

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Konrad Ginther *

Introduction

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the Convention') adds a new approach to the promotion and protection of human rights.¹ According to Article 1 of the Convention, a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the Committee') shall be established in order to examine, by means of visits, the treatment of persons deprived of their liberty with a view to strengthening, if necessary, their protection from torture and from inhuman or degrading treatment or punishment.

The Convention was opened for signature to Member States of the Council of Europe on 26 November 1987.² It entered into force on 1 February 1989 upon the ratification of 7 states. As of January 1991, 20 Member States of the Council of Europe had ratified the Convention.³ The Committee started to operate in November 1989. It adopted its Rules of Procedure on 16 November 1989.⁴ The first list of states to be visited in 1990, established by the Committee by drawing lots, includes Austria, Denmark, Spain, Malta and the United Kingdom. The first country to receive 'a periodic visit'⁵ by the Committee was Austria.

I. The Objective and Background of the Convention

The Convention was concluded in the conviction that 'the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits.'⁶ In its operative part, the Convention does not set or specify standards, neither does it provide for any complaint or adjudicatory procedures. The objective of the Convention is more complex; it is not to apply the law to certain established facts or situations and, if the circumstances so demand, to condemn a certain state for misconduct. The object is, 'in a spirit of cooperation and through advice, to seek improvements, if necessary, in the protection of persons deprived of their liberty.'⁷ The underlying idea is to monitor and thereby improve the environment, i.e. places

* University of Graz, Austria.

1 Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', 83 *AJIL* (1989) 128.

2 Council of Europe, Doc. H (87) 4; reprinted in 27 *ILM* (1988) 1152.

3 The states which have not yet ratified are: Belgium, Greece, Hungary and Liechtenstein.

4 CPT/Inf. (90) 5 Rev. (Strasbourg, 31 May 1990). The Rules of Procedure were since amended twice (8th March and 11th May 1990).

5 As to the distinction between periodic and *ad hoc* visits see Rules 31ff. of the Rules of Procedure and below.

6 Preamble paragraph 5.

7 See Explanatory report on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg 1989) paragraph 20 (the Expl. rep.). The

where persons are deprived of their liberty up to a point where torture and inhuman or degrading treatment or punishment will come under routine control or will no longer occur at all. Toward this end, the Convention provides for a complex and sensitive mechanism of *on-site inspections* of prisons and other places of detention, involving communication and interaction between the Committee, its members, including experts, the government of the Party concerned and its competent authorities, private persons deprived of their liberty and other persons who might supply relevant information, including non-governmental organizations ('NGOs').⁸

As regards the background and the political circumstances surrounding the drafting of the Convention, in 1976 Jean-Jacques Gautier, the founder of the Swiss Committee against Torture, had already proposed the system of visits, as developed and practiced by the International Committee of the Red Cross (ICRC) in respect to prisoners of war camps and to all other places where persons are deprived of their liberty.⁹ In the course of the drafting of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰ the government of Costa Rica submitted a draft Optional Protocol to the UN Convention against Torture for eventual consideration by the Commission on Human Rights, based on Jean-Jacques Gautier's idea to combat torture by non-judicial means of periodic visits of prisons and other places of detention.¹¹

Given its novel approach and complex and sensitive character, it was not surprising that the Costa Rican draft Optional Protocol would prove controversial. While its fate as an additional protocol to the UN Convention against Torture was uncertain, initiatives were taken within the Council of Europe to realize Jean-Jacques Gautier's idea at the regional level with the view to set an example of how the system would function, thus preparing the ground for its realization at the universal level at a later stage. The initiative came from the Legal Affairs Committee of the Consultative Assembly and a draft European Convention was produced on its behalf¹² by 1983. It took, however, another 4 years of debate, before the Committee of Ministers adopted on 26 June 1987 the final draft of the Convention.

explanatory report of the Committee of Experts drafting the Convention is considered as a means of authentic interpretation of the Convention, 'and almost as having a kind of "binding force" of its own', cf. Cassese, *supra* note 1.

⁸ See the Convention Article 7ff. and Expl. rep. paragraphs 47ff. and below III.

⁹ For the drafting history see Cassese note 1, 130ff. and Expl. rep. paragraphs 1-11.

¹⁰ Rs. 39/46, 10th December 1984; reprinted in 15 *EuGRZ* (1985) 131ff.

¹¹ UN Doc. E/CN.4/1409 (1980).

¹² See Cassese, note 1, 131.

II. The Main Features of the Convention

A. The Non-Judicial Character of the Operations under the Convention

The Committee is supposed to be guided by human rights norms and case-law, but without taking an active part in its application and further development.

In its preambular paragraph 3 the Convention recalls that under Article 3 of the European Convention on Human Rights and Fundamental Freedoms, ‘no one shall be subject to torture or to inhuman or degrading treatment or punishment;’ in its preambular paragraph 4 the Convention notes that the machinery provided for in the European Convention on Human Rights operates in relation to persons who allege that they are victims of violations of Article 3. Yet, the Committee was not created to act as a ‘law enforcement agency’. Although it will be guided by the case-law of the European Court and Commission of Human Rights on Article 3,¹³ the Committee shall not perform any judicial functions, but shall instead carry out fact finding visits and, if necessary, on the basis of information obtained through them, make recommendations with a view to strengthening the protection of persons deprived of their liberty from torture and other inhuman or degrading treatment or punishment;¹⁴ it should not seek to interfere in the interpretation and application of Article 3.¹⁵

The findings of the Committee shall be purely fact oriented, its evaluations shall be derived from the information obtained and observations made during the visit of places of detention and shall, if necessary, be conveyed to the authorities of the Party concerned in the form of recommendations with a view to achieving improvements, in a spirit of cooperation and through advice.

The Committee or its members may to this effect consult with the Party concerned with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.¹⁶ The Committee has, however, no mandate to judge whether violations of human rights have been committed, neither is it entitled to express its views on the interpretation of human rights’ instruments either *in abstracto* or in relation to concrete facts.¹⁷

B. The Principle of Cooperation

Visits to ‘any place, where persons are deprived of their liberty *by a public authority*’¹⁸ require the cooperation of the Committee and the competent national authorities. ‘At the heart of the Convention is the principle of “cooperation”’.¹⁹ By acceding to the Convention, the State Parties assume an obligation to permit visits, i.e. to allow the Committee to have access to its territory and the right to travel without restriction;²⁰ however, the mechanism of visits requires also that ‘the Committee and the competent national authorities of the Party concerned shall

¹³ See Expl. rep. paragraph 27.

¹⁴ Expl. rep. paragraph 26.

¹⁵ See Expl. rep. paragraph 27.

¹⁶ Article 10, paragraph 1.

¹⁷ See Expl. rep. paragraph 17.

¹⁸ Article 2. Emphasis added.

¹⁹ Historical background and main features of the Convention; CPT/Inf. (90) 3 (Strasbourg, 28 February 1990), 3.

²⁰ See Article 2 and Article 8, paragraph 2, lit.a.

cooperate with each other'²¹ at all stages of the Committee's activities.²² The principle of cooperation applies in particular with respect to the information on places where persons are deprived of their liberty;²³ to the implementation of the right to move inside such places;²⁴ and in particular to cases where the Party concerned makes representations to visits on the grounds specified in Article 9.²⁵ The principle of cooperation also extends to the obligation of the Party concerned to give due consideration to any recommendations made by the Committee.²⁶ In this respect the Convention provides a sanction for non-cooperation: 'If the Party fails to cooperate or refuses to improve the situation in the light of the Committee's recommendations the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter.'²⁷

The cooperative mechanism, as envisaged by the Convention, also includes private persons deprived of their liberty. While the detained persons are not obliged to communicate with the members of the Committee on the occasion of its visits to places of detention, the Committee is entitled to ascertain whether a refusal to communicate with the Committee occurs out of the free will of the persons concerned. The cooperative mechanism will also, by implication and in an informal way, have to cover other private persons and NGOs that can supply relevant information and/or are active in the promotion of a human rights' awareness in the state concerned.

C. The Confidential Nature of the Committee's Activities

A consequence of the principle of cooperation is the strictly *confidential* character of the Committee's work. Publicity will occur only if a state fails to cooperate with the Committee or refuses to make improvements following the Committee's recommendations.²⁸ The principle of confidentiality is specified in Article 11 and covers the information gathered by the Committee in relation to its visit, its report and its consultations with the Party concerned. The 'information gathered by the Committee' may consist of facts observed, information obtained from external sources and information which it has itself collected. When the Committee makes a 'public statement on the matter' under Article 10 paragraph 2,²⁹ it has a wide discretion in deciding what information to make public, but will have to take due account of the need to ensure that information communicated to it in confidence is not revealed.³⁰ The principle of confidentiality finds its roots in the provision that the Committee shall meet *in camera*.³¹

21 Article 3.

22 See Expl. rep. paragraph 34.

23 Article 8, paragraph 2, lit.b.

24 Article 8, paragraph 2, lit.c.

25 See below III.C.2.

26 Article 10, paragraph 1.

27 Article 10, paragraph 2; see also Expl. rep. paragraph 74f.

28 Historical background, note 19, 3.

29 See at note 27 above.

30 Expl. rep. paragraph 75.

31 Article 6, paragraph 1.

III. The Legal Framework and Mechanism of the Convention

A. The Organs

The Committee is the only organ provided for in the Convention. It consists of a number of members equal to that of the States Parties to the Convention³² who are elected by the Committee of Ministers of the Council of Europe³³ from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention; they shall be independent and impartial, and shall serve in their individual capacity.³⁴ The members of the Committee need not be lawyers though it is considered desirable that they should include members with an experience in matters such as prison administration and various medical fields relevant to the treatment of persons deprived of their liberty.³⁵

According to the Rules of Procedure, the Committee elects from among its members a President and two Vice-Presidents who constitute the 'Bureau of the Committee'. The Bureau shall direct the work of the Committee.³⁶ The Secretariat of the Committee is provided by the Secretary-General of the Council of Europe.³⁷ The function of the Committee and of its Bureau is to organize visits to places referred to in Article 2 of the Convention.

B. The Places to be Visited

According to Article 2 of the Convention, the States Parties are obliged to permit visits to '*any place*³⁸ within (their) jurisdiction where persons are deprived of their liberty by a public authority'. Accordingly, any place where one or more persons are deprived of their liberty by a public authority, no matter whether the deprivation is based on a formal decision or not, is covered by the provisions of the Convention.³⁹

The provision is broad enough so as to include places where persons are held in custody, or imprisoned as a result of conviction for an offense, or held in administrative detention, or are interned for medical reasons or where minors are detained by a public authority.⁴⁰ The provisions of the Convention also cover detention by military authorities and apply in peace time, as well as during war or any other public emergency.⁴¹ According to the Explanatory Report the qualification of places where persons are *deprived of their liberty*, has to be understood within the meaning of Article 5 of the European Convention on Human Rights; however, the distinction between 'lawful' and 'unlawful' deprivation of liberty arising in connection with Article 5 is immaterial in relation to the Committee's competence.⁴²

32 Article 4, paragraph 1.

33 Article 5, paragraph 1.

34 Article 4, paragraphs 2 and 4.

35 Expl. rep. paragraph 36.

36 Rules 5 and 10.

37 Article 6, paragraph 3.

38 Emphasis added.

39 Expl. rep. paragraph 28.

40 Expl. rep. paragraph 30. See also Cassese, note 1, 139f.

41 Expl. rep. paragraphs 29f.

42 Expl. rep. paragraph 24.

Under exceptional circumstances, a Party concerned may make representations to the Committee against a visit to a particular place or at a particular time proposed by the Committee. Following such representations, the Committee and the Party shall immediately consult with each other in order to clarify the situation and seek agreement.⁴³

C. The Procedure Concerning Visits

1. Normal Procedures

By ratifying the Convention, the states are under an obligation to permit visits to any place within their jurisdiction. The Convention distinguishes between periodic visits and such other visits as appear to be required in the circumstances.⁴⁴ Before a particular visit, the Committee may request, and the state concerned shall provide, information and explanations with respect to places and situations where persons are deprived of their liberty.⁴⁵ In particular, each Party must supply on request the Committee with a list of places of detention such as prisons, police stations, mental hospitals, etc. On the other hand, the principle of cooperation requires that the Committee duly notifies the state concerned in advance of its intention to carry out a visit.⁴⁶ The time-span between notification and the actual visit should, in view of the circumstances of the case, be practicable and reasonable.⁴⁷

The rules of procedure distinguish between periodic, *ad hoc* and follow-up visits.⁴⁸ As regards periodic visits, the different States Parties to the Convention should be visited on an equitable basis, with consideration being given to the number of relevant places in each State Party.⁴⁹ *Ad hoc* visits are carried out as circumstances require; and the Committee may carry out one or more follow-up visits to any place already visited in the context of a periodic or *ad hoc* visit.⁵⁰ The Committee or the Bureau, as the case may be, may issue general or specific instructions or guidelines in accordance with which visits shall be carried out.

Visits are carried out by 'visiting delegations, consisting at least of two members of the Committee, assisted, if necessary, by experts and interpreters'.⁵¹

After each visit the Committee draws up, on the basis of the visiting delegation's report, its own report on the facts, taking account of any observations which the state concerned might wish to make.⁵² It shall transmit to the party concerned its report containing any recommendations it considers necessary. If the party concerned fails to cooperate or refuses to improve the situation in the light of the Committee's recommendation, the Committee may make a public statement on the matter, taking due account of the principle of confidentiality.⁵³

43 On the plea of exceptional circumstances see below III.C.2.

44 Article 7, paragraph 1.

45 Article 8, paragraph 2.lit.b and Rule 30.

46 Article 8, paragraph 1 and Expl. rep. paragraph 55ff.

47 Expl. rep. paragraph 56ff.

48 Rules 31ff.

49 Rule 31, paragraph 2.

50 Rule 31ff.

51 Article 7; Rule 34 and Rule 37ff.

52 Article 10, paragraph 1 and Expl. rep. paragraph 73 and Rule 41.

53 Article 10 and Rule 44. See also above II.C.

2. The Plea of Exceptional Circumstances

As Article 21 of the Convention does not allow for reservations to be made on the occasion of ratification, Article 9 of the Convention provides that, in exceptional circumstances, the Party concerned may make representations to the Committee against the visit at the time or to the particular place proposed by the Committee. It may do so, however, only on grounds of national defence, public safety, the medical condition of a person, etc.⁵⁴ The Party making a representation against a visit is furthermore obliged to consult immediately with the Committee in order to clarify the situation and to seek agreement on an arrangement to enable the Committee to exercise its functions expeditiously.⁵⁵ This means, that also in the case of exceptional circumstances the principle of cooperation will prevail and the Party concerned will be held accountable accordingly.

3. The Relation Between the Convention and other Instruments

The Convention is only one of several measures protecting persons from torture and other inhuman or degrading treatment or punishment. It does not limit or derogate from any obligations assumed by the Parties or from the procedures established under the European Convention on Human Rights; neither does it prejudice provisions of domestic law or of any international agreement providing greater protection for persons deprived of their liberty.⁵⁶ A genuine situation of a conflict of jurisdiction exists, however, in respect to the mandate of delegates of protecting powers or the ICRC under the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977, which apply in the case of armed, international or non-international, conflict. According to Article 17 paragraph 3 of the Convention, this conflict of jurisdiction is decided in favour of the priority of application of the Geneva Conventions and Additional Protocols. The priority of application of Geneva Conventions applies, however, only to places which are visited under the Geneva Conventions and Additional Protocols 'effectively on a regular basis'.⁵⁷ This provision does not apply when the ICRC is visiting places in time of peace by virtue of a special agreement. In this case the Committee will have to decide on visiting a certain place according to the special circumstances in each case.⁵⁸

IV. Concluding Remarks

The operation of the mechanism of visits for the prevention of torture on the basis of fact finding at the places of detention and consulting with the competent authorities is an ambitious undertaking. It requires innovative and constructive cooperation on the part both of the governments and competent authorities of the Parties concerned and of the persons deprived of their liberty and other private persons and NGOs. In this respect, the Convention breaks new ground in the field of the promotion and protection of human rights. The time has been too short to assess how the system of visits works in practice, notwithstanding the provision of the Convention that its operation shall be conducted in confidentiality. That the system has been accepted and put into operation – for the time being – within the framework of the Council of Europe, is, however, by itself already a success as the first step of developing a new branch of

54 Article 9, paragraph 1.

55 Article 9, paragraph 2.

56 Article 17, paragraph 1.

57 Expl. rep. paragraph 93.

58 Ibid.

the human rights culture, the underlying idea of which has always been understood to be of universal validity.

Bibliography

Antonio Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', in 83 *AJIL* (1989) 128-153.

Emmanuel Decaux, 'La Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants', in XXXIV *Annuaire Français de Droit International* (1988) 618-634.

Hans Haug, 'Efforts to Eliminate Torture through International Law', *The International Review of the Red Cross* No. 775 (1989) 9-27.

International Commission of Jurists, The European Draft Convention Against Torture, *The Review*, No. 31 (1983) 50-59.

Jean-Bernard Marie, 'La Convention européenne pour la prévention de la torture – un instrument pragmatique et audacieux', 19 *Revue Générale du Droit* (1988) 109-125.

Manfred Nowak, 'Die Europäische Konvention zur Verhütung von Folter', 15 *Europäische Grundrechte-Zeitschrift* (1988) 537-542.

'The Implementation of the European Convention for the Prevention of Torture, Acts of the Strasbourg Seminar on 7/8 November 1988', 10 *Human Rights Law Journal* (1989) 131-214.

The Implementation of the European Convention for the Prevention of Torture. A Study prepared by the Swiss Committee against Torture at the Request of the Council of Europe, Geneva 1989.

Jean-Daniel Vigny, 'La Convention européenne de 1987 pour la prévention de la torture et des peines ou traitements inhumains ou dégradants', 43 *Annuaire Suisse de Droit International* (1987) 62-78.