The Disease of Torture – The role of the CPT to perform preventive "medical" check-ups

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1. To what extent do you (dis)agree with the following statement: *"In formal terms, CPT reports and recommendations are not legally binding but possess only moral and political force"*

I. Introduction

"Torture and other forms of ill-treatment can be viewed as a highly dangerous and contagious disease that needs to be battled and cured not only for sake of those who are affected by it but for the greater good of humanity." This analogy might sound slightly farfetched at first, but if one thinks about its meaning it becomes clear that torture and other forms of ill-treatment – just like tragic diseases such as cancer – severely affect the lives of many humans and lead to (often) concealed but catastrophic (physical and psychological) consequences for those affected. Furthermore, just like diseases, torture and ill-treatment generally result from numerous causes that can be found at very different levels. Therefore, to fight it thoroughly one needs to adopt an integral approach that incorporates actors on all of the aforementioned levels and addresses potential risk factors at their roots. In other words, to avoid metastases and fully "cure" torture and other forms of ill-treatment a collective effort is required and strong follow-up measures also need to be put in place.

The establishment of the Committee for the Prevention of Torture (CPT) on a European regional level in 1989 has been a major step towards putting in place such a system (Niveau, 2004). The CPT generally focuses on monitoring the current situations in relation to torture and ill-treatment in the member countries, thereby ensuring to prevent it by identifying and eliminating risk factors at their very roots. The committee does this by conducting country visits to facilities where people are deprived of their liberty by public authorities (Art 2 ECPT). After each of these visits the CPT issues a generally confidential report and if necessary some recommendations to the respective government of the country examined. Nevertheless, these reports and recommendations are – in formal terms – not legally binding to member states (Art 10 (1) ECPT). One might ask if such non-binding documents can actually influence the conduct of states and reduce potential risk factors within their jurisdiction.

The aim of this essay therefore is to analyse the impact such reports have on the situation of detained persons within states and whether this instrument has actually led to improvements in the fight against torture and other forms of ill-treatment. This will be done by firstly analysing the procedures put in place by establishing the CPT and secondly by discussing its importance in the wider system in place on a European regional level.

II. The nature of the CPT and its functioning

Over the last 25 years both the United Nations and the Council of Europe have strongly increased their efforts to combat torture (Bank, 1997). Especially Europe has always taken a pioneer role in the general promotion of human rights in post-war times. Already the drafting of the European

Convention of Human Rights and Fundamental Freedoms (ECHR) in 1950 represented a major first step in this area. Over the following 40 years further measures have been taken to continuously expand the protection of human rights (APT, 2008). In the field of torture, particularly the entry into force of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) in 1989, which established the CPT, stands out and represents one of the highlights in the battle against torture on a European regional level. Its foundation can be seen as yet another milestone on the way to the comprehensive protection of Art 3 of the ECHR [1] (CPT, 2014). So with the entry into force of this convention and the establishment of the CPT a new and innovative mechanism to ensure and secure the prevention of torture and any other form of ill-treatment was put into place.

The reason why this new monitoring system has been viewed as highly advanced was the particularly strong mandate of the CPT to conduct its visits. Whereas most monitoring systems in place before the establishment of the CPT where mostly based on reports published by each state, the CPT now gathers most of its information through a compulsory on-site visitation system. Under this framework the CPT can conduct two types of visits: periodic visits and ad-hoc visits (Cassese, 1989). The first category refers to the committee's general task according to Art 1 ECPT – ie. the examination of "the treatment of persons deprived of their liberty by public authorities with a view to strengthening and – if necessary – to protecting such persons from torture and from inhuman or degrading treatment or punishment". The concerned state is generally notified in advance of such periodic visits. The aim of the CPT is to carry out such a visit to each state party every four to five years to foster a continuous dialogue and monitoring procedure. Secondly, the committee can also carry out so called ad-hoc visits. According to Art 7 (1) ECPT the committee shall conduct such a visit "if it appears to be required under the circumstances". Therefore, the CPT is flexible to act upon information received from any source and thereby respond to concrete allegations. In relation to both types of visits, the CPT can at its own discretion choose to visit any of the aforementioned places within its jurisdiction. Moreover, the respective governments have the duty to fully cooperate with the committee and ensure that it has access to all chosen facilities at any time[2] (Murdoch, 1994). All this results in a very wide and strong mandate held by the CPT and also explains its classification as trailblazer for modern monitoring procedures.

After notifying the respective country, members of the committee carry out the visit. The delegation generally consists of at least two committee members and a number of experts from numerous fields that assist them. Such experts might come from the fields of law, medicine, criminology or any other discipline that can contribute to producing a sophisticated report on the visit (Cassese, 1989). All members of the delegation have to be impartial and independent in order to provide an unbiased and apolitical account of the actually on-goings and conditions (APT, 2010). Generally visits start with a series of official meetings with government officials and authorities. This is often followed by discussions with some local NGOs to gather first-hand information on potential wrong-doings within the respective state party's jurisdiction. After this the delegation splits up and visits different facilities to investigate on-site. The respective state party governemnt has to ensure that the delegations have the

[1] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[2] Only under very exceptional circumstances the respective authorities may be allowed to postpone a visit by the CPT (Art 9 (1) ECPT).

possibility of unrestricted movement in the facility, of unsupervised communication with detainees and the availability of any further information required (Murdoch, 1994).

Nevertheless, these visits alone are unlikely to be sufficient to effectively prevent torture and other forms of ill-treatment. For this reason the visit of the CPT can be viewed only as the beginning of a continuous dialogue between the member state and the committee. Thus, at the end of each visit the delegation meets again with government officials to informally communicate some first impressions of the visit (Morgan & Evans, 2001). In accordance with Art 8 (5) ECPT the CPT can however also forward some immediate observations to the competent authorities if there is an urgent need to improve the treatment of particular detainees. Finally after each visit the CPT prepares a detailed report and sends – ideally within six months – it to the respective government. This report contains all the findings, requests for information, comments and – if regarded necessary by the committee – recommendations to solve existing problems in order to improve the situation (Cassese, 1989). These reports are generally drafted by the delegations and then discussed, amended and agreed upon in one of the three annual plenary sessions of the CPT. The CPT also requests from each government a subsequent response on the actions taken or planned. It also conducts follow-up visits to some of the facilities reviewed in its first visit (Groma & Kaija, 2014). From all this it can be seen that the visits of the CPT are part of an on-going dialogue that forms a monitoring circle.

However, as mentioned above, these reports and recommendations of the CPT are – in formal terms – not legally binding for the state party governments. In the following section of this essay the legal nature and the actual impact of these reports and recommendations will be discussed. It will also be discussed how these instruments fit into the broader framework of torture prevention that is in place on a European regional level.

III. Discussion

The outline of the nature and the functioning of the CPT have shown that this body has been an important step towards a better system to ensure the effective enforcement of Art 3 ECHR. The system of compulsory periodic visits by an independent and impartial delegation has been an unprecedented innovation in the field of torture prevention. Such a step was however necessary to come closer to the integral approach of fighting the "disease of torture". To put it in the words of this analogy, a system of continuous visits to the doctor is necessary not only to beat but also to prevent any serious disease. Self-diagnosis can very often be misleading and subjective. Therefore, an external opinion and monitoring system (ie. doctors) is required. Nevertheless, is the framework provided by the ECPT enough to make this happen? As mentioned in the last paragraph, neither the CPT's reports nor its recommendations are - in a formal sense - legally binding. So can these instruments still play a major role in achieving an ever more sophisticated mechanism to prevent torture and other forms of ill-treatment?

To answer this question one first needs to analyse the position of the CPT within the broader system of the prevention of torture within the European regional context. Every strategy of prevention requires an integral approach consisting of three interrelated elements: 1) a legal framework that prohibits torture and other forms of ill-treatment, 2) an effective system to implement these legal norms and 3) an elaborate system of pre-emptive monitoring to avoid torture and other forms of ill-treatment from happening in the first place (Groma & Kaija, 2014). At a European level, the first element can be found in Art 3 ECHR which stipulates an absolute prohibition of torture and other inhuman or degrading treatment or punishment. By signing and ratifying the ECHR all member states are legally bound by all the provision of the convention. In cases of breach the second element mentioned above comes into play – the European Court of Human Rights (ECtHR) – has to deal with both inter-state and individual complaints. In other words, the ECtHR can be viewed as the guardian of the ECHR which interprets and enforces the convention. Its decisions are legally binding to all member states of the convention (Art 32 ECHR). And finally, the last element requires a sophisticated mechanism to constantly monitor the situation within the member states. This is where the responsibilities of the CPT are lying. Through its periodic visits to all states the committee can monitor the current situation, emerging trends and improvements. Hence the establishment of the CPT has been accurately qualified as a vital step towards the implementation of an integral torture prevention system.

One might ask however, why such an integral system also needs a monitoring body that does not have the power to issue legally binding recommendations. The important question here is whether the instruments of the CPT – even though not having a legally binding force – still have a certain political or moral force. The CPT as a non-judicial body does not have the same capabilities as a court. Thus, it cannot hold formal hearings[3] and more importantly its decisions are not binding to the state parties (de Beco, 2012). So how do these reports and recommendations have an impact on the conduct of a state party's government? This can be answered by looking at the follow-up procedure after a visit has been conducted and the reports and recommendations have been forwarded to the respective government. Generally governments have the possibility to request the publication of the findings of the committee. Morgan & Evans (2001) have identified four approaches state party governments have taken in relation to the publication of reports and recommendations: 1) A minority of states authorise the publication soon after they have received the documents; 2) The vast majority however request the publication only together with their formal reply to the report and recommendations; 3) Few member states only authorise the publication a very long time after the actual visit has taken place, providing very obscure reasons for doing so [4]; 4) And finally some countries decide not to allow publication of the findings at all. This nevertheless is the exception to the rule. From each state's behaviour regarding the publication of the reports one can draw certain conclusions about the content of the reports. It is generally inferred from a reluctance to authorise publication that the respective government is trying to hide something. For this reason, the vast majority of countries prefer to not obstruct the publication of a report for too long in order to avoid being associated with potential wrong-doings. Yet, countries also do not want to publish findings of the CPT which actually show serious risk factors or even actual cases of torture or other forms of ill-treatment. For this reason, it can be said that CPT reports and recommendation definitely do have a rather strong impact[5] on the behaviour of member states as the existing procedure does lead to a certain pressure – be it morally or politically – on governments to allow the publication of the findings of the committee.

[3] This means that the persons interviewed are not obliged to say the truth or even to say anything at all.
[4] Timeframes from around five years have been seen here.
[5] Often governments try to pre-emptively ensure that no such risk factors occur in order to avoid criticism by the CPT.

Nevertheless, even though the CPT is generally bound to the principle of confidentiality in regard to reports and recommendations, the committee does under certain circumstances even have the opportunity to unilaterally publish its findings. This means that generally all the information obtained by the CPT and the conclusions it draws from this have to be kept confidential and can only be communicated to the respective state party (Murdoch, 1994). This principle of confidentiality has been essential to built up a continuous dialogue based on trust and cooperation with state party governments which is of paramount importance to the success of the work of the CPT. The greater the assistance on a ministerial level the better the cooperation and support at the actual facilities visited will be (APT, 2010). Nonetheless, it is also necessary for the CPT to ensure effective preventive monitoring also in countries that only show minimal or no cooperation with the committee. In such cases the CPT can – by a 2/3 majority vote – also decide upon the unilateral publication of the reports and recommendations (Art 10 (2) ECPT). Thus, if member states obstruct the work of the CPT, by for example refusing access to some facilities or withholding necessary information, or if such countries consistantly refuse to act upon the committee's recommendations, the CPT can sanction this state by publishing its findings. As such a reluctance to cooperate with the committee normally results from wrong-doings which the state party governement is trying to hide, the unilateral publication of the CPT's findings will shed a considerably bad light on the affected country (Cassese, 1989). Hence, such a "naming and shaming" strategy also allows the CPT to create a strong international pressure on the respective government to take measures in accordance with its recommendations to improve the situation. So again, even though its reports and recommendations are not in formal terms legally binding, the CPT does have the means to exercise a certain moral and political pressure on state party governments.

However, do countries even have a morals or political "good conscience" to actually take into account such pressure? Political scientists have identified, broadly speaking, two different reasons why governments generally act upon international obligations and best practises (Posner, 2003). Firstly, they do so because of political reasons, assessing potential reputational consequences or retaliation by other members of the international community. Secondly, countries act upon their international obligations due to moral reasons that "influence states by constraining their prudential decisions" (Posner, 2003, p. 1902). In other words, states would consider it wrong to break these obligations even if they could get away with doing so without facing any sanctions. Even though some scholars argue that there is no such moral force which states take into account[6], it can be assumed that international obligations generally concern common international problems. Thus, to comply with these obligations can only be in every governments best interest – even if they could get away breaching them unsanctioned (Raustiala & Slaughter, 2002). This is even more true with human rights such as for example the absolute prohibition of torture. For this reason, it can be argued that state governments are not only influence by a political but also by a moral force to comply with international obligations and best practices (such as CPT reports and recommendations).

[6] These scholars argue that in an international sphere every individual state government will try its best to best satisfy the interests of its own citizens without caring too much about foreign citizens. Therefore, the proponents of this theory argue that international obligations are never in the very best interest of one single state which leads to the individual states' governments not being bound by any moral force to fully comply with these obligations.

IV. Conclusion

The analysis in this essay has demonstrated that the establishment of the CPT has been a significant piece of the puzzle of creating an integral approach to prevent torture and other forms of ill-treatment in a European regional context. Whereas the ECtHR takes a reactive stance within this framework where it focuses on the investigation, prosecution and sanctioning of actual cases of torture or other forms of ill-treatment once they have already occurred – thereby indirectly preventing and deterring such behaviours – the work of the CPT begins one step earlier (Groma & Kaija, 2014). Through its system of visits the committee can pre-emptively monitor the situations within member states and identify and point-out potential risk factors or problems. Therefore – in accordance with the saying "Prevention is better than reaction" – the CPT takes a direct and proactive approach to mitigating and preventing torture and other forms of ill-treatment (Kicker, 2012). The strong and unprecedented mandate of the CPT, that allows the committee to visit any facility within its jurisdiction where persons are detained of their liberty by a public authority at any time, is another vital feature in this framework. Through these compulsory visits the CPT can engage in a continuous dialogue with governments and can monitor devolpments and trends in all members states (Evans, 2002). As demonstrated above, even though the committee's reports and recommendations do not formally have a legally binding force, the findings of the committee do in reality exercise a real impact on governments' behaviours on the basis of moral and political forces. Practice has shown that – even though improvements often happens slowly – the majority of state party governments do actually take action upon the recommendations of committee and put effort into eliminating existing risk factors identified by the CPT (Bank, 1997).

To put all this together, the tasks and activities of the CPT can very much be compared to the preventive medical check-ups everybody should have performed by a doctor from time to time. These preventive examinations help to identify diseases at very early stages which highly increases the possibility of success of any subsequent treatment. But such continuous check-ups do not only enable early identification, but it also helps to strongly enhance the prevention of these diseases by addressing their root causes– ie. nutrition, life style, stress and many more. The same can be said for torture. The work of the CPT does not only identify actual cases of torture and other forms of ill-treatment, but it ensures that such acts do not even occur in the first place by identifying and addressing potential risk factors. It issues confidential reports and recommendations to the respective governments and follows-up on the actions taken to eliminate these risks and to improve the existing situation. To use the analogy "Torture as a disease" again, this can be equated to a docter prescribing some homeopathic medicine or telling a patient to modify the diet or do more exercise after one of the aforementioned preventive check-ups. From this it can be seen, that diseases can be fought and remedied using less-intrusive means if tackled at their root causes. Fighting the actual disease often requires strong and potentially harmful medication. Again this analogy can be perfectly used in the context of torture as well. It is clearly in the interest of any state and individual to proactively prevent such acts from happening in the first place, rather than to deal with it after it has already happened. For this reason – just like a disease – the best remidy to fight and prevent torture and other forms of ill-treatment is to tackle it at its very root causes. From all this it can be inferred that the question of whether the CPT's reports and recommendations are of a legally binding nature or not, does not really carry much weight in reality. This is due to the fact that the committee's findings do have – as mentioned above – a very strong moral and political force on state party governments. Thus, even though they are not in formal

terms legally binding, the CPT's reports and recommendations are an integral part of the European regional framework of torture prevention and are of paramount importance in the on-going fight against torture.

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