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Silvia Casale

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The Importance of Dialogue and Cooperation in Prison Oversight

Dr. Silvia Casale*

Like other participants who came from Europe to participate in the international conference in Austin, Texas, I was, as I still am, keen to learn more about the different correctional systems in the United States of America and to understand the arrangements for oversight in the prisons field. From the European perspective, oversight of how people are treated in custody was of special interest at that time, as the entry into force of the Optional Protocol to the United Nations Convention against Torture (OPCAT)¹ was imminent.² Now the Subcommittee on Prevention of Torture (SPT), the new international mechanism established as a result of the entry into force of the OPCAT, has been working for two and a half years.³ It represents a new generation of UN treaty bodies,

* This essay is an updated version of a presentation at the international conference “Opening a Closed World” held in 2006 at the University of Texas and organized by Professors Michele Deitch and Michael Mushlin. At that time, Dr. Silvia Casale was President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); subsequently she became the first President of the United Nations Subcommittee on Prevention of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (SPT).

1. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002) [hereinafter OPCAT], *available at* <http://www2.ohchr.org/english/law/cat-one.htm>. The text is also available in the other five official languages of the UN: Spanish, French, Russian, Arabic and Chinese. At the time of the conference, there were 50 signatories and 18 ratifications; thus, only two more ratifications were needed for the OPCAT to enter into force.

2. The entry into force occurred on 22 June 2006, after twenty states became party to the Protocol.

3. The SPT started operating in February 2007. U.N. Comm. Against Torture, Sub-Comm. on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *First Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 3, U.N. Doc. CAT/C/40/2 (May 14, 2008), *available at* www2.ohchr.org/english/bodies/cat/opcat/annual.htm (for English, follow “E” hyperlink).

since its focus is on work in the field along with the national preventive mechanisms (NPMs), which all the ratifying states are obliged to maintain, designate or establish.⁴

The CPT has been among those observing how the new international mechanism develops and how each state party is setting about establishing or maintaining independent preventive mechanisms at the national (and/or local) level. The CPT owes its own existence to the realisation in the 1980s that the time was not yet right then for a global oversight mechanism and to the decision of the European states to develop instead their own regional preventive mechanism—the CPT.⁵ Since the SPT began its work, it has been in close contact with the CPT through meetings and joint membership.⁶ The Optional Protocol encourages the SPT to consult and coordinate with regional treaty bodies to avoid duplication and both the SPT and the CPT have made efforts to cooperate with one another for the common goal of preventing the ill-treatment of all persons deprived of liberty.⁷

This essay draws upon the long experience and practice of the CPT, with some references to the emerging practice of the SPT, and proceeds from the perspective of a practitioner who has worked in both treaty bodies. As the CPT and SPT carry

4. This is in accordance with Articles 3 and 17 of the OPCAT.

5. This is in accordance with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), adopted in 1987 by the Council of Europe. For the official text of the ECPT in English, see Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, www.cpt.coe.int/en/documents/ecpt.htm (last visited Feb. 6, 2010). The text is also available in the other official languages of the Council of Europe, namely French, and in twenty-one other languages spoken in Europe.

6. Two of the members of the SPT are also members of the CPT, while another SPT member is a former member of the CPT. The first SPT member from Spain was also a former CPT member. For the current membership of the SPT, see Subcommittee on Prevention of Torture, Office of the United Nations High Commissioner for Human Rights, Membership, www2.ohchr.org/english/bodies/cat/opcat/membership.htm (last visited Feb. 2, 2010).

7. See, e.g., U.N. Comm. Against Torture, Sub-Comm. on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Second Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 54, U.N. Doc. CAT/C/42/2 (Apr. 7, 2009) [hereinafter *Second Annual Report*], available at www2.ohchr.org/english/bodies/cat/opcat/annual.htm (for English, follow “E” hyperlink).

out visits to prevent torture and other forms of ill-treatment of people deprived of liberty, their mandate extends to many different settings where people are or may be deprived of liberty.⁸ The specific focus on prisons in this essay reflects the subject matter of the international conference; however, it should be noted that the discussion includes pre-trial detention, since, in many prisons visited by the CPT and SPT, there are mixed custodial populations of sentenced prisoners and people on remand.

It should also be emphasized at the outset that what the public commonly understands as torture—severe ill-treatment of people deprived of liberty for the purpose of extracting information or a confession—tends to be encountered by the SPT and the CPT predominantly in the context of investigations of offences and, therefore, relates primarily to the behaviour of the police and other security forces involved in identifying suspects and clearing up crimes. This by no means reflects the scope of the concept of torture, as legally defined, nor the broad scope of the preventive mandates of the SPT or the CPT.

In the European common legal space,⁹ torture is defined in the case law of the court, which has judged that, under certain circumstances, extremely poor prison conditions amount to torture.¹⁰ At the global level, UN treaty bodies and special procedures, such as the UN Committee against Torture, the Human Rights Committee and the Special Rapporteur on Torture, have contributed to an international understanding of

8. These settings include police stations and other police facilities, pre-trial detention facilities (jails), centres for persons held under immigration legislation, military detention facilities, psychiatric institutions and social care homes.

9. “European common legal space” refers to the region of forty-seven European states in which the European Convention on Human Rights (ECHR) applies and the European Court of Human Rights (ECtHR) has jurisdiction.

10. See *Kalashnikov v. Russia* (No. 47095/99) 2001-XI Eur. Ct. H.R. (extracts). It is noteworthy that in this case the court cited examples of prison conditions from CPT reports on visits to the Russian Federation. The decision is available on the European Court of Human Rights’ webpage. European Court of Human Rights, Case-Law, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (last visited Feb. 2, 2010) (follow “HUDOC” hyperlink, enter “47095/99” in the “Application Number” field, click “Search” hyperlink, follow “CASE OF KALASHNIKOV V. RUSSIA” hyperlink).

torture, as encompassing not only acts that cause physical pain but also acts that cause mental suffering to the victim; in addition, prolonged solitary confinement of a detained or imprisoned person may constitute torture, as may corporal punishment.¹¹

In prisons, although both the CPT and the SPT may encounter examples of physical or mental abuse of prisoners by individual or groups of staff, more frequently the ill-treatment encountered relates to poor conditions, including overcrowded accommodation and lack of time and activities out of cell, or other shortcomings in the system. Staff may themselves be keen to point out these organisational failings, since they are often frustrated in their work by these inhibiting factors. In prisons, CPT and SPT oversight tends, therefore, to centre on the gap between policy and practice or the lack of capacity (human and other resources) leading to systemic shortcomings.

This essay discusses the use of dialogue and cooperation in oversight of prisons. The Conventions establishing the CPT¹² and OPCAT,¹³ which reflect many of the same provisions as the ECPT, both envisage cooperation as an essential element in the approach of visiting bodies to the prevention of torture and other ill-treatment.

As in the other custodial locations visited, the CPT and SPT mandates in prisons involve preventive oversight. They look forward, concentrating not so much on exposing shortcomings in the past as on identifying future possibilities: possibilities for improvement and also risks of deterioration. Prison systems and prison practices are generally not noted for rapid change, although past experience of slippage indicates that sometimes a prison can go rather rapidly downhill.

The concern of the CPT and SPT is that systematic safeguards should be in place: legislative provisions

11. See Office of the High Comm'r for Human Rights, *General Comment 20 of the Human Rights Committee (CCPR) on the Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Article 7 of the International Covenant on Civil and Political Rights (ICCPR)* (Mar. 10, 1992), available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5).

12. Article 3 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe, 1987) [hereinafter ECPT].

13. Article 2(4) of the OPCAT.

guaranteeing the human rights of prisoners; regulations establishing standards for conditions, programmes and services; procedural safeguards; codes of conduct; rules concerning the areas of potentially greatest risk such as security restrictions, the disciplinary process, the use of force and special means, segregation and isolation; and, last but not least, the mechanisms for oversight, both internal and external.

Our dialogue and cooperation happens at many levels—with government ministers, prison policy makers, directors of prison systems, prison managers, prison staff and with monitoring bodies—and begins with the recognition that every prison we visit and every staff team we meet is at a different starting point in the process of change and faces a unique combination of challenges, not least among which are the individuals in prison. The dialogue about prevention is a long-term on-going enterprise, continuing from one visit to the next, with written reports, responses and reactions, with correspondence and meetings with the authorities and further visits to follow-up on particular issues to facilitate the next steps forward.

In order for the cooperative dialogue to work, it is important to build mutual confidence. Those we meet might believe that we are ignorant interlopers with a special axe to grind and perhaps expecting to find abuse around every corner and failing to understand the local context. For treaty bodies with “torture” in their title, it is important to overcome initial misgivings and misconceptions. Under the ECPT and the OPCAT respectively, the CPT and SPT are granted unique powers of access to all places involving deprivation of liberty,¹⁴ to move freely inside them, to speak in private with persons held there and to have access to any information the CPT deems necessary in order to carry out its mandate.¹⁵ This represents a powerful and sometimes intrusive mandate, exercised by the CPT in forty-seven European countries¹⁶ and

14. Article 2 of the ECPT and Article 4 of the OPCAT.

15. Article 8 of the ECPT and Articles 12 and 14 of the OPCAT.

16. All the member states of the Council of Europe, which includes the twenty-seven states of the European Union plus another twenty states including the Russian Federation and Turkey.

by the SPT in forty-nine countries across the world.¹⁷

For oversight to be accepted, it is important to demonstrate that we are neutral observers with no hidden agenda, that we do have relevant expertise, experience and knowledge, that we have studied carefully the legislative and internal regulatory framework within which prisons in a particular jurisdiction operate and, perhaps most importantly, that we have empirical experience of custodial settings—that the sounds and the sights and the smells of a prison have meaning for us.

I do not refer merely to the smell of fresh paint, although of course, when a prison sees a CPT or SPT delegation coming, there may be a scramble to put on a good appearance. We do smell a lot of fresh paint, but that is part of the positive preventive effect: at least a CPT or SPT visit means that the prison may be painted. However, if relations with our interlocutors were to remain at the level of the fine façade, this would be a wasted opportunity. It is important to find a way past the superficial and to get down to brass tacks.

I recall being told by one prison director¹⁸ that the CPT delegation was quite mistaken when we pointed out that the living areas in the prison were not adequately heated. Having observed staff wearing double pullovers and prisoners huddling for warmth, while our own fingers grew stiff with cold as we worked, we invited him to see for himself. When he put on his overcoat to come with us, he rather proved our point. Moreover, our equipment for measuring ambient temperature told its own story. Then we got down to discussing the roots of the problem and it became apparent that the allowance for fuel set by the central authorities was woefully inadequate. Later, after an urgent recommendation from the CPT, the fuel allowance was increased. The important point arising from this example is that identifying problems is not an exercise in laying blame. It is the necessary first step in the process of finding solutions and encouraging change.

One factor that helps the initial phases of our work is the

17. There are currently twenty-six European states parties, twelve Latin American, six African, six from the Asia Pacific region and one Middle Eastern state party.

18. As the work of the CPT and SPT is bound by the rule of confidentiality, the examples given in this essay will not be identified.

principle of strict confidentiality enshrined in the ECPT¹⁹ and the OPCAT.²⁰ In its twenty years of operation, that strict confidentiality has never been breached by the CPT. Prison personnel can rely on that fact, and the knowledge that the discussions will remain confidential can have a liberating effect. So too can the realisation that the CPT can be an important ally for prison personnel who are striving, often against the odds, to run a safe and decent prison. It may become clear that the problems encountered in a prison derive, at least in part, from staff shortages or lack of staff training, from budget cuts even at a time when the prisoner population is increasing, and from policies which fail to take sufficient account of the situation on the ground or create more paperwork rather than better practice.

If this is the case, we will point it out to the authorities and recommend to the central administration the changes needed to improve the situation. This is part of our face-to-face dialogue with the central authorities. When we cite problems observed in detail on the spot, we do not do so merely for the sake of criticising; we give detailed concrete examples in order to demonstrate that we understand the problems on the ground. Sometimes this catches the authorities unaware. At times, the initial reaction may be defensive; it may be, quite understandably, a matter of not wanting to lose face. These reactions are natural; nobody really enjoys criticism, even when it is framed in a constructive way. However, it is important to establish a baseline of agreed facts in order to focus on what can be done to improve the situation and what safeguards need to be put in place to prevent a recurrence of the problems.

The confidentiality of the discussions enables everyone to be more frank, without fear that what is said will be reported. On that basis, it is possible to reach some kind of constructive dialogue with all but the most entrenched officials. It is very rare, in prisons, that we encounter someone who is in total denial that there is anything wrong at all. Most managers and staff know that in the complex world of prison work—arguably one of the most difficult and demanding of all the public

19. Article 11 of the ECPT.

20. Article 2(3) of the OPCAT.

services—there is always something that can be improved. Even the most entrenched individuals want a better system, although there may be disagreement about the best way to ensure it. Preventive oversight can only really work if those who remain after the visiting oversight team has departed are persuaded that change is necessary and is to be embraced, however cautiously at first, and with whatever natural misgivings.

As in all closed systems, it is easy for attitudes and behaviours to become entrenched; there may be nobody with a different perspective to challenge traditional ways of treating prisoners. It is now rare for the CPT to find prisons in which prisoners are expected to stand, turn, bow their heads and face the wall when officials approach. It has taken time to reduce the prevalence of this custom, formerly pervasive in many European prison systems.

The face-to-face dialogue may include difficult moments; it is necessary to tell hard truths from time to time, but there are also moments of humour and of cordial agreement. Often we have a sense that prison managers have little or no opportunity to voice their operational concerns and that they are not used to being listened to when they describe the difficulties they and their staff face from day to day. A central part of the cooperative work of the CPT and the SPT is to listen carefully to interlocutors—to what is expressed and what is left unsaid. Hearing from people with very different perspectives—policy makers, prison managers, staff on the units, and prisoners—a visiting delegation receives a complex mix of messages to complement its observations.

Analysing the detailed information and observations drawn from and cross-checked among many sources, each visiting delegation formulates its findings and recommendations for improvement—at first given orally at the closing stage of each visit as preliminary feedback and then developed in much greater detail in writing after the visit. The authorities—in the case of prisons, usually the Ministry of Justice and the correctional administration—respond to the detailed written report which is adopted by the CPT or SPT after each visit; in their response they are to indicate the measures taken, or planned, to implement the

recommendations.²¹ The central authorities will often consult the local institutions visited in order to address the comments and recommendations made by the CPT or SPT. In turn, the CPT or SPT will consider the responses and will reply, asking for clarification of certain points and for further information where there are omissions. Thus the on-going dialogue continues until the next meeting.

Although CPT and SPT visit reports are confidential in the first instance, there are provisions in both the ECPT and the OPCAT for the state to approve publication.²² In practice it is now the norm for CPT reports and the responses by governments to be published at the request of the states.²³ Although the SPT has so far visited only seven states and presented six visit reports, already two states—Sweden and the Maldives—have requested publication; it is to be hoped that this marks the beginning of a trend similar to that experienced in the European region. Publication of the reports and responses is an important indicator of the cooperative relations between the CPT or SPT and the states parties. It is also a measure of the confidence that exists between the CPT or SPT and their interlocutors.

Publication allows a wider cooperation with other bodies. Interested organisations working in the field will read the findings of the CPT and SPT and the action reported in the response. In some cases, a non-governmental organisation (NGO) providing services in the prison field may take the opportunity to offer assistance to prisons in the process of implementing the recommendations, or an NGO focusing on advocacy work may check the situation in a particular prison and will report if the change indicated in the government's response has not fully materialised or if there has been slippage. That, in turn, enables the CPT and SPT to follow up on the situation by asking the authorities for an explanation or by revisiting, if the situation warrants a follow-up visit.

21. *Cf.* Articles 1 and 10 of the ECPT and Article 16 of the OPCAT.

22. Article 11(2) of the ECPT and Article 16 (2) of the OPCAT.

23. The one exception is the case of the Russian Federation. For all published materials of the CPT, including CPT visit reports, CPT General Reports, the CPT standards, the latest press releases and the CPT database, see CPT Home (European Committee for the Prevention of Torture), www.cpt.coe.int (last visited Feb. 2, 2010).

The positive relations forged with those who have responsibility for prisons rests in no small part on a common interest in, and shared sense of, what prisons should be like and could be like. In case this sounds too idyllic, I would like to recall that the CPT is working with forty-seven sovereign states, encompassing the countries of Western, Central and Eastern Europe, including the Russian Federation and most of the countries which, not so very long ago, were part of the Soviet Union, and all the countries in the Balkan region. The CPT has worked with the prison systems of all these countries on the often arduous journey away from the legacy of the past. Now the SPT is embarking on another challenging journey—in Africa, Latin America, the countries of the Asia Pacific region, the Middle East and Europe.

Over time, there has developed a set of common values concerning basic human rights among the forty-seven member states of the Council of Europe. These are rooted in the European Convention on Human Rights (ECHR) and are reflected in the evolving case law of the European Court of Human Rights and the treaties and other instruments deriving from the work of the Council of Europe. This body of human rights jurisprudence includes materials specifically relating to prisoners, notably the revised European Prison Rules (EPRs).²⁴ The EPRs constitute a body of principles and standards for custodial institutions, developed by consensus, through the work of experts designated by the Council of Europe, in consultation with all the prison services of Europe and in close co-operation with the CPT. Consequently, there is a high degree of consonance between the EPRs and the standards of the CPT. This body of principles is an important backdrop for the cooperative dialogue between member states and the CPT, not least because of the clear statement in the EPRs of fundamental principles:

1. All persons deprived of their liberty shall be

24. COMM. OF MINISTERS, COUNCIL OF EUROPE, RECOMMENDATION REC(2006)2 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE EUROPEAN PRISON RULES (2006), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=955747> (“Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.”).

treated with respect for their human rights.

2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.
4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
5. Life in prisons shall approximate as closely as possible the positive aspects of life in the community.
6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
7. Co-operation with outside social services and as far as possible the involvement of civil society with aspects of prison life shall be encouraged.
8. Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.
9. All prisons shall be subject to regular governmental inspection and independent

monitoring.²⁵

These principles may not be reflected in the reality of prisons across Europe, but they represent norms to which all member states are committed by virtue of their adoption of the EPRs in the Committee of Ministers.²⁶ The EPRs provide authoritative guidance for the correctional profession as to what European prisons should be like. Although they are not binding on states, they are widely accepted within the European common legal space. The struggle to achieve and maintain these principles in practice is on-going.

The dialogue and cooperation between the CPT and the authorities responsible for prisons, at the central, regional and local levels, is long standing and on-going, whereas the SPT is at an early stage in the process of developing the dialogue and cooperation and is hampered by a significant lack of resources at this crucial early stage in its operations.²⁷ As is the SPT's current experience, at the beginning of the relationship with a new state party, a CPT delegation may have visited prisons where outside visitors were virtually unknown and where the notion of a body with the mandate to go anywhere in the prison and speak in private with any prisoner was startling in its novelty. Nonetheless, as the CPT visits have borne fruit and prisons have experienced a greater attention to their problems from central authorities, including changes in conditions which have brought benefits to staff as well as prisoners, the initial doubt and unease have given way to a greater willingness to cooperate.

A good example of change in prisons can be found in the Russian Federation. For years, international non-governmental organisations campaigned to put an end to the dark airless prison cells where conditions were ripe for the spread of infectious diseases such as tuberculosis. The CPT's findings and recommendations underscored the urgent need for this problem to be systematically addressed. At the end of 2002, I was present, as President of the CPT, when the

25. *Id.*

26. The Committee of Ministers is the decision-making body of the Council of Europe, consisting of the Foreign Affairs Ministers of all the member states or their permanent diplomatic representatives.

27. See *Second Annual Report*, *supra* note 7, ¶¶ 4-5.

Minister of Justice announced to prison governors from across the Russian Federation his decision to remove the shutters from the windows of all the prison cells. It was a dramatic move to let in the light, vividly symbolising the effect of oversight on the closed world of prisons.