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Mechanisms for Custodial Oversight: The United States and Europe

Dr. Silvia Casale*

For this examination of transparency in custodial systems as a means of protecting against abuse and ensuring safety, I shall concentrate on key elements of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)¹—the international oversight mechanism² with a mandate to examine abuse and safety in all places where people are deprived of liberty in Europe, including prisons and jails.

How might the CPT experience be relevant in the American context? The American experience has certainly been important for us in Europe: long before our prison systems had developed codes of standards or had applied modern management approaches to prisons, the United States was making progress in this direction. We learned much from the example of the American Correctional Association and its early development of standards for managing and monitoring prisons.

In Europe, oversight mechanisms have gradually developed, at the international, national and local level. Mistakes have been made along the way, but workable systems are emerging. Perhaps these developments can inform the debate in the United States on safety and abuse in custody, on the theory that one can learn from other people's errors as well as from their successes. Clearly a simple transposition to the context of the United States would be unhelpful,

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1. See CPT, <http://www.cpt.coe.int/EN/documents/ecpt.htm> (last visited June 3, 2006).

2. To avoid overlap with other witnesses, who will be describing national oversight mechanisms (such as the Prisons Inspectorate in England and Wales), I confine discussion of such bodies to a short note on the interplay between the CPT and other monitoring mechanisms in Europe. See discussion *infra* Part IX.

yet a consideration of the distinguishing features of international oversight in the European region may stimulate further thought about what elements are fundamental to all effective monitoring.

I shall highlight the distinguishing features of the CPT's mechanisms: legal mandate, independence, expertise, impartiality, powers of access and powers of enforcement, within the important context of shared values and principles which have slowly been developing in Europe since the Second World War. These features are inter-linked and their relationship dynamic; they require constant testing and reinforcing.

I. EUROPEAN BACKGROUND

First, I digress briefly for some important basic definitions and data, as these are necessary for a common foundation for discussion. I refer throughout this paper to the European region in which the CPT operates and which consists of forty-seven European countries. It includes all twenty-five countries of the European Union,³ plus twenty-two others in Central and Eastern Europe, such as Turkey, Russia and many states of the former Soviet Union.⁴

In this region, stretching from the Sea of Japan to the Atlantic Ocean and from the Arctic Circle to the Mediterranean Sea, live about 810 million people.⁵ The population in prison is around 2 million,⁶ not counting the jails. This is an overall rate of around 400

3. The twenty-five countries of the European Union are: Austria; Belgium; Cyprus; the Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; the Netherlands; Poland; Portugal; Slovakia; Slovenia; Spain; Sweden; and the United Kingdom. European Union Member Countries, <http://www.eurunion.org/states/offices.htm> (last visited June 3, 2006).

4. Including the Baltic states (Estonia, Latvia and Lithuania), the Balkan states (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and the former Yugoslav Republic of Macedonia), and the southeastern states (Armenia, Azerbaijan and Georgia).

5. This population estimate is based on the statistics provided by Eurostat, the European Commission's statistical office, which can be accessed at http://epp.eurostat.cec.eu.int/portal/page?_pageid=1090,1&_dad=portal&_schema=PORTAL (follow "English" hyperlink; then follow "Population and social statistics" hyperlink; then follow "Population" hyperlink; then follow "Total population" hyperlink), and using statistics from the Central Intelligence Agency's World Factbook, which can be accessed at <http://www.cia.gov/cia/publications/factbook/>.

6. This estimate was compiled by data from the International Center for Prison Studies' (ICPS) *World Prison Brief*, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_

people per 100,000 of the population in prison, as compared with the United States' rate of over 700 people per 100,000 of the population.⁷ In both Europe and the United States the overall rate masks considerable variation in the prison population across states.⁸

This region of greater Europe constitutes the common European legal space, encompassing all those states that have ratified the European Convention of Human Rights (ECHR)⁹ and fall within the jurisdiction of the European Court on Human Rights (ECtHR).¹⁰ All of these states have also ratified the European Convention for the Prevention of Torture (ECPT),¹¹ by virtue of which they are subject to the CPT—our international preventative oversight mechanism. The two international oversight mechanisms, the CPT and ECtHR, complement each other.

The judicial mechanism of the ECtHR receives cases brought by individuals against states which are alleged to have violated the principles of human rights enshrined in the ECHR. It is noteworthy that all states before the ECtHR submit to the court's jurisdiction, defend themselves against the cases brought by individual plaintiffs, and abide by the court's decisions.¹²

The preventative mechanism of the CPT visits all states proactively to examine system safeguards against torture and inhuman or degrading treatment or punishment of all persons

rates.html (choose "Europe" and "Prison population totals").

7. This estimate was also compiled by data from the ICPS's *World Prison Brief*, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.html (choose "Europe" and "Prison population rates" or "North America" and "Prison population rates").

8. Among the national states of Europe: from Iceland with under 50 per 100,000 to Russia with over 500 per 100,000, *World Prison Brief*, http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest_to_lowest_rates.html (choose "Europe" and "Prison population rates") (last visited June 3, 2006); or among the individual states of the United States: from Minnesota and North Dakota with 200–299 prisoners per 100,000 to Texas with over 1000 per 100,000. *Id.* (choose "North America" and "Prison population rates").

9. See Convention Information, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> (follow "Convention for the Protection of Human Rights and Fundamental Freedoms" hyperlink) (last visited June 3, 2006).

10. See European Court of Human Rights, <http://www.echr.coe.int/echr> (last visited June 3, 2006).

11. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, 27 ILM 1152 (1998) [hereinafter *European Torture Convention*], available at <http://www.cpt.coe.int/en/docsref.htm> (last visited June 3, 2006).

12. There are a few disputes about implementing the court's decisions in individual cases.

deprived of liberty by a public authority. The mandate thus encompasses all aspects of safety and abuse in custody. All of the state parties to the CPT facilitate the committee's visits, including those that are unannounced, and respond to CPT reports.¹³

Whereas the ECtHR redresses past violations of human rights, the goal for the CPT is to prevent violations in the future, by ensuring that custodial places are safe for all who live or work in them and affording the necessary safeguards against ill treatment.

II. LEGAL MANDATE

The CPT's preventive mandate derives from an instrument of international treaty law: the ECPT. In the European region international treaty law is respected as placing binding obligations upon state parties. This respect for international law has its roots in geography and recent history. European states exist in close proximity. In the aftermath of the Second World War neighboring states that were recent enemies needed to find a way to co-exist in peace. With the memory of the inhumanity of war still fresh, states looked for mechanisms to safeguard human rights. Accepting the ECHR as a statement of shared values and the European Court as the final arbiter of human rights issues was an important step for sovereign states. Their recognition of the supremacy of international law needs to be understood clearly for the legal basis of the CPT's mandate to be fully appreciated.

III. INDEPENDENCE

Our convention stipulates that the CPT shall be composed of independent experts, one from each of the state parties to the ECPT. Independence is difficult to demonstrate, but for effective oversight it is important that there is perceived as well as actual independence.

Some rules are conducive to greater independence. We CPT experts do not represent our own countries. Some of us have worked in the public services, but none of us are government officials or

13. Most comply within the deadline set by the CPT; when a state is about to miss the deadline, it will request a short extension, which, to date, has almost always been met.

policy-makers. We do not carry out oversight in our own countries and do not pass substantive opinions on matters concerning our own countries. The independence of CPT experts derives from a commitment to the mandate above other competing values (such as loyalty to one's profession or one's country). However, there are no rules for true independence, which depends ultimately upon an attitude of mind.

IV. EXPERTISE

For the oversight mechanism to have the required effect of promoting transparency and accountability in the interests of positive change, the quality of oversight must be respected by the audience to which it reports. For example, a circular discussion with gaol managers about the provision of care for juveniles suddenly took a positive turn when the team quoted the precise article and subsection of the relevant piece of national legislation concerning the special rights of juveniles in custody, which the managers had conveniently been ignoring in the confident expectation that the uninformed outsiders would not know of it.

The quality of the CPT's visits, detailed written reports, and dialogue with interlocutors depends on the caliber of CPT teams carrying out the work. These teams include expert members, external experts and the full-time expert international civil servants who permanently organize the CPT's activities. As far as the professional background of a team member is concerned, a combination of theoretical expertise and empirical experience is most useful. The CPT counts among its members people who have worked in and run prison systems, police forces, courts, psychiatric institutions, forensic laboratories, and custodial inspection services. Yet, we do not always achieve an ideal balance in our pool of team members.

One of the shortcomings of the CPT is the lack of clarity and transparency about the process of selecting and appointing CPT experts. The decision ultimately rests with the Committee of Ministers, which are the Foreign Secretaries of the state parties. It is important to have a clear sense of which criteria should inform the process of selecting teams for custodial monitoring.

V. IMPARTIALITY

The credibility of any oversight mechanism depends upon demonstrably maintaining a neutral stance and applying principles and standards in an even-handed way. Naturally, that does not mean making the same recommendations everywhere. Our member states begin from very different starting points. For example, it does not make sense to recommend advanced activity programs as a priority in a prison where the roof is falling in. The eventual goal may be the same in all places—achieving a safe and decent environment that is free from abuse—but the process of change toward that goal will differ greatly. From what I have seen of custodial practices in the United States there is considerable variation there as well.

Some European countries with proportionately smaller custodial populations and more resources manage to ensure broadly decent, material conditions, whereas others do not. For example, there is still slopping out¹⁴ in some Scottish and Belgian prisons, and some prison buildings in, for instance, Italy and Georgia are old and dilapidated. By contrast, Valley State Prison for Women in Chowchilla, California, has modern physical facilities. Of course, the plant and equipment are only part of what determines the quality of a prison.

VI. POWERS OF ACCESS

By virtue of the ECPT, the CPT is empowered to go to any place of custody unannounced;¹⁵ move freely within all such places;¹⁶ speak with any person in custody in confidence (for example without the presence of custodial staff), as well as to speak to staff in confidence;¹⁷ and to have access to any information the CPT considers necessary for its work, including internal documents and police or court files.¹⁸

14. “Slopping out” is the practice of emptying and swilling out buckets or similar receptacles used by prisoners who are not allowed out of their cells for access to toilets and who are locked up in cells which do not have integral sanitation.

15. European Torture Convention, *supra* note 11, art. 8(1).

16. *Id.* art. 2(c).

17. *Id.* art. 8(3)–(4).

18. *Id.* art. 8(2)(b)–(d).

At the end of each year the CPT announces a list of the countries it intends to visit as part of its periodic visiting program. The CPT also carries out ad hoc visits, which are not included in the announcement list. Ad hoc visits are generally shorter than the periodic visits and focus on following up on a problematic area previously identified in a periodic visit or on serious issues arising during the year and requiring urgent monitoring. The CPT will indicate, before a periodic visit, some of the places it intends to examine. The announced visit offers states the opportunity to demonstrate improvement. The CPT is interested in systematic improvement. Prisons simply cannot be radically altered in a very short space of time. Of course, we tend to smell a lot of fresh paint on announced visits to prisons, but at least that means that the prison is painted.

The ad hoc visits and the examinations of unannounced places during periodic visits allow the CPT to gain as true a picture as is possible (and monitoring is never an exact science) of what life is like in a prison or gaol. Unexpected visits sometimes provoke more frank discussion. The aim is not to “name and shame,” but to find ways of improving the situation.

VII. POWERS OF ENFORCEMENT

The CPT has no powers of enforcement. It works by persuasion, reminding states that they have chosen to ratify the convention and must engage in a cooperative dialogue with the CPT. A key part of the persuasive process is the discussion with senior managers and staff at the end of the visit to each prison or gaol, and the dialogue with ministers and senior officials. The former are opportunities to make clear to local managers that CPT oversight can be useful to them by highlighting shortcomings in resources and particular difficulties of the specific institution which necessitate support from the center. The latter occurs at the end of each visit and is on-going after the visit.

State parties are obliged to cooperate with the CPT not only by facilitating the CPT’s monitoring work but also by improving the

situation in the light of the CPT's recommendations.¹⁹ The CPT recommends improvements in light of its practical findings. Some recommendations are made on the spot, because they require, and can be achieved by, urgent action. Sometimes the response is immediate. For example, in a visit to Turkey in 2003 a police detention facility was asked to immediately alter its interrogation rooms; the visiting CPT team made this recommendation in the morning and, by the afternoon, the changes had been made.

Other recommendations require more time to implement. These are normally contained in the detailed written report that is drawn up after each visit, setting out all recommendations and noting any action already taken on immediate recommendations. States must respond to the report within a time frame established by the CPT and explain the various actions taken and policies put in place to address the improvements recommended by the CPT. An example of longer-term implementation can be seen in the decision of the central prison administration of the Russian Federation to implement the long-standing recommendation of the CPT for the removal of the shutters on cell windows, which were a common feature of Russian cells, ostensibly to restrict communications among prisoners. It has been remarkable to observe the opening of prison cells to daylight, an improvement to the dark and airless conditions, which had contributed to the spread of tuberculosis and other communicable diseases, and the concomitant shift in attitudes. The CPT does not claim this as its success alone; many non-governmental organizations at the local, national and international level helped to bring about this simple but significant change.

This is just one example of successful state cooperation. The process of cooperation is enhanced by the principle of confidentiality. The CPT does not divulge details of its work to the press or to any actors other than its official interlocutors—the national authorities of the state party. Its detailed reports contain some sharply critical comments about problems of which the state may or may not have been previously aware, but to which the state must respond. Of

19. *Id.* art. 10.

course, where the CPT finds positive elements in the system and examples of good practice, it will include these in the report.

CPT reports remain confidential until the state authorizes publication. This allows the state ample time to digest the criticisms and to take steps toward improving the situation. All states, except for the Russian Federation, have adopted the routine practice of authorizing the publication of the CPT reports and their responses. States have no editorial rights over the CPT's reports; the CPT publishes them in their entirety along with the state's responses. Authorized publication has become the norm over time, as more and more states have succumbed to the pressure of example. This competitive pressure should not be underrated, nor the pressure to avoid embarrassment and to "join the group." In particular, many of the state parties that are "applicant states" for membership in the European Union have shown themselves keen to implement the CPT's recommendations, perhaps in part because the findings from the CPT form part of the assessment of an applicant state's fulfillment of the human rights requirements for acceptance into the European Union.

The CPT has one measure at its disposal if a state significantly fails to improve the situation in the light of the CPT's recommendations: the public statement.²⁰ This process has been invoked sparingly in the CPT's fifteen years of operation—twice with respect to Turkey, in 1992 and 1996; and twice with respect to Russia, in 2001 and 2003 (both times in connection with the Chechen Republic). Turkey has improved the situation significantly since 1996, both in terms of legislative reform and prison system changes, and police practices are also improving. The CPT continues to monitor closely the situation in Chechnya.

The public statement has been discussed with states more often than used. The power of the procedure appears to lie not only in the embarrassment of being publicly called to account for their failures,

20. In accordance with Article 10(2) of the European Torture Convention, the CPT may make a public statement indicating the manner in which the state has failed to comply with its obligation under the Convention to improve the situation in the light of the CPT's recommendations. *Id.* art. 10(2); *see also* CPT States: Documents and Visits, www.cpt.coe.int/en/states.htm (last visited Sept. 23, 2006) (text of public statements organized by name of the state concerned).

but also in its role as a deterrent. Ultimately this measure would not work if states did not mind being seen as lacking in their commitment to the prevention of torture and inhuman or degrading treatment or punishment. The CPT is continuing proof that diverse states care enough about human rights to accept and cooperate with a custodial oversight mechanism with unique powers.

VIII. COMMON VALUES

The reason why states maintain this commitment is that, in the European common legal space, transparency is regarded as a characteristic of democratic societies, alongside the rule of law, respect for human rights and universal suffrage. Even if they do not always follow their own precepts in practice, European governments declare that public services must openly demonstrate that they operate in accordance with human rights; more particularly, the public services responsible for the execution of one of the state's most extreme measures against the individual—deprivation of liberty—must operate, and must be seen to operate, in accordance with human rights.²¹

A current example of common values is the revision of the European Prison Rules (EPRs),²² a body of principles and standards for custodial institutions, which was adopted by the Council of Europe's Committee of Ministers in 2006. These rules were developed by consensus through the work of experts designated by the Council of Europe²³ and in consultation with the prison services of Europe and the CPT.²⁴ Although not binding, these rules are accepted widely within the custodial profession. Among the principles articulated in the EPRs are the following:

21. In the Europe there is no death penalty so deprivation of liberty *is* the ultimate penal measure.

22. European Prison Rules, Recommendation No. R (89) 3 of the Committee of Ministers to Member States [hereinafter Prison Rules] (2006), *available at* <http://www.portal.coe.ge/index.php?lan=en&id=cm> (last visited June 3, 2006).

23. *See* Council of Europe, <http://www.coe.int/> (last visited June 3, 2006).

24. There is a high degree of consonance between the EPRs and the standards of the CPT.

- All persons deprived of their liberty shall be treated with respect for their human rights.²⁵
- Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision to sentence or remand them to custody.²⁶
- Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.²⁷
- Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.²⁸
- All prisons shall be subject to regular governmental inspection and independent monitoring.²⁹

IX. MONITORING THE MONITORING MECHANISMS

Finally, a few remarks about the interplay among the different levels of oversight operating in the custodial field in Europe. The CPT draws upon information from internal and external oversight mechanisms in a state (to the extent that they exist, either at the national or local level) in order to gain insight into how prisons and jails are functioning. By internal oversight, we mean oversight carried out by some part of the same organization or Ministry (branch of government) that is responsible for the custodial facility. External oversight involves a separation of the oversight function from the custodial function. The information from oversight is useful not only in terms of what it says about the prisons and jails under scrutiny, but also in terms of what it tells us about how the concept of oversight is understood in that state.

In theory, most European custodial systems, like American custodial systems, have some degree of internal oversight, because self-criticism is regarded as the hallmark of a healthy organization and self-evaluation as the hallmark of a professionally-managed

25. Prison Rules, *supra* note 22, pt. 1(1).

26. *Id.* pt. 1(2).

27. *Id.* pt. 1(3).

28. *Id.* pt. 1(7).

29. *Id.* pt. 1(8).

service. All of these internal oversight systems require improvement. In practice, internal oversight varies greatly in effectiveness as a means of examining and controlling abuse. This effectiveness depends on a number of factors: the goals of the oversight exercise; who carries out the oversight; the caliber of the senior and middle managers of the custodial service under scrutiny; whether traditionally senior managers are apart from operational managers or actually in touch with what goes on in prisons and jails; and whether the custodial and oversight approaches are theoretical or empirical.

In Europe there are a few variations of external oversight of prisons and jails. Europe has not followed the American example in terms of involving the courts in custodial oversight through litigation. In a number of European systems oversight is a function of a prosecutor or supervising judge or magistrate, but this is an administrative role. In this context, oversight usually means checking compliance with legal procedures by examining official documentation or written complaints. Examples include assessing whether a defendant has been held in law enforcement custody for longer than the legal maximum before transfer to prison custody, and whether the time and date of entry and exit from a custodial facility has been duly recorded. Such oversight rarely includes examining how the defendant has been treated; it is bureaucratic in nature, focusing largely on paperwork and procedures.

The CPT has long recommended a proactive approach to custodial oversight. The CPT attaches particular importance to regular visits to all prison establishments by an independent body (for example, a visiting committee or a judge with responsibility for carrying out inspections) with authority to receive—and, if necessary, take action on—prisoners' complaints. During such visits the persons concerned should make themselves "visible" to the prison authorities, staff and prisoners. They should not limit their activities to seeing prisoners who have expressly requested to meet them, but should take the initiative by visiting the establishments' detention areas and entering into contact with inmates.

CONCLUSION

I have tried to provide a brief account of the main features of the unique European monitoring mechanism—the CPT—by focusing on its preventive mandate, its powers of access, and its credibility based on the independence, expertise, and impartiality of those who carry out its work. I have emphasized that the CPT works not by powers of enforcement or by naming and shaming states for past violations, but rather by cooperation in order to prevent future ill treatment by identifying and rectifying system shortcomings.

To some eyes the CPT may appear to be a “foreign body” in many senses, but I have tried to indicate how its work is underpinned by the shared human rights values and principles of the European common legal space, encompassing forty-seven sovereign states. Now there is evidence that custodial oversight has even wider support. On June 22, 2006, the Optional Protocol to the United Nations Convention Against Torture entered into force, with ratification by states from across the world. This will lead to the development or improvement of national monitoring mechanisms in each of the ratifying states reporting to a global oversight mechanism rather similar to the CPT. In fact, after the Second World War when states were looking for mechanisms to protect human rights, the original idea was a world-wide monitoring body; when it became clear that unanimity could not be reached among the leading world states, Europe went forward alone and developed the CPT as a regional mechanism. Now the time has come for a monitoring mechanism that spans the continents. Already states from the Americas, Africa, and Europe have ratified the Optional Protocol and, in doing so, have strongly affirmed the universal importance of custodial oversight.