Guarantees of persons deprived of liberty in criminal procedure in the light of recommendations issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment

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Abstract.
Existence of each country presumes a usage of compulsion which includes administrative, criminal procedural, disciplinary etc. types. Conditions, procedure, provisions and applications of compulsory measures are determined in the international and national legal acts. Detention is a criminal procedural compulsory measure related to the deprivation of liberty. A detained person is isolated for a certain time being sustained in special conditions. This creates a risk that detained person’s dignity can be humiliated. This paper aims analysis of a current situation related to the rights of detained person, done in the light of recommendations provided by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment following implementation of human rights in places of detention in European states.

Key words: human rights, criminal procedural detention, prevention of torture
Introduction.

The main principles of human rights such as universality, interdependence and indivisibility, equality and non-discrimination appearing in the Universal Declaration of Human Rights (UDHR), state that human rights simultaneously entail both rights and obligations. These have been reiterated in numerous international human rights conventions, declarations, and resolutions. Today, all United Nations member States have ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

While the interpretation of human rights standards such as by the treaty bodies or by courts is a separate step in the monitoring process, the use of indicators helps to ensure that the interpretive phase is well informed. Together with national human rights action plans, baseline studies and rights-based approaches to development and good governance, the oversight work of United Nations human rights mechanisms, and regional and national human rights institutions, indicators provide concrete, practical tools for enforcing human rights and measuring their implementation. In general, the above mentioned indicators are stratified into quantitative and qualitative, both facilitate the implementation and attainment of the objectives associated with the realization of human rights. Whereas, illustrative indicators deciphering observance of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (UDHR, art. 5) include: proportion of received complaints on the right not to be tortured investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by the Government; proportion of communications sent by the Special Rapporteurs on torture and on violence against women responded to effectively by the Government in the reporting period; proportion of law enforcement officials (including police, military, specialized investigation agencies and custodial staff) trained in rules of conduct concerning proportional use of force, arrest, detention, interrogation or punishment [Human Rights Indicators]. A regular monitoring of places of detention aims to address the root causes that can lead to torture and ill-treatment. This study provides characteristics on the actions of The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) in the light of observance of guarantees of persons deprived of liberty representing a new phase in international human rights intervention. The authors examine the modus operandi of the CPT, set the CPT's reports to the States on the visits to Baltic countries and discuss how international human rights standards are implemented and enforced at the local level in an enlarged and increasingly diverse European community of nations.

The study is based on analysis of a variety of international and national legal acts, documents, opinions and suggestions of CPT. The main methods are analysis and synthesis, scientific induction and deduction as well as comparative method.

Human dignity, freedom, democracy, equality, the rule of law and respect for human rights must be more than concepts in our days. Fundamental rights are the foundation on which the European Union is built: they must be continuously respected and protected as it has been stated by
Viviane Reding, the Vice-President of the European Commission. This commitment is laid down in the European Union's Charter of Fundamental Rights – Europe's "Bill of Rights" and the most modern codification of fundamental rights recognised in national constitutions [Reding, 2013].

Since the adoption of the UDHR in 1948, the prohibition of torture has been universally understood to mean that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (article 5). Torture\(^1\) is one of the most horrendous violations of a person’s human rights. It is an attack on the very essence of a person’s dignity. The Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Collectively, this definition contains three cumulative elements: the intentional infliction of severe mental or physical suffering, by a public official, who is directly or indirectly involved, and for a specific purpose.

The prohibition of torture is absolute and can never be justified in any circumstance. This prohibition is non-derogable, which means that a State is not permitted to temporarily limit the prohibition on torture under any circumstance whatsoever, whether a state of war, internal political instability or any other public emergency. The prohibition of torture and other forms of ill-treatment has a special status in the international protection of human rights. It is included in a number of international and regional treaties and also forms part of customary international law, binding all States. Considering the particular importance placed on the prohibition of torture, the traditional obligations of States to respect, to protect and to fulfil human rights is complemented by a further obligation to prevent torture and other forms of ill-treatment.

An Operational Guide for National Human Rights indicates that it is important to distinguish between two different forms of torture prevention. This distinction is based on when the intervention occurs and the approach that is employed. Direct prevention (mitigation) aims to prevent torture from occurring by reducing the risk factors and eliminating possible causes. This intervention happens before torture takes place and aims to address the root causes that can lead to torture and ill-treatment, through training, education and regular monitoring of places of detention. Direct prevention is forward-looking and, over the long term, aims to create an environment where torture is not likely to occur. Indirect prevention (deterrence) takes place once cases of torture or ill-treatment have already occurred and is focused on avoiding the repetition of such acts. Through investigation and documentation of past cases, denunciation, litigation, prosecution and sanction of the perpetrators, as well as reparation for victims, indirect prevention aims to convince potential torturers that the “costs” of torturing are greater than any possible “benefits”. Both forms are complementary and both should form part of an integrated program to prevent torture.

It is important to note that many international torture prevention mechanisms stress the importance of a gender-sensitive interpretation of torture and the need to pay particular attention to questions such as rape in detention, violence against pregnant women and denial of reproductive

\(^1\) Torture is the infliction of severe physical or mental pain or suffering for a purpose, such as extracting information, coercing a confession, or inflicting punishment. It is normally committed by a public official or other person exercising comparable power and authority. http://www.britannica.com/EBchecked/topic/600270/torture
rights, which have long been recognized as falling under the Convention’s definition. It is also worth noting that “with the consent or acquiescence of a public official or other person acting in an official capacity” has been interpreted to mean that privately inflicted harm against women, children or groups may be covered under the definition if severe pain or suffering is caused and if the State fails to act with duediligence to prevent or protect individuals, since it would be committed for a discriminatory purpose.

Further, the prohibition of torture is also recognized as a peremptory norm of international law, or *jus cogens*, and regional treaties. *Jus cogens* overrides any inconsistent provision in another treaty or customary law. Firstly, the unequivocal prohibition on torture is included in the founding document of the international human rights system - the UDHR. Simultaneously, it also says that people have the right to “an effective remedy” if their rights are violated. Secondly, Article 7 of the International Covenant on Civil and Political Rights provides that no person “shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Additionally, the article 10 states: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Covenant provides that anyone claiming that their rights have been violated shall have an effective legal remedy. Further, no derogation is allowed regarding the right not to be subjected to torture and other forms of ill-treatment. The article 11 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force in 1987, determines that States parties are required to keep under systematic review interrogation rules, instructions, methods and practices, as well as custody procedures. These should comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The article 13 of the above mentioned Convention determines the right of victims to complain and obtain redress as the following “any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by competent authorities of State”, whereas, the article 14 states that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

The Convention against Torture was complemented by an Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 2002 and entered into force in 2006. The Optional Protocol reinforced the specific obligations for prevention of torture in articles 2 and 16 of the Convention by establishing a system of regular visits to places of detention by international and national bodies.

There are four general instruments based on regional subdivisions - human rights treaties operating in Europe, Africa, Arab countries and the Americas, which each contain a clear and unequivocal prohibition of torture. There are also two regional treaties – in Europe and the Americas – that deal specifically with torture. Specifically, for the European Union the European Convention on Human Rights, adopted in Rome in 1950, is a regional treaty under the auspices of the Council of Europe. Article 3 of the European Convention on Human Rights provides that “no

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2 *Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. Examples of *jus cogens* norms include: prohibition on the use of force; the law of genocide; principle of racial non-discrimination; crimes against humanity; and the rules prohibiting trade in slaves or human trafficking. [http://www.law.cornell.edu/wex/jus_cogens](http://www.law.cornell.edu/wex/jus_cogens)
one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Cooperation with national authorities is at the heart of the Convention, given that its aim is to protect persons deprived of their liberty rather than to condemn states for abuses. Right to an effective remedy stated in the article 13 of the above mentioned European Convention comply with legal regulation regarding right to an effective remedy appearing in the article 7 of the International Covenant on Civil and Political Rights.

The European Union's accession to the European Convention on Human Rights was made obligatory by the Lisbon Treaty (Article 6(2) TEU), and, therefore, complemented the system protecting fundamental rights by making the European Court of Human Rights competent to review Union acts. This external judicial review further encouraged the European Union to follow an ambitious policy for fundamental rights [Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union]. With the new Article 6 TEU the protection of fundamental rights in the EU context has been taken to a new level. Moreover, Article 6 TEU also brings about changes for the Member States. By turning the Charter of Fundamental Rights into a legally binding instrument, Article 6 TEU also obliges the Member States to respect the provisions of the Charter [Mathisen, 2010].

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989 has been ratified by all the 47 member States of the Council of Europe. Simultaneously, the CPT was set up under the Convention complementing the judicial work of the European Court of Human Rights, and its task is to examine the treatment of persons deprived of their liberty. For this purpose, it is entitled to visit any place where such persons are held by a public authority. Modus operandi of CPT delegations is carrying out visits on a periodic basis, usually once every four years, following the implementation of a unique human rights treaty which seeks to prevent human rights violations in places of detention in European states. Apart from periodic visits, the CPT also organizes visits which it considers necessary (ad hoc visits). Visiting prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals, social care homes, etc. and having unlimited access to places of detention the CPT interviews persons deprived of their liberty. The CPT has already announced its 2015 program of periodic visits reporting that the Committee intends to examine the treatment of persons deprived of their liberty in the following ten countries: Armenia, Bosnia and Herzegovina, France, Germany, Luxembourg, Malta, Republic of Moldova, Serbia, Sweden and Switzerland.

After each visit, the CPT sends a detailed report to the State concerned, which includes the CPT’s findings, recommendations, comments and requests for information. The CPT also requests a detailed response to the issues raised in its report. These reports and responses form part of the ongoing dialogue with the States concerned.

The CPT has been reporting that some detainees run a great risk of serious ill-treatment and/or torture by the police, and in certain cases supporting medical evidences have been collected deciphering suspension by the legs with the head just a few centimeters above the ground, the application of electric shocks to various parts of the body (including the penis); the placing of a metal bucket on the head and then striking it with blows from wooden sticks; blows struck with truncheons or wooden clubs; “falaka” (beatings on the soles of the feet). In most cases, however the

3 *modus operandi*, (Latin: “operating method”) in criminology, distinct pattern or manner of working that comes to be associated with a particular criminal. Criminologists have observed that, whatever his specialty—burglary, auto theft, or embezzling—the professional criminal is very likely to adhere to his particular way of operating. Enciclopaedia Britannica. http://www.britannica.com/EBchecked/topic/387437/modus-operandi
CPT is confronted with less severe forms of ill-treatment of detainees, such as the infliction of slaps, punches, kicks or verbal abuse both at the time of arrest and during custody.

The CPT published report to German government reflecting observations made during it in November-December, 2010 states that since a few allegations were received from detained persons (including juveniles) that they had been subjected to excessive use of force by police officers at the time of apprehension (in particular, punches and kicks). Moreover, a particular attention should be paid to the continued use of Fixierung (the physical fixing to a bed or mattress) of agitated and/or violent detained persons in police establishments, therefore, Committee has recommended that the authorities put an end to this practice. In their response, the German authorities state that the practice of Fixierung in a police context has been abolished in many of the Lander, but continues to be applied in some Lander in rare, exceptional cases. As a matter of fact, the CPT heard no allegations of recent medical treatment during custody in police establishments

Several observations and suggestions were made during the CPT’s visits organized to the Baltic States occurred between 2008 and 2014. Collectively, the CPT’s delegation outlined the main facts found during the visit to Estonia on 30 May up to 6 June 2012 [Report to the Estonian Government on the visit to Estonia] suggesting the urgent matters, two concerning conditions in police detention houses and two on prison-related matters. They found conditions in Haapsalu Police Detention House to be appalling. The delegation requested the Estonian to take this detention facility out of service since natural light was not provided in the cells. A similar CPT request was issued to Estonian authorities because Narva Police Detention House practiced detainee accommodation in the size limited cells with lack of access to natural light. Notwithstanding was a fact that a new detention house was already under construction, the CPT delegation requested the Estonian authorities to take the above-mentioned cells out of service immediately. The third request of CPT delegation suggested the Estonian authorities to make plans in order to take a certain block of Tallinn Prison out of service and find for disciplinary purposes another location within the prison as well as take out the cells measured less than 6 m². Additionally, it was requested that no juveniles be placed in any disciplinary cell of block mentioned above. The final immediate observation concerned the excessive use of solitary confinement at Viru Prison, including in relation to juveniles. The above-mentioned immediate observations were subsequently confirmed in a letter of 14 June 2012 from the Executive Secretary of the CPT, and the Committee requested the Estonian authorities to provide, within three months, an account of the steps taken in response. The Estonian authorities provided a response to the report of the CPT on its visit to Estonia from 30 May to 6 June 2012, and informed the CPT of measures taken in respect of the observations [Response of the Estonian Government to the report of the European Committee]. Reporting on the remarks related to the police detention in Narva, the Estonian authorities confirmed that the old detention cell of the East Prefecture in Narva was shut down on 30 January 2013. The authorities reported that they agree with the opinion of CPT that detention conditions must be such as to ensure the health and welfare of the detained person. They note that the improvement of the detention conditions is a long-term process, which also depends on the availability of financial resources, and

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4The citation is based on the publication appeared in the: Human rights information bulletin. Strasbourg: Council of Europe Pub., 2012, 85, 110. A full text of the report to German government following visit is published in the: Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010
they are making the best efforts in order to find the financial resources for improving detention conditions at detention houses. Lighting and overall detention conditions at detention houses are being gradually improved. The Estonian authorities made also steps to ensure that collective punishments are not applied in the juvenile ward at Viru Prison, and cells are locked only in case of a justified need and for as short of a period as absolutely necessary. Moreover, the Medical Departments checks the quality of food before every meal by tasting it, in order to prevent the provision of poor quality food to inmates. Entries on food quality are made electronically by a nurse in charge. The Health Board carries out random inspections of the alimentation of inmates.

Reporting to the Lithuanian Government on the visit to Lithuania carried out by the CPT from 14 to 18 June 2010 the observations made by the delegation during its 2008 visit to Kaunas Juvenile Remand Prison confirming that this establishment had unacceptable conditions of detention appeared [Report to the Lithuanian Government on the visit to Lithuania]. The visit also presented an opportunity to review the treatment of persons deprived of their liberty by law enforcement agencies. It is important to note, that despite some improvements made since the 2008 visit, the findings of the delegation in 2010 indicate that little progress has been made regarding a number of the CPT's recommendations, in particular in the fields of legal safeguards against ill-treatment of persons deprived of their liberty by the police, detention of remand prisoners in police facilities and the activities to be offered to prisoners at Kaunas Juvenile Remand Prison. The delegation requested that the Lithuanian authorities provide to the Committee, within two months, a full and detailed report on the investigation into allegations of recent inter-prisoner violence at Klaipėda City Police Detention Centre. This request was confirmed in a letter of 5 July 2010 from the Executive Secretary of the CPT. Furthermore, by letter of 20 July 2010, the President of the CPT, confirming a request made by the delegation during the visit, requested the Lithuanian authorities to provide, by 6 September 2010, an account of the investigative acts taken in the course of the pre-trial investigation which had been initiated concerning the allegations that the Central Intelligence Agency had operated secret detention facilities on Lithuanian territory. Reporting on the major improvement made in Kaunas Juvenile Remand Prison the Lithuanian authorities confirm that for the purpose of reducing any manifestations and Intimidation and violence as well as convict subculture, specialists of the Psychological Group provide preventive personal psychological consulting to detainees and convicts. A special publication on the specific features of communication with delinquent teenagers has been prepared for the staff. Detainees and convicts are provided with regular medical, health care and hygiene services and facilities as well as schooling. Whereas, the 2009-2015 Program for Optimization of the Activities of Police Detention Facilities was used for the construction of a new detention facility of Vilnius County Police Headquarters and the renovation of the first wing of Klaipeda City Police Detention Center [Response of the Lithuanian Government to the report of the European Committee].

Since the very outset of its activities, the CPT has been recommending the establishment of independent monitoring mechanisms at national level for all types of places of deprivation of liberty. If adequately resourced and truly independent, they can make a significant contribution to the prevention of ill-treatment of persons deprived of their liberty. In this connection, the CPT considers that Parties to the Convention establishing the CPT should also become parties the Optional Protocol to the United Nations Convention against Torture (OPCAT). Indeed, this instrument provides, inter alia, for the setting-up of one or several independent monitoring bodies at national level (National Preventive Mechanisms), which will possess significant powers. Those bodies should be in a position to intervene more regularly – and more rapidly – than any
international body. The CPT therefore encourages the Latvian authorities to accede to/ratify the OPCAT.

The legal framework governing the deprivation of liberty by the police in Latvia has remained basically unchanged since the last periodic visit in 2007. Thus, criminal suspects may be held in police custody (before being seen by a judge) for a maximum of 48 hours.

As was the case during the CPT’s previous visits when the Latvian authorities were called to ensure that the return of prisoners to police detention facilities is sought and authorised only very exceptionally, for specific reasons and for the shortest possible time. Such a return should in each case be subject to the express authorisation of a prosecutor or judge.

The CPT stated that little or no progress has been made in implementing many key recommendations made by the delegation after its previous visits to Latvia, in particular as regards conditions of detention in police establishments, the regime of activities offered to remand prisoners, the regime and security measures applied to life-sentenced prisoners, and prison staffing levels [Report to the Latvian Government on the visit to Latvia].

In the course of the visit to Latvia happened on 5 up to 15 September 2011, the delegation received a number of allegations from detained persons of physical ill-treatment by police officers. The ill-treatment alleged consisted, in the main, of punches and kicks, and in a few cases of inappropriate use of truncheons and too-tight handcuffing. It was said to have occurred at the time of apprehension and/or subsequently, during the initial stay at a police establishment (including during questioning). Some allegations were also received of threats and verbal abuse. It should be stressed that no allegations of physical ill-treatment were received in respect of police officers performing custodial tasks in police detention facilities. During this visit the immediate observations under Article 8, paragraph 5, of the Convention related to conditions in the disciplinary cells at Jelgava and Valmiera Prison came into light. The above-mentioned immediate observations were subsequently confirmed by the Executive Secretary of the CPT in a letter dated 22 September 2011, in which the Latvian authorities were asked to provide, within one month, confirmation that the requested action had been taken. Consequently, by letter of 21 October 2011, the Latvian authorities provided information on the measures taken in response to the above-mentioned immediate observations [Responses of the Latvian Government to the report of the European Committee].

During the 2011 visit the Committee applied for information in respect the number of complaints of ill-treatment made against law enforcement officials and the number of criminal/disciplinary proceedings which have been instituted as a result as well as an account of criminal/disciplinary sanctions imposed following such complaints. The statistics provided, namely, the number of complaints of physical ill-treatment by the police (including those concerning physical ill-treatment of persons in police custody) was as follows: 128 (59) in 2007; 165 (81) in 2008; 113 (95) in 2009; and 161 (96) in 2010. Sanctions imposed on police officers were as follows: nine disciplinary sanctions in 2007; five disciplinary and one criminal sanction in 2008; one disciplinary sanction in 2009 and one in 2010. Collectively, the CPT suggested that it is struck by the very low number of disciplinary sanctions and the total absence of criminal sanctions in 2009 and 2010. In this context, the Committee noted with considerable concern that no action was taken by the Latvian authorities in response to the comments and recommendations made in the report on the 2007 visit, regarding the need to carry out a thorough review of the procedures for processing complaints about police ill-treatment. Consequently, the CPT once again recommended that such a review be carried out.

A comprehensive strategy for torture prevention to be developed requires an integrated
approach, composed of three interrelated elements: a legal framework that prohibits torture; effective implementation of this legal framework, and mechanisms to monitor the legal framework and its implementation. This strategy should begin with a thorough analysis of risk factors. The general political environment is an important factor to consider, as a lack of political will to prohibit torture, a lack of openness of governance, a lack of respect for the rule of law and high levels of corruption can all increase the risk of torture. The organization and functioning of the criminal justice system is another important factor to consider. The level of independence of the judiciary, as well as the level of reliance on confessions in the criminal justice system, will have a direct influence on the risk of torture. As the risk of torture is higher during the initial period of detention, particular attention should be paid to law enforcement authorities. In this regard, the institutional culture, the role and functioning of the police and recruitment and training processes for officers can all positively or negatively influence the risk of torture. The level of accountability and transparency of the authorities, the existence of public policies regarding crime prevention and the effectiveness of complaints mechanisms are factors that can significantly reduce the risk of torture.

Conclusions.

Torture is one of the most horrendous violations of a person’s human rights. It is an attack on the very essence of a person’s dignity. However, while there is an absolute prohibition on torture under international law, it continues to be widely practised in all parts of the world. Combating torture therefore requires the active involvement of many actors all over the world.

The traditional obligations of States to respect, to protect and to fulfil human rights are complemented by a further obligation to prevent torture and other forms of ill-treatment. States are required to take positive measures to prevent its occurrence. In the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice.

Through ratification of international human rights treaties, States are obligated to put into place national legal framework and legislation compatible with their treaty duties. The national legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. Where national legal proceedings fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

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