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OSCE - HUMAN DIMENSION SEMINAR

Upholding the Rule of Law and Due Process in Criminal Justice Systems
Warsaw 10 – 12 May 2006

Contribution of the Council of Europe

The work of the Council of Europe in upholding the rule of law and due process in the criminal justice system

I. The rule of law and due process in the criminal justice system

IN GENERAL ("upholding the rule of law and due process in criminal justice systems")

The rule of law in the criminal justice system cannot be dissociated from the justice system in general, and the Council of Europe's work in the legal field is making a substantial contribution to the development of a European legal area, harmonising and modernising the legal systems of its member States, on the basis of common standards drawn up within the Organisation. Its overall aim is to encourage the creation and development of democratic institutions and procedures at national, regional and local level, and to promote respect for the principle of the rule of law.

It works through the establishment of normative instruments – treaties and recommendations, through assistance to its member states to meet the standards of those normative instruments and, in some areas, through monitoring bodies (e.g as regards corruption or money laundering)

Treaties

The Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions and agreements". The texts of conventions and agreements become final when adopted by the Committee of Ministers,

which also decides when to open them for signature. They are binding on States which ratify them. Almost 200 treaties have been adopted to date.

Recommendations

The Committee of Ministers may make recommendations to member States on matters for which it has agreed "a common policy". Recommendations are not binding on member States, although the Statute empowers the Committee of Ministers to ask member governments "to inform it of the action taken by them" on recommendations.

Legislative reforms

The Council of Europe cooperates with its member States to ensure the conformity of their domestic legislation with European norms. This legislative assistance (expert appraisals of legal texts) addresses all legal fields, from the main codes in civil, criminal and administrative law to specific laws such as those regarding bioethics or data protection.

Our Organisation also aims at developing efficient legislative procedures and modern techniques for law drafting in its member States, in order to make legal systems more coherent and legal norms easier to understand by the public.

Concerning the criminal justice system, (from the point of view of due process, and also with an emphasis on the need to fight organised crime), the following achievements can be highlighted:

The Council of Europe contributes to the efforts of the international community to fight terrorism, in particular by the adoption of new legal instruments, based on the fundamental premise that it is possible and necessary to fight terrorism while respecting human rights, fundamental freedoms and the rule of law. The Committee of Experts on Terrorism (CODEXTER) pursues the coordination of activities in this field as well as the identification of lacunae which could be the subject of future action by the Council of Europe and actions in favour of support and compensation of victims of terrorist acts. The relevant conventions are the European Convention on the Suppression of Terrorism, its Amending Protocol and the European Convention on the Prevention of Terrorism.

The action of the Council of Europe against corruption, organised crime and money laundering follows a multidisciplinary approach and is based on three pillars which are inter-related : setting European standards (Criminal Law Convention on Corruption and its Protocol, Civil Law Convention on Corruption, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the financing of terrorism, and a series of recommendations and resolutions), monitoring compliance with these standards (GRECO for corruption, MONEYVAL for money laundering), and strengthening capacities against these criminal phenomena, through technical cooperation programmes.

In addition the Convention on Cybercrime has received widespread international support.

Other normative instruments include:

- Recommendation Rec (97) 13, on Intimidation of witnesses and the rights of the defense
- Recommendation Rec (2001) 11, on Guiding principles in the fight against organised crime;

as well as, especially as regards terrorist acts:

- Recommendation Rec (2005) 9 on the protection of witnesses and collaborators of justice

- Recommendation Rec (2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism

Other standard setting achievements in the criminal justice field include the protection of rights of victims (including a revision currently underway of Recommendation Rec (85) 11 on the position of the victim in the framework of criminal law and procedure), and Recommendation Rec (99) 19 concerning mediation in penal matters

The Council of Europe has also undertaken important work with regard to other aspects of the criminal justice system such as: the prevention of crime, ways of dealing with offenders, including treatment of prisoners and reintegration of offenders, ways of dealing with juveniles and other vulnerable categories of offenders or victims as well as an important set of conventions to improve international cooperation in criminal matters. Several key legal instruments have been adopted, such as the Convention on Extradition, the Convention on Mutual Assistance in Criminal Matters and the Convention on the Transfer of Sentenced Persons. These international treaties are systematically monitored in order to fine tune the texts to reflect current events. The Council of Europe actively encouraged the implementation of the Statute of the International Criminal Court.

Working Group I

AN INDEPENDENT JUDICIARY AND DUE PROCESS IN CRIMINAL JUSTICE SYSTEMS

One of the Council of Europe's main areas of activity is the promotion of an efficient and independent judicial system, as reflected in numerous and specific instruments. For example, work is ongoing on the development of the independence and impartiality of judges (the Consultative Council of European Judges plays an essential role in that respect) and on practical measures for improving the quality and the efficiency of judicial organisation and measures, in particular through the work of the European Commission on Efficiency of Justice (CEPEJ). It is responsible for evaluating the functioning of judicial systems in

Member States. The European Day of Civil Justice (on 25 October every year), launched jointly by the Council of Europe and the European Commission, aims at improving public understanding of the functioning of justice and the role of the professionals in the legal field.

The right to an independent and impartial tribunal has been clearly stated in Article 6 of the European Convention on Human Rights (ECHR) and reaffirmed in Recommendation No. R. (94) 12 on independence, efficiency and role of judges in which it is recalled that there is a need to promote the independence of judges in order to strengthen the Rule of Law in democratic States.

In order to make more effective the promotion of judicial independence, necessary for the strengthening of the Rule of Law and for the protection of individual freedoms within democratic States, the European Charter on the Statute for Judges has been elaborated in the framework of the Council of Europe.

Instruments and other legal documents include:

- European Charter on the Statute for Judges - DAJ/DOC (98)23
- Recommendation concerning measures to prevent and reduce the excessive workload in the courts – R(86) 12
- Recommendation concerning the simplification of criminal justice – R(87)18
- Recommendation on the independence, efficiency and role of judges – R(94)12
- Recommendation concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases – R(95) 5
- Recommendation on the management of criminal justice – R (95) 12

Working Group II
ACCOUNTABLE AND RESPONSIVE POLICING IN UPHOLDING THE RULE OF LAW

The European Code on Police Ethics (Rec (2001) 10) contains guidelines and principles for the effective functioning of police in a democratic society. Its application is followed up by the Council for police matters (PC-PM) – a subordinated body to the European Committee on Crime Problems. The Code of Ethics is the basis for the Council of Europe's co-operation with its member States to help them meet the standards contained therein.

Other normative texts include

- Recommendation No. R (87) 15 regulating the use of personal data in the police sector, and
- Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism

Reference can also be made to the findings of the 12th Criminological Colloquium (1999) devoted to "police powers and accountability in a democratic society". The PC-PM has decided to give further reflection to this issue in its future work.

With reference to the opening statement of the annotated agenda of this Working Group, one can observe that the need for physical security of citizens and the, sometimes insufficient, means of the State to ensure this has given rise to a growing activity of private security services. The PC-PM is presently undertaking a study to evaluate whether the regulation of these private security services meets the requirements of the rule of law, a sufficient protection of citizens against violations of fundamental rights while establishing a clear division of roles between police and private security services.

Among the issues to be addressed the following merit particular consideration:

- tasks and limits of private security services primarily with regard to criminal justice functions,
- links between private security services and public police,
- professional conduct of private security staff,
- the accreditation, control and accountability (legal and administrative aspects),
- personnel issues such as recruitment and training requirements,
- the use of force and other professional activities affecting individual rights")

The work should lead to a report identifying recent developments in this field including examples of good practice and ways and means to exchange those good practices. It may also lead to proposals to develop normative instruments in this area.

As regards the question of corruption, the work of GRECO is highly relevant. The GRECO, (which is an enlarged agreement providing for participation on an equal footing of both member States and certain non-member States having participated in the preparation of the Agreement) was conceived as a flexible and efficient follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption. Full membership of the GRECO is reserved to those who participate fully in the mutual evaluation process and accept to be evaluated.

According to its Statute, the aim of the GRECO is to improve its members' capacity to fight corruption by monitoring the compliance of States with their undertakings in this field. In this way, it will contribute to identifying deficiencies and insufficiencies of national mechanisms against corruption, and to prompting the necessary legislative, institutional and practical reforms in order to better prevent and combat corruption.

GRECO is responsible, in particular, for monitoring observance of the Guiding Principles for the Fight against Corruption and implementation of the international legal instruments adopted in pursuit of the Programme of Action against Corruption (PAC). So far three such instruments have been adopted, the Criminal Law Convention on corruption (ETS n° 173),

opened for signature on 27 January 1999, the Civil Law Convention on corruption (ETS n° 174), adopted in September 1999, opened for signature on 4 November 1999 and Recommendation R (2000) 10 on codes of conduct for public officials, adopted on 11 May 2000.

Working Group III

ROLE OF PUBLIC PROSECUTORS IN UPHOLDING THE RULE OF LAW

The main normative text in this area is Recommendation Rec (2000) 19 on the role of public prosecution in the criminal justice system. In addition, at their conference in 2005 the Prosecutors General of Europe adopted the Budapest guidelines on ethics and professional conduct of public prosecutors.

Within the context of the intergovernmental work carried out by the Council of Europe concerning the role of Public Prosecution, in particular pursuant to the adoption by the Committee of Ministers of Recommendation (2000) 19 on the Role of Public Prosecution in the Criminal Justice System, a number of events were organised intended to bring together high level prosecutors from all member and candidate States, in particular state and regional prosecutors general.

Thus was set up the Conference of Prosecutors General of Europe, which as held 6 sessions to date and will hold a 7th Conference in Moscow in July 2006, which will deal with the role of the public prosecutor in the protection of individuals and in particular: towards persons deprived of their liberty, and towards victims and witnesses and in particular juveniles

Recognising the essential role of the public prosecutor in the criminal justice system, and the important contribution to international judicial cooperation played by the prosecutors in the context of the CPGE, the Committee of Ministers decided in July 2005 to institutionalise the CPGE through the creation of the **Consultative Council of European Prosecutors (CCPE)**.

This consultative body to the Committee of Ministers has in particular a task to prepare opinions for the European Committee on Crime problems (CDPC) on difficulties concerning the implementation of Recommendation Rec(2000)19, to promote the implementation of this recommendation, and to collect information about the functioning of prosecution services in Europe. Given the success of the CPGE, the CCPE has also been given the task to continue the organisation of conferences on topics of common concern to public prosecutors. The first meeting of the CCPE will take place in 2006. At this meeting it is expected to adopt its Action Plan which, inter alia, may lead it to propose further standard setting initiatives regarding public prosecutors

The seminar's annotated agenda refers to the relationship between the public prosecutor and the executive branch of government. Recommendation Rec (2000) 19 devotes a chapter

to the *Relationship between public prosecutors and the executive and legislative powers* and the CPGE discussed this question in detail at their **4th session** in Bratisalava, (June 2003)

Another issue raised in the annotated agenda of the seminar is that of the functions and duties of the public prosecutor. In his regard it can be noted that:

- the question of the discretionary powers of public prosecution, advantages and disadvantages was the main theme of the 5th CPGE in Celle (2004);
- duties outside the criminal sector was one of the themes of the 6th CPGE in Budapest (2005)

Finally - the relationship between prosecutors and police was the main theme of the Budapest Conference

Defence lawyers

To ensure that justice effectively guarantees the respect for the rule of the law, the Council of Europe takes part in the training of all legal professions, including lawyers.

The Council of Europe also helps to harmonise the rules on lawyers, who play a key role in safeguarding the right to a fair trial. Recommendation (2000) 21 on the freedom of exercise of the profession of lawyer, which lays down general principles on the legal training of lawyers and their entry into the profession, professional standards, the role and duties of lawyers, disciplinary proceedings and access for everyone to lawyers is relevant here. In the context of its assistance and co-operation activities, the Council is working with a number of countries (e.g. Albania, Romania, Moldova and Ukraine) on Bar reform and the training of lawyers, and runs multilateral seminars on questions of common interest to European states (e.g. the organisation of the profession, and relations between bars and ministries of justice). A Regional Council of Bar Associations has been set up under the Stability Pact for South Eastern Europe and the conclusions of its meeting in April 2004 inlcuded the following:

"1. Legal Assistance in Criminal Matters and Access to a Lawyer in such Matters.

…

1.5 The provision of free or partly free of charge legal aid (hereinafter referred to as "legal aid") is a part of the fundamental human right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights (hereinafter referred to as "the ECHR") and is an essential component in the proper functioning of the judicial system in a state governed by the Rule of Law.

1.6 In criminal cases, Article 6.3.c of the ECHR expressly states that everyone charged with a criminal offence has…. (the right) "to defend himself or through legal assistance

of his own choosing, or, if he has not the sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

1.7 States should consider and progressively implement the standards and principles contained in the Recommendations and Resolutions of the Committee of Ministers concerning: legal aid in civil, commercial and administrative matters (No R (76) 5), legal aid and advice (No R(78) 8), measures to facilitate access to justice (No R(81)7), on effective access to the law and to justice to the very poor (No (93) 1), and on the freedom of exercise of the profession of lawyer (No R(2000)21).

1.8 Furthermore, the States should also pay due regard to the case law of the European Court of Human Rights, which stipulates that the Convention requires that a person charged with a criminal offence who does not wish or is unable to defend himself in person must be able to have recourse to legal assistance of his own choosing[1] and to be given it free when the interests of justice so require."

There are a number of Recommendations and Resolutions on access to justice, of which some contain reference to the need of availability of qualified legal aid and advice provided to persons who have no means to pay for it. Besides Recommendation Rec (2000) 21 noted above, Resolution (78) 8 on legal aid and advice and Recommendation No. R (81) 7 on measures facilitating access to justice are the most relevant.

[1] Campbell and Fell judgment, § 99, and the Pakelli judgment of 25 April 1983, Series A no. 64, § 31

2. Human Rights and due process in the criminal justice system

A. Human Rights Co-operation and Awareness Department (HRCAD)

Elements relating to the theme of Working Group One: *An independent judiciary and due process in criminal justice systems*

Any efforts aimed at strengthening the independence and efficiency of the judiciary should include training, in particular training on international human rights standards, which include the requirement of judicial independence and other fair trial requirements. Judges and prosecutors who are able to use the provisions and case law of international legally binding human rights instruments have a basis on which to rely in cases of allegations of human rights violations brought before them. It also makes the judges and prosecutors aware of the fair trial standards they must themselves respect. Furthermore, being trained and knowledgeable can help to give members of the judiciary the confidence to insist on the independence of their office and to preserve their integrity in the face of any pressure to take a particular stance, for example when ruling on allegations of ill-treatment.

The Council of Europe is very active in conducting bilateral human rights training for members of the judiciary. In addition, the Council has launched a new three-year programme aimed at integrating training on the European Convention on Human Rights into the curricula for judges and prosecutors in all its member states. The programme, called Human Rights Education for Legal Professionals or HELP, will assist with inter-institutional networking, human rights training materials, course development, etc. The overall objective is to help create the conditions under which national judiciaries have the capacity to use European human rights standards as part of their daily work.

B. European Committee for the Prevention of Torture (CPT)

Elements relating to the theme of Working Group One: *An independent judiciary and due process in criminal justice systems*

It should be underlined that the response concerns allegations of torture and all other forms of ill-treatment (including inhuman or degrading treatment). Attention is drawn to the standards developed by the CPT in its 14th General Report on its activities in respect of "Combating impunity" (doc CPT/Inf (2004) 28 on the CPT's website), in particular as far as the assessment of allegations of ill-treatment and investigation into possible ill-treatment are concerned. The CPT's standards (CPT/Inf/E (2002)1 paragraph 45 , page 14 of Doc) deals with the role of judicial and prosecuting authorities as regards combating ill-treatment by the police.

As far as access to legal counsel is concerned , reference can be made to the CPT's standards on the right of access to a lawyer from the very outset of police custody (doc CPT/Inf/E (2002)1- CPT standards I Police custody - paragraphs 36-38- page 6; paragraph 15, page 9; paragraph 41, page 12). Finally, the CPT has always advocated for inspection of police and prison establishments by an independent authority (e.g.

paragraph 50, page 16 of the document on CPT's standards and paragraph 54, page 19 of the same document.)

All relevant extracts from the cited CPT documents are appended.

C. Department for the Execution of Judgments of the European Court of Human Rights

Several hundreds of constitutional, legislative or other reforms, including changes in domestic case-law have been or are regularly being adopted to comply with the Court's judgments under the CM's supervision. Most of them contributed to the improvement of the rule of law in the respondent member-states, including in the specific four topics concerned.

Below are some bullet points followed by illustrative examples:

Working Group I Independent judiciary and due process

The right of a detainee to be heard is a fundamental principal in criminal law safeguarded by Art. 5 § 4 of the European Convention on Human Rights and the Court's case law and that is upon the judiciary/domestic courts to protect this right.

Examples of European Court case law:- *Niedbala v. Poland*, judgment of 04/07/2000, closed by Resolution ResDH(2002)124. It concerns the non-adversarial character of the procedure for reviewing the lawfulness of the applicant's detention, since neither the applicant nor his counsel were given the possibility to participate (violation of Article 5§4). This case was closed following the reform of the Code of Criminal Procedure.

Frommelt v. Liechtenstein, judgment of 24/06/2004, where the applicant's detention on remand was extended to the maximum of one year without hearing him before taking this decision (violation of Art. 5§4). In response to the Court's judgment this practice was changed giving the detainee the opportunity to comment either directly or via his legal representative.

Working Group II Accountable and responsive policing in upholding rule of law

Proper instructions of police members in particular through clear guidelines or criteria governing the use of force or weapons is vital to ensure adequate protection of citizens' life and freedom from ill-treatment as required by Art. 2 (right to life) and Art. 3 (prohibition of torture) of the Convention.

Examples of the Court's judgments and states' responses to them:

Turkey has responded to a number of judgments by aligning itself with the Convention standards by effectively combating torture and other abuses by members of security forces.

In particular, Turkey's constitution and laws have been considerably changed and the necessary instructions issued to the law enforcement agencies. The effectiveness of these major reforms is presently being closely supervised by the Committee of Ministers in the context of the cases concerned.

The United Kingdom has also adopted comprehensive legal and regulatory reforms to put in place a system of effective investigations into alleged abuses by members of the security forces, thus remedying some major shortcomings in this area revealed by the Court's judgments concerning the events in Northern Ireland.

Russia is in the process of adopting general measures to implement the Court's judgments relating to the abuses by security forces in Chechnya. Comprehensive measures have been called for.

Makaratzis v. **Greece**, judgment of 20/12/2004, Grand Chamber. The applicant died of police gunshot wounds which he received in hot pursuit, in a situation which got out of control (violation of Art. 2). the Greek authorities have taken a series of general measures to establish a modern, comprehensive legal framework for the use of force and firearms by policemen, as well as their overall conduct towards citizens.
In detail:
(a) On 24/07/2003 Law 3169/2003 entered into force, repealing earlier legislation on firearm use by the police. The new law contains specific, strict conditions for carrying and use of firearms by policemen who now have to undergo special tests before being issued with firearms and receive ongoing training. Finally, policemen are now criminally liable in cases of unlawful use of firearms. Inter-ministerial decision No. 9008 of 14/07/2004 provided the establishment and conditions of operation of police shooting galleries, in accordance with Article 5§6 of Law 3169/2003. They will be divided into open and closed galleries and are expected to be established in all prefectures within six years.
(b) On 3/12/2004 the Policemen's Code of Conduct (Presidential Decree 254/2004) entered into force. It contains useful guidelines for policemen's conduct towards all citizens, in accordance with international human rights principles. Specific provisions provide for the policemen's obligation to respect every individual's right to life and personal security. Policemen should never use force in enforcing the law unless absolutely necessary. Firearms may be used only in cases provided for by law.(c) Finally, awareness measures have been taken. In particular, in June 2004 the United Nations Human Rights Centre's *Pocketbook on Human Rights for the Police*, translated into Greek by the Greek National Commission for Human Rights, was distributed to Greek policemen by the Ministry of Public Order. In this context, the Head of the Greek Police, by a circular of 06/07/2005, also sent out the European Court's judgment to all police units. The circular contained a summary of the Court's main findings and was accompanied by a translation into Greek of the judgment (which is also available at the website of the State Legal Council, www.nsk.gr).

Working Group III: Role of public prosecutor in upholding rule of law

It is crucial for a democratic society based on the rule of law to ensure **the speediness**, **impartiality and effectiveness of the prosecution**

Examples of European Court judgments and of states' responses:

Egmez and *Denizci and others v.* **Cyprus** *(*judgments of 21/12/2000 and 23/08/2001), Final Resolution ResDH(2006)13

On 12/04/2006 the CM adopted the above Final Resolution, thus concluding its supervision of execution by Cyprus of the above two final judgments dating from 21/12/2000 and 23/08/2001 respectively. The cases concerned notably the applicants' (who were of Turkish origin) inhuman treatment by Cypriot police forces in 1994 and 1995, lack of an effective investigation into the incidents, the applicants' unlawful arrest and detention by the police and unlawful restriction of their freedom of movement. The CM took into account, *inter alia*, the following major individual and general measures adopted by Cyprus in compliance with the Court's judgments: **(a)** The initiation by the Attorney General of independent criminal investigations into both cases; **(b)** Interim measures adopted immediately after the Court's judgments, such as the Council of Ministers' decision to empower the Attorney General to appoint independent criminal investigators *ex officio* and the police training schemes; **(c)** Legislative measures adopted in 2002, 2004 and 2005 mainly improving legal aid and remedies available to victims (and their families) of human rights violations, enhancing protection from ill-treatment of detainees and providing heavier sanctions against offending police officers.

Numerous comprehensive reforms have also been adopted **by Turkey and the UK** in the above mentioned cases to improve the effectiveness of investigation into abuses by members of security forces and prosecution thereof.

Working Group IV Defense lawyers as fundamental pillars of effective criminal judicial system

Under Art. 6 § 1, 3c and 5§ 4 of the Convention, States have the duty to ensure **access to legal counsel** and their **proper involvement** into criminal proceedings at all levels to safeguard the principle of **equality of arms**.

Examples of European Court judgments and responses to them:

Case of *Poitrimol* v. France judgment of 23/11/1993. The case i. a. concerns the failure to respect the applicant's right of defence, in that the appeal court prohibited him from being represented by counsel on the grounds that the applicant failed to appear in court (violation of Article 6§ 3c). Following the European Court's judgment, French case law changed this practise in 2001.

Berliński Roman and Sławomir v. Poland, judgment of 20/06/02. The case concerns in particular the prosecutor's failure to deal with the applicants' request for free legal assistance at the first stage of criminal proceedings. The applicants were deprived of a lawyer for more than a year and were sentenced in 1996 to one and one-and-a-half years' imprisonment, suspended (violation of Articles 6§§1 and 3c). The measures necessary to prevent new similar violations are presently being supervised by the CM.

In this context, **access to case files and submission of all relevant documents** to the parties, in particular the defence lawyers are crucial to ensure equality of arms.

Examples of European Court case law: numerous cases v. *France* (Lebègue, judgment of 22/12/2004, F.W., judgment of 31/03/2005, Cossec, judgment of 14/12/2004, Lacas,

judgment of 08/02/2005, Le Duigou, judgment of 19/05/2005, Pause Phillipe, judgment of 15/02/2005,)

- failure to communicate the report of the reporting judge (a document establishing the questions of law) to the applicant, whereas this report had been submitted to the advocate-general (cases of Lebègue, F.W. and Lacas). It is now communicated to the defence, too.
- failure to communicate the advocate-general's conclusions to the applicant who consequently had no opportunity to reply to them, the applicant not being represented by a member of the *Court de cassation* Bar (cases of Lacas, Le Duigou and Pause). The conclusion is now communicated to all accused.
- the advocate-general's presence at the Court's deliberations, which is, in itself, incompatible with Article 6§1 (cases of F.W. and Cossec). The advocate general no longer attends deliberations.

See also cases v. Bulgaria with regard to detention pending trial: *Shishkov v. Bulgaria,* judgment of 09/01/03, *Nikolov v. Bulgaria,* judgment of 30/01/03
Kehayov v. Bulgaria, judgment of 18/01/2005

The cases concern *inter alia* certain violations of the applicants' right to obtain a decision on the legality of their detention pending trial (in 1997 and 1998) due to the fact that their lawyers did not have access to the case-file (violations of Article 5§4). In the Kehayov case the applicant's lawyer was also prevented from representing his client at one of the hearings.
Individual measures: The Court awarded the applicants just satisfaction in respect of non-pecuniary damages.

General measures: - *Concerning the violations of Article 5§4* due to fact that applicants' lawyers were refused access to the case file with a view to lodging an appeal against the preliminary detention, the attention of the Bulgarian authorities was drawn to the observation of the European Court that at the relevant time it was an established practice, in particular at the court in Plovdiv, to refuse access to case files in appeals against detention pending trial in cases when criminal proceedings were pending at the preliminary investigation stage (§79 of the Shishkov judgment and §98 of the Nikolov judgment). Since national legislation governing access to case files of accused persons was not questioned in this case, the authorities consider that the publication and dissemination of the judgments of the European Court appear to be sufficient measures for execution. They have indicated in this respect that on 23/06/2004 the Ministry of Justice sent the judgments in the Shishkov and the Nikolov cases to the Plovdiv District Court, to the Plovdiv District Prosecutor's Office and to the Regional Investigation Office in Plovdiv with a circular letter drawing their attention to the fact that the practice of refusing access to case files is contrary to the requirements of the Convention.

- As regards the violation of Article 5§4 in the Kehayov case related to the prevention of the applicant's lawyer from representing him at one of the hearings, the publication and the dissemination of the judgment appear to be sufficient measures to prevent similar violations. The European Court noted that the alleged defect in the authorisation for representation did not justify the decision depriving the applican of his defence, not only under Article 5 of Convention, but also with regard to the relevant domestic law. Information is expected in this respect.

APPENDIX

Extract from :

CPT's 14th General Report [CPT/Inf (2004) 28]

Combating impunity

25. The *raison d'être* of the CPT is the "prevention" of torture and inhuman or degrading treatment or punishment; it has its eyes on the future rather than the past. However, assessing the effectiveness of action taken when ill-treatment has occurred constitutes an integral part of the Committee's preventive mandate, given the implications that such action has for future conduct.

The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.

Conversely, when officials who order, authorise, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. The knowledge that those responsible for ill-treatment have been brought to justice will also have a beneficial effect for the victims.

26. Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues. Positive action is required, through training and by example, to **promote a culture** where it is regarded as unprofessional – and unsafe from a career path standpoint – to work and associate with colleagues who have resort to ill-treatment, where it is considered as correct and professionally rewarding to belong to a team which abstains from such acts.

An atmosphere must be created in which the right thing to do is to report ill-treatment by colleagues; there must be a clear understanding that culpability for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should

know, that ill-treatment is occurring and fails to act to prevent or report it. This implies the existence of a clear reporting line as well as the adoption of whistle-blower protective measures.

27. In many States visited by the CPT, torture and acts such as ill-treatment in the performance of a duty, coercion to obtain a statement, abuse of authority, etc. constitute specific criminal offences which are prosecuted *ex officio*. The CPT welcomes the existence of legal provisions of this kind.

Nevertheless, the CPT has found that, in certain countries, prosecutorial authorities have considerable discretion with regard to the opening of a preliminary investigation when information related to possible ill-treatment of persons deprived of their liberty comes to light. In the Committee's view, even in the absence of a formal complaint, such authorities should be under a **legal obligation to undertake an investigation** whenever they receive credible information, from any source, that ill-treatment of persons deprived of their liberty may have occurred. In this connection, the legal framework for accountability will be strengthened if public officials (police officers, prison directors, etc.) are formally required to notify the relevant authorities immediately whenever they become aware of any information indicative of ill-treatment.

28. The existence of a suitable legal framework is not of itself sufficient to guarantee that appropriate action will be taken in respect of cases of possible ill-treatment. Due attention must be given to **sensitising the relevant authorities** to the important obligations which are incumbent upon them.

When persons detained by law enforcement agencies are brought before prosecutorial and judicial authorities, this provides a valuable opportunity for such persons to indicate whether or not they have been ill-treated. Further, even in the absence of an express complaint, these authorities will be in a position to take action in good time if there are other indicia (e.g. visible injuries; a person's general appearance or demeanour) that ill-treatment might have occurred.

However, in the course of its visits, the CPT frequently meets persons who allege that they had complained of ill-treatment to prosecutors and/or judges, but that their interlocutors had shown little interest in the matter, even when they had displayed injuries on visible parts of the body. The existence of such a scenario has on occasion been borne out by the CPT's findings. By way of example, the Committee recently examined a judicial case file which, in addition to recording allegations of ill-treatment, also took note of various bruises and swellings on the face, legs and back of the person concerned. Despite the fact that the information recorded in the file could be said to amount to *prima-facie* evidence of ill-treatment, the relevant authorities did not institute an investigation and were not able to give a plausible explanation for their inaction.

It is also not uncommon for persons to allege that they had been frightened to complain about ill-treatment, because of the presence at the hearing with the prosecutor or judge of the very same law enforcement officials who had interrogated them, or that

they had been expressly discouraged from doing so, on the grounds that it would not be in their best interests.

It is imperative that prosecutorial and judicial authorities take resolute action when any information indicative of ill-treatment emerges. Similarly, they must conduct the proceedings in such a way that the persons concerned have a real opportunity to make a statement about the manner in which they have been treated.

29. **Adequately assessing allegations of ill-treatment** will often be a far from straightforward matter. Certain types of ill-treatment (such as asphyxiation or electric shocks) do not leave obvious marks, or will not, if carried out with a degree of proficiency. Similarly, making persons stand, kneel or crouch in an uncomfortable position for hours on end, or depriving them of sleep, is unlikely to leave clearly identifiable traces. Even blows to the body may leave only slight physical marks, difficult to observe and quick to fade. Consequently, when allegations of such forms of ill-treatment come to the notice of prosecutorial or judicial authorities, they should be especially careful not to accord undue importance to the absence

of physical marks. The same applies *a fortiori* when the ill-treatment alleged is predominantly of a psychological nature (sexual humiliation, threats to the life or physical integrity of the person detained and/or his family, etc.). Adequately assessing the veracity of allegations of ill-treatment may well require taking evidence from all persons concerned and arranging in good time for on-site inspections and/or specialist medical examinations.

Whenever criminal suspects brought before prosecutorial or judicial authorities allege ill-treatment, those allegations should be recorded in writing, a forensic medical examination (including, if appropriate, by a forensic psychiatrist) should be immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Even in the absence of an express allegation of ill-treatment, a forensic medical examination should be requested whenever there are other grounds to believe that a person could have been the victim of ill-treatment.

30. It is also important that no barriers should be placed between persons who allege ill-treatment (who may well have been released without being brought before a prosecutor or judge) and doctors who can provide forensic reports recognised by the prosecutorial and judicial authorities. For example, access to such a doctor should not be made subject to prior authorisation by an investigating authority.

31. The CPT has had occasion, in a number of its visit reports, to assess the activities of the authorities empowered to conduct official investigations and bring criminal or disciplinary charges in cases involving allegations of ill-treatment. In so doing, the Committee takes account of the case law of the European Court of Human Rights as well as the standards contained in a panoply of international instruments. It is now a well established principle that **effective investigations**, capable of leading to the

identification and punishment of those responsible for ill-treatment, are essential to give practical meaning to the prohibition of torture and inhuman or degrading treatment or punishment.

Complying with this principle implies that the authorities responsible for investigations are provided with all the necessary resources, both human and material. Further, investigations must meet certain basic criteria.

32. For an investigation into possible ill-treatment to be effective, it is essential that the persons responsible for carrying it out are independent from those implicated in the events. In certain jurisdictions, all complaints of ill-treatment against the police or other public officials must be submitted to a prosecutor, and it is the latter – not the police – who determines whether a preliminary investigation should be opened into a complaint; the CPT welcomes such an approach. However, it is not unusual for the day-to-day responsibility for the operational conduct of an investigation to revert to serving law enforcement officials. The involvement of the prosecutor is then limited to instructing those officials to carry out inquiries, acknowledging receipt of the result, and deciding whether or not criminal charges should be brought. It is important to ensure that the officials concerned are not from the same service as those who are the subject of the investigation. Ideally, those entrusted with the operational conduct of the investigation should be completely independent from the agency implicated. Further, prosecutorial authorities must exercise close and effective supervision of the operational conduct of an investigation into possible ill-treatment by public officials. They should be provided with clear guidance as to the manner in which they are expected to supervise such investigations.

33. An investigation into possible ill-treatment by public officials must comply with the criterion of thoroughness. It must be capable of leading to a determination of whether force or other methods used were or were not justified under the circumstances, and to the identification and, if appropriate, the punishment of those concerned. This is not an obligation of result, but of means. It requires that all reasonable steps be taken to secure evidence concerning the incident, including, inter alia, to identify and interview the alleged victims, suspects and eyewitnesses (e.g. police officers on duty, other detainees), to seize instruments which may have been used in ill-treatment, and to gather forensic evidence. Where applicable, there should be an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.

The investigation must also be conducted in a comprehensive manner. The CPT has come across cases when, in spite of numerous alleged incidents and facts related to possible ill-treatment, the scope of the investigation was unduly circumscribed, significant episodes and surrounding circumstances indicative of ill-treatment being disregarded.

34. In this context, the CPT wishes to make clear that it has strong misgivings regarding the practice observed in many countries of law enforcement officials or prison officers wearing masks or balaclavas when performing arrests, carrying out interrogations, or dealing with prison disturbances; this will clearly hamper the identification of potential suspects if and when allegations of ill-treatment arise. This practice should be strictly controlled and only used in exceptional cases which are duly justified; it will rarely, if ever, be justified in a prison context.

Similarly, the practice found in certain countries of blindfolding persons in police custody should be expressly prohibited; it can severely hamper the bringing of criminal proceedings against those who torture or ill-treat, and has done so in some cases known to the CPT.

35. To be effective, the investigation must also be conducted in a prompt and reasonably expeditious manner. The CPT has found cases where the necessary investigative activities were unjustifiably delayed, or where prosecutorial or judicial authorities demonstrably lacked the requisite will to use the legal means at their disposal to react to allegations or other relevant information indicative of ill-treatment. The investigations concerned were suspended indefinitely or dismissed, and the law enforcement officials implicated in ill-treatment managed to avoid criminal responsibility altogether. In other words, the response to compelling evidence of serious misconduct had amounted to an “investigation” unworthy of the name.

36. In addition to the above-mentioned criteria for an effective investigation, there should be a sufficient element of public scrutiny of the investigation or its results, to secure accountability in practice as well as in theory. The degree of scrutiny required may well vary from case to case. In particularly serious cases, a public inquiry might be appropriate. In all cases, the victim (or, as the case may be, the victim's next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

37. **Disciplinary proceedings** provide an additional type of redress against ill-treatment, and may take place in parallel to criminal proceedings. Disciplinary culpability of the officials concerned should be systematically examined, irrespective of whether the misconduct in question is found to constitute a criminal offence. The CPT has recommended a number of procedural safeguards to be followed in this context; for example, adjudication panels for police disciplinary proceedings should include at least one independent member.

38. Inquiries into possible disciplinary offences by public officials may be performed by a separate internal investigations department within the structures of the agencies concerned. Nevertheless, the CPT strongly encourages the creation of a fully-fledged independent investigation body. Such a body should have the power to direct that disciplinary proceedings be instigated.

Regardless of the formal structure of the investigation agency, the CPT considers that its functions should be properly publicised. Apart from the possibility for persons to lodge complaints directly with the agency, it should be mandatory for public authorities such as the police to register all representations which could constitute a complaint; to this end, appropriate forms should be introduced for acknowledging receipt of a complaint and confirming that the matter will be pursued.

If, in a given case, it is found that the conduct of the officials concerned may be criminal in nature, the investigation agency should always notify directly – without delay – the competent prosecutorial authorities.

39. Great care should be taken to ensure that persons who may have been the victims of ill-treatment by public officials are not dissuaded from lodging a complaint. For example, the potential negative effects of a possibility for such officials to bring proceedings for defamation against a person who wrongly accuses them of ill-treatment should be kept under review. The balance between competing legitimate interests must be evenly established. Reference should also be made in this context to certain points already made in paragraph 28.

40. Any evidence of ill-treatment by public officials which emerges during **civil proceedings** also merits close scrutiny. For example, in cases in which there have been successful claims for damages or out-of-court settlements on grounds including assault by police officers, the CPT has recommended that an independent review be carried out. Such a review should seek to identify whether, having regard to the nature and gravity of the allegations against the police officers concerned, the question of criminal and/or disciplinary proceedings should be (re)considered.

41. It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the **sanctions imposed for ill-treatment** are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.

Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. Similarly, sanctions imposed following the determination of disciplinary culpability should be commensurate to the gravity of the case.

42. Finally, no one must be left in any doubt concerning the **commitment of the State authorities** to combating impunity. This will underpin the action being taken at all other levels. When necessary, those authorities should not hesitate to deliver, through a formal statement at the highest political level, the clear message that there must be “zero tolerance” of torture and other forms of ill-treatment.

45. The CPT has stressed on several occasions **the role of judicial and prosecuting authorities** as regards combatting ill-treatment by the police.

For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue ; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).

Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.

The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity.

Extract from :

CPT/Inf/E (2002) 1 - Rev. 2004

police custody:
- paragraphs 36-38- page 6
- paragraph 15, page 9
- paragraph 41, page 12

inspection of police and prison establishments
- paragraph 50, page 16
- paragraph 54, page 19

Police custody

Extract from the 2nd General Report [CPT/Inf (92) 3]

36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).[2] They are, in the CPT's opinion, three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).

37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particularly the rights of access to a lawyer and to request a medical examination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.

38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation.

As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by

[2] This right has subsequently been reformulated as follows: the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities).

the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer.

Extract from the 6th General Report [CPT/Inf (96) 21]

15. The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.

The CPT recognises that in order to protect the interests of justice, it may exceptionally be necessary to delay for a certain period a detained person's access to a particular lawyer chosen by him. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the police investigation should be arranged.

Extract from the 12th General Report [CPT/Inf (2002) 15]

41. However, in a number of countries, there is considerable reluctance to comply with the CPT's recommendation that the right of **access to a lawyer** be guaranteed from the very outset of custody. In some countries, persons detained by the police enjoy this right only after a specified period of time spent in custody; in others, the right only becomes effective when the person detained is formally declared a "suspect".

The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should

not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

The right of access to a lawyer must include the right to talk to him in private. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation.

The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend - and stay at - a police establishment, e.g. as a “witness”.

Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer.

Police custody: inspections

Extract from the 12th General Report [CPT/Inf (2002) 15]

50. Finally, the **inspection of police establishments by an independent authority** can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully
effective, visits by such an authority should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights (in particular the three rights referred to in paragraphs 40 to 43); compliance with rules governing the questioning of criminal suspects; and material conditions of detention.

The findings of the above-mentioned authority should be forwarded not only to the police but also to another authority which is independent of the police.

Imprisonment: inspections

Extract from the 2nd General Report [CPT/Inf (92) 3]

54. Effective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have

confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (eg. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general.