

Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty

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Abstract

Although international humanitarian law and human rights law were originally intended to operate in different areas of competence, thirty years of visits by human rights mechanisms to places of detention in parallel with visits made by the International Committee of the Red Cross have shown that they are clearly complementary in several respects. First, there is complementarity in terms of action, in that different but not competitive visits are made. Secondly, through the formulation of increasingly precise legal rules there is complementarity in codification. Lastly, there is institutional complementarity through cooperation between the respective bodies. The result is broader and above all more effective protection for detainees — whatever the legal status assigned to them — which, if it cannot entirely eliminate the possibility of torture and cruel, inhuman and degrading treatment or punishment, can at least help to prevent and remedy such abuses.

On 25 September 1975, Jean-Jacques Gautier first unveiled his idea of a convention which would establish “roving commissions authorized to visit any prison or police station without prior notice”¹ in order to combat torture and cruel, inhuman or degrading treatment or punishment more effectively, it would have been certainly very hard to imagine that, thirty years later, numerous bodies operating under human rights law would be visiting places of detention or confinement.

At the time, the classic approach to international human rights law had essentially been limited to an exercise in standard-setting. Although many texts banning torture and cruel, inhuman or degrading treatment or punishment had been adopted at the United Nations,² the Council of Europe³ and the Organization of American States,⁴ implementing machinery had not necessarily been put in place.

Jean-Jacques Gautier’s idea was prompted primarily by the limitations inherent to this classic approach and its consequent failure to put a stop to the heinous assault of torture and cruel, inhuman or degrading treatment or punishment on human dignity. It also originated more explicitly from the protective activities of the International Committee of the Red Cross (ICRC), which, under the Geneva Conventions for the protection of war victims and the Statutes of the International Red Cross and Red Crescent Movement, was visiting prisoners of war. Jean-Jacques Gautier believed that, if this practical approach to preventing torture were also carried out in peacetime, on a basis of cooperation and confidentiality and included in the material scope of human rights protection, it could go a long way towards averting the torture and ill-treatment of all persons deprived of their liberty, especially common-law detainees.

The position is quite different thirty years on; the adoption by the United Nations General Assembly of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (hereinafter “the Protocol” or “OPCAT”) on 18 December 2002 was an important, albeit not the final, step in this new approach,⁵ since the Protocol, which is open to all States party to that Convention, provides for a uniquely global system of regular visits to persons deprived of their liberty. These visits are conducted by independent national and international bodies, which, working on the basis of state cooperation, submit recommendations to the competent authorities with a view to preventing torture and ill-treatment.⁶

1 *Jean-Jacques Gautier et la prévention de la torture: de l'idée à l'action: Recueil de textes*, APT and the European Institute of Geneva University, Geneva, 2004, p. 56.

2 For instance, Article 5 of the Universal Declaration of Human Rights; Article 7 of the United Nations International Covenant on Civil and Political Rights; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and United Nations Standard Minimum Rules for the Treatment of Prisoners.

3 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4 Article 5 of the American Convention on Human Rights.

5 Antonio Cassese, “Une nouvelle approche des droits de l’homme: la Convention européenne pour la prévention de la torture”, in *Revue Générale du Droit International Publique*, 1989-1, pp. 5-43.

6 For more details, see *The Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention*, APT and the Inter-American Institute for Human Rights, Geneva, 2004, <www.apr.ch> (visited on 3 March 2005).

This new approach, to the protection of international human rights, which closely resembles the humanitarian protection work of the ICRC, is not confined to the United Nations alone; visiting mechanisms have also been set up within various national and regional systems for the protection of human rights.

The Council of Europe played a major part in creating one such mechanism for visits akin to those of the ICRC, namely the European Committee for the Prevention of Torture (CPT), which has the power to make regular or ad hoc visits to places of detention. In the early 1980s, Jean-Jacques Gautier, realizing that it was both impossible and inadvisable to institute a worldwide visiting system at that early date, decided to push for the establishment of regular visits under the auspices of the Council of Europe.⁷ The CPT, which began its work in 1989 is composed of independent experts; since 1989 it has carried out 189 visits in member States.⁸ The CPT makes regular visits⁹ or “such other visits as appear to it to be required in the circumstances.”¹⁰ After these visits, it sends a confidential report to the State, in which it puts forward recommendations designed to improve the situation of persons deprived of their liberty and to prevent torture and ill-treatment.

Within the Organization of American States, the Inter-American Commission on Human Rights (IACHR) is responsible for making *in situ* visits to assess the general human rights situation in a given country, or to investigate particular circumstances. During these visits, which are subject to the consent of the State concerned, the IACHR may inspect places of detention. In terms of visits that included inspections of places of detention, the IACHR has conducted seven visits in Haiti, five in Nicaragua and Peru, four in the Dominican Republic, Panama, the United States of America and Guatemala, three in El Salvador, two in Mexico, Argentina, Venezuela, Honduras, the Bahamas, Jamaica, Ecuador, Surinam and Paraguay, and one in Colombia.¹¹

7 For more details about the lead-up to the adoption of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and of OPCAT, and about the link between the two texts, see *OPCAT Manual*, *op. cit.* (note 8); *20 ans consacrés à la réalisation d'une idée: Recueil de textes en l'honneur de Jean-Jacques Gautier*, APT, Geneva, 1997; Emmanuel Decaux, “La Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants”, AFDI, 1988, pp. 618-634; Jean-Daniel Vigny, “La Convention européenne de 1987 pour la prévention de la torture et des peines ou traitements inhumains ou dégradants”, ASDI, 1987, pp. 62-78; Malcolm D. Evans and Rodney Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Clarendon Press/Oxford University Press, Oxford/New York, 1998, in particular Chapter IV, “The origins and drafting of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, pp. 106-141.

8 For a complete list of the visits made by the CPT and an account of all its activities, see <www.cpt.coe.int> (visited on 3 March 2005).

9 Art. 7, para. 1, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

10 *Op. cit.* (note 9).

11 Dominican Republic (1965-1966, 1996 and 1997), Nicaragua (1978, 1980, 1988, 1992 and 1999), Haiti (1978, 1987, 1988, 1990, 1993, 1994 and 2000), El Salvador (1978, 1986 and 1987), Panama (1977, 1989, 1991 and 2001), Argentina (1979), USA (1982, 1996, 1998 and 1999), Venezuela (1996), Guatemala (1982, 1985, 1992 and 1998), Honduras (1982), Surinam (1983 and 1985), Mexico (1983), Peru (1991, 1992, 1993, 1998 and 2002), the Bahamas (1994), Jamaica (1994), Ecuador (1994), Paraguay (1999) and Colombia (1997 and 2001). This list does not include visits in connection with other rights, when no place of detention was visited and which did not concern torture or ill-treatment. Source: IACHR, Annual Reports (1970-2003) and various reports on follow-up visits available at: <<http://www.cidh.oas.org/publi.eng.htm>> (visited on 3 March 2005).

In 1996, the African Commission on Human and Peoples' Rights appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa who is mandated to visit, with the consent of the State concerned, places of detention in Africa in order to assess the general conditions of detention and the treatment of detainees. To date, the Rapporteur has been to Benin, the Gambia, Malawi, Mali (twice), Mozambique, the Central African Republic and Zimbabwe.¹²

The United Nations Special Rapporteur on Torture should also be mentioned because, although he does not regularly visit places of detention, he may nonetheless visit a country, subject to the consent of the government concerned. The first Special Rapporteur was appointed in 1985¹³ by the United Nations Commission on Human Rights and to date he and his successors have carried out 28 visits.¹⁴

In some countries, visits to places of detention are carried out by national entities or officials such as ombudspersons, national human rights institutions, parliamentary commissions, judges and non-governmental organizations (NGOs).¹⁵ For example the Moroccan Prison Observatory (OMP),¹⁶ the Centre for Victims of Torture, Nepal,¹⁷ the Georgian Young Lawyers Association,¹⁸ the Peace and Justice Service (SERPAJ) in Uruguay,¹⁹ the Bulgarian Helsinki Committee²⁰ and the Independent Medico-Legal Unit (IMLU) in Kenya²¹ are all NGOs which visit places of detention. Similarly, the national human rights commissions of Uganda,²² South Africa²³ and Fiji,²⁴ the Argentine prison ombudsman (Procurado Penitenciario),²⁵ the Polish ombudsman²⁶ and the Chancellor of Justice in Estonia²⁷ are empowered, under a variety of procedures, to go to places of detention in order to prevent torture and ill-treatment.

Two main difficulties arose, both in theory and in practice, owing to the multiplicity of bodies actively engaged in the protection of persons deprived of

12 <www.legal.apt.ch/Mechanisms/Africa> (visited on 3 March 2005).

13 Commission on Human Rights resolution 1985/33, 13 March 1985, E/CN.4/RES/1985/33.

14 For a complete list, please see: <<http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm>> (visited on 3 March 2005).

15 For more details, see *Visiting places of detention. Lessons learnt and practices of selected domestic institutions. Report on an expert seminar*, APT and Office of the United Nations High Commissioner for Human Rights, <www.apt.ch> (visited on 3 March 2005).

16 Amnesty International, "Preventing torture at home: A guide to the establishment of national preventive mechanisms", AI Index: IOR 51/004/2004 (1 May 2004).

17 <www.civict.org.np/legal.html> (visited on 3 March 2005).

18 <www.gyla.ge> (visited on 3 March 2005).

19 <<http://www.serpaj.org.uy/>> (visited on 3 March 2005).

20 <http://www.bghelsinki.org/index_en.html> (visited on 3 March 2005).

21 <<http://www.imlu.org/>> (visited on 3 March 2005).

22 *Op. cit.* (note 16).

23 <www.sahrc.org.za> (visited on 3 March 2005).

24 <www.humanrights.org.fj> (visited on 3 March 2005).

25 See Procuración Penitenciaria, Ley 25.875 (20 January 2004), Articles 15-21, <<http://infoleg.mecon.gov.ar/txtnorma/92063.htm>> (visited on 3 March 2005).

26 Act on the Commissioner for Civil Rights Protection, of 15 July 1987, Article 13, <<http://www.brpo.gov.pl/index.php?e=1&poz=360>> (visited on 3 March 2005).

27 <<http://www.oiguskantsler.ee/>> (visited on 3 March 2005).

their liberty. The first stemmed from a perceived potential for states to play off new visiting mechanisms against the established role of the ICRC, the second from the potential contradictions between the classic, essentially institutional, normative approach and the innovative essentially operational and practical approach.

Twenty-five years later, it must be said that, in both respects, pitfalls have been avoided. The ICRC and the visiting mechanisms forming part of the human rights protection system have succeeded in developing in tandem and cooperating in such a way as to increase the protection of persons deprived of their liberty, while retaining in common the visiting methods used.

As for the second issue, the highly specialized approach developed by visiting mechanisms and the expert knowledge they have built up on detention-related problems have enhanced the legal standards applicable to persons deprived of their liberty.

The International Committee of the Red Cross and human rights visiting mechanisms: Two-pronged action for persons deprived of their liberty

The growing number of agencies engaged in detention-related activities has resulted in coverage of a wider range of situations by visiting mechanisms and in complementary protections for persons deprived of their liberty.

The broader competence of visiting mechanisms

Before human rights bodies were mandated to assist persons deprived of their liberty, the ICRC was the only organization to visit them; it did so within the terms of reference defined by the Geneva Conventions and the Statutes of the Movement. The emergence of mechanisms operating under human rights law not only extended the scope of organizations to protect such persons, but also supplemented their range of activities.

A theoretical distinction becomes blurred

Since international humanitarian law and international human rights law “have totally different historical origins, the codification of these laws has until very recently followed entirely different lines.”²⁸ When formulated, there was a clear-cut distinction between them, and the various organizations working in those two domains were intent on retaining their own independence and specific field of action. That being the case, although the applicability of human rights in wartime was solemnly reaffirmed at the United Nations Teheran Conference in 1968, the tendency for many years has been to regard the two bodies of law as absolutely distinct from one another.

28 Louise Doswald-Beck and Sylvain Vité *International Humanitarian Law and Human Rights Law* in *International Review of the Red Cross*, No. 293, March-April 1993, pp. 94-119, p. 94.

Notwithstanding the drafters' original intention, however, it is now increasingly difficult for at least two reasons to dissociate them. First, the principles embodied in the various human rights instruments are largely echoed in the norms of international humanitarian law. Particular examples are Article 3 common to all four Geneva Conventions and Article 75 of Additional Protocol I, which are nowadays interpreted as belonging to both bodies of law, for although "international human rights law and the humanitarian law of armed conflicts have a dissimilar material field of application, they have an identical concern — to protect human beings in "ordinary" or "daily" circumstances, as it were, on the one hand and in armed conflicts, on the other and they necessarily come to share a number of fundamental rules ..." ²⁹ Moreover, while humanitarian law still pertains specifically to armed conflicts, the purpose of human rights law is no longer solely to govern relations between States and individuals in peacetime only, as the Human Rights Committee recently reaffirmed in its General Comment No. 29 referring to Article 4 of the International Covenant on Civil and Political Rights ³⁰ and as the International Court of Justice made clear in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. ³¹

Parallel action

While in theory their respective fields of action were, if not completely separate, then at least sharply delimited, ³² the work of the ICRC and human rights mechanisms has in practice revealed situations where both legal regimes were applicable and where both types of organizations therefore found themselves acting, if not jointly, then at least in parallel. For example, in Peru the Inter-American Commission on Human Rights made several visits to places of detention between November 1998 and August 2002 and subsequently made a number of recommendations to the authorities in its report on Peru in 2000 and its special report on Challapalca Prison. ³³ Throughout this period, the ICRC was

29 Frédéric Sudre, *Droit international et européen des droits de l'homme*, Presses Universitaires de France, Paris, 5th edition, 2001, p. 31.

30 Paragraph 3 of General Comment 29, States of Emergency, adopted on 24 July 2001, A/56/40 Annex VI.

31 ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 106, "... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights."

32 For example, Article 17.3 of the European Convention for the Prevention of Torture stipulates: "The Committee shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto." Similarly, but in a less categorical manner, Article 32 of OPCAT states: "The provisions of the present Protocol shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977, nor the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law."

33 IACHR Special Report on the Human Rights Situation in the Challapalca Prison, Department of Tacna, Republic of Peru, OEA/Ser.L/V/II.118 Doc.3, 9 October 2003 available at <<http://www.cidh.oas.org/countryrep/Challapalca.eng/toc.htm>> (visited on 15 December 2004) and IACHR, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, Chapter IX.

present in Peru and was also visiting places of detention.³⁴ In Azerbaijan, places of detention were likewise visited by the United Nations Special Rapporteur,³⁵ the CPT³⁶ and a local NGO, the Human Rights Centre of Azerbaijan,³⁷ in parallel with the ICRC's activities. The same is true of Chechnya, beset for many years by a non-international armed conflict: while ICRC protection activities in that connection continued,³⁸ the CPT has made seven visits there since 2000.³⁹ The CPT has even taken the exceptional step of releasing two public statements⁴⁰ on the critical situation in that region, and is the last international agency still working in the Chechen Republic.

Furthermore, some human rights mechanisms have found it necessary to exercise their powers in circumstances where international humanitarian law was applicable *prima facie*, but where the ICRC was not authorized to step in. This has been the case in Turkey, where the authorities have always denied the existence of an internal armed conflict in their territory and have consequently always refused the ICRC access. In contrast the CPT, which is not subject to the same requirement — the existence of an armed conflict — before visits under the Geneva Conventions can take place, has been on numerous missions to Turkey, including visits to the conflict areas.

Hence, although in theory the ICRC and human rights mechanisms might have been expected to intervene in different and almost completely separate situations, more often their action has proved to be parallel or overlapping. Furthermore, the complementary nature of the two bodies of law has led to operations that are truly complementary in practice, to the undeniable benefit of persons deprived of their liberty.

Diversification of operating methods has encouraged complementarity

The fact that the ICRC and human rights mechanisms take action in the same areas and therefore sometimes visit the same places of detention has not entailed pointless duplication; on the contrary, it has often led to operational cooperation that has been to the advantage of persons deprived of their liberty. In the early years, the mutual indifference of the various agencies striving to prevent torture and ill-treatment did result in useless duplication and operational blunders,⁴¹ but they have gradually learnt to turn their different ways of working to good account and to cooperate effectively.

34 See ICRC Annual Report 2002, p. 212.

35 E/CN.4/2001/66/Add.1.

36 CPT/Inf (2004) 36, visit from 26 November 2002 to 6 December 2002.

37 <www.peacewomen.org/campaigns/regions/westasia/abouteng.htm> (visited on 3 March 2005).

38 ICRC Annual Report 2001, p. 270.

39 To date, none of the visit reports on this region has been published, but information on the dates and places visited is available on <<http://www.cpt.coe.int/fr/etats/rus.htm>> (visited on 3 March 2005).

40 CPT/Inf (2001) 15 of 10 July 2001 and CPT/Inf (2003) 33 of 10 July 2003.

41 On one occasion, both the CPT and the ICRC decided not to visit a place of detention, as each was sure that the other was going to visit it.

Distinct operating methods

While the manner in which the actual visits to places of detention are conducted is more or less the same for all mechanisms, irrespective of whether they are working under humanitarian or human rights law,⁴² the diversity of operational procedures is a source of complementarity.

The first difference is one of presence. Unlike the ICRC, which maintains a continued presence in the places of detention it visits, most human rights mechanisms spend but a few days at best in a given place and return only during a follow-up visit, if any. Such a difference naturally has implications for the type of visit made, the protection of inmates interviewed and the manner in which recommendations are submitted to the relevant authorities. Whereas the ICRC delegation will establish a direct, ongoing relationship with the detaining authorities, and especially the person in charge of the place of detention, in order to improve the treatment of detainees, human rights mechanisms such as the CPT will turn to the supervisory governmental authorities.⁴³ The nature of the addressee naturally affects the content of recommendations, which will be more practical and specific in the first case, and more concerned with the overall structure in the second.

The second difference relates to confidentiality. Some human rights mechanisms are theoretically bound by this requirement, which for them is not so much a principle as a condition for action. However, although a literal reading of Article 11 of the European Convention for the Prevention of Torture would give the impression that confidentiality is the rule and disclosure the exception, in practice the opposite is true: reports on 139 out of 169 visits have been made public. Other mechanisms, such as the Inter-American Commission on Human Rights, the Special Rapporteur on Prisons and Conditions of Detention in Africa and *a fortiori* NGOs which visit places of detention, are not bound by this confidentiality requirement; nor are the national preventive mechanisms under OPCAT, which may “make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations.”⁴⁴

The third difference has to do with conditions of access to places of detention. But this time, there are differences among the human rights mechanisms; the distinction is not between human rights mechanisms on the one hand and the ICRC on the other. Article 126 of the Third Geneva Convention⁴⁵ gives the ICRC the right to go to any place of detention where prisoners of war may be held and to talk to them without witnesses, either personally or with the

42 In this connection, see *Monitoring Places of Detention: A Practical Guide*, APT, 2004, <www.apr.ch> (visited on 3 March 2005).

43 It should, however, be noted that in practice the CPT is making increasing use of immediate on-the-spot observations made directly to the person in charge of the place of detention at the end of a visit.

44 Article 19(b).

45 Article 143 of the Fourth Geneva Convention guarantees the ICRC identical rights of access to protected persons.

assistance of an interpreter. This provision also guarantees the ICRC full liberty to select the places it wishes to visit. Similarly, under Article 2 of the European Convention for the Prevention of Torture and Article 14 of OPCAT, States Parties must accept visits to their territory by the CPT and the Sub-Committee on Prevention, which are not required to obtain authorization for each visit.

Conversely, the Inter-American Commission on Human Rights, the United Nations Special Rapporteur on Torture, the Special Rapporteur on Prisons and Conditions of Detention in Africa and even the ICRC in situations of non-international armed conflict must obtain the authorities' agreement before they can visit places of detention. This need to secure prior consent does not mean, however, that these mechanisms must bow to the government's demands. The ICRC will carry out a visit only if it receives a number of guarantees: it must be able to go to all places where persons covered by its mandate are held, it must be able to meet them and talk to them without witnesses. It must also be able to repeat these visits as often as it wishes. The United Nations Special Rapporteur likewise demands guaranteed freedom of movement throughout the country, access to all places of detention, free contact with the authorities, civil society and the media, confidential and unsupervised contacts with the persons of his choice, access to all relevant documentation and assurances that persons who have been in contact with him will not be subjected to retaliation of any kind.⁴⁶ The Inter-American Commission sets very similar conditions.⁴⁷

Fruitful complementarity

The ICRC and human rights mechanisms have become well acquainted with each other and have learnt to turn their differences to good account to enhance the protection of persons deprived of liberty. The ICRC and CPT in particular maintain frequent informal contacts, not to exchange information but to coordinate their activities.

This coordination can take two forms: they may decide to share out between them, according to the geographical area covered or the type of place, the places of detention to be visited; they may also decide to visit the same place of detention, but not to make the same kind of visit. For example, the CPT might choose to focus on the sanitation at a prison, while the ICRC will concentrate on protection activities. This type of coordination makes it possible to maximize the use of resources and expert knowledge to the best advantage of persons deprived of their liberty.

Enhancement of the legal rules protecting persons deprived of their liberty

Multiple reporting by a plethora of bodies mandated to conduct visits under human rights law has also had a considerable impact on the legal rules protecting

⁴⁶ See <<http://www.ohchr.org/english/issues/torture/rapporteur/visits.htm>> (visited on 3 March 2005).

⁴⁷ Regulations of the Inter-American Commission on Human Rights, reprinted in *Basic Documents pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 103 (1992), Article 58.

persons deprived of their liberty. First, these mechanisms have helped to elaborate and improve the standards applying to such persons. Secondly, they have prompted traditional mechanisms for human rights protection to give close attention to the question of deprivation of liberty.

Enhancement of the norms applicable to persons deprived of their liberty

While for twenty-five years the United Nations,⁴⁸ the Council of Europe,⁴⁹ the Organization of American States⁵⁰ and the African Commission on Human and Peoples' Rights⁵¹ have unstintingly adopted standards relating to the prohibition of torture and ill-treatment in general and to deprivation of liberty in particular, the influence of visiting mechanisms has also greatly furthered the development and enhancement of the legal rules applying to persons deprived of their liberty.

Development of new standards

The CPT, initially for practical reasons, established its own standards for the treatment of persons deprived of their liberty.

Faced with the wide variety of approaches applied by individual members of its visiting teams, the CPT set out to devise *pro domo* standards to provide them with a common frame of reference. For this purpose, beginning in 1991, the CPT set out in its annual reports standards for specific matters related to deprivation of liberty. Such standards now cover police custody,⁵² imprisonment,⁵³ prison health services,⁵⁴ foreign nationals detained under aliens legislation,⁵⁵ involuntary placement in psychiatric establishments,⁵⁶ juveniles deprived of their liberty,⁵⁷ women deprived of their liberty,⁵⁸ the training of law enforcement personnel⁵⁹ and combating impunity.⁶⁰ These standards have gone from being a compilation intended for in-house use to being a point of references for many other bodies that deal with cases or situations of deprivation of liberty.⁶¹

48 *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, of 10 December 1984.

49 In particular *Recommendation R (87) 3 on the European Prison Rules*, adopted by the Committee of Ministers on 1 February 1987; *Recommendation R (89) 12 on education in prison*, adopted by the Committee of Ministers on 13 October 1989; *Recommendation R (98) 7 concerning the ethical and organisational aspects of health care in prison*, adopted by the Committee of Ministers on 8 April 1988; *Recommendation R (80) 11 concerning custody pending trial* adopted by the Committee of Ministers on 27 June 1980.

50 *Inter-American Convention to Prevent and Punish Torture* of 9 December 1985.

51 Article 5 of the African Charter on Human and Peoples' Rights; *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, available at: <<http://www.aht.ch/africa/rig/Robben%20Island%20Guidelines.pdf>> (visited on 3 March 2005).

52 CPT/Inf(92)3; CPT/Inf(96)21 and CPT/Inf(2002)15.

53 CPT/Inf(92)3; CPT/Inf(97)10 and CPT/Inf(2001)16.

54 CPT/Inf(93)12.

55 CPT(97)10 and CPT/Inf(2003)35.

56 CPT/Inf(98)12.

57 CPT/Inf(99)12.

58 CPT/Inf(2000)13.

59 CPT/Inf(92)3.

60 CPT/Inf(2004)28.

61 See above.

Enhancement of existing standards

At the same time, the formulation of these standards and the activity of these new bodies had a considerable influence on the development of similar standards elsewhere. Consequently, at both international and regional level, a process of upgrading the standards applying to persons deprived of their liberty took shape in the late nineties. At the United Nations, mainly owing to lobbying by Penal Reform International, the Standard Minimum Rules for the Treatment of Prisoners were tabled for review. This process, which should have culminated in a revision of the rules,⁶² has nevertheless led to the adoption of a draft Charter of Fundamental Rights of Prisoners⁶³ by the four regional preparatory meetings. Various initiatives are being taken at regional level. For example, an African Charter on Prisoners' Rights⁶⁴ and an Inter-American Declaration Governing the Rights and the Care of Persons Deprived of Liberty⁶⁵ have been drawn up. Within Europe, a process of revising or adopting standards for the treatment of detainees has been launched concomitantly, though not in a coordinated fashion, at the Council of Europe and European Union. Working in close cooperation with the European Union, the Council for Penological Cooperation (PC-CP), which answers to the Committee of Ministers of the Council of Europe, has embarked on a revision of the European Prison Rules. It should be completed in 2005 with the adoption of a European Prisons Charter, which would become the benchmark standard not only within the Community, but also throughout Europe. This process of reviewing and improving existing European standards springs directly from the recent progress achieved by the CPT in preventing torture and ill-treatment.

Stronger protection by traditional mechanisms for persons deprived of liberty

Despite the fact that torture and cruel, inhuman or degrading punishment or treatment were treated at the United Nations as a violation of human rights in connection with detention or imprisonment, conditions of detention have long been the poor relation of the traditional human rights protective machinery. The activities of the various above-mentioned visiting bodies have led to a marked improvement in that regard.

Development of the case-law of the European Court of Human Rights

Again, it was not until the late 1990s that the European Court of Human Rights turned its attention to conditions of detention in the light of Article 3 of the

62 To date this subject has not been put on the agenda of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, which is to be held in Bangkok from 18 to 25 April 2005.

63 E/CN.15/2003/CRP.9.

64 This text was adopted by the Fifth Conference of the Eastern, Southern and Central African Heads of Correctional Services, held in Windhoek, Namibia, from 4 to 7 September 2001, and debated during the Pan-African Conference on Prison and Penal Reform in Africa, held at Ouagadougou from 18 to 20 September 2002.

65 Draft resolution tabled by the Permanent Mission of Costa Rica to the Permanent Council of the OAS on 24 April 2002.

Convention, which prohibits torture and inhuman or degrading treatment or punishment. This development owes much to two kinds of healthy competition from the CPT.

First of all, in 1995, when the CPT had already been active for six years, the Parliamentary Assembly of the Council of Europe passed Recommendation 1257 (1995) urging that work on a draft protocol to the European Convention on Human Rights concerning prisoners' rights be concluded as soon as possible. The purpose of this draft text was to circumvent the Court's inertia in this respect, since the protocol would have enhanced the right of applicants to submit a complaint regarding conditions of detention to the Court. It was also designed to end a certain inconsistency within the Council of Europe, arising from the fact that the CPT's work rested on Article 3 of the European Convention on Human Rights,⁶⁶ whereas the Court — the main institution for implementation of the Convention — refused to apply Article 3 to deprivation of liberty.

The call for this draft protocol induced the Court to agree for the first time, in the case of *Tekin v. Turkey* of 9 June 1998,⁶⁷ to examine disputes involving deprivation of liberty in the light of Article 3 of the Convention. In the case in question, the applicant alleged that he had been detained in a cold and dark cell and blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation.⁶⁸ The Court found that these conditions of detention and the manner in which he had been treated amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.⁶⁹

The influence of the CPT was again evident in the case of *Assenov and Others v. Bulgaria*.⁷⁰ In order to assess the conditions of detention of a juvenile delinquent suspected of theft and arrested by the Bulgarian police,⁷¹ the Strasbourg court had regard to "the size of the cell and the degree of overcrowding, sanitary conditions, opportunities for recreation and exercise, medical treatment and supervision and the prisoner's state of health."⁷² Each of these criteria had been dealt with in turn by the CPT in its 2nd General Report in the section on substantive issues⁷³ devoted to police custody.⁷⁴ By thus introducing the CPT's standards into the body of its own legal doctrine, the Court at last brought deprivation of liberty within its jurisdiction.

The Court subsequently issued decisions on ill-treatment by prison warders⁷⁵ and on conditions of detention in a Lithuanian prison⁷⁶ and in the

66 Third preambular paragraph of the European Convention for the Prevention of Torture.

67 *Tekin v. Turkey*, 9 June 1998, ECHR, Reports of Judgments and Decisions, 1998-IV.

68 *Ibid.*, para. 9, 24, 42.

69 *Ibid.*, para. 53.

70 *Assenov and Others v. Bulgaria*, 28 October 1998, ECHR, Reports of Judgments and Decisions, 1998-VIII.

71 The Court even took the view that the application, although originally filed under Article 5.1 of the Convention, should be examined in relation to Article 3 thereof so that the conditions of detention could be considered.

72 *Op. cit.* (note 70), para. 135.

73 See above.

74 CPT/Inf (1992)3, para. 42.

75 *Labita v. Italy*, 6 April 2000, ECHR, Reports of Judgments and Decisions, 2000-IV.

76 *Valašinas v. Lithuania*, 24 July 2001, ECHR, Reports of Judgments and Decisions, 2000-IV.

segregation unit of a Greek prison.⁷⁷ The Court has consistently held that “under [Article 3] the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject that person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the said person’s health and well-being are adequately secured.”⁷⁸

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) Similarly, but in the normative context of international criminal law, the ICTY has established precedents that are of particular relevance to deprivation of liberty. Although the effect of “competition” is non-existent here, it should be emphasized that, in most of the cases in question, the Presiding Judge of the Chamber was Antonio Cassese, the former President of the CPT.

In the *Tadic* judgement,⁷⁹ the judges “confined” themselves to mentioning the particularly harsh conditions in the Omarska and Keratem⁸⁰ detention camps, but did not characterize them as a crime. Later, in the “Celebici camp” case,⁸¹ the judges made a point of characterizing detention conditions as the offence of “inhumane conditions.”⁸² More specifically, the court in The Hague also took into account deprivation of food or water,⁸³ the lack of medical care,⁸⁴ inadequate sanitation and the smallness of rooms⁸⁵ and overcrowding in prisons.⁸⁶ In the same way, the atmosphere of terror,⁸⁷ death threats and the constant intimidation to which detainees were subjected⁸⁸ were deemed by the Tribunal to constitute inhuman treatment since they inflicted damage on human dignity.⁸⁹

The use of information

Lastly, mention must be made of the informative role played by visiting mechanisms. Until very recently, places of detention were completely sheltered from the public gaze, but visiting bodies have helped in two ways to lift the lid on what goes on inside prisons. First, the publication of the reports of the CPT, the Inter-American Commission on Human Rights and the African Commission’s Special Rapporteur have had a perceptible impact on the public’s awareness of detention-related problems. The same can be said of the reports of the United

77 *Peers v. Greece*, 19 April 2001, ECHR, *Reports of Judgments and Decisions*, 2001-III.

78 *Kudla v. Poland*, 26 October 2000, ECHR, *Reports of Judgments and Decisions*, 2000-XI, para. 94.

79 *Prosecutor v. Dusko Tadic aka Dule*, 7 May 1997, ICTY, IT-94-1-T.

80 *Ibid.*, paragraphs 159-160 and 169.

81 *Prosecutor v. Zejnir Delalic, Zdravko Mucic also known as “Pavo”, Hacim Delic and Esad Landzo also known as “Zenga”*, 16 November 1998, IT-96-21-T.

82 *Ibid.*, para. 554.

83 *The prosecutor v. Tihomir Blaskic*, 3 March 2000, ICTY, IT-94-14-T, para. 681.

84 *Op. cit.* (note 79), para. 170.

85 *Op. cit.* (note 83) para. 694.

86 *Op. cit.* (note 81), para. 151.

87 *Op. cit.* (note 83), para. 700.

88 *Op. cit.* (note 79), para. 154.

89 *Ibid.*, para. 744.

Nations Special Rapporteur on Torture. To judge by the heated manner in which he was called to account during the 60th Session of the United Nations Commission on Human Rights by one government whose country he had visited, it is plain that his visits and reports not only cause a stir within the State concerned, but also provoke an international reaction. The above-mentioned reform of European standards is likewise largely due to the wider awareness generated by the propagation of these mechanisms' findings.

From a more institutional angle, the information in these reports is being increasingly used by traditional mechanisms to assess the human rights situation of persons deprived of their liberty. When the United Nations Committee against Torture considers the periodic reports of States Parties which are also Members of the Council of Europe, it tends as a matter of course to question them about the implementation of CPT recommendations and/or about changes in conditions at a place of detention following a CPT visit there.⁹⁰

Furthermore, it is not rare for the European Court of Human Rights to use information from and the assessments of the CPT to determine whether Article 3 of the European Convention on Human Rights has been violated. In the *Dougoz* case, for example, the Court explicitly refers to the conclusions of the CPT visit report as the basis for its appraisal of the compatibility of the conditions of detention with Article 3 of the Convention.⁹¹ This last example is an apposite illustration of the cross-fertilization⁹² of different legal regimes and institutional and operational approaches.

90 It should be noted that this practice owes much to the presence of a CPT member in the CAT (Dr Bent Sorensen from 1988 to 2000 and Mr Ole Vedel Rasmussen since 2000).

91 *Dougoz v. Greece*, 6 March 2001, ECHR, *Reports of Judgments and Decisions*, 2001-II.

92 Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2001, p. 45.