with existing norms (in particular, the Prison Rules and the Human Rights Convention), and whether the CPT's standards should be preferred if these prove more liberal. It also gives rise to the question of whether another set of 'measuring rods' will be required when visits begin to Central and Eastern European States. The CPT has already hinted that it will recognize the political realities facing States emerging from totalitarian government.⁹⁶

91 Novak, 'The European Convention on Human Rights and its Control System', 7 *Netherlands Quarterly of Human Rights* (1989) 98, at 104.

92 E.g., Recommendation of the Committee of Ministers Rec No. R (80) 11, Concerning Custody Pending Trial, adopted 27 June 1980; Recommendation of the Committee of Ministers Rec No. R (82) 17, Custody and Treatment of Dangerous Prisoners.

93 Committee of Ministers' Resolution (66) 26 on Status, Recruitment and Training of Prison Staff, adopted 30 April 1966. See also the Recommendation from the Committee of Experts on Staff Concerned with the Implementation of Sanctions, and approved by the Committee of Ministers in October 1992, Decision CDPC/93/260692, adopted 19-22 October 1992, in which it was decided to prepare a European Code of Conduct for prison staff to secure a more effective implementation of the European Prison Rules.

94 Contained in Recommendation No. R (87) 3, adopted by the Committee of Ministers on 12 February 1987.

95 *First General Report*, *supra* note 6, at paras. 95-96.

96 *German Report*, *supra* note 32, at paras. 10-11, 69-70, 110-2, 120 (conditions in institutions formerly under the control of East German authorities); cf. *Maltese Report*, *supra* note 32, at paras. 85-6 (progressive introduction of rights to legal advice for inmates, but advances in treatment by

At first glance, the European Prison Rules provide a ready set of agenda items. They purport to be 'essential to human conditions and positive treatment in modern and progressive systems' and are to 'serve as a stimulus to prison administrations' to further 'good contemporary principles of purpose and equity',⁹⁷ and thus share something of the purpose behind the CPT (in addition to the fact that the recommendations of both bodies have no binding force⁹⁸). The Rules are essentially for domestic consumption and are designed 'to provide realistic basic criteria' for administrators and inspectors to 'make valid judgments of performance and measure progress towards higher standards'.⁹⁹ Their fundamental weakness lies in their lack of precision which diminishes any normative value they may have. Four distinct categories have been identified. First, vague formulations, in particular when principles are qualified by the phrase 'as far as possible'; second, evaluative formulations, which arise when there is a qualification such as 'normal', 'suitable', 'adequate', 'desirable', etc.; third, references to the conflict of objectives inherent in the execution of custodial sentences (when attention is drawn to institutional interests in efficient administration, security and even financial efficiency); and finally, formulations framed in precise terms, for example, the requirements of a minimum of one hour's open-air exercise per day and of one bath or shower per week.¹⁰⁰

While the CPT's work extends to institutions other than prisons, the essential spirit behind many of the Rules could be held to apply with equal force to, for example, police stations and mental hospitals. Yet the CPT appears reluctant to acknowledge that the Rules may apply beyond narrow categories, such as the requirement of at least one bath or shower per week,¹⁰¹ the medical examination of prisoners upon admission,¹⁰² the provision of written information on prison regulations¹⁰³ and one hour's daily exercise in the open air.¹⁰⁴ Their potential use in providing a moral and persuasive foundation upon which to build any CPT 'corpus of standards' by giving a ready made agenda of concerns and a set of general principles already agreed to by Member States seems to have been ignored.¹⁰⁵

police officers of suspects after removal of former regime should not be 'jeopardised by expecting too much too soon').

97 Preamble, clauses a-c, *supra* note 94.

98 Cf. Trechsel, 'Human Rights of Persons Deprived of their Liberty', 7th International Colloquy on the ECHR, 1990, Doc. H/Coll (90) 3, 20.

99 Preamble, clause d, *supra* note 94.

100 See generally Trechsel, *supra* note 98, at 21-23.

101 *Supra* note 94. Rule 18: cf. *United Kingdom Report*, *supra* note 32, at para. 74.

102 *Ibid.* Rule 29: cf. *Austrian Report*, *supra* note 32, at para. 83.

103 *Ibid.* Rule 41: cf. *Swedish Report*, *supra* note 32, at para. 83.

104 *Ibid.* Rule 86: cf. *Austrian Report*, *supra* note 32, at para. 78; *Maltese Report*, *supra* note 32, at para. 45; *Swiss Report*, *supra* note 32, at paras. 22-3.

105 It has been suggested that the Rule's general principles could form the basis for a new optional protocol to the Human Rights Convention on the protection of prisoners. See Lang, Report on 'Human Rights of Persons Deprived of their Liberty: Mechanisms of Control and Legal Safeguards', 7th International Colloquy on the ECHR, 1990, Doc. H/Coll (90) 4, at 13-14.

However, a brief consideration of the extent to which CPT recommendations mirror some of the European Prison Rules suggests minimal divergence, and prompts the suggestion that the anchoring of CPT standards to the Rules would surely enhance the CPT's recommendations by giving them greater legitimacy and weight.

I. Basic Principles, Treatment Objectives and Staffing Issues

Parts I and IV of the Rules specify certain basic principles and treatment objectives. Prisoners must be accommodated in material and moral terms which ensure respect for their dignity, and they must be accorded treatment which is non-discriminatory and which recognizes religious beliefs and sustains health and self-respect.¹⁰⁶ General treatment objectives should aim to minimize the detrimental effects of incarceration through encouraging family contact, the development of skills, and the provision of recreational and leisure opportunities.¹⁰⁷ The language of the Rules here is open, and is 'designed to reflect a modern philosophy of treatment', but one which has jettisoned rehabilitation in favour of humane containment or 'positive custody'.¹⁰⁸

What the CPT is likely to find is that the reality of under-resourced prison services does not meet the rhetoric of positive custody. Thus while the philosophy of the Prison Department for England and Wales was one of 'dynamic security' based upon purposeful activities, treating prisoners as individuals, and developing good relationships between staff and inmates, daily life in prisons was premised upon control and containment or 'static security'.¹⁰⁹ In France, the delegation was told openly that in places of detention '*on garde des gens. On ne fait pas de resocialisation*'.¹¹⁰ The overall effect of a regime may be 'deadening'¹¹¹ or 'quite inadequate'.¹¹² From the outset, the CPT has encouraged the provision of appropriate work¹¹³ at suitable rates of remuneration,¹¹⁴ educational

106 *Supra* note 94. Rules 1-3.

107 *Ibid.* Rules 65-66, 71-86.

108 Cf. B. Hudson, *Justice Through Punishment* (1987) 19, 165 et seq.

109 *United Kingdom Report, supra* note 32, at paras. 84-85.

110 *French Report, supra* note 32, at para. 126.

111 *Swedish Report, supra* note 32, at para. 57.

112 *United Kingdom Report, supra* note 32, at para. 52.

113 Cf. *Austrian Report, supra* note 32, at para. 34 (lack of appropriate work for women prisoners; underutilization of workshops owing to staffing shortages); *Swedish Report, supra* note 32, at para. 92 (tedious nature of elementary work); *United Kingdom Report, supra* note 32, at paras. 53-5 (majority of inmates had no work; what work was available was of a 'dull, repetitive nature'); *French Report, supra* note 32, at para. 126 (more work needed); *Finnish Report, supra* note 32, at paras. 84 and 95 (work places limited).

114 *United Kingdom Report, supra* note 32, at para. 55.

opportunities,¹¹⁵ and adequate recreation facilities.¹¹⁶ Subsequently, the CPT has developed its own statement of basic treatment objectives with quality of life being assessed in terms of the existence of beneficial activities, individualized treatment, and good relationships between staff and prisoners.¹¹⁷

[T]he CPT considers that prisoners should have access to programmes of activities which enable them to spend a reasonable part of the day (eight hours or more) outside their cells, engaged in purposeful activities of a varied nature (group association activities, education, sport, work with vocational value). Further, the legal status and needs of sentenced and remand prisoners are not the same: this should be reflected in the regimes applied to them.¹¹⁸

There are further examples of convergence between other 'basic principles' found in the Rules and the approach of the CPT. Thus the Rules referring to supervision of penal institutions by national inspectorates and boards of visitors¹¹⁹ are mirrored in recommendations¹²⁰ which refer to the involvement of external bodies to inspect and to deal with prisoners' grievances, but which do not take over day-to-day management.¹²¹ The CPT is also concerned that information on detainees' rights is made available in appropriate translations,¹²² and that foreign nationals should not be treated more oppressively.¹²³ Part V of the Rules dealing with the specific needs and rights of special categories of prisoners¹²⁴ is replicated in CPT

115 E.g., *United Kingdom Report*, *supra* note 32, at para. 55 (provision 'not sufficiently developed to make a significant impact'); *Finnish Report*, *supra* note 32, at paras. 84-5 (concentration on development of vocational skills 'should not be allowed to overshadow the need to provide those detained with a satisfactory range of educational opportunities').

116 E.g., *Austrian Report*, *supra* note 32, at para. 34 (underuse of gymnasium through staffing shortages) and 78 (no open-air access in police jail); *Swedish Report*, *supra* note 32, at paras. 50-2 (exercise areas 'left a great deal to be desired'); *Maltese Report*, *supra* note 32, at para. 45 (inadequate exercise time in open air); *Swiss Report*, *supra* note 32, at paras. 22-3 (access to open air restricted) and 30 (no sporting facilities); and *German Report*, *supra* note 32, at para. 159 (removal as sanction of outdoor exercise 'unacceptable').

117 *Swiss Report*, *supra* note 32, at para. 72.

118 *Finnish Report*, *supra* note 32, at para. 96; cf. *French Report*, *supra* note 32, at para. 108; *Swiss Report*, *supra* note 32, at para. 30; cf. *German Report*, *supra* note 32, at para. 100.

119 *Supra* note 94. Rules 4-5.

120 E.g., *Austrian Report*, *supra* note 32, at para. 87 (independent visiting body would improve standards in police jails); *Danish Report*, *supra* note 32, at para. 59 (restrictions on access by board of visitors 'surprising') and para. 104 (need for independent body to deal with complaints); *Swedish Report*, *supra* note 32, at paras. 135-7 (recommended that State explore possibility of introducing independent inspection body).

121 Cf. *Maltese Report*, *supra* note 32, at para. 61 (possibility of 'power vacuum' caused by absence of prison director being filled by board of visitors thought undesirable).

122 *Austrian Report*, *supra* note 32, at para. 60; *United Kingdom Report*, *supra* note 32, at paras. 105 (information booklet available in several languages, but not English) and para. 213; *Swedish Report*, *supra* note 32, at para. 29; *French Report*, *supra* note 32, at para. 77; *Swiss Report*, *supra* note 32, at paras. 38 and 64; *Finnish Report*, *supra* note 32, at para. 42. Cf. Rules 6 and 41.

123 *Danish Report*, *supra* note 32, at para. 65 (allegations of 'negative and mistrustful' attitude towards asylum seekers); *Maltese Report*, *supra* note 32, at paras. 51 (general allegations of discrimination) and 74-8 (detainees under immigration legislation held in 'stultifying' conditions). Cf. Rule 2.

124 *Supra* note 94. Rules 90-100.

recommendations calling for status to be considered. Thus the CPT considers it better for unconvicted prisoners to be held in prisons than in police stations,¹²⁵ and such inmates should be able to wear their own clothing rather than prison issue.¹²⁶ Where work is done by remand prisoners, it should be remunerated.¹²⁷ Where mental illness is the reason for deprivation of liberty, it is important that individuals be held in appropriate hospitals with suitably qualified staff¹²⁸ and sufficient resources.¹²⁹

The importance of the calibre of staff is acknowledged in Part III of the European Prison Rules¹³⁰ as having an important bearing on the extent to which the dignity of the inmate is acknowledged and respected. Similarly this theme is found in CPT reports. There is a reduced risk of ill-treatment of prisoners if the detention of inmates¹³¹ and the resolution of prison disturbances¹³² are matters for the prison service and not the police. There is a clear need for management to indicate to subordinate officers that brutality or ill-treatment is not tolerated.¹³³ Above all, attention must be given to selection and training of prison staff. Thus an individual's abilities in 'interpersonal communication' skills should be taken into account at recruitment¹³⁴ and enhanced through training.¹³⁵ Training needs to include suicide prevention¹³⁶ and, where relevant, an awareness of foreign cultures.¹³⁷ The end result should be the establishment of communication¹³⁸ and trust¹³⁹ between staff and inmates. Indications of inappropriate attitudes on the part of staff have included the display of a collection of weapons (in a Swiss jail)¹⁴⁰ and (in England) attitudes which were 'rather militaristic' bordering upon the display of contempt for

125 *Finnish Report*, *supra* note 32, at para. 53; cf. Rules 91-98.

126 *United Kingdom Report*, *supra* note 32, at para. 78.

127 *Maltese Report*, *supra* note 32, at para. 47; cf. Rule 76, *supra* note 94.

128 *Swiss Report*, *supra* note 32, at paras. 20 and 67; cf. Rule 100, *supra* note 94.

129 Cf. *United Kingdom Report*, *supra* note 32, at para. 165; *Swedish Report*, *supra* note 32, at para. 120; *French Report*, *supra* note 32, at para. 196; and *Dutch Report*, *supra* note 32, at para. 130; cf. Rule 100, *supra* note 94.

130 Rules 51-63.

131 *Maltese Report*, *supra* note 32, at paras. 59-60 (referring to Rule 54(2)); *Finnish Report*, *supra* note 32, at para. 53; cf. *Austrian Report*, *supra* note 32, at para. 88 (police who discharge custodial duties should receive special training).

132 *French Report*, *supra* note 32, at para. 87; *German Report*, *supra* note 32, at paras. 64-5.

133 *French Report*, *supra* note 32, at para. 13; cf. Rule 63, *supra* note 94.

134 *United Kingdom Report*, *supra* note 32, at para. 96; *French Report*, *supra* note 32, at para. 129; *Swiss Report*, *supra* note 32, at para. 74; *German Report*, *supra* note 32, at para. 70; cf. Rule 54(1), *supra* note 94.

135 *Danish Report*, *supra* note 32, at para. 52; *United Kingdom Report*, *supra* note 32, at paras. 94-6; *Swiss Report*, *supra* note 32, at para. 74; *Finnish Report*, *supra* note 32, at para. 124; cf. Rule 55, *supra* note 94.

136 *United Kingdom Report*, *supra* note 32, at para. 174; *Swiss Report*, *supra* note 32, at para. 82.

137 *Swiss Report*, *supra* note 32, at para. 65.

138 Cf. *Swiss Report*, *supra* note 32, at para. 40; *Dutch Report*, *supra* note 32, at paras. 90-2.

139 *German Report*, *supra* note 32, at para. 69 (special difficulties in institutions of former East Germany); cf. *Danish Report*, *supra* note 32, at paras. 45-6.

140 *Swiss Report*, *supra* note 32, at paras. 70-1.

inmates.¹⁴¹ Positive relations are seen as important for ensuring 'humane treatment', but also assist in maintaining 'effective control and security'.¹⁴²

2. Conditions of Detention

Part II of the European Prison Rules deals with the management of prison systems and considers such matters as reception, accommodation and food, personal hygiene, medical services, and general discipline. Above all, the standard of accommodation has an impact on the general environment since it affects the morale of inmates and staff alike and the attainment of treatment objectives.¹⁴³ It must meet 'the requirements of health and hygiene, due regard being paid to climatic conditions' and offer 'a reasonable amount of space, lighting, heating and ventilation'.¹⁴⁴ Sanitary arrangements should permit inmates 'to comply with the needs of nature where necessary and in clean and decent conditions',¹⁴⁵ while personal hygiene needs require baths or showers to be available 'as frequently as necessary... according to season and geographical region, but at least once per week'.¹⁴⁶ The physical conditions of detention lie at the heart of any assessment of the treatment of inmates. Certain visits have uncovered situations of detention which are 'wholly unacceptable', 'humiliating' or 'debasing' through to those which indeed constitute 'inhuman and degrading treatment'. Criticism has centred upon accommodation,¹⁴⁷ personal hygiene issues,¹⁴⁸ clothing and bedding,¹⁴⁹ and food.¹⁵⁰ Yet material provisions are not enough: the CPT stresses the need to look beyond superficial appearances to consider the effect of the whole detention regime.¹⁵¹

With a substantial number of members and experts with a medical background, it is not surprising that the CPT has considered in some detail health care services. The

141 *United Kingdom Report, supra* note 32, at paras. 80-2.

142 Cf. *Dutch Report, supra* note 32, at para. 90 (relaxed regime for high-risk inmates in special unit).

143 Explanatory Memorandum is published along with the European Prison Rules, *supra* note 94, 39.

144 *Supra* note 94. Rule 15.

145 *Ibid.* Rule 17.

146 *Ibid.* Rule 18.

147 E.g., *Austrian Report, supra* note 32, at paras. 523 and *Swiss Report, supra* note 32, at para. 114 (need for mattresses); *Swedish Report, supra* note 32, at paras. 17-8 (size of cubicles in detention centre); *French Report, supra* note 32, at paras. 16-9 ('deplorable' condition of overcrowded and poorly ventilated cells); *Swiss Report, supra* note 32, at para. 26 (inadequate lighting); *Finnish Report, supra* note 32, at para. 20 (detention conditions for intoxicated individuals resembled 'human car park'); and *German Report, supra* note 32, at para. 95 (need for removal of certain physical features associated with former Communist regime before unit should be reused).

148 E.g., *Austrian Report, supra* note 32, at paras. 52-3 (access to toilet and washing facilities); *United Kingdom Report, supra* note 32, at paras. 75-6 ('slopping out' in food distribution areas and lack of dish cloths, etc); and *French Report, supra* note 32, at paras. 113-4 (washing of clothing and bed linen).

149 E.g., *Austrian Report, supra* note 32, at para. 85 and *French Report, supra* note 32, at para. 71.

150 E.g., *Austrian Report, supra* note 32, at paras. 54-5, *Swedish Report, supra* note 32, at paras. 19-20 and *French Report, supra* note 32, at para. 30 (insufficient food provided to detainees).

151 *Swedish Report, supra* note 32, at para. 70.

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European Prison Rules themselves specify that medical services should be 'organized in close relation with the general health administration of the community or nation',¹⁵² and should include suitable psychiatric services. Prisoners are to be examined 'as soon as possible upon admission and thereafter as necessary',¹⁵³ and authorization of the prison medical officer may be required before disciplinary sanctions can be imposed or instruments of restraint applied.¹⁵⁴ Similar concerns are found in CPT reports: whether prisoners are examined upon admission;¹⁵⁵ whether punishments such as solitary confinement are accompanied by medical supervision;¹⁵⁶ whether adequate first aid cover is available;¹⁵⁷ the extent of the independence and professional standing of prison doctors and other medical staff;¹⁵⁸ the issue of how HIV positive inmates are dealt with;¹⁵⁹ and the treatment of prisoners in psychiatric units.¹⁶⁰ The complexity and importance of the topic prompted the CPT in its 1992 report to issue a detailed checklist or policy statement of its approach which in several respects goes beyond the European Prison Rules. For the CPT, 'prisoners are entitled to the same level of medical care as persons living in the community at large' since health care can help combat the infliction of ill-treatment and indeed can contribute positively to the quality of life within places of detention since inadequate care can 'lead rapidly to situations falling within the scope of the term "inhuman and degrading treatment"'.¹⁶¹ Seven distinct requirements are identified. The first is access to a doctor without delay upon admission, and without undue delay upon request at any time thereafter. Good practice would include the issue of a leaflet detailing the operation of the health care system at the time of reception. Access to services should be upon a confidential basis (for example, by a note sent in a sealed envelope), and should include at the minimum access to regular outpatient, dental and emergency care.¹⁶² Second, there has to be 'equivalence of care' between community and prison health services in both general medicine (including physiotherapy, nursing care, etc.) and psychiatric

152 *Supra* note 94. Rule 26(1).

153 *Ibid.* Rule 29.

154 *Ibid.* Rules 38(1) and (3), and 39.

155 E.g., *Danish Report, supra* note 32, at para. 48; *Swedish Report, supra* note 32, at para. 115; *French Report, supra* note 32, at para. 178.

156 E.g., *Danish Report, supra* note 32, at para. 29.

157 E.g., *Swedish Report, supra* note 32, at para. 122; *Maltese Report, supra* note 32, at para. 52.

158 E.g., *United Kingdom Report, supra* note 32, at para. 177; *Finnish Report, supra* note 32, at para. 102.

159 E.g., *French Report, supra* note 32, at paras. 180-81; *Swiss Report, supra* note 32, at para. 34; *Finnish Report, supra* note 32, at para. 40.

160 *German Report, supra* note 32, at paras. 124-36 (management of Straubing Prison's forensic psychiatry department in the light of findings that the head psychiatrist 'rarely prescribed antidepressants', did not consider it appropriate to seek patients' consent on a systematic basis, welcomed the 'sinister reputation' which surrounded the unit as 'facilitating his task', and did not see the need for external support).

161 *Third General Report, supra* note 19, at paras. 30 and 31.

162 *Ibid.*, at paras. 33-7: this implies the presence at all times of a qualified first-aidier who can call upon a doctor at all times, backed up by a full inpatient service in a prison or civil hospital.

care, since high incidences of psychiatric disorders are likely in prisons.¹⁶³ Third, general community standards of informed consent before treatment and confidentiality of care and records should apply in prisons with equal force.¹⁶⁴ Fourth, health care should be directed not only at treatment but also at prevention of disease, through supervision of hygiene, suicide prevention measures, the fostering of social and family ties, medical counselling, and the giving of proper information on transmittable diseases such as AIDS.¹⁶⁵ Fifth, special attention should be paid to particular categories of detainees, for example, pregnant mothers and mothers who have recently given birth, adolescents, and prisoners with personality disorders or who otherwise are unsuited for continued detention on account of age or severe handicap.¹⁶⁶ Sixth, the professional independence of health care staff should be enhanced by aligning them 'as closely as possible with the mainstream health-care in the community at large'.¹⁶⁷ Finally, professional competence to deal with particular requirements of prison patients must be assured.¹⁶⁸

The promulgation of this statement on health care perhaps illustrates the work of the CPT at its most persuasive. Such 'measuring rods' reflect the 'experience of its members and of a careful and well-balanced comparison of various systems of detention'.¹⁶⁹ However, they also raise the issue as to whether the CPT should proceed by acting in a quasi-legislative manner after discussions behind closed doors since the effect may be seen as akin to a papal pronouncement: while the underlying morality may receive some support, the infallibility is open to challenge. Greater citation in aid of the authority of the European Prison Rules would confer added weight upon general policy statements and particular recommendations. As a matter of tactics and to help ensure State cooperation, the CPT may be wiser in respect of prison conditions at least to be seen to be interpreting an existing text, rather than developing what is projected as a completely new body of principles and practices.

B. The CPT and the European Convention on Human Rights

Through the right of individual petition, individuals can challenge certain features of detention in terms of its compatibility with the European Convention on Human Rights. The Commission and Court have made a significant contribution towards extending the rights of detainees,¹⁷⁰ so how does the CPT fit into this existing protection? The question has been raised whether examination of an individual's

163 Ibid., at paras. 38-44.

164 Ibid., at paras. 45-51.

165 Ibid., at paras. 52-63.

166 Ibid., at paras. 64-70.

167 Ibid., at paras. 71-74.

168 Ibid., at paras. 75-77.

169 Cf. *First General Report*, *supra* note 6, at para. 95.

170 See further, Council of Europe, Human Rights File No. 5, *Conditions of Detention and the ECHR* (1981); A. Reynaud, *Human Rights in Prisons* (1986) 37-113.

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case by the CPT would bar the applicant from making use of the Human Rights Convention, given that it provides that the Commission cannot deal *inter alia* with any matter which 'has already been submitted to another procedure of international investigation'.¹⁷¹ Consequently, the Torture Convention provides that any domestic or international law which provides greater protection is not prejudiced, and in particular, that the competence of the Commission and Court is not limited.¹⁷² Indeed, the CPT readily discusses individual cases of allegations of severe ill-treatment of identifiable (but not identified)¹⁷³ detainees.¹⁷⁴ The real issue is again the CPT's 'gradual compilation of a corpus of standards' which is likely to differ from that developed under the Human Rights Convention. While both treaties refer to 'torture' and to 'inhuman and degrading treatment', the thrust of CPT activity is pre-emptive action through non-judicial means such as regularly visiting particular establishments; the CPT's focus is the present and future rather than the past; and its concern is with the establishment of dialogue rather than with the condemnation of State authorities. Preventive action is difficult to shape, and there may be a tendency to advance approaches which are overly broad. Not all the Committee members are lawyers, and the multidisciplinary composition will reflect wider concerns. This more dynamic, critical and purposeful approach to prison conditions will in turn call into question some perceived failures of the Commission and Court to deal with certain features of detention. For the Commission and Court, peaceful cohabitation may be difficult as the CPT may turn out to be an uneasy bedfellow.

1. 'Torture' and 'Inhuman and Degrading Treatment'

The very essence of the work of the Torture Committee is the prevention of 'torture' or 'inhuman and degrading treatment or punishment'. This terminology is also found in Article 3 of the European Convention on Human Rights and has been interpreted as prohibiting behaviour such as, for example, corporal punishment

171 ECHR, Art. 27(1)(b); *Cassese*, *supra* note 39, at 135. See further P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed., 1990) 71-75.

172 Art. 17(1) and (2).

173 Cf. Art. 11(3): '(N)o personal data shall be published without the express consent of the person concerned'.

174 E.g., *Swiss Report*, *supra* note 32, at para. 101 (six cases of assault on prisoners in Geneva police station); *French Report*, *supra* note 32, at para. 85 (five prisoners severely battered and assaulted after a failed escape attempt in Marseilles); *Danish Report*, *supra* note 32, at paras. 19-20 (serious ill-treatment of a Gambian and a Tanzanian in Copenhagen prisons); *Danish Report*, *supra* note 32, at paras. 33 & 50 and *United Kingdom Report*, *supra* note 32, at para. 64 (cases of suicide); *United Kingdom Report*, *supra* note 32, at paras. 192-4 (transfer of prisoner 19 times in 18 months); *Swiss Report*, *supra* note 32, at para. 79 (last-minute cancellation of transfer of prisoner to home State); *German Report*, *supra* note 32, at para. 21 (ill-treatment of demonstrators in Munich); *Dutch Report*, *supra* note 32, at paras. 634 (assault on remand prisoner). But cf. para. 49 of the Explanatory Report to the Convention: '[The CPT] should not be concerned with the investigation of individual complaints (for which provision is already made, e.g. under the [ECHR])', *supra* note 143.

(whether ordered by a judge¹⁷⁵ or administered by a school teacher¹⁷⁶) and certain deportation or expulsion practices.¹⁷⁷ Both the Commission and the Court have spent not inconsiderable effort in determining the minimum level of severity required before there is a breach of Article 3, and have drawn distinctions between the three forms of behaviour. The nature and context of the treatment or conditions (including its length and method of imposition) are considered in respect of the age, sex, or health of the individual applicant.¹⁷⁸ What is prohibited is suffering which goes beyond that which is excessive as considered in the light of prevailing general standards¹⁷⁹ with distinctions being based primarily on the intensity of the suffering inflicted. Thus 'torture' is 'deliberate inhuman treatment causing very serious and cruel suffering'; 'inhuman' treatment is that which causes 'intense physical and mental suffering' if not 'actual bodily injury'; and 'degrading' treatment is 'such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance'.¹⁸⁰

The result is line-drawing which is often contentious.¹⁸¹ More critically, it has proved difficult to bring general detention conditions within the scope of the Article. The feeling seems to be that there is always 'an inevitable element of suffering or humiliation' in the very nature of legitimate punishment.¹⁸² Even highly unsatisfactory conditions in mental hospitals may escape Article 3 censure.¹⁸³ Before there is a finding of breach of the provision, there must be extreme or excessive State action, or a failure to take extraordinary humanitarian measures,¹⁸⁴ or a finding of extreme psychological effects of imprisonment in an individual case

175 *Tyrer case*, ECHR (1978) Series A, No. 26.

176 Cf. *Y v. United Kingdom*, ECHR (1992) Series A, No. 247-A.

177 Cf. Appl. 4162/69, *X v. Federal Republic of Germany*, YB XIII, 806; *Vilvarajah & Others case*, ECHR (1991) Series A, No. 215; *Beldjoui case*, ECHR (1992) Series A, No. 234-A.

178 *Soering v. United Kingdom*, ECHR (1989) Series A, No. 161, para. 100.

179 *Tyrer case*, *supra* note 175, at para. 38.

180 *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, para. 167.

181 Cf. criticism of the Court's decision in *Ireland v. United Kingdom*, *ibid.* See Amnesty International, *Torture in the Eighties* (1984) 15. The Commission had held that use of the 'five techniques' (hooding, wall-standing, subjection to continuous noise, deprivation of sleep and deprivation of food) against suspects by members of the security forces constituted 'torture'. The Court, however, held these did not 'occasion suffering of the particular intensity and cruelty implied' by the term. Amnesty International in particular considered the Court's disposal as surprising 'given that the Commission had found convincing evidence of weight loss, mental disorientation and acute psychiatric symptoms'. See, too, *Costello-Roberts case*, ECHR (1993) Series A, No. 247-C, in which the Court held by a 5 to 4 majority that the infliction of corporal punishment on a young boy was not serious enough to amount to a breach of Article 3. The minority, however, disagreed because of the 'ritualised character' of the punishment inflicted on a 'lonely and insecure 7-year-old boy'.

182 *Ireland v. United Kingdom*, *ibid.*, at para. 167.

183 *Y v. United Kingdom*, (1977) DR 10, 37.

184 E.g., *McFeely v. UK*, (1980) DR 20, 44 (prison authorities to exercise custodial authority in such a way as to safeguard health, etc of all prisoners, even those taking part in unlawful protest involving refusal to wash). For a summary of the case-law, see Reynaud, *supra* note 170, at 37-113.

caused by special holding conditions.¹⁸⁵ Thus while 'prolonged removal from association with others is undesirable', such must be considered in terms of 'the particular conditions of its application, including its stringency, duration and purpose, as well as its effects on the person concerned',¹⁸⁶ while State interests (for example, security considerations or the interests of justice) may even justify solitary confinement involving sensory deprivation.¹⁸⁷ On the other hand, national authorities must 'maintain a continuous review of the detention arrangements employed with a view to ensuring the health and well-being of all prisoners with due regard to the ordinary and reasonable requirements of imprisonment'.¹⁸⁸

In contrast, the CPT's approach has been more vigorous. Ill treatment of detainees lies at the very heart of its crusade. It is said to be 'repugnant to the principles of civilised conduct' and 'not only harmful to the victim but also degrading for the official who inflicts it and ultimately harmful' to State authorities.¹⁸⁹ The findings of routine infliction of torture in Turkey¹⁹⁰ were repugnant enough to suggest that the Commission on Human Rights would reach similar conclusions. But the real contrast arises with the view taken of 'inhuman or degrading treatment' which for the CPT can refer to both positive actions and omissions to act.¹⁹¹ Ill treatment has been found to exist in reference to specific treatment or practices as well as general holding conditions, where it is unlikely that the Commission would have considered that there had been a violation of Article 3. Thus the CPT has questioned ill-treatment such as solitary confinement (which could lead to 'isolation syndrome'¹⁹²), holding in overcrowded and ill-equipped conditions,¹⁹³ the manner in which asylum-seekers are questioned by police,¹⁹⁴ and the handcuffing of prisoners to their beds in civilian hospitals.¹⁹⁵ French practices

185 Cf. *Soering v. United Kingdom*, *supra* note 178; see Breitenmoser & Wilms, 'Human Rights v. Extradition', 11 *Mich.J.Int'l.L.* (1990) 845, and Blumenwitz 'Fall Soering' 16 *EuGRZ* (1989) 314.

186 *R v. Denmark*, (1985) DR 41, 149 at 153.

187 *Kröcher & Möller v. Switzerland*, (1981) DR 26, 24; *Bonzi v. Switzerland*, (1978) DR 12, 185.

188 *Dhoest v. Belgium*, (1987) DR 55, 5 at 21.

189 Cf. *Finnish Report*, *supra* note 32, 7.

190 It was found that suspects in Turkish police stations are regularly suspended by the arms and wrists, had electric shocks applied to genitals and other sensitive parts of the body, had the soles of their feet beaten, and had their bodily orifices forcibly penetrated with a stick or truncheon. See *Public Statement on Turkey*, *supra* note 28, at paras. 5-8 and 15. The findings relied upon medical expertise amongst the delegation. The use of torture in Turkey has been discussed in medical writings: e.g., Turdér *et al.*, 'Torture of Turkish Kurds', *The Lancet*, Vol. 1 (1989) 1319 (and replies in Vol. 2 (1989) 221-22).

191 *Finnish Report*, *supra* note 32, at paras. 60-5 (development of 'culture conducive to inter-prisoner violence' in prison where drug-related assaults were found to be commonplace) para. 139 (mixing of categories of prisoner posing a threat to the safety of inmates); *Swiss Report*, *supra* note 32, at para. 16 (further information sought on allegations of bullying of inmates).

192 *Danish Report*, *supra* note 32, at para. 23 (further information sought on practices); cf. *Swiss Report*, *supra* note 32, at paras. 48-52 (non-voluntary isolation lasting up to seven years without sociotherapeutic stimulation for prisoners); *German Report*, *supra* note 32, at para. 72 (solitary confinement should be of minimum duration).

193 *French Report*, *supra* note 32, at paras. 92-3.

194 *Danish Report*, *supra* note 32, at para. 117.

195 *French Report*, *supra* note 32, at para. 90.

which permitted sexual relations between prisoners and their partners in conditions of openness were labelled as 'degrading',¹⁹⁶ and the placing of juveniles in certain detention cells as 'inhuman'.¹⁹⁷

The difficulty lies in using the same labels – inhuman or degrading treatment – for different purposes. The Commission and Court have been left to develop their own measuring scale for assessing the seriousness of the physical or mental pain inflicted as best they can. The outcome is that relatively harsh instances of punishment or treatment may fail to be condemned.¹⁹⁸ Should the CPT be bound by this case-law? It has been suggested that the consequence of any departure would lead to 'hopeless confusion, legal uncertainty, and ultimately a weakening of faith in the Human Rights Convention machinery', and thus the CPT should concentrate on the 'grey area' between irreproachable conditions of detention and those conditions which just fall short of a violation of Article 3, leaving the more serious conditions to be referred to the Commission for deliberation.¹⁹⁹ This would undermine the CPT's *raison d'être*. It stresses the protection of the Commission and Court rather than tackling the real issue of whether these organs have adequately protected detainees' rights. A more appropriate approach would be to confront the Commission and Court with CPT reports where 'inhuman or degrading' situations have been established and to seek to extend Article 3 protection to such circumstances. Whether the Commission is likely to be sympathetic to attempts to revise its jurisprudence is not yet clear; in the 1993 decision in *Delazarus v. United Kingdom* the argument arose but an answer was avoided.²⁰⁰ Delazarus had sought to rely on a CPT report which had criticized holding conditions in certain English prisons, and which concluded that the cumulative effect of overcrowding, lack of integral sanitation leading to 'slopping out', and inadequate regime activities all amounted to 'inhuman and degrading treatment'.²⁰¹ The Commission dispensed with the application in the following manner:

The Commission does not doubt that the conditions in Wandsworth Prison, involving overcrowding, a lack of integral sanitation and poor hygiene, were extremely unsatisfactory and that they were in urgent need of improvement... However, the Commission is only competent to deal with the case which it has before it, not the general situation at Wandsworth. The applicant in the present case cannot complain of overcrowding because throughout his stay at Wandsworth he was in a single cell. This fact must have reduced the difficulties created by the lack of integral sanitation in the cell.²⁰²

196 *Ibid.*, at para. 133.

197 *Ibid.*, at paras. 96-7.

198 Trechsel, 'Zum Verhältnis zwischen der Folterschutzkonvention und der Europäischen Menschenrechtskonvention', in *Völkerrecht im Dienste des Menschens: Festschrift für Hans Haug* (1986) at 356-57.

199 Trechsel, *ibid.*, at 358-59 (author's translation).

200 Application 17525/90 Decision on the Admissibility, 16 February 1993.

201 *United Kingdom Report*, *supra* note 32, at para. 57.

202 *Delazarus*, *supra* note 200, at para. 1.

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Until now, suggestions that a progressive reinterpretation of Article 3 is possible²⁰³ have run into the difficulty that the preponderance of case-law runs against it, and hence discussion has centred upon the adoption of an additional Protocol to guarantee to prisoners additional procedural rights and minimum entitlements to facilities and services (such as medical assistance, food, training, and so on).²⁰⁴ While any threat of 'hopeless confusion' was avoided in *Delazarus*, CPT reports will continue to give ammunition to applicants to question general holding conditions. Although there are certain structural limitations in the Human Rights Convention enforcement machinery,²⁰⁵ if the Commission and Court accept a less restrictive approach the potential may well exist to achieve under the Human Rights Convention something akin to what has occurred in the United States where systematic use of the Bill of Rights and State constitutions by inmates has had a vital impact on detention regimes;²⁰⁶ even though this was achieved at the expense of constitutional propriety and judicial competence.²⁰⁷ The real surprise is that national authorities in establishing the Torture Committee have agreed to allow another institution to prompt not only their human rights consciences but also those of the Commission and the Court. However, whether these organs will permit CPT reports to be used to open this particular Pandora's box remains to be seen.

2. Procedural and Substantive Rights for Detainees

The European Convention on Human Rights contains associated protections for detained persons. Procedural safeguards must exist to ensure that detention is lawful. Thus under Article 5 detainees may challenge confinement in inappropriate regimes²⁰⁸ or the legality of continuing detention²⁰⁹ and lengthy pre-trial detention,²¹⁰ while detainees must be brought 'promptly' before a judicial officer when deprived of their liberty,²¹¹ and there must be periodic review of the legality

203 Trechsel, *supra* note 98; Rodley, 'Written communication on "Human Rights of Persons Deprived of their Liberty"', 7th International Colloquy on the ECHR, 1990, Doc. H/Coll (90) 17.

204 Lang, *supra* note 105; Spielman, 'La protection des droits de l'homme: Ouid des droits des détenus?', in *Protection des Droits de l'Homme: La Dimension Européenne: Essays Published in Honour of Gérard J Wiarda* (1988) 589.

205 Cf. Warbrick, 'Coherence and the ECHR', 11 *Mich.J.Int'l L.* (1990) 1073.

206 Cf. Fiss, 'The Supreme Court: 1978 Term', 93 *Harv. L. Rev.* (1979) 1.

207 See, for example, Prigmore, 'Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform', 12 *HarvCRLR* (1977) 367; Clements, 'Prisoners, 1983, and the Federal Judge as Warden', 9 *UToLLR* (1978) 873. The arguments against social policy making by judges are forcibly put by D. Horowitz in *Courts and Social Policy* (1976), especially in Chapter 7.

208 E.g., *Boamar case*, ECHR (1988) Series A, No. 129 (confinement of juvenile in adult prison); cf. *Ashingdane case*, ECHR (1985) Series A, No. 93 (confinement of psychiatric patient in secure rather than in ordinary hospital).

209 E.g., *Winterwerp case*, ECHR (1979) Series A, No. 33 (challenging mental health detention order); *Thynne, Wilson & Gunnell case*, ECHR (1990) Series A, No. 190 (discretionary life sentences imposed upon sex offenders); *Doran v. the Netherlands*, Application 15268/92, Decision of 30 November 1992 (detention centre refused to implement court order instructing release).

210 E.g., *Bezicheri case*, ECHR (1989) Series A, No. 164.

211 Cf. *Brogan and others case*, ECHR (1988) Series A, No. 145-B.

of continuing detention.²¹² Under Article 6, due process guarantees are further extended for example to disciplinary proceedings which may lead to deprivation of liberty²¹³ or substantial remission of sentence.²¹⁴ This emphasis on subjecting initial and continuing detention to adequate scrutiny is followed by the CPT. Thus the CPT will be concerned if procedures leading to loss of liberty are unsatisfactory from a legal point of view.²¹⁵ The CPT has also borrowed the idea of periodic review of the legality of detention and applied it to judicially imposed solitary confinement.²¹⁶ Such provisions found in the Human Rights Convention generally have been given an interpretation favouring individual rights,²¹⁷ and the CPT for its part follows the trend of the case-law. There is, here, little in the way of conflict between approaches under the two treaties.

However, in three separate areas the CPT can be seen to be advancing cautiously beyond Human Rights Convention protection. First, the CPT has considered the imposition of disciplinary or restraining measures. The Commission and Court have not clearly settled the question of when due process guarantees must accompany such action, beyond indicating that both domestic classification of the offence and severity of sanction are relevant.²¹⁸ Further, the Commission does not consider solitary confinement to violate Article 11's guarantee of freedom of association.²¹⁹ These issues are approached by the CPT from an alternative perspective. In imposing penalties, there must be proportionality in that the punishment must reflect the offence.²²⁰ Safeguards must accompany the imposition of particular forms of punitive detention such as solitary confinement²²¹ or 'special restraint' measures.²²²

212 E.g., *Thynne, Wilson and Gunnell case*, ECHR (1990) Series A, No. 190.

213 *Engel case*, ECHR (1976) Series A, No. 22, paras. 81-2.

214 *Campbell & Fell case*, ECHR (1984), Series A, No. 80; cf. *McFeely et al v. United Kingdom*, (1980) DR 20, 44.

215 *Swedish Report*, *supra* note 32, at para. 146.

216 *Danish Report*, *supra* note 32, at para. 29.

217 For recent summaries, see J.L. Murdoch, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person*, Doc. H (92) 13, Council of Europe, 1992; A. Grotrian, *Article 6 of the European Convention on Human Rights: The Right to a Fair Trial*, Doc. H (92) 3, Council of Europe, 1992; P. van Dijk and G.J.H. van Hoof, *supra* note 171, at 251-357, 368-396.

218 *Kiss v. United Kingdom*, (1976) DR 7, 55 (80 days' loss of remission not substantial enough to call for Art. 6(1) due process protection); *Pelle v. France*, (1986) DR 50, 263 (12 days' placement in punishment cell and 18 days' loss of remission in the case of a prisoner serving a lengthy sentence was not severe enough to bring the matter within the criminal sphere).

219 *McFeely and Others v. United Kingdom*, (1980) DR 20, 44 at 97-98.

220 *Austrian Report*, *supra* note 32, at para. 35 (discussing 14 days' isolation awarded in the case of insulting language towards a prison officer); *German Report*, *supra* note 32, at para. 72 (imposition of solitary confinement).

221 *Swedish Report*, *supra* note 32, at para. 80; *French Report*, *supra* note 32, at para. 203; cf. *Finnish Report*, *supra* note 32, at para. 74 and *German Report*, *supra* note 32, at para. 83 (detailed recommendations include giving reasons for solitary confinement in writing; right of prisoner to present his views on the matter beforehand; and full review and psychiatric assessment at least every three months).

222 *Danish Report*, *supra* note 32, at para. 38; *Swedish Report*, *supra* note 32, at paras. 127-30; cf. *United Kingdom Report*, *supra* note 32, at paras. 92-93 ('body belt' potentially dangerous as a form of restraint).

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Institutional practices which proceed on the basis of 'a minimum of paper, a maximum of efficiency' are thus suspect.²²³ Second, the CPT has hinted at the need to tackle lengthy detention on remand,²²⁴ a matter which the Court has proved unable to approach in interpreting Article 5's guarantee of 'trial within a reasonable time'.²²⁵ Third, the CPT has moved in to tackle the hiatus in protection accorded to individuals at the outset of criminal investigations, a gap partly attributable to the failure to consider deprivation of liberty of a suspect for interrogation a 'deprivation of liberty' in terms of this Article,²²⁶ and partly accounted for by the difficulties the Commission and Court have had in deciding when legal representation is called for.²²⁷ Here the aim is to develop general procedures which will provide safeguards against ill-treatment, backed up by a police complaints system which permits proper review.²²⁸ The CPT has thus encouraged States to allow detainees to advise a close relative or third party of their detention, the right of access to a lawyer, and the right to medical examination by a doctor of the detainee's choice (in addition to any examination by a doctor appointed by State authorities). The content of these three rights has been spelt out with some care. Their existence must be advised, and they should be accorded 'from the very outset of custody'.²²⁹ Notification of custody may be delayed in the interests of justice, providing reasons for delay are clearly circumscribed and subject to such safeguards as approval of a senior police officer or public prosecutor and to an express time limit.²³⁰ Access to a lawyer implies the right to a private interview, but if in exceptional cases it is felt desirable to place restrictions upon access to a particular lawyer of the detainee's choice, then unrestricted access should be given to another independent lawyer 'who can be trusted not to jeopardise the legitimate interests of the police investigations'.²³¹ The

- 223 Cf. *Swiss Report*, *supra* note 32, at para. 37 (need for proper weight to be given to procedural propriety in disciplinary proceedings).
- 224 *Danish Report*, *supra* note 32, at para. 113 (detention on remand lasting up to 2 years, often associated with a lengthy period of solitary confinement).
- 225 In *W v. Switzerland*, ECHR (1993) Series A, No. 254, the pre-trial detention of the applicant lasted just over four years. The Commission by 19 votes to 1 was of the opinion that Article 5(4) had been violated; a Chamber of the Court, by 5 votes to 4, disagreed. See further, Murdoch, *supra* note 217, at 510-17.
- 226 Cf. *X v. Federal Republic of Germany*, (1981) DR 24, 158.
- 227 E.g., *X v. Denmark*, (1982) DR 30, 93 (no right to legal representation to challenge the legality of detention); cf. *Boamar* case, ECHR (1988) Series A, No. 129, para. 60 (circumstances youthfulness of individual in which legal representation required to ensure effectiveness of adversarial nature of proceedings) and *S v. Switzerland*, ECHR (1991) Series A, No. 220, (restrictions on free communication between an accused remanded in custody and his lawyer breached Art. 6(3)(c)).
- 228 *Austrian Report*, *supra* note 32, at para. 97; *Maltese Report*, *supra* note 32, at para. 94; cf. *German Report*, *supra* note 32, at para. 19 ('positive situation' in large measure due to 'importance and care attached to the professional training of police officers').
- 229 *French Report*, *supra* note 32, at paras. 12 and 36; *Swiss Report*, *supra* note 32, at paras. 119-24; *Finnish Report*, *supra* note 32, at paras. 26 and 27; *German Report*, *supra* note 32, at paras. 35 and 39.
- 230 E.g., *Finnish Report*, *supra* note 32, at paras. 28-30.
- 231 *Ibid.*, para. 32.

actual conduct of the interrogating police should be recorded electronically.²³² Such recommendations highlight the CPT's emphasis on encouraging States to develop procedures to forestall the possibilities of inappropriate behaviour by police officers and the importance of efficient and effective systems of police complaints.²³³

The general thrust is thus to develop the principles of procedural propriety found in Articles 5 and 6 but free from the fine line-drawing and balancing undertaken by the Commission and Court. The recommendations go further than most systems of domestic law. Here, too, the possibility exists that applicants will begin to advance CPT standards before the Commission and Court in an attempt to extend further the protection accorded by the Human Rights Convention.

3. *Maintaining Communication with the Family and the Outside World*

Persons deprived of their liberty have also been able to rely upon other guarantees such as Articles 8, 9, 10 and 12 which protect privacy and family life, religious expression and the right to marry. The results can be summarized briefly. The Court's decisions in the prison censorship cases have progressively narrowed the ability of authorities to interfere with prisoners' correspondence to the extent necessary to meet State interests.²³⁴ Respect for family life implies that authorities must assist prisoners in maintaining effective contact with their close relatives and friends,²³⁵ but always having regard to the 'ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion' which must be accorded the national authorities in regulating contact.²³⁶ Article 12's protection of the rights to marry and to found a family has been interpreted by the Commission as requiring States to make arrangements to permit prisoners to marry (either inside institutions or by allowing special leave²³⁷), although conjugal visits have not yet attracted support, since they may prejudice good order and security in prisons.²³⁸ Still, there is some reluctance in permitting challenges which would unduly hamper the smooth running of the prison system, and many complaints fail on the grounds that the

232 *Austrian Report*, *supra* note 32, at para. 66; *Swedish Report*, *supra* note 32, at paras. 32-4; *Maltese Report*, *supra* note 32, at paras. 89-90; *French Report*, *supra* note 32, at paras. 47-9; *Swiss Report*, *supra* note 32, at paras. 125-7; *German Report*, *supra* note 32, at para. 43.

233 *Maltese Report*, *supra* note 32, at para. 94; *Finnish Report*, *supra* note 32, at paras. 50-51; cf. *Austrian Report*, *supra* note 32, at paras. 95-6 (observations on the need for proper balancing of interests behind rights of police officers to raise defamation actions for false allegations).

234 *Golder case*, ECHR (1975) Series A, No. 18; *Silver and others case*, ECHR (1983) Series A, No. 61; *Campbell & Fell case*, *supra* note 214; *Boyle & Rice case*, ECHR (1988) Series A, No. 131; *Schönenberger & Durmaz case*, ECHR (1988) Series A, No. 137; *McCallum case*, ECHR (1990) Series A, No. 183; cf. *T v. United Kingdom* (1983) DR 49, 5 (blanket prohibition on communication of artistic or scientific material not justified).

235 *X v. United Kingdom*, (1982) DR 30,113 (restrictions on visits with persons campaigning about prison medical treatment did not violate Art. 8).

236 *Boyle and Rice case*, *supra* note 234, at para. 74; see too *X v. United Kingdom*, *supra* note 235.

237 *Hamer v. United Kingdom*, (1977) DR 10, 174, and DR 24, 5.

238 *X & Y v. Switzerland*, (1978) DR 13, 241 (married couple in prison not allowed to share same cell).

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interferences are 'necessary in a democratic society' to achieve a legitimate end prescribed in the Convention.²³⁹

For its part, the CPT takes a path which broadly follows the trend of such case-law, but which in certain respects again seeks to extend (but less markedly so) the protection of detainees. Thus in order to secure eventual reintegration, limitations on contacts with the outside world (especially with family, partners and children) should only be justified upon compelling security grounds or by the lack of available resources.²⁴⁰ The CPT's recommendations also display a certain sensitivity perhaps missing from Commission and Court decisions. Letters sent by inmates should not be immediately recognizable as having been sent from a prison,²⁴¹ and a complete prohibition on telephone contact with families (especially where regular visits are not possible) is not acceptable.²⁴² National authorities must be able to justify prohibitions on visits from children under the age of 15²⁴³ or from persons with criminal records, drug users or non-residents.²⁴⁴ Visiting accommodation should be appropriate to facilitate communication,²⁴⁵ and where families live some distance from a prison, some flexibility in visiting arrangements should be possible.²⁴⁶

In contrast, the CPT has taken the line that intimacy between inmates and their spouses or partners during prolonged visits in conditions respecting privacy and dignity should be encouraged since this will help maintain stable relationships.²⁴⁷ The CPT has also been prepared to consider specific problems facing non-nationals, and has encouraged States to utilize the European Convention on the Transfer of Convicted Prisoners to permit the remainder of sentences to be served in home institutions.²⁴⁸ Several countries report a high percentage of foreign inmates, and

239 E.g., *McFeeley v. United Kingdom*, *supra* note 219.

240 *French Report*, *supra* note 32, at para. 130, citing in support Rule 43 of the European Prison Rules; cf. *United Kingdom Report*, *supra* note 32, at para. 110 (visiting entitlement of one hour per month not sufficient to allow the maintenance of good relationships).

241 *United Kingdom Report*, *supra* note 32, at para. 113.

242 *French Report*, *supra* note 32, at para. 135; cf. *Swedish Report*, *supra* note 32, at para. 78 (information sought on access to telephones in prison for inmates who do not receive regular visits).

243 *Swedish Report*, *supra* note 32, at para. 96.

244 *Ibid.*, at paras. 107-8 (State justification was to keep prison drug-free).

245 *Austrian Report*, *supra* note 32, at para. 76; *Swiss Report*, *supra* note 32, at para. 42 (poor ventilation; visitors and inmates required to raise their voices in order to be heard).

246 Cf. *Finnish Report*, *supra* note 32, at para. 135 (information on any travel arrangements to facilitate visits to remote prisons requested).

247 *French Report*, *supra* note 32, at paras. 130, 133-4.

248 *Ibid.*, at para. 155; *Swiss Report*, *supra* note 32, at para. 79.

have detailed the particular problems they face.²⁴⁹ This has prompted the CPT to call for special efforts on the part of authorities to overcome language barriers.²⁵⁰

In this area, then, the CPT and Human Rights Convention case-law are broadly in tandem. Here, the CPT is perhaps encouraging minor rather than radical change. The moves in prison systems in Western Europe towards the opening up of closed detention regimes and the recognition of civil rights to the maximum degree consistent with the deprivation of liberty²⁵¹ have been encouraged by the decisions of the Commission and Court, and are now reflected in the recommendations of the CPT.

III. Conclusion

Within a remarkably short period of time, then, the CPT has established itself as a positive force for improving the position of detainees. That so much has already been accomplished so early on is a tribute to the dedication, expertise and hard work of its members, experts and Secretariat staff; indeed, this achievement is all the more impressive in view of the drafting of the Convention which gives more weight to patronage interests of States than ensuring balanced membership of the CPT. On the other hand, the general willingness of States to authorize publication of country reports should be taken as a positive sign of cooperation, and in the long run, will enhance considerably understanding and appreciation of the Committee, its work, and its attempts to develop a 'corpus' of standards for the treatment of persons deprived of their liberty. It is this latter feature that perhaps provides the greatest interest to lawyers. The CPT has the ability to nudge the Commission and Court towards enhancing the protection of detainees under the Human Rights Convention. The transformation of recommendations to national authorities into positive rights in international law through the processing of applicants' claims in individual cases may indeed prove to be the most important (although indirect) impact of the work of the CPT. However, even if the progressive reinterpretation of this treaty is resisted, the CPT's recommendations and compilation of standards do have the potential of breathing new life into other sets of international norms, especially the European Prison Rules. But caution needs to be taken if standards are set which do not take account of pre-existing initiatives which already command a general degree of support amongst States. Taking account of established rules will enhance the legitimacy of the standards set and the standard-setters.

249 E.g., *Danish Report*, *supra* note 32, at paras. 88-90 (plight of Greenlanders sent to Danish prisons and who often suffer acute homesickness to the extent 'that could cause psychological disorders' is exacerbated by difficulties in maintaining family links and establishing rapport with Danish prisoners; their reintegration into society is extremely difficult to envisage).

250 Through making available classes in the national language to non-national inmates. See *Austrian Report*, *supra* note 32, at para. 39; *Danish Report*, *supra* note 32, at para. 109.

251 Cf. Rentzmann, 'Cornerstones in a Modern Treatment Philosophy', 16 *Prison Information Bulletin* (1992).