# mediterranean journal of HUMAN RIGHTS

Volume 1 Number 3 1997

## *Objective*

*The Mediterranean poses a unique and fascinating challenge to existing Human Rights charters. Conventional approaches to the enforcement of Human Rights often overlook the significance of cultural differences. A new approach is needed to address the tensions between institutional uniformity and cultural diversity.*

*The Mediterranean Journal of Human Rights is a response to this challenge. An interdisciplinary journal, the review explores the inter-relationships between Human Rights charters and their cultural and socio-economic contexts. Drawing on a broad academic landscape, the journal aims to stimulate debate on the restructuring of traditional Human Rights charters to reflect economic and cultural reality.*

## *Readership*

*The Mediterranean Journal of Human Rights is of interest to all those having an academic interest or practical interest in the enforcement of human rights in the Mediterranean region. The journal focuses on issues which are the common concern of lawyers, scholars and politicians.*

## *Format*

*Each edition of the Mediterranean Journal of Human Rights is a dossier of information on cross-cultural application of a specific area of Human Rights. Politics, Law and Religion in the Mediterranean; Women's Rights; Ethnic Groups and Minorities; Environmental Rights; Political Participation and Immigration are some of the themes that the Review deals with.*

*The Journal is issued on a bi-annual basis. Papers, which may be submitted in any language, are published in English and French, with Abstracts translated ino Arabic.*






*Published by Foundation for International Studies, Valletta, Malta with the financial support of the Ministry of Foreign Affairs and Environment.*

*Printed by P.E.G. Ltd, San Gwann, Malta*

**M.J.H.R.** **Mediterranean Journal of Human Rights**

**CONTENTS** **Vol 1 Number 3 1997**

**Articles**



*SERIOUS CRIME AND THE REQUIREMENT OF RESPECT FOR HUMAN RIGHTS IN EUROPEAN DEMOCRACIES*



DOSSIER: *THE PREVENTION OF TORTURE IN SOUTHERN EUROPE*

## ARTICLES

# JURIDICAL PROTECTION OF FOREIGNERS IN ITALY AND IN EUROPE

GIUSEPPE FINOCCHIARO

Immigration is an old phenomenon but since the end of the last century, and especially during the last twenty years, it has become a veritable social and political problem for Europe and for the West in general. Jurists, historians and politicians are all witnessing the strong pressure which the latest waves of immigrants are exerting at the doorsteps of united Europe and of the more industrialized countries, like North America and Japan.

In spite of this, however, from the juridical point of view the phenomenon of immigration is a *quaestio nova*, a new problem, especially for Europe. In fact in the past immigration used to be typical of certain situations, like those of England, France and Germany, either as a result of their having been colonial countries or for their rapid rate of industrialization and for the growth of their home labour market.

Following a complex series of historical, economic, social and political factors, immigration began to concern other areas of Europe. Thanks to the changes in Italy and Spain, the end of the dictatorship in Greece and its economic revival, the strong receptive capacity of the home markets in the Netherlands and Belgium and the ample possibilities of accommodating more people in Sweden, waves of

immigrants began finding their way into other countries *as well*. On top of this there came the not negligible phenomenon of returned migrants, which means that people who had migrated from their homeland a long time before were now, for economic and work reasons, coming back. This typically Mediterranean phenomenon has affected mainly Italy, Spain and Portugal.

The attempts by the authorities, at national and European community levels, to control and manage migration (which on the whole had not been underestimated) have not been uniform throughout its development. Such diversity was perhaps inevitable, when one considers the social and economic differences of the individual States, and also the historical and political origins which have influenced the manner, speed and nature with which each state reacted to the problem of migration.

This lack of uniformity, however, together with the growth of the phenomenon, has not hindered the attempts at reaching a common line of conduct to address the question of the presence of foreigners in Europe.

The authorities of the European community and of Europe in general have often shown the way and pointed out the lines to be followed, and the objectives have been reached, for example, by the harmonization of regulations attempted by the Treaty of Schengen, by the recognition of immigration as a primary question within the social and defence policies of the treaty of Maastricht, and in the individual provisions first of the C.S.C.E. and then of the O.S.C.E.

Attempts to reach common policy directions regarding immigration have up to now been rather difficult, since it has been evidently necessary for each State to vary its own political actions and its own regulatory instruments according to the individual internal situations. In spite of this, at least on general principles a fair kind of integration has been reached on the more important procedures and on the final objectives, notwithstanding the diversity in the ways followed to reach these common objectives. The legislators' actions have been particularly influenced by conditions of the labour market, its possibilities of expansion and of reception (or the need for manpower) and its capacities of social and economic accommodation. Finally one also has to consider the role of political will, which in this field is more influential and interactive with regulatory discipline than in other fields of jurisprudence.

Up to now the tendency has undoubtedly been of an evidently restrictive type, brought about by necessities of various kinds, ranging from the socio-economic need to block the influx to the more

recent problems of safeguarding public order. In spite of this situation, and beyond the limits of what has been called "the European Fortress", the pressures of immigration keep increasing because their causes remain and even tend to increase their effects.

From the normative point of view, Europe has not established a common approach to face the problem. This has depended on the concurrence of various causes that are not only political but belong to the social texture itself, which has consequently been expressed at the level of jurisdiction by the regulation in the set-up. First of all the great difference in the evaluation of the phenomenon: just consider, for example, the historic parameter according to which certain States have felt the effects of immigration before others, and in this way have been able to develop a set of rules which, beyond its contents and the restrictive or open policy which created it, made it easier to face the problem and the changed conditions connected with it, both concerning the society and the structure of the influx itself.

Secondly, in the normative perception of the phenomenon a very important role has been played by the geographic and social concentration of immigrants from one country to another. Although at first this has appeared to be unrelated with the issue, it has created great contradictions both in the social and the economic aspects from State to State, and consequently countries with a high level of integration have reacted and react differently to those where integration is still far away or is not managed as it should be.

This explains the deep differences that exist in the norms and local situations among the countries, which have been followed by a process of "imitation", producing difficult and muddled juridical structures, often arising out of emergency situations.

Countries which have only recently started to feel the consequences of immigration have tried to face the new situation by importing foreign experiences and instruments from reference models to adapt or construct their own regulations. But this has created more confusion, in spite of the Community's hope in establishing unified regulations by adopting rules which are substantially similar. A degree of real harmonization of the principal aspects of the issue has been reached by careful supervision and reform, thanks also to the effects of common treaties since Schengen, without limiting the political freedom of individual legislative organs to make laws that deal with local situations. However what strikes the keen observer today is the substantial difference of "normative maturity" between the States concerned: as a consequence Europe

keeps getting more foreigners and it appears ever more divided in political decisions.

In this scenario, which I have sketched very briefly, Italy is an example of a country where the legal and social approach has been one of emergency measures, taken after forty years of deplorable legislative silence on the matter, in spite of what is laid down by the Constitution.

Although Italian legislation has successfully introduced some interesting innovations, today it is in need of substantial integration. One negative aspect, which it shares with other European and non-European legislations, is the lack of regulations to guide it in the second phase of the immigration problem, that is social integration.

It is important to bear in mind that, as has often been emphasised, the problem of immigration is not simply a question of visas and permits: it is mostly concerned with the integration of immigrants in the social context, with all the problems which this creates. By considering it only in terms of numbers or public order we would be missing the real problem and no solutions will be found. If a State, whoever it may be, has decided to allow the entry and integration of foreigners in its own territory, it must have the legal instruments which can guarantee its security in juridical terms, to help peaceful and productive integration, and to respect its socio-cultural relationships.

In this direction newly-conceived studies have looked into this issue with a keen eye, and they have emphasised that in this new relationship between the State and the immigrant new rights are arising and that the juridical basis of the immigrant is becoming wider. The prejudice against the outsider doubtlessly lingers on but it is now limited to ethnic, religious and racial problems. But the immigrant community is receiving encouraging signs from those juridical and constitutional structures which accept integration. It is enough to mention the right to one's cultural identity, religion, the respect of one's customs and way of life, within the limits of the community that follows these rules.

In spite of this, integration is often perceived as a violation, an unjustified intrusion into the life of a community. This also happens at the juridical level, when the law must codify and enforce proposals conceived and applied in other fields. One could here refer to the controversies that arise in the cultural, intellectual and political sections of a community when the right to vote in local elections is proposed. This has recently happened in Italy when this possibility was included in a bill on immigration presented by the Government

last February. I will not take sides on this issue, but I think it is important to reiterate that integration is inseparable from immigration: the matter is composed of two phases, immigration and integration, and one cannot consider one without the other.

If one imagines that one can regulate immigration without providing the instruments for integration, this would make any form of *real,* peaceful and multi-ethnic coexistence perhaps not impossible but certainly difficult. In this direction the experiences of countries with a high degree of social chemistry (like Sweden and the Netherlands) have shown that the ability to integrate has reached important goals. In these countries the extension of considerable rights to immigrants is sometimes guaranteed even by the Constitution (including the right to vote in local elections), within the full observance of the prerogatives that citizens, as such, respect foreigners, thanks to delicately-balanced formulas.

Establishing a common line of action on immigration in Europe will mean, first of all the control and management of security and of the numbers of immigrants, and secondly the not less important aspect of the ability to accommodate and integrate them. In this sense the acceptance or the expulsion of foreigners from the State will be particularly meaningful. With all the consequences that are connected to them, including those concerning human rights.

As I have shown before, however, some of the principal European States have had a sudden and traumatic approach to immigration, and among these, for the reasons given above, one finds the Mediterranean countries which are in the forefront facing the immense human reserves of Africa and Asia.

It is not by chance that, among the policies followed by the various groups which are active in regional and international institutions and agreements, those concerned with the Mediterranean deal expressly with immigration.

This is a problem which in the near future, in this area, could grow to alarming proportions, due to the high instability in this region, which does not really form part of the problem but is directly linked to it.

## 1. The influx into Europe and especially in the Mediterranean

The direct consequence of what has been said above is the choice of political directions intended to stop immigration, both at the Community level and at the individual nations' level. To obtain this goal new instruments have been established, like the intervention

by cooperation on the spot in those countries which are sources of economic migratory movements, as well as the adoption or modification of laws aimed at better control and monitoring of the influxes.

Since the eighties, the Executive Commission of the European Community has proposed solutions for hosting and integrating foreigners, the most innovative being the recommendations on the right to vote in local elections and on the participation of the foreigner in the life of the host country. However these juridical steps were accompanied by increasing agreement on the need to restrict entry, thus creating difficulties in the interpretation of the real directions being followed by the supranational authorities.

On the strictly juridical level one must remember that no State is obliged to welcome foreigners on its territory, apart from cases provided for by international Conventions to safeguard certain protected categories. The first difficulty in the harmonization of migration policies concerns the fact that the choice of policy is necessarily taken by each individual nation. However once the choice in favour of hosting is made, the treatment of foreigners must conform to the principles of the minimum standard of the fundamental human rights. It follows therefore that the freedom to host foreigners entails the obligation for the kind of treatment to which the State must conform. In this field the degree of homogeneity is relatively good, thanks to the common juridical heritage shared by the individual European nations as well as due to the worldwide evolution towards guaranteeing human rights.

Within this general context the Mediterranean has reacquired its old strategic importance. Political developments after the end of the Cold War have shifted political equilibrium from the West-East frontier to the one between North and South, which is still in hand, and have laid the foundations for a renewal of geopolitical considerations of the Mediterranean region. Its strategic position, both from the political and economic viewpoints, its being the natural frontier between the West and Islam has put forward again the importance of the control of the region, especially on account of the Islamic expansion in the heart of Europe, called the diaspora of Islam, which is feared so much by the Western authorities. This presence is quite strong, with important religious centres in Italy, like the mosque of Rome, but also widely spread in Spain, on account of its traditional historical and cultural Islamic presence, and in France, due to its colonial links and the numerous Maghreb colony in its territory.

Consequently immigration in the Mediterranean comprises three kinds of problems which concern all Europe:

a) First of all, regarding the strictly demographic and human dimension, because of the large numbers of people which keep flowing into the nearest and more easily accessible parts from the South of the Mediterranean and the Caucasian East. Some observers have emphasised that the Mediterranean is the weak spot, the easiest entry into the Community's Europe and particularly into the Schengen area.

In order to give an idea of the numbers involved in this kind of demographic pressure and of its possible consequences, the ILO has declared last year that about 20 million potential workers will reach employment age in 20-30 years' time (that is practically by the year 2020). Considering the problem of over-population and the failure of demographic policies of the North African countries, as well as due to the lack of economic development and industrial planning, this would mean that there might be 20 million probable emigrants seeking work and economic improvement.

Such figures are eloquent enough.

In this framework the regulations on immigration in the countries of Southern Europe, who will be the first to be hit by these waves of immigration, are being considered incapable of addressing the problem, mainly because legislation and policies are not clear as to whether there is an effective desire to close the doors. Experts therefore criticize the regularization of the position of whole groups in Italy or the inability to effect expulsions swiftly and with a steady hand, contrary to what happens in other countries, especially in France.

In this sense it is important to note that almost all the (European) nations bordering the Mediterranean boast of legislation on immigration which is fairly recent. A more careful glance will show that the problem will consist of how much the Mediterranean countries will be able to filter immigrants before they reach unified Europe, especially those countries which are more exposed to the influx of foreigners on account of their economic and labour attractions, like Germany, Great Britain, Sweden or the Netherlands. Whatever the real situation in the home market of these countries may be (and it is presently not as rosy as it used to be), it still exerts a strong attraction on immigrants.

b) The problem of employment, which is not very healthy since Europe is beset by contradictions and economic and social disparity. Unemployment, particularly, has become a problem for

the whole Community, to which there does not seem to be a short term solution.

In this sense the Conference of Luxembourg in June 1994 had already stressed the priority to safeguard the home job market from natural competition and from the infiltration of immigrants. In particular three general directives were established to combat illegal immigration, illegal employment and the exploitation of women and minors at work in the violation of general regulations, as in the case of underpayment which is very competitive.

This wound, which is very strong in Portugal, Spain and Italy, has now spread to the whole of Europe.

The risks which threaten the market and the stability of the socio-economic apparatus have been understood by the European authorities and have stimulated a considerable production of laws and institutions to guarantee the protection of the labour market. Within the directions set by the Conference of Barcelona in November 1995, Europe is moving towards a global kind of closure in order to regulate entry, a policy which is being run parallel to, and this is a concrete innovation, interventions *in loco* by the EU in the countries of the Mediterranean region, which is being extended to Subsaharan countries which have considerable demographic and religious importance.

The creation of a Euro-Mediterranean Partnership is the way to involve the authorities of countries which "export" migrants and labour in order to stop the exodus. The motion which was intended to compel States to take back migrants who have been expelled or refused entry (diplomatically transformed into responsibility in the management of international and local migratory movements) which was moved during the Barcelona meeting shows that Europe is clearly pursuing a braking policy, casting a tightly knit net around the continent's borders.

c) Vis-à-vis internal security, the issue has changed aspect in the last three years, becoming increasingly important to three major issues: the high socio-political instability in the region ranging from Islamic fundamentalism to international terrorism; the problem of the exploitation and organized traffic of migrants, drugs or prostitution, sometimes run by foreign criminal rings; problems pertaining to social and economic dropouts who may come into contact with local criminal organizations, which may even be very powerful.

The problem of terrorism is the one which worries national Governments most, since it has been proved that immigration

channels have been used for terrorist actions on the continent (like the Algerian Islamic cells on French territory). This explains the introduction of changes in the legislation of certain countries increasing controls, making antiterrorist laws more strict, reducing the list of countries whose citizens do not need a visa, and vesting the Police authorities with more powers.

But even in this scenario, as I have stressed before, the problem of the integration and the settlement of foreigners on one's territory crops up. Events in France two years ago, with the terrorist attacks in Paris, have demonstrated this: the locking up of foreigners in their urban areas as in a ghetto, with solutions which are sometimes dangerous to the equilibrium of an already uneasy social fabric, have contributed then, and can contribute now, to extremist symptoms which may stop all forms of dialogue.

These three kinds of problems must, finally, be analyzed with reference to the problems of the granting of basic rights to foreigners, because the limitations imposed by the more strict laws on immigration, as well as the parallel laws on anti-terrorism and expulsion, tend to extensively limit the freedom of movement and participation of foreigners – even within the observance of the minimum standard of human rights laid down by international bodies – in some cases they stretch to the limits of compression in the name of the supreme right to defend public order and the legal system.

Substantially, the point on which the question assumes real social and juridical importance, and clashes with political conceptualization, does not concern the respect of rights in itself – on these there seems to be a certain homogeneity, at least on the fundamental ones – but rather on their *identification*. In this sense the term "foreigners' statute" shows peculiar characteristics and different contexts from State to State. It follows that even the legal approach will be different.

As regards immigration, therefore, Europe seems to have decided upon a policy of holding in check the continuous and massive influx of foreigners, by creating instruments intended to block illegal immigration at the frontiers; some States have even embarked on accomplishing the integration of communities who were already established on their territory, mainly by harmonizing their laws further, within the observance of the individual needs and the freedom of each State to choose the political line of action which it considers most appropriate.

It is only natural that the first part of the process to regulate immigration by legal means concerns the problem of hosting, because

of the strong repercussions on the management and programming of entry.

## 2. The entry and hosting of foreigners: common issues and their connected problems. A comparison of experiences in Europe

Once the criteria which guide the actions of the EU on immigration, and which inspire national legislation, have been established, attention can be turned on the effective contents of the individual legal systems. The degree of homogeneity among these, as I have said before, varies a lot according to the different cases. Regarding entry and hosting, the degree of integration and similarity is quite high, allowing for the differences which mark the individual systems, on the basis of what I have said before.

The first common rule, since it has been chosen as a model by various legal systems on the question of entry, is the Agreement of Schengen, whereby interesting measures have been introduced to start at least a process of convergence of the individual laws regarding visas and entry permits for stays up to 90 days. Gradually other countries have followed this model and adopted its general principles in their laws, even if they were not members of the Agreement.

Within the framework of this Agreement the principle was established giving right of passage from a member country to another, recognizing the validity of the controls made in the first one. Then the SIS was set up (the Schengen Information System), a computerized system of control and monitoring of the movements of persons and goods within the member states, which is very useful in the field of immigration. Lastly, important tasks were given to Europol, like the control of terrorism and illegal immigration.

Beyond the norms of principle laid down by the Agreement of Schengen, the common characteristic of European legal systems on entry and hosting depends on the conditions for entry into the territory of the State. A general degree of similarity can be observed in this sense, although in principle the procedures and the further guarantees required by some legislations to allow regular entry are different. Most of the regulations distinguish between short and long stays, usually less or more than three months, for which different rules and regulations are in force and different procedures are followed in the various States.

On the other hand, the motives for longer stays are more or less

similar in all European States, consisting of work, family reunion and study. The motives for shorter stays are many, and range from family visits to business trips, from religious purposes to medical reasons or bibliographical research. However, the fact that there is no uniformity here does not weaken the validity of the general framework.

Even the requirements that regulate entry are common: the regularity of procedures; the motive for entry must be the same on visas, residence permits and later activities, economic and financial guarantees, and the requirement that the candidate should not be dangerous to society. This last category is considered very important by the authorities, since the problems connected to it keep cropping up in a very worrying way. Some legal systems, among which those of France and Spain, have taken into consideration the risks potentially deriving from the influx of immigrants and have introduced laws *ad hoc,* especially regarding the category of offences which are intimately connected to the status of foreigner, such as the introduction or aiding illegal entry, illegal immigration, attempts against the stability of the labour market (section 499b of the *Codigo Penal Espanol* recently introduced in the text of laws safeguarding the stability of labour against exploitation, incentivization and complicity in creating *lavoro nero* and the black market), as well as the general risks of terrorism.

The principle which has to be stressed, before everything else, is that since the State is not obliged to host a foreigner in its territory, in principle there is likewise no absolute right for a foreigner to be hosted in the territory of a State. A State is therefore free to establish certain requirements that must be satisfied by a foreigner who files an application for entry into the country. Consequently on the basis of this *regula iuris*, regulations governing entry and settlement are important instruments which can control the flow of immigration, and which can be made use of first of all to reach such objectives as the closure of frontiers.

French legislative measures have followed these directions since 1945, the year when the first law on this issue was approved. In fifty years French legislation has passed no less than 13 laws governing immigration and policies of admission or expulsion, a fact which proves that this topic is considered very important to French society, especially when one compares it to the absence of such laws in Italy in spite of the provisions of section 10, para. 2 of the Constitution in a period of time which is only slightly shorter.

The first law on this topic was the *ordonnance* 2685, which was

enacted in conditions which were very different from today's. This was followed by a relevant number of laws which have integrated, modified or updated it but French law continues to base its fundamental principles on the lines set down in the old law.

The French legal system, which is one of the most complex but also one of the most functional and advanced, up to a short time ago used to allow entry into France to all adult foreigners who possessed the common requirements mentioned above and who could, as regards short stays, give ample guarantees of repatriation, show that they possess financial means calculated on a daily basis, and that they could eventually prove their status of tourists by hotel bookings and agreement with tour operators.

The law of 1993 introduced the so-called *repatriation guarantees*: besides the afore-mentioned requirements, the foreigner was required to produce proof that he had the means for returning to his homeland, like a personal and non-transferable return air ticket with a limited validity. This practice had already been adopted much before by the Dutch authorities with good results. Another interesting measure was the one requiring those foreigners who wanted to stay with a French family to produce a signed declaration of hospitality, countersigned by the mayor to prove that the host family's socio-economic situation and their residence were such as to allow a third person to live with them. This condition was waived for foreigners who joined their own family.

In February of this year a strong political debate arose in France when the draft of the *Loi Debré* was presented, a rather harsh law whose aim was to introduce big innovations into the complex legislative structure about the control and prevention of immigration and the issues linked to it. The principles that this law wanted to introduce included the compulsory declaration by the person who had hosted the foreigner, stating that the latter had actually left the country within the period established by the visa.

This point in the bill was strongly challenged by the population, and it was accompanied by a whole series of modifications giving wider powers to the Police, the Prefect (who took charge of the tasks of administrative control concerning residence permits) and the Frontier Guards, except the areas bordering with countries which are members of the Schengen Agreement. It provided for such measures as the possibility of revoking residence permits and the confiscation of personal documents of foreigners who were still being checked, the confiscation of passports, the speeding up of arrest procedures when one had no documents, the introduction of the

annual residence card for those whom the French press has called the "neither-nor" (*"ni-ni"*), that is foreigners who can neither be regularised nor expelled (*"ni régularisables ni expulsables"*).

The strong reaction to the measures proposed in the bill, which was widely discussed in the media, was not the only highly controversial one in France: a similar reaction met the *Loi Pasqua* in 1993 which was considered rather rigid (this was later declared constitutional, by a decision taken on 13 August 1993, in no less than eight articles by the French Constitutional Council). This bill had introduced strong corrective measures limiting admission into France, increased the number of reasons which could lead to deportation, cancelled the compulsory judgement of the Departmental Commission for Expulsion and gave full discretionary powers to the Prefecture which could now take the final decision regarding the expulsion of a foreigner.

The question of the *sans papiers*, which had caused such an outcry in the summer of 1996, has shown that France has lately adopted a firm policy of closure, far from the innovative openings pursued by the *Loi Joxe* in 1989, which was followed by the laws of 1990 and 1991. In that period France increased reasons for admission, eased control procedures, implemented the plan provided for by the Schengen Agreement (particularly the SIS project), and enacted the *Loi Besson* on residence policies which caused a great deal of comment, especially among experts in geography and territorial planning, for its provisions in favour of immigrants.

The current legislation provides for two valid titles of residence, the first one being the *Carte de séjour temporaire* (valid for one year, showing the reason for entry and accompanied by abundant documents which prove the reason for entry). The *Loi Debré* changed these regulations, especially to guarantee public order, allowing the Police to adopt very strict procedures for issuing such titles, also partly modifying the Agreements for free circulation, which exempted from certain controls the citizens of former French colonies like Algeria and Tunisia.

I have no right to express judgements on the legislative engineering of the latest French laws, but apart from the merits of the case, they seem to show that the issue is seriously worrying the French authorities.

The second title is the *Carte de résident*, valid for ten years and destined only to those who have been living in France for at least three years, and it establishes particular conditions. The bearer enjoys wide freedom of movement and work.

The Spanish experience is of particular interest because legislation has strongly developed since 1974, the year of enactment of the first law governing the admission and the stay of foreigners on the Iberian territory. It has established adequate legislation with the *ley bàsica* of 1985, number 7, and with the more recent law number 9 of 1994.

The situation in Spain is very different to that of other nations: stable immigration is relatively recent and has not reached the levels of those of France, Germany, the United Kingdom and even Italy. Up to the Sixties it consisted mainly of transit immigration but now foreign presence has taken firm root in Iberian territory and it originates mainly from Maghreb areas. Since there is not much social pressure against the establishment of foreign communities, the law has for a certain period been more relaxed than others, although within the limits necessarily imposed by the nature of the issue it governs. Already the law of 1985 provided for the possibility of foreigners, possessing the necessary requisites, like a long period of regular residence, to participate in local elections, although on conditions of reciprocity.

Presently the harmonization of Iberian legislation with the general norms of European legislation on immigration has introduced three types of residence title: the *permiso de residencia inicial* corresponds to the old fixed residence permit, and allows a stay of up to one year; *ordinario*, valid for three years and issued only to those who have been already resident for three years; and the one called *permanente*, issued to foreigners who have been residing in Spain for six years and is valid for five years.

Spain, like France, Germany, the Netherlands, Belgium, Luxembourg, Austria, and Sweden has adopted a form of residence permit based on progressive degrees of the status of foreigners, and this is what is most interesting in the legislation we have seen up to now. In practice it is the regularity of a prolonged stay which guarantees the recognition of full rights which are further extended and are linked to privileges which give a right to adoption, as in France, or to voting rights in local elections as in Sweden and the Netherlands. Consequently the participation of a foreigner in the life of the community, as well as his or her stay, depend substantially on the regularity and the continuity of residence which, by increasing the possibilities of integration (from linguistic to social aspects, from the family to the housing situations, and so on), juridically guarantees his or her safeguarding by the concession of further rights and freedoms. In this way the law, in fact, places on

the foreigner the responsibility of his or her own social behaviour, although with evident limits.

The only country besides Italy not using this system is Greece, which for different cultural and sociopolitical reasons has adopted a legislation (law 1971/1991) which follows the other model, the one where entry and residence permits are based on reasons for admission which are regulated individually according to each specific case, and are valid for a certain period of time and are renewable.

Moreover, to safeguard public order, which is a very sensitive issue in Greece both on account of its strategic position in the area and for its being a doorway between the Mediterranean and Eurasia, the law normally avoids the long term validity of entry documents, restricting their validity to the minimum, and regulates admission as strictly as possible, scrutinizing stays longer than three months while special new laws regulate short and very short stays, especially if the reason is tourism.

When a valid international travel document is shown, and proof is given that one has the legal financial means which are sufficient to guarantee the daily expenses necessary for a respectable lifestyle for the whole stay, the foreigner can obtain a residence permit for a longer period. This is not required of those whose aim is to be reunited with their family.

Once the foreigner obtains the residence permit, he can move about freely in the country, so long as he informs the competent authorities, and he can even change jobs from one city to another.

It is precisely the problem of the guarantee of repatriation, and especially of checking the movements of immigrants on the national territory, that is in contrast with the idea that the foreigner too should enjoy full freedom of movement, in virtue of the fact that the freedom of the individual must include freedom of movement as well as freedom of thought. Evidently, supporters of this stand see the restriction of liberty of movement as an objective violation of the minimum standard, or anyhow a position at the limits of fundamental human rights. Although this is quietly accepted in ordinary legal opinion, at least with reference to the Constitutional Law of every State, it is not as easily admitted where the foreigner is concerned.

In the past serious doubts have been raised in this sense regarding the question of security, from which the State cannot derogate, by referring to parallel concepts like obligatory residence and the impediment of departure for bankrupt persons, or to the prohibition of movement to the foreigner and his obligation to inform the

authorities of his whereabouts. Such theories however have not had further developments in spite of the fact that, it is well to keep this in mind, the restriction of freedom of movement has been common to most legislative systems up to the end of the eighties and one of the principle measures to control, manage and monitor the presence of foreigners in a State.

In Italy, France and Spain freedom of movement is guaranteed and respected, except for the limits which the individual laws impose also on the State's own citizens (for example in the event of a national calamity or epidemic) and for change of residence or city for employment or for study.

The same happens in other countries, although there are various juridical establishments with the aim, not so much of restricting freedom of movement in itself, but rather of extending it progressively taking into account the long period one has already been in the country and his everyday behaviour.

An interesting measure has been introduced in Germany, where regulations governing residence permits now include the extension of freedom of movement (as well as the enjoyment of other rights) on the basis of the title possessed, from the annual *Aufenthalterlaubnis* to the much desired *Aufenthaltsberechtigung* which has unlimited validity and gives maximum freedom of movement on the Federal territory.

Italy alone, among the nations of Europe, is conspicuous for having no less than eighteen types of entry permits, differing on the basis of the reasons for their issue, while there is an equally high number of titles for residence. In the new bill, the Government has reviewed the present regulations, in the hope of solving the need of regulating individual issues connected with immigration. Among others, the reform of the procedures of admission and settlement, about which new measures had been already introduced in Law number 477 of 1996, which later fell through, on the subject of regularization and admission for seasonal employment, besides Law number 489 of 1995, which also fell through, which had controversially modified the institution of deportation.

Besides, as has already been shown, Italy boasts of one of the most recent sets of regulations because up to the eighties the need had not been felt to regulate a question which was considered anyway quite limited – and it objectively did not seem to be an urgent issue.

In this way there was a long gestation period by means of minor instruments derived from the regulations actually in the T.U.L.P.S. and from the so-called "discipline by circulars", that is by rules applied

immediately but lacking a wide horizon, issued by the various competent authorities, and which were therefore not always coordinated.

The peculiar character of the Italian regulations, which finds similar institutions in Portugal and Austria, although with due differences, consists of the programming of the influxes, which up to now has not given very encouraging results. Besides, employment control is shared by the provisions of Law number 983/1986 (which includes the principles of the ILO Convention number 143/1976) on subordinate employment and by those of Law number 39/1990 concerning the self-employed.

Control of entry for academic reasons is still governed mainly by circulars, although some are of considerable importance, while the provisions for Centres of Welcome have been disregarded for a long time. Admission to working-class housing is regulated by a limited number of Regional Statutes, and decisions are taken by the Regional Government, contrary to what happens in other countries where regulation is in the hands of the National Government.

## 3. Deportation and connected issues. The development and the origins of this institute

During this discussion I have often referred to the problem of public order as one of the main issues related to immigration. The State has, among others, the task of safeguarding its security from internal and external dangers, for its own sake and for its citizens, a responsibility from which it cannot shirk – one must keep this in mind – and which must be pursued with adequate instruments which are also compatible with the spirit and the democratic evolution which are typical of the present international juridical system.

It follows that the State itself, in drawing up the laws that govern immigration, produces instruments that can be used when necessary to *safeguard* public order, as we know it.

In its defence the State can make use of the proper instruments which, as regards immigration, are not only of the preventive kind (like the visa, for instance, which makes sure that one satisfies the conditions for entry into a country), but can also be used to intervene later by applying sanctions against a person, strictly in observance of the law and within the limits established by the heritage of rights and liberties.

Deportation is the strongest weapon among these instruments.

The institute under consideration is one of the oldest principles of legislation on the subject of immigration and foreigners, which were introduced out of the need to regulate the status of the foreigner and his juridical safeguarding, even before the need to control the movement of persons and immigration. Substantially this institute consists in empowering the State to send away a foreigner from its territory if he has committed an action which violates a law, particularly of the criminal kind, or has disturbed the rules of peaceful communal coexistence. It is therefore on the opposite side of admission.

Naturally there is no absolute right to admission, but there is the absolute right of the State to adopt instruments which safeguard social peace, to defend itself and its citizens. In reality, however, such a right does not imply the absolute liberty to expel, since there are general limits to the action of the State. First of all, because of a considerable number of international Conventions which deal with the subject, starting with the UN documents, secondly, on account of the existence of a number of wide-ranging juridical principles which are the common heritage of all the national juridical systems, like the *principle of legality* (which is also valid for deportation), according to which the institute, in order to be applied, has to exist within the State's legislation.

Deportation has often been defined, in the field of juridical studies on immigration, as the strongest expression of power of the State on the foreigner, and its nature, precisely due to these particular characteristics, was originally an act of grave sanctions, a kind of *extreme measure* which does not punish the offence in itself, which could be punished according to criminal law, but its author, the foreigner. This last statement, then, considered in itself, is very important in legislation on foreigners since it renders this institute peculiar to the *status* of foreigner, discriminating against the subjective situation of a citizen who, contrary to the first one generally cannot be expelled from his own State.

In its development, however, the general lines of this institute have been modified, and from a serious and particularly extreme act it has become a widely-used instrument, becoming merely an instrument for controlling the quantity and quality of migratory influx. It has often been written that a crackdown on immigration takes the shape of limiting entry permits and of increasing the list of elements that can trigger deportation procedures. In its historical and juridical aspects this has increased in importance in the last twenty years, especially in consideration of the use that has been

made of it, systematically, almost always coinciding with strong reactions to social disturbance.

It is quite evident now that the institute itself has become a clear symptom of the political spirit that permeates legislation on the subject, as well as a thermometer of social unrest, as one can see in the development of legislation in countries with more experience like France, Germany and the United Kingdom, and outside Europe in the United States, Japan and in developing countries which have a high rate of regional immigration.

This helps to explain why in the numerous discussions that arise on the problem of immigration and its management, as well as the questions related to it, few elements arouse as much interest as the institute of deportation.

The recent general tendency of national legislators to make deportation easier is a strong sign of the radical change which this institute has undergone as an instrument of control and repression, although parallel to this process another one has helped the proliferation of procedures in which the foreigner can defend himself, consisting of the existence of rights to appeal, debates and limitations of the discretionary powers of the authorities concerning the application of this measure.

There has therefore been a series of changes of direction which widened or restricted the cases for the application of deportation.

More than the other institutes which are typical of the regulations on immigration, deportation has raised doubts about its position with respect to the question of human rights, which have often been invoked to limit this sanctionary action. I have said above that the action of the State, in this sense, is not free and this limitation derives precisely from the fact that some cases, when censored, make deportation a measure which violates, in its turn, the principle of the safeguarding of human life and dignity, as well as fundamental human rights.

Considering how delicate this subject is, one understands how in this field the harmonization of the various legislations has become even more difficult. There is no doubt that in the Community and other international organizations there are acts for regulating this subject, but such regulations are solely limited to a few essential principles, like the prohibition of collective deportation, the prohibition of mass deportation after dismissal and the prohibition of deportation when the person expelled faces the danger of reprisals after his forced re-entry into his homeland.

Besides these principles, whose validity cannot be placed in doubt,

the national situation can be strongly determined by the difficulties of each geographical and social reality. This accounts for the strong differences between various countries, starting with those who have included deportation into their Constitution and ending with those who have introduced appeal against it before *ad hoc* organs.

A certain homogeneity in laws on this subject can only be seen in the motives that can lead to deportation. These are common to most of the European regulations, especially regarding the battle against illegal immigration, a relatively recent problem and therefore one that is more likely to feel the influence of coordinated action, especially within the (European) Community.

These motives are:

a) The irregular position of the foreigner's stay in the country. In spite of the general agreement which logically exists on this point, the question continues to have rather hazy contours, especially because of the difficulty of distinguishing, in a homogeneous and definitive manner in all the States, between *illegal* and *irregular* immigrants. The former are foreigners who enter the country without documents or without the necessary permit, violating all the regulations on entry and residence in the State. Since the decision whether to admit a foreigner or not belongs only to the State, the foreigner's entry into the national territory in an illegal manner constitutes a violation of the regulations. The attention of the Luxembourg EU summit and of the OSCE's principal acts on immigration has been focused mainly on illegal immigration.

On the other hand, the irregular foreigner is one who, after having entered the country by satisfying all the legal conditions in force, no longer possesses the full requirements imposed by the law, such as in the case of subjects whose residence permit is revoked after entry or whose renewal is refused, or has been revoked because of the commission of offences or for any reason provided for by the law.

The two figures, often confused in terminology as well as in substance, have essentially very different profiles.

b) Danger to society and to national security. It is my intention to dwell on this concept, which is not a hard and fast one, since it embraces various hypotheses which are linked in various ways. This is one of the principal motives for deportation, and it is also the oldest one, directly linked to the hypothesis of the foreigner actually carrying out activities or interests in violation of the regulations which safeguard the security of the State or of the community, and thereby actually disturbing national security.

The difference between the danger to national security and the danger to public order can be said to contain a degree of similarity in that for both it is only necessary to establish the proper procedures which should be followed to carry out the deportation. In countries like France, where they have ordinary and emergency deportations, for instance, the participation in acts of terrorism triggers off the emergency mechanisms which consist of a series of actions and particularly rapid procedures aimed at the immediate expulsion of the dangerous subject. In this last case the peculiar nature lies in the fact that deportation follows a criminal action against the State itself and not against the community or one of its members.

In a different way the threat to public order provides for a potential danger to the community. The concept of a social danger is known in many European legislations and it can be recognized in a number of attitudes which provoke social alarm in the members of the community in which the foreigner lives, as well as the actual commission of acts which are considered offences by the laws of the State. No regulation defines or governs their contents, but these are generally recognizable in proven membership of criminal organizations, doubts about the moral behaviour of the foreigner even in his own land, the commission of criminal acts, and so on.

To the above can be added doubts about the practice of rituals or attitudes which are considered contrary to public order, and the violation of rules on human rights, but these actions can be liable to legal prosecution (as in the case which has recently been denounced in Europe, of the practice of female infibulation, which is as important in the culture of certain peoples as it is denounced, even conceptually, in Western culture and subsequently by the law).

c) Conviction. There is no disagreement on the fact that, once an offence has been committed in violation of a country's criminal code, when a sentence is passed in virtue of the principle of territoriality the State can intervene with a special sanction against the foreigner, like deportation. In this case the institute's nature changes fundamentally, becoming a juridical act (up till then it was of an administrative nature), because it is included in a judgement, and sometimes it can be ordered by a judge by a special act or automatically, but always as a consequence of a judicial process.

In this case it is an ancillary penalty, following a general judgement for a serious offence, for an accumulation of minor offences or for relapsing.

The offences for which the legal framework of a country provides

deportation are often linked to such criminal acts by the foreigner as drug trafficking, the exploitation of prostitutes, the organization of and trading in illegal immigration. In recent years, in the wake of a strong social reaction to a wave of ordinary crimes, deportation measures have been introduced to punish crimes which are considered revolting by the community, such as rape and the abuse of, trading or violence on minors.

d) The lack of financial means, as one of the principal elements in the procedure for the granting of visas and admission on the national territory. The inspection of the prospective immigrant's financial means is virtually a preventive measure to guarantee public order which has two aims: on the one hand it permits selection and gives guarantees on the entry of foreigners, on the other it exerts control on the same, since it demands proof that the sums involved are licit.

This measure, which is also included in Italian legislation, in its global *ratio* is also intended to safeguard the foreigner from the risk of slipping into criminal circles (like the Mafia organization) for his financial survival, because it forces him to find licit ways to satisfy his everyday needs and dignity.

I have previously mentioned how deportation is not applicable in an absolute or discretionary manner. There are in fact three main categories which limit the defensive action of the State (besides the political and juridical choice of its contents): the observance of human rights in its widest meaning, the observance of the general principles of the legal framework, starting with the principle of legality, and the existence of generically identified situations for which the measure of deportation must be avoided because of the grave consequences that it might create.

As to the first principle, the respect of human rights places a limit on the State when it decides to effect a deportation to safeguard the dignity of a man, his life and his honour, ruling out expulsions based on racial and religious discrimination and their carrying out in a violent or arbitrary manner. This last concept, which has been debated recently following charges of violations committed by a number of European States, is necessarily linked to the second limitation, the observance of the general elements of the regulations.

In line with this obligation the deportation must be provided for by the laws in the said regulations, it must be free of the risks of discretionality and administrative abuse, must follow the juridical

principles contained in the Constitution and must conform to the general laws which are typical of a juridical system, and it must also avoid creating differentiated treatment with the rights that belong to other persons, particularly to the State's citizens. All this notwithstanding, as I have already pointed out, that deportation is in itself already a kind of differentiated treatment, since a citizen cannot normally be expelled from his homeland.

Of particular interest is the part which is linked to the third point, since there is a kind of parallel between extradition and deportation which has brought about the assimilation of certain rules which are typical of the Criminal Code into the institute under consideration. Many European legal systems follow the criterion that a foreigner cannot be deported if:

1) his expulsion can lead to repressive measures which endanger his life, dignity, honour and physical and moral well-being, especially regarding forced repatriation or blocking at the frontier. The topicality of this measure has been highlighted by events in these last years because in many regions of the world there have been strong inter-ethnical and religious clashes which were followed by fierce political, social and racial persecutions.

In certain cases there have been attempts at introducing mechanisms for the expulsion of a foreigner to countries which border on or are near to his native land. However such a procedure has its limits, especially regarding the difficulties of having such a burden accepted in a third State.

2) the person being deported is a foreigner with a particular family situation like a mother with a young child or the breadwinner whose children are not self-sufficient and do not have any other income. This formula originated from the respect of the family ties which would be seriously impaired if such an important member were to be sent away. In cases where the deportation cannot be postponed – as in France where deportation with an urgent process has been introduced – the child and the whole family can be "deported" as well as the original object of this process. Besides criticism of its abuse, formulated by some observers in the application of this measure and with reference to the procedure itself, the authorities have always pointed out that this measure strikes the right balance between family needs, which are inviolable, and the safeguarding of regulations, which is also insurmountable.

3) the person being deported is of an age which does not allow

the measure to be carried out without exposing the subject in question to great harm, as in the case of young people under 18 (in Italy under 16) or old people over 80.

This principle has not been adopted by all European legislations, but it has been introduced in France and Greece, and can be considered an interesting innovation which deserves deep attention, at least for humane reasons.

In France legislation on deportation is rather complex because the regulations on immigration have been modified many times since the first integrations to the ordinance 2658/1945. Ordinary procedure lays down that sentences of imprisonment up to one year without probation, or for particularly serious offences like rape, exploitation and trading of prostitutes, illegal immigration, besides the violation of regulations on immigration and residence, the foreigner can be deported by a procedure which may include the possibility of appeal before an *ad hoc* organ.

There is also an urgent procedure, which has already been mentioned here, whose range has been extended in a restrictive sense by the latest amendments in the law, and concerns terrorism and subversion of the constitutional order. In these cases deportation follows a speedy process and causes the immediate expulsion from the territory of the State. In the case under consideration even the aforementioned protected categories can be deported, although an exception is made for persons under 18 years of age.

Spain has drawn up a very similar discipline, that follows the same kind of conduct and with a certain degree of homogeneity. Deportation follows a judgement of one year in jail on the Iberian territory or in another country if the criminal act for which he has been punished is recognized as such also in Spain, provided that it carries a similar punishment.

Greece provides for deportation for the violation of the rules of entry, employment for the commission of offences and for terrorism.

The Italian situation is more complex because for a certain period the two main systems of regulations have overlapped, as contained in the laws 39/1990 and 489/1995. The latter divided the institute into five elements: deportation as a measure of security, deportation as a measure of prevention, on application by a party, for reasons of security and by an administrative measure of expulsion. With these subdivisions, Italy came closer to the lines being followed by most of the European legislations which consider deportation as a preventive act and not only as a punitive measure.

In some cases there has also been a certain fusion with the similar

institute of escorting a foreigner to the frontier and with turning someone back at the frontier.

In some cases, as in Italy and Spain, regulations have included the substitution of imprisonment by deportation from the State.

The present juridical evolution has given the foreigner an increasing possibility of opposing the deportation order in the terms established by law and with the means placed at his disposal by the regulations.

The first important achievement in this sense has been the introduction of the right to appeal against deportations which are of an administrative nature, that is all those which have not been decided following a criminal sentence or conviction. In Italy, France, Spain, Greece, Sweden, Portugal, etc., the foreigner, within the limits that such a process places on the person concerned, both in terms of his knowledge of juridical matters as well as the economic side of such a defence, is allowed to appeal to the competent authorities (the T.A.R. in Italy) against the measure issued.

In France in particular, the competent body is the Departmental Commission for Deportation, whose decision however is no longer binding after the introduction of the discipline contained in the Loi Pasqua of 1993, which actually gives wide discretionary powers to the Prefect of Police. But the latter must always keep in mind the opinion of the said Commission. The summons is compulsory except in cases of procedural urgency and takes place 15 days before the meeting and the discussion, to allow the foreigner to contact a lawyer and draw up eventual notes for his defence.

In Spain, on the contrary, notification of the measure is given, for the same reason, at least 72 hours before, to allow the person concerned to start the proceedings for the appeal, when necessary.

## 4. Between admission and deportation: the new rights of foreign communities

The natural conclusion of what has been said up to now is that the present political tendencies, at the national and international levels, are directed towards the prevention and avoidance of further forms of mass immigration on the territory of Europe. To this end limitations and instruments have been set up to intervene on the influx before it touches the national territory and to block illegal immigration which brings so much harm, first of all to the victims, secondly to the local socio-economic structure.

But this policy does not, and cannot, take into account foreign

communities already present on the national territories. For these, especially where figures of spontaneous integration are relatively high, there must be instruments as incentives for and to safeguard the process of osmosis with the local community. In countries where such a situation is being created, the foreign community has been allowed to participate further in local life, by the concession of even more rights.

This extension of rights is linked with the safeguard of the human person, particularly concerning the needs which may arise once it has been regularly inserted in a context.

In this way new rights for foreigners are introduced, others are consolidated, others are now becoming part of the acquired juridical heritage. The debate which has been launched in the juridical sphere, has remained up to now confined to the level of enunciation, and in practice it has been transformed into permissive conduct and into the actual recognition of a few general principles. Few legal systems have given concrete form to these discussions by producing laws in this sense. This can be interpreted in the light of various factors which limit its development, none of which, it must be here pointed out, seems to be deliberately limitative in scope. The problems of foreigners are often tackled by Governments on the lines of those which concern their citizens, according to a logic which is not open to criticism, and even for these latter often considerably bigger difficulties arise in the application and identification of rights. Just consider the strong diformity which, in parallel topics, the various regulations have addressed issues pertaining to ethnic and linguistic minorities, the right to vote for citizens residing abroad, the measures for cheap housing, and so on.

The fact remains, however, that in many States the foreign community has been given the freedom of exercising and unconditionally enjoy other kinds of rights, mainly connected with the cultural and religious spheres, occasionally limited only by the rules of entry and residence, which in this case are more concerned with the observance of the laws than with the prohibition of the exercise of one's rights.

More recently devised, but more widely applied, are the rights of cultural identity, of the freedom to openly practice one's religious rituals, to respect one's cultural needs in the place of work (as the Muslim's Fridays, which has been recognized in certain collective agreements in some European countries, or the break for prayer on the job).

Although there are limits which differ from State to State,

nowadays the foreigner's statute includes reunion with the family, the right to study, freedom of movement, the general recognition of civil rights (or a part of them), the progressive abolition of the conditions of reciprocity, in this sector, placed as limits in the former legislation.

A separate case, with very strong repercussions which interact in the fabric of society, is the right to participate in policy-making in government and local administration, as in the case of the vote for administration. This principle has been accepted in Sweden and the Netherlands, has been applied in Switzerland and in other European countries, but it does not seem to spread easily, given the strong opposition that the interpretation of the "right to vote" undergoes from State to State.

Even more varied is the scenario, which has developed in some States but is forbidden in others, concerning the concept of membership, foundation and militancy in political groups, while the situation is more fluid concerning trade unions.

In conclusion it is evident how local and international legislation on the problems of immigration varies, depending on the direct action it has on the community and on the policy of the individual realities. The legislator's general intention seems to be the updating of the *status* of the established immigrants, not least because of the strong pressure that regularization and integration place in terms of social peace, of the foreigners' rights and above all about the problems of the so-called third generation, that of immigrants born abroad, who were consequently brought up and lived in a reality which is more similar to that of the local community.

The problem of the third generation continues to be of considerable importance, both on account of the social effects that it can trigger and for the rights and safeguards which, in most cases, concern minors, who usually make up the larger part of this generation.

In the near future these will form the adult part of the community of foreigners living in Europe, that which has been born and has lived together with our present generation. A number of national authorities place a lot of trust in it for the development of integration, and try to help it with proper and targeted interventions, aimed above all to eliminate the risks or involvement with criminal components.

In particular there have been attempts to act on the right to study, granting free access to state and private schools, on compulsory school attendance, on the health measures as provided for the citizens' children, on the extension of the rights of protection of minors, which

these days are sadly in the limelight because of the well-known events linked to violence to and sexual abuse of minors. The latter problem is increasingly linked with the issue of immigration, since the migratory channels constitute an easy bridge to extend such activities in the West.

The Europe of the above-mentioned future generations, seems to be increasingly becoming a Europe of foreigners, a Europe in which, if cards are played carefully, many States will create really multi-ethnic societies, the burden and the delight of intellectual circles who now prophesy their creation.

Therefore we can conclude that the regulations of each State or the concerted action of international bodies must take into account how, in little more than half a century, immigration has changed structurally from a peculiar phenomenon to a role of a "container" of the original central problem and channel of a well branched-out series of other issues, among which, as we have briefly analyzed, we find integration, cultural and religious diffusion, terrorism, demographic pressure and the market of child prostitution. All these are problems which have to be considered in the light of a migratory phenomenon which, it is worth remembering, concerns a large part of the world.

At the doorstep of the new millennium, whatever the road to future development will be, "Fortress Europe" continues its battle against the siege.

---

**Giuseppe Finocchiaro** *is the author of* Juridical Protection of Extracommunitarian foreigners in Italy and in the world *(Maggioli Editore 1996) and has worked in the field of international and national policies on social matters with some of the most important Institutes in Italy.*

## References

Attina, F., Longo, F., *Unione Europea e Mediterraneo fra globalizzazione e frammentazione*, Cacucci Editore, Bari, 1996.

Finocchiaro, G. *La tutela giuridica dello straniero in Italia e nei paesi europei*, Maggioli Editore, Rimini, 1996.

Fouchet, A., *Vingt ans de lois sur l'immigration*, da "La Croix", 25/2/1997, pp. 3-4;

Gonzalez-Trevijano Sanchez, P.J., *Libertades de circulaciòn, residencia, entrada y salida de Espa$a,* Cividas, Madrid, 1991.
Guimezanes, N., *Les politiques d'immigration en Europe*, La Documentation Française, Paris, 1992.
Melica, L., *Lo straniero extracomunitario*, Giappichelli Editore, Torino, 1996.
Nascimbene, B., *Da Schengen a Maastricht*, Giuffré Editore, Milano, 1995.
Nascimbene, B., *Il trattamento dello straniero nel diritto internazionale ed europeo*, Giuffré Editore, Milano, 1984.
Ramoneti, I., *Xénophobies*, in "Le Monde Diplomatique", Marzo, 1997.
Saint-Blancat, C., *L'Islam della diaspora*, Edizioni Lavoro, Roma, 1995.
Zolo, D., *La cittadinanza: appartenenza, identità, diritti*, Laterza, Roma, 1994.

# ETAT, SOCIÉTÉ CIVILE ET DÉMOCRATIE DANS LE MONDE ARABO-MUSULMAN

BICHARA KHADER

## 1. Introduction

La réflexion sur la nature de l'Etat arabo-musulman, la structure du pouvoir, la société civile et la démocratie est relativement ancienne. Mais elle a pris depuis les années 70 une vigueur nouvelle avec, entre autres, la publication en 1978 de l'ouvrage de B.Ghalioun[1] *"manifeste pour la démocratie"*, celui d'Ali El Din Hilal (ed) intitulé *"la démocratie et les droits de l'homme dans la patrie arabe"*[2] ou celui de Khalil Ahmad Khâlil sur *"les Arabes et la démocratie: une analyse de la politique future"*[3] et l'organisation d'une série de colloques notamment celui organisé en 1979 par l'Union des juristes arabes sur *les droits de l'homme et les libertés dans la patrie arabe*[4] et ceux organisés par le Centre d'Etudes de l'Unité Arabe (CEUA) en 1984 sur la *crise de la démocratie dans la patrie arabe*[5], et *la société et l'Etat dans la patrie arabe*[6] ainsi que celui organisé par le Forum de

---

[1] B. Ghalioun (politologue syrien): *Manifeste pour la Démocratie* (en arabe), Beyrouth, 1978.

[2] Ali El Din Hilal (et autres): *La démocratie et les droits de l'homme dans la patrie arabe* (en arabe), Le Caire et Beyrouth, 1983.

[3] Khalil Ahmad: *Les Arabes et la démocratie* (en arabe), Beyrouth, dar Al-hadathah, 1984.

[4] L'Union des Juristes Arabes: *Droits de l'homme et libertés fondamentales dans le monde arabe*, Bagdad, revue Al-Houquouki Al-Arabi, n° spécial, 1979.

[5] Centre d'Etudes de l'Unité Arabe: *La crise de la démocratie dans la patrie arabe*, Beyrouth, 1984.

[6] Saad Eddine Ibrahim (ed): *La société et l'Etat dans la patrie arabe*, CEUA, Beyrouth, 1987.

la pensée arabe sur *"pluralisme politique et la démocratie dans la patrie arabe"*.[7]

Depuis la fin des années 80, les écrits sur ces sujets connaissent une nouvelle floraison et la moisson de colloques et séminaires est impressionnante.

Pourquoi donc cet engouement pour ces thèmes? Et pourquoi depuis les années 70 tout particulièrement? Une question corollaire: pourquoi ces débats intellectuels dans le monde arabo-musulman sont-ils méconnus en Europe, pourtant si proche, en dehors des cercles des spécialistes?

## 2. La rupture entre l'Etat arabo-musulman et la société: l'explication culturaliste

Une des thèses avancées pour expliquer cet intérêt renouvelé pour les sujets de la société civile et de la démocratie est la rupture du consensus entre l'Etat post-colonial et la société.[8]

Pour expliquer cette rupture, les explications abondent. Certaines, répandues dans certains milieux journalistiques et académiques s'inspirent d'une *approche culturaliste* à partir de l'étude de l'Islam. Cette approche récuse l'idée même de rupture et "crée le sentiment ... qu'il existe un *homo islamicus* spécifique, coupé anthropologiquement du reste de l'humanité"[9]... et que l'Islam est irrémédiablement associé à une sorte de théocratie qui se révèlerait incapable de s'ouvrir à l'univers pluraliste et à son corollaire démocratique. Ce soi-disant *"exceptionnalisme arabo-musulman"* est réducteur et manichéen. Car non seulement il procède d'une vision *a-historique*, révèle une attitude paresseuse de l'esprit scientifique, mais surtout il débouche sur un postulat discutable: les sociétés islamiques ne peuvent accéder à l'idéal de l'univers démocratique parce qu'elles seraient rebelles à toute forme d'expression démocratique.

---

[7] Saad Eddine Ibrahim (ed): *Pluralisme politique et démocratie dans la patrie arabe*, Forum de la pensée arabe, Amman, 1989.

[8] Le titre de l'article de Walid Nuwayhid: "La problématique de l'Etat arabe contemporain: la rupture avec la société" (Ishkaliyyat al-dawla al'arabiyya almu'asira: al infisâl an al-mujtama) in *Al-Ljtihad*, 4, 1992.

[9] George Corm: "Perspectives démocratiques au Machrek" in R. Bocco & M. R. Djalili: *Moyen-Orient: migrations, démocratisation, médiatisations*, PUF, Paris, 1994, p. 119.

D'autres versions des *explications culturalistes* sont mises à contribution pour affirmer que les structures sociologiques du monde arabo-musulman ne se prêtent pas à l'émergence d'une société civile dynamique et autonome et à l'établissement de régimes démocratiques. Sont alors invoquées pêle-mêle les traditions millénaires du *despotisme oriental*, de pouvoir patriarcal ou de solidarités tribalo-confessionnelles. C'est ainsi que la théorie d'Ibn Khaldoun sur l'*Assabiya* (esprit de corps particulier)[10] est dépoussiérée et resservie. Il en va de même des théories fondées sur le *"factionnalisme"* et le *"clientélisme"*, la *"Oumma"* ou *"l'esprit sectaire"* (sectarianism). Bref, comme le résume Elie Kedourie, un anti-arabe impénitent: " ... Il n'y a rien dans les traditions politiques du monde arabe – qui sont les traditions politiques de l'Islam – qui rendraient familières, ou même intelligibles, les idées organisatrices du gouvernement constitutionnel et représentatif".[11] David Pryce-Jones dans son "Interpretation of the Arabs" va plus loin encore: *"Aujourd'hui, un démocrate arabe, ce n'est pas seulement une vue de l'esprit, c'est une contradiction dans les termes"*.[12] D'autres auteurs vont lui emboîter le pas, rappelant les rivalités tribales, la contestation permanente de l'autorité, les séditions en chaîne, la succession des révoltes qui rendraient la Cité islamique, dès l'origine, "anarchique". De sorte que la culture de la violence et de la force qui prévaudrait dans l'aire arabo-islamique ne militerait pas en faveur de l'émergence de société civile et d'un espace de droit.

Pour étayer davantage l'argumentation, la *théorie culturaliste* en arrive à rappeler l'importance, dans la théorie politique musulmane, de l'obéissance (Al-Ta'ah) au Prince, au Sultan, au Roi, à l'Emir, au Cheikh, au père.

Théorisé plus tardivement à la suite des travaux de Max Weber, le concept de *patrimonialisme* et de *néo-patrimonialisme* (neo-

---

[10] Jean Leca: "La démocratisation dans le monde arabe: incertitude, vulnérabilité, légitimité" in G. Salamé: *Démocraties sans démocrates*, Fayard, Paris, 1994.

[11] "... There is nothing in the political traditions of the Arab World – which are the political traditions of Islam – which might make familiar, or indeed intelligible, the organizing ideas of constitutional and representative government", in Elie Kedourie: *Democracy and political culture*, Washington, Institut for Near East Institute, 1992, p. 15.

[12] David Pryce-Jones: *The closed circle: an interpretation of the Arabs*, New York, Harper and Row, 1989, p. 406.

patriarchy Hisham Sharabi)[13] viendra signifier la réalité d'un pouvoir où la chose publique devient une chose privée, une quasi-propriété d'un seul individu, le chef, auquel tous les autres individus doivent obéissance et soumission.

L'explication culturaliste s'est tout naturellement appuyée sur le *corpus juridique musulman* où l'intérêt de la Oumma (la Communauté musulmane), prétend-on, prévaudrait sur les droits de l'individu. Cette approche culturo-religieuse a dominé trop longtemps la recherche sur la société civile, les droits de l'homme et la démocratie dans l'aire arabo-musulmane, condamnant la réflexion à interroger continuellement et stérilement l'*"esprit arabe"* (the Arab Mind) pour comprendre l'autoritarisme des Etats, l'absence d'autonomie pour les individus et donc de démocratie.

Ainsi la première tâche des analystes qui veulent percer le mystère de la culture politique arabe et de son rapport à la démocratie, c'est de s'affranchir de l'essentialisme culturel, d'éviter les approches réductionnistes et d'utiliser une méthodologie recourant, non pas aux textes coraniques, mais aux sciences humaines telles que l'histoire, la géographie, l'anthropologie, la sociologie religieuse, la science politique et économique, comme on le fait d'habitude quand on analyse des phénomènes similaires sous d'autres horizons comme en Europe orientale, en Asie ou en Amérique latine.

### 3. La crise de l'Etat post-colonial, une approche historique

Comme on sait, la première incarnation de l'Etat moderne dans le monde arabe, au début du XXè, a été libérale, "fondée sur l'alliance hétéroclite entre les réformateurs musulmans, les nouvelles classes moyennes constituées de professions libérales et des classes commerçantes".[14] En effet, au XIXè et au début du XXè siècle, bon nombre de penseurs arabes ont été très vite acquis à la *"Philosophie des lumières"* critiquant le despotisme (Al-hukm al-mutlâq), pensant la religion, la politique, la société en termes modernistes, séculiers et rationalistes, se situant par rapport à l'Europe des idées et s'inspirant des principes fondateurs de la *Révolution française*. Le chef de file de ce courant libéral est l'égyptien Rifâa Tahtawi qui a

---

[13] Hisham Sharabi: *Neopatriarchy: a theory of distorted change in the Arab World*, New York, Oxford University Press, 1988.

[14] Bourhan Ghalioun: *Le malaise arabe: l'Etat contre la nation*, La Découverte, Paris, 1991, p. 78.

passé à Paris 5 ans dans la première moitié du XIXe siècle. C'est lui qui écrit dans un de ses livres: "*Que la patrie soit le lieu de notre commun bonheur que nous bâtirons par la liberté, la pensée et l'usine*". De nombreux intellectuels du Maghreb (notamment Khayr el din El Tunsi) et du Machrek (notamment Kassem Amin) reprennent à leur compte les idées libérales d'Al-Tahtawi. Fatima Mernissi se plaît à rappeler que les idées de Tahtawi, notamment celles de la liberté d'opinon (Huriyyat al Ra'y) et de tolérance (al-tassamouh), furent et sont enseignées en classe primaire et secondaire.[15] Le courant libéral s'affirme en Iran avec la révolution constitutionnaliste, en Turquie avec l'introduction du laïcisme par Mustafa Kemal et, dans le monde arabe, sous l'impulsion de Loutfi el Sayyed et de Salama Moussa. On assiste, après la première guerre mondiale, au développement du *système parlementaire* en Egypte, en Irak et ailleurs, à la floraison de *partis politiques* (11 partis en Palestine en 1928), au développement spectaculaire de la presse et à une évidente sécularisation des élites.

Reflet, projection ou reproduction de la pensée libérale occidentale, l'Etat libéral arabe se résume, comme le souligne A. Laroui, "en une adoration de la forme", car il y avait un tel déphasage de la réalité arabe par rapport au *modèle occidental* imité que *l'Etat libéral colonial* n'a pas pu faire face aux nombreuses difficultés politiques et matérielles pour développer un véritable sentiment d'adhésion nationale.[16]

Le seuil d'indépendance franchi, après la seconde guerre mondiale, c'est le problème de *l'affirmation nationale* qui éclate. L'Etat *nationaliste, arabiste, socialiste, radical* succède à l'Etat libéral. Des coups d'Etat (Syrie, 1948; Egypte, 1952; Iraq, 1956; Libye, 1969), des révolutions populaires et des luttes politiques contre le colonialisme portent au pouvoir de *nouvelles élites*, souvent d'extraction rurale ou petite-bourgeoise.

En dehors des monarchies arabes traditionnelles, *le nationalisme arabe des années 50 et 60* est essentiellement *politique*, ayant l'arabité pour principale référence culturelle, se développant "*grâce à l'Etat territorial moderne et contre lui*", car oeuvrant à l'unification des Arabes et à la lutte contre l'impérialisme. *L'Etat post-colonial arabe*,

---

[15] Fatima Mernissi: *La peur-modernité, Conflit Islam-démocratie*, Albin Michel, Paris, 1992, p. 69.

[16] Pour une synthèse, voir Bichara Khader: *L'Europe et le Monde Arabe, cousins, voisins*, Publisud-Quorum, Paris, 1994.

incarné par le nassérisme, le ba'athisme et l'idéologie du FLN algérien, *embrasse le socialisme* considéré comme l'incarnation idéologique des revendications populaires (réformes agraires, industrialisation d'Etat, monopole public du commerce international) et, tout en rejetant le *marxisme athée*, il se réconcilie avec la religion pour attirer les milieux populaires en même temps qu'il pousse à consolider le.

Sur le plan international, les Etats nationalistes arabes sont très actifs dans le mouvement afro-asiatique (Bandoeng, 1955) et le non-alignement (Belgrade, 1961) mais, en réalité, inscrivent leur lutte anti-impérialiste dans une stratégie d'alliance avec l'URSS pour faire contrepoids à l'alliance indéfectible américano-israélienne.

A partir de la défaite de 1967, on assiste à un repli de l'idéologie nationaliste pan-arabe. Les rivalités inter-arabes s'aiguisent de plus belle. Les unions se font et se défont avec une rapidité déroutante. Les affirmations étatiques prennent le pas sur les projets arabistes. La mort de Nasser (1970) assombrit davantage le décor.

Le vide idéologique ainsi créé est alors propice à tous les excès idéologiques (islamisme), à toutes les violences intra-étatiques (Liban, 1975-1989), inter-étatiques (Irak-Iran, 1980-1989, crise et guerre du Golfe, 1990-1991) et à la perpétuation de l'occupation des territoires arabes à l'exception du Sinaï rétrocédé à l'Egypte en vertu des Accords de Camp David (1979).

## 4. La crise de légitimité des régimes, une approche politique

Parmi les traits dominants de l'Etat nationaliste arabe post-colonial, on note généralement le populisme et l'autoritarisme.

En se voulant agent de changement socio-économique et de transformation des structures, des techniques et des valeurs sociales, l'Etat nationaliste passait en fait un "contrat social tacite" avec la population, selon lequel l'Etat prenait en charge les questions de développement, d'indépendance politique et de justice sociale, en échange de quoi la population ne se montrait pas trop revendicative, au moins dans un premier temps, sur la question de participation politique.[17]

---

[17] "In return, citizens were to forgo, at least for a while, the quest for liberal participatory politics", Saad Eddine Ibrahim: "Liberalization and Democratization in the Arab World: an overview" in R. Brynen, B. Korany & P. Noble (eds): *Political liberalization and democratization in the Arab World*, Lynne Rienner Inc., London & Colorado, p. 36.

Ce "consensus négatif" a été très dommageable non seulement pour les partis politiques existants, mais aussi pour toutes les organisations de la *société civile* souvent contrôlées ou handicapées par tout un arsenal de décrets et de lois réglementant et restreignant leurs activités. C'est ainsi que s'est développé le *parti dominant* ou *unique* et le *système autoritaire*.

La défaite de 1967 a démontré la fragilité intrinsèque du mouvement arabiste qui n'a pas su traduire *l'existence* d'un fort attachement à l'arabité en une *exigence* d'unité. Tandis que la crise pétrolière déplace vers le Golfe le centre de gravité du système arabe, surtout moyen-oriental. Fragmenté en de multiples foyers, le système arabe se déradicalise progressivement. Economiquement, l'Egypte inaugure la politique de la porte ouverte (open-door policy) et de la désocialisation. Sur le plan social et culturel, on observe la montée de la contestation (révoltes du pain et de la semoule) et le renforcement des mouvements islamistes. L'éclatement du soulèvement populaire palestinien (Intifada) contre l'occupation israélienne (1987-1993) révèle l'extrême vitalité et capacité de résistance de la société civile mais confirme concomittamment le principe de négociation avec Israël selon la formule d'un "échange de paix contre les territoires" (Camp David, 1979; Plan de Fès, 1982).

L'érosion de légitimité des régimes se confirme dans les années 90, pendant et après la Crise du Golfe (1990-1991).

Mais quelle légitimité?

Le professeur libanais, Joseph Maila, distingue deux logiques de légitimation mises en oeuvre par l'Etat arabe post-colonial[18]:

a) la *logique de restitution* articulée autour de la restauration et de la régénération d'une communauté humaine colonisée et qui tend à une mobilisation nationaliste;
b) la *logique de rétribution* qui ressortit à une légitimité découlant de la distribution de la rente.

Dans la première logique, ce sont les *droits de la nation* qui doivent triompher face aux puissances coloniales ou ex-coloniales, et auxquels sont évidemment subalternés *les droits de l'individu*. En somme la

---

[18] Joseph Maila: "Le droits de l'homme sont-ils impensables dans le monde arabe?" in *Les nouvelles questions d'Orient*, Les Cahiers de l'Orient, Hachette, 1991, pp. 181 – 183.

conquête de l'historicité pour la nation passe *avant* la conquête des droits pour les individus.

La légitimité de rétribution, en revanche, ressortit à une logique qui vise à maintenir la représentation hiérarchique de l'ordre social (ordre tribal, utilisation de l'arbre généalogique qui conduit à une parenté avec le prophète, etc.) ou pérenniser le rapport de dépendance entre l'Etat-rentier distributeur de services et allocataire de ressources, et la population-cliente.

Selon ces deux logiques, soit le "chef" exige la docilité en échange de ses libéralités, soit il exige la révérence en raison de ses titres de noblesse ou de son passé de chef révolutionnaire, de résistant ou de père historique de la Nation.

Ainsi globalement la culture politique arabe, aussi bien dans l'Etat arabe populiste que dans les Etats monarchiques, laissait peu de place aux citoyens par manque de médiations nécessaires entre le chef et ses sujets (Ra'aya), entre le Père fondateur de la Nation et ses "fils". Mais au fil des années, du fait de la croissance démographique, du vieillissement des élites traditionnelles et de l'explosion de nouveaux besoins, on assiste à une progressive érosion du capital de légitimité des régimes. Les Etats sont ainsi devenus, en dehors de tout principe moral (respect de l'individu) et de toute efficacité économique, des secteurs lucratifs pour ceux qui tiennent les rênes du pouvoir et ceux qui gravitent dans son orbite.

Ainsi globalement, au crédit de l'Etat radical arabe, on peut mettre:

1. La libération du territoire national de l'emprise étrangère;
2. L'installation et la consolidation de l'Etat territorial;
3. La généralisation de l'enseignement et sa démocratisation.

A son débit, il faut mentionner:

1. La monopolisation du pouvoir par des équipes résistantes à l'alternance;
2. Le développement de systèmes autoritaires et souvent policiers;
3. La dilapidation des ressources dans des stratégies de développement inadéquates;
4. Les freins mis à l'expression libre de la société civile.

## 5. Le contexte historique de la ré-émergence de la société civile

Plusieurs faits d'ordre externe et interne vont concourir à *redynamiser la société civile arabe* dans les années 70, 80 et 90.

*5.1.* Nul doute que *la progressive mondialisation de l'économie et la circulation quasi instantanée des informations et des images ont* contribué à casser le monopole des Etats sur l'information. La pensée officielle unique perd de son emprise.

*5.2. La fin des dictatures* latino-américaines (au Chili, en Argentine, au Brésil) ainsi que celle des dictatures européennes (en Grèce, au Portugal, en Espagne) ont produit un puissant effet de démonstration. Les Arabes y voient le signal que le système autoritaire n'est pas leur seul lot et qu'il n'est inscrit ni dans une sorte de fatalité, ni lié à une sorte d'écologie sociale ou religieuse des Arabo-musulmans.

*5.3. L'auto-décomposition de l'empire soviétique et les bouleversements géopolitiques à l'Est* ont fini par convaincre les plus récalcitrants que le *tout-Etat* et le système du *parti unique* n'assurent pas une gouvernance viable à terme et débouchent sur une perversion de l'Etat lui-même et un asservissement intolérable de la société.

*5.4. Le triomphe de l'idéologie libérale* qui prouve par l'échec du marxisme réel *sa supériorité* intrinsèque sur les idéologies concurrentes. Cela a eu pour effet de conforter les élites étatiques arabes et la bourgeoisie qui gravite dans leur orbite dans leurs choix de désocialisation et d'ouverture. Mais comment pouvait-on ouvrir son économie au monde extérieur tout en maintenant un système politique fermé?

*5.5.* L'accent mis en Occident, au niveau des instances étatiques, dans certains milieux académiques et surtout dans la littérature de la Banque Mondiale et du Fonds Monétaire International sur la nécessaire réforme des Etats, une amélioration du fonctionnement de l'administration, la participation de la société civile, la libéralisation des échanges et la privatisation. Après avoir attribué le sous-développement aux traditions considérées comme hermétiques à la modernisation occidentale, aux carences scientifiques et technologiques, à la faiblesse de l'épargne et de l'investissement, l'accent est désormais mis sur la responsabilité de l'Etat tiers-mondiste, dépensier et non productif, ostentatoire mais non efficient, populiste et clientéliste.

Désormais, on ne parle plus que de *gouvernance.* La liberté politique et le degré de participation sont désormais deux critères pris en compte pour mesurer l'Indicateur de Développement Humain

(IDH).[19] Désormais, les Etats du Tiers-Monde sont classés, catalogués selon qu'ils respectent ou non les libertés. Et *l'ingérence démocratique* est imposée par l'air du temps.[20]

Il y a donc sur le plan externe à la fois *des effets de démonstration* quant à la capacité des sociétés civiles de renverser un ordre établi mais injuste, et des *sollicitations* de la part des Etats développés et des bailleurs de fonds (BM et FMI) pour contraindre les Etats à lâcher du lest.

*Sur le plan interne arabe*, plusieurs facteurs vont réveiller la société civile et l'amener à prendre conscience de son rôle et de sa place.

a) *Tout d'abord les évolutions démographiques et sociales.* Au cours des 50 dernières années, la population arabe est passée de 80 à 250 millions d'habitants dont 60% ont moins de 20 ans, l'exode rural n'a épargné aucun pays, l'urbanisation s'est développée à un rythme moyen de 6% par an, la dépendance alimentaire s'est aggravée puisque, à partir des années 80, une calorie sur deux est importée, toutes les stratégies d'industrialisation (de substitution aux importations, de sous-traitance ou industrialisation industrialisante) ont atteint leurs limites, tandis que l'endettement rampant atteignait le chiffre record de 250 milliards de dollars en 1996.

Toutes ces évolutions accroissent la *demande sociale* adressée aux Etats qui doivent *outiller* les pays, *scolariser* plus de 80 millions d'Arabes, *loger* dans des villes déjà en surnombre, *soigner* et *nourrir* une population qui double tous les 25-30 ans.

b) Et cela à un moment où les Etats connaissent une *crise financière grave* dûe:

1. A la faiblesse de la base taxable et à la modicité de la *taxe sur les revenus* (±20% des ressources des Etats);
2. A la lourdeur du service de la dette (±19 milliards de $ en 1996);
3. A la fuite des capitaux et au développement de la corruption;
4. A l'érosion des différents systèmes de rente:
   - la rente stratégique (avec la fin du système bi-polaire),

---

[19] PNUD (UNDP): "Liberté politique et développement humain" in *Rapport mondial sur le développement humain*, Economica, Paris, 1992, pp. 29 – 31.

[20] Philippe Moreau Defarges: *Un monde d'ingérences*, Presses de Sciences Po, Paris, 1997.

- la rente pétrolière (avec le contre-choc pétrolier 1985-86 et la contraction de la demande énergétique),
- la rente de solidarité inter-arabe (à la suite de la guerre du Golfe),
- la rente touristique (toujours aléatoire et liée à la sécurité),
- la rente des transferts des immigrés (avec la progressive installation de l'immigration surtout dans les pays européens),
- la *rente de l'aide internationale* (qui demeure problématique et liée aux positions politiques des Etats); etc.

c) Les Etats arabes ne disposent plus, dans les années 80 et 90, des mêmes moyens financiers pour *s'acquitter de leurs tâches modernisatrices* (créer des infrastructures, construire des usines, faire des aménagements ruraux, etc), *créer des emplois* (dans le système scolaire et hospitalier, dans l'administration, dans l'armée, dans le secteur public) et *pourvoir des services sociaux*. Et ils ne disposent même plus de la possibilité de canaliser vers l'extérieur, par le biais des flux migratoires, le surplus de leur population inactive.

d) Ce n'est donc pas étonnant que le chômage s'envole (±25% de la population active), n'épargnant ni les jeunes (±35% de chômeurs), ni les femmes, ni les diplômés. Le marché du travail ne parvient plus à absorber tous ceux qui quittent le système scolaire. Ainsi les pays arabes doivent créer chaque année 2,5 millions d'emplois; mais ils ne parviennent à en créer *qu'un petit cinquième*, suscitant dans la jeunesse une immense frustration, terreau de la contestation radicale.

e) Dans ce contexte, marqué par la crise, toutes les anciennes légitimations se fissurent. Si la *"légitimation religieuse"* continue à fonctionner, non sans mal, la *légitimation historique* – (Nous sommes les pères de la nation) – n'est plus mobilisatrice. Tandis que la *légitimation modernisatrice et rentière* (Nous construisons le pays) ne convainc plus grand monde.

Même la légitimation arabiste ou nationaliste a perdu de son attrait du fait des échecs passés, du lancement du processus de paix israélo-arabe (1991-1997) où, d'ailleurs, il y a eu jusqu'ici *plus de processus que de paix* et le gel de certains conflits régionaux ou locaux.

f) Ainsi *le retrait de l'Etat et ses carences*, accompagnés d'une érosion des légitimités sur lesquelles il asseyait son autorité libère

un espace que les organisations de la société civile vont s'empresser d'occuper. Les organisations islamistes ont été parmi les plus actives, grâce à leurs sociétés de bienfaisance, d'entraide et de solidarité. Mais, contrairement à une idée répandue, elles n'ont pas été les seules à occuper le terrain laissé vacant par les Etats.

## 6. Pourquoi ré-émergence de la société civile arabo-islamique?

Parce que celle-ci n'est pas une invention de ce dernier quart de siècle. En réalité, et n'en déplaise aux tenants de l'explication "culturaliste", elle a toujours existé depuis la naissance de l'Islam car l'autorité politique n'a jamais pu occuper tout l'espace public. La ville arabe ancienne avait ses ulémas, ses marchands, ses ordres soufis, ses communautés religieuses, ses artisans. En dehors de la ville, la campagne n'était pas inerte et les tribus jouissaient d'un espace de liberté et pouvaient même défier l'autorité centrale. Les congrégations, les communautés, les corporations professionnelles, etc, élisaient leur leadership, réglementaient leurs rapports internes, résolvaient leurs conflits, finançaient leurs activités et leurs services sociaux sans recourir à l'arbitrage, au soutien ou à la protection de l'autorité centrale.

Cet *équilibre traditionnel de gouvernance* était quelquefois perturbé par des troubles ou des séditions, mais ceux-ci étaient l'exception et non la règle.

La pénétration coloniale va désintégrer le système traditionnel de l'organisation de la cité arabe et les rapports entre l'autorité centrale et la société civile.

Celle-ci renaîtra avec la crise *de l'Etat post-colonial* et connaîtra un développement spectaculaire dans les années 80, avec le développement *d'organisations de défense des droits de l'homme*, d'organisations privées sans but lucratif, de fondations scientifiques ou charitables, d'associations de développement communautaire, d'organisations féminines, de clubs sportifs, de syndicats professionnels, de cercles de diplômés universitaires, et surtout d'ONG dont on estime aujourd'hui le nombre à près de 75.000 dans tous les pays arabes alors qu'il ne dépassait pas les 10.000 au début des années 60.

Le développement spectaculaire des organisations de la société civile arabe peut être attribué aux facteurs externes et internes mentionnés plus haut, mais il y a lieu d'épingler aussi les facteurs suivants:

### 6.1. *Les difficultés induites par l'application des programmes de l'ajustement structurel*

La plupart des pays arabes non-pétroliers ont dû s'engager dans les années 80 sur la voie des réformes économiques, sous les auspices du FMI et de la Banque Mondiale, en lançant des programmes dits de *"stabilisation et d'ajustement"*. Ces programmes avaient pour objectifs de redresser les équilibres financiers et d'ouvrir les économies sur l'extérieur.

Si les résultats globaux ont été, dans l'ensemble, positifs, l'impact social des Programmes d'Ajustement Structurel s'est fait sentir notamment dans les régions rurales, chez la population urbaine pauvre et dans les secteurs non directement productifs: notamment la santé et l'éducation, comme l'a révélé une étude que j'ai coordonnée sur le cas maghrébin.[21] Les organisations de la société civile sont venues donc pallier les carences de l'Etat en apportant une aide aux populations les plus affectées et les plus démunies.

### 6.2. *L'accroissement de la population scolarisée*

En dépit de la baisse des dépenses pour le système éducatif à partir des années 80, il faut reconnaître qu'une des réussites les plus remarquées des Etats arabes post-coloniaux a été le développement de la scolarisation, l'augmentation du nombre des universités (avec plus de 150 universités et grandes écoles) et la généralisation de l'enseignement de masse, le monde arabe dispose désormais d'une élite intellectuelle bien formée, plus exigeante, moins docile et dont les attentes en termes d'emploi et de participation sont évidentes. La société arabe dispose désormais d'élites nouvelles maîtrisant les nouvelles techniques d'organisation et de gestion et devenues les moteurs des organisations de la société civile.

### 6.3. *Un accès plus facile à des ressources financières d'origine non-étatique*

Que ce soit grâce à *l'aide internationale* (aides de l'Union européenne ou de ses Etats, soutien de fondations européennes et étrangères, appui des ONG étrangères) ou grâce aux collectes de fonds à l'intérieur des pays eux-mêmes, à l'utilisation des biens *Waqf*

---

[21] Bichara Khader (ed): "Ajustement structurel au Maghreb", n° 3, *Alternatives Sud*, Louvain-la-Neuve, 1995.

ou à la générosité de fondations ou de personnalités arabes, les organisations de la société civile ont pu trouver les fonds nécessaires pour financer leurs activités, sans devoir solliciter des aides publiques. Cela a eu pour effet d'accroître *leur autonomie relative* par rapport aux Etats locaux.

*6.4.* Et, tout naturellement enfin, *l'augmentation des marges de liberté* du fait des campagnes de protestation orchestrées à l'intérieur ou des avertissements et des sanctions (blocage des protocoles financiers par le Parlement européen, p.ex) venus de l'extérieur. Aujourd'hui peu de pays se ferment à double tour, les voyages sont fréquents. Et si on ne peut aller en Europe, en Amérique ou ailleurs, *l'ailleurs* vient à domicile grâce à la TV, aux satellites, à l'internet, au fax. L'information des Arabes s'en ressent. La comparaison est possible, l'émulation aussi. Cette liberté, bien que relative, permet à la société civile non seulement de s'organiser mais de bénéficier d'expériences positives venues d'ailleurs.

Tous ces facteurs et bien d'autres mentionnés plus haut expliquent la re-dynamisation de la société civile dans les pays arabes. Le processus de démocratisation en cours dans beaucoup de pays ouvre de nouvelles fenêtres d'opportunité. Le retrait des Etats et la contraction de leurs moyens financiers a permis la relève par les organisations de la société civile. D'ailleurs ce n'est pas un hasard si ce sont la Cis-Jordanie et Gaza qui, proportionnellement à leur taille, connaissent la densité la plus forte d'ONG et d'organisations de tous genres en l'absence d'un Etat national souverain et autonome.

## 7. La société civile arabe et le processus de démocratisation

Les analyses suggèrent généralement que la société civile est une sorte *d'espace autonome* entre l'individu et l'Etat, composé d'une pléthore d'*associations volontaires*, qui fondent leur action sur des principes moraux reconnus et acceptés, notamment *la tolérance, le pluralisme, le respect des personnes, la participation, la coopération et le règlement des conflits par la négociation ou la concertation*. Ainsi la société civile ne peut fleurir que dans un *espace civique* et dans un milieu dont la *culture politique* reconnaît la légitimité de la différence[22], la multiplicité des points de vue et

---

[22] Cf. Ali Oumlil: *La légitimité de la différence* (fi Char'yyat Al-Ikhtilâf), Rabat, 1991.

la divergence d'intérêts ou la diversité des positions de classe ou d'idéologie ou l'hétérogénéité culturelle, bref une démocratie à la fois consensuelle quant au respect des institutions et des règles démocratiques et conflictuelle puisqu'elle suppose et nourrit la diversité.

Or, dans le monde arabe, la démocratisation est loin d'être consolidée. Dans beaucoup de pays, elle en est à ses premiers balbutiements. C'est pour cela d'ailleurs qu'on parle de pays en voie de démocratisation ou en transition démocratique. Certes beaucoup de pays recourent désormais aux élections (municipales, parlementaires ou présidentielles), autorisent les partis politiques à faire campagne mais concernant la liberté de presse, l'assouplissement du contrôle étatique sur l'information, la préservation de l'égalité des chances pour les partis et leurs candidats et, de manière générale, la liberté d'expression, il reste encore beaucoup à faire.

C'est pour cela que les organisations de la société civile doivent naviguer à contre-courant, défendre constamment leur autonomie face à l'Etat en insistant tout particulièrement sur l'Etat de droit et l'égalité de tous face à la loi.

Il n'y aura probablement jamais d'autonomie absolue de la société civile par rapport à l'Etat. Dans les pays arabes, celui-ci est jaloux de ses prérogatives et ne tient nullement à voir un espace de plus en plus large échapper à son contrôle et à son encadrement. Ce n'est pas d'ailleurs étonnant que certains Etats voient dans l'insistance mise par l'Occident sur la gouvernance et la société civile une forme d'ingérence visant à fragmenter le centre de décision et à affaiblir l'Etat national.

Ainsi, on a le sentiment que dans certains cas, les Etats ont une position ambigüe à l'égard des organisations de la société civile; d'une part, celles-ci leur rendent service en les déchargeant de certaines responsabilités dans le domaine économique, éducatif, social ou de santé, mais d'autre part elles les inquiètent dans la mesure où les pratiques volontaires, participatives, coopératives, tolérantes et pluralistes de ces organisations créent dans le pays *des habitudes* et un état d'esprit qui tendraient à se propager à tout le pays et à tous les niveaux, minant l'autorité des Etats ou, en tout cas, en la confinant là où elle doit s'exercer.

Dans ces conditions, on comprend aisément que certains Etats instrumentalisent le mot d'ordre de la démocratie comme pour mieux préserver, voire consolider leur emprise sur la société. Dans ce cas, le processus de démocratisation apparaît davantage comme *"une*

*expérimentation de l'Etat sur la société pour mieux la contrôler*"[23] et non un instrument de contrôle de la société sur l'Etat.

Il arrive donc que les Etats acceptent une *démocratisation formelle* moins par conviction que par opportunisme: une sorte de démocratie de façade "for the West to see" dans le but d'accéder à des aides communautaires et de capter les investissements étrangers.

Ainsi la démocratisation conçue comme *stratégie de survie* ou *stratégie de complaisance* joue contre l'autonomisation des acteurs de la société civile et, par conséquent, le développement d'une véritable citoyenneté. Or une citoyenneté responsable et comptable (accountable) ne peut se développer que si le jeu démocratique ne se cantonne pas à la tenue d'élections (plus ou moins libres) et que la démocratie devient un véritable complexe intégré de normes, de structures et de pratiques fondé sur un Etat de droit, et satisfaisant à deux exigences: celle de *limiter le pouvoir des Etats* sans vider les Etats de leur substance et celle de le *distribuer* sans verser dans l'anarchie.

## 8. Démocratie et économie de marché

C'est sans conteste l'auteur italien, Norberto Bobbio, qui a le mieux cerné la complexité du rapport entre libéralisme et démocratie.[24] On reconnait d'habitude que l'existence actuelle des régimes communément qualifiés de libéraux-démocrates, ou dits de *démocratie libérale* conduit à penser que le libéralisme et la démocratie sont interdépendants. Au contraire, affirme Bobbio, "*le problème de leurs rapports est très complexe et tout autre que linéaire* ... Un Etat libéral n'est pas nécessairement démocratique; historiquement, il se réalise plutôt dans les sociétés où la participation au gouvernement est très restreinte, limitée aux classes possédantes ... Un gouvernement démocratique ne donne pas nécessairement vie à un Etat libéral"... (pp.11-12). Mais comme le libéralisme est, par définition, la doctrine de l'Etat limité tant au regard de ses pouvoirs (Etat de droit) que de ses fonctions (Etat minimal), alors l'émancipation de la société civile s'en trouve facilitée et la démocratie peut éclore sans entraves.

---

[23] M. Al-Jabiri, cite par G. Salamé, *op.cit.*, p. 20.

[24] Norberto Bobbio: *Liberalismo e democrazia*, Franco Angeli, Milano, 1991 – *Libéralisme et démocratie* (trad. française), CERF, Paris, 1996.

La deuxième idée que développe Bobbio est la *fécondité de l'antagonisme* qui, selon lui, est un thème novateur de la pensée libérale (pp.33-34). En effet, la pensée libérale postule que "l'opposition entre individus et groupes en concurrence ... est bénéfique et constitue une condition nécessaire du progrès technique et moral de l'humanité". Dans les sociétés où on privilégie l'harmonie, la concorde même forcée, la subordination régulée et contrôlée et où on condamne le conflit comme élément de désagrégation sociale, il ne peut y avoir que stagnation, asservissement et immobilisme. Et Bobbio de citer Machiavel qui dénonçait les règnes despotiques orientaux, notamment, en Turquie, où "un seul est libre".

Mais *le libéralisme comme théorie de l'Etat* est lié au développement du capitalisme bourgeois, moderne, alors que la *démocratie*, comme forme de gouvernement est ancienne. C'est ce que rappelle à juste titre l'Egyptien Ali Al-Din Hilal[25] pour démontrer la tension qui peut surgir entre la liberté individuelle et les droits politiques, d'une part, et l'égalité, d'autre part. A partir de cette distinction, on peut dissocier la démocratie formelle de la démocratie substantielle ou la démocratie comme gouvernement *du peuple* de la démocratie comme gouvernement *pour le peuple*. En effet, si on définit la démocratie comme "gouvernement pour le peuple", alors le problème des rapports entre libéralisme et démocratie devient très complexe, parce qu'il se résume au difficile rapport entre *liberté et égalité*. Bobbio dit clairement: libéralisme et égalitarisme puisent leurs racines dans les conceptions de l'homme et de la société profondément différentes *individualiste, conflictuelle, pluraliste* quant au libéralisme; *totalisante, harmonieuse et moniste* quant à l'égalitarisme (p.46). Ainsi la démocratie "peut être considérée comme le développement naturel de l'Etat libéral à condition qu'on la considère non pas du point de vue de son idéal égalitaire mais du point de vue de sa formule politique qui est ... la souveraineté populaire" (pp.50-51).

Le livre de Bobbio est dense, nuancé et le lien qu'il fait entre démocratie et libéralisme est tout autre qu'automatique. Il est à l'opposé des thèses plus tranchées de J.F. Revel qui constate *"l'incontestable consanguinité entre la démocratie et le marché"* et décrète de manière péremptoire que "le jumelage de la démocratie et du marché fournit *la seule clef de la sortie, aussi bien du*

---

[25] Ali Al-Din Hilal: "Les concepts de démocratie dans la pensée politique moderne" (en arabe) in *La crise de la démocratie* (en arabe), op. cit., pp. 35 – 49.

*communisme que du sous-développement*".[26] Certes, il veut bien admettre que "*s'il n'est pas de démocratie sans économie de marché ... il existe des économies de marché sans démocratie*", mais prend soin d'ajouter que la liberté économique conduit tôt ou tard à la liberté politique. Mieux, *le marché est par lui-même une première forme de démocratie.* Du seul fait qu'il crée et met à l'abri une catégorie cohérente de comportements, de relations et de pouvoirs qui échappent au contrôle central de l'Etat, le marché écorne la toute-puissance de ce dernier et l'empêche de déborder hors de sa sphère. Ainsi le marché rendrait inéluctable la démocratie. Tandis qu'à l'opposé, l'absence totale de démocratie empêche le décollage. Car pour décoller, "*un début de démocratie est indispensable, sous la forme de l'autonomie du marché qui fonde l'indépendance relative de la société civile par rapport à l'Etat*".[27]

Mais si la connection entre démocratie et marché est si étroite, pourquoi vient-on d'en faire la découverte si tardivement? A cette question embarrassante, on a avancé plusieurs raisons: La première était la thèse selon laquelle *la planification centralisée convenait plus que le marché* aux pays sous-développés; la deuxième était qu'un *Etat fort* (*strong State*) était plus apte à mettre en oeuvre cette planification; et la troisième thèse soutenait que le sous-développement provenait, pour l'essentiel, du *pillage du tiers-monde* et non de la mauvaise gouvernance.

Si l'échec des pays de l'Est a permis d'infirmer la première et la deuxième, la troisième thèse est aujourd'hui soumise au feu de la critique dans beaucoup de milieux, notamment ceux de la Banque Mondiale. Pour celle-ci, beaucoup d'économistes s'étaient trompés dans leur analyse, car en parlant du *pillage du Tiers-Monde* comme l'ont fait Susan George ou Samir Amin (et toute l'école dépendantiste), on finit par disculper les dirigeants du Tiers-Monde de leurs échecs et d'en rejeter la responsabilité sur les étrangers (le néo-colonialisme, les multinationales, etc.)

Il y a certes une petite part de vérité dans cette position, mais là où le bât blesse dans cette nouvelle croisade au culte du libéralisme et du marché, c'est qu'au nom de la critique – par ailleurs justifiée – des autocrates corrompus du Tiers-Monde, on finit par laver de tout soupçon les corrupteurs et se dispenser de toute critique concernant

---

[26] Jean-François Revel: *Le regain démocratique*, Fayard, Paris, 1992, pp. 274 et 283.
[27] *Ibid.*, p. 299.

le fonctionnement du système financier international, l'engrenage de l'endettement et les rapports inégaux Nord-Sud. C'est en somme la fin du *"sanglot de l'homme blanc"*.

Pourquoi donc se met-on tout à coup à parler aujourd'hui haut et fort de démocratie "sur des terres qui, il n'y a pas si longtemps, buvaient le sang des démocrates?". Les appels à la démocratie sont-ils donc frappés de suspicion? Beaucoup le pensent, surtout dans le tiers-monde. Robert Mugabé de Zimbabwé l'a dit sans détours en 1990: *"Pourquoi devrions-nous prêter l'oreille à ceux qui, hier encore, étaient nos colonialistes oppresseurs et qui maintenant jouent les mentors en nous prêchant la démocratie, qu'ils n'ont jamais pratiquée chez nous?"*.[28]

L'argumentation serait sans faille si elle ne consistait pas à jeter le bébé avec l'eau du bain. Le fait que la démocratie ait été pervertie là où elle est née, le fait que les droits de l'homme, base de la démocratie, aient été souvent bafoués par ceux-là même qui s'en font aujourd'hui les infatigables avocats, ou le fait que le droit international ait souffert d'une application à géométrie variable, tout cela ne doit pas conduire à rejeter les valeurs, qui sont universelles, de tolérance, pluralisme et respect des droits de l'homme.[29]

Ceci dit, si le rapport *démocratie-économie de marché* fait l'originalité de l'expérience historique occidentale, peut-on retrouver ce rapport sous d'autres horizons, par exemple dans le monde arabo-musulman?

Ecartons d'emblée le postulat selon lequel le monde arabo-musulman restera rétif au changement et hostile à engager un véritable processus de démocratisation, ou que l'Islam *"ne fait pas encore partie de ce monde moderne"* car *"il refuse d'en observer les règles culturelles, morales et juridiques"*, comme l'affirme un si mauvais connaisseur de l'espace musulman qu'est J.F. Revel.[30]

---

[28] Why must we ever listen to those who only yesterday were our oppressive colonialists, as they now seek to be our mentors of democracy and preach to us multiparty democracy which they never practiced in respect of our countries?", New York Times, 22 avril 1990, cité par J. F. Revel: *op. cit.*, p. 341.

[29] C'est ce que vient d'écrire un professeur yéménite: "L'application erronnée du thème des droits de l'homme de la part des puissances dominantes n'est pas une preuve que l'idée même du respect des droits de l'homme est suspecte", Mohammad Abdel Malek Al-Mutawwakel: "L'Islam et les droits de l'homme" (en arabe) in *Al-Mustaqbal al arabi*, n°2, 1997, p. 5.

[30] J. F. Revel: *op. cit.*, p. 363.

La réalité est que le modèle libéral-démocratique ne pouvait être reproduit tel quel dans l'aire arabo-musulmane, au moins pour deux raisons. La première saute aux yeux et c'est *la différence de situation* entre deux contextes économiques, sociologiques et humains différents, différence accentuée par la période coloniale. La deuxième est plus fondamentale. En effet, le monde arabo-musulman rencontre l'Europe conquérante, aux temps modernes, avec l'expédition de N.Bonaparte en Egypte (1798-1800). L'Europe est donc immédiatement appréhendée comme un adversaire en tant que *puissance de domination et non comme un modèle pacifique de civilisation et d'organisation étatique.* Cette vision va fausser les perspectives. En effet, si l'Europe était vue comme "modèle" de la modernité, les Arabes auraient cherché à comprendre les "conditions objectives" qui ont rendu possible son émergence en tant que foyer de civilisation. Or l'Europe est d'abord perçue comme "foyer de colonialisme". C'est donc en "eux" que les premiers réformistes musulmans au 19è siècle ont cherché le "secret de leur faiblesse".[31] De sorte que, comme le souligne l'historien F. Jad'ân[32], "les Musulmans ne pensent pas d'emblée le phénomène de la modernité en termes de rupture avec leur passé, mais en termes de renouement avec le passé, non pas en termes de Progrès, mais en termes de Renaissance, donc au bout du compte en termes magiques ou mythiques". Certes il y a eu, concomittamment au courant réformiste musulman du XIXè et début du XXè siècle, un *courant libéral éclairé* davantage influencé par les idées de la Révolution Française que par les projets de l'expédition de Bonaparte. Mais ce courant libéral et séculier n'est pas parvenu à s'affirmer après les indépendances.

Ainsi on peut dire que la période coloniale a provoqué *un tel traumatisme* dans l'aire arabe que toutes les potentialités d'éclosion d'une *bourgeoisie nationale* s'en trouvèrent compromises, réduisant les chances d'affirmation de la démocratie comme forme de gouvernement, et d'une société civile autonome. L'Etat national qui a succédé au pouvoir colonial n'a pas facilité non plus l'émergence d'une bourgeoisie autonome et entreprenante et d'une société civile réellement dynamique, pour les raisons indiquées plus haut.

---

[31] Abdallah Laroui: La crise des intellectuels arabes, Maspero, Paris, 1974. Aussi Islam et modernité, La Découverte, Paris, 1987.

[32] F. Jad'ân: Usûl al taqqadum Inda Mufakkiri al-Islam ("l'origine du progrès chez les penseurs musulmans"), Beyrouth, 1979, cité par H. Djaït: "La pensée arabo-musulmane et les Lumières", in Débat, Gallimard, 1991, p. 37.

Aujourd'hui le décor change.

Pratiquement tous les pays arabes ont adopté des codes d'investissement des plus libéraux, encouragent les joint-ventures, se proposent de mettre à niveau leurs entreprises, privatisent des pans entiers du secteur public et proposent de participer à une zone de libre-échange qui se met en place dans le cadre du partenariat euro-méditerranéen.

Peut-on dès lors espérer, dans ces nouvelles conditions, plus de rôle pour la société civile et plus de démocratie?

La réponse à cette question mérite d'être nuancée car cette ouverture économique reste problématique. Prenons à titre d'illustration deux problèmes: celui de la *privatisation* et celui de la *fiscalité*.

## 9. Privatisation et Société civile

Avec la détérioration de la situation économique, les entreprises publiques dans le monde arabe se retrouvent dans l'inconfortable position de boucs émissaires responsables de tous les malheurs. D'où l'insistance du FMI, de la Banque Mondiale et de la Déclaration de Barcelone sur le partenariat euro-méditerranéen, sur la *privatisation* afin d'éliminer "les canards boîteux", d'assainir la situation financière, de mobiliser l'épargne locale et d'attirer les capitaux étrangers. Mais la privatisation, dans le contexte arabe actuel, n'est pas en soi une panacée. Et cela pour plusieurs raisons[33]:

a) par la substitution d'un monopole privé à un monopole public, on ne gagnerait pas en efficacité;
b) les évidences empiriques prouvent que la *compétence* joue un rôle plus actif que la *propriété* pour atteindre l'efficacité;
c) la bourgeoisie locale manque souvent d'*esprit d'entreprise*, préfère le profit immédiat et facile et les activités spéculatives davantage que les activités productives;
d) la *corruption publique* peut être stimulée par les firmes privées qui cherchent à obtenir des contrats de sorte qu'au lieu de passer *du plan au marché* (plan to market), on passe du plan au clan (plan to clan).

---

[33] Pour plus de développements, voir Bichara Khader: Le partenariat euro-méditerranéen: après la Conférence de Barcelone, L'Harmattan, Paris, 1997.

Une relation de clientélisme et de népotisme (Clientela & parentela relationship) lie ainsi l'Etat à un secteur privé.[34] D'ailleurs, bon nombre de directeurs de banques ou de compagnies privatisées étaient ou sont souvent ministres ou de hauts responsables. Un parachutage que connaissent d'ailleurs beaucoup d'autres pays; il n'y a pas vraiment de lignes de démarcation nettes entre *le privé et le public*. D'une part, parce qu'il n'y a pas de réelle transparence dans les relations entre la bourgeoisie d'Etat et le secteur privé. D'autre part, parce que la bourgeoisie d'Etat continue d'extraire une rente économique par le biais de moyens non-économiques. Et enfin parce que le secteur privé vit à l'ombre de l'Etat et non séparé de lui et que, par conséquent, la vraie opposition aux régimes actuels ne provient pas du secteur privé économique mais du secteur privé socio-culturel.

Dans ces conditions, la libéralisation économique ne conduira – dans la meilleure des hypothèses – qu'à une démocratisation limitée, une sorte de *democradura*, une "démocratisation cosmétique" (cosmetic democratisation) ou une démocratisation opportuniste (opportunistic democratisation)[35] "para os ingleses ver".[36]

Dans un tel processus, la société civile pourra se développer parce qu'il faut remplir l'espace vide laissé par le retrait de l'Etat, mais elle demeurera, pour un certain temps, *sous contrôle*. Et la situation restera inchangée tant que corruption et clientélisme resteront monnaie courante et tant que la communauté des entrepreneurs privés continuera à solliciter les subsides, la protection et le soutien de l'Etat, dans une sorte "d'alliance pour le profit".

Cela n'a rien à voir avec l'Islam ou l'esprit arabe. En Amérique latine et ailleurs, on assiste aux mêmes phénomènes. La libéralisation économique ne se traduit en libéralisation politique que lorsque *la société civile* devenue plus complexe acquiert une plus grande autonomie par rapport à l'Etat, tout en adhérant aux *valeurs politiques reconnues*.

---

[34] Tout cela a été magnifiquement illustré par Nazih Ayubi: Over-stating the Arab State: *Politics and Society in the Middle-East*, Tauris, London, 1995: surtout pp. 402-415.

[35] Nazih Ayubi: op. cit., p. 411.

[36] Une attitude qui consiste à plaire aux bailleurs de fonds et aux étrangers. "Para os ingleses ver" est une expression portugaise pouvant se transformer, en se mettant au goût du jour: "pour plaire à l'Europe"; N. Ayubi: *op. cit.*

## 10. Taxation sans représentation

Giacomo Luciani n'est pas le seul à affirmer que l'érosion de la rente "laisse espérer qu'un pays s'engage dans un processus de démocratisation, mais ne garantit nullement le résultat".[37]

L'idée sousjascente ici est qu'un Etat qui souffre d'une crise financière va devoir imposer ses citoyens. En conséquence, les gouvernements qui tirent des ressources importantes de l'imposition de leurs sujets devront tôt ou tard rendre compte de l'utilisation de ces ressources aux contribuables. D'où le vieil adage: *pas de taxation sans représentation.* Or dans l'histoire récente du monde arabe, comme l'ont affirmé plusieurs auteurs, il semblerait qu' *"il y eut peu de taxation et peu de représentation"*. De fait, si on regarde le pourcentage des impôts directs dans les ressources collectées par les Etats arabes, on peut déduire facilement que les taux d'imposition dans le monde arabe sont très faibles par rapport aux pays industrialisés.

Ce n'est pas mon point de vue. En réalité, dans le monde arabe, la part des *revenus fiscaux* dans le PNB a dépassé en moyenne, au cours des 15 dernières années, 25% contre une moyenne de 16% pour la Turquie et seulement 15% en Amérique latine. Mais il est vrai que près d'un cinquième de ces impôts proviennent des taxes sur les revenus des sociétés pétrolières et que, comme le souligne d'ailleurs J.Waterbury[38], "l'origine de la plus grande partie des impôts est typiquement indirecte" ou moins visible pour le contribuable, entre autres:

a) les contributions indirectes;
b) l'impôt par l'inflation;
c) la subvention des denrées de base destinées essentiellement aux populations urbaines, au détriment de la population rurale et de la production agricole locale;
d) l'attribution d'une grande partie de l'épargne nationale et de la dette contractée à l'extérieur à la défense et à l'acquisition d'armes.

---

[37] Giacomo Luciani: "Crise pétrolière, crise fiscale de l'Etat et démocratisation", in G. Salamé (ed): *Démocraties sans démocrates*, Fayard, Paris, 1993, p. 228 et *"Resources, revenues and authoritarianism in the Arab World: beyond the rentier state"*, in Brynen, Korany & Noble: op. cit., pp. 211 – 228.

[38] John Waterbury: "Le potentiel de libéralisation politique au Moyen-Orient", in G. Salamé (ed): *op. cit.*, p. 104.

Globalement, il est vrai, *l'impôt sur la propriété et sur le revenu est resté faible*.

A partir de ce constat, rien ne dit qu'une plus lourde imposition directe susciterait automatiquement des demandes démocratiques. En fait, il n'y a pas d'automaticité entre le fardeau fiscal et le passage à la démocratie. Les contre-exemples confirment cette hypothèse: des pays asiatiques autoritaires, alors que les populations sont lourdement imposées (Indonésie) et d'autres, comme l'Inde ou la Turquie qui dépendent traditionnellement des contributions indirectes et qui connaissent pourtant une transition démocratique.

Il n'empêche que la crise financière des Etats arabes et le nécessaire recours à de nouvelles formes d'imposition – surtout sur les revenus – pourraient faciliter la transition démocratique, en ce sens que les citoyens exigeront de leurs gouvernements une *gestion rationnelle et responsable des ressources du pays pour les besoins du développement*, ce qui est précisément la *définition de la gouvernance* telle qu'elle est donnée par la Banque Mondiale.

## 11. Paix, société civile et démocratie

Les crises financières que traversent les pays arabes ont des causes multiples dont: *le contre-choc pétrolier de 1985-1986 et l'effondrement des prix pétroliers des années 80, l'inadéquation des politiques économiques, la charge excessive du service de la dette, la baisse des transferts des immigrés* (surtout en Palestine, Jordanie, Yémen) et la disparition ou la baisse des multiples rentes et aides dont certains pays arabes bénéficiaient.

Mais il est une cause qu'on ne saurait ignorer: *le coût de la défense nationale et des conflits armés entre les Etats*: *les pays arabes et Israël*: (1948, 1956, 1967, 1973, 1982) *Irak-Iran* 1980-1988, *la guerre du Golfe* (1990-1991) ou *à l'intérieur des Etats*: Soudan, Liban, Yémen du nord, Yémen du Sud, Somalie, etc.

Cette conflictualité quasi permanente a produit au moins trois effets:

1) Un fardeau financier excessif du fait des besoins de défense[39] et de police et de la mise en place d'*armées disproportionnées* dont

---

[39] Bichara Khader et V. Legrand: "La course aux armements", in B. Khader (ed): *L'Europe et la Méditerranée: géopolitique de la proximité*, L'Harmattan, Paris, 1994, pp. 107 – 118.

l'efficacité en termes militaires a été bien en deça des moyens mis à leur disposition. On peut estimer que les pays arabes ont dépensé en moyenne annuelle 50 milliards de dollars en achats d'armement entre 1986 et 1996.

Saad Eddine Ibrahim estime à 6000 milliards de $[40] le coût occasionné par les conflits inter (4000 milliards) et intra-étatiques (2300 milliards), soit un total de 6300 milliards de $ pour la période 1948-1992, sans que, par ailleurs, le conflit le plus ancien, à savoir le conflit arabo-israélien ait été définitivement réglé.[41]

2) La domination de la scène politique arabe par les *militaires*. Comme le dit J. Waterbury: "Ces prétoriens en situation de guerre ... ont constamment déclaré qu'ils gouvernaient pour accomplir une *mission sacrée* ... (Et) parce que la mission est sacrée (anti-impérialisme, libération nationale, socialisme, sionisme, etc) le débat sur les moyens et les fins est immédiatement considéré comme subversif et blasphématoire".[42] Mais ce qui est curieux c'est que les débâcles militaires se sont rarement soldées par des rendements de comptes. Contrairement aux militaires argentins discrédités par la défaite des Malouines, les militaires arabes parviennent toujours, ou presque, à survivre aux débâcles militaires.

3) La conflictualité régionale a été instrumentale dans la mobilisation de la société derrière l'Etat et son armée et donc dans la suppression des voix dissidentes qui émettaient des critiques ou demandaient des comptes.[43] Ainsi l'*Etat de tension* a desservi l'expression libre de la société civile, le débat et le pluralisme. L'Etat lui-même s'est dressé contre la Nation, pour reprendre le titre de l'ouvrage de B. Ghalioun.[44]

Peut-on conclure de tout cela que la paix plus que le développement est la véritable clé de la démocratie? Nul doute que dans le cadre du conflit israélo-arabe, pour ne prendre que cet exemple, une paix juste, globale et durable, accompagnée de la mise en place de mécanismes

---

[40] Saad Eddine Ibrahim: *Liberalization and Democratization*, art. cit., p. 34.

[41] Selon A. Al-Nasrawi, la guerre Iran-Irak aurait coûte quelque 417 milliards de dollars à mi-parcours entre 1980 et 1985. Quant au coût de la Guerre du Golfe, il a été estimé par la Ligue Arabe à plus de 500 milliards de dollars.

[42] J. Waterbury: *art. cit.*, p. 100.

[43] Le slogan était: "Pas de voix plus haute que celle de la lutte" – "No voice can be louder than that of the struggle".

[44] B. Ghalioun: *Le malaise arabe: l'Etat contre la Nation*, Paris, La Découverte, 1991.

de prévention des conflits et d'institutions régionales de sécurité, contribuera considérablement à asseoir les bases de la démocratisation naissante dans les pays arabes, ne fût-ce que parce que la paix atténuerait le "caractère missionnaire" des Etats nationalistes, libérant ainsi la société civile de la prison de "l'obéissance imposée". Mais une paix sans développement serait inconcevable; le contraire, d'ailleurs, est tout aussi vrai.

## 12. Système éducatif, Société civile et démocratisation

La majorité des Etats arabes ont consacré entre 5 et 10% de leur PNB au développement de leurs systèmes éducatifs. En 1996, il y avait près de *40 millions* d'enfants dans les écoles primaires, *20 millions* dans les écoles secondaires et *2,5 millions* d'étudiants inscrits dans les universités. Les chiffres de 1960 étaient de 7 millions, 1,3 millions et 163.000 respectivement. Le bond est, à l'évidence, spectaculaire et il est à mettre au crédit des Etats nationalistes arabes. En l'an 2000, il y aura plus de 70 millions de jeunes sur les bancs des écoles et des universités.[45]

Mais alors que l'éducation connaissait une avancée remarquable, pendant longtemps, la démocratie n'apparaissait pas comme préoccupation majeure aux yeux des élites arabes. En 1980, selon Saad Eddine Ibrahim, seuls 5,4% des sondés sur un échantillonnage couvrant dix pays arabes ont cité l'absence de démocratie comme un problème important. En 1990, selon une enquête récente[46] portant sur 1137 intellectuels de tous les pays arabes, ils étaient 11%, ce qui représente un net progrès mais reste toujours très bas.

En effet, en listant les *principaux défis* qui se présenteront à la région arabe: 20,3% des intellectuels ont épinglé les défis économiques et technologiques, 13% les problèmes démographiques et environnementaux, 12,8% la question de l'unité, 12,5% la question sociale, 11,2% la sécurité nationale, 11% *la démocratie et la participation*, bien avant la dépendance et le néo-colonialisme (10,6%) et la question de l'éducation (8,6%).[47]

---

[45] Bichara Khader: "El Mundo Arabe ante el umbral del ano 2000", in Joan Prats Catala (coordinator): *Gobernabilidad y libro cámbio en el Mediterraneo*, Tirant lo Blanch, Valence, 1996, pp. 79 – 127.

[46] Résultat du sondage effectué par Diyâ Al-Din Zaher: *Comment l'élite arabe pense l'éducation future* (en arabe), Forum de la pensée arabe, Amman, 1990, tabl. n°9, p. 105.

[47] Al-Zaher: *op. cit.*, p. 105.

Mais quand on interroge l'élite intellectuelle arabe sur les objectifs futurs du système éducatif, on obtient des résultats surprenants: en effet sur les 13 objectifs identifiés par l'enquêteur, *l'objectif du développement de l'interaction sociale des citoyens selon des bases démocratiques* (11,6%) vient en deuxième rang après celui de la *formation des cadres pour les besoins du développement* (12,5%), bien avant l'objectif de consolidation de l'identité culturelle (5,7%) ou même celui de la *formation religieuse du citoyen arabe* (seulement 4,2%).[48]

En classant les objectifs futurs de l'Education arabe par *degré de désirabilité*, les résultats s'affinent davantage puisque le *développement des valeurs et des pratiques démocratiques* est un objectif très souhaité pour 73,9% des sondés, souhaité pour 25% et non-souhaité pour 1,1%. Seul l'objectif du "développement de la pensée scientifique, analytique et critique" obtient un meilleur score avec 92,6% (très souhaité) et 7,5% (souhaité). L'objectif de formation religieuse obtient les pourcentages de 58,9% (très souhaité), 43,5% (souhaité) et 1,1% (non-souhaité).[49]

Les résultats de cette enquête sont donc particulièrement éclairants. Ils démontrent clairement que la *demande démocratique est désormais prioritaire pour l'élite intellectuelle arabe*, qui souhaite très vivement que les notions telles que société civile, droits de l'homme, pluralisme, tolérance, interaction avec autrui, soient inculquées aux enfants dès leur plus jeune âge.

Est-ce à dire que *l'élite intellectuelle arabe* se désolidarise des Etats, se libère de leur emprise et assume ce qui devrait être sa tâche: *un engagement actif dans et pour la société* au sens gramscien de l'intellectuel organique?

Trop longtemps subornée par les Etats, l'intelligentsia arabe[50] semble retrouver le sens de l'engagement, du risque, de la témérité, de la dissidence qui lui ont fait défaut pendant toute la période du nationalisme radical. C'est en se dissociant de la pensée officielle et des solidarités aveugles que l'intellectuel donne un sens à sa voix et devient éducateur de sens civique. Mais, comme le dit superbement bien mon compatriote, Edward Saïd, "la tentation de céder sur le

---

[48] *Ibid.*, tabl., 21, p. 146.

[49] Al-Zaher: *op. cit.*, tabl. 33, p. 177.

[50] Cela n'est pas seulement le cas de l'intelligentsia arabe. Déjà en 1927, Julien Benda dénonçait la trahison des clercs. Julien Benda: *La trahison des clercs*, Paris, Grasset, 1927.

sens moral (...), de sacrifier le scepticisme au conformisme est bien trop grande pour ne pas s'en méfier".[51] Bien des intellectuels arabes et non arabes, y succombent.

## 13. Islamisme, société civile et démocratie

L'islamisme radical est un phénomène général, qui s'étend de l'Indonésie au Maroc, mais il prend une coloration particulière selon les pays. Cependant, si l'islamisme a un visage diversifié, il est néanmoins l'enfant d'une époque, les années 70, et le résultat d'un immense espoir déçu: le développement pour tous. De ce fait, il n'est pas une réaction contre la modernisation des sociétés musulmanes, mais un produit d'une modernisation de façade qui a créé de nouveaux besoins, mais qui n'a pas permis de les assouvir. Le retour à l'Islam devient alors une forme obsessionnelle de l'identité, une sorte de tendance à rapporter toute action, présente ou future, à un précédent historique, autochtone, mythifié et enjolivé. Gilles Kepel écrira pour décrire ce phénomène que "*Dieu prend sa revanche*"[52] mais Dieu n'a rien à y voir. Ce qui se passe est une revanche de la société civile sur l'Etat, mais une revanche qui se situe dans un *contexte populiste* sous la forme de "conduites rituelles collectives, d'observance stricte d'interdits alimentaires, de signaux vestimentaires, de solidarités immédiates".[53]

En effet, la protestation islamiste se fait au nom de l'universalité du corps social (conçu comme communauté religieuse) contre *l'Etat importé*, contre la segmentation de la société. C'est un désir d'*enracinement* amplifié par la remise en question des grandes idéologies universalistes et sans doute par une «résurgence de la tradition» qui, du reste, est un phénomène mondial. Mais aussi *projet messianique* qui pousse la pensée islamiste à rechercher un Etat universel, un ordre politique réel concilié avec la légitimité d'inspiration religieuse et une contribution à la production de sens.

Dans le développement de l'islamisme sont souvent invoqués les *facteurs d'ordre économique* (appauvrissement, chômage), *d'ordre démographique* (désagrègement des anciennes solidarités par

---

[51] Edward Saïd: *Des intellectuels et du Pouvoir*, Seuil, Paris, 1996, p. 102.

[52] Gilles Kepel: *La revanche de Dieu*, Seuil, Paris, 1991.

[53] "Entretien avec Mohammed Arkoun", in *Revue du Tiers-Monde*, juillet-sept. 1990, p. 503.

l'urbanisation et éclatement des familles), *d'ordre politique* (la mainmise des Etats sur la société) et *d'ordre culturel* (un sentiment d'inauthenticité face à une modernité davantage subie qu'assumée). On oublie souvent le jeu des puissances. En effet, le retour en force du référent religieux s'est opéré aussi par *l'évolution du jeu géopolitique mondial*, issu du contexte de la Guerre Froide. George Corm avait démontré comment les puissances européennes puis les Etats-Unis avaient tenté *de mettre en échec l'arabisme laïc d'inspiration libérale ou marxiste*, considéré comme dangereux pour les intérêts géostratégiques de l'Occident, par la mobilisation de solidarités religieuses transnationales et comment, avec l'invasion de l'Afghanistan par l'URSS en 1980, les Etats-Unis ont tout fait pour mobiliser, armer, financer des volontaires musulmans (dits les "Afghans") pour résister aux Soviétiques. Une manière, en somme, de "jouer sur l'attachement populaire à la religion pour combattre l'extension de l'idéologie marxiste".[54]

La cible soviétique disparue, c'est à nouveau vers les régimes en place que *se retourne aujourd'hui la contestation islamiste*. Il leur est reproché d'avoir dilapidé les ressources de la nation, rompu le "contrat social" en se dressant contre la société, monopolisé le pouvoir politique et conduit le pays dans un cul-de-sac.

Face à de telles accusations, les Etats ont globalement adopté trois attitudes: l'éradication, la co-optation sélective ou l'inclusion dans le jeu politique. Cette dernière attitude adoptée par la Jordanie s'est révélée payante jusqu'ici. En effet, la Jordanie a pensé, à juste titre, qu'exclure les islamistes de la politique électorale était une dangereuse illusion mais, en même temps, elle a exigé, en contrepartie, que les islamistes jouent le jeu parlementaire et acceptent les règles et les lois de l'ordre constitutionnel.

Mais quelle que soit l'option des Etats, les islamistes ont déjà remporté une victoire: dans le souci de couper l'herbe sous le pieds des islamistes, des Etats arabes reviennent sur certains acquis, notamment en ce qui concerne par exemple: le code de la famille, le statut de la femme ou la mixité dans les écoles, voire la tenue vestimentaire.

Une islamisation par le bas se fait donc tout doucement. Et nul doute que les prochaines batailles entre élites islamistes et élites

---

[54] G. Corm: "Perspectives démocratiques au Machrek", *art. cit.*, pp. 125 – 129.

laïques porteront sur *le système éducatif et les valeurs à inculquer aux prochaines générations de la jeunesse arabe*.

Les Etats semblent sur la défensive. Comment pourront-ils contrôler les institutions éducatives et y développer les valeurs de la sécularisation, de la tolérance, du respect des minorités et de la participation alors qu'ils se trouvent souvent déconnectés de leurs sociétés et ne respectent pas toujours ces mêmes valeurs? Il leur sera difficile de convaincre s'ils trichent *au jeu du pluralisme* qu'ils tentent d'enseigner.

C'est dire combien il est urgent de re-crédibiliser le discours démocratique et redonner espoir pour attirer une jeunesse qui se détourne des Etats. A défaut de "ré-enchantement", la jeunesse pourrait se laisser tenter par l'utopie islamiste.

D'ailleurs les mouvements islamistes recrutent beaucoup dans la jeunesse. Certes, ils continuent à attirer les pauvres, les chômeurs et la population des bidonvilles. Mais ils percent également dans la jeunesse universitaire et parmi les technocrates instruits et les ingénieurs sortis des facultés de sciences.

En posant comme postulat le retour à la vraie oumma (communauté) des croyants, le dépassement des inégalités, la transcendance des cloisonnements claniques, ethniques et étatiques, l'islamisme nie la segmentarité et la «fécondité de l'antagonisme» dont parle Bobbio ou la "légitimité de la différence" dont parle Ali Oumlil et, donc, nie le pluralisme social et politique qui est la pierre d'angle de toute démocratie et de toute société civile.

Tout naturellement, les groupes islamistes occupent un large éventail des plus modérés aux plus radicaux. Ils continuent à investir le champ social, culturel et politique. Ils feront pression pour participer en tant que partis religieux à l'exercice électoral. Les Etats ne devront les laisser participer à la vie politique que s'ils acceptent officiellement les lois d'un ordre constitutionnel "*qui pourrait refléter les valeurs islamiques mais qui sera explicitement laïque. Aucun système ne mériterait le nom de démocratie si les droits des femmes et des minorités se distinguaient en quoi que ce soit de ceux des hommes et des musulmans*".[55] La contrepartie devrait être la soumission des Etats aussi aux mêmes lois de l'ordre constitutionnel.

Ainsi le pari pour les années futures pourrait être celui de la

---

[55] John Waterbury: *art. cit.*, p. 120.

transformation de la "communauté des croyants" en une "société" de citoyens.[56] Mais rien ne dit qu'il sera gagné facilement.

Au delà de ces quelques réflexions, c'est tout le problème du rapport entre *politique et religion, démocratie et religion* qui est posé. Que la religion et la politique se laissèrent réciproquement instrumentalisées dans le passé comme dans le temps présent, voilà qui ne souffre aucune controverse.[57] Mais il est clair que depuis l'effondrement du communisme, ce rapport acquiert une nouvelle relevance, d'autant que le monde est entré dans une ère d'incertitudes liées aux aléas de l'évolution des sociétés post-communistes et de la mondialisation et à la perte de repères utilisables et des "références centrales"[58] (disparition de l'axe Est-Ouest, par exemple) et aux formidables recompositions géopolitiques en cours.

D'où l'urgence d'analyser plus à fond le lien complexe du politique et du religieux, se définissant comme le mouvement allant de l'un à l'autre dans un échange incessant.

## 14. Médias et Société Civile

Dès le début du XIXe siècle, les écoles et l'expansion de l'imprimé aidèrent à propager dans de larges couches de la population arabe, surtout urbaine, de nouvelles idées sur la science, la politique et la société. Les historiens arabes, notamment Abdallah Laroui pour le Maghreb, Philippe Hitti et Albert Hourani pour le Machrek, se plaisent à rappeler *le rôle positif* joué par les sociétés littéraires et scientifiques, par les associations islamiques, confréries et écoles coraniques dans la lutte contre l'occupant français au Maghreb et l'occupant turc au Machrek.

A défaut d'une presse libre, c'est à travers les livres et les revues et les sociétés secrètes que circulaient les idées nationalistes et s'exprimaient les opinions dans toute leur diversité.

---

[56] C'est le sens du propos de Gema Martin Munoz quand elle écrit: "... bloquear el dessarollo de una *cindadania emancipada* consagrando la "sociedad de creyentes" frente a la "sociedad de individuos" bloquea la emergencia de una sociedad democratica haciendo prevalecer el hecho communitario sobre el social", in "Islam, laicismo y democracia" in Dolores Garciá Cantus (ed): *El Mediterraneo y el mundo arabe ante el nuevo orden mundial*, Université de Valence, 1994, p. 100.

[57] P. J. Vatikiotis: *L'Islam et l'Etat* (traduction française), Gallimard, Paris, 1992.

[58] Terme employé par Patrick Michel: *"Religion et démocratie"*, Albin Michel, Paris, 1997, p. 11.

Après la première guerre mondiale et le développement du courant libéral, la presse – surtout en Egypte et au Machrek – connait une effervescence peu commune.

La période nationaliste qui suit la 2ème guerre mondiale et les indépendances introduit "la pensée officielle". Mais celle-ci n'est pas unique et doit co-habiter avec une presse souvent liée à des partis politiques tels que le parti communiste ou le mouvement des Frères Musulmans. C'est dans le mouvement palestinien que l'écriture est la plus libérée et que les débats intellectuels sont les plus houleux.

Au fil des années, la presse est cependant mise au pas. Au niveau de la nation, la radio, la télévision et les principaux journaux sont sous contrôle étatique. Les autres organes plus critiques sont généralement placés sous surveillance et font souvent l'objet de mesures arbitraires de fermeture provisoire ou d'interdiction définitive. Et souvent, pour s'informer sur ce qui se passe dans tel ou tel pays, on se branche sur les émissions en langue arabe des radios étrangères.

Ainsi la presse est surtout mise à contribution pour servir de caisse de résonance de la politique des régimes. Les journalistes s'apparentent à des fonctionnaires aux ordres du pouvoir politique.

Le renouveau de la presse critique et variée est quasi concomittant à la ré-émergence de la société civile dans les années 70. Aujourd'hui, on ne compte plus les journaux, aussi bien en Algérie qu'en Egypte, représentant les sensibilités les plus diverses. Un annuaire de la presse maghrébine, préparé par la fondation allemande, Friedrich-Naumann-Stiftung[59] a dénombré 170 journaux et revues publiés en Tunisie, Algérie et Maroc en 1993.

C'est une tendance encourageante car la presse libre alimente la société civile et est alimentée par elle; elle provoque un débat, casse le monopole des Etats sur l'information. Et, de manière générale, la diversification du paysage médiatique, outre qu'elle favorise la pluralité des points de vue, constitue un excellent apprentissage du savoir et du vouloir-vivre en commun.

Contrôlés plus ou moins sévèrement dans les pays arabes, les médias vivent sous la hantise du couperet des Etats. Mais l'arbitraire étatique tend de plus en plus à diminuer, d'abord parce que la liberté de presse apparait souvent comme une soupape de sûreté et ensuite

---

[59] Friedrich-Naumann-Stiftung: *Les journalistes de la presse écrite au Maghreb*, journée d'étude, Alger, 28 – 31 janvier 1993.

parce que les organisations internationales commencent à dénoncer de plus en plus les atteintes à la liberté de la presse.

Cela n'empêche pas que le métier de journaliste est aujourd'hui fort périlleux. On ne compte plus les journalistes algériens qui ont payé de leur vie leur courage d'écrire et on se rappelle des lettres piégées envoyées dernièrement aux journalistes d'Al-Hayat à Londres.

La liberté de presse est une conquête inachevée. Il reste encore un long chemin à parcourir, ce qui confirme qu'autonomie de la société civile et information libre sont interdépendantes.

## 15. Synthèse

### *15.1. Ré-émergence de la société civile dans le monde arabe*

Depuis les années 70, on assiste, dans tous les pays arabes, mais à des degrés divers, à une ré-émergence des sociétés civiles sous le quadruple effet de la crise de l'Etat allocataire et nationaliste, de l'érosion des légitimités des régimes en place, du phénomène de maturation sociale (du fait du développement de l'éducation et de l'accroissement des demandes démocratiques) et des recompositions géopolitiques mondiales.

*15.2.* Le nombre des associations et des ONG passent de 10.000 en 1960 à plus de 75.000 en 1996. Elles comprennent aussi bien le mouvement associatif que le travail social, l'action culturelle ou les organisations féminines, etc. Mais beaucoup de ces associations sont encore à l'état embryonnaire, inefficaces, contrôlées, cooptées, instrumentalisées par les Etats qui rechignent à voir l'espace public échapper à leur emprise. Celles qui sont réellement autonomes se sont révélées d'une redoutable efficacité et visibilité.

*15.3.* En dépit de sa faiblesse, *la société civile arabe* est appelée à jouer un rôle déterminant dans la construction de l'avenir. Diffusant les valeurs de pluralisme, de tolérance, de la concertation, de la créativité, elle pourra devenir un outil pédagogique indispensable pour inculquer la confiance en soi et le respect des autres et des opinions adverses. Mais une société civile est, par définition, une société civique. Aussi tout mouvement qui affiche ouvertement des positions en contradiction avec un comportement ouvert et tolérant peut être difficilement intégré à la société civile.

*15.4.* En créant dans les pays des "habitudes" participatives, coopératives et tolérantes, la société civile ouvre la voie à la démocratisation. Les Etats doivent lâcher du lest pour répondre à la demande sociale et aux pressions extérieures. Il arrive donc que certains acceptent une *démocratisation formelle* se réduisant souvent à un jeu électoral et que d'autres poussent l'expérience plus loin par une sorte d'effet d'entraînement se pliant à un contrôle judiciaire autorisant le renouvellement des élites au niveau du législatif, tout en préservant intacte la coupole dirigeante.

*15.5.* La libéralisation économique et la démocratie entretiennent des rapports complexes et il n'y a pas d'automaticité dans le passage de l'une à l'autre. Mais il est clair que l'ouverture économique, en libérant les initiatives privées et l'ingéniosité des individus, peut faciliter la transition démocratique sous les conditions suivantes:

a) que le dividende de la libéralisation ne se limite pas au "happy few" au détriment de la majorité de la population;

b) que l'on passe réellement d'une économie étatique à une économie de marché (from plan to market) et non pas *du plan au clan* (plan to clan), tout en évitant un libéralisme débridé et anti-social;

c) que les nouveaux impôts qui pourraient être prélevés donnent lieu à une gestion *rationnelle et responsable* (rational and accountable management) des ressources selon le principe de "no taxation without representation".

*15.6.* La paix et la sécurité régionale sont aussi importantes pour l'éclosion de la société civile et la transition démocratique que le développement et la croissance économiques. La conflictualité régionale a été instrumentale dans la suppression des dissidences et des critiques. La paix casserait cette fusion arbitraire entre l'Etat et la société civile, libérerait celle-ci de l' "obéissance imposée" et substituerait la fécondité de l'esprit critique à l'esprit moutonnier et consensuel. Mais, pour cela, il faut que la paix soit juste et durable et la sécurité globale et concertée.

*15.7.* La démocratie est une fleur qui prend les odeurs du pays où elle pousse. Pour qu'elle soit robuste, il faut que le terreau soit accueillant. Aussi constate-t-on une forte demande démocratique parmi l'élite intellectuelle et les gens instruits dans le monde arabe.

Le fait d'ailleurs que l'éducation ait connu dans tous les pays arabes une poussé considérable accroît cette exigence de démocratie. Celle-ci sera d'autant plus vigoureuse si *le système éducatif* est révisé pour inculquer aux nouvelles générations non pas la glorification d'un passé mythifié mais le développement de la pensée scientifique, analytique et critique et l'ouverture au monde qu'exige l'entrée dans le XXIè siècle.

*15.8.* L'islamisme n'est pas tombé du ciel comme un météorite sur une banquise. Il est le produit d'une époque caractérisée par l'accumulation de frustrations et de défis. Aujourd'hui, il constitue la principale opposition aux Etats parce qu'il a pu instrumentaliser le fait religieux et bénéficier de l'immunité des mosquées. La réforme des Etats et le développement de la société civile dans toutes ses composantes religieuses et laïques devrait à l'avenir réduire l'attrait des mouvements islamistes, surtout les plus intégristes. En attendant, l'intégration des islamistes modérés dans le jeu parlementaire devrait être encouragée, à condition que les islamistes acceptent les règles et les lois de l'ordre constitutionnel.

*15.9.* L'existence d'une presse libre favorise l'émergence d'une *société citoyenne* et participe notamment au renforcement et à la visibilité de la société civile.

*15.10.* Les débats intellectuels qui tournent autour de la laïcité, de la démocratie et de la société civile, du progrès, de la modernité, etc. dans le monde arabe sont peu connus en Europe en dehors des cercles spécialisés. Aussi en reste-t-on, au niveau officiel comme au niveau des médias européens, à reproduire les informations, soit appauvries par le manque de curiosité, ou stéréotypées par facilité et goût du conformisme. Il convient donc d'insister sur la nécessité d'encourager l'effort de traduction et de distribution des ouvrages arabes les plus percutants, favoriser des recherches communes, notamment des enquêtes sur le terrain, soutenir tous ceux qui, dans le monde arabe, luttent pour un renouveau d'un arabisme séculier, ouvert sur la démocratie et prêt au dialogue confiant avec l'Europe et les autres, promouvoir des opérations conjointes entre rédactions de journaux arabes et européens et promouvoir dans les universités européennes des chaires sur l'Islam, le monde arabe et la Méditerranée, à l'instar des chaires de l'UNESCO ou les chaires sur la Méditerranée du Comité italien pour l'UNICEF. L'Europe devrait également, dans le cadre du partenariat euro-méditerranéen, de ses

relations avec la Ligue des Etats arabes ou de son accord avec les pays du Conseil de coopération du Golfe, encourager des initiatives conjointes telles que des instituts euro-arabes de recherche et de formation. A cet égard, l'Ecole de Management euro-arabe de Grenade est une expérience à soutenir et à généraliser.

Une étude sur l'image de l'Occident et de l'Europe dans les livres scolaires dans les pays arabes est à mener sans tarder à l'instar de recherches similaires menées en Europe concernant l'image de l'Islam et du monde arabe dans les livres scolaires européens. Une autre recherche doit s'atteler à analyser les positions officielles des Etats arabes quant aux projets européens et les messages véhiculés par les journaux et les revues arabes concernant ces mêmes projets. Dans le cas du partenariat euro-méditerranéen, le décalage est net et mérite d'être bien appréhendé.

En somme, l'Europe gagnerait à prêter davantage d'attention à la société civile arabe. La coopération décentralisée est un instrument utile, mais ce n'est pas le seul. Un effort doit être fait en direction des intellectuels arabes, qu'ils soient laïcs ou islamistes modérés, non pas pour les séduire mais pour bénéficier de leur contribution critique dans la mise en place de nouveaux projets de partenariat fondés sur une réelle géopolitique de proximité et un échange à deux sens, et évitant les pièges de l'arrogance ou du paternalisme.

---

**Bichara Khader** *is director of the* Centre d'Etude et de Recherche sur le Monde Arabe Contemporain *(CERMAC) and has published extensively, including* L'Europe et la Mediterranee: géopolitique de la proximite *(L'Harmattan, Paris 1994) and* L'Europe et le Monde Arabe *(edition francaise, Publisud-Quorum, Paris 1992).*

# HUMAN CAPITAL AND ECONOMIC DEVELOPMENT: AN ANALYSIS FOR THE MEDITERRANEAN COUNTRIES

FERDINANDO OFRIA

## Introduction

In this essay we shall dwell on examining the influences of "human capital" on per capita income of the countries bordering the Mediterranean.

Since the 60's, physical and human capital emerged as an important theme for analysis. Schultz (1964) demonstrated that for the less developed countries to record a higher growth, it was necessary to disseminate new technologies and to provide infrastructures and services by higher expenditures. Better infrastructures would enable the economy to have low transport costs as in Coase (1937) as well as low costs in the implementation of contracts.

But what is human capital? It is made up of all skills and productive knowledge found in individuals, as agents able to product an income inside an economic system. In relation to the characteristics of the individuals incorporating it, we can refer to the human capital and also to all the qualified human resources, whose enterprises have to carry out the production processes. Literature (see amongst others: Prausello and Marenco, 1996) considers higher school education and vocational training as the most important forms of human capital investment. Generally, every time the present consumption is given up in order to increase the stock of individual knowledge and skills, a human capital investment takes place. This means that particular forms of human capital are connected with the expenses, or costs and opportunities faced for health reasons, to buy and deal information

and particularly to look for a work, to move to another town or emigrate, to achieve a minimum level of production capabilities by means of food expenses in the case of developing countries and so on.

In the first part of this paper we shall dwell on the innovative role given to the theory of economic growth by those researchers that consider also among the productive factors the human capital or endogenous growth models; in the second part the basic hypothesis of these models will be considered; and finally, in the third part, we shall verify (by means of an econometric analysis), the correlation between some proxies of human capital and the per capita income of the countries bordering the Mediterranean; in the fourth conclusive remarks are expressed.

## 1. The innovative role of the models taking into account the human capital

As everybody knows, according to literature, the Harrod model represented, from the 40's to the 60's, the prototype of modern theory of growth. Even if this model did not hypothesise the possibility of difference between effective growth pattern and guaranteed growth pattern, the variations set by the neo-classicists (Solow Model, 1957) and by the Keynesians threw light on the possible difference between the two above-mentioned models of growth. According to the neo-classists, the solution of the problem of the coincidence between guaranteed and natural pattern of growth was committed to the variation of the combinations between capital and work employed in the production process, made possible by the adjustments of the two factors prices. According to the Keynesians, on the other hand, this solution was possible due to the variations of this disposition towards saving and therefore due to the variations of the income distribution. The assumption that technical progress was exogenous and freely appropriable brought about general agreement. The situation, however, changed radically in the following decades. The up-heavals and the transformations of the world economic system commencing from the first half of the seventies and the widespread phenomenon of dullness, crisis, deindustrialization occurring in most less developed countries challenged the thesis that the development economics had proposed, and were subject to more and more negative criticism. Particularly at the outbreak of the debt crisis, the problems of the less developed countries began to be examined and discussed mainly on a short

term basis, as problems of macroeconomic balance, efficiency and of markets running.

Furthermore, it is not to be forgotten that the difficult adjustment process which accompanied many developing countries recovering from the debt crisis, has often been characterised by high social costs unequally distributed. This means that the whole costs of recovery will be evident only in ten or twenty years, when the human capital disinvestiment, emerging from the minor present levels of nourishment, health and education, will spread its effects, expressing itself as less productive labour force. Finally, there is a growing consciousness of the environmental approaches to economic development, after a period during which the pessimistic expectations of the early seventies had partially neglected them.

These can be considered to be the historic motivations which, in the second half of the 80's, promoted the proliferation of new literature on the models of growth, spurned particularly by the seminar works of Romer (1986) and Lucas (1988). This literature takes into account the role of some factors previously not considered such as the formation of human capital and the satisfaction of basic needs.

General wisdom holds that illiterate and unskilled workers are an obstacle to alternative trade and financial development along with more complex managerial activities. All this limits the 'absorption of investment capacity', that is the amount of investment is not compatible with the level of workforce skills. Overall, they will follow both mistakes in the implementation of investment and inefficiencies.

An improvement in human capital may take place either by traditional education or by 'learning by doing'. With regard to the traditional form of education, even if subjective decisions are based upon disposable income, the government should contribute financially in the supply of such services. Experience in developed countries shows that primary education, often compulsory, was state supported. Vis-à-vis the second form of learning, a full range of skills is obtained by simply 'doing' some activity (Arrow, 1974) and it is not independent of economic policy decisions. This type of learning is related to the level of public investment and the degree of incentives to private capital towards the sectors and the forms of organization where such learning is qualitatively and quantitatively important. In countries where the main component in investment policies is in the hands of both foreign investors and international organizations, the governments should involve domestic workers in the active

implementation of investments in order to let them acquire new knowledge. The peculiar domestic socio-economic characteristics are to be taken in account.

## 2. Human development and growth

Many of the adjustment programmes adopted during the 80's have had a significant impact on social welfare. The public and private expenditure devoted to health, education and nourishment have not only short-term effects on the level of current consumption, but influence also the storage of human capital. Many studies show that the investments in education have positive and high internal return rates as in (Psacharopoulos, 1988) and the best levels of nourishment in the first years of life, measured in terms of height, are linked with higher productivity and income levels during the working life (see Immink and others, 1982). The link between human development and long-term growth through the formation of human capital is therefore an aspect that deserves major attention. This is particularly true if, as will be seen, the concept of human development is wide, and the attempts to define and measure it usually centre on measures of life expectancy, illiteracy rates, state of nourishment and infant mortality rates. Good levels of health, education and nourishment are the result of the allocation of public or private resources for this aim. In the case of private resources it is necessary that the distribution of income is sufficiently egalitarian so as to allow individuals to produce or buy goods and the necessary services on the market. With regard to public resources it is necessary to guarantee sufficient income to meet expenses and an efficient allocation of these resources.

The definition of human capital, generally used in the literature on endogenous growth, is based on a vaguely specified "state of knowledge", or more precisely, on the educational level. The literature on international trade (see Romer, 1986) considers knowledge more as a series of schemes or as the state of the available technology, and it is more inclined to be incorporated in machineries rather than in human beings. Lucas (1988) instead considers in particular the investments in education and formation which are an alternative to the productive activity. Empirical verifications of the contribution of human capital to development utilize measures based on the illiteracy rate (as in Romer, 1989), on the enrolment rate to primary and secondary schools (see Barro, 1989) or on the average of school year attendance of the population (see Barro and Lee, 1993). Mankiw

and others (1992), instead, use the percentage of population in working age that attend secondary schools as (proxy) indicator of the investment rate in human capital.

## 3. Relationship between human capital and per capita income for the countries of the Mediterranean: an econometric analysis

According to Kuznets (1966) a part of Meg (*modern economic growth*) deals with the per capita income growth. However, the per capita income indicator is not a reliable approach to judge development: rich countries (e.g., oil exporting countries) are not always as developed as it is believed. By contrast, it would be important to take into account income distribution, structural transformation such as scale economies, technologies applied to production etc. In any case, there are difficulties in evaluating the level of economic development. In the literature, the level of per-capita income seems the most useful indicator (Pomfret, 1995) and more strongly Lewis (1955, 1979, 1980, 1984). Lewis (1955, p. 421) also supports the view that income growth gives more freedom to people through better control on the environment. Moreover, Lewis affirmed in his presidential address to the American Economic Association, in 1984[1], that "per-capita income remains the better instrument for measuring income development and defined the economic of development as the structures and behaviours of economies when their per-capita income is below $2000".

In this part making use of the World Bank data for 1990, through econometric estimations, we shall attempt to see to what extent, for the countries bordering the Mediterranean, the average level of per capita income (Y) – quoted into dollars is influenced by some proxies of human capital, used by the literature.[2]

The proxies of human capital that will be taken into account for each country are:

1) The infant mortality rate (M);
2) The probabilities of living years hypothesized upon birth (V);
3) The rate of enrolled at secondary school (S).

---

[1] See Pomfret (1995, p. 20).

[2] See Daveri (1996, p. 86).

In **table 1** the values of such data are reported in relation to fifteen countries bordering the Mediterranean.[3]

**Table 1**

| Countries | Per capita income[4] (Y) | Infant mortality rate (M) | Probability of living years (V) | Rate of secondary school enrolled (S) |
|---|---|---|---|---|
| **Algeria** | 2,600 | 66,5 | 65,4 | 61,0 |
| **Cyprus** | 8,020 | 10,0 | 76,5 | 88,0 |
| **Egypt** | 0,610 | 65,9 | 60,2 | 81,0 |
| **France** | 1,952 | 71,0 | 76,8 | 97,0 |
| **Greece** | 5,990 | 11,3 | 77,1 | 97,0 |
| **Italy** | 1,686 | 87,0 | 77,5 | 78,0 |
| **Libya** | 5,310 | 74,0 | 62,4 | N.D. |
| **Malta** | 6,610 | 89,0 | 73,4 | 80,0 |
| **Morocco** | 0,950 | 67,2 | 61,8 | 36,0 |
| **Portugal** | 4,900 | 12,3 | 74,9 | 53,0 |
| **Spain** | 1,100 | 85,0 | 76,3 | 105,0 |
| **Syria** | 1,000 | 42,5 | 66,1 | 54,0 |
| **Tunisia** | 1,440 | 44,4 | 66,7 | 44,0 |
| **Turkey** | 1,640 | 59,5 | 66,6 | 51,0 |
| **Yugoslavia** | 3,060 | 22,8 | 72,4 | 80,0 |

Source: World Bank, year 1990

As can be noted in **table 1** the countries with a lower per capita income show lower values of proxies of human capital. We can have a further confirmation of the afore-mentioned by taking into account an econometric estimated correlation of variables per-capita income and proxies of human capital. (*See* **table 2**)

[3] The data about Libya are not complete for all items.

[4] Into million of dollars.

**Table 2**
Estimated correlation matrix of variables

| | Y | M | V | S |
|---|---|---|---|---|
| **Y** | 1,0000 | -0,7300 | 0,7673 | 0,6359 |
| **M** | -0,7300 | 1,0000 | -0,9599 | -0,6670 |
| **V** | 0,7673 | -0,9599 | 1,0000 | 0,6636 |
| **S** | 0,6359 | -6670 | 0,6636 | 1,0000 |

As can be pointed out from the results reported in the *table 2*, all the proxies of human capital considered have a significant effect with expected sign-correlation with per capita income. The proxy, in any case, coming out to be the most relevant in static terms is: "The probability of living years supposed upon birth" (V).

## 4. Conclusion

To conclude through the exercise developed in this last part, it was possible to verify, in agreement with what was stated by the above mentioned literature, the existence of a considerable correlation between the proxies that represent human capital and the per capita income of the countries bordering the Mediterranean. All this suggests that the policy to follow in order to improve the per capita income of the more disadvantaged countries will have to be turned to the strengthening of the factor "Human capital". The single countries, in synthesis, must intervene with the purpose of improving the human capital. They must intervene directly and indirectly. Directly:

a) supplying the necessary incentives to stimulate an appropriate production and diffusion of knowledge by means of research and development activities and sufficient investment in education;
b) supplying an adequate level of goods and services which are complementary in the production process.

Indirectly:

a) favouring the realization of infrastructures and services from the private part, with agreements of the "Project Financing" type;
b) favouring the opening of one's own country with foreign countries.

It is known, in fact, that the economic opening degree affects the growth rate, because the flow of goods and investment among countries helps the diffusion of knowledge on an international level. Moreover, as the knowledge produces positive expressions, the availability of a greater quantity of knowledge connected to the trade expansion should also lead to the extension of the productive possibilities of the interested countries. The positive effect will be as great as more trade contributes to the creation of a stock of knowledge common among the countries. This means that the commercial and investment flows should be diversified and be subject to few sectional restrictions, and the transfer of technology here plays an important part in stimulating growth.

---

**Ferdinando Ofria** *is Doctorate Degree (Ph.D.) in Economic and Policy of Development (University of Naples "Federico II"). His most recent publications treat Productivity and Growth in Italian manufacturing industry.*[5]

## Bibliography

Arrow, K. 1974, *Le implicazioni economiche dell'apprendere per esperienza*, in *Progresso tecnico e sviluppo economico*, Angeli, Milan.

Barro, R.J. 1989, *Economic Growth in a Cross-Section of Countries*, Cambridge, Ma, in "Nber Working Paper", n. 3120.

Barro, R.J. and Lee J. 1993, International Comparisons of Educational Attainment, Washington DC, World Bank, February.

Coase, R. H. 1937, *The Nature of the Firm*, in "Economia", November.

---

[5] Recent Publications:

1997: *Divari regionali di produttivita nell'industria manifatturiera italiana*, Franco Angeli, Milan.

1997: *Divari regionali di produttivita e condizioni ambientali nelle regioni italiane: una analisi empirica per le aziende manifatturiere del settore "tradizionale"*, "Economia Marche" n. 2.

1997: *Una verifica empirica della "legge di Verdoorn" per il Centro-Nord e il Mezzogiorno (anni 1951 – 92)*, "Rivista Economica del Mezzogiorno", n. 2.

1996: *Produttività ed efficienza: una rassegna teorica*, "Quaderni dell'Istituto di Economia, Statistica e Analisi del Territorio", University of Messina, n. 22.

1996: *Performance delle aziende di credito e ambiente socio-economico*, "Banche e Banchieri", n. 6, pp. 575-81.

Daveri, F. 1996, *Economia dei paesi in via di sviluppo*, Il Mulino, Bologna.
Immink, M., Viteri F. and Helms, R. 1982, *Energy Intake Over the Life Cycle and Human Capital Formation in Guatemalan Sugarcane Cutters*, in "Economic Development and Cultural Change", vol. 30, n. 2.
Kuznets, S. 1966, *Modern Economic Growth*, New Haven, CT, Yale University press.
Lewis, W.A.
1955, *The Theory of Economic Growth*, Allen and Unwin, London.
1979, *The Dual Economy Revisited*, in "Manchester School", n. 47.
1980, *The Slowing Down of the Engine of Growth*, in American Economic Review, n. 70.
1984, *The State of Development Theory*, in "American Economic Review", n. 74.
Lucas, R.E. 1988, *On the Mechanics of Economic Development*, in "Journal of Monetary Economics", vol. 22, n. 1.
Mankiw, N.G., Romer D., and Weil D. 1992, A Contribution to the Empirics of Economic Growth, in "Quarterly Journal of Economics", vol. 107, n.2.
Pomfret, R. 1995, *Percorsi diversi per lo sviluppo economico*, Il Mulino, Bologna.
Prausello, F. and Marenco, M. 1996, *Economia dell'Istruzione e del Capitale Umano*, Laterza, Bari.
Psacharopoulos, G. 1988, *Education and Development. A Review*, in World Bank Research Observer, vol. 3, n. 1.
Pio, A. 1994, *Teoria della Crescita Endogena: Potenzialità e Limiti nell'Applicazione ai Paesi in Via di Sviluppo*, in "Giornale degli Economisti e Annali di Economia", n. 4-6.
Rivera-Batiz, L.A. and Romer, P. 1990, *Economic Integration and Endogenous Growth*, Cambridge, Ma, Nber in "Working Paper", n. 3528.
Romer, P.M.
1986, *Increasing Returns and Long Run Growth*, in "Journal of Political Economy", vol. 94, n. 5.
1989, *Human Capital and Growth: Theory and Evidence*, Cambridge, Ma, Nber in "Working Paper", n. 3173.
1990, *Endogenous Technological Change*, in "Journal of Political Economy, vol. 98, n. 5.
Schultz, T. W. 1964, *Transforming Traditional Agriculture*, Yale University press, New Haven.
Solow, R. 1956, *A Contribution to the Theory of Economic Growth*, in "Quarterly Journal of Economics, vol. 70, n. 1.

# SERIOUS CRIME AND THE REQUIREMENT OF RESPECT FOR HUMAN RIGHTS IN EUROPEAN DEMOCRACIES

The papers by Mario Chiavario, Ralph Crawshaw, Mario Lana & Vito Mazzarelli, Marie Pierre de Liege, Shlomo Giora Shoham and Vivien Stern appearing in this journal were presented by the authors at a seminar on "Serious Crime and the Requirement of Respect for Human Rights in European Democracies" organised by the Secretariat General of the Council of Europe in co-operation with Intercenter of Messina held in Taormina (Italy) on 14–16 November 1996.

# A CHALLENGE TO BE ACCEPTED BY EUROPEAN DEMOCRACIES: THE OBSERVANCE OF HUMAN RIGHTS AND THE EFFICIENCY OF THE FIGHT AGAINST CRIMINALITY

MARIO CHIAVARIO

**1.** The safeguard and promotion of pluralist democracy, to which the whole of Europe is now committed, are no longer safe from growing threats, such as increasingly violent crime that is very much present especially, but not exclusively, in the nascent democracies.

This not only causes formidable problems of law and order but also poses a constant threat to the proper functioning, and indeed the very survival, of democratic institutions. It is even suspected that important political and judicial decisions may have been directly influenced by criminal organisations. In any case, the weakness (be it genuine or presumed) of public institutions vis-à-vis crime gives rise to widespread disillusionment which, in turn, nurtures nostalgia for the "strong arm" of authoritarianism or dictatorship.

The widespread desire for more draconian penal policies, for stronger justice and harsher punishment at whatever cost, therefore comes as no surprise. "Aim at the head!" is an exhortation that can scarcely be regarded as a mere metaphor, particularly when heard echoing down the corridors of police training colleges.

There is at present considerable pressure in favour of unscrupulous recourse to capital punishment. The abolition of the death penalty

is being called into question by official declarations, in the very countries that made abolition a symbol of their return to democracy. Furthermore, politicians calling for the death penalty as a short-cut solution to new outbreaks of crime are not present only in certain countries – just think of the speech by the President of the United States on the day after the bombing in Atlanta.

**2.** Yet it is no coincidence that the rejection of the death penalty has become one of the cornerstones of European commitment to the safeguarding of human rights, with the result that accession to Protocol No 6 of the European Convention on Human Rights – which imposes a total ban on capital punishment in time of peace – is envisaged as one of the conditions for full participation in the new democratic Europe.

Allow me to borrow a famous phrase by Pascal to restate in a nutshell that this rejection – the irreversible manifestation of the finer aspects of mankind's conscience – is based on both the *raisons de la raison* (rationality) and on the (deeper) *raisons du coeur* (reasons of the heart). There is nothing I can add to this belief. Rather, we should ask ourselves whether our "no" – which is based on a consistent belief in the right to life (and more generally stated in the name of human rights as the foundation and aim of democracy) may not sometimes lack real credibility, particularly when it is not accompanied by a major effort to find alternative solutions to the challenge of serious crime. We remain speechless in front of sentiments of huge, angry crowds after the discovery of the pathetic remains of the victims of the "Marcinelle monster".

Nor is it wrong to say that a hidden and distorted form of death sentence is passed and executed every day by savage, unscrupulous criminals, and more often than not on innocent victims. And we are asked, not without a hint of controversy, to explain our attitude as persons claim to speak and act in the name of human rights.

The theory of *Drittwirkung* has had the merit of preparing fertile ground for discussions showing acute sensitivity to this type of problem. At this point, however, we should consider the contributions made by the "living" system of the European organs which monitor respect for human rights, in terms of a real awareness of the attacks which those rights suffer from both crime and the abuses and superior power of public authorities.

**3.** This immediately brings us to the clause in Article 15 of the

European Convention on Human Rights which distinguishes between rights from which no derogation whatever may be made – in as far as they are secured by specific provisions of the Convention – and other rights and freedoms which are safeguarded but from which derogations may be made "to the extent strictly required by the exigencies of the situation", not only in time of war but also "in time of ... other public emergency threatening the life of the nation".

We might endeavour to wonder in greater depth about the reasons for the different attitudes taken by the various member states of the Council of Europe. For example, it transpires that Italy has never formally relied on this derogation, although it could – as far as terrorism and with the mafia are concerned – defend its emergency legislation from most of the criticism levelled against it. It is, however, more important to note the care taken by the European Court of Human Rights (since its first judgement in the *Lawless* case) to ensure that the formal and material conditions required for the application of Article 15 are met, so that this very delicate tool continues to be a weapon that is used only in extreme circumstances.

Quite apart from any recourse to Article 15 – a derogation clause which is both general and exceptional – the question of serious crime has already been raised before the European Court, which has thus been led to examine in greater detail both the concept and the scope of certain rights and freedoms safeguarded by the Convention.

It could be said that the entire system of the Convention provides a basis and substance for this need for clarification, if it is true that "freedom and the rule of law" are not to be considered solely as limitations on the action of state bodies but more generally as the underlying principles of a generally applicable operational model. More surprising is the scarcity of references in European case-law to Article 17 of the Convention, the role of which appears remarkable in that it forbids any interpretation of human rights likely to encourage the misuse of these rights in order to destroy them. Indeed, engaging in activities and committing acts "aimed at the destruction of any of the rights and freedoms set forth ... in the Convention" are typical deeds of organised crime. However, the caution and misgivings expressed about this clause – which has been accused of having served during the "cold war" as a means of ideological persecution – are perhaps justifiable.

**4.** Whatever the case, the Court has not side-stepped the essential problems and has even gone so far as to examine possible restrictions

on the very rights which Article 15, paragraph 2, includes in the list of rights from which no derogation may be made.

As regards the prohibition on torture and inhuman and degrading treatment, a very recent judgement (the *Ribitsch* case) underlines very clearly that Article 3 of the Convention "prohibits in absolute terms" the practices in question "irrespective of the victim's conduct"; moreover, the said decision refers to a previous decision in which it was stated that "the requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals".

As regards the right to life, the Court has taken account of the fact that Article 2 of the Convention does not exclude the possibility that the deliberate use of lethal force may be justified in cases where it is "absolutely necessary" to prevent certain kinds of crime. However, in a case concerning the use of such force by soldiers against persons suspected of the case of preparing a terrorist attack (*McCann and others*), the Court stressed that it was its duty to "carefully scrutinise ... not only whether the force used ... was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force". In this particular case the Court held that there had been a violation of the Convention.

On the other hand, the Court has not yet had the opportunity to deal directly with the scope of Article 1 of Protocol No. 6 which forbids recourse to the death penalty in times of peace. This article was relied upon in an indirect and inconclusive manner in the reasons given for the *Soering* judgement, by means of which the Court prevented the extradition of a person sentenced to death because there was not sufficient guarantee that he would not be subjected to "inhuman" treatment prior to execution. This judgement, which was "historical" (at that time), is also a clear indication of the restrictions imposed by a very special situation.

**5.** There are, with good reason, more direct and frequent reminders of the requirements of crime prevention in the European Court's decisions relating to Articles 8, 10 and 11 of the Convention. National security, as well as public safety, crime prevention and the authority of the judiciary, are mentioned among the public interests that may justify state measures as "necessary in a democratic society",

although they restrict either the right to private life, home and correspondence or the right to freedom of expression, association or peaceful assembly.

In the case of rights which, according to the definition given in the Convention, are not limited by such general clauses, similar trends have developed (at least to a certain extent), for example in particular the right to liberty and security of the person (Article 5) and the right to a fair hearing and the characteristics and conduct of such a hearing (Article 6). As regards these rights, it is evident that the question of possible restrictions arises most directly and most frequently in relation to the requirements of fighting crime, since their field of application largely coincides with the fields of action of the police and judicial authorities.

Furthermore, it would be fair to say that the clarification referred to earlier has been achieved more in terms of adjusting the internal dynamics of these rights than by laying down external restrictions. The Court was thus led to "re-write", so to speak, the interpretation of the rights in question, in the sense that the conclusions drawn about their scope in "normal" situations are no longer necessarily the same where serious crime is concerned.

**6.** It is impossible here to go into all the aspects of this case-law (which has been illustrated and fully examined in a quite recent article by Mr de Salvia in *Bulletin des droits de l'homme*, 1996, no. 5).

The number and the quality of the dissenting opinions appended to each judgement bear witness to the importance of the issues raised and also to the intensity of the passions and tensions that they almost inevitably arouse. These strong feelings, moreover, are those that our societies experience whenever crime prevention is held up as the declared aim of legislation restricting certain rights and freedoms which are firmly rooted in (at least part of) our civic conscience. I have already mentioned Italian legislation, in particular the emergency legislation introduced after the murders of Giovanni Falcone and Paolo Borsellino, which affects *inter alia* the law of criminal evidence and the special régime for prisoners who continue to be active members of certain criminal organisations. Nor can we forget that English legislation has substantially altered the rules governing the accused's right to silence, affecting one of the legal practices most representative of a certain human rights approach to criminal procedure. There is also the recent French "anti-terrorist"

legislation concerning foreigners illegally present on the territory, which was referred for review to the Constitutional Council which criticised certain aspects, including the right conferred on the police to carry out searches at night outside the normal hours.

It is also these same strong feelings which – once brought under control by underlying tolerance on both sides – have probably been one of the key factors in the survival of democracy in Europe during the darkest years of its history.

**7.** The European Court, which rules on actual violations of human rights and fundamental freedoms, systematically refuses to judge domestic laws as such. It has, however, sent out fairly clear signals to the law-makers and, more generally, to the state institutions involved in implementing crime prevention measures. With reference only to signals of a general kind, I would say that the Court both provides **encouragement** and delivers **warnings**.

It obviously, and above all, delivers **warnings** with regard to the inadmissibility of measures which fail to meet the conditions of necessity and proportionality, as well as the warning that certain limits should never be exceeded with regard to the very concept of each right.

There is a large number of "condemnations" to choose from, and they are all the more interesting in that they are usually preceded by statements accepting in advance that such and such a rule may be subject to extension, derogation or a less rigid interpretation when confronted with certain forms of crime. There have been such decisions on the confidentiality of prisoners' correspondence (the cases of *Campbell* and *Messina* judgements), on time-limits for police custody (the case of *Brogan et al*) or for detention on remand (the case of *Tomasi*), conditions for the legitimacy of custodial measures (the case of *Guzzardi* and *Ciulla*), on limitations on the right to question witnesses for the prosecution (the case of *Lüdi* and *Saïdi*) etc. The last-mentioned aspect is particularly significant because it is linked to the question of the use of information supplied by undercover officers and informers from criminal organisations (forms of aid which are as important as they are difficult to control).

**8.** In short, states are not given a free hand in the name of crime prevention. Nevertheless, how can we forget the **encouragement** – also deriving from this case-law – given to a penal policy which takes care not to confuse respect for the rights of the individual

with the abstract and naive peddling of cheap illusions, exposing the least privileged members of society to the worst forms of criminality.

I would first like to draw attention to the essential value of a warning not to ride roughshod over the witness and the victim considering only the rights of the accused. In a case concerning drug trafficking, the recent *Doorson* judgement held that it may be justified to preserve the anonymity of a witness in certain situations, precisely because "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify", where "their life, liberty or security of person may be at stake". Is this a significant step towards the "statement of the rights of victims" (and "of witnesses") which ought to appear in the texts alongside the statement of the rights of the accused?

Secondly, the Court, without claiming that the accused should actively co-operate with the prosecuting and judicial authorities (cf. the recent *Yagci and Sargin* judgement) and while asserting that the state is responsible for ensuring that its courts are organised and proceedings conducted in such a way as to avoid delays that might infringe the accused's right to proceedings and detention of reasonable length, has also ruled that an accused person cannot complain of delays caused by the obstacles raised by his defence (see the *Vendittelli* judgement). Is this not a way of underlining that there is a world of difference between abuse and misuse of a right (in the instant case, a right of the defence) and the honest exercise of that same right, particularly as such abuses prevent the fulfilment of a requirement (the reasonable length of court proceedings), which exists to serve both the essential interest of the community and another fundamental right of the individual?

Similarly, certain precautionary measures taken by states accord fully with the European Court's case-law where the Court acknowledges, for example, that there are greater risks of an accused person absconding if he has links with a criminal organisation and that this must be taken into account in deciding whether to keep him in custody (the case of *Van der Tang*).

Finally, the Court has not hesitated on occasion to declare that certain measures are not in themselves open to criticism, although the means of applying them and the field of application may be debatable. A recent example is provided by the *Welch* judgement. Although the Court held that there had been a violation of Article 7 of the Convention with regard to a confiscation ordered on the basis

of a retrospective law, it stressed that its finding "concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking".

**9.** As a result, there are fixed points of reference which lose none of their relevance from one case to the next. In short, it could be said that these points of reference make it possible to draw the line between a punitive system that knows no limits and a penal policy that has the necessary weapons at its disposal but is nevertheless unwilling to renounce the principles of legality and respect for human rights.

It is not the aim of this paper to discuss in detail the consequences of this distinction, in terms of penal and penitentiary policies, police action, etc. Instead I will limit myself to a few general remarks.

First of all, I would say that a precondition for the effectiveness of such a penal policy is the awareness of the considerable diversity and complexity of the phenomena in the category of "serious crime". Any one-sided approach would lead us astray from our goal, including – among other things – pandering to the popular view which perceives only the most visible (and therefore not necessarily the worst) aspects and often demands measures which would deal only with the tip of the iceberg.

Similarly, one cannot ignore the relationship between problems of "serious" crime and of "petty" crime – a relationship which is sometimes expressed in terms of organisation and frequently in terms of the attraction the former holds for the latter; the existence of this relationship is in any event perceived as unquestionable by the public, by whom petty crime is directly experienced through the threatening and intrusive presence of a person or group interfering with the normal conduct of daily life. Any alternative to imprisoning a number of persons living on the fringes of society is welcome, provided it does not result in outright impunity.

**10.** Another general factor that must be taken into account is the exponential growth of the financial and technological resources which enable those involved in serious crime to dissimulate their criminal conduct and, more generally, to alter, manipulate and fabricate evidence. Sexual abuse and the traffic in children organised through the sophisticated structures of the "Internet" have provided the latest shocking example.

This fact should have substantial consequences at several levels, beginning with the methods covering the definition of offences. The Strasbourg Convention on laundering, search, seizure and confiscation of the proceeds from crime seems to advocate courage, whereas a more coherent attitude on the part of European states is required in a different area, that is with regard to making the mere fact of belonging or providing support to a criminal organisation a crime. This, of course, is conditional on respect for the principles of legality and non-retroactivity; nor must the definition of a criminal offence go so far as to prohibit actions or omissions constituting the "normal exercise" of human rights (the *Engel* case).

The application of new penalties relating to activities and property, the rules on limitation, updating the rules governing banking secrecy, greater specialisation and better national and international co-ordination between investigators are but a few of the other aspects concerned. The success already achieved in pursuit of related objectives shows that these are the best lines of action to follow. I would, however, also add that an effort must be made regarding the "philosophy" on criminal evidence. Although it is necessary to restate the importance of a number of principles – beginning with the presumption of innocence – established over centuries to protect individuals against the worst effects of the inquisitorial approach, it is also important not to place "doctrinal" obstacles in the way of legitimate undertakings to combat the abuse of those principles, which is doubtless easier now than it used to be.

**11.** The effectiveness of punitive justice, beginning with the search for evidence of crimes and their perpetrators, is beyond all doubt a key factor in the fight against crime. Effectiveness also depends on citizens' active support for the justice system, support such as to break down the barriers of silence which often make it impossible to detect offenders and, above all, such as to disprove the widely held opinion that the countervailing powers constituted by crime are more reliable than state institutions.

In order to gain that support, judicial institutions themselves also need a high degree of credibility. I have already mentioned the reasonable length of proceedings, which is a key aspect of such credibility – its importance is undeniable both from the viewpoint of the rights of the defence (and above all of the innocent defendant) and from the viewpoint of justice for the community itself, which otherwise all too easily falls prey to the attractions of summary

justice. To this we should add the need for greater – and more transparent – endeavours to achieve real equality in the administration of justice, without which citizens will never co-operate with the judicial institutions in a consistent and sincere manner.

Is it not true that the credibility of domestic legal systems – and consequently the chances of obtaining the entire population's full, active cooperation in the prevention of crime – are largely measured by the courts' capacity to take action against the corruption of senior officials of the State, and even of those in its own midst? On a quite different level, the capacity of permanent organs of international criminal justice to enforce the fair but severe punishment of crimes against humanity is clearly an essential requirement, going beyond the steps taken, and also the controversies arising, from the Nuremberg trials to the courts set up by the UN to judge crimes committed in the former Yugoslav territories and in Rwanda. From a quite different viewpoint, it has already been observed that impunity is not the most appropriate solution to the problems of petty crime.

Finally, at the risk of appearing repetitive, we must always remember the most elementary requirement of equality between persons on trial, the need for effective legal counsel, and, in general, legal aid, to represent those who are in need both financially and socially. Indeed, it is in the name of such "effectiveness" that the European Court has delivered many of its judgements against respondent governments.

**12.** A modern democracy is under an obligation not only to discard the barbaric rituals of the death penalty and other inhuman forms of punishment, but also – to ensure an effective and credible system of punitive justice, which is still an essential part of any strategy to combat crime.

We must, however, be increasingly conscious that such action, however essential, can only be a kind of sticking plaster that cannot deal with the underlying causes of disease, of which serious crime is one of the most alarming manifestations. We know the long-standing dualism "prevention-suppression", but the complexity of modern life confers new dimensions on this dualism, if only from the standpoint of organising controls over certain activities (notably the production and sale of arms or drugs).

Moreover, awareness of the purely subsidiary nature of criminal justice – ie the awareness that punitive measures to tackle crime

are only partial, belated and insufficient solutions – helps us to concentrate on other possible solutions further "upstream". This seminar has the merit of giving a special place to the discussion of these aspects, and jurists can only listen and try to learn. They will see for themselves, however, that the question of human rights is more firmly rooted than ever at the heart of these same problems "of context", in the form of the right to a family life, to education and to work and so forth, that is, in the form of rights which are no less essential than those that have been discussed in greater detail in this report. It must, however, be acknowledged that it is less easy to safeguard such rights through democratic forms alone, because they require the highest degree of positive action by public institutions and society as a whole so as to gather and distribute the material and spiritual resources needed to exercise them, while at the same time giving rise to some of the most acute forms of tension and interaction between the members of a national community and between one population and another.

Hence the importance, not only of ethical principles and policies concerning the family, youth, spatial planning, full employment, social welfare and so on, but also and even more, of new problems and new prospects – for example – involving immigration and the right to asylum, especially when a large part of the population is convinced – rightly or wrongly – that certain phenomena have been aggravated by a massive influx of new ethnic groups into their territory. An understandable demand for law and order and security is easily and dangerously interwoven with racism, although this may in itself, by way of reaction, bring about an unexpected return to pride in a nation's long-established traditions of welcoming the world's poor and persecuted. The recent events in France this summer – though far from being exceptional in Western Europe – were good illustrations of this phenomenon.

**13.** The effectiveness, credibility and subsidiary nature of criminal law are all factors essential to the success of everything our societies do to combat serious crime without infringing human rights. These are goals that can only be achieved if they receive the support of the moral forces in society, i.e. the force of formed and informed individual and collective conscience, so that we are capable of not giving up or losing our way under the often violent impact of first impressions. This is why a discussion on the role and responsibility of the media is so important.

Education and the media – in particular the latter – are always tempted to try the case before it goes to court; they become hawkers of partial and sometimes distorted images of crime, police inquiries and criminal proceedings. However, both are also indispensable sources of support for, and democratic control of, justice administered in the name of a free people. It is also their duty to ensure that the collective memory does not lose that sense of the message embodied in the various human rights texts that has inspired clandestine resistance to dictatorship.

A "united" Europe, at least in the (by no means definitively established) sense of a shared commitment to pluralist democracy, is the result obtained above all by virtue of "hoping against hope". Thanks to the commitment of countless individuals, often paid for in bloodshed, and thanks to the long and bitter patience of peoples capable of resisting without self-annihilation, of struggling in silence most of the time, and also capable of overturning, by the force of conscience, oligarchies and tyrannies established in their countries. The long-hidden banner of human rights has been a source of strength and courage for these individuals and peoples. This is why legal experts and institutions which have made the protection and promotion of these rights one of the main aims of their discussions and their work, now bear a heavy responsibility. This banner must not become a mere decorative flag whose splendour pales and finally disappears when touched by the problems and tribulations of daily life.

---

**Mario Chiavario** *is professor of criminal procedural law at the University of Turin, Italy. He has also lectured at the University of Perugia and Pisa and is editor of the journal* La Legislazione penale.

# THE TRAINING OF LAW ENFORCEMENT OFFICIALS

RALPH CRAWSHAW

*"Ainsi que la vertu, le crime a ses degrés"*[1]

The prevention and detection of crime are virtuous activities, but not unreservedly so. The degree of virtue present in those activities can be, and is, diminished by the means adopted to carry them out. Sometimes those means are themselves criminal and take on varying degrees of criminality so that they can become more heinous than the crime against which they are directed. Crimes such as torture or those which subvert the right to a fair trial, committed by people dignified by the authority of the state to exercise power over their fellow citizens, are at least as serious as most crimes committed by common criminals.

Social, political and economic changes taking place at national and supra-national levels present significant challenges to police agencies and to police leaders throughout Europe. Some forms of serious criminality and some current concerns about policing derive from, or are exacerbated by, these changes. Concerns about policing revolve not only around the extent to which police are able to prevent and detect crime and maintain or restore order, but also around police behaviour.

It is a fundamental function of police to maintain social order and the rule of law so that change within and between societies can take place constitutionally, lawfully and peacefully. For this function to be fulfilled it is necessary for police leaders to have a sophisticated awareness of the nature and extent of that change and of its implications for the ends and means of policing. The ends of policing

---

[1] Racine (1677), "Phèdre" 1V.ii.

include the prevention and detection of serious crime, and the means of policing include the requirement to respect human rights.

Police leaders then have to adapt the organisations they command and manage so that those organisations can respond effectively, lawfully and humanely to the changing environment within which they function. Training of police leaders to manage change is an essential element, perhaps the essential element, of a policing response to serious crime which requires respect for human rights. Furthermore leadership training must focus on the normative aspects of policing and police leadership, as well as on the technical aspects of policing and the technical aspects of the command and management of police organisations. In this way police leaders can be equipped to command and manage their organisations in such a way that the prevention and detection of crime become and remain entirely virtuous activities.

It is here argued that the normative and technical aspects of policing are inextricably linked; that there is no conflict, nor even tension, between human rights and policing; and that not only must police respect human rights in the process of policing, it is actually a function of policing to protect human rights. These arguments are made and illustrated by reference to human rights standards on the treatment of detainees, which include especially the prohibition on torture, and international standards on interrogation of suspects – a technical policing skill significant in relation to the investigation of crime and, when it is lacking, significant in relation to serious human rights abuses.

Ways in which normative aspects of policing are dealt with through courses, seminars and workshops for police arranged by organisations disseminating international human rights and humanitarian standards are considered, as are, to a lesser extent, national initiatives. However, it is first necessary to consider the relationship between human rights and policing.

## 1. Human rights and policing – A symbiotic relationship

In countries where democratic forms of government and the rule of law prevail, respect for human rights and effective policing are mutually dependent upon each other. Democratic government requires, in fact subsumes, democratic policing, for government by consent includes the notion of policing by consent. Principles of democratic policing are set out in the United Nations General Assembly resolution 34/169 of 17 December 1979 by which the United

Nations Code of Conduct for Law Enforcement Officials was adopted. The resolution requires, inter alia, that "every law enforcement agency should be representative of and responsive and accountable to the community as a whole".

A number of human rights[2] are essential for democracy to prevail but, at the same time, human rights are more likely to be respected and protected under democratic government where policing is representative, responsive and accountable to the community. One of the factors necessary for effective policing in democratic states is the support and cooperation of the community for the police. This is more likely to be forthcoming if the relationship of the police with the community is governed by the principles of democratic policing and characterised by lawful and humane exercise of power by police. Lawful exercise of police power is another aspect of the relationship between human rights and policing.

### *1.1. The Lawful Exercise of Power*

Human rights are protected by law, international law and the law of states, which expresses human rights and their legal limitations, and defines police powers which are largely a reflection of those limitations. For example, Article 5 of the European Convention on Human Rights guarantees the right to liberty and security of the person. It then defines the limits on that right by stipulating that there shall be no deprivation of liberty "save in the following cases and in accordance with a procedure prescribed by law".[3] This terminology means that the list of six permissible reasons

---

[2] See for example the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association in Articles 18,19 and 20 respectively of the Universal Declaration of Human Rights, and Articles 9,10 and 11 respectively of the European Convention on Human Rights.

[3] The cases listed are lawful detention after conviction by a competent court; lawful arrest or detention for non-compliance with the lawful order of a court in order to secure fulfilment of any obligation prescribed by law; lawful arrest or detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence; the detention of a minor by lawful order for the purpose of educational supervision or for the purpose of bringing him before the competent legal authority; lawful detention for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; lawful arrest or detention to prevent unauthorised entry into the country or with a view to deportation or extradition.

for deprivation of liberty is exhaustive, and that, if deprivation of liberty is to occur, domestic law must establish procedures for the exercise of lawful power to arrest or detain.

Clearly the exercise of power in this domain, deprivation of liberty, as in all other domains, must be lawful. However in every state, to a greater or lesser extent, the power to arrest and detain, and other powers, are abused by police for a variety of reasons. These include ignorance of law and procedures, inadequacy of technical policing ability, and "necessity". This last reason is in fact a justification for violating human rights in the interests of some perceived higher public good such as securing the conviction of a suspect in a particular case or maintaining social order generally. All of these reasons are destructive of human rights and of effective policing, but the last one is particularly so.

Basic police functions include enforcing the law, upholding the rule of law, and maintaining social order. When police break the law, for whatever reason, they subvert their own functions. They undermine the rule of law, and they commit a grave breach of social order – they create the disorder of criminal abuse of power. Considered in these terms, effective policing must include the notions of lawfulness and respect for human rights. Policing cannot be judged according to such limited criteria as the prevention and detection of a number of crimes, or the restoration of social order when social unrest has occurred on particular occasions. In democratic states governed by the rule of law the technical aspects of policing cannot be considered separately from the normative aspects, they are inextricably bound together.

This is the principal strand to the argument that the relationship between human rights and policing is symbiotic. It is also the main justification for stating that abuse of power by the police is destructive of effective policing, but there are other justifications. In the long term, human rights abuse by the police leads to loss of confidence by the community in the police and, hence, to diminishing support and cooperation. Furthermore, systematic or large-scale abuse of human rights seriously impedes the development of technical policing skills necessary for effective policing.

### *1.2. Respect for and protection of human rights*

Two other aspects of the relationship between human rights and policing need to be considered briefly. The first is self-evident but needs to be expressed – human rights are to be respected in the

processes of policing. Human rights standards stipulate **the ways in which** policing is to be carried out. The second is rarely expressed but needs to be more so. The protection of human rights is a **function** of policing. It is so closely bound up with the other, more generally expressed, functions of policing that it deserves to be expressed as a function in its own right.

Police perform this function in a variety of ways. For example, the protection and delivery of various categories of rights – civil, political, economic, social and cultural – are dependent upon sophisticated forms of government and of social organisation. For these to function there needs to be a certain level of peace and order in society, and one of the purposes of policing is to maintain that peace and order. In this sense policing contributes to the protection and delivery of every type of right – including rights not normally associated with policing. When the different rights are considered individually it can be seen that the police protect these in very specific ways. For example, treaty provisions protecting the right to life[4] require that the right to life should be protected by law. One of the ways in which states meet this obligation is to outlaw certain forms of killing. It is a function of police to prevent and detect crimes of homicide, and in this way police contribute to the protection of the right to life.

From this account of the relationship between human rights and policing it follows that training in the normative aspects of police work is of paramount importance, and that effective, lawful and humane policing is dependent upon this type of training as well as on training in technical aspects of policing. This point is revisited when training in relation to the treatment of detainees and the technical policing skill of interrogating suspects of crime are considered.

Before this, however, it will be useful to review the work of some organisations which are involved in disseminating international human rights and humanitarian standards on policing, and to attempt to gauge the extent and nature of national initiatives in this area.

---

[4] The right to life is protected, for example, under Article 2 of the European Convention on Human Rights, and Article 6 of the International Covenant on Civil and Political Rights.

## 2. Human rights and policing – Training initiatives

### *2.1. International Initiatives*

Earlier efforts in this field appear to have involved displacing and disorienting groups of high-powered international lawyers by flying them halfway around the globe and asking them to lecture groups of bemused police officials on the finer points of *jus cogens*, the travaux préparatoires for the Standard Minimum Rules for the Administration of Juvenile Justice, and the arcane workings of the Human Rights Commission.

This, somewhat overstated, parody of what actually did happen is concocted to make the point that, whilst training in technical policing cannot and should not be attempted in a human rights seminar or workshop, the content of such programmes should be related to day-to-day policing concerns.

The United Nations Centre for Human Rights, located at the Palais des Nations in Geneva, was one of the pioneers in this field, and the dedicated and industrious officials of the Centre responsible for organising human rights programmes for police, very quickly developed a set of nine working principles on which such programmes should be based.[5] The principles are designed to ensure that human rights programmes for police are presented by resource persons who have expertise in policing; are relevant to the needs of each specific group of participants; contribute to the spread of good policing

---

[5] These principles are set out in a background paper prepared for a Council of Europe Seminar on Human Rights and the Police held in Strasbourg between 6-8 December 1995, and in Chapter 1 of the Centre for Human Rights publication **Human Rights and Law Enforcement** – A Manual on Human Rights Training for Police (Professional Training Series No. 5). The Principles require, for example:

- collegial presentations (presentations on programmes to be made by resource persons expert in policing and training police);
- the training of trainers (so that the impact of programmes is multiplied through a commitment of trainers to conduct training programmes based on the one they attended);
- practical approach (providing practical information and examples of good practice in relation to each aspect of police work considered);
- teaching to sensitize (by extending the goals of programmes beyond the imparting of standards and the dissemination of good practice to include exercises designed to sensitize participants to their own potential to violate standards).

practice; and that there is maximum dissemination of human rights standards within the client agency.

The United Nations Centre for Human Rights draws from a continuously developing list of resource persons to conduct its programmes in a wide variety of countries. The principles have been successfully applied to training programmes for police officials engaged in United Nations peace-keeping operations.

The Crime Prevention and Criminal Justice Branch of the United Nations, which is located in Vienna, has also organised training programmes for police officials in a number of countries. These combine a substantial practical element with human rights standards, and standards of particular relevance to the activities of the Branch.[6]

The presentation of practically based programmes, which at the same time are not attempts to provide technical training for police, is one of the objectives of the International Committee of the Red Cross (ICRC) in its dissemination activities in this particular field. The ICRC is best known for its primary activities of providing protection and assistance to military and civilian victims of armed conflicts, and for its dissemination of international humanitarian law – particularly through training programmes for members of armed forces.[7]

The increasing number of internal conflicts; the difficulty on occasions of distinguishing between armed conflicts (in which military are generally deployed), and conflicts falling below that threshold (in which police or paramilitary police agencies are deployed); and the fact that police operations to control internal violence increasingly give rise to humanitarian problems comparable to those arising during armed conflicts are all factors which led the ICRC to develop a dissemination programme for police.

Its programmes, which are flexible and adaptable to the needs of specific audiences, focus on the rules of international humanitarian law (and particularly those of relevance to police officials), as well as on appropriate human rights standards. Teaching material,

---

[6] For example, as set out in the **Compendium of United Nations Norms in Crime Prevention and Criminal Justice**, United Nations, New York, 1992. (United Nations Publication Sales No. E.92.1V.1 ISBN 92-1-130148-3).

[7] The mandate for the activities of the International Committee of the Red Cross is based on the four Geneva Conventions of 1949 and the Additional Protocols of 1977, as well as its own Statute.

including role play exercises, has been produced for these programmes, and, whilst the programmes and material have proved relevant and acceptable to civil police agencies not for the time being confronted with any form of conflict, they are particularly relevant to the needs of para-military police agencies and to civil police agencies responding to internal tension or conflict.

Another institution with expertise in international human rights law and international humanitarian law is the Raoul Wallenberg Institute of Human Rights and Humanitarian Law based at the University of Lund in Sweden. The Raoul Wallenberg Institute offers programmes based on these disciplines to politicians, government officials, the judiciary, lawyers, the military and police in many countries. It is particularly active in Africa. The Institute draws on the talents of its own staff and on external resource persons with the necessary expertise. Its programmes are practically based and, because of its administrative efficiency and the adaptability of its staff and resource persons, the Institute can respond at short notice to meet requests for a wide variety of training and educational needs.

In addition to the programmes it runs abroad, the Institute holds seminars for a variety of officials, including police officials, at its premises in Lund. It also organises study visits for such officials. Some participants in the seminars in Lund have already benefited from programmes offered by the Institute in their home countries and, by attending the Institute, are able to extend their knowledge and awareness of human rights and humanitarian standards.

The final, but not the least significant, player on the international scene referred to in this context is the Council of Europe which seeks to promote its statutory principles of parliamentary democracy, and respect for human rights and the rule of law. The Directorate of Human Rights of the Council of Europe has taken a number of initiatives in relation to police training which include: the publication of a handbook[8] "Human Rights and the Police" by John Alderson, a distinguished former chief officer of police; the holding of a meeting of directors and representatives of police academies and police training institutions in Strasbourg in 1990; the publication and

---

[8] J. Alderson, **Human rights and the police**. Council of Europe Press, Strasbourg, 1994.

distribution of a document[9] on "The Police and the European Convention on Human Rights" by Peter Duffy, a barrister; human rights training for Turkish police officials through study visits to Sweden, the United Kingdom, Belgium and Germany; human rights training for Albanian police officials and members of the Albanian Police Academy through seminars, workshops and study visits; and the holding of a Seminar on Human Rights and the Police in Strasbourg during December 1995.

Other Directorates of the Council of Europe have undertaken activities in this field, including a number of training courses for police organised by the Directorate of Legal Affairs for the countries of Eastern and Central Europe.

### *2.2. National Initiatives*

For the purposes of the Seminar it organised in Strasbourg in December 1995, the Directorate of Human Rights of the Council of Europe requested participants who were directors or representatives of police academies or police training institutions to provide details of human rights and training for police in their own countries. Representatives from all member States were invited together with representatives from Belarus, Croatia, Russia, "the former Yugoslav Republic of Macedonia" and the Ukraine.

Representatives from eleven member States[10] responded to this request and, of these, it appeared that human rights were dealt with as a separate and specific subject in training institutions of four states[11], and that instruction on international instruments expressing human rights was included on the curricula of training institutions of five states.[12] Other responses indicated that human rights were taught during lessons on other subjects such as "constitutional law" and "police theory".

Clearly this is inadequate data from which to draw very firm conclusions because of the small number of states responding and

---

[9] Peter Duffy, **The Police and the European Convention on Human Rights**. Council of Europe Human Rights Information Centre, Strasbourg, 1995. (DH-AW-PO (95) 23).

[10] Denmark, Finland, France, Hungary, Iceland, Norway, Poland, Romania, San Marino, Sweden and Turkey.

[11] Denmark, Norway, Poland and Turkey.

[12] Denmark, Finland, Poland, Romania and Turkey.

because the amount of detail provided varied considerably. Furthermore, it is not possible to evaluate the extent or quality of the teaching provided from the responses, and it may be that an institution incorporating the teaching of human rights with other lessons is dealing with the topic adequately.

However, it is possible to form some idea of the state of human rights teaching or training from these responses, and the author of this paper is able to supplement this information with his impressions, having conducted seminars and workshops on human rights for police in many states in Europe, Africa, the Middle East, Central Asia and Asia.

The responses of participants as described above and the author's impressions from his teaching experiences enable him to conclude, with a fair degree of certainty, that most national training programmes do not address human rights as a separate and significant topic, and that the international dimension of human rights protection is not covered to any great extent. Furthermore, the author concludes from his own involvement in teaching human rights to police that there is fairly widespread resistance to the notion of human rights among police, and that many police officials do feel that they are entitled to violate, or justified in violating, human rights in the course of their duties.

The author also concludes that, whilst the extent to which human rights are respected or protected in the numerous countries in which he has conducted programmes varies enormously, the attitudes of police officials to human rights, and expressions of the perceived justification for violating them, do not vary to the same degree.

These conclusions emphasise the importance of human rights training for police officials; the importance of proper command, management and supervision of police officials; and the importance of ensuring the legal accountability of individual police officials for their own acts or omissions. The conclusions also suggest that, with few exceptions, human rights training for police officials is inadequate, and this is inimical to enjoyment of human rights and to effective policing.

## 3. Concomitants – The normative and technical aspects of policing

The effective performance of the profession and craft of policing depends on awareness of, and compliance with, the rules according to which it is to be practised, and the application of technical skills.

Whilst many police officials emphasise, and take a pride in, the practical and pragmatic approach they bring to their duties, and their ability to apply "common sense" to situations they face, all of the technical skills they require have sound theoretical bases and they ignore these at their peril.

These essential links between the normative and the technical aspects of policing, and between the theory and practice of policing, are particularly apparent in the area of policing taken to illustrate these points – that concerning the treatment of detainees and, more specifically, the interrogation of detainees suspected of crime. The power and ability to deprive a person of his or her liberty and to question that person is an essential element of the investigative process, especially in relation to the investigation of serious crime.

### *3.1. International standards on the protection of detainees*

In essence the international standards on the treatment of detainees express the total and absolute prohibition on torture and other cruel, inhuman or degrading treatment or punishment[13], and they express the right to humane treatment as a detainee.[14] They also set out a number of other rights and safeguards upon which these are contingent, for example rights designed to prevent incommunicado detention and to ensure basic standards of hygiene and comfort for detainees.[15]

Torture is defined in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment on Punishment[16], and part of that definition reads:

"The term 'torture' means any act by which severe pain or

---

[13] For example: Universal Declaration on Human Rights (Article 5); International Covenant on Civil and Political Rights (Article 7); European Convention on Human Rights (Article 3).

[14] For example: International Covenant on Civil and Political Rights (Article 10); Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (Principle 1).

[15] For example: European Convention on Human Rights (Article 5.3 and 5.4); International Covenant on Civil and Political Rights (Article 9.3); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles 12, 16, 17 and 19); Standard Minimum Rules for the Treatment of Prisoners (Rules 9-20).

[16] Adopted and opened for signature, ratification and accession by General Assembly, resolution 39/46 of 10 December 1984.

suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession."

The definition also stipulates that torture is an act committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". As far as police officials are concerned, the prohibition on torture under international law is expressed in the following way in Article 5 of the United Nations Code of Conduct for Law Enforcement Officials[17]:

"No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."

In spite of the fact that torture is universally condemned and outlawed, the United Nations Special Rapporteur on torture, in his report to the 43rd Session of the United Nations Commission on Human Rights, stated that torture remains a "widespread phenomenon" and that "no society, whatever its political system, is totally immune".[18] Furthermore, since the Special Rapporteur on torture was first appointed in 1985, most of his annual reports to the Human Rights Commission stress the importance of training police in the prohibition on torture and the humane treatment of detainees.

Recommendations of this nature echo provisions of the Convention against torture (referred to above), and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[19] which require training of police officials to take full account of the prohibition against torture.[20] Both of these instruments also require states to keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of detainees.[21]

---

[17] Adopted by United Nations General Assembly, resolution 34/169 of 17 December 1975.

[18] Reference E/CN. 4/1987/13.

[19] Adopted by General Assembly, resolution 3452 (XXX) of 9 December 1975.

[20] See Article 10 of the Convention and Article 5 of the Declaration.

[21] See Article 11 of the Convention and Article 6 of the Declaration.

In his report dated 18 December 1989[22] to the Commission, the Special Rapporteur called for training of police officials to incorporate teaching in "how to interrogate in a manner which recognises and respects the detainees' rights and dignity". This recommendation is important because, whilst his other recommendations could be read as calls for training simply in the standards on the treatment of detainees, this is an explicit call for training in a technical policing skill. The question then arises as to what should form the basis of such training.

### *3.2. International standards on interrogation of detainees suspected of crime*

One source could be found in a recommendation of the Committee for the Prevention of Torture (established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). In seeking to compile standards, the Committee recommended[23] that legislative provisions could be usefully supplemented by a code of conduct for interrogations which would cover such issues as the systematic informing of detainees of the details of officials conducting the interrogation; rest periods between, and breaks during, interrogation; places where interrogation may take place; and the questioning of vulnerable suspects.

Whilst provisions of this nature express standards of behaviour, and do not address the technical, or skills based, aspects of interrogation, the proposal to add to the, all too few, standards on technical policing matters is noteworthy. Such standards can provide a sound guide for action and a solid basis for training.

The Convention against torture, and the Declaration, require states to keep interrogation methods and practices under review, but provide no benchmark for such reviews – apart from the fact that torture and ill-treatment should not form part of those methods and practices. Some standards on the actual practice of interrogation are, however, set out in the Body of Principles for the Protection of

---

[22] Reference E/CN. 4/1990/17.

[23] Recommendation referred to in a paper by Professor Jim Murdoch, **The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its Relevance to Police**. Presented at Council of Europe Seminar on Human Rights and Police at Strasbourg, December 1995 (DH-AW-PO (95) 3).

All Persons under Any Form of Detention or Imprisonment[24], and this is an example of how an instrument expressing international human rights standards can also express standards on a technical policing matter.

Another set of international principles doing this, and doing so more completely, are the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[25] The fact that international instruments, essentially setting norms of behaviour and conduct, should also embody standards of a practical or technical nature supports the argument that the normative and technical aspects of policing are inseparable.

The standards on interrogation in the Body of Principles are brief and succinct, and they are informed by an awareness of some of the psychological processes involved during interrogation, and by insights into what amounts to "bad practice" in police interrogations of persons suspected of crime. Principle 21 prohibits taking "undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person". It also prohibits subjecting a detained person, while being interrogated, "to violence, threats or methods of interrogation which impair his capacity of decision or judgement".

These provisions represent a tentative step into a technical, skills-based area of policing. It is a tentative step because it does not venture very far into that area, and because it expresses prohibitions rather than positive examples of good practice.

## Concluding remarks

International standards expressing norms of good behaviour for policing are well established and are probably complete. There is now a pressing need for the formulation of international standards which address key areas of policing and which are informed not only by existing normative standards, but also by sound theory and existing best practice on the technical aspects of those key areas. The absence

---

[24] Adopted by United Nations General Assembly, resolution 43/173 of 9 December 1988.

[25] Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

of standards combining the normative and the technical is one reason why the plethora of normative standards continues to be breached.

The interrogation of persons suspected of crime is an example of one such key area. The results of research into the psychological processes involved in interrogation and confessions provide the necessary theoretical basis[26], and examples of good practice in lawful and humane interrogation methods can be found in the publications of various people who have developed and who teach those methods.[27]

Especially in the absence of standards which expressly and convincingly combine the normative and the technical, police training programmes need to seriously and systematically address the requirements for good behaviour in policing. Good behaviour in policing means police respecting human rights without reservation, and acknowledging and embracing their function to protect human rights. This, in turn, means that human rights must be treated as a separate and significant topic in police training programmes, and that all aspects of technical training must be fully imbued with the requirement to respect and protect human rights.

One way of achieving this is to encourage more extensive co-operation between police academies and the various organisations, referred to above, which already offer human rights training programmes for police. Teaching the international dimension to human rights protection is an indispensable element of human rights education. Good behaviour is an indispensable element of effective policing.

---

**Ralph Crawshaw** *is extensively involved in the field of human rights and law enforcement, working with the UN Centre for Human Rights, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, the International Committee of the Red Cross and the Council of Europe.*

---

[26] See for example Gisli Gudjonsson, The Psychology of Confessions, Interrogation and Testimony. Wiley, Chichester, 1992.

[27] See for example E. Shepherd (ed.), Aspects of Police Interviewing. Issues in Criminal and Legal Psychology, No. 18. Leicester: British Psychological Society. Teaching of "investigative interviewing techniques" (psychologically based interviewing techniques for questioning victims of crime and witnesses to crime, as well as suspects of crime) is also undertaken, for example, by Aspley Limited of St Albans, Hertfordshire in the United Kingdom.

# LES DROITS DE L'HOMME: L'ARME VICTORIEUSE CONTRE LA CRIMINALITÉ ORGANISÉE

MARIO LANA ET VITO MAZZARELLI

**1.** Le pacte social devient lettre morte quand l'Etat n'est pas capable de garantir le droit à la vie, à la liberté et à la sécurité. **Rousseau** écrivait "... que si mourrait dans l'Etat un seul citoyen que l'on aurait pu sauver, si un seul était gardé à tort en prison, et si un seul procès était perdu pour une injustice évidente, on ne comprendait plus quel droit ni quel intérêt peut maintenir le peuple dans l'union sociale, à moins qu'il n'y soit retenu par la seule force qui fait la dissolution de l'Etat civil."[1]

**2.** Entre la criminalité organisée et l'exigence du respect des droits de l'homme, il ne peut y avoir ni armistice ni paix.

La criminalité organisée ignore les droits de l'homme; pire encore, elle en est la négation. Là où elle triomphe meurt la société démocratique qui est le fondement des droits humains inviolables.

Mais là où les droits de l'homme sont affirmés et protégés, la criminalité recule.

Le thème du séminaire nous oblige donc à orienter notre réflexion dans trois directions:

a) la première: indiquer les moyens de lutte de la démocratie pour battre la grande criminalité;
b) la seconde: réaffirmer le respect des droits de l'homme, entre autres vis-à-vis de sujets accusés de faire partie de la grande criminalité ou condamnés pour ce même motif;

---

[1] La citation est extraite de l'Introduction de Derathe à "Il Contratto sociale" de J. J. Rousseau (Einaudi Editore).

c) la troisième: la mise en oeuvre des moyens de défense et de lutte ne peut pas et ne doit pas influencer négativement la garantie et la protection des droits de l'homme reconnus à tout individu en tant que tel.

Naturellement, les indications qui suivent ne sont données qu'à titre d'exemple. Une étude globale exhaustive est laissée aux spécialistes, aux hommes politiques et à la société dans son ensemble.

## 3. Premier point – La lutte contre la criminalité organisée

*3.1.* Nul n'ignore ce qu'est la criminalité organisée. Nous savons tout aussi bien par quels instruments elle a opéré et continue à opérer. De quels moyens technologiques elle peut disposer dans un proche avenir, pour agir d'un bout à l'autre de la planète, en temps réel, c'est chose aisée à prévoir.

Tout le monde admet que la criminalité organisée n'est pas seulement la manifestation d'une pathologie grave mais étrangère au système. C'est un phénomène qui, dans certaines de ses parties, est devenu un élément constitutif de la société, de l'économie et de la politique, grâce à la légitimation que les organisations criminelles sont parvenues à acquérir dans la société civile, fortes des immenses ressources financières dont elles disposent.[2]

Il ne suffit donc pas de prévoir dans la loi le délit de meurtre, d'association mafieuse, de séquestration de personne, d'extorsion, de blanchiment d'argent (art. 575, art. 416 bis, 630, 629, 648 bis et 648 ter du code pénal italien) pour que l'on puisse déclarer qu'est protégé et assuré "le droit de quiconque à la vie, à la liberté et à la sécurité" (art. 2 et 5 de la convention européenne pour la sauvegarde des droits de l'homme et des libertés fondamentales, du 4 novembre 1950).

La démocratie ne peut se condamner au suicide seulement parce que l'Etat manque de courage. Et la communauté internationale ne peut rester indifférente. Il serait en effet trop simpliste de soutenir que le droit à la vie, à la liberté et à la sécurité, parce qu'il est affirmé vis-à-vis de l'Etat et comme limite à son action, n'implique

---

[2] L. Violante. Cass. Pen. fasc. II/1990 page 2035 rapport commission parlementaire anti-mafia sur "Le nouveau procès criminel et la criminalité mafieuse".

pas la responsabilité de l'Etat pour tout crime commis sur son territoire. Ce raisonnement ne tient pas compte du fait que la criminalité organisée mène à la dictature et, donc, au suicide de la démocratie. En effet, la société, face à l'expansion des manifestations criminelles, ou bien invoque l'homme fort, ou bien se réfugie dans les bras du plus fort, c'est-à-dire de la criminalité elle-même qui, légitimée au plan économique, impose son homme.

C'est encore Rousseau qui écrivait que "le fort est plus fort parce qu'il transforme sa force en droit et l'obéissance en devoir".

*3.2.* Il est donc nécessaire et urgent que, justement pour protéger des droits inviolables, soient définis des instruments efficaces de lutte contre la criminalité.

Ces instruments doivent constituer le contenu d'autant d'obligations imposées aux Etats.

On peut les illustrer par les exemples suivants:

a) contrôle approprié du territoire. En Sicile, par exemple, on a envoyé les militaires et personne ne s'est plaint d'une violation des droits de liberté. Au contraire, la présence des militaires, discrète, qui n'a pas envahi les activités privées, a donné un sentiment de sécurité aux habitants; elle a aussi produit des résultats au plan de la prévention et, dans certains cas, de la répression;
b) surveillance des mineurs et du respect de la scolarisation obligatoire. L'école est un facteur essentiel de la démocratie;

Il faut empêcher que les adolescents préfèrent l'école du crime à celle des enseignants;

c) élimination des zones de marginalisation sociale, du chômage, analyse et élimination des causes qui empêchent l'exercice effectif du droit au travail;
d) vaste circulation de la culture des raisons de la démocratie et de la légalité;
e) surveillance de toutes les sources d'achat et d'investissement. On peut comprendre qu'un tel instrument pèse sur la liberté du trafic économique. Pourtant, il faut bien inventer un système. Dans le repérage des moyens de lutte, dans ce domaine, il faut avoir bien présent à l'esprit un principe: la liberté economique ne peut être conçue comme liberté de s'enrichir de façon illégale ou au détriment de la société;
f) contrôle des critères et des modes d'affectation des dépenses

publiques. Transparence totale de tous les actes qui comportent une dépense de l'Etat et autres établissements publics. Il est nécessaire que les citoyens puissent savoir pourquoi est prévue une dépense donnée, quels en sont les critères d'affectation, comment, dans quels délais et au bénéfice de qui.

Une fois définis, entre autres, ces instruments de lutte, l'Etat doit être considéré comme responsable s'il ne donne pas la preuve qu'il s'est employé activement à garantir la vie, la liberté et la sécurité des citoyens.

## 4. Deuxième point – Les droits humains et les membres des associations criminelles

A ceux qui sont accusés ou condamnés pour des délits ressortissant à la criminalité organisée, on ne peut certes pas nier les droits qui, reconnus à tout individu en tant que tel, sont rattachés à la position d'accusé ou de condamné.

Il en est ainsi du droit de l'accusé à un procès équitable et juste et à un jugement dans des délais raisonnablement rapides, rendu par un juge préconstitué selon la loi, indépendant et impartial. Il en est ainsi du droit du suspect ou de l'accusé et/ou du condamné à ne pas être soumis à des tortures ou à des peines et traitements cruels, inhumains ou dégradants. Il en est ainsi, enfin, du droit du condamné d'expier sa peine selon les standards minimaux prévus par les instruments internationaux en matière de traitement des détenus et aux fins de rééducation de la peine elle-même (art. 27 de la Constitution italienne).

Lorsqu'il s'agit de juger, le juge doit le faire selon les preuves qui lui sont offertes: il n'y a aucune alternative à ce principe. Et il n'y a pas d'alternative à l'interdiction de la torture qui, on le sait, ne peut jamais se justifier, pas même dans les situations d'urgence.

Certes, dans les procès pour crimes liés à des activités d'organisations criminelles, le mode de formation de la preuve peut être discipliné autrement que dans les procès pour délits de droit commun. Des dérogations dans les strictes limites rendues nécessaires par la situation concrète sont possibles en cas de "danger public qui menace la vie de la nation" (art. 15 Convention Européenne). Mais un principe ne devrait jamais être altéré ou lésé: au moment du jugement, les moyens de preuve doivent être entre les mains des parties; et ceux qui sont disposés par le juge, en cas d'absolue nécessité, doivent eux aussi pouvoir faire l'objet d'une

vérification lors des débats avec le contradictoire le plus large et le plus libre des parties.

Ces principes ne sont pas respectés par les normes qui, justement dans les procès contre la criminalité organisée, permettent le témoignage des personnes qui collaborent avec la justice au moyen de vidéo-conférences (art. 147 bis normes d'application du code de procédure pénale).

Et l'on ne peut pas non plus dire que soit conforme au principe du droit à la preuve la norme du code de procédure pénale italien qui permet de produire comme preuve les copies de déclarations faites durant d'autres débats sans que le témoin soit entendu dans le procès en cours (art. 190 bis et 238.5 code de procédure pénale). On autorise donc l'utilisation de déclarations rendues dans d'autres procès et on nie, en substance, le droit à la contre-preuve et au contre-examen dans le jugement en cours. Une atteinte aussi grave au droit à la preuve (art. 6 d., Convention Européenne et art. 14 n° 3 du pacte international sur les droits civils et politiques) n'est pas justifiable par la nécessité d'éviter, dans les procès de mafia, le risque de dispersion ou d'altération des preuves.

Pour la phase des enquêtes, il faut considérer que la nature même de l'activité des forces de police et du ministère public peut donner lieu à des déviations et à des abus. Dans ce domaine, justement, le risque existe aussi que la nécessité de combattre la criminalité organisée ou de faire face à des urgences réelles ou supposées n'amènent à accroître les pouvoirs de la police, avec les dangers qui en découlent d'une violence d'Etat.

En Italie, par exemple, la faculté a été prévue pour certains organes (personnel et agents DIA) d'avoir des entretiens avec des détenus et des personnes internées afin d'acquérir des informations utiles pour la prévention et la répression des délits de criminalité organisée (art. 18 bis loi n° 354 du 26 juillet 1975, règlement pénitentiaire introduit par l'art. 16, 3e alinéa, de l'ordonnance n° 306 du 8 juin 1992). C'est une faculté qui se prête à des abus. Je ne dis pas qu'elle doit être purement et simplement supprimée. Mais il est évident qu'une telle faculté n'est pas conforme à l'esprit de la convention ONU contre la torture. Afin d'éviter jusqu'au soupçon de tortures ou d'aveux extorqués par des pressions, même seulement psychologiques, il faut que cette faculté soit, d'une façon ou d'une autre, réglementée. Je pense, par exemple, à la nécessité de donner le droit au détenu ou à l'interné qui fait des confidences, immédiatement après l'entretien, d'être visité par un médecin et par un psychologue.

Dans l'état actuel de notre code de procédure pénale, il peut se

faire, en outre, que certains actes acquis lors d'enquêtes de la police judiciaire ou du ministère public soient fournis au juge des débats sans que soit donnée l'opportunité d'une vérification au cours des débats. C'est le cas, par exemple et entre autres, pour les procès-verbaux des actes acquis à l'etranger à la suite d'une commission rogatoire (art. 431 du code de procédure pénale), même du ministère public.

## 5. Troisième point – Les droits de l'homme, uniques instruments efficaces dans la lutte contre la criminalité

Comme on le voit, la nécessité d'une lutte efficace contre la criminalité organisée a infligé quelques blessures profondes aux droits de l'homme, surtout dans le cadre des procès.

Mais, à notre avis, il n'est pas du tout démontré que la défaite de la criminalité exige une limitation de la protection des droits humains.

La criminalité organisée prospère, comme l'histoire italienne, mais aussi celle d'autres pays, nous l'enseignent, dans les zones où l'Etat est absent. Ce n'est que là où l'absence de l'Etat provoque une injustice sociale et la corruption et la complicité des agents de l'Etat que la criminalité organisée parvient à gagner du terrain, à construire des réseaux de complicité, de chantages, d'adhésions et à s'approprier des richesses qu'elle réussit ensuite à introduire sur le marché qui accepte tout et le transforme en biens légitimes, même ce qui provient des crimes les plus atroces. Les exemples sont sous les yeux de tous.

Il faudrait alors s'entendre sur la signification de droits humains et de démocratie.

Pour ceux qui estiment que la démocratie n'est pas l'élection du chef par le peuple, mais est la participation effective de la collectivité à la construction de la justice sociale, la perspective sur l'arme à utiliser pour vaincre la criminalité ne change pas, et ce n'est pas une arme qui amène forcément à limiter les droits de l'homme. Au contraire, dans une véritable démocratie, ces droits sont affirmés, garantis, protégés, préservés, en luttant contre les inégalités, souvent inhumaines et honteuses; en prévenant et en combattant tous les types de corruption; en donnant à chacun les moyens d'exprimer son individualité dans le concert collectif; en éduquant la collectivité à considérer les besoins et à trouver les moyens de les satisfaire.

Dans une société engagée dans ces efforts, la criminalité organisée aurait une place pratiquement nulle et, quoi qu'il en soit, une place

bien inférieure à celle que les sociétés démocratiques lui ont permis d'occuper.

La fonction de l'Etat, ou la fonction de la collectivité, de quelque façon qu'elle veuille s'organiser, est en effet de garantir et de protéger les droits fondamentaux, y compris les droits sociaux. Et cette tension constitue le contenu essentiel du devoir être de l'Etat et/ou de la collectivité.

Pour combattre un ennemi, il faut d'abord se connaître soi-même. La démocratie ne peut prétendre combattre la criminalité si elle n'est pas et ne se reconnaît pas en soi-même. Faisons donc en sorte qu'elle soit étendue à tous les niveaux et que son esprit se reconnaisse dans les yeux du plus puissant comme du plus humble de nos concitoyens. Le crime et le délit ne seront certes pas abolis. Mais la criminalité organisée accusera une défaite certaine dans au moins deux de ses positions stratégiques: celle de laquelle elle voudrait imposer ses lois à la société et celle de laquelle elle voudrait frapper au coeur la démocratie. Ainsi il n'y aura nul besoin de lois d'urgence et de compression des droits de la défense dans les procès.

Et même si nous nous trouvions dans une situation d'urgence, les mesures restrictives adoptées ou à adopter seraient celles d'une démocratie attentive envers elle-même, flexible et prête à combler toutes les lacunes congénitales de la démocratie. Mais enfin, la démocratie ne devrait pas pouvoir cacher sous le terme d'urgence l'incapacité et la paresse de ceux qui se sont offerts en spectacle à la criminalité organisée.

---

**Mario Lana** *is practising lawyer and President of the* Unione Forense per la tutela dei diritti dell'uomo. *He is also editor of the journal* Diritti dell'Uomo – Cronache e Battaglie.

**Vito Mazzarelli** *is practising lawyer and member of the executive board of the* Unione Forense per la tutela dei diritti dell'uomo *and of the journal* Diritti dell'Uomo – Cronache e Battaglie.

# PREVENTION OF DELINQUENCY AND SOCIAL DEVELOPMENT IN FRANCE

MARIE PIERRE DE LIEGE

A look back through history shows that periods known for insecurity and higher crime invariably saw profound economic or social change, such as industrialisation, rapid urbanisation, economic crisis, political transformations and even war. This simple fact is sufficient to demonstrate that, statistically at any rate, crime as a phenomenon is not unrelated to other forms of disorder or difficulty.

Whether in the United States and western Europe since the 1970s or in central and eastern Europe more recently, the question of "insecurity" has gone hand in hand with economic, social and political upheaval, becoming a matter of priority for many States and decision-makers. All seek better strategies to contend with this phenomenon, but as yet, no one seems to have found the "panacea".

Responses to crime have varied quite widely from one period to another and from one country to another, ranging from a failure to recognise difficulties and an abdication of responsibility on the part of the public authorities to policies focusing exclusively on punishment, involving large-scale reliance on prison and harsh sentencing. Between these two extremes, there have been attempts to deal with the problem by emphasising social and economic development, equal opportunities and, hence, the reduction of social tensions, and by giving priority to crime prevention, the rehabilitation of offenders and the fight against recidivism.

In an effort to deal with crime, France itself has attempted a variety of methods, from which a number of lessons may be learned.

First, however, some comments are called for, as the subject of this paper is concerned with means other than strictly punitive ones to combat serious crime, namely preventive action in the fields of social policy and urban development.

One cannot discuss crime prevention and social development without first making a number of preliminary remarks. For a long

time, no distinction was drawn between the different types of crime; the response was the same: treatment through punishment or nothing. Then, the interest of the international community focused for a while on two types of crime originally perceived as being separate: on the one hand, there is serious crime, whether organised or not, which leads above all to a mobilisation of the state law-enforcement apparatus, at times requires the use of technology and considerable means to fight it and entails international cooperation, harmonised legislation and effective prosecution and punishment. When we talk about this form of crime, we are referring, more or less consciously, to a small number of crime "professionals". Italy was one of the pioneers in this area. It is a form of crime that is not very visible, but has a heavy impact: the cost of economic crime alone is estimated to amount to 90 % of the overall financial cost of all crime. On the other hand, there is everyday, ordinary, less serious crime, often known as urban crime. It is much less professional, but many more persons, especially young people, are occasionally or regularly involved. It is also much more visible (accounting for 80 % of crime statistics), and is closer to people, engendering a sense of insecurity. It is very directly linked to social development, people's difficulties, unemployment, consumer attitudes and the sense of a bleak future: in a word, it is intimately associated with the economic crisis.

In the light of this crisis, the usual penal responses often seem inadequate, belated and inflexible, and have a desocialising effect. Treating such crime means treating society and its ills. During the 1980s, France made this type of crime a priority and produced entirely new strategies involving in a local partnership all those active in the penal process and social development.

In an approach that is confined to these two phenomena, it may appear naive or in any case inappropriate to speak of "other means" of combating serious crime: "professional" criminals (large-scale traffickers or financial criminals who offer or accept bribes) often come from a sort of elite which knows no social problems (businessmen, elected officials, lawyers) and thus need no help with social reintegration.

The only reason why this question of "other responses" for combating serious crime makes any sense is because today there is a much better understanding of just how interrelated serious and petty crime are.

For serious crime, petty criminals often serve as a "breeding ground", one of the first places for recruitment being prison and/or a "support" that major criminals rely on for back-up work: preparing

the crime, being on the lookout, disposing of the merchandise, seeking customers. This essential cooperation is particularly visible in the area of drug trafficking and terrorism, but also in mafia organisations.

One element that is new in this regard is the increasingly frequent involvement, among petty criminals, of entire family or social groups, which at first tolerate and eventually support them. This phenomenon is associated with unemployment and the lack of other resources, in a context in which the fruits of crime constitute a real "substitute income".

These people regard serious crime as something positive, because:

1) it provides income;
2) it ensures a degree of local social order, because major criminals do not want to be disturbed in their activities by a too frequent presence of the police;
3) those concerned often do not notice the adverse consequences of such activity for society;
4) perpetrators of serious crime also often invest in difficult neighbourhoods in order to "launder" money there (shops, restaurants, etc.).

Hence the importance of combating economic stagnation, the social crisis and the growth of less serious crime by conducting a crime and recidivism prevention strategy and attempting to keep serious and petty crime at a distance from one another.

There are a number of ways in which this may be done, for example by keeping the two kinds of criminals apart in prison, ensuring that the public authorities control the drug supply and promoting social resistance to crime by furthering education, instilling values and providing people with other ways of achieving social and economic fulfilment so that they can see that, even if they are unemployed, they have the potential for things other than committing crime.

In the light of these two types of crime, there is a need to introduce new, coherent and complementary strategies and ways of organising social and penal machinery. The fight against organised crime calls for specialised police and courts which often need to be organised at a high level, and indeed internationally. The fight against ordinary crime on the other hand calls for local police and courts that are well integrated in the community and in close contact with all elected officials, public and social services, etc.

The police and courts must also be organised for some purposes on generalist lines, and for others (drug addiction, victims of violence, etc) on specialist lines.

We shall now briefly review the various aspects of penal policy in France and then consider in greater depth the strategy experimented with in recent years of crime prevention based on social development.

## 1. History of the Fight against Crime

### *1.1. Human rights as foundations of social and criminal policies*

The French Declaration of the Rights of Man and of the Citizen of 1789 recognises a number of fundamental principles, which have been reasserted since then in the various French constitutions and in the Universal Declaration of 1948. These include the principles of equality and fraternity and the principles of liberty and security.

Since then, successive political strategies have sought to give substance to these principles. On the basis of the principles of equality and fraternity (today one would tend to say "solidarity"), a tradition has been built of sound social policies guaranteed by State and community: state-funded compulsory education, a system of social security (to guarantee the right to health), pensions and family benefits, paid holidays, maternity and child welfare, housing benefits, guaranteed minimum wage, etc.

In the name of these principles, the community sets out to maintain a certain balance between citizens and to offset inequalities to the greatest extent possible, usually by providing assistance in the form of benefits for individual recipients. The principle of "safety", described in the 1789 Declaration as a "natural and inalienable right of man guaranteed by a public power instituted for the benefit of all", is the foundation of our system of law and criminal justice. At the same time it creates a permanent legal and political tension between safety (now usually referred to as "solidarity") and "liberty".

For a long time, the State responded in a completely different manner to these two categories of obligations, which were perceived as unrelated to each other.

Social policies served to "assist" people in danger of becoming alienated from society, while criminal policies were designed to ensure security, punishing those who undermined it by breaking the law; which is another way in which people became alienated.

For many years, combating crime was thus confined to prosecuting and punishing offenders. In actual fact, the choice of punishment was limited to fines, imprisonment – a kind of "banishment" from society – or capital punishment.

Immediately after the end of the second world war (under the impetus, it is said, of "decent people" who had experienced prison), France saw the first signs of change, the two hitherto separate strategies gradually becoming more and more interdependent. Criminologists and those in charge of criminal policy grew increasingly interested in possibilities for treating crime as a social problem.

### *1.2. Punishment and/or rehabilitation?*

The first step, and by no means the least important one, was taken by introducing the possibility for the children's judge to impose, instead of the usual forms of punishment, educational measures for juvenile offenders and for minors in danger. Later, laws were passed making provision for release under certain conditions (judicial supervision, release on parole and probation), which increasingly took on a socio-educational character, and alternatives to imprisonment (suspension of various licences, confiscation of property, community service). In the 70's and especially the 80's, emphasis was clearly placed on the need to give priority to the rehabilitation of offenders; this often implied a better socialisation, i.e. a return to employment, health care, housing ...

All these measures helped and assisted the offender, in exchange for varying degrees of supervision by the police, the courts or social workers. Aimed above all at preventing recidivism, some of these measures may, owing to their coercive nature ("either you comply with them or you'll return to prison"), violate certain freedoms to some extent (prohibition on frequenting certain places or keeping company with certain persons, obligation to submit to treatment, seek employment etc.). However, given that there are measures applied in accordance with judicial decisions, the restrictions that they place on the rights of the individual, in so far as they do not violate his or her fundamental rights (dignity, privacy, integrity, procedural rights, etc.), do not pose any particular problems.

### *1.3. From punishment of crime to its prevention*

The beginning of the 1980s saw a shift from a policy of treating the offender, of responding *a posteriori*, to one that focused on crime prevention as a social problem.

Crime soared throughout the 60's and above all the 70's, and with it came a perceptible heightened sense of insecurity (double the number of offences in 1975 as in 1967, five times as many armed

robberies, double the number of hold-ups). This development affected towns in particular, with a noticeable increase in the less serious offences (theft, damage to property, etc) that created a strong feeling of insecurity among the population, 67% of those questioned stated at the time that they felt less safe.

This situation came about and worsened against the backdrop of an incipient economic crisis. In this context, the usual means for fighting crime seemed insufficient: reliance on the police and the courts to respond to urban crime, whose perpetrators are difficult to identify (success rate in solving cases: about 20%), remained the exception. Procedures and penalties were often considered too cumbersome and ill-suited to "petty offenders", and imprisonment was denounced as encouraging recidivism (approximately 50%) and even the transition to serious crime.

Politicians could not remain indifferent to these developments, insecurity having become a major concern of the State. The government of the time, after attempting a strategy that focused on treating the phenomenon as a social problem rather than relying on punishment after the fact (Peyrefitte's report on violence)[1], yielded to the pressure of public opinion and eventually, just before the presidential election of 1981, passed a repressive "security and freedoms" act which was sharply criticised by the opposition. Several months later, the Left came to power and immediately was faced with an outbreak of urban violence, demanding novel responses to a number of problems. It had to deal with the problem of crime, not ignore it, cut short the exploitation of this phenomenon for political purposes and come up with new and more effective ways of combating crime, not through massive additional expenditure, given the already difficult economic situation, but through a redeployment of resources.

### *1.4. A pragmatic approach and partnership structures*

Aware that France's problems were not confined to a problem of urban crime but also reflected real difficulties of urban social development, the government of the time commissioned two reports. In May 1982, the Prime Minister entrusted 36 mayors of all political leanings with the task of carrying out, under the guidance of Mr Gilbert Bonnemaison, a study of problems relating to security and

---

[1] *Réponse à la violence; Documentation Française 1977.*

making proposals for contending with the growth in the less serious types of crime. More than 800 mayors were consulted, and the final report, unanimously approved in December 1982, proposed specific measures, based on the local experience of the members of the commission and their colleagues. The main thrust of the report[2] can be summarised as follows:

"Security must not be a matter for the police and the courts alone: it must be a matter for all. Criminal acts must not go unanswered".

Another mayor, Mr Dubedout, was asked to analyse the difficulties that certain urban neighbourhoods were encountering in all spheres and to make proposals for furthering their social and economic development. This report laid the foundations for an integrated, partnership-based urban social development policy.

At first, these two problems – crime prevention and urban social development – were addressed independently. Then, in 1988, the two national commissions were merged, to form the "Interministerial Delegation for Urban Affairs". This body received fresh impetus in 1991 with the setting up of a Ministry of Urban Affairs, which has continued in different forms under all subsequent governments, including the present one.

Today, "crime prevention" is one of the priorities of the Ministry of Urban Affairs, alongside urban planning and social and economic development, this all being part of one and the same overall integrated approach, known as "urban policy".

## 2. The Fight against Crime since 1982

The recommendations of the Mayors' Commission on Security have profoundly marked French strategy in fighting crime, and urban crime in particular. The very title of the report was highly programmatic: "Combating crime: prevention, punishment, solidarity".

### *2.1. The diagnosis*

The most important elements of the diagnosis, drawn from the experience of all these mayors and forming the basis for the new strategy, are as follows:

- The traditional approach in terms of police and the courts is insufficient for controlling crime.

---

[2] *Face à la délinquance, prévention, repression, solidarité – Commission des maires sur la sécurité – Documentation française 1983.*

- The factors involved in crime are very similar to those that lead to suicide, alcoholism, drug addiction and mental illness, notably: grave changes in family life, worsening housing conditions, unemployment, the disappearance of informal or traditional methods of social control and the absence of leisure or cultural activities. Needless to say, these factors are exacerbated in a context marked by large-scale and long-term unemployment, expanding drug trade and the presence of more and more consumer goods which are inaccessible to a large part of the population.
- To be effective, a long-term policy for curbing crime must combat these factors and must be open-ended and able to adapt to local circumstances. Such a challenge must bring together all those involved at the local level: the police, the courts, social services, the departments responsible for public health, education, youth and sport, culture, housing etc., but also elected officials and other representatives of the population, such as trade unions, associations and voluntary organisations. Such a strategy must prevail over bureaucratic behaviour, facilitate the redeployment of resources and educate the public so as to overcome the stereotypes which media exploitation of crime helps to perpetuate.
- To fight crime effectively, punishment must be combined with an approach that tackles the phenomenon preventively as a social problem and the law must be applied in a clear-sighted unambiguous and consistent manner.
- Lastly, the report stressed the fact that to reduce the sense of insecurity, an effective strategy to combat crime must not focus solely on offenders and their treatment but must also contain a strong component of assistance to the victims of crimes.

### *2.2. Structures*

On the basis of this report, things began to change very quickly. In 1983, a National Crime Prevention Council *(Conseil National de Prévention de la délinquance)* (CNPD) was set up with its own (at first very modest) budget; it was composed of elected local officials from the various political parties, representatives of the voluntary sector, trade unions and employers' associations, and representatives of the various ministries. The purpose of the Council was to propose

to the public authorities appropriate measures for preventing crime and reducing its effects, offer advice and support local crime prevention initiatives.

A Departmental Council (*Conseil départemental*) was set up in each department; most importantly, a Municipal Crime Prevention Council (*Conseil communal de prévention de la délinquance*) (CCPD) was set up at municipal level wherever this appeared necessary, involving all the relevant local officials. One hundred CCPDs were established in 1983; today there are 820, and all major cities have introduced a crime prevention strategy. This highly flexible organisation makes it possible to define very precisely and coordinate the goals of local crime prevention policy and to carry out activities geared to needs, thanks to financial commitments and the pooling of staff and equipment by the various parties concerned.

Starting in 1985, a system of contracts ("contracts for action on crime prevention and security"), at first annual and later several times a year, enabled financial support for local bodies to be organised at national level (first CNPD, and then, as from 1988, the Interministerial Delegation for Urban Affairs).

These contracts, drawn up at local level in the framework of the CCPD and approved by all the local parties involved, describe the local situation, diagnose the most worrisome local forms of crime and their causes and give an account of the coordinated plan of action drawn up at local level to attempt to deal with this problem, as well as the resources that everyone plans to commit.

### *2.3. How the Municipal Council works*

The CCPD, a key element in urban crime, operates in the following manner: of the 820 CCPDs, it is generally estimated that one-third are actually inactive, one-third operate on a more or less formal basis and one-third can really bring about change. The Councils are chaired by the Mayor and comprise the Public Prosecutor, representatives of the police, the social services, schools and associations, and all those deemed to be capable to help in the fight against crime. The biggest Councils are headed by an official recruited by the municipality.

The largest cities (such as Marseille) may have a Council in each large neighbourhood. These Councils meet several times a year. Increasingly, the large conurbations also have intercommunity crime prevention councils.

In practice, their functions are to meet with various local officials,

pooling and exchanging information, often from a wide variety of sources, for a better qualitative understanding of local crime; to jointly analyse specific local difficulties relating to crime; to devise coordinated overall strategies involving all participants and to draw up a concerted plan of action in the form of "contracts for action on crime prevention and security".

Every year, the Councils and local officials receive an inter-ministerial circular (Prime Minister, police, the courts, social affairs) identifying national priorities for combating crime and formulating recommendations. All contracts contemplating initiatives consistent with these priorities may receive co-financing from the national level. In 1994, 150 million French francs were earmarked nationally for these initiatives, making it possible to finance some 600 contracts, or approximately 2000 initiatives. It is estimated that on average, for each franc allocated at national level, local officials contribute four. These contracts, concluded between the local authorities and the central government, enable local and national strategies and initiatives in the private and public sectors to be coordinated.

The contracts involve such initiatives as primary crime prevention initiatives: school support, combating illiteracy and school absenteeism, initiatives to promote citizenship, maternity and child welfare; social and occupational integration, assistance in seeking employment and housing, improved access to care and cultural and leisure activities of all kinds. Also there may be assistance to victims, mediation between the offender and the victims; prevention of recidivism, assistance to offenders serving non-custodial sentences, support upon release from prison, promotion of educational activities in prison; situational prevention, of a defensive nature, to reduce opportunities (for example, armour-plated doors, lighting, electronic surveillance, etc.); siting of police and judicial services in neighbourhoods in difficulty; initiatives to combat alcohol and drug abuse and specific crime prevention strategies at sensitive locations, such as shopping centres, schools, public transport, etc.

## 3. A provisional assessment

### *3.1. The situation in France*

Fifteen years later, despite many changes of government and a number of structural reforms, the spirit in which these

problems are addressed and the method for doing so have changed little.

All courts now receive assistance from associations and municipalities, which participate in the implementation of non-custodial measures and take preventive action to help persons in difficulty (community service, support upon conditional release, etc). Apart from one or two exceptions, all the departments in France have set up free arrangements for assisting victims, under which any victim of assault can receive moral support, information and help in carrying out administrative formalities. A national Institute for assistance to victims and for mediation has run this entire network since 1986, working continuously to improve legislation on the protection of victims.

Thus, notwithstanding an economic and social context that relegates more and more people to the margins of society and makes their reintegration increasingly difficult, and in spite of the spread of drugs and related offences, crime, although it has not been stopped, has at least been contained (decline between 1984 and 1988 and reasonable increase since then, followed by a recent renewed downturn).

But over time, problems have changed and with them the priorities, which today are predominantly: the fight against drug addiction and the growth of an underground economy; the prevention of juvenile delinquency (10-15 years of age), strengthening of the role of parents and closer supervision of serious cases (juvenile repeat offenders); the fight against crime at sensitive locations (transport, shops, schools) and the prevention of recidivism and assistance to victims.

Several years of partnership have in some cases led to considerable changes in attitudes and practices. Social workers, teachers and police officers now have greater confidence in each other and work together to prevent crime. The courts and the police have been reviewing their working methods (community policing, court branches in sensitive neighbourhoods, mediation etc.), and the jobs themselves have changed[3]. Experience has shown that there are no miracle or universal solutions, but that the evolution of crime requires untiring observation and an equally untiring ability to adapt professional

---

[3] *Prévention de la délinquance et modernisation de la justice*, Marie Pierre de Liege – *Revue des Sciences criminelles*, 4th quarter 1992 and 1st quarter 1993.

strategies and practices to local situations, taking their special nature into account.

Thus, alongside a criminal policy based on punishment, which still plays a very important role alongside rehabilitation goals, a socially-oriented crime prevention strategy or, more accurately, a strategy of crime prevention through social development, has also developed.

Attention should, however, be drawn to a number of difficulties encountered. Despite continuous encouragement to work together on a partnership basis, the various public services and government departments, at national and local level alike, have a strong tendency to return again and again to their own specific practices; partnership requires very strong and constantly reasserted commitment and mobilisation. This partnership has, in fact, had little success in involving local people themselves (parents, neighbours, etc); it is often confined to local associations specialising to varying degrees in particular areas of work. People working in the various fields must constantly ensure that they are not isolated and take care not to forget their responsibility towards the others. These crime prevention strategies are of a long-term nature. They call for determined and reliable teamwork. But how can enthusiasm and commitment be maintained in a world in which all too often the media define the "fashion", dictate priorities and are more interested in reporting than in analysing the policy issues involved? How can exhaustion and discouragement be avoided in a deteriorating economic situation? How can the simplistic call for harsh punishment, so quick to be heard whenever a serious crime is committed, be countered once and for all?

How can a sustained, large-scale effort be made to fight the less serious types of crime when authorities are more concerned with organised crime, gangs and terrorism? After all, serious crime often finds an ideal breeding ground among young people with no prospects who have been relegated to a marginal existence as a result of the recession.

Only a determined and tireless effort on all fronts involving everyone in the field, with the firm support of political leaders, can achieve these goals.

### *3.2. Assessing these strategies from the point of view of human rights*

"Soft" policies do not mean that it is no longer necessary to pose

the question of human rights, in particular social and economic rights. With regard to the prevention of recidivism, measures involving supervision and help with rehabilitation do not give rise to any problems. In France, measures to keep an offender out of prison or provide him with support on his release from prison are always taken under the supervision of a judge. The judge responsible for the execution of sentences monitors the social services in charge of implementing those measures.

The strategy of crime prevention "upstream", namely through social development, aims above all to restore social equilibrium, facilitate access to housing, education and employment and promote the right of all to family life. In so doing, it tends to strengthen human rights, especially as the method chosen is designed first and foremost to encourage collective prevention arrangements and the provision of services rather than assistance to the individual, which often entails a degree of control of a normative character which may be in violation of individual freedoms. Thus, for example, magistrates, prosecutors or juvenile judges who attend CCPD meetings naturally refuse to make any reference to particular cases, citing not only their independence but also the protection of the individual. Increasingly, however, in both France and English-speaking countries, an effort is being made to involve the community and instil a sense of responsibility for these problems of crime and even to bring the community to participate directly in crime prevention strategies. This is useful and may prove effective, because family and friends constitute a first bulwark against risks of criminal behaviour, but once institutionalised, it can also be dangerous from the point of view of human rights. It is a known fact that in certain contexts, social control by the community may be very constraining, normative and inhibitive, ie it may violate rights and freedoms. This means that the powers of elected and court officials must be limited and closely supervised so as to ensure full respect for human rights and freedoms.

### *3.3. Transposing this policy*

Can such a policy be of use to others? No experience or "solution" to a particular problem is directly transposable. What works in one case might, at most, serve as a basis for what might be tried elsewhere, after having been "adapted". Nevertheless, the practice developed in France and described above has two features which suggest that it might be useful and usable for others. It is not claimed

that this practice offers universally applicable solutions for crime: there are no "recipes", models that can deal with all problems of crime in all contexts. But by confining itself to suggesting a "methodology for action", it proposes a flexible and adaptable approach which appears to be appropriate in many situations. This method was conceived in France precisely in order to respect local diversity and to allow local protagonists to take over the strategies developed for fighting crime and make them their own. It functions both in big cities and in rural areas, in prosperous regions and poor.

This strategy is part of a "subsidiarity" system coordinating the various levels of action.

An inexpensive strategy, this approach is suitable in many contexts, regardless of the level of development, because it does not require the injection of considerable additional resources. It stresses the identification, stocktaking and possible redeployment of existing resources, ie the possibility of putting them to different uses. The point is not to have a large number of services and staff fighting crime, but to mobilise, logically and simultaneously all social forces around the same objectives and to make them work more "intelligently". These social forces exist in all contexts and at all levels of development, even though they are different and even though, depending on the particular case, they may be answerable to national governments, municipalities or the community itself. Everywhere there are structures or groups, some of them formal and some of them less so, whose objective and function are to ensure public order and respect for the law and to promote efforts in the areas of the family, youth, health care, housing, economic activities, leisure, etc.

These are the persons that must be singled out and encouraged to work together, once there is agreement on the assessment of the local situation. Energy and resources are squandered when efforts are not combined. Introducing more rational approaches improves efficiency, even without additional resources. In those areas in which fresh additional resources are available, they will be better used if they serve to stimulate, notably through agreements on objectives, the mobilisation of all and the development of new working methods aimed at preventing crime rather than financing the consequences of a purely punitive policy. Regardless of the context, a crime prevention policy is invariably less costly than a policy of large-scale incarceration, the cost of supervising and monitoring persons in open institutions being vastly inferior to the cost of keeping them in prison. Lastly, a properly conducted crime prevention policy

is also advantageous in that, in the medium or long term, it perceptively reduces the cost to society: a person in difficulty, treated on time and appropriately assisted, will cost society much less in the long run than a permanent social "outcast" who is incapable of being rehabilitated once released from prison. In the end, investing in development and rehabilitation is less costly than investing in coercion, even if, admittedly, it does require greater political courage.

This approach has aroused interest in the international community, the spirit and the method described above having been embodied in a resolution adopted by the United Nations General Assembly laying down guidelines for cooperation and technical assistance in the field of urban crime prevention (ECOSOC 1995/9). The basic principles here are local, coordinated diagnosis of crime problems); joint framing of integrated crime prevention plans taking into account all the areas concerned (education, health care, employment, housing, police, the courts) and support at national level for local initiatives and centralised policies through agreements on objectives.

In recent years, these principles have also inspired initiatives for curbing crime in Europe (United Kingdom, Netherlands, Spain), North America (Canada and several states in the US), Latin America, Australia and even Africa. In Europe and Latin America, in order to work towards urban security, "forums" of towns and cities have recently been set up, bringing together local authorities with severe crime problems who would like to share their experience and develop a common methodological approach. The French and Canadian governments have also created an "international Centre for crime prevention" (CIPC), an institute affiliated with the United Nations whose goal is to offer advice and training to all those wishing to adopt strategies of this type for combating urban crime.

In many countries, social development and greater social cohesion are essential to fighting urban crime effectively on a day-to-day basis so as to reduce the sense of insecurity in the population and improve the quality of life.

But these efforts are also very useful in connection with the fight against organised crime. In many areas (drugs, prostitution, various forms of trafficking and even terrorism), organised crime exploits the vulnerability of entire sectors of the population, where it finds potential petty criminals who will form the networks on which their pernicious activities are based. Fighting petty crime thus deprives

organised crime of this resource. Hence, all states must strive to wage this battle at both levels simultaneously, because just as serious crime encourages petty crime, the latter serves as a breeding ground for serious crime.

---

**Marie Pierre de Liege** *is judge and works for the Arab World Institute in Paris, responsible for cultural issues and integration of migrants. She was also responsible for the Crime Prevention and Protection of Victims department in the French Ministry of Justice.*

# THE SITUATIONAL ASPECTS OF CRIME PREVENTION: THE THEORETICAL AND PHILOSOPHICAL FOUNDATIONS

SHLOMO GIORA SHOHAM

The differences between the causal models of crime and the situational ones have already been highlighted by Sutherland who said,

"Scientific explanations of criminal behaviour may be stated either in terms of the processes which are operating at the moment of the occurrence of the crime or in terms of the processes operating in the earlier history of the criminal. In the first case, the explanation may be called 'mechanistic', 'situational' or 'dynamic', in the second, 'historical' or 'genetic'... Criminological explanations of the mechanistic type have thus far been notably unsuccessful, perhaps largely because they have been formulated in connection with the attempt to isolate personal and social pathologies among criminals. Work from this point of view has, at best, resulted in the conclusion that the immediate determinants of criminal behaviour lie in the person-situation complex."[1]

In this paper, the interactional model of situational violence will be highlighted and I shall examine how violence may be predicted, and discuss possible modes of its prevention. There is indeed a link between predisposing factors on the biological, personal and social levels and the situational interaction, but the predisposition and situational aspects express themselves in different dynamics.

Predisposition to violence, as gleaned from various studies, may eventually be expressed as probability profiles, which would estimate

---

[1] E. H. Sutherland and D. R. Cressey, *Principles of Criminology*, 7th ed. (Philadelphia: J. B. Lippincott, 1966).

the likelihood of an individual, displaying a given set of characteristics, to commit a violent act. However, the actual sequence of events precipitating the violence would in some cases take the form of a causal chain of interaction between criminal and victim. This sequential pattern could be ignited on the spot by exposure to a compromising situation; e.g., the ever-loving wife and her lover in the husband's nuptial bed. Words hurled with obvious intent to offend would have the effect of switching Ego's action (Ego being defined as the acting individual, plus his cognitive perceptions, and Alter as how the other in the dyadic interaction is perceived by Ego) to a different cognitive level, i.e., he would "see red". Other expressions may have this triggering effect on Ego because he defines them subjectively as humiliating, due to peculiarities of his own personality. The word "bugger" thrown at a latent homosexual or an expression questioning the virility of a man who has anxieties about his potency, may have the same effect. The conventional form of an offensive gesture, such as the twisting of a moustache and the emission of a snore in the presence of a devout Moslem, may have an even stronger escalatory effect. Such an exchange of words and gestures would not trigger immediate arousal to another cognitive level, but depending on the reaction, may gradually lead to the "point of no return", the threshold of violence.

The interaction between the perpetrator of violence and the victim operates as sequential cycles, with each situational cycle limiting the rational choice of each actor, so that in the end, the violent act erupts as an almost indeterministic sequence with very little rational choice. This, of course, assumes that each actor in the dyadic interaction picks up the cue which leads him to another limitation of rational choice and of violence-precipitating action. As we shall show, there could be a violence-non-precipitating decision effected by the rational choice of one of the actors so that the *dans macabre* situational sequence would be pushed away from the violent eruption.

## 1. The Situational Model

The structure of the relationships, which I hypothesise as determining acts of violence, would be as follows:

1. Alter transmits to Ego a pattern of communication, which is overtly or latently provoking;
2. The narrowing of the range of non-violent reaction leads Ego swiftly and inexorably to a limitation of rational choice and

to a point of no return where the violent option becomes highly probable;
3. In the course of the interaction, Ego makes an outward commitment to Alter or a relevant other, to commit the act of violence. This would further accelerate the generation of tension, and rational choice of violence-precipitating actions;
4. The violent act would be the cathartic release of this tension;
5. It would be followed by a sense of fulfilment or homeostatic contentedness.

*1.1. The provoking communication*

The offender may be exposed to words, gestures or actions, which are culturally defined as provoking; e.g. gestures of obscenity which are performed by different fingers in different cultures. The communication pattern may also be provoking within the specific context of interaction between the offender and the victim, such as reference to some very touchy personal episodes or vulnerable character traits known only or primarily to the partner in the dyad. Finally, there may be words or acts neutral to Alter but **interpreted** as offensive by Ego. This could occur in confrontation of individuals from different cultures. We admit that a violent reaction, or one that may further accelerate the violent interchange, occurs where sublimation has not been possible in a small percentage of cases only; but these are the ones which we are studying. We shall first dwell on the types of non-violent reactions when the rational choice would be of violence-non-precipitating actions.

*1.2. The alternatives to violent reactions*

As I have assumed that the point of no return involves the narrowing of the range of reactions to those which lead to a rational choice towards violence, I may proceed by eliminating the non-violent alternative choices. It is evident that the dynamics of the interaction are not one-directional towards violence, and the various forms of perception are not mutually exclusive. One form is the **twisting of the incoming perception** to fit Ego's previously internalised stances, which can be analysed in the following categories:

a) **Selective perception**, which is not a "face-saving" mechanism, as described by Goffman, but a non-awareness of the provoking communication. This may happen when the communication seems so painful that its perception is evaded in self-defence;

b) **The differentiation process** is another technique for utilising some demographic or social stratification characteristics of the provoker so as to avoid taking offence, such as "he is only a child", "what can you expect of a woman?", "these bums just have to be lewd and dirty-mouthed", or "I shall not lower myself to his level by answering him". The best illustration of this premise is in O. Henry's *The Coming-out of Maggie*, where Dempsey Donovan, the Irishman, finds out that his opponent, O Sullivan, is nothing but a Dago, to use O. Henry's terminology, in disguise: "and then Dempsey looked at O Sullivan without anger, as one looks at a stray dog, and nodded his head in the direction of the door. The back stairs, Giuseppi, he said, briefly. Somebody'll pitch your hat down after you". This rational choice process might also guard against taking offence even if the provoker is in a position of authority. Elia Kazan's *America, America* and the numerous instances depicted in the novels of Kazantzakis describe the Greek as disregarding the insults hurled at him, since a barbaric Turk could never hurt the serene inner dignity of a Greek;

c) Finally, there are techniques for **explaining away** provoking behaviour. A prostitute interviewed in one of my previous studies[2] related how her boyfriend had had sexual intercourse with a new girl in her presence. She did not mind, she said, because "The new girl had to be 'broken in' for business", while she herself was her pimp's only true love.

The situational aspects of violence prevention, when applied to provoking communication, may be directed in mass immigration countries towards the media, law enforcement agencies, and social services. This should highlight the facts that provoking communications are culture bound, and that acceptable communication in one culture may be very offensive in another. As for the outward commitment, social services as well as law enforcement officers should be alerted to the fact that any outward commitment in the domestic scene between the members of tension-laden family is bound to exacerbate the possibility of violence; threats, displays of arms, positive verbal undertaking of violence should not be taken lightly, since any outward commitment fixates one of the parties on a violence-precipitating course, which becomes more and

---

[2] Shlomo G. Shoham, *Social Stigma and Prostitution*, *British Journal of Criminology* (1968).

more difficult to cut. Hence, any threat within the domestic scene should be treated as a violence-escalating outward commitment, which might have fatal consequences, and treated appropriately by the social services and law enforcement agencies.

## 2. The Cycles of Violence

The various types of interaction described above can be analysed as cycles of stimulus-response. A chain of cycles accelerates towards violence in the form of a positive feedback cycle which culminates in the blowing of a fuse, i.e., the violent act. When the interaction does not end in violence, the interchange may be likened to a negative feedback cycle. It should be pointed out that such acts may be further analysed into meaningful typologies, and the interaction can be related both to the involved and the passive actors. The following paradigm may be a useful framework for a typology of the differential perception of stimuli and the corresponding reactions towards violence, for each given cycle.

The axes of the paradigm represent the classical stimulus-response

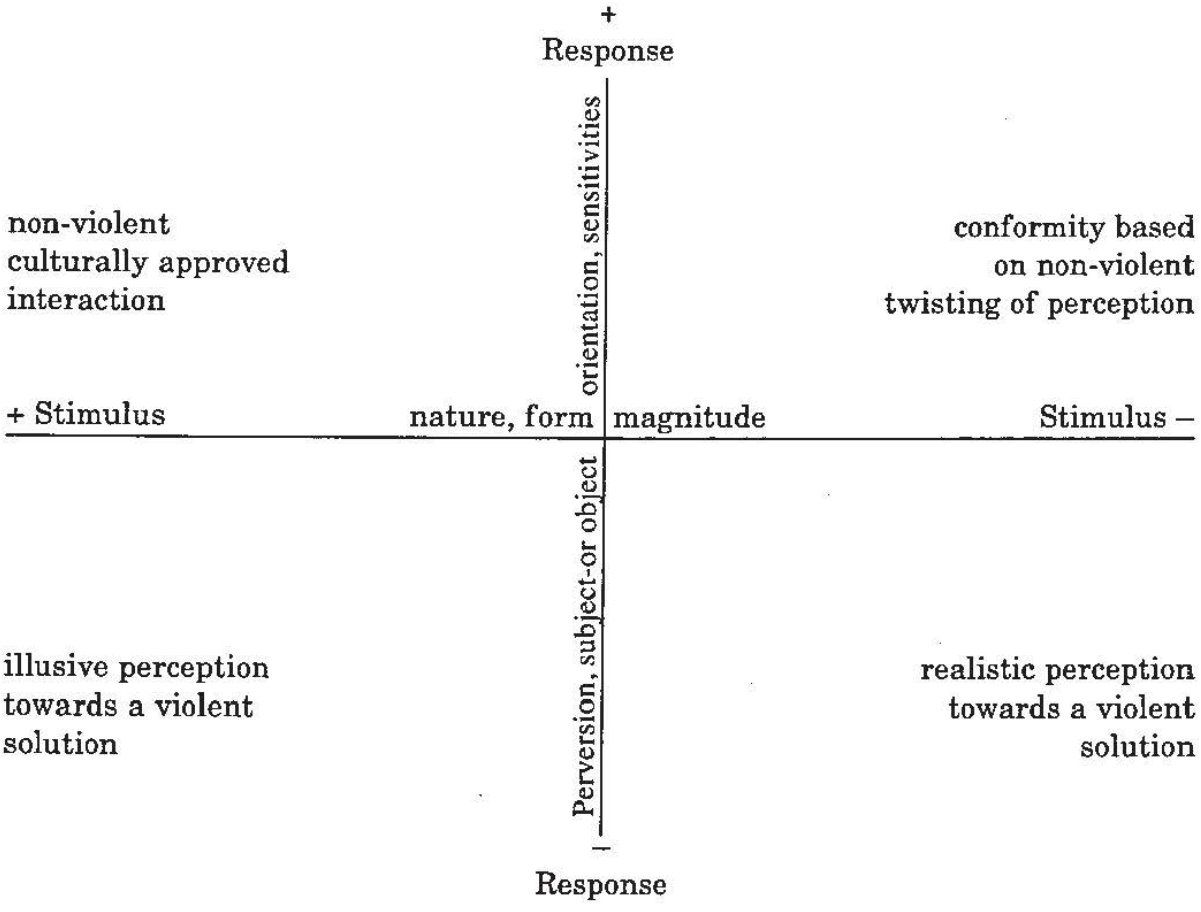


**Figure 1.** Differential perceptions and reactions towards violence or non-violence for each cycle of interaction.

relationship. Stimuli may be either neutral or intentional. It may be pointed out that even at this stage the neutral stimulus is not detached from the probable reaction. The fact that a neutral stimulus appears in our paradigm of violence suggests the possibility that the perception of this stimulus might not be at all neutral. In other words, the stimulus specified as neutral is expected not to be perceived as such by the violence-prone, reacting Alter.

The interrelationship between the stimulus and its perception by Alter may be described by the four property spaces around the intersection of the axes. Of these, only two are relevant to our present context. These are the violent-realistic perception of the stimulus and the illusive-violent one. These may be arranged at the extreme planes of a space in a scalogram, utilising the Guttman-Lingol technique.

The main vectors portray the nature of stimuli as related to the perception of these stimuli. A positive stimulus would mean that Alter relates to Ego in a cordial or any other culturally approved manner. The positive perception of these positive stimuli would not, of course, result in violence, e.g., neighbourly exchanges of "good morning" and ritualistic predictions of the weather. If the stimulus is negative and the perception of it by Alter is either neutral or positive, Alter performs some perceptual juggling, which amounts to explaining away the offensive nature of the stimulus, e.g., when a gracious lady mutters to herself that this coarse and vulgar type cannot possibly hurt her feelings. A positive stimulus when perceived as violent, would be related to an illusive perception by Ego of Alter's intention, e.g., a benign smile by a lad at a passing girl may be perceived by her as an offensive leer which calls for a violent reaction.

The predisposition towards violence can be measured by some standard instruments for perceptual twisting, e.g. the Petrie Augmentor and Reducer.[3] Another possibility may be the negative perception of a negative, i.e. offensive stimulus. This is, of course, the realistic perception of a fist in the eye as what it is meant to be. It should be stressed that the decision on the nature of a stimulus, as well as on the nature of a response to a stimulus, with a positive, neutral or negative grading, permits a wide range of stimuli-ranking vis-à-vis perceptual ranking. The dichotomy of violent and non-violent

---

[3] A. Petrie, *Individuality in Pain and Suffering* (Chicago: University of Chicago Press, 1968).

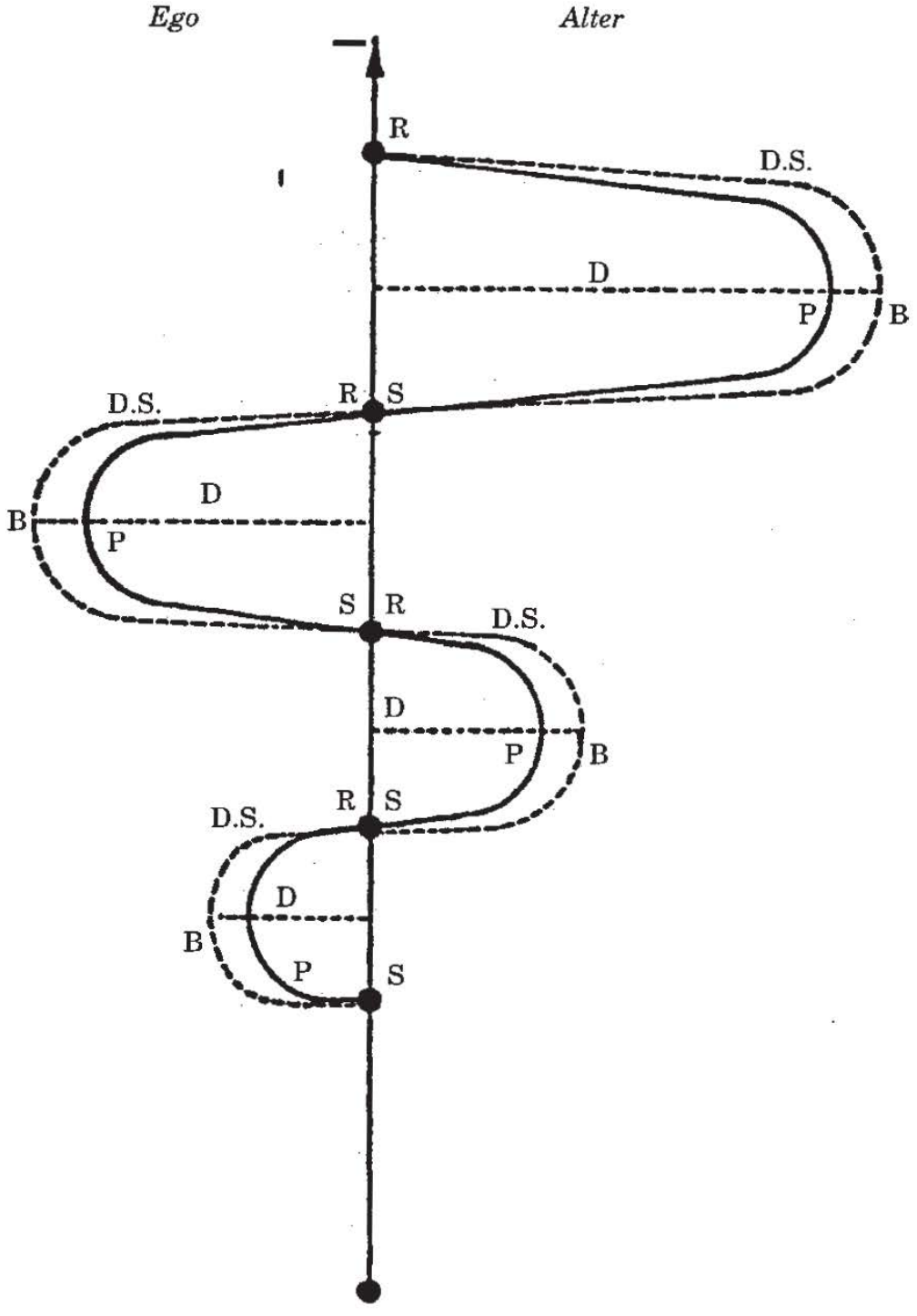


**Figure 2.** The dyadic interaction process, analyzed in terms of stimulus, perception, definition of the situation and response.

solutions is clearly apparent in our scheme, so that the cycle of interaction which constitutes an acceleration towards a violent solution is only displayed in the lower half of our paradigm.

Other components which may be correlated with our main axes are as follows: the magnitude of the stimuli would be ranked on the stimuli axis, according to an objective violence prone stimuli typology.

The form of the stimulus could be physical (i.e., actual assault or other physical contact performed by Alter on Ego), gesture, mimicry, or other stances which are culturally defined as offensive, and verbal insults or provocation. These forms of stimuli cannot be ranked, because the magnitude for the first form might be the amount of force used as related to the physical perception of pain by Ego. The second may be related to a typology of gestures as related to the magnitude of obscenity or offensiveness as defined in a given culture. The third, verbal provocation, could be ranked not only by the offensive content of the words, but also by their pitch and volume.

The variables which relate to the perception axis are linked to the twisting of incoming perception, so that it better fits Ego's previous normative internalisation.[4] This involves the various defence mechanisms, differentiation techniques and other processes of "explaining-away", which would influence Ego's rational choice.

## 3. The Escalation

The research model proposes to analyse the different steps of the rational choice of violence-precipitating actions within the context of the interrelationships among the stimuli by Ego, the perception of it by Alter, and Ego's reaction. This model synchronises the various cycles into a continuous chain.

The vertical line represents the objective ranking of stimuli and responses (from neutral to negative) according to the average severity of the provocation they present to individuals in a given representative sample of the population. On this line, the first stimulus at the bottom of the line will be the trigger, and the last response at the top, the violent outbreak.

The model represents the interaction between Ego and Alter. The spiral curve delineates the dyadic process of interaction. Each loop stands for one cycle. Ego perceives the stimulus by Alter, and Ego's response becomes the stimulus for Alter's rational choice in the second cycle, which Alter is supposed to perceive and to which he is supposed to react in turn. In the case of escalation towards violence, the distance between the subjective perception and the objectively ranked stimulus increases with each cycle. For analytical purposes the process should

---

[4] Shlomo G. Shoham, *Society and the Absurd* (Oxford: Basil Blackwell Ltd.; New York: Springers, 1974).

be differentiated into two dimensions, represented in our model by the spiral curve and its shadow. The first dimension, the spiral line itself, is the process of perception of the stimulus. This perception is deepened, interwoven with, and at times is perverted by, the person's background and personality, which constitute the second dimension – the shadow of the line. The outcome of these two dimensions is the definition of the situation which comprises the actor's perception of the stimulus, the various factors which tend to augment or reduce the provocative meaning of the stimulus, and the sensitivities described previously when the actor relates the stimuli to himself. This definition of the situation includes also the individual propensity to react violently as measured by some biological factors, e.g., the amount of alcohol in the individual's blood or a hypoglycemic condition, the degree of anxiety, fear and central nervous system excitation, or other aggressive traits which may be measured by various personality inventories and projective techniques.

The definition, as used here, of the situation is described by MacIver[5] as a process of "dynamic assessment" which includes three stages:

a. A choice between alternatives which is made by the actor, based on his salient values and psychological needs in the given situation;
b. With the decision, certain external factors are selectively rearranged and given subjective significance. This dynamic assessment brings the external world selectively into the subjective realm;
c. Finally all the factors which belong to different orders of reality are determining conscious behaviour and are brought into a single order. The single order is the definition of the situation directing and determining the response of the actor, which closes the cycle.

The responses are also scaled objectively for severity in the same manner in which we have ranked the stimuli. The responses may also be physical, verbal or gesticulative. Their ranking is carried out in relation to their cultural significance and legal severity as determined by the courts. It may be assumed that the stimulus-response relationship could be predicted. Deviations from this

---

[5] R. MacIver, *Subjective Meaning in Social Situations*, in: *Sociological Theory*, 2nd ed. L. Coser & B. Rosenberg, eds. (New York: Macmillan, 1964), 252-7.

prediction may then be used as a hypothetical indicator for distorted perception and an illusory definition of the situation by the *dramatis personae* of the situational dyad of violence.

## 4. The Cycles of Interaction in Violence

In this section I shall deal with the situational aspects of violence, suggesting that a violent act may be best explained and understood by regarding the act as an escalating series of stimulus-response interactions between two persons. The basic unit of such a series is the cycle which is described and explained. A scale for measuring the intensity of the cycle may be constructed, and it could be adapted to different cultures. The scale is used to verify the suggested hypotheses that the intensity of stimulus decides the form taken by the interaction, and that the escalation towards violence occurs more rapidly when the provocative intensity is high.

The study of violence as a situational phenomenon contained in an interactional matrix of Alter and Ego has several important connotations. The first, obviously, is to add a new dimension to our understanding of violent acts. Second, it has important legal connotations. If a violent act is accepted as the inevitable result of a series of escalating stimulus-response cycles leading to a "point of no return", the overall importance of *mens rea* and criminal responsibility, as conceived by the criminal law, may be left open to doubt, as the question whether it is Ego or Alter who inflicts the final (legally-defined) violent blow is seen to be solely a result of the structure of the situation. Third, there are preventive connotations. Once the perspective is placed on the situational aspect, the position of contributory factors (such as availability of weapons, use of alcohol, etc.) becomes clear, and preventive policies with regard to these factors may be implemented.

The main hypotheses are that the outbreak of violence is the result of a series of interactions, called cycles, between Ego and Alter. Each cycle consists of stimulus and response, and given favourable circumstances, will effect a new cycle with a higher level of provocation and consequent reaction, until a "point of no return" is reached, after which the eventual eruption of violence is inevitable.

The following points are relevant to the primary description of our premise:

a. Subjective perception of stimulus: the stimulus may be either

| | Negative Response |
|---|---|
| Non-violent<br>culturally approved interaction | Conformity based on<br>non-violent twisting of perception |
| Negative Stimulus | Positive Stimulus |
| Illusive perception towards<br>a violent solution | Realistic perception towards<br>a violent solution |
| | Positive Response |

**Figure 3**

positive (provocative) or negative (non-provocative). The perception may be either realistic or non-realistic.

The manner of perception of the stimulus may affect:

b. corrective techniques, leading either to escalation of violence (in the case where a stimulus is perceived, realistically or non-realistically, as provocative) or away from violence (in the case where the stimulus is perceived, realistically or non-realistically, as non-provocative)[6];
c. form taken by the cycles: in the event of violence, this is seen as a causal chain of interaction between Ego and Alter.

The form of the cycles will be effected to varying degrees by:

d. Content of the cycle: this involves the degree of provocation, objective and perceived, contained in the stimulus. The provocation may take the form of an action, gesture or verbal expression, and may have varying degrees of effect, in the light of specific cultural or personal connotations.

The interactional nature of these four factors, and their mutual effect on the nature of the cycle, can be represented diagramatically, as in figure 3 above.

The study of the actual process of eruption of the violent act does not take into consideration the predisposition to violence as measured

---

[6] E. Goffman, *Interaction Ritual: Essays in Face-to-Face Behaviour* (Chicago: Aldine, 1967).

by biological and personality variables. We feel that the interactional dynamics of violence have sufficient independent processes to warrant their separate treatment.

The study may concentrate on a stimulus-response interaction, and examine the nature of the provocation, the nature of the reaction, and the relationship between the two factors. These three components constitute one cycle, and each cycle acts as stimulus to the subsequent one.

A full-scale study of violence should include not only a study of the escalatory processes leading towards an eruption of violence (that is, verbal communication, gestures, and mutually understood symbols), but also a study of the factors which are linked to the avoidance of violence. The non-violent sequel to a tension laden interaction may be explained using the cognitive dissonance and balance models in social psychology.[7] It is feasible that homeostatic and congruity mechanisms may induce the actors to solve their dispute in a non-violent way. The present study, however, confines itself only to those interactions which escalate towards violence.

Similarly, many violent situations involve more than the two principal actors. Observers, both non-participant and participant, often play a part, even to the extent of an all-out brawl. Our theoretical model, however, involves the conception of violence as a dyadic type of interaction between Ego and Alter, or two groups in a dyadic interrelationship. This interaction takes the form of cycles, and our hypotheses are based on the assumption that the interaction towards violence takes the form of an escalating series of stimulus-response cycles as follows:

a. The nature of the response is in direct relation to both the form and content of the nature of the stimulus, so that the possible number of responses, and hence cycles arising from a specific stimulus, is limited;
b. The intensity of the interaction is inversely proportional to the number of cycles leading towards violence: that is, the lower the intensity of the interaction, the greater the number of cycles leading to violence, and the higher the intensity, the lower the number of cycles leading to violence.

---

[7] Roger William Brown, *The Principle of Consistency*, in: *Social Psychology* (New York: Free Press, 1965), chapter 12.

## Concluding remarks

This study is only the beginning of the empirical verification of the intricate and vast field of the situational aspects of violence. I have established that the situational interaction of violence may indeed be quantified and measured, and have devised a measuring instrument. The cyclic conception of the escalation towards violence has been shown to be tenable, and we have also demonstrated that the escalation towards violence is related to the perceived intensity of the initial provocation. Finally, I have shown that there is a distinct relationship between the number of cycles, the intensity of the interaction, and the escalation towards violence. When the intensity is high, the number of cycles is less and the duration of the interaction is shorter. Per contra, when the intensity is low, the number of cycles is larger and the duration of interaction longer. We realise that our measures may be crude, and that their application to different cultural settings may involve the design of new scales. However, the first step in the investigation of the situational aspects of violence has been made, and any further contemplated research may do well to take our study as stepping-stone.

As I have shown, the situational aspects of violence may be quantified and predicted and situational crime prevention may be geared towards the aggressor-victim relationship when the violent person is a public official, a public servant or a law enforcement officer. In these cases, the public official and officer are, so to speak, captive audiences and we could train them not to react to violence-precipitating cues by the potential victim. Training programmes may be envisaged for police officers and public officials as well as prison officers, labour exchange personnel, health personnel, especially in geriatric and mental hospitals, as well as social workers in underprivileged areas. In Israel, 35% of violence cases occur within the situational interaction of public officer and a client who becomes a potential violence victim or perpetrator.[8]

The essence of situational crime prevention in our context is to stress different aspects than those that have hitherto been highlighted. First, any threats within a domestic arena must be given full attention by law enforcement agencies, since any threat within the context of the pressure cooker of emotions within the family

---

[8] Israeli Ministry of Police Reports, 1995-96.

could lead to and accelerate the slide towards violence and murder. A special unit for domestic relationships should be established in conjunction with women's shelters, and any tell-tale signs of violence-escalating and precipitating behaviour within the family should be monitored. The idea is that any violence-precipitating actions which could lead to other cycles of violence-escalating interaction should be cut by police intervention or removal of one of the participants before the escalation leads to violence. As for the services, some training manuals should be structured and tested which show violence-precipitating actions, gestures, and words. Then serious attention should be given to adjust the verbal and action cues to the cycles of violence and to find ways and means to cut the escalation towards violence and to enhance violence-non-precipitating alternatives. The programmes should, of course, be different for police officers, social workers, school officials, mental care facility personnel, retirement institution personnel, and for the staff of all other total institutions in which patient-worker relationships could lead to violence. It is suggested that the various programmes for situational violence prevention should be adapted to various cultures, since cues, interaction, words and gestures have different meanings and connotations in different cultures.

---

**Shlomo Giora Shoham** *is specialised in criminology and criminal law and has lectured and published widely in this field at various universities, including Oxford University, Harvard and the University of Leuven, Belgium.*

# RAISING THE PUBLIC AWARENESS ON THE PROTECTION OF HUMAN RIGHTS IN THE FIGHT AGAINST CRIMINALITY

VIVIEN STERN

Undoubtedly we are now seeing in Western Europe a diminishing respect for the human rights of various groups of people who seem to disturb the peace or prosperity of the majority. The consensus about human rights that was established after the Second World War and embodied in the European Convention on Human Rights is no longer so strong. It has become more common to hear arguments suggesting that the human rights protections put in place since 1945 are not sacrosanct and may be flawed in certain respects.

One group whose rights are being seriously questioned are foreigners, be they refugees, asylum seekers or other immigrants. For example, in France and in the United Kingdom new measures are in place to make it more difficult for immigrants or asylum-seekers to come to those countries. A similar impatience with the requirements of the international human rights framework is seen in attitudes to convicted criminals and accused persons. Examples come from several countries. In the United Kingdom a longstanding principle deeply embedded in the legal structure, i.e the right for an accused person to remain silent without this affecting the judgement of the case, has been diminished. In the Netherlands, long seen as a beacon of humanity and decency in its treatment of convicted criminals, prisoners in a top security unit, the *TEBI*, in the prison in Vught have been kept in handcuffs whenever they leave their cells, seemingly in contravention of the requirements of Rules 39 and 40 of the European Prison Rules.

A gulf is opening up between those who understand human rights discourse, and those who do not. Many people who care about society and the way it is going, people who accept an ethical basis for life, do not understand many of the arguments used by human rights

proponents. For example, it is asserted that democracy is the most desirable form of government. Democracy means that the people should choose. But when it is clear that a majority wants capital punishment or corporal punishment, the assertion is made that these methods are an abuse of human rights and unacceptable in a country that wants to be a member of the Council of Europe. This assertion is not readily understood and no consistent programme of work is underway to explain it. No organisation or group has been given the task of working to inform and explain.

## 1. Justice as a commodity

It is important to ask "How do we explain these developments?" Three factors are important. One arises from the very desirable and necessary development of a movement to campaign for better treatment of the victims of crime. Support for the plight of victims and arguments that the state should recognise the damage done to them and give some recompense to them, has been widely advocated by reformers and human rights proponents for many years. As a result many countries have established victim support schemes and compensation arrangements for those who have been victims of crime. This development represents a very welcome extension of rights in the field of criminal justice.

However, what is essentially a progressive movement has features that are moving beyond the call for better treatment of victims. Some proponents of victims' rights are taking the argument much further. They are asserting that it is in the interest of victims that offenders should undergo more suffering in their punishment. Justice is being seen as a commodity that the state offers to citizens, like health and education. It is also seen as finite and limited. There is only so much of it and offenders get a great deal of it, through all the legal processes and the protection of their rights, whilst victims get very little. In this line of argument victims are entitled to a certain "amount" of justice from the State and not enough is left for them. They feel they should be entitled to more. What this means is that they are entitled to see their offender being charged at a level that reflects the victim's view of how serious the crime is, and if the defendant is found guilty he must be punished severely. If the punishment is not adequate, victims feel cheated. "I did not get a good enough service. I should have got more. Other people have got more when something like this has happened to them. My judge was not as good as another judge because another judge gave more", they think.

The language of rights is used to justify this position. Some victims' representatives begin to argue in the following way: "Defendants and offenders have been given all these rights and they are set down in international conventions. What about my rights as someone who has suffered a crime? What about the human rights of victims? How can someone who has committed a heinous crime be entitled to protection and consideration in the same way as the person who has suffered the crime? How can the criminal be equal to the victim when rights are being considered?"

In a sense a "rights competition" has been set up. Whose rights should win the competition, the victim or the criminal, "decent law-abiding people" or "bad people"?

This understandable way of thinking has consequences that are damaging not only for the process of justice but also for the work of resocialisation of offenders. The view is becoming widespread that people who work for the resocialisation of offenders are in opposition to the people who support victims. In this view it is not possible to respect the rights of victims as well as to respect the rights of offenders. The two would be incompatible. Contempt for convicted offenders extends to contempt for those who work with them to try and resocialise them. This makes the task of resocialisation, which is very important for public safety, doubly difficult.

## 2. New emergence of evil

The second important basic factor is the widespread view that serious crime has escalated. In the United Kingdom, the case that seemed to symbolise this shift in public opinion was that of James Bulger, the two-year old boy killed by two ten-year old boys. Such an act is so horrific and inexplicable that it leads people to move away from rational responses and enter a framework where reasoned argument holds less sway. The facts, that murder of children by children is very uncommon, that in the United Kingdom there has been about one case a year for the past twenty years, have little effect on the way people respond to such an event.

Sexual abuse of children has also sprung to public attention and the UNICEF conference held in August 1996 in Stockholm has given it worldwide publicity. Abuse of children has undoubtedly always occurred. Now however it seems much more common. What seemed in the past to be innocent is now regarded with suspicion. The recent case in Belgium of the alleged paedophile organisation and the abduction of teenage girls, widely publicised through globalised

television channels, and the case of the Wests in the United Kingdom, who abused and murdered their own children, arouse fear and hatred. People are very shaken by them and they begin to wonder about their neighbours, themselves and the world we live in: "Are there dreadful people in the next street? Has a new form of evil emerged?"

These cases of the torture and murder of children are in a sense the ultimate test of respect for human rights. To argue against the death penalty in such cases and to support the humane treatment of the perpetrators of such horrific crimes is a task of enormous difficulty.

### 3. Terrorism

The third factor is the increase in political terrorism in West European countries. The Irish question has familiarised the citizens of the United Kingdom with the limitations imposed on everyday activities and the implication of bombing campaigns. The Basque question has had the same effect in Spain. Now in France as a result of the Algerian situation, there are similar experiences. It is becoming commonplace in Europe for main line railway stations to have no litter bins and no place to leave luggage as a precaution against the planting of bombs. People are searched when entering public buildings. There is considerable pressure on Governments facing terrorist situations to bypass the rule of law and move onto a war footing against terrorist crimes. The result of this would be the carrying out of extra-judicial executions. Allegations of such a response are being investigated in Spain.

These events – child abuse and murder, terrorist bombs – induce real fear and horror and seriously affect people's view of the nature of the environment they live in. They begin to see the world as a hostile, threatening, unsafe place. They stop their children going out and they alter their own behaviour so as to feel safer. They resent these changes and they look to politicians to take action to deal with them. In this climate it is difficult for society to restrain itself – or to understand why it should. In a democratic society politicians find it very difficult to resist the pressure and few, if any, have the courage to speak out for the human rights values embodied in the establishment of the Council of Europe and the Convention on Human Rights.

Another factor to be considered is the mass media, which is becoming more a producer of stereotypes about crime and criminals and the dangerousness of the contemporary world. In many countries

crime stories are featured every day on television and in most of the newspapers, and no indication is given of how common or how rare these crimes are. To the consumers of this media the world thus begins to look very frightening. In some countries the concentration of the ownership of the media in the hands of a few powerful people who have no particular commitment to the well-being of any of the countries whose means of communication they monopolise has great dangers for human rights education. The media moguls are committed to the profitability of their businesses and the profitability of business in general. The main aim of much of their media is not to inform and educate but to entertain.

Developments in the United States show where this process can lead. There, rights of offenders are being rapidly eroded. Boot camps have been set up where a form of inhuman and degrading treatment is the basis of the regime. Ritual humiliation is deemed to lead to the recovery of self-respect. Chain gangs were set up in Alabama. According to Amnesty International, prisoners from the Limestone Correctional Facility are taken to a work site wearing white work suits and caps with "Alabama chain gang" emblazoned on the front. There they are linked to each other at the ankle in groups of five. Amnesty International has described the operation of the chain gangs as:

> "cruel, inhuman or degrading treatment, in violation of international standards on the treatment of prisoners".

In Arizona and Florida chain gangs are also being operated. The death penalty is being applied even more widely, albeit selectively, and legislation has just been brought in to end the funding to the law centres dedicated to working with poor prisoners on death row.

Also of importance in the debate is a view of human rights that comes from the economically very successful countries of South-East Asia. There we see a major questioning of the whole basis of the European human rights ethos. It is suggested that this ethos places a premium on individualism, leading to crime, drug abuse and other Western inner city evils. The attitude of Eastern cultures, stressing collective rights and duties, is said to be much more socially and economically beneficial. It is commonly said in the West, when justifying the human rights protections that surround the legal process: "It is better for many guilty people to go free than for one innocent person to be convicted". The response from the South-East might be: "Why?".

## 4. The educational process and the need for human rights education

Against this background, those who argue for a fair legal procedure for suspected persons, oppose the death penalty and support humane treatment of people who are in prison, face a complex task in putting the arguments across. It is a long philosophical journey to make, a deep educational process, for people to say they are prepared to respect the rights of all human beings, even child abusers and bomb planters. It is therefore necessary to retrace the steps of the argument which led in 1953 to the entry into force of the European Convention on Human Rights. Fifty years have passed. For a large proportion of the population of Western Europe the Second World War is distant history.

We need to remind ourselves what are the steps on that philosophical journey. We need to ask ourselves why we feel we have to fight for the human rights of, for example, a man who abused and terrorised small children, an activist who planted a bomb that killed many innocent people or a person who murdered in cold blood for financial gain?

One step of the journey is the process of understanding the abuser or the terrorist, not to find an excuse for what has been done, but to have insight into how someone who has carried out terrible acts has been able to do so. Many studies show how terrible childhood experiences can lead, though by no means always do, to the perpetration of terrible deeds later. A detailed study of twenty children who had committed homicide, carried out by a British psychiatrist, showed that:

> "they come from backgrounds of unstable family lives, absent fathers with a history of alcoholism, psychopathic disorders, and violence at home. Mothers had a history of depression and found it increasingly difficult to look after the children as they got older".

Second there is a need to explain how mass abuses of human rights become possible. We need to make it very clear how ignoring the basic human rights of any single group, however undeserving of respect they may seem, leads society down a dangerous path. We can start by accepting that it does not matter what society does to a child abuser. The crime is so horrific that it puts the person beyond the pale of decent treatment and respect. So it becomes acceptable to treat one sort of person, for example child abusers, in this way. The rest are not so bad. It is agreed that it will stop there.

But the idea moves on. It is not just the child abuser who can be ill-treated without any regard to his human rights. Anyone who looks like a child abuser can get similar treatment, even those against whom the case is unproven. Then people ask: "why just child abusers?" Those who break into houses at night and steal belongings are also causing fear and ruining people's peace of mind. Why should their rights be protected either? Once it becomes acceptable to put one single human being beyond the reach of common humanity many people will be at risk.

The third element in the journey to understanding is an appreciation of what society can be like when the rule of law ceases to be, when everyone can do what they like. Bosnia is a clear example here. Peter Maass, in his book about the Bosnian war, quotes the Bosnian writer Ivo Andric. Andric, writing of the outbreak of the First World War in 1914 says:

> "that wild beast, which lives in man and does not dare show itself until the barriers of law and custom have been removed, was now set free. The signal was given, the barriers were down. As has so often happened in the history of man, permission was tacitly granted for acts of violence and plunder, even for murder, if they were carried out in the name of higher interests".

We need to understand the importance of creating and maintaining institutions strong enough to resist populist calls for vengeance and respected enough to be accepted by the public when they carry out their functions without succumbing to populist pressure. The importance therefore of the War Crimes Tribunal set up to deal with the atrocities committed during the break-up of the former Yugoslavia is immense. Radovan Karadzic is not being hunted down to be shot. He is being sought in order to go on trial. Lawlessness is not being met with lawlessness but by a firm reassertion of the supremacy of the rule of law.

Is there a need for human rights education? Would such education be effective? Some survey results from the United States may throw light on this question. The results come from public opinion surveys on the death penalty. Opinion on this topic is surveyed in the United States every year. In 1995 the question was asked: "Are you in favour of the death penalty for a person convicted of murder?" 77% were in favour. Another question was asked: "In your view, what should be the penalty for murder – the death penalty or life imprisonment with absolutely no possibility of parole?" The proportion supporting the death penalty fell to 50% with 32% supporting life imprisonment

without parole. The figures also show that attitudes can change greatly over time. In 1995, 77% were in favour of the death penalty. In 1966 only a minority of those questioned, 42%, were in favour and the figures of those in favour and opposed were very similar until 1972 when the number of death penalty supporters started to increase.

These figures show that attitudes on these difficult human rights matters are not fixed, inborn, fundamental, deeply rooted in human nature. People can respond and react to debate, facts, discussions and campaigns. They can listen to arguments and change their minds.

Since the coming of democracy to countries of the former Soviet bloc, and their inclusion in the Council of Europe, many programmes of human rights education have been developed and supported. Lawyers and teachers have been trained and materials produced. The process cannot stop there. Western Europe is in similar need of a major programme of human rights education. The commemoration of the end of the Second World War in 1995 was an excellent opportunity that was well-used to remind those who might have forgotten, and tell those who had never known, what happened in Europe between 1939 and 1945 and why an international framework to protect human rights had been put in place. But such opportunities are rare. A planned and consistent programme is needed that ensures frequent exposure of the arguments and the debate. Governments should consider establishing human rights education units to stimulate such programmes.

An impetus must be given to start a substantial educational campaign with five elements.

First, it must be based on people's understanding of the world as it is today. The human rights arguments must be made as relevant to people growing up in 1996 as they were in 1949 when the Council of Europe was established. Second, the teaching of history provides an excellent opportunity for analysis and thought about man's inhumanity to man, the circumstances that lead to major human rights abuses and the safeguards that need to be put in place. Third, courses on the basic international human rights framework and the mechanisms in place need to be established and supported in colleges and universities. Fourth, teachers need to be trained to use literature and drama that throw light on human rights abuses and the processes that lead to them. Fifth, funds should be found to support media projects that debate and develop the arguments about protecting the human rights of criminals, why corporal punishment is wrong, why the death penalty is wrong.

## 5. The role of non-governmental organisations

The international organisations that promote human rights are very detached from the citizens of the member states and can seem remote and irrelevant. The bridges between the international level and the people in the member states are the non-governmental organisations (NGOs). A major role can be played by NGOs working to protect human rights. There are many international, regional and domestic NGOs in the human rights area. NGOs have taken the lead in the struggle against the death penalty. Amnesty International has campaigned for many years against the death penalty and has supported the production of films and other materials to support the case. Through its groups and donors in 170 countries and territories and a world membership of over 1.1 million people it campaigns in many different and imaginative ways to draw to the attention of the public the abuses that occur throughout the world and the many cases of individuals sentenced to death.

Penal Reform International (PRI) works throughout the world to strengthen existing NGOs which work for penal reform and to help set up new organisations. PRI has been experimenting with new ways of bringing an awareness of the need for penal reform to the public. In 1992 PRI joined with the Hungarian Association for Penal Reform to organise a three-day festival of prison films. Films which highlighted the possibilities for human rights abuses in prison were shown and the films were followed by debates with film-makers and leading thinkers about the intentions and implications of the films. The event aimed to bring to the attention of the public the human rights problems associated with imprisonment and to promote penal reform. A similar international event, this time about women in prison, was organised in London in 1993 by the National Association for the Care and Resettlement of Offenders, a United Kingdom-based NGO and opened by a senior official of the Council of Europe.

NGOs have many strengths and a great deal to contribute to public education on human rights. They are composed of committed people. They have an ethical basis for their activities. They are able to draw on much volunteer effort and creative ability. They are often free of cumbersome bureaucracy and can respond quickly and flexibly to the needs of the moment. They often find it easier than state agencies to relate to minorities and to young people.

If they are to make their maximum contribution to dealing with the human rights crisis faced in Europe they will need support. It is

always much easier for NGOs to raise funds for their practical project work aimed at concrete changes than for the less tangible but equally vital task of influencing public opinion. NGOs active in penal reform for instance are more easily able to find the money for specific projects such as improving prison conditions and resocialising offenders than for their education work, which aims to bring to the attention of the public the human rights questions involved in the treatment of offenders.

The engine that promotes the educational campaign for human rights must be the Council of Europe. The importance of the Council of Europe is enormous and it is regarded as a source of inspiration and strength by those concerned with human rights. In 1999 the Council will be fifty years old. It is an appropriate time to renew and reformulate the basic ideas and concepts that have guided its development so far and to find new ways of working that reflect the 21st century.

## 6. Conclusions

The situation in Europe is moving rapidly towards a worsening of human rights protections for convicted criminals. Public attitudes are hardening. Prison populations are rising. The search for scapegoats is intensifying. The individualisation of justice and the move towards seeing it as a commodity bring great dangers. These developments diminish the balancing power of the state and open the door to mob vengeance and lynch law. The agreement that there is a need to treat people with a minimum of humanity, whatever they have done, is wearing very thin.

However, whilst developments in the United States have moved very far from the human rights consensus of the post war world, in Europe many protections are still in place. The punitive and exclusionary attitudes prevalent in the United States are not so deeply embedded in European traditions. A philosophy of re-integration into society for offenders still underpins legislation and practice. A philosophy of social cohesion governs institutions. The assumption is that offenders, although they must undergo criminal sanctions and pay back in some way for what they have done, keep their citizenship and must be welcomed back into society.

These beliefs are part of European democratic ideals. They have considerable strength. In some countries activists put their lives at risk by fighting for them. If they are to remain strong, much energy will need to be put into supporting and maintaining them in penal

policy in the years ahead. A major education programme should be launched by European institutions, working with governments and with NGOs, to heighten awareness of the reasons why there is a human rights framework and the horrors of a world without one.

The events in Bosnia have shown how fragile are the values of tolerance, respect for others, humanity and decency firmly believed to be the basis of European civilisation. As Peter Maass says:

> "the wild beast had not died. It proved itself a patient survivor, waiting in the long grass of history for the right moment to pounce".

---

**Vivien Stern** *is Secretary-General of Penal Reform International and is member of the Advisory Council of the Cambridge Institute of Criminology in England amongst others. She has also published* Imprisoned by our Prisons *and* Bricks of Shame, Britain's Prisons.

## References

Amnesty International, (1) *United States of America: Reintroduction of China Gangs – Cruel and Degrading* (2) *Report 1996*; London, Amnesty International, 1995.

Christie Nils, *Crime Control as Industry* London and New York, Routledge, 1993 revised 1994.

Coyle Andrew, *The Prisons We Deserve* London, Harper Collins, 1994.

Donziger Steven R, *The Real War on Crime: The Report of the National Criminal Justice Commission* New York, Harper Perennial, 1996.

Maass Peter, *Love Thy Neighbour: A Story of War* New York, Knopf, 1996.

Maguire, Kathleen and Pastore, Ann, eds, *Sourcebook of Criminal Justice Statistics 1994* Washington DC, US Department of Justice, 1995.

Penal Reform International, *PRI Newsletter no. 20* London, 1995.

DOSSIER: *THE PREVENTION OF TORTURE IN SOUTHERN EUROPE*

# AN EDITORIAL INTRODUCTION

SALVO ANDÒ

The European Convention against Torture is certainly not the only document published by the international community to compel its states to fight and prevent torture in all its forms. The European Convention, as Rod Morgan observes in his essay published in this journal, does not establish new rules for the prevention and fight against torture but strengthens the obligations which have previously been listed in, for example, the European Convention on Human Rights (art. 3).

The European Convention against Torture, however, represents one of the most efficient documents in this area, particularly where it provides for some form of control over abuse committed by States in the form of violence and ill-treatment of prisoners as well as in the raising of public conscience and awareness of prison conditions.

There is no doubt that in this sense the most significant element of the European Convention against Torture really consists in the creation of a Commission for the Prevention of Torture. The Commission's role is two-fold, to regulate the place and form of detention by collaborating with state authorities and mostly by carrying out inspections inside prisons, and to publish reports on visits made by the Commission inside prisons. These reports carry a critical analysis of the situation, advises on how to improve it as well as the replies provided by the governments concerned to the Commission's observations.

The articles published also in this dossier on torture in Southern Europe and written by Marco Mona & Claudine Haenni, Rod Morgan, Renate Kicker, Didier Rouget and Malcolm D Evans strike a balance

from the experience gained by the Commission in all these years. They tend to put the Commission's role and activities into the perspective of the present international situation, characterized by the overtaking of those political and ideological blocs which have divided the world for more than 40 years. A political and ideological division has also influenced the concept of human rights and states' obligations to guarantee such rights.

Today, we are fortunate to find ourselves in a world with an ever increasing demand for the respect of human rights. It is a world increasingly critical of any arrogant manifestation of state sovereignty, without being justified by the protection of the collective interests of the population or, even less, individual needs.

Today, the problem in the fight against torture, is not that of compelling all countries to commit themselves on paper to prevent and fight torture. If one were to think of the conventions against torture which have been ratified at a regional and international level, we have to acknowledge that torture is the most condemned human right violation by the international community. But notwithstanding the solemn commitments by governments, it is probably the most frequent violation. The truth is that most of the states making solemn declarations of principle in this field, often do it with mental reservations as well as guilt complexes, bearing in mind some dark moments in their history in this field. The most arduous task is not how to fight and condemn acts of torture but how to single out and prevent such acts. The act of prevention does not always emerge as the most adequate, also because in most cases it is entrusted only to campaigns planned by non-governmental organizations. These normally prepare a worthy action of sensibilisation and declaration but they are in no position to exercise any state power, imposing, for example, an effective control of suspect or 'at risk' situations.

In this field, it is moreover difficult to overcome the reticence shown by states or their open hostility towards any form of more or less penetrating control at the level of their internal rule. They either deny the facts or they diminish them explaining that it is not a matter of torture but of non-vexatious treatment and justifiable, bearing in mind the need of taking action against dissident political movements and the necessity of defending the state for the sake of peaceful cohabitation.

One also has to consider that torture is the most violated human right because it is the most easy to violate considering that the victim is in a condition of isolation, whereby he or she is not in a position to

pursue his or her rights. And yet the damage incurred by torture in terms of destruction of personality are often irreparable.

International law on torture singles out any fact of physical and mental violence on a prisoner capable of forcing him to change his will and behaviour. Article 1 of the 1984 Convention against Torture says that torture is any pain or suffering inflicted, physically or mentally, to obtain information or confessions.

Torture is condemned in all its forms in the Declaration on the Protection of Persons from Torture and Degrading Treatment approved by the UN General Assembly on December 9, 1975 in the Convention against Torture approved by the UN General Assembly in 1984, and in the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment of 1989, now ratified by 34 states. Torture is defined in the UN Convention of 1984. The international community has no doubts when it comes to singling out those behaviours which aim solely to inflict pain and suffering on human beings. The international community has appeared to be very rigorous in the identification and condemnation of these behaviours. This attitude cannot be belied by an ambiguous claim like, for example, that used by the Landau Commission (nominated by the Israeli government to investigate the practices of the General Security Service) which stated that "moderate physical pressure" should be tolerated.

This is a concept belied by experience which indicates that there are no half measures when it comes to torture.

The most serious problem in the prevention of torture, one should repeat, is how to find out and verify the existence of violent treatment with regard to prisoners.

It is clear that one cannot simply trust the word of individual governments, who will never admit they are resorting to torture to make strong pressures on the prisoner to obtain collaboration or a confession.

No government will ever admit resorting to torture, not even in the face of unequivocal facts and an accusation by public opinion worldwide. Neither would it submit itself to controls (if it knows it has committed violations of rights) in a bid to verify in what conditions prisoners actually live and to what kind of treatment they are subjected.

And on this matter, the international community has to be demanding, particularly because violence on prisoners is not easy to ascertain, even when the accusation is supported by circumstance, bearing in mind the psychological condition of the victim of such violence.

Moreover, moral violence is difficult to confirm because it can be closely related with an "ordinary" form of detention. Obviously it is not enough that the law limits itself to punishing moral violence. The difficult part is knowing how to single it out even when it is exercised through mechanisms which formally respect the law.

One has to exercise an extraordinary type of vigilance which goes beyond a formal respect of the law above all when serious criminal occurrences could induce the authorities to resort to forceful measures in order to come out on top of the situation.

There is no need for exceptional laws or mass physical violence, i.e. a formal clamorous suspension of the rights to reveal the emerging politics of public order founded on "violent use" of the law.

There is a lot of atypical violence which is difficult to single out from afar. And it is very difficult to defend oneself from this type of "new torture".

In the past, the fight was against the "serum of truth" because this induced the prisoner to talk beyond any form of self-control since it reduced his freedom to take decisions.

But without resorting to the "serum of truth", the very fact of being subjected to interrogation *in vinculus*, for example an interrogation conducted with the threat of grave or very grave afflictions if the prisoner does not collaborate, constitutes a form of physical or mental violence which is absolutely illicit.

There is certainly no scarcity of national penal laws which severely punish torture. But these tend to be unused laws and maybe even inapplicable laws. Authorities consenting to or even authorising violence or ill-treatment against prisoners are often also vested with the power of providing for the singling out of such crimes and for the application of punishment.

Moreover, penal rules are hardly efficient rules. They are difficult to apply because the injured party almost never has the possibility to avail himself of them.

It is impossible to prove how much violence has been suffered except when this leaves indelible traces even after a length of time and as such can be pointed out, for example, by persons capable of conducting appropriate inquiries on the violence suffered by prisoners.

These are some of the reasons why the national laws in this field are inefficient. Above all there is a lacking or inconsistent political will by the authorities to impede the setting up of a repressive mechanism directed against the state itself.

The prisoner, even if tortured, is hardly ever in a position to

collaborate with an authority external to the institutional system, which could take the state to a national or international court.

If one excludes the violence carried out or tolerated by individual public officers acting without the explicit authorisation of the political authority or even openly without the authority's backing, there is no doubt that the authority cannot be said not to know of cases of violence or ill-treatment of prisoners.

Usually it knows and tolerates this. So what use can recognised instruments be to the individual prisoner trying to react judicially with regards to the violence he has suffered and to attack the highest authorities?

Could the state sue itself when it is faced with "crimes of state"? In these cases the only possible defence is the appeal made to the international community, the international protest against impunity. It is the judgement of public opinion, the condemnation and the eventual isolation handed down by the international community vis-à-vis the state which violates human rights which could stop "state violence", and not a normal trial entrusted to normal judges of that state.

The judicial process, when it is a matter of reacting to torture, in many cases does not lead anywhere because it is difficult if not impossible to punish those responsible through the ordinary channels of national justice.

Against these difficulties, what can one do to prevent torture and the other forms of violence on prisoners? In the first place, evidence obtained through the exercise of violence should not be admissible in a court of law. If such evidence cannot be used, the recourse to violence would, as a consequence, be discouraged. One has to gaurantee in this field, the rights established under international law to ensure a fair trial. One must also ensure that after an arrest, a *super partes* judicial authority and the defence can immediately enter into the judicial process to avoid the irregular collection of evidence.

The time during which the prisoner is subjected to the control of state police or judicial inquiry has to be somewhat reduced. The right of defence during preliminary investigation should be guaranteed in an efficient manner. It is necessary that the judge is in a position to discover immediately any violations committed by public officers in this phase of the inquiry, bearing in mind that a mutual cover-up by inquiring magistrates and police may occur, both working towards the establishment of the truth and unfortunately, sometimes, towards any truth.

Often, these gaurantees of a fair trial exist only on paper.

To think that inquiring magistrates can unilaterally guarantee the legality of the investigation is a belief nowadays increasingly contradicted by some judicial practices. Only the defence can react to abuses and work to ascertain the responsibility of the authorities practising torture or violent actions leading to a confession.

In these cases one cannot limit oneself to condemning the abuse committed by administrative officials physically responsible for the treatment. One cannot believe that they act autonomously. Just as the eventual execution of an unjust order does not render the executor not responsible for the crimes committed, the apparent autonomous inhuman treatment perpetrated by an administrative official does not exonerate his superiors from responsibility or the same magistrate who is duty bound to supervise treatment practiced on the prisoner and maybe has not done it. In this field, the duty to obey cannot be invoked as an exemption from crime. On this there is widespread consensus. Even on this point, the UN Convention against Torture should have been more explicit.

The fact is that it is difficult to place clear boundaries between those forms of investigative pressures which, although conditioning the prisoner's will are not torture, and other forms of pressure which even without resorting to the use of physical violence constitute a mental violence capable of destroying the personality of the prisoner and which should be treated in the same manner of torture.

In this field there are prejudices which have to be faced and overcome because it is a matter of discussion of the legality of the penal process. When one speaks of degrading treatment, one is mostly preoccupied with the phase of execution of the suffering, of the way of life of the prisoner.

But torture normally falls into another phase of the trial (when there is a trial) which is that of the preliminary investigation. Torture can constitute an inadmissible shortcut to acquire evidence in any way, such that a trial may take place.

If the fundamental rights are going to be guaranteed to the prisoner at the end of his trial and after judgement has been given, one cannot believe that these rights cannot be violated during the trial.

The principle of a fair trial in the first place imposes the regular collection of evidence and the correct conduction of the preliminary inquiry. This may be achieved through the observance of two fundamental principles: the judge who has to evaluate the evidence should be in reality a third party, and it is necessary to guarantee the absolute equality of the parties.

Today we are accustomed to considering torture as an abuse which matures, or in the undemocratic context, within which the rules of the relationship between authority and freedom are *in toto* upset, or even as a reply by democratic countries to a serious internal threat which risks upsetting the state. One thinks about the phenomenon of terrorism, above all about the terrorism carried out by military or paramilitary organisations which can count on a strong and diffused social presence (eg. ETA, IRA, PLO in Israeli occupied territory).

There can be different forms of violence practiced by the state, for example when it is a matter of fighting criminal phenomena having no political value. One may not resort to classic torture or to a formal suspension of rights, but seek to cope with an emergency, for example, with the creation of special tribunals or the enactment of special laws which introduce severe exceptions to the normal forms of the trial.

It may also happen, though, that the forms of trial and detention could remain normal on paper but when put into practice can give rise to proper abuses with the aim of exerting strong mental pressure on the prisoner.

From this point of view, one may mention pressure exerted on a prisoner through preventive custody without a valid reason, or prolonged custody, as happens in the case when as soon as the legal limits for detention lapse, the charge is changed and the prisoner is detained for another term.

One can also recall imprisonment lasting only a few hours, the time necessary to obtain a confession, and which is therefore not justified for cautionary reasons. But one has to think also of the manipulation of evidence or of the accusations of complicity made solely on the suggestion of the investigator to support precise investigative strategies.

With reference to detention, one should also think of prisoners transported from one place to another in inhuman conditions totally without justification, humiliating body inspections or forms of detention which can put at risk the safety of the prisoner (prisoners detained in the same cell with violent prisoners or prisoners from whom they fear retribution or sick prisoners) or the refusal of necessary treatment for the sick prisoner.

There are then situations in which the prison can reveal itself to be incompatible with the personality and conditions of the prisoner. There is no doubt that some treatments may not amount strictly to torture but tend to, like torture, condition deeply the freedom of will

of the prisoner, thus being totally incompatible with that safeguard of the human dignity which is to be respected in every person.

It should be clear that the sphere of personal liberty of the prisoner cannot be subject to an ulterior restriction, for example, with totally unjustified violence. It is true that the concept of torture is somewhat flexible, but there is no doubt that the violent use of prisons, whether on the basis of a 'violent' application of the law or whether for the purpose of the trial for political aims, for example, the use of detention, particularly preventive custody without valid reason, violate defined rules established under international conventions.

We are here not referring merely to the principle of rendering punishment more humane but that of a fair trial and fair preventive custody (justified by specific trial necessities), equality of arms, the presumption of innocence, the right to confrontation and the right to defense.

In this field, it is not necessary to invoke the rules which prohibit torture. An ad hoc norm which could apply to this phenomenon can be the one found under art. 10 of the international Covenant on Civil and Political Rights.

In the Covenant, torture is prohibited under art. 7, but under art. 10 it is stated that all persons deprived of liberty should be treated humanely and with respect to their human dignity. It is often the case that there is no torture but that the treatment does not conform to article 10.

The "violent treatment", even if it does not reach the intenstiy of torture, has the identical aim of destroying the personality of the prisoner, i.e. to force him to accept a truth imposed by the authorities. It is certainly easier to prove a violation of art. 10 of the Covenant than a violation of art. 7.

In the same way, it is undeniable that art. 10 is closely bound with the respect of art. 7. Such situations, that is of violence other than torture, but which like torture end in the obtaining of confessions, collaborations and repentance, have occurred in the most civilised and democratic countries where the control exercised by the mass media and public opinion is strong, and where the culture of rights is widespread.

The hampering of the penal process cannot be justified by any exceptional situation of public order or by any situation of criminal emergency. The violent use of investigation is perfectly identical to classic torture aimed at acquiring evidence. Spanish public opinion for example, demands transparency with reference to methods used in the fight against terrorism and the same doubts were occasionally

raised in Great Britain with reference to the treatment reserved for IRA terrorists. Similar doubts were raised in the 70s in countries where terrorism had not taken root within the masses, like in some Spanish territories (Basque countries) and in England (North Ireland) but had shown themselves capable of hitting at the pillars of the social and institutional system (Germany).

The question posed in these cases is always the same: what are the legal limits of the penal investigation? And above all, how can one ascertain that these limits have been exceeded even if one has acted in conformity with the law?

We retain that there are some elements that could reveal the existence of irregularities in a trial, capable of leading to a systematic violation of rights, especially in the case of the citizen detained while awaiting judgement.

When one takes recourse to a special trial, a special tribunal and special laws to face particular criminal emergencies, this is the most clear sign of the abuse of a trial. In this case the trial is not the arena of ascertainment of the truth, but an instrument of violent actions against individuals.

When the legal culture tolerates deep changes to the system of individual rights it is then fatal that the administration, the public officer, interprets this in his own way and resorts to very violent ways of repressing the criminal, feeling in a way justified because of the social and political climate, and the derogations introduced in the juridical system by "exceptional laws".

The justification of the illegal investigation in this environment is not different to the justification which is often given to torture as an instrument with which the state defends itself. Those who have often justified torture have brought at stake the need of the contemporary state to adopt severe mechanisms in its defence. It was maintained that the state has too much power, but is very vulnerable to its enemies whether internal or external enemies and as a consequence social order can be easily disintegrated.

There is a precise relationship between the fairness of the trial and the preliminary inquiry and the respect of the prisoner as a human being and his rights (above all, in the case of prisoners awaiting trial). To prevent and fight torture, one has to have precise knowledge of every fact relative to the detention or an accurate inquiry into indications which might reveal the existence of violent treatment on prisoners.

A democratic regime is normally difficult to attack on this matter, because it can count on the force of consensus of the public opinion.

But it is even more difficult to attack such a regime when there are signs that trial violations have occurred, such as the application of a form of moral pressure for the ascertainment of truth which is prohibited by international conventions. In summary, every democratic regime is considered to be beyond suspicion until the contrary is proven.

It does not seem to us that up to now there have been appreciative results obtained by the organisations delegated by the international community from time to time to investigate and refer to it on violations of human rights outside Europe. And when they produced some kind of result, one must understand that this was due, above all, to the extraordinary mobilisation of the global public opinion (as in the case of the Argentinian desparecidos).

One thing is certain. In order to prevent torture, strong legal controls on the behaviour of States, even of the ones which are most democratic, like the European states, are needed. Such controls are needed on a universal level for the adequate prevention of torture. For years the addition of a Protocol to the UN Convention against Torture or the enactment of a separate Convention to organise a system of visits in prisons on a universal level (Costa Rica Protocol) have been discussed. In this context, one has to move from abstract ideas to actual political decisions.

In particular this involves the implementation of the European model at the universal level.

The European Convention for the protection of human rights is the only one amongst the many international agreements on the subject, which has effective machinery to guarantee the rights of prisoners through the Commission and the European Court, even if it only dedicates a single article – Art. 3 – specifically to them. Nonetheless the attention which up to now has been dedicated by this organ to the phenomena herein considered is still marginal.

The number of petitions presented by single individuals to the Court in Strasbourg have not been many but this may also be due to the access mechanism to the Court. Yet the Commission, even if it has not been involved in the rights of prisoners to be reinstated in society, has adopted a series of decisions which affect the daily life of prisoners, especially prison rules and the use of force against prisoners. The results of such work are modest, also due to the absence of supervisory instruments available to the Commission, as can be seen from the activity of the Commission and the Court.

However not all the difficulties in the protection of the prisoners'

rights emanate from the system of the Convention. The rules in the Convention are in fact often neglected on a national level.

Nonetheless, they are not abstract rules but rules which should find immediate application. In this sense, the Italian *Corte di Cassazione* has been clear in judgement no. 6978 given on 14 July 1982. In this judgement it is held that the rules of the European Convention on fundamental human rights have immediate application, and should be concretely valued for their effect on other laws in consequence to their inclusion in the Italian legal system.

This judgement is particularly important because it singles out the right to a fair trial as a guarantee of the protection of fundamental human rights.

Judgement 6978 says: "the principles and rights specifically safeguarded under Article 6 of the Convention are the frame-work according to which one can determine whether a fair trial subsists or not". This means that the Court should not avail itself only of the rules of the Convention, in so far as they are on an equal level with those of the internal legal regime, but it can, or rather it should, consider them as interpretative instruments for the same internal legal regime.

In this way, the European rules are to be considered as 'a magnifying lens' for the interpretation of the rules of the national legal order.

In summary, in a contrast between a protective norm of fundamental human rights and a norm of the Italian national law, it is the former which should prevail.

No special law, nor any special tribunal, can derogate that minimum standard of protection of fundamental human rights established through many conventions by the international community in order to gradually widen and improve the protection of fundamental human rights.

With the end of the Cold War, the internal situation in many States is far from stable or peaceful. The same can be said about the international situation. The new conflicts do not only affect the impoverished world but also the developed societies. These are conflicts which give rise to all sorts of violence and sustain very strong and diffused resentment.

The truth is that the contradictions caused by unfair development on a global level are reflected in a dramatic way in the reality of many developed societies with strong democratic traditions. The society of tomorrow will be more multi-racial, especially in Europe and also in other developed parts of the world and this will create

new conflicts which were still unknown up to yesterday. What is needed are strong social policies which can face such conflicts. However up to now these tensions are only entrusted to policies of public order, that is, by making refugees, illegal immigrants and some "ideological enemies" appear as criminals. This will be the new internal conflict, the "new civil war". However, the State cannot defend itself by recurring to violence.

It is clear that these people are now at risk, not only risking violence by private individuals but also by States.

Faced with this new conflict and of the possible violence which could be committed by a State, the Commission for the Prevention of Torture (CPT) does not have the necessary instruments to intervene.

This is the inevitable limit of all the activities undertaken by the CPT. Yet this limit can be explained, considering the nature of such an organ and its origins. This is due to the fact that it does not operate in a mechanism of juridical repression which is able to react to the violation of fundamental human rights, with the aim of punishing those responsible for such violations. On the contrary it forms part of a preventive mechanism (in this context one may refer to the article of Renate Kicker, also in this dossier) which caters for particular risk situations, particularly in prisons.

In any case, visits and reports are only made occasionally: there is no permanent supervision, and neither can there be one.

Thus the Commission operates on the basis of a fiduciary and cooperative relationship with all the states parties thereto, which receive the visits of the Commission. Such states are, or rather should be supportive of the "supervisory" work of the Commission and are meant to carry out the advise given.

This collaboration is only easy, or rather easier by states which do not have any reason to fear supervision by the Commission. On the other hand, cooperation is difficult or almost impossible when the Commission feels that a particular state is not in line with the Convention or can even be covering up for perpetrators of crimes against prisoners.

Perhaps in this sense, it is ideal that governments are not the only institutional partners of the Commission. If it is suspected that a government is "the opposing party" of the Commission, is subject to its investigations or even accused by it, it is unwise to request collaboration from the same state. In such circumstances, it would be appropriate if the Commission's reports are given the widest circulation possible, not only on the social level or at the level of

experts of humanitarian law, as is already the case, but also at the institutional levels.

For instance, it could be in the interest of the Opposition Party to be aware of any liabilities and shortcomings of the Government on custodial policies and perhaps link such facts in its political strife against the Government. Doubtlessly, the handing over of the CPT reports not only to the Government but also to exponents of the Opposition as well as to parliamentary leaders of other minority groups, could strengthen not only the supervisory activities of the Commission but also help in the search for adequate solutions, particularly in countries whose governments are traditionally known to be negligent in this field.

After all, the Commission must try to reach with every possible means and within the sphere of powers granted to it, the practical results for which it was originally set up. It is necessary that in its relations with governments, the Commission makes clear the contested subject, even if this is detrimental to the harmonious diplomatic relationship between the two. There can be situations in which the state does not collaborate with the Commission by not allowing visits to places which the Commission may want to inspect, or because of such visits, the state transfers the prisoners to places which are less "conventional" than prisons. It may also happen that the state fails to respond to remarks made by the Commission, shows no reaction to its objections or even worse, does not take any heed of any proposed measures. In such cases, the responsible state is usually reproached by the international community and made subject to the pressures of public opinion and the mass media, but this is where it all ends. Indeed this can be said to be a modest and out of date result.

On the other hand today it appears possible to go beyond the present powers of the CPT, in order to organise activities for the prevention and repression of torture on a different basis, and to fit the Commission's role and work as part of a mechanism which is able to convince states to respect the laws.

It has already been explained that if torture and ill-treatment of prisoners are not an expression of "sadism of a state" or the will to anticipate or aggravate the punishment of dissidents, but is a type of a violent short-cut aimed to obtain the collaboration of the prisoner and thus strengthen the investigative and repressive activities of the state, there is no doubt that in a democratic state one must be on the look-out so that such an objective is not attained. There is no need for new regulations. It is enough to re-read the rules found in

the Covenant on Civil and Political Rights and insist on their application.

The control of trials so as to guarantee a 'fair trial' in every case and the blaming of states which do not guarantee such a right constitute some form of deterrence against the use of torture as an instrument exceptionally useful mostly in preventive custody (refer to the article by Mona & Haenni) to do away with the prisoner's resistance.

However one must go beyond this because it is necessary to punish those responsible for torture and ill-treatment of prisoners. This does not only ensure the proper use of justice whereby the guilty are punished, but also serves as an admonition to the public authorities that that violence cannot remain unpunished.

In this field, if one goes beyond the periodical visits in prisons and the publication of reports thereupon, there is no doubt that the CPT can become the connection link in an articulated and informative system based mostly on non-governmental organisations, capable of controlling daily life in prisons and establishing dialogue with the national public opinions.

In future, the role of the CPT might reveal itself to be essential not only in the field of prevention but also in the area of repression: the punishment of those responsible for torture and ill-treatment constitutes one of the main instruments to prevent the repetition thereof.

It is not with amnesties that the past is cancelled, in the hope that it does not repeat itself.

What is needed is an act of justice: it is necessary that those responsible are singled out and punished. The truth of the facts must be established in order to answer to the victims' demand for justice. It is also necessary to indemnify the physical and mental damages suffered by the victims. In short, it is necessary that the system of the European Convention, which is a system for the prevention of crimes, forms part of an international judicial system responsible for these crimes.

It is in this respect that the Convention should be complementary.

Through visits, *notitiae criminis* can be acquired. Reports can mobilise the international public opinion, satisfying the demands for justice. But it is necessary to determine the responsibility of such crimes and to punish the guilty.

The system envisaged by the Convention against Torture should be extended to other regions. There is the idea of creating a "supervisory" institution, similar to the Committee of the European

Convention, even for the UN Convention. The APT is fighting for this.

In the last years there is no doubt that extensive progress has been made in the protection of fundamental human rights. Two ad hoc tribunals have been set up to deal with cases of international crimes. One of the tribunals deals with ordinary crimes in European states. However such crimes should be permanently dealt with by an international court having universal jurisdiction, capable of punishing not collective and "abstract" responsibility but individual responsibility.

Torture and ill-treatment constitute serious violations of human rights, apart from the fact that their serious character can make them look like crimes, international or otherwise. These are illegalities which can occur even outside a situtation of an international armed conflict or even of an internal conflict but still it is not only the particular political context or the character of the crimes which reduces or amplifies the seriousness thereof. For instance, the situations brought to light by the activities of the two ad hoc tribunals for the former Yugoslavia and Rwanda should help us reflect on this matter.

The Statute of the Tribunal for Rwanda defines the "serious violations of humanitarian international law" in which the Tribunal can exercise its jurisdiction according to art. 2,3 and 4. What is surprising is that amongst such violations, art. 4 includes not only those found in art. 3 common to the Geneva Conventions of 12 August 1949 for the Protection of Victims of War, but also those of the Additional Protocol II of 8 June 1977 relating to the Protection of Victims of non-international armed conflicts. The same reference to Protocol II is not found in the Statute of the Tribunal for the former Yugoslavia.

Up to then, such violations were not considered "crimes" in terms of international humanitarian law. In a way, with such a choice, the Statute of the Tribunal for Rwanda indicates a prospect of great political importance: the handling of the most significant violations of human rights and not only violations of humanitarian law, such as violations of international law.

The Tribunal for the former Yugoslavia is also following this road. With reference to the decision taken by the Appeals Chamber in October 1995 in the famous Tadic case, amongst other things, it was explained that the violations of Art. 3 and of Protocol II bring about individual penal responsibility and that customary international law imposes criminal liability for such violations, regardless of whether

they were incurred within an internal or an international armed conflict.

This is a clamorous development in international law, having great political significance. Surely, one can note that there is a great difference between internal conflicts which may have often thrown into crisis even the major State institutions and mechanisms, and the situations which a system for the prevention of torture, like the European Convention which is based on a relationship of cooperation and trust between the Commission and the States, has to face. In any case, when conflicts give rise to violence, the mechanisms for the protection of human rights should be operational. It is not really the formal definition of the conflict (whether it is an internal or an international conflict, a violent form of a political struggle, or a claim for power for the self-determination of a nation) which can set off the mechanism for the protection of fundamental human rights in the face of abuses and violations committed also by the state, but rather the fact that there are the violations of human rights which remain unpunished because the State cannot or does not want to defend them, and because such violations are relevant in the international sphere.

Therefore it is necessary to determine the responsibilities of the perpetrators thereof and to punish the guilty, indeed to prevent further violations. It is the breach of human rights beyond any realpolitik – which causes such violations – that should, in a world which finally aims for a more orderly system, always lead to the trial and the punishment of the individuals found responsible for such violations.

## Conclusions

It appears to us that the CPT in these years has sought to be an efficient instrument in the fight against torture in an international situation characterised by a lot of attention to what was happening within the States, in particular in the way the penal repressive mechanism was functioning.

Today, the situation at the international level is changing, and revolutionary innovations in this field are verifying themselves, provoking convincing and diffusing consensus of public opinion.

It is enough to think of the creation of the two ad hoc international tribunals and the work being done to launch negotiations between states for the creation of a permanent international Criminal Court

by 1998. The Committee must revise its international role within this new reality.

It is promising that a committee similar to the European one has to be created with the same duties with respect to the UN Commission against Torture. The Association for the Prevention of Torture (APT) is also committed for an Optional Protocol to the UN Convention. It is also promising that the CPT has a different institutional role and more incisive powers.

The committee can be not only an organ of supervision and reporting of some of the most serious violations of human rights, which up to now are still being committed, but an organ of 'action', hastening the activity of the future permanent tribunal considering that the *notitiae criminis* which the committee is able to collect and elaborate are among the most numerous and documented which can be collected.

The committee, in this sense, can represent in Europe, at least until there is a universal institution with the duties of the European Committee (Costa Rica Protocol) the centre point of a network of public and private institutions which control prisoners' conditions of life everywhere and denounce the most frequent abuses of repressive power exercised by the States.

---

**Salvo Andò** *is visiting professor of Public Law at the University of Malta. His most recent publications treat human rights after the end of the Cold War and the debate on constitutional reform in Italy.*

# THE ASSOCIATION FOR THE PREVENTION OF TORTURE (APT) AND ITS RELATIONSHIP TO THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE (ECPT)

MARCO MONA AND CLAUDINE HAENNI

## 1. The association

The Association for the Prevention of Torture (APT) is a non-governmental organisation based in Geneva, Switzerland. Its mission of international scope addresses the prevention of torture and ill-treatment, as these are prohibited by a number of international norms. APT and its predecessor-organisation, the Swiss Comittee against Torture (CSCT) began to operate in 1977. The founder, the Genevan banker and humanist Jean-Jacques Gautier decided that it was not sufficient to feel deep disgust for the plague of torture, but that something had to be done against it, something to prevent it through an officially acknowledged system of visits to all places of detention. The idea that one could not be limited to condemnation and repression of already perpetrated torture, but that it was necessary to go further, to disclose the mechanisms that may lead to torture and ill treatment and intervene there, obviously was too appallingly simple. It took quite an amount of perseverance to persuade the right people to do the right thing.

After many efforts, the CSCT and the International Commission of Jurists finally presented a draft Convention to the Parliamentary Assembly of the Council of Europe which lead, in 1987, to the adoption of the "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" (ECPT). Today more than 30 European countries are parties to the Convention, allowing the Convention's body, the "European Committee for the Prevention of Torture" (CPT) to visit all places where persons

deprived of their liberty are held. Would the States allow such incisive interference into their sovereignty? This was the main challenge to the promoters of the system of visits as well as the main objection raised by so many busy politicians. The answer is: they would. Today the Convention is being enforced.

In a world that seems to care little for the integrity of the individual, the sole task of preventing torture and ill-treatment may seem titanic – added to the the tasks of denouncing and of helping the victims that other NGOs are committed to. But with well targeted efforts and clear action criteria, small steps in the right direction can be taken and others can be stimulated to do likewise.

As an association under Swiss law, APT is very much based on its members, who are an increasing number of persons from all over the world. They are all committed to the simple idea of prevention and contribute by spreading the idea, by supporting APT's action through networking in their own country or simply by participating with their annual contribution or supporting APT's fund-raising activities, thus helping to maintain the organization's independence.

The objective of APT is the prevention of torture through:

a) promoting a system of preventive visits, carried out by a treaty body on a national, regional or universal level as well as promoting the implementation of existing systems;
b) catalysing the general reflection about other preventive tools on a national, regional or universal level;
c) identifying risk categories: persons, situations or professions, in order to analyse the mechanisms that lead to torture and ill-treatment and thus to propose corresponding preventive remedies;
d) awareness raising and interdisciplinary training for various professionals and NGOs concerning the various existing means of prevention;
e) establishing country reports (so far mainly on Europe, due to the European Convention) and following up the CPT's work in European countries in collaboration with national and regional NGOs.

It goes without saying that these objectives are constantly discussed and adapted. While APT is celebrating this year its 20th anniversary and can proudly show the results of its commitment, the view towards the future is both demanding and challenging. Undoubtedly, there is no way of circumventing the process of concentration of forces, deepening of collaboration and merging of efforts aiming towards similar or complementary goals.

## 2. Preventing torture

### *2.1. Identifying risk categories; populations, situations and actors*

The question as to whether torture is a State policy or not is a moot point. It is much more important to know what the authorities' reaction is to this phenomenon of torture or ill-treatment within their own State borders: does a clearly-stated commitment against torture translate into a clearly-executed political will?

Experience shows that, irrespective of the fact whether torture or ill-treatment is a systematic State policy or not, it is usually the "marginals" of society that are tortured. The definition of a "marginal" may vary from one society to another: it may be refugees, illegal migrants, but also people pertaining to an ethnic or religious minority, it may be people perceived as professing an "enemy" ideology, or belonging to another country or race, etc. In other words, States (as well as NGOs, of course) can often identify in advance who is more likely to become a victim of torture and do something to prevent it.

As far as preventive identification of risk situations and risk periods is concerned, there are of course particular situations of detention where classifying the risks may become a difficult task, for instance in centres where illegal migrants or refugees without the right of asylum are held expecting repatriation or in psychiatric wards. But in cases of criminal detention one can roughly divide a detention period into four phases: arrest – interrogation – preventive detention pending investigation – detention once the person has been sentenced. Torture and ill-treatments are more likely to occur at the initial phase, i.e. (police) custody, where and when the first interrogations take place, and less during preventive prison detention and even less after the detainee has been sentenced. Therefore safeguards should be mainly aimed at functioning during the high-risk period.

One should here mention also the situation of armed conflict, since the question as to what the APT does in cases of armed conflict regularly arises. Clearly, armed conflict is a high-risk situation, and the best prevention here would be to avoid these situations. When we are talking about prevention, we are ideally placing ourselves before the act, and therefore also before the outbreak of armed conflict. Although the APT does not at all exclude utopical goals it cannot claim to cover all risk situations by itself.

The case of armed conflict is covered by the detention work of the ICRC, which, in the context of our reflections, could be considered

as a preventive mechanism tailored especially for these exceptional situations.

### 2.2. *Prevention by focusing on the victims: prison visits, ombudspeople, other mechanisms*

Most of the preventive work today is done through visits to places of detention, and as pointed out earlier, we are not only referring to prisons. From the very beginning of its work, the APT has concentrated its efforts on places where people are deprived of their liberty and over which the State has direct or indirect control; the European Committee for the Prevention of Torture does the same.

The aim of these visits can be simply to see physically the detainees, and therefore avoid ill-treatment or disappearences, because they are no longer anonymous. It can also have the scope of reporting on detention conditions – bad or inhuman detention conditions can be paramount to ill-treatment – and raise the issues before the competent authorities, and, if need be, in public. Finally visits can have a monitoring function and therefore act as a deterrent for possible perpetrators of torture and ill-treatment.

Many countries today have national in-built protection mechanisms, such as human rights ombudspeople that have the right to visit prisons. There are also specific prison ombudspeople, people in charge of safeguarding human rights within the Ministry of the Interior or within the national police-structure. On a more informal level, certain countries let NGOs or religious groups function as prison monitors. The representatives may not establish systematic reports but are more likely to intervene on behalf of individual cases.

In Europe, the European Committee for the Prevention of Torture, the treaty body of the European Convention, carries out visits to places of detention (refer to the article by Rod Morgan also in this issue). A similar system is currently being negotiated at the United Nations, in the form of a draft Optional Protocol to the UN Convention against Torture. The UN Convention foresees a Committee against Torture (CAT) which receives reports from the State parties and examines them. The Optional Protocol would create a Sub-Committee to the CAT which could visit detention places and make recommendations in a similar way as the European Committee. It goes without saying that the APT is not only at the origin of this idea but also follows the developments very closely.

### *2.3. Prevention through dissuasion: punishing the perpetrators*

Impunity for the perpetrators of torture is a serious hindrance in the struggle to extirpate the plague, yet it is well known that impunity is wide-spread and that many torturers keep doing their dreadful job only because they are reasonably secure that their crimes will be unaccounted for. Many efforts are undertaken to stop this direct cause of the continued perpetration of torture. The United Nations established mechanisms like the Special Rapporteurs on Torture and on Summary Executions or the Working Groups on Forced Disappearences or Arbitrary Detention. There is much to be done in this field, also for international and national NGOs. The discussion on a permanent International Penal Court, currently taking place, may have an important impact on the prevention of torture and impunity, as well as on the questions of the right of victims to reparation.

### *2.4. Prevention by eliminating loop-holes*

Procedural mechanisms regulating arrest, detention and investigation, rules of detention, restrictions on incommunicado-detention, collective or individual rehabilitation programs, rules concerning the personal integrity of the person deprived of liberty (habeas corpus for instance) etc., may certainly be a very effective means of prevention of ill-treatments. Efforts to improve such mechanisms and to eliminate loop-holes are to be made on a national level. Thus the national NGOs are once again challenged. Obviously networking amongst them and close collaboration with NGOs acting on an international level is extremely important for the exchange of information, comparisons, new suggestions and the support and follow-up of their work.

## 3. Opportunities and limitations

As in any legal system, laws and rules can only work if there is basic good-will and good faith. The most perfect law does not change anything unless it is supported at the operational level. It is also impossible and impractical to foresee all the loop-holes. But, at the same time, there is a certain amount of additional prerequisites for a succesful preventive action against torture.

First of all the stated political will must not only be lip-service but must be translated into concrete action, which needs to be very strict. There is absolutely no room for attitudes that belittle certain

so-called "minor" transgressions committed by State agents. Such attitudes can only be percieved as condonation by the hierarchy and would therefore be conducive to further abuses. This is even more true where the highest political and judicial authorities of a State start defining the difference between tolerable and prohibited forms of torture or ill-treatment.

Torture and other abuses are often shrouded in a veil of secrecy. This is not only detrimental for the victims but it also encourages the perpetrators. A clear policy of transparent information to and from the civil society, to the families of the detainees and other interested groups, such as human rights NGOs or the press, is a way of avoiding situations that may generate ill-treatment in the medium term. It acts as a deterrent and provides input for an external monitoring, which, if done in a spirit of constructive dialogue, can only prove to be a help in the authorities' endeavours to prevent torture and other ill-treatment.

The conclusion is obvious: other prerequisites for the successful prevention of torture are freedom of speech and true democracy. And "democracy" does not only mean the formal political democracy – more or less free elections do not necessarily come along together with guarantees of the rights of detainees – but it means openness to dialogue. The State authorities must be able to accept criticism as well as the NGOs and other members of the civil society must be willing to make constructive criticism. This also means willingness to cooperate on both sides with the goal of eliminating the dichotomy "it's them against us".

Lastly, one also has to be realistic: if torture and ill-treatment are due to risk factors like lack of infrastructure (bad detention conditions, lack of personnel, lack of adequate traning for investigation officials and prison personnel etc.) there will always be a problem of financial resources for many countries. This problem is often coupled with popular considerations as to the necessity to establish priorities for State expenditures, where very often the detainees are at the bottom of the list of the priorities.

## 4. APT and the European Convention for the Prevention of Torture today

In 1977, the founder of the APT started spreading the idea that specific preventive tools were needed in the struggle against torture. Today, twenty years later, the European Convention is enforced, the European Committee for the Prevention of Torture is at work, and

its achievements are quite remarkable. A very important goal of APT's efforts has been reached, but it is a partial success. APT's work does not stop here: other tools of prevention, on a universal level and in other regions than Europe are on its schedule, as well as the implementation of the European Convention itself. This entails gathering information on the condition of detention in the countries party to this Convention, it also means establishing a network of local NGOs, training them on how to use and help this unique mechanism and, more generally, generating awareness on the work of the European Committee for the Prevention of Torture (CPT).

Here are some highlights of APT-work aiming to assist in the implementation of the European Convention:

a) Research and publication of reports on conditions of detention in countries party to the ECPT: many reports have been produced by APT since the CPT started its work, lately with a special focus on the new member States to the European Council. Wherever this is possible, such reports are a result of collaboration between APT and the local NGOs. Now that many of the member States have been visited more than once by the CPT, the follow-up of such visits becomes more and more important, as well as reports especially tailored to the recommendations made by the CPT and its implementation by the local authorities. The risk-analysis (cf 2 a) as well as the analysis of the information already available, has also lead the APT to narrow down the subject of such reports; this is also done after discussions with the Secretariat of the CPT in Strasbourg.

b) Training for NGOs and other partners: Since 1989 (i.e. since the CPT started its work) APT multiplied its efforts to create a network of locally acting NGOs and other partner-organisations. After the first five years of activities of the CPT, a seminar was held in 1994 at Strasbourg, where some hundred participants from about twenty countries of Central, Eastern and Western Europe gathered. The Acts of this seminar have already become a handbook for NGOs acting in this area. Amongst others, they contain a catalogue of practical suggestions towards the implementation of the ECPT. One conclusion of the Strasbourg seminar was that it would be useful to organize follow-up seminars in different parts of Europe. APT scheduled two such seminars in 1997. One is to be held in September in London, in partnership with the British Institute for Human Rights, for the countries of Northern Europe. The other one took place in Oñati, in Basque country, together with the

International Institute for Sociology of Law, in April, and gathered participants from Cyprus, Greece, Italy, Malta, Portugal, San Marino, Spain and Turkey. Of course the question as to the similarities of problems and findings in countries of southern Europe was raised there, but quite quickly dropped, the only obvious comon pattern being that the Convention is still quite unknown in southern Europe. The holding of regional seminars has already proven to be a good choice: the size of the seminar permits a more thorough dialogue between the different national partners to the CPT, a valuable comparison of experiences. And the fact that experts, official partners of the CPT as well as the inofficial ones come together to listen, talk and to develop common strategies towards improving the effect of the preventive action caused by the ECPT, is in itself a guarantee for an outcome of high interest. The Oñati seminar fulfilled its expectations, the Acts of the seminar, published in Spanish and English, will be a further helpful document for all those interested in the implementation of the ECPT.

Yet another instrument to further implementation will be the APT Manual on the ECPT which is planned as a series of pamphlets on various aspects of the European Convention, such as its functioning and the various means of supporting the CPT before, during and after its visits to the member States. The first parts of the manual, which is meant to be very flexible and open to adaptation when needed, should be published this year.

## 5. APT's action not limited to Europe

We have already shown that, as proud and happy APT may be about the success obtained with the ECPT, it may consider this only a partial success. Prevention of torture must become a main issue universally. Thus APT is promoting the draft Optional Protocol to the UN Convention against Torture which should provide for a universal system of visits to detention places quite similar to the one enforced by the CPT in Europe. APT is today also trying to explore other venues. In its regional programmes, especially in Africa and Latin America, reflections are being promoted on how prevention can have even better regional solutions, more adapted to local needs and circumstances. What may work well in Europe, may also work elsewhere, but better mechanisms may be discovered, other criteria considered. This is why APT is pursuing a closer cooperation with regional human rights bodies such as the African Commission on Human and Peoples' Rights.

The approach of an institution like the Foundation for International Studies at the University of Malta, taking advantage of its boarder situation between regions and cultures and considering the boarder situation more a link than a separation, may be very helpful for APT's main purpose: that of spreading the idea that prevention is crucial also in the struggle for human rights. It can help to identify partners across boarders who will work together in view of a genuine, culturally and politically accepted concept for prevention of torture on national and regional scales.

The academic institutions play an important role in developing and disseminating such concepts, but also in the practical implementation of existing instruments of prevention. But there are also the NGOs which have a crucial role to play in the prevention of torture. They are the ones that can monitor and identify the risk categories and the risk situations on a national level. Whether they will then limit themselves to denouncing their findings or commit themselves to the more complex and consuming task of cooperating and seeking dialogue with other partners and with the authorities (and, where possible, with the supranational bodies of prevention of torture) is a matter of effectiveness, strategy and of available forces. Dialogue and cooperation may be useful to all sides involved, especially if each protagonist is clear about the respective roles and identities. An NGO will never have the same reasoning nor way of acting as a State authority, and this is correct if it is to be useful. However, considering that NGOs are representative of certain opinions, currents and priorities within the civil society and that they indeed have the means of specializing and knowing more, States would do well to listen carefully and cooperate with them. For the real changes are not those imposed from outside, but they come from within the countries.

---

**Marco Mona** *is president of the Association for the Prevention of Torture since 1991, he served as district attorney in Zurich and later as a district judge until he became a partner of a Zurich law firm in 1981.*

**Claudine Haenni** *is secretary general of the Association for the Prevention of Torture and has worked for several years as a delegate for the International Committee of the Red Cross, where she was sent on several missions to Latin America, Europe and Africa.*

# THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT): OPERATIONAL PRACTICE[1]

ROD MORGAN

## 1. Introduction

The CPT is the creation of a Convention of the same name which came into force in February 1989. The Convention does not establish any new norms, but aims to strengthen the obligation found in the European Convention for the Protection of Fundamental Human Rights and Freedoms, Article 3 states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Convention does so by non-judicial means of a preventive nature. A state party to the Convention agrees to a system of visits carried out by the CPT to 'any place within its jurisdiction where persons are deprived of their liberty by a public authority' (Article 2). This includes prisons, police stations, closed psychiatric hospitals, immigration detention centres, juvenile reformatories, and so on. The system is based on the parallel principles of co-operation and confidentiality. At the time of writing (May 1997) 33 countries are bound by the Convention[2] and more have committed themselves to ratifying the Convention system in the near future.[3]

---

[1] This paper is an adaptation of a briefing document prepared for delegates attending a workshop in April 1997 organised by the Geneva-based Association for the Prevention of Torture at the Onati Institute for the Sociology of Law on the topic of preventing ill-treatment in custody in the Mediterranean countries.

[2] These being: Albania, Andorra, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finand, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

[3] At the time of writing there are 40 member states of the Council of Europe. This suggests that Croatia, Latvia, Lithuania, Moldova, Russia, TYFRO Macedonia and the Ukraine will shortly become parties to the ECPT. The Parliamentary Assembly of the Council of Europe now requires States joining the Council of Europe to ratify the ECPT within a year of accession.

The work of the CPT revolves entirely around organising visits, preparing for visits, undertaking visits, reporting on visits and following up visits. These sub-headings are used below briefly to describe the methodology of the Committee.

The CPT comprises one person from each member state elected by the Committee of Ministers of the Council of Europe. Members 'shall be independent and impartial' [Article 4(4)], and they 'shall be chosen 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' [Art 4(2)]. There are currently 28 members of the CPT.[4] They include lawyers with varied backgrounds and experience (13), medical doctors (8, including 3 psychiatrists), psychologists (2), parliamentarians (2) and persons with experience of penal administration (3, plus 2 of the lawyers). The Committee elects a central Bureau (a President and two Vice-Presidents) and is served by a Secretariat, currently comprising eleven staff, based in Strasbourg.

Information about the CPT and its working methods are available from a variety of sources. The Council of Europe produces information leaflets on the work of the Committee. The CPT itself produces an annual report which describes the activities it has undertaken in the previous year and, from to time, the methods it employs and the standards it looks to when conducting visits and the safeguards against torture and inhuman or degrading treatment or punishment that it generally promulgates in visit reports. Of particular importance are the second and third Annual Reports which summarised the Committee's standards in relation to police and penal custody and medical issues respectively.[5] The Committee has indicated that its Annual Report for 1996, which should appear shortly, will provide a similar statement relating to the detention of foreign nationals, a growing phenomenon throughout the Council of Europe member states.[6]

---

[4] At the time of writing members have not yet been elected for Albania, Andorra, Estonia and Slovenia and no new member has been elected for Portugal following the expiry of the previous member's term of office in September 1996.

[5] CPT/Inf (92)3, paras 35-60 and CPT/Inf (93)12. paras 30-77.

[6] See CPT/Inf (96)21, para 3.

## 2. Organising Visits

CPT visits comprise *periodic* visits and *ad hoc* or *follow up* visits. *Periodic* visits are those regularly planned by the Committee and which the Explanatory Report to the Convention envisaged would be made 'as far as possible ... on an equitable basis'.[7] The CPT initially hoped that this would mean each country being visited every two years[8], but it is already clear that this is not feasible given the resources available and that every four years is now a more realistic target.[9] *Ad hoc* and *follow up* visits are 'those required in the circumstances' [Article 7(1)] either to investigate allegations, to clarify situations or to see if situations in previously visited institutions have improved or recommendations been implemented.[10] Most visits are *periodic* and generally six are planned for each year. They are normally supplemented by several *ad hoc* or *follow up* of which a greater number are now occurring and are likely in future.

In 1993, when the first round of *periodic* visits was completed, the CPT decided to conduct fewer full-length *periodic* visits in order that the Committee be able to react more speedily to events and concerns made known to them.[11] This was in accordance with expectations set out in the Explanatory Report to the Convention.[12] The pattern of visits since 1993 shows that this plan has been enacted. Thus in 1994 ten visits were undertaken, four of them *periodic* and six *ad hoc*, one of which, to Turkey, was to *follow up* an earlier visit.[13] Once all the new member states have received their first *periodic* visit – a requirement that largely preoccupied the CPT in 1995 and to a lesser extent in 1996 – we should expect the balance to shift towards more *ad hoc* visits.

*Ad hoc* visits can take place very rapidly indeed. In June 1994, for example, the CPT carried out a brief visit to Spain, arranged at 'very short notice', specifically to interview several persons who had recently been in custody. The Committee had carried out a full-length *periodic* visit to Spain only two months earlier.[14] *Follow up* visits

---

[7] Explanatory Report, para 48.
[8] CPT/Inf (91)3, para 89.
[9] Interview with the CPT Bureau, September 1996.
[10] Explanatory Report, para 49.
[11] CPT/Inf (94)10, para 21.
[12] Explanatory Report, para 48.
[13] See CPT/Inf (95)10, paras 1-2.
[14] See CPT/Inf (95)10, paras, 1-2

may also be highly focused. The *follow up* visits to France in July 1994, Portugal in 1996, and Greece and Italy in November 1996, for example, were all brief (three or four days) and were all to return to specific institutions about which the CPT had earlier expressed concerns, namely the Paris police *'dèpôt'*, Oporto Prison, Attica State Mental Hospital for Children and the Milan Remand Prison.[15]

The first round of *periodic* visits, to what was then 23 member states, was determined by lot and completed in 1990-3. Thereafter countries, other than new member states, have been selected for visits according to assessed need and equity. Whereas some longstanding member states, generally smaller countries, have yet to receive a second visit[16], others have been visited repeatedly.[17]

## 3. Preparing for Visits

The Strasbourg-based CPT Secretariat receives information relevant to the CPT's mandate from any number of sources – the press, official sources, NGOs and individual informants. All communications prepared for and sent specifically to the CPT are acknowledged by the Secretariat and notified to CPT members when meeting in plenary session, which they do three times each year. Receipt of general mailing list material from NGOs is not acknowledged though, if it is judged important, it is brought to the particular attention of CPT members when meeting in plenary session. Generally speaking the CPT does not solicit information and its rules of confidentiality are interpreted so as to absolutely prevent the Secretariat from telling correspondents how the information they have sent has been acted on. Correspondents may be able to infer that their information *has* been acted on only by reading the press releases issued by the Council of Europe shortly after visits have taken place (which list all custodial institutions

---

[15] For these expressions of initial concern see CPT/Inf (93)2, paras 70-75, CPT/Inf (94)20, paras 192-251, CPT/Inf (96)31, paras 90-104 and CPT/Inf (95)1 paras 74-6, respectively.

[16] For example, Iceland and Luxembourg, both visited in 1993.

[17] The most visited country to date is Turkey (a *periodic* visit in 1992, and *ad hoc* or *follow up* visits in 1990, 1991, 1994 and twice in 1996), though Spain has also been visited repeatedly (*periodic* visits in 1991 and 1994 and *ad hoc* visits in 1994 and 1997).

visited) or the report on a visit made, providing the government of the country concerned authorises its publication. This one-way communication system concerns and is regarded as off-putting by some NGOs, but is arguably central to the CPT's confidential method as required by the Convention.

Once the CPT has decided in the autumn of each calendar year what its programme of visits is to be for the following year, the Secretariat informs the countries concerned and shortly thereafter the Council of Europe issues a press release naming the countries. The exact timing of visits is kept secret. Meanwhile the Bureau, together with the Secretariat, formulates a plan for the timing and duration of all visits and the composition of visiting delegations. The shape of this plan is constrained by: budgetary considerations; the need to ensure that all CPT members equitably take part in visits; and the need to ensure that all delegations are balanced in terms of expertise, experience and linguistic compatibility. Because they are in relatively short supply, for example, members with medical expertise tend to undertake above average numbers of visits. Most delegations are led by a member of the Bureau and members do not visit their own countries.

When this visit plan has been approved by the CPT meeting in plenary session the members selected to form the delegation meet and begin to plan the detail of the visit. They decide matters such as: the duration of the visit; which institutions to visit; whether the delegation will need to be assisted by experts; and, if so, by what sort of expert and whom; whether specific NGOs should be approached with a view to meeting their representatives during the course of the visit; whether the delegation should be split during part of the visit so as to enable different parts of the country to be visited; and so on. To assist the CPT members in this task the Secretariat prepares a dossier of information received about the country on the basis of which proposals are made as to which institutions should be visited. It follows that receipt of good quality up-to-date information from organisations and individuals in the country concerned is vital to the effective carrying out of the CPT's mandate.

About two weeks before the visit is due to take place the official liaison officer of the country concerned is informed of the proposed date and duration of the visit, as well as the identities of the Committee members, experts and interpreters making up the delegation. Finally, a few days before the visit commences, a provisional list of places to be visited is sent to the country. This

procedure is designed to give the country time to: make necessary practical arrangements: collate and transmit information about the institutions notified and fix meetings with officials. The notification period is, arguably, too short to allow the authorities time to make significant changes to conditions or the regime at the places to be visited. However, it should be noted, the CPT always reserves the right to visit places not notified and invariably does so. Most visits, with the exception of *follow up* visits focused on one or two institutions, typically involve the delegation going to places of custody not notified, particularly small loci like police stations and immigration holding centres.

## 4. Making Visits

The size of visiting delegations and the duration of visits depends on the size of the country being visited and the complexity of the issues which it is anticipated have to be addressed. *Periodic* visits typically last ten to twelve days though *periodic* visits to very small countries and *ad hoc* or *follow up* visits may be as short as three or four days. Delegations on longer visits typically comprise four or five members of the CPT accompanied by one or two *ad hoc* experts recruited for the purpose, plus two or more interpreters and two members of the Secretariat. Most delegations include two medically qualified members, one of whom is generally a CPT member and one an *ad hoc* expert. Brief *ad hoc* or *follow up* visits lasting three or four days are generally undertaken by much smaller delegations.

Visits tend to follow an established pattern.[18] They generally begin on a Sunday with private meetings with local NGO representatives or individuals who it is felt can advise the delegation about recent developments that the delegation may wish to take into account when deciding to make last minute alterations to their programme. On the following day meetings are typically held with ministers and officials responsible for the institutions to be visited. But most members of delegations are only briefly involved in these formal exchanges. Delegations quickly get on with the principal business of visits – namely, going to places where persons are held in custody – police stations, prisons, youth detention facilities, closed psychiatric

[18] The pattern is described in the CPT's 1st Annual Report, see CPT/Inf (91)3, paras 64-8.

hospitals, immigration detention centres and so on – looking closely at the conditions in which detainees are held, scrutinising custody records and, above all, talking to prisoners about their experience in custody, both that where they are currently held and other places where they may have been since their initial arrest or detention.

The CPT enjoys considerable powers when carrying out a visit. They have: unlimited access to the territory of the state concerned and the right to travel without restriction; unlimited access to any place where people are deprived of their liberty, including the right to move inside such places without restriction; access to full information on places where people deprived of their liberty are being held, as well as other information, including medical records, available to the state which is necessary for the Committee to carry out its task [Article 8(2)]. The CPT is entitled to interview in private any persons deprived of their liberty [Article 8(3)], though such persons may of course refuse and to communicate freely with anyone else who the Committee believes can supply relevant information about the treatment of persons deprived of their liberty [Article 8(4)].

The Committee sets great store by having immediate and unrestricted access to places of detention, and all areas within them, and published CPT reports testify to the fact that the Committee is insistent on compliance with this letter of the Convention. References are made from time to time to difficulties which the Committee has encountered. The CPT's 1st Annual Report, for example, cited a 'certain amount of reticence' met in police stations[19] and the following year the Committee reported that 'there were some isolated examples (in both police and prison establishments) of access to a place that a delegation wished to visit being delayed'.[20] These minor difficulties have continued. Thus the 6th Annual Report notes problems relating to delayed access and to officials sometimes instructing that detainees be not seen without the prior authorisation of judges or public prosecutors, instructions which the CPT has unequivocally stated to be 'in clear breach of the Convention'.[21]

Whenever delegations encounter obstacles to their access they are adamant about their rights and to date it appears from published

---

[19] CPT/Inf (91)3, para 69.
[20] CPT/Inf (92)3, para 21.
[21] CPT/Inf (96)21, paras 5-6.

country reports they have always prevailed. During the 1993 visit to Greece, for example, the delegation requested that police officers' private lockers in the police station at Thessaloniki be opened, a request that was vigorously resisted. The Committee stood firm and eventually got its way. This proved to be a strikingly important example because when eventually opened one of the personal lockers was found to contain an electric shock device of a type which former detainees had alleged had been used against them in that police station.[22]

The CPT concentrates its attentions on relatively few places of custody which are looked at rather thoroughly. During the course of a *periodic* visit, a CPT delegation will typically visit perhaps half a dozen police stations (some of which will have been notified, but others not), two or three prisons, a psychiatric hospital, a youth facility and an immigration holding centre. The precise balance of institutions will depend on the country, the problems it presents and whether it has been visited previously. CPT delegations often split up when carrying out visits. This is particularly the case in large countries where different regions are being visited.[23]

Finally, visits end as they formally begin, with a meeting with ministers and senior officials responsible for the places visited. At this meeting the head of the delegation provides an oral summary of the delegation's preliminary findings and, if any, its immediate concerns. This enables the government concerned to correct any misapprehension under which they may contend the delegation is operating and possibly take rapid steps to act on the Committee's immediate concerns. This is ideally the first step in the ongoing dialogue which results from the Committee's visit and report.

Shortly after the delegation has left the country, the CPT issues a press release announcing that the visit has taken place. This press release provides details of the membership of the delegation and the places visited. But the press release contains no reportage of the Committee's findings and the CPT tries, not always successfully, to

---

[22] CPT/Inf (94)20, paras 22-25.

[23] The *periodic* visit to Spain in 1991, for example, involved the delegation splitting into two groups after initial meetings and visits in Madrid, one group going to Algeciras and Cadiz in the South and the other group going to Bilbao in the North (see CPT/Inf (96)9, para 3). The delegations to Italy in 1992, Greece in 1993, Spain in 1994 and Portugal in 1995 appear to have made similar arrangements.

avoid publicity during the course of visits.[24] For example, the Committee enjoins those NGO representatives with whom delegations have contact during the course of visits to preserve their virtual public invisibility during the course of the visit.[25] These efforts have not always been successful and there have been examples of the Committee's activities being misreported, something the CPT has a policy of immediately remedying by issuing a public correction.[26] Thus during the course of its visit to Turkey in August 1996, a visit unique in CPT annals, in that it was made in response to an invitation from the Turkish Government to visit Eskisehir Prison where a mass hunger was in progress, the following Council of Europe press release was issued:

> "According to certain reports in the Turkish media, the CPT's delegation commented favourably upon the situation of Eskisehir Special Type Prison. Such reports are figments of the imagination: the CPT's delegation made no comments whatsoever concerning this prison establishment during its visit to Turkey."[27]

It may not be necessary to speculate as to the origins of these media reports.

## 5. Reporting on Visits

The CPT strives to transmit reports on visits, the text of which is agreed at full plenary meetings of the Committee, to the governments of member states within six months of visits taking place. This target is not always met, though the Committee's record is improving.[28]

Following a visit the Secretariat prepares a draft report which is

---

[24] For a detailed statement of the CPT's policy relating to the media see the Committee's 1st Annual Report, CPT/Inf (91)3, paras 78-84.

[25] Information derived from interviews with NGO representatives in many countries.

[26] See CPT/Inf (91)3, para 83.

[27] Council of Europe Press Release Ref 454 (96).

[28] At the time of writing the most recent published report relates to Denmark and arising out of a visit in October 1996. The report was transmitted to the Danish Government at the beginning of April 1997 and publication authorised almost immediately. The report was published in late April 1997 [CPT/Inf (97)4], that is almost exactly six months after the visit took place. This is the shortest period yet achieved between carrying out a visit, preparing, agreeing and transmitting the report and authorisation of publication.

based on delegation members' fieldnotes. The visiting delegation, including the *ad hoc* or *follow up* visits may be shorter. Reports are clearly designed with publication in mind. The facts of the visit are set out in full together with a brief account of the legal framework, followed by the Committee's findings and concluding with *recommendations, comments* and *requests for information.*

The overwhelming majority of member states have published their CPT reports (over 30 visit reports at the time of writing), but the manner in which they have emerged has varied as has the time they have taken to emerge. We can distinguish four responses to date. First are the states which authorise publication very soon after they receive the report, about six to nine months after the visit. Second are the states which authorise publication simultaneously with their response, which may take a considerable time (eighteen months to two years after the visit is typical). Third are those states which for reasons that are usually obscure and no doubt vary, authorise publication of the CPT report, and possibly their response, long after they were received from and transmitted to Strasbourg. In one instance, Spain, this happened five years after the visit.[29] Finally there are those countries that after a very long interval have not authorised publication – currently Cyprus and Turkey – though, given the third category, it is always possible that they may yet authorise publication.[30]

It is notable that the Mediterranean states include those which, to date, appear to be most reluctant to publish CPT findings or to do so speedily. Cyprus and Turkey stand alone now as non-publishers. Spain currently holds the record for the longest delay in authorising publication of a CPT report. Italy took almost three years to authorise publication of the report arising out of the *periodic* visit in 1992. Malta and Portugal took two years to authorise publication of the reports arising out of their first *periodic* visits and Malta failed to publish a response, though the Maltese Government has published

---

[29] The reports resulting from the first three visits to Spain – in 1991, 1994 and 1994 respectively – were not published until March 1996, that is almost exactly five years after the first visit. The reports were published in a single volume with the Spanish Government's responses [see CPT/Inf (96)9] and this was done shortly after the change of government which resulted from the General Election in Spain in February 1996.

[30] It is suggested that the Government of Cyprus may yet authorise publication of the report arising out of the CPT's *periodic* visit in November 1992.

a response to the second *periodic* visit to Malta.[31] No Mediterranean state has adopted the typically Scandinavian stance of authorising publication of CPT reports as soon as they are received.

## 6. Following Up Visits

The CPT has always emphasised that a visit, *periodic* or *ad hoc*, is but a stage in an ongoing dialogue. The dialogue is conducted on the basis of co-operation and in confidence and is designed to prevent ill-treatment of persons in custody taking place. The purpose of the exercise is not to condemn states but to work towards prevention in the future. It follows that country reports represent the beginning of a process, not the end of it.

The CPT asks each member state to submit an interim response to a visit report within six months of receipt and a final response within twelve months of receipt. Most states have met these deadlines, but a minority have failed to do so, some conspicuously so.[32] Government responses are then considered by the Committee, following which observations, in the form of extended letters, are sent to the governments concerned. The pressure on the CPT's limited Secretariat resources has meant that the Committee is itself 'far from satisfied with its own record as regards the on-going dialogue', which presumably means that government responses are not reacted to as rapidly or fully as the Committee considers appropriate and would wish.[33]

The CPT's written observations are, like the CPT's original reports, sent in confidence, though they could be published or made available to commentators requesting copies were the recipient governments to authorise it. In practice this has seldom happened: most governments have authorised publication of their interim and final responses at the same time as they have submitted them, that is, well before receipt of the CPT's observations.

The distinction between *recommendations*, *comments* and *requests for information* in CPT visit reports is important because the Convention refers only to *recommendations*, failure to respond to which may lead to the CPT's only sanction being triggered. If a

---

[31] CPT/Inf (96)26.

[32] See CPT/Inf (95)10, para 10 and CPT/Inf (95)21, para 10.

[33] CPT/Inf (95)10, para 10.

member state fails to co-operate with the CPT or refuses to improve the situation regarding torture or inhuman or degrading treatment or punishment in the light of the CPT's *recommendations*, then the Committee may, by a two thirds majority vote, decide to make a public statement on the matter [Article 10(2)]. It should be stressed that in this event, it is not the report of the CPT which is made public – that remains confidential – but a statement on the matter. Article 10(2) has to date been invoked only twice, both with regards to Turkey, in December 1992 and December 1995.[34] In Turkey, the Committee concluded in 1992, 'the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread', is a 'deep-rooted problem' and the Turkish authorities are failing to take steps to improve the situation.[35] These conclusions were repeated in 1995.

However, although Turkey undoubtedly represents the worst case of ill-treatment of persons in custody that CPT inspections have yet revealed, it is apparent that most of the Mediterranean member states exhibit significant problems according to CPT accounts. We do not know for certain what conclusions the CPT came to regarding Cyprus in 1992. However, lengthy purported extracts from the unpublished CPT report appeared in the *Cyprus Mail* in the autumn of 1993. The extracts suggested that the CPT had received allegations of torture at the hands of the Cyprus police in Limassol, allegations sufficiently well-founded to lead the Committee to recommend that the Cypriot authorities hold an official inquiry. Subsequent reports in the Cypriot press suggest that an official inquiry was held and that allegations of torture were upheld. Whatever the truth of these reports we must assume that the absence of a public statement on Cyprus reflects the CPT's satisfaction with the steps taken by the Cypriot authorities to prevent further ill-treatment.

Following an *ad-hoc* visit to Spain in 1994 the CPT reported a series of serious allegations received of torture by means of asphyxiation, electric shock treatment, physical beating and threats. Though the delegation acknowledged the problem of false allegations by persons arrested in relation to terrorist offences in Spain, they concluded that 'the accounts of most if not all of the persons interviewed by the delegation were not of a stereotypical nature',

---

[34] CPT/Inf (92) and CPT/Inf (95).

[35] CPT/Inf (92) paras 2, 21 and 25.

and that though some of the allegations could have been exaggerated they had 'the ring of truth about them'.[36] Some of the interviewees displayed physical marks consistent with their allegations, including one person who bore marks consistent with having been given electric shocks.[37]

In France, following its visit in 1991, the CPT came to the conclusion that 'persons deprived of their liberty by the security forces on the order of the court run a risk which is not inconsiderable of being ill-treated'.[38]

The delegation heard a large number of allegations of ill-treatment, some of them serious, from persons deprived of their liberty by the security forces. The allegations included: punches and slaps; blows on the head with telephone directories; psychological pressure; verbal abuse; and deprivation of food and medicine. The allegations concerned: males and females; foreigners, young persons and other vulnerable detainees; and they related to police stations in both Paris and the provinces. The allegations were corroborated from so many sources that they merited belief.[39]

Almost identical conclusions were reached regarding Italy, both with respect to the Carabinieri and the police.[40] In Portugal, following a visit in 1992, the CPT came to the conclusion that 'the ill-treatment of persons in police custody is a relatively common phenomenon'[41] a conclusion to which the Committee came again following its visit in 1994: 'firm and unequivocal action' was required of the Portuguese authorities to address the situation.[42]

In Greece the CPT found that though 'the (reported) frequency and severity of ill-treatment by the police had certainly diminished as compared to the situation some years ago' nevertheless:

a) certain categories of persons deprived of their liberty by the police in Greece (in particular persons arrested for drug-related offences; persons arrested for serious crimes such as murder, rape, robbery, etc) run a significant risk of being ill-treated, and that on

---

[36] CPT/Inf (96)9, para 29.
[37] *Ibid*, paras 30-34.
[38] CPT/Inf (93)2, para 11.
[39] *Ibid*.
[40] CPT/Inf (95)1, para 18-23.
[41] CPT/Inf (94)9, para 15.
[42] CPT/Inf (96)31, para 27.

occasion resort might be had to methods of severe ill-treatment/ torture.[43]

b) kicks, punches, slaps, stamping on feet, etc, were the most common type of ill-treatment alleged; further, a number of allegations of blows with the butt of a pistol or wooden stocks were heard. A few quite recent allegations were heard of a more serious kind, in particular of *falaka* or the administration of electric shocks.[44]

Reference has already been made to the find made by the CPT delegation in a Greek police locker. It is apparent that there are no grounds for complacency regarding the CPT's mandate in the Mediterranean states.

---

**Rod Morgan** *is professor of Criminal Justice and Director of the Centre for Criminology and Criminal Justice at the University of Bristol, UK. He is author and editor of a number of publications including* The Future of Policing *(with Newburn, 1997) and* The Oxford Handbook of Criminology *(with Maguire and Reiner, 1st Ed., 1994). The author has on several occasions acted as an ad hoc expert assisting visiting delegations of the CPT.*

---

[43] CPT/Inf (94)20, para 25.

[44] *Ibid*, para 20.

# PARTNERS TO THE COMMITTEE FOR THE PREVENTION OF TORTURE: COOPERATION AND CONFIDENTIALITY

RENATE KICKER

## 1. Introduction

This article will focus on the specific relations between the CPT and its partners, as two round-tables in the framework of the seminar on the Prevention of Torture in Southern Europe (Onati-seminar 1997) have been devoted to this topic. One round-table dealt with the formal partners to the CPT, with reports given by an ombudsman for the police from Portugal (Antonio Rodrigo Maximiano), a penitentiary judge (Remei Bona i Puigvert) and a representative of the police (Miguel Martin Pedraz), both from Spain, under the chair of Malcolm Evans (UK). I myself chaired the other round-table, which focused on the experiences of informal partners to the CPT in the Mediterranean States. Eva Falcaö from Portugal spoke on behalf of the Forum Justica e Liberdades, a national Non Governmental Organisation (NGO); Inigo Elkoro Aiastul from Spain, who works with TAT (Group Against Torture), an organisation involved in the human rights protection of Basque prisoners, represented the group of defence lawyers; and Jean-Pierre Restellini, a physician from Switzerland who gained experience as a frequent expert with the CPT, spoke from the point of view of a medical doctor. A representative of the media (Stephania Miloti from Italy) had been invited but unfortunately could not attend the meeting. In the following, some main features of the European system on the prevention of torture will be looked at in more detail to illustrate the fundamentals and existing obstacles as regards the relations between the CPT and its partners.

## 2. The principles of cooperation and confidentiality: A contradiction in terms?

Two aspects are essential to understanding the system laid down in the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT). First, it is not a repressive judicial system that is applied after human rights of individuals have been violated. On the contrary, it is a system that aims at preventing human rights violations in special situations at risk of ill-treatment, namely at places where people are kept in detention against their will. Second, the system is based on visits that closely follow the procedure and methodology developed and carried out by the International Committee of the Red Cross (ICRC). Therefore, the CPT's working method is to start and continue a dialogue with each of the contracting parties following the main principle of cooperation. In addition, the rule of confidentiality is laid down as the basis and precondition for a successful task. Confidentiality is lifted as soon as the government concerned authorizes the publication of the CPT's findings or if the Committee itself, in case of lack of cooperation from the government's side, makes a public statement. This happened twice with Turkey.

In the first General Report on the CPT's Activities it is stressed that in its relations with other bodies, the CPT is bound by its obligation of confidentiality, and that consequently the flow of information has to be mainly a one-way process. The principle of confidentiality is seen as the natural corollary to the spirit of mutual understanding and cooperation upon which the Convention is founded[1], but as it turned out in practice also as its main barrier! During a seminar in Strasbourg in 1994 on the implementation of the ECPT after five years of activities of the CPT, it was pointed out that the most fundamental impediments concerning cooperation are confidentiality as well as the lack of resources.[2] In the same way, during the seminar in Onati, criticism was raised and suggestions were made to improve the situation.

---

[1] Cf. Paragraph 64 of the Explanatory Report on the Convention.

[2] See Silvia Casale, Conclusions and Suggestions of the Seminar, in: apt (ed.), Acts of the Seminar of 5 – 7 December in Strasbourg, p 304.

## 3. Formal and informal partners to the CPT: Identification and role

In order for CPT to base its work on cooperation partners are needed! A distinction is made between formal, that means official and informal or non official partners.

**Formal partners** to the CPT are the government itself, represented by one or more liaison officers, who have to be designated according to the Convention (art. 15). The nomination of several liaison officers is recommended, when the country has a federal structure or when different ministries are concerned. The tasks of the liaison officers are crucial at all stages of the CPT's work. First, they must provide the CPT with the information required under article 8 of the Convention, i.e. on the places where persons deprived of their liberty are being held (para.2.b), as well as on applicable rules of national law and professional ethics (para.2.d). Second, they have to make the CPT known within the country. That means that information on the existence, mandate and powers of the Committee must reach those in charge of persons deprived of their liberty and naturally the detainees themselves. On 4 March 1994, the CPT invited the liaison officers to an exchange of views of the Parties to the Convention on the CPT's activities and to provide a forum for addressing practical issues arising out of the Committee's visits.[3] In the course of this meeting it was agreed, inter alia, that States should update information, in particular regarding places of detention within their jurisdiction on an annual or biannual basis. Furthermore, there was general agreement on the importance of circulating information on the CPT's mandate and the related obligations of the State, as experiences had shown that problems of access to medical records and other documents often originated from a lack of knowledge on the part of those concerned.

Important formal partners to the CPT are also those persons who are responsible, in the first place, for the execution of detention, such as policemen, penitentiary judges and personnel of penitentiary establishments as well as supervisory bodies like ombudsmen or national visiting committees. They can give information on the specific situations and problems of detention in a respective State.

---

[3] A summary on this meeting is given in the 5th General Report on the CPT's Activities, CPT/Inf (95) 10.

In return, these groups must be specifically informed of the standards and recommendations issued by the CPT to be able to implement them.

Another important group of formal partners are parlamentarians at European as well as national level. The Parliamentary Assembly has not only decisively contributed to the creation of the CPT within the Council of Europe system, but further supported its functioning and improvement. Of great significance in this respect is the Committee on Legal Affairs, which only recently submitted a report on strengthening the machinery of the ECPT.[4] The national delegations to the Parliamentary Assembly play a crucial role regarding the effective implementation of the Convention, as they are mainly responsible for the nomination of the right candidates to the CPT. National parliamentarians could also play an important role by urging governments to make the report of the CPT as well as the responses of government public. Further, the national parliament could supervise the implementation of the CPT's recommendations as well as the improvements promised by the respective government.

Informal partners are, first of all, Non Governmental Organisations (NGOs) at national or international level, such as the Association for the Prevention of Torture (APT). Besides, all individuals who have any contact with or knowledge about persons deprived of their liberty are asked to cooperate with the CPT. These are, for example, lawyers, doctors, nurses, social workers, visitors of prisons, chaplains, friends and families of the detainees and, last but not least, the detainees themselves! Further, academics and the media are of utmost importance for the CPT as they can provide a more widespread knowledge and understanding of its mandate and work. These various informal partners to the CPT have to fulfill different functions within the process of cooperation.

## 4. Communicating information to the CPT

What sort of information should be communicated to the CPT? Reliably attested information on cases of torture and inhuman or degrading treatment or punishment that have already occured, as well as information on situations in places of detention that may lead up to violations of human rights of detainees. The distinction

---

[4] Parliamentary Assembly Doc. 7784 from 26 March 1997.

between torture cases and cases of ill-treatment may be relevant as regards the distinction between regular visits and visits "required in the circumstances". The latter will be instigated more likely if allegations of torture or serious cases of ill-treatment that may come close to torture will be brought to the knowledge of the Committee.

But what are torture cases and what is ill-treatment? Bent Soerenson, former vice-president and member of the CPT, makes a clear distinction and calls them two different things.[5] On the one hand, torture is defined by the UN Convention against Torture under art.1 and is condemned universally. Therefore torture is usually practiced secretly, without the consent of the government concerned and occurs mainly in the primary stage of detention during police investigation. Examples of modern torture methods are solitary confinement, falaka – beating on the soles of the feet – burns on the buttocks and cigarette burns, Palestinian hanging – a form of vertical suspension – often combined with electric shocks. As regards inhuman or degrading treatment of detainees, there is no definition and its existence may be acknowledged and admitted by the State itself as well as some parts of the public. Ill-treatment is perpetrated more frequently in prisons, refugee camps, psychiatric hospitals etc.

Whereas torture is easier to identify, ill-treatment raises the question of standards and whether there could be differences in their application within the various member states. Answers can be found in the Convention (ECPT) and its Explanatory Report as well as in the General Reports on the CPT's Activities. The preamble of the Convention states that the system laid down operates in relation to persons who allege that they are victims of violations under article 3 of the European Convention on Human Rights (ECHR). Following the Explanatory Report, case-law of the European Court and Commission of Human Rights will provide a source of guidance for the CPT. At the same time it is stressed that the Committee's activities are aimed at further prevention rather than the application of legal requirements to existing circumstances. The CPT itself interprets its mandate as follows: "In carrying out its functions the

---

[5] Prof Bent SOERENSEN, First Vice-President of the CPT, Member of the UN Committee against Torture, Rehabilitation Center for Torture Victims in Copenhagen, devoted his contribution in the framework of the Strasbourg seminar to the precise definition and description of torture on the one hand and ill-treatment on the other with indications why, when, how, where and to whom they may occur. See the Apt publication, pp 259 – 265.

CPT has the right to avail itself of legal standards contained not only in the European Convention on Human Rights but also in a number of relevant human rights instruments (and the interpretation of them by the human rights organs concerned). At the same time, it is not bound by the case-law of judicial or quasi-judicial bodies acting in the same field, but may use this as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries". (First General Report, § 5). And in the same report a gradual compilation of a corpus of standards is envisaged: "...the CPT considers to develop its own *measuring rods* and may decide to make them public, so as to offer national authorities some general guidelines in relation to the treatment of persons deprived of their liberty" (§ 95). The second General Report already contains some substantive issues pursued by the CPT during visits as regards police custody and imprisonment, and the third Report lays down standards relating to health care services in prisons. This codification of standards will be continued in the seventh General Report regarding the detention of foreign nationals.[6]

In this context, Claude Nicolay, at that time president of the CPT, raised two crucial questions in the framework of the Strasbourg seminar, the first being whether this standard setting by the Committee, which is not expressly laid down in the Convention, may be seen as an excess of mandate by the States Parties, and secondly, if standards developed in the context of Western Europe could be applied in the same way to the new members of Central and Eastern Europe.[7] The same question may be raised as regards the Mediterranean states.

The CPT focused on the problem of different standards already in its first Report, stating: "....often one cannot understand and assess the conditions under which persons are deprived of their liberty in a given country without considering those conditions in their general (historical, social, economic) context. Although human dignity must be effectively respected by all Parties to the Convention, the background of each of these countries varies, and can account for differences in their response to human rights issues. It follows, that, to fulfill its tasks of preventing abuses, the CPT must often look

---

[6] See Rod Morgan above in his introduction and footnote 7.

[7] See Claude Nicolay, Five Years of Activities of the CPT: And Now?, in : Apt, Acts of the Seminar of 5 to 7 December in 1994 Strasbourg, pp 221 – 228.

into the underlying causes of general or specific conditions conducive to mistreatment". (§ 49) References to prevailing material conditions can be discovered among the standards already established, when it is for example stated that there should be 'equivalence' of health care between prisoners and the general community. But it is a very sensitive issue to accept different standards between member states to one and the same convention, even if there may be and are big differences within the legal systems, the political and especially economic situations as well as the cultures regarding the protection of human rights between North and South, and even more so, the Eastern European countries. It is doubtful if the application of a national margin of appreciation can be granted with respect to standards in the field of the protection of human rights!

Communication of information raises further the question of first and second source information. The problem is that NGOs, for example, often have no access to places/situations at risk and therefore first source information, while those who are working at the fore-front do not obtain or are often not prepared to pass on information to the CPT. A further obstacle to an appropriate transmission of information to the CPT is the total lack of response to the information received. It has already been questioned whether the principle of confidentiality has to be understood in this strict sense. At least, a formal communication through the secretariat that the information brought forward will be taken into account, would satisfy the informant and could be done without big efforts. There would also be the possibility to ask for further particulars. In this context, it has been suggested that the CPT should elaborate a questionnaire identifying and structuring the basic and most important information required.

## 5. Making the CPT known and understood

One of the main tasks of NGOs, parlamentarians, academics and the media is to provide information and education for the so-called target groups, i.e. persons having regular contact with detainees, such as policemen, prison guards, prosecutors, doctors and others. The problem and illegitimacy of torture and inhuman and degrading treatment must become common knowledge and ways and means to improve given situations should be disclosed. In this respect, it is important to inform on the existence and functioning of the CPT, its working methods and the standards it applies for the treatment of detainees.

## 6. Supporting the publication of the reports and the implementation of the recommendations

Partners to the CPT should also work towards a quick authorization of the publication of the CPT's report and the State's responses, if possible within a period of one year after the visit has taken place. This means putting pressure on the responsible government to deliver its response in due time and to authorize immediate publication. Subsequently proper implementation of the recommendations must be supported by the external partners, which could be done by instigating parliamentary questions to the government, public discussion, media campaigns etc.

The CPT report, after having been published, may still lack understanding because of its language and wording. In terms of language this means that these reports are given in English or French only, one of the official Council of Europe languages and not in any other national or minority language. In terms of wording, the report and especially the recommendations themselves may be difficult to understand as it is a diplomatic language using stereotypes with a special meaning that may be unknown even to the public officials concerned. It is therefore sometimes useful and even necessary that NGOs, lawyers and academics make the essence of the CPT's findings more transparent by translating them into practical terms.

## 7. Keeping up the dialogue with the government to improve situations at risk

The limited resources of the CPT as well as the increased membership of participating states limit the CPT's opportunities to maintain an ongoing dialogue with its formal partners. Therefore it would be important that national NGOs and individual professionals build up contacts with the government and try to improve situations that have been criticized by the CPT.

## 8. Suggestions made during the Onati seminar

### *8.1. Concerning the relations between the CPT and formal partners*

Maria José Mota da Matos, liaison officer at the Ministry of Justice of Portugal since 1992, summarized his personal experiences as follows: there are four liaison officers appointed in Portugal, in the Ministries of the Interior, Justice, Health and Defence. Only two of

them – Interior and Justice – were involved in the preparation of the visits by sending material requested by the CPT and giving information at the initial meetings that took place immediately before the visits. During the visits (two periodic visits in 1992 and 1995 as well as one ad hoc visit in 1996) there was no contact between the CPT and the liaison officers. After the visit and once the CPT report was received, the liaison officers had to coordinate the work of compiling information in order to ensure the preparation of the Government's response. The liaison officers themselves had the impression that their role should be more active and should have a continuing character. The problem may perhaps be due to the fact that in the context of the Convention no specific functions are assigned to the liaison officers and this absence of detailed regulations may lead to an absence of activities. Therefore, the meeting between the CPT with the liaison officers in Strasbourg in 1994 was judged very positively. There it was possible to discuss the main difficulties in an open and informal way and to establish some guidelines. It was, however, critically pointed out that, although one of the conclusions of the participants was precisely the advantage of holding such meetings on a regular basis, none has taken place since then. The CPT is therefore asked to organize another meeting as soon as possible.

*8.2. Concerning the relation between the CPT and informal partners*

Eva Falcáo from Forum Justica e Liberdades, a Portuguese NGO the statutary objectives of which are primarily the defense of civil rights and liberties, characterized the relations of her organisation to the CPT as "sporadic" and "non-integrated". There have been no regular or periodical meetings, scheduled and planned in order to coordinate their work with that of the CPT. They have been contacted only when the CPT was in place and they got the impression "that CPT members only went to Portugal, saw, inquired and reported". From the point of view of Forum Justica e Liberdades it would therefore be very important to establish regular contacts with the CPT, for instance trimestral meetings. In this context CPT should ask for information and should also demand specific actions and investigations, concrete tasks – for example, appealing to them to make the first contacts with any prisoner or other allegedly victims of torture who might have already contacted the CPT. In this way, the national NGOs could act as local agents for the CPT. Joint meetings should also serve to elaborate "rights charters" based on

real situations, since different countries and societies have different and specific needs and the CPT should work locally!

Forum Justica e Liberdades had never received the CPT's reports directly, or any other briefings or working material. As regards reports, Eva Falcáo suggested that the CPT should arrange a "distribution agreement" with governments as it would be of great interest for her organisation to receive CPT reports through the Portuguese government. This kind of triangle – NGOs, CPT and governments – should be stimulated, as NGOs could function as mediators between the CPT and local authorities, due to being faster and nearer. General reports and other materials should be supplied regularly to certain NGOs by the CPT itself, in order to update their collaborators.

### *8.3. Concerning the standards*

Jean-Pierre Restellini first raised the question of how a health professional working in an environment at risk can make use of the CPT. He pointed out that, first of all, it would be extremely important that the professional in question can refer to internationally recognized prescriptions in order to uphold a professionally ethical position. In this respect, the standard setting already done by the CPT, for instance in its third General Report, defining the professional ethical rules of the prison health services is very useful, as it strengthens the position of the professionals when they find it necessary to act in opposition to the written guidelines or attitudes of the prison authorities. In the same context it would, from his point of view, be important to have access to information on national legal provisions and practice as regards medical ethics in neighbouring countries in Europe. A responsible doctor could more effectively defend his position vis-à-vis the police or jail administration if there is evidence that specific proposals have already been concretely adopted with no particular difficulty in countries of similar democratic and humanitarian tradition. This aim could also be achieved by organizing national or international meetings of health professionals working in environments at risk. One such meeting of the Turkish Medical Association was already held under the auspices of the Council of Europe. Further meetings should be supported at least morally if not financially by the CPT.

### *8.4. Concerning the recommendations of the CPT*

According to Restellini, it may happen that the recommendations the CPT makes to the authorities of the country visited are not

applicable for legal or technical reasons. This can be due to a lack of adequate information and the limited time available during the visits. Therefore he proposed that non-official external partners who are convinced that the CPT was mistaken in its suggestions should directly contact the CPT and ask for immediate amendment. It would be important that the CPT accepts such a criticism and corrects its recommendations, thus effectively practicing the principle of cooperation.

*8.5. Concerning the principle of confidentiality*

Inigo Elkoro, member of TAT (Euskal Herria's anti-torture group) who spoke on the lawyer's role in the work of the CPT, raised some pertinent questions as regards the strict application of the principle of confidentiality in the CPT's working methods. He asked himself why the evidence the CPT gains on cases of torture and ill-treatment cannot be obtained for use in national legal proceedings? Why cannot the CPT draw the attention of any alleged breach of Art. 3 of the ECHR to its conventional bodies? And why should the reports of the CPT be confidential? Could they not be published automatically, or on the expiry of a time-limit, with the Committee then being empowered and obliged to make a public statement? All these questions have to be answered in the negative for the time being as there are clear provisions in the Convention itself. From a long-term perspective, it may be desirable to amend the ECPT-system and to loosen the principle of confidentiality in practical and, as a precondition, in legal terms.

---

**Renate Kicker** *is associate professor of international law at the University of Graz, Austria. She is vice-chairperson of the Austrian Society on the Prevention of Torture and designated Austrian member of the European Committee on the Prevention of Torture (CPT).*

# EUROPE DU SUD: UN ENJEU DÉCISIF POUR LE COMITÉ EUROPÉEN POUR LA PRÉVENTION DE LA TORTURE

DIDIER ROUGET

## 1. Introduction

Voici dix ans que la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants existe. L'élaboration de cet instrument et son adoption au sein du Conseil de l'Europe ont marqué une étape majeure dans la lutte internationale contre la torture. Dix ans plus tard, le système d'inspection internationale qu'est chargé de mettre en oeuvre le Comité européen pour la prévention de la torture[1] s'est affirmé comme un outil essentiel de protection des droits de la personne humaine. En sept ans et demi d'activités, le Comité a déjà réalisé au 1er mai 1997 soixante visites dans les Etats parties et tous les observateurs sont unanimes pour souligner le sérieux du travail accompli par le CPT, la qualité de son expertise, la valeur de ses constatations et de ses recommandations. Ainsi, en incluant la ratification de la Convention européenne pour la prévention de la torture au côté de la Convention européenne pour la prévention de la torture au côté de la Convention européenne des Droits de l'Homme parmi les engagements souscrits par les Etats membres lors de leur adhésion au Conseil de l'Europe, l'Assemblée parlementaire a souligné l'importance politique de la Convention.[2]

---

[1] Ci après le CPT ou le Comité.

[2] De même, dans ses opinions relatives à l'accession de nouveaux Etats membres au sein du Conseil de l'Europe, l'Assemblée parlementaire insiste sur la nécessité d'améliorer les conditions de détention [Voir notamment, pour la demande d'adhésion de la Fédération de Russie, l'Opinion n° 193 (1996) de l'Assemblée, au paragraphe 7 (ix)].

**2.** Aujourd'hui, le Comité européen pour la prévention de la torture est confronté à un véritable défi: il doit adapter ses méthodes de travail et disposer des moyens suffisants pour mener à bien ses missions dans les 33 Etats membres du Conseil de l'Europe qui ont déjà ratifié la Convention.[3]

Demain, ce champ d'action sera encore plus largement étendu par la future entrée en vigueur de la Convention à l'égard de six autres Etats, et notamment de la Russie et de l'Ukraine.[4] Car, l'adhésion de ces deux Etats au système de la Convention entraînera plus du doublement de la population civile carcérale civile relevant du mandat du CPT.[5] En effet, on estime à 200000 personnes la population carcérale en Ukraine, soit l'équivalent des populations carcérales réunies de la France, de l'Allemagne et du Royaume Uni. Dans la Fédération de Russie, on pense qu'il y a un million d'individus dans les prisons civiles et les centres de détention.[6] Ainsi, la manière dont le Comité saura faire face à cet élargissement et, notamment, apporter des solutions dans les Etats d'Europe centrale et orientale est fondamentale pour l'avenir de ce mécanisme de prévention de la torture. Le Comité doit donc tout à la fois étendre son action et, dans chacun des Etats parties, maintenir un haut niveau d'activités, car le suivi régulier est l'une des conditions essentielles de l'efficacité d'un système d'inspection internationale. Déjà, dans la pratique, face à l'ampleur de ces tâches, le Comité a été obligé de revoir ses

---

[3] La Convention lie les Etats membres du Conseil del'Europe suivants: Albanie, Andorre (à compter du 01.05.97), Autriche, Belgique, Bulgarie, Chypre, République Tchèque, Danemark, Estonia, Finlande, France, Allemagne, Grèce, Hongrie, Islande, Irlande, Italie, Liechtenstein, Luxembourg, Malte, Norvège, Pays-Bas, Pologne, Portugal, Roumanie, Saint-Marin, Slovaquie, Slovenie, Espagne, Suède, Suisse, Turquie et Royaume-Uni.

[4] Au 1/04/1997, six Etats du Conseil de l'Europe avaient signé, mais non ratifié la Convention: Croatie, Lituanie, Moldavie, Russie, Macédoine et Ukraine. On estime, à l'horizon 2000 que 40 à 45 Etats seront devenus Parties à la Convention [CPT/Inf (96) 21, 6è rapport général d'activités du CPT, paragraphe 24].

[5] Voir Assemblée Parlementaire du Conseil de l'Europe, Recommandation 1323 (1997) relative au renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, adoptée le 21 avril 1997, paragraphe 5.

[6] Voir à ce propos l'important rapport du Comité des Affaires juridiques et des Droits de l'Homme de l'Assemblée parlementaire du Conseil de l'Europe, sur le renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, Rapport de M. Jerzy JASKIERNA, Document 7784, 26 mars 1997.

ambitions à la baisse. Initialement, il avait prévu de visiter de façon régulière chaque Etat tous les deux ou trois ans.[7] En fait, il ne peut le faire que tous les quatre ans, et souvent, par des visites beaucoup plus courtes.

**3.** Plus encore, après sept années et demie d'activités, le Comité doit démontrer par son activité et ses résultats que le système de visites imaginé par Jean-Jacques Gautier est un moyen efficace pour renforcer la protection des personnes privées de liberté contre la torture et les autres formes de mauvais traitements. Car, aujourd'hui déjà et pour les années qui viennent, le CPT a une obligation de réussite; en effet, il doit prouver que le système qu'il est chargé de mettre en pratique et qui est fondé sur la coopération des Etats, est capable de conduire les Gouvernements à mettre en oeuvre de façon effective les recommandations qu'il formule.

**4.** Dans les pays de l'Europe du Sud, ces constatations et ces recommandations du Comité trouvent un écho particulier, car dans chacun de ces pays, le CPT est confronté à des situations spécifiques. En effet, il est important de se souvenir que plusieurs de ces pays, et notamment l'Espagne, la Grèce, le Portugal et la Turquie furent le théâtre d'histoires spécifiques et furent soumis, en particulier, à des dictatures ou à des régimes autoritaires. Dans ces pays, il n'y a pas si longtemps, les forces de sécurité utilisaient de manière systématique et massive la torture et les mauvais traitements. Ces pratiques ont laissé des traces profondes dans le comportement des membres de ces forces de sécurité: sentiment d'impunité, mépris des personnes privées de liberté. Plus grave, dans deux de ces Etats au moins, la Turquie et l'Espagne, la pratique de la torture n'a pas été éradiquée. En effet, dans ces deux pays, le CPT reste confronté aujourd'hui à des pratiques institutionnalisées de torture et de mauvais traitements, systématiques ou fréquentes. A cet égard, il convient de rappeler que, quelles que soient les situations de crise, de graves tensions ou même de guerre qui règnent dans ces deux Etats, rien ne peut justifier l'utilisation de la torture et d'autres formes de mauvais traitements par les forces de sécurité. En effet, en tous temps et en tous lieux, torturer doit être prohibé!

---

[7] CPT/Inf (94) 10, 4è rapport général d'activités du CPT, paragraphe 24.

**5.** En outre, dans nombre de pays du Sud de l'Europe, la transparence administrative est parfois difficile à réaliser. Ainsi, les réponses des Etats aux constatations et recommandations du Comité sont souvent convenues, stéréotypées et correspondent peu à la réalité. Dans chaque pays, il est parfois ardu pour les autorités nationales de vaincre les inerties administratives et d'obtenir que les recommandations du CPT et les réglementations déjà existantes ou nouvelles soient effectivement mises en oeuvre par les fonctionnaires concernés. Ces situations représentent un enjeu particulier, car de la capacité du CPT à commencer à apporter des solutions dans ces pays dépend la crédibilite du système mis en place par la Convention.

**6.** Face à ces multiples défis, plusieurs lignes directrices peuvent être ici tracées qui doivent permettre au CPT d'accomplir au mieux ses missions:

a) Promouvoir dans les Etats parties la Convention européenne pour la prévention de la torture et les travaux du Comité;
b) Assurer le suivi effectif des recommandations du CPT;
c) Articuler la prévention internationale et la protection interne contre la torture;

En conclusion, il apparait que la garantie et le renforcement de l'efficacité du CPT sont des axes fondamentaux pour assurer la réussite effective du mécanisme de prévention de la torture mis en place par la Convention.

**7.** Face aux tâches immenses qui l'attendaient, le Comité a légitimement concentré ses efforts et ses ressources budgétaires et humaines afin de réaliser dans les meilleures conditions son travail essentiel, les visites. Mais, ceci s'est fait au détriment de la lisibilité du travail du CPT, de sa promotion, de l'exposé clair de sa méthodologie et des standards qu'il a progressivement dégagés. Le travail du CPT est trop peu connu, y compris par les professionnels directement concernés; ses rapports sont peu diffusés à un large public. Cette absence de promotion du travail du CPT l'affaiblit et l'isole face aux Etats, et rend parfois incompréhensible le sens particulier de sa démarche. C'est pourquoi, des voies doivent être trouvées au sein du CPT, de l'ensemble du Conseil de l'Europe, des autorités nationales et des Organisations non gouvernementales[8] qui veulent assurer la promotion du travail du Comité, pour contre-

carrer ce défaut de communication et mieux faire connaître le mécanisme de la Convention et les recommandations du CPT.

**8.** La plupart des Etats parties ont autorisé la publication les rapports du Comité et leurs réponses. Ainsi, la publicité des travaux du CPT est dans la pratique devenue la règle. Ceci est un élément extrêmement positif qui doit permettre de faire connaître l'activité du Comité. Toutefois, selon la pratique du Conseil de l'Europe, confirmée par l'article 13 du Règlement intérieur du Comité, les langues officielles de travail du CPT sont l'anglais et le français. Or, pour assurer une diffusion la plus large possible des travaux du Comité, il est important que les rapports rendus publics puissent être aussi disponibles dans la langue du pays concerné. Cette traduction pourrait être assurée par les services compétents du Conseil de l'Europe, par les Etats parties ou par les ONG nationales. Ainsi traduits, les rapports du CPT pourraient être plus facilement diffusés auprès de l'ensemble du public adéquat, de l'ensemble des autorités et des personnels concernés, à l'échelon national et local (policiers, agents pénitentiaires, magistrats, personnels de santé, ...), représentants d'ONG et des personnes privées de liberté, avocats, juristes, parlementaires. De plus, depuis quelques temps, le Comité publie des extraits choisis des rapports rendus publics, comme communiqués de presse. Cette pratique doit continuére.

**9.** Mais l'efficacité du Comité ne se résume pas à ses seuls travaux. Le CPT rayonne aussi par son influence, notamment sur les autres instruments de protection des droits humains, en particulier au sein du Conseil de l'Europe, par la prise en compte de situations qu'il a dévoilées par la Commission et la Cour européenne des Droits de l'Homme, et par l'évolution non négligeable de leur jurisprudence. De même, l'Assemblée parlementaire du Conseil de l'Europe s'est appuyée sur l'expérience du CPT pour formuler par exemple sa Recommandation 1257 (1995) relative aux conditions de détention dans les Etats membres. La pratique du CPT a influé aussi sur les travaux des Nations-Unies, et notamment du Comité contre la torture. Ainsi, on a pu constater que la première Déclaration publique du CPT relative à la Turquie faite le 15 décembre 1992 a été un

---

[8] Ci après ONG.

véritable révélateur pour l'ensemble de la communauté internationale de la réalité et de la gravité de la situation de ce pays. De plus, dans ses recommandations et ses constatations, le Comité a progressivement dégagé un ensemble de standards visant à promouvoir les garanties fondamentales contre la torture et les autres formes de mauvais traitements. Ainsi, sur le plan normatif, l'approche spécifique de la Convention enrichit le système international de lutte contre la torture car, par son rôle préventif, le Comité tend à imposer un degré plus élèvé de protection que les organes juridictionnels ou quasi-juridictionels.

**10.** Au cours d'une visite, le Comité ne se contente pas de constater l'existence de torture ou de mauvais traitements. Il doit aussi dégager les facteurs de risque de mauvais traitements. Pour ceci, il doit déterminer si il y a des conditions ou circonstances, générales ou spécifiques, prises isolément ou combinées, susceptibles de dégénérer en pratiques ou traitements inadmissibles. Dans ce but, le CPT doit examiner un large éventail de questions, et notamment le cadre législatif et réglementaire de la privation de liberté, les droits dont disposent les personnes privées de liberté, les procédures de détention et d'interrogatoire et les procédures de plaintes. Il doit également passer en revue l'ensemble des conditions matérielles de détention: état général de l'établissement visité, dimension et aménagement des cellules, éclairage, taux d'occupation, propreté et hygiène, alimentation, organisation des services médicaux, régime disciplinaire, mise à l'isolement, régime des fouilles, relation avec le personnel, contact avec l'extérieur, organisation des visites, régime d'activités, exercice en plein air, etc.

**11.** Ainsi, dans ce domaine, par ses constatations, le Comite enrichit la jurisprudence, car désormais, pour évaluer une situation, c'est l'ensemble des conditions de détention qui doit être pris en compte, car elles peuvent, notamment par leur effet cumulatif, constituer un traitement inhumain et dégradant. Par exemple, pour le CPT, l'effet cumulatif du surpeuplement dans un établissement, d'un régime d'activités inadéquat, du manque d'installations sanitaires représente un traitement inhumain et dégradant.[9] De plus, notamment au niveau

[9] CPT/Inf (91) 15, paragraphes 57 et 229; CPT/Inf (93) 2, paragraphe 93; CPT/Inf (94) 15, paragraphe 85.

des conditions de détention, des situations peuvent se révéler objectivement constitutives de mauvais traitements sans qu'il soit besoin d'établir l'intention des autorités de l'Etat concerné. Dans ses premiers rapports annuels d'activités, le Comité avait publié des recommandations de caractère général, destinées à préciser ses lignes directrices dans des domaines précis: protection des personnes pendant la garde à vue, questions de santé, etc. Il est essentiel que le CPT reprenne et systématise ses observations de caractère général, car elles constituent, sur le plan normatif, un condensé extrêmement riche de l'expérience du Comité.

Assurer le suivi effectif des recommandations du CPT.

**12.** Le succès effectif de la Convention, c'est la mise en oeuvre concrète par les Etats des recommandations que formule le Comité pour renforcer la protection des personnes privées de liberté contre la torture et les autres formes de mauvais traitements. Pour convaincre les autorités de réaliser cette application, le Comité, se fondant sur le principe de coopération consacré par l'article 3 de la Convention, souhaite engager un dialogue permanent avec les Etats. A cet effet, le CPT a mis progressivement en place une procédure de suivi. Selon ce processus, suite à une visite du Comité, l'Etat partie doit présenter six mois après la réception du rapport de visite du Comité, un rapport intérimaire, et au bout d'un an, un rapport de suivi, sur la façon dont il a mis en oeuvre les recommandations du Comité. Si des difficultés particulières sont rencontrées, le Comité peut, en application de l'article 10 paragraphe 1 de la Convention, entrer en consultation avec les autorités de l'Etat concerné. Pour que ce dialogue permanent soit effectif et soutenu, le Comité doit s'efforcer d'élaborer ces rapports de visite avec un soin particulier et dans des délais rapides. Mais, le CPT doit également exiger des Etats qu'ils respectent les délais impartis pour fournir leurs réponses. Enfin, le Comité doit répondre en temps opportun aux rapports intérimaires et de suivi des Etats. Cette cadence assez rapide des échanges entre les Etats et le Comité est d'autant plus importante que l'intervalle entre deux visites périodiques à un pays donné est beaucoup plus long que le Comité ne le souhaite.[10]

**13.** L'article 15 de la Convention stipule sans autre précison que

---

[10] Voir CPT (95) 10, Cinquième rapport général d'activités du CPT, paragraphe 10.

chaque Etat partie doit désigner un agent de liaison avec le CPT. Or, dans une approche dynamique de la Convention, il est essentiel que cet agent de liaison ne soit pas considéré comme une simple "boîte aux lettres" ni par le CPT, ni par les Etats, ni par les ONG. Car, d'une part, dans l'institution de ce dialogue permanent entre l'Etat et le Comité, cet agent de liaison doit jouer un rôle primordial d'impulsion et de relance. D'autre part, l'agent de liaison peut jouer un rôle de relais pour les ONG qui souhaitent interpeller les autorités nationales sur la mise en oeuvre des recommandations du Comité.

**14.** Pour assurer un suivi réel de ces recommandations, la Convention offre au Comité un ensemble de moyens qu'il lui appartient d'utiliser et de combiner de la manière la plus efficace possible. Le Comité peut en effet enchainer visites périodiques, visites de suivi, visites ad hoc. Mais, pour orienter son travail, le Comité doit délimiter quelles sont ses priorités au niveau de chaque Etat. En effet, les visites dans un pays ne doivent pas se répéter de façon mécanique comme des photocopies. Au contraire, elles doivent s'enchaîner les unes après les autres pour s'efforcer de préciser la situation d'un pays et cerner les problèmes essentiels pour tenter de les traiter en priorité. Chaque nouvelle visite doit donc pleinement s'intégrer au processus de dialogue permanent entre l'Etat et le Comité pour le faire progresser et représente un pas qualitatif pour améliorer la situation et la qualité de ce dialogue.

**15.** Au cours d'une visite, lorsqu'il rencontre une situation particulièrement urgente et grave, la délégation peut formuler des observations immédiates en vertu de l'article 8 paragraphe 5 de la Convention.[11] Par ailleurs, en application de l'article 30 de son Règlement intérieur, il peut formuler des demandes d'informations spécifiques aux Etats pour préparer une visite, pour évaluer un problème ou pour assurer le suivi de recommandations particulières. Il peut aussi, selon l'article 8 paragraphe 4 de la Convention, communiquer avec toute personne qui peut la renseigner sur la mise en oeuvre de ses recommandations.

---

[11] Lorsqu'une telle "observation sur le champ" est formulée par la délégation du Comité, le CPT peut demander à l'Etat concerné qu'un rapport spécial sur ce point lui soit remis dans un délai donné plus rapide, en règle générale trois mois (Voir CPT (95), Cinquième rapport général d'activités, paragraphe 9).

**16.** Enfin, si ce dialogue permanent que le Comité doit s'efforcer de poursuivre échoue, lorsque l'Etat refuse de coopérer ou d'améliorer la situation à la lumière des recommandations du Comité, ce dernier peut engager les procédures prévues par l'article 10 paragraphe 2 de la Convention. D'abord, le Comité doit donner l'occasion à l'Etat partie de s'expliquer et pour cela doit rentrer en consultation avec lui. Et après, si cela n'a rien donné, le CPT peut faire une déclaration publique. Cette procédure de déclaration publique n'a été utilisée que deux fois par le CPT, le 15 décembre 1992 et le 6 décembre 1996, et pour le même Etat, la Turquie. L'utilisation de la déclaration publique a donc conservé jusqu'à aujourd'hui un caractère exceptionnel. Il conviendrait peut-être de "dédramatiser" cette procédure de déclaration publique et de la "démocratiser" pour que le Comité puisse utiliser cet outil qui lui est fourni par la Convention à des situations moins extrêmes et plus partielles que celle de la Turquie, par exemple, pour souligner une situation particulière de blocage avec un Etat partie dans un domaine précis et important et introduire plus de transparence dans la pratique de la Convention. Dans cette optique, le CPT a indiqué qu'un retard excessif dans la présentation par un Etat d'un rapport intérimaire pourrait conduire le Comité à faire une déclaration publique en vertu de l'article 10, paragraphe 2 de la Convention.[12]

**17.** Le Comité doit aussi adapter ses méthodes de travail pour prendre en compte les évolutions de la situation. Divers exemples de ces adaptations peuvent être donnés. Par exemple, d'une part, notamment dans des situations d'urgence et pour réagir efficacement aux événements au moment où ils surviennent, le Comité peut organiser rapidement une visite *ad hoc* ciblée sur des situations ou des lieux de détention particuliers et assortie d'un très court délai de notification aux autorités nationales.[13] D'autre part, il faut constater que les tortionnaires s'adaptent malheureusement aux méthodes du CPT, utilisant des procédés de plus en plus sophistiqués pour ne pas laisser de traces. Les membres des délégations du CPT,

---

[12] Voir CPT (96) 21, Sixième rapport général d'activités du CPT, paragraphe 10.

[13] Voir CPT (94) 10. Quatrième rapport général d'activités du CPT, paragraphes 21 et 22. Le CPT rappelle que, selon le paragraphe 48 du rapport explicatif de la Convention, il "devrait même accorder une certaine priorité aux visites *ad hoc* qui lui paraîtront exigées par les circonstances".

et notamment ses experts médicaux, doivent surmonter ces difficultés, sachant que leurs propres conclusions seront désormais contestées par les Etats à un niveau équivalent d'expertise grâce à des spécialistes gouvernementaux. De plus, pour éviter les délégations du CPT, les tortionnaires sont parfois tentés de pratiquer la torture dans les lieux non-officiels de détention, directement dans les habitations des personnes privées de liberté ou dans des lieux déserts.[14]

**18.** Pour assurer une mise en oeuvre efficace de la Convention, le rôle essentiel des ONG doit être souligné et répété. Ce rôle majeur s'affirme à tous les stades de l'action du CPT: dans la préparation des visites, dans l'explication du travail du CPT, pour obtenir la publication des rapports par les Etats, pour contraindre les autorités à mettre en oeuvre les recommandations du CPT et pour le suivi du travail du CPT. Suivant les pays, on constate des situations très différentes et très inégales quant à l'implication effective des ONG à l'égard du CPT. En effet, pour les ONG, il est parfois difficile d'appréhender le mécanisme de la Convention qui n'est pas destiné à mettre en accusation les Etats. De plus, du fait du principe de confidentialité auquel est tenu le Comité, les ONG ont parfois le sentiment de "donner" au CPT, en lui envoyant régulièrement des informations, sans rien recevoir en retour. Pour vaincre cette impression, les ONG doivent avoir la vision la plus exacte possible du mandat du CPT et des limites qui lui sont imposées. De même, ces organisations doivent concevoir le système de la Convention comme un mécanisme complémentaire s'articulant avec les autres procédures internes et internationales de lutte contre la torture, et notamment les systèmes de plainte. Enfin, la publication des rapports du Comité, de ses constatations et de ses recommandations relatives à un pays donné et des réponses de l'Etat concerné peuvent enrichir considérablement le travail des ONG qui peuvent s'appuyer sur ces éléments extrêmement riches pour soutenir leur propre démarche.

---

[14] C'est pour prendre en compte ces situations qu'on peut interpréter la demande formulée par l'Assemblée parlementaire auprès du Comité des Ministres d'envisager la possibilité de rendre le CPT compétent en matière de personnes disparues (Assemblée Parlementaire du Conseil de l'Europe, Recommandation 1323 (1997) relative au renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, adoptée le 21 avril 1997, paragraphe 10, iv).

Articuler la prévention internationale et les mécanismes nationaux de protection contre la torture.

**19.** Ces deux aspects de la lutte contre la torture sont essentiels et complémentaires. Le CPT réalise en effet une inspection internationale dans le but de renforcer les dispositifs internes de chaque Etat pour lutter contre les mauvais traitements. Or, dans chaque pays, il existe déjà des mécanismes nationaux, à caractère préventif ou répressif, de lutte contre la torture et les autres formes de mauvais traitements, mais ceux-ci sont souvent peu ou pas du tout mis en oeuvre. Une meilleure articulation entre le niveau interne de lutte contre la torture et le système international est essentielle et plus efficace. Car, par nature, l'inspection internationale, comme toute procédure supranationale, a un caractère subsidiaire par rapport aux mécanismes nationaux. En effet, quelque puisse être l'activisme du CPT, le système international de contrôle est toujours lacunaire et aléatoire et ne peut pas avoir un caractère permanent. C'est pourquoi il appartient en premier lieu à l'ensemble des acteurs nationaux (autorités nationales, magistrats, parlementaires, ONG, personnels concernés, représentants d'associations professionnelles, avocats, etc.) de veiller à ce que les mécanismes internes de lutte contre la torture soient effectivement mis en oeuvre et améliorés.

**20.** A ce propos, il est essentiel de souligner que l'élément fondamental pour éradiquer la torture est la volonté politique des Etats pour que la pratique de la torture soit effectivement prohibée. Sans cette volonté politique qui doit s'exprimer à tous les niveaux, au niveau gouvernemental, administratif et judiciaire, bien des efforts seront vains. Sans cette volonté politique, gouvernements, forces de sécurité, juges et médias dominants trouveront toujours des arguments pour légitimer une telle pratique aux yeux des opinions publiques et la perpétuer. Ceci concerne la pratique de la torture, bien entendu, mais aussi les mauvaises conditions quotidiennes de privation de liberté. N'est-il pas courant d'entendre dire parmi la population de tous les pays que "les détenus vivent dans des prisons quatre étoiles" et qu' "ils n'ont que ce qu'ils méritent"?

**21.** S'agissant des procédures internes qui permettraient d'assurer une protection effective contre les mauvais traitements, dans la plupart des Etats, elles existent déjà mais ne sont pas mises en oeuvre efficacement. Or, la réactivation et l'utilisation effective de ces dispositifs pourraient être très efficaces. Par exemple, il peut

s'agir de mécanismes judiciaires, comme l'institution des juges de vigilance pénitentiaire et des juges d'application des peines, ou les missions que devraient remplir les procureurs en visitant régulièrement les lieux de détention. Au niveau judiciaire, ce sont également les procédures de plaintes dont disposent les personnes privées de liberté, mais on constate qu'elles aboutissent très rarement ou qu'elles sont difficilement accessibles par les personnes concernées. Souvent même les juristes ignorent ces aspects du droit des personnes privées de liberté. Il peut s'agir aussi de procédures de contrôle administratif, comme par exemple les inspections générales des services responsables des différentes formes de privation de liberté. Il y a aussi des autorités administratives indépendantes, comme les Défenseurs du Peuple ou les Ombudsman. Enfin il peut exister, mais on trouve peu ce type d'institutions dans les pays de l'Europe du Sud, des commissions indépendantes, comme les commissions de visiteurs, composée de citoyens ou de personnalités indépendantes, et chargées de visiter les lieux de détention ou de recevoir les plaintes des détenus.

**22.** Le phénomène de l'impunité est particulièrement préoccupant. Souvent, les procédures engagées contre les responsables de la torture sont très longues, leurs chances de succès sont extrêmement minces. Les sanctions prononcées sont peu ou jamais appliquées, certains gouvernements n'hésitant pas à amnistier les tortionnaires.[15] Pour les victimes de la torture, la réunion des preuves est fréquemment très difficile. A cet égard, il est fondamental de souligner combien l'existence de mécanismes d'enquêtes impartiales est importante et combien la garantie de l'indépendance des médecins légistes est essentielle.

**23.** Pour éradiquer la torture et les autres formes de mauvais traitements, les Etats doivent bien-entendu entamer les réformes de fond indispensables et notamment les adaptations législatives et réglementaires nécessaires pour renforcer la protection des personnes privées de liberté. Dans cette optique, il importe que les parlementaires nationaux soient informés et saisis des recommandations du Comité, les rapports du CPT pouvant faire l'objet d'une diffusion

---

[15] Ainsi, on peut constater qu'en Turquie et en Espagne, ces mécanismes d'impunité sont souvent mis en oeuvre au profit des tortionnaires.

auprès des commissions parlementaires compétentes et de débats dans les assemblées. Mais prévenir les mauvais traitements, c'est aussi pouvoir introduire au quotidien des nouvelles méthodes de travail qui peuvent être efficaces. Ainsi, à titre d'exemple, peuvent être citée l'adoption de protocoles unifiés pour les examens des médecins légistes, la mise en place de registre et de règles spécifiques pour les interrogatoires, etc. De même, une attention particulière doit être portée à la formation adéquate des personnels concernés.

## 24. Conclusion: Garantir et renforcer l'efficacité du CPT

Tous les Etats Parties doivent être conscients qu'un échec du CPT sera considéré comme un échec de l'ensemble du système de protection des droits de l'Homme promu au sein du Conseil de l'Europe. Car, face aux défis qui l'attendent, le CPT est encore dans une situation très précaire. Pour surmonter ces difficultés, il est important de rappeler les recommandations de l'Assemblée Parlementaire du Conseil de l'Europe destinées à renforcer le mécanisme de la Convention européenne pour la prévention de la torture.[16] Ainsi, il est essentiel que le Comité des Ministres du Conseil de l'Europe donne au CPT toutes les ressources humaines et budgétaires qui lui sont nécessaires pour accomplir sa mission. De plus, les Etats Parties doivent tous ratifier sans délai le Protocole n°2 à la Convention. Le deuxième protocole à la Convention est en effet destiné à assurer un renouvellement équilibré des membres du Comité, en leur permettant d'être rééligibles deux fois et en regroupant les élections. Le système actuellement en vigueur crée de nombreuses difficultés, car aboutissant à une atomisation des élections des membres du CPT. Ce deuxième Protocole est ouvert à la signature et à la ratification depuis le 4 novembre 1993. Or, plus de trois ans après cette disposition essentielle pour un meilleur fonctionnement du Comité n'a pu encore entrer en vigueur, car elle doit être ratifiée par tous les Etats parties à la Convention.[17]

---

[16] Assemblée Parlementaire du Conseil de l'Europe, Recommandation 1323 (1997) relative au renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, adoptée le 21 avril 1997.

[17] Au 1er avril 1997, 27 des 33 Etats parties à la Convention avaient ratifié le Deuxième Protocole, 5 autres l'avaient signé (Bulgarie, Chypre, Italie, Portugal et Turquie), un seul Etat ne l'avait pas encore signé (Andorre).

**25.** A de nombreuses reprises, il a été souligné qu'une attention particulière doit être portée à la composition du Comité, et notamment à l'origine professionnelle, au sexe et à l'âge de ses membres, pour augmenter le nombre des spécialistes des prisons, des médecins légistes, et le nombre de femmes, et avoir des membres plus disponibles pour accomplir leur mission.[18] En effet, l'appartenance au CPT ne peut pas être considérée comme une simple fonction honorifique. Ainsi, le membre du Comité pour la prévention de la torture doit être une femme/un homme de terrain, qui doit posséder de réelles qualités d'expertise et qui doit aussi avoir le capacité physique et la disponibilité pour mener à bien des missions souvent éreintantes. De plus, l'indépendance des membres du Comité doit pouvoir être indiscutable. A cet égard, les membres de l'Assemblée parlementaire du Conseil de l'Europe, et notamment son Bureau, doivent jouer un rôle déterminant pour sélectionner les meilleurs candidats.[19]

---

**Didier Rouget** *is lecturer of public law at the University of Paris 8 and lecturer of international law at the University of Lille 2. He has researched extensively in the field of human rights and is author of numerous articles and papers.*

---

[18] Ainsi, pour s'assurer de cette disponibilité, l'Assemblée parlementaire du Conseil de l'Europe recommande au Comité des Ministres de rendre la fonction de membre de l'Assemblée incompatible avec celle de membre du CPT (Assemblée Parlementaire du Conseilde l'Europe, Recommandation 1323 (1997) relative au renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, adoptée le 21 avril 1997, paragraphe 10, vi)

[19] En effet, selon l'article 5.1 de la Convention, "les membres du Comité sont élus par le Comité des Ministres du Conseil de l'Europe, sur une liste de noms dressée par le Bureau de l'Assemblée consultative du Conseil de l'Europe; la délégation nationale à l'Assemblée consultative de chaque partie présente trois candidats dont deux au moins sont de sa nationalité". Voir à ce propos la Directive n° 530 (1997) relative au renforcement du mécanisme de la Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants, adressée par l'Assemblée Parlementaire du Conseil de l'Europe à son Bureau, adoptée le 21 avril 1997, paragraphe 5.

# THE IMPACT OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE (CPT): LESSONS FROM SOUTHERN EUROPE

MALCOM D EVANS

The purpose of this article is to set out the conclusions which were drawn from the presentations made at the Oñati Seminar by Country Rapporteurs from Greece, Italy, Portugal, Spain and Turkey on the work of the CPT and the response of those States to its recommendations.[1] These presentations provided the background information necessary to move towards the analysis of the record of the implementation of CPT recommendations by the States of Southern Europe. Such an analysis is of interest in its own right but, more importantly, it provides – or, rather, it was hoped that it would provide – a starting point for a more general consideration of the impact of the CPT upon these states. This in turn was to shed light upon the manner in which this influence was exercised and channelled in order to see whether there were any general lessons which could further our understanding of how the CPT and its partners could improve the quality of their relationship and encourage the fullest compliance with CPT recommendations.

As was to be expected, the presentations did not adopt a common format, nor did they focus upon similar issues. This was inevitable – indeed, desirable – since it reflects the differing issues raised by the CPT reports themselves and the varied nature of the governmental response. Not unnaturally, they were also influenced by their author's own exposure to, and understanding of, the

---

[1] The Country Rapporteurs were: Greece, Effi Lambropoulou; Italy, Mauro Palma and Patrizio Gonnella; Portugal, Eva Falcao and Francisco Teixeira da Mota; Spain, Rafael Sainz de Rozas Bedialauneta; Turkey, Mehmet Semih Gemalmaz. The author of this article wishes to thank the Rapporteurs for placing their Reports at his disposal and to apologize for any inadvertent inaccuracies or misrepresentations of their views, for which he is, of course, responsible.

particular concerns raised. It is, therefore, virtually impossible to analyze them by reference to a common template. Perhaps it is unfortunate that due to constraints of space they cannot be reproduced in full[2], since this would allow the reader to draw his or her own conclusions. However, this itself would not be a fully satisfactory approach since it would exclude the discussions to which these presentations gave rise and which played a crucial role in drawing out the essence of the Reports relative to the purposes of the seminar.

Rather, the following sections will highlight the key points found in the Reports and raised in the discussions, arranged under a number of headings. The choice of headings may seem idiosyncratic but it reflects those themes which were common to the Country Reports and the more generalized conclusions that were ultimately drawn from them in the discussions to which they gave rise. This means that not all of the points raised in the Country Reports as presented at the Seminar will be given here and this section should not be read as a 'summary' of the views presented. Rather, it represents this author's understanding of the position relative to implementation of the CPT's Recommendations in the light of the written materials and oral discussions.

## 1. The Factual Background

It is important to bear in mind that not all 'Southern European' States are embraced by this study. Although Malta was represented at the discussions, there was no Country Report. Cyprus and San Marino were unrepresented. France, though a 'Mediterranean' State was not included as a 'Southern European State' for the purposes of this seminar, nor, indeed, were the Balkan states party to the ECPT (including Albania, Croatia, Slovenia and "TFYRO" Macedonia). Since any categorization is likely to be anomalous in some respects, the following paragraphs will limit themselves to setting out the facts of the CPT's involvement with those States for which Country Reports were presented.

---

[2] Revised versions of the Country Reports will appear in the version of the Seminar Proceedings, shortly to be published by the Association for the Prevention of Torture.

### *1.1. Greece*

The CPT paid its first visit to Greece from 14-26 March 1993. This was a periodic visit and its Report was transmitted to the Greek Government some 9 months later on 20 December 1993. The Report[3] was not made public until 29 November 1994 and was published alongside the Interim Response.[4] The Greek Government's Follow-up Report was published on 21 February 1996[5] but it is clear from its contents that it was finalized in February 1995, although the date of its transmission to the CPT is unclear. A second visit took place from 4-6 November 1996. This was a follow-up visit to the Attica State Mental Hospital for Children.[6] As yet, no material arising out of this visit has been published. A further periodic visit is scheduled to take place in the course of 1997.

### *1.2. Italy*

Italy has now been visited by the CPT on three occasions. The first two were periodic visits and took place between 15-23 March 1992 and 22 October-6 November 1995. The third was a follow-up visit to the San Vittore remand prison in Milan between 25-28 November 1996. So far, the only information in the public domain relates to the first periodic visit. The CPT transmitted its Report[7] on 25 January 1993 but it was not made public until two years later, on 31 January 1995, and at the same time as the Interim Response was published.[8]

### *1.3. Portugal*

Like Italy, Portugal also received 2 periodic visits, from 19-27 January 1992 and 14-16 May 1995 and subsequently received a follow-up visit, from 21-24 October 1996, which was focused on Oporto Prison. Portugal has published the Report and interim responses to both periodic visits. The first Report was transmitted to Portugal on 27 October 1992 and the Interim Response submitted

---

[3] CPT/Inf (94) 20.
[4] CPT/Inf (94) 21.
[5] CPT/Inf (96) 8.
[6] Council of Europe Press Release 628 (96).
[7] CPT/Inf (95) 1.
[8] CPT/Inf (95) 2.

a year later on 12 October 1993. Both the Report and Response were published together on 22 July 1994.[9] The Final Response to the first periodic visit was only made available (in Portuguese) during the course of the 2nd periodic visit.[10] The Report[11] on the 2nd visit was itself transmitted to Portugal on 20 December 1995 and its publication authorized, along with the Interim Response[12] to that visit, on 21 November 1996.

### *1.4. Spain*

The CPT has now carried out four visits to Spain, two periodic visits, followed by two *ad hoc* visits. The periodic visits took place between 1-12 April 1991 and 10-22 April 1994, the *ad hoc* visits between 10-14 June 1994 and 17-18 January 1997. The first *ad hoc* visit was to Madrid I Prison, and the purpose was to interview persons held there who had been arrested in the Basque Country by the Civil Guard and had allegedly been severely ill-treated.[13] The purpose of the second was to visit the General Directorate of the Civil Guard and to Madrid V (Soto del Real) Prison, where it interviewed a person recently detained at the General Directorate.[14] The Reports arising out of the periodic and first *ad hoc* visits were transmitted to Spain on 21 October 1991, 15 December 1994 and 21 September 1994 respectively. The publication of all three Reports, along with the Spanish responses, took place on 5 March 1996.[15]

### *1.5. Turkey*

Turkey has been visited by the CPT more frequently than any other country. *Ad hoc* visits took place from 9-21 September 1990 and 29 September – 7 October 1991 and a periodic visit was conducted from 22 November – 3 December 1992. A third *ad hoc* visit took

---

[9] CPT/Inf (94) 9.
[10] See CPT/Inf (96) 31, para. 7.
[11] CPT/Inf (96) 31.
[12] CPT/Inf (96) 32.
[13] CPT/Inf (96) 9, p.195.
[14] Council of Europe Press Release Ref 34 (97).
[15] The Reports were published in CPT/Inf (96) 9 and the Responses to the 2nd Periodic and lst *ad hoc* visits published in CPT/Inf (96) 10. The Response to the First Report was submitted in Spanish and remains untranslated. It is available on request in Spanish from the CPT (as are the other published Responses).

place from 16-10 October 1994. The CPT returned to Turkey at the invitation of the Turkish Government from 19-23 August 1996 and then conducted a fourth *ad hoc* visit from 18-20 September 1996. A further periodic visit is planned for 1997. Members have also returned to Turkey for discussions outside the framework of visits. None of the documentation arising out of the visits has been published but two Public Statements have been issued, on 15 December 1992[16] and 6 December 1996[17] which draw attention to the continued failure of the Turkish authorities to improve the situation in the light of its recommendations.

## 2. Cooperation between the State and the CPT

### *2.1. In the Preparation of Visits*

Responsibility for the preparation of a visit lies with the CPT. However, the State is obliged to provide the Committee with information regarding places where persons are deprived of their liberty[18] but it is apparent this has not always been done promptly and comprehensively. For example, in Italy the CPT only received a full list of Police and Carabinieri stations after the visit had begun. Given that the Follow-up Report to the first Portuguese Visit was only submitted during the course of the second, this must have had some ramifications for the preparations. All of the Country Rapporteurs thought that the Committee was well prepared for its visit and had chosen appropriate places to visit, although the Spanish Rapporteur thought that prison facilities could have featured more prominently.

### *2.2. In the course of visits*

Drawing on both the CPT Reports and their wider investigations, the Country Rapporteurs commented upon the levels of cooperation between the States and the CPT. In the case of Turkey it is evident from the Public Statements that the CPT itself is not satisfied with the levels of cooperation encountered. Most published CPT visit

---

[16] See 3rd General Report, CPT/Inf (93) 12, Appendix 4.
[17] CPT/Inf (96) 34.
[18] See ECPT, Articles 8(2)(b) and (d).

Reports indicate some problems of access to certain institutions or sources of information but, on the whole, levels of cooperation are generally good. The Italian Country Report, however, concluded that cooperation was generally poor during the visit in 1992, the principal problems stemmed from a lack of knowledge of the CPT, its mandate and working methods by the Police and Carabinieri. This is typically at the root of such difficulties in most states, rather than a wilful refusal to cooperate (perhaps with the exception of Turkey) and the intervention of the Liaison Officer is usually sufficient to deal swiftly with the situation. There do not seem to be instances of principled opposition to the CPT having access to certain places of detention or forms of information (such as medical records) which have been subsequently supported by the State authorities.

### *2.3. After a Visit*

Following a visit, there is inevitably a delay whilst the CPT Report is prepared. This has been in excess of 10 months in some cases and this must reduce the impact that the visit has upon the state. The effectiveness of the dialogue will also be adversely affected by delay in the transmission of the States' Responses. The CPT requests that Interim Responses are submitted within 6 months, and Follow-up reports within 12 months, of the State receiving its Report on the visit. It is clear from the factual material summarized in the previous section that this is an aspiration that is rarely achieved. However, there is evidence that the situation is improving and responses to the more recent Reports seem to have been produced and transmitted more speedily.

## 3. Publication of Reports and Responses

No State is obliged to give its consent to the publication of CPT material and the failure to do so cannot be taken as evidence of a lack of cooperation. However, there is now a clear expectation that publication will occur and delay in doing so inevitably raises question marks over the nature of the relationship between the CPT and the State. It is in the nature of things that delay encourages a suspicion that a Report is highly critical or a response either non existent or transparently inadequate. The general observations of the Country Rapporteurs from Italy and Spain, and to a lesser extent, Portugal, seem to bear this out.

Certainly, the publication record of Italy and Spain has been poor,

with the CPT Reports on the first periodic visits to Portugal and Italy appearing some two years after receipt and, in the case of Spain, three years later. Greece published the Report on its first periodic visit alongside its interim response nearly one year after receipt. This is closer to the general practice of States within the CPT system. Spain and Portugal have already improved on their previous record in the case of subsequent Reports and it is to be hoped that Italy will do likewise. Although it is too soon to be sure, it does appear that once a State has accepted the principal of publication (and all the States under consideration have done so with the exception of Turkey), its practice in this regard becomes settled and relatively non-contentious.

## 4. The Adequacy of State Responses

The extent to which the response of the State to the work of the CPT can be considered 'adequate' can be addressed in a number of ways. This section will consider briefly the contents of the written responses submitted as an element of the dialogue between the Committee and the State. The following section will begin to address the broader question of the extent to which the CPT's recommendations seem to be having an impact on the practice of custody and custodial regimes within the States concerned.

Most of the Country Rapporteurs considered the published responses to be defective in some fashion. In the case of Spain the accuracy of the published Responses on a wide range of matters was called into question. The Portuguese Report joined the Spanish in emphasising the gap between what was said in the Responses and what actually happened in practice, although the extent to which this was believed to result from an intent to mislead differed. The Portuguese Rapporteur also believed that the Responses tended to be 'formalistic', and betrayed a lack of real understanding of the situation in a number of instances. The Italian Rapporteurs considered elements of the Italian response to be 'excessively bureaucratic', and betrayed a greater interest in justifying the Italian legislative and administrative position than to 'take a stand' vis-à-vis the CPT's recommendation. The Greek Rapporteur also noted a degree of vagueness, but thought the responses generally accurate, if not comprehensive: some gaps again emerged between the picture in the responses and the underlying situation, with the Ministry of Justice 'avoiding' expressing their position on some recommendations, the Ministry of Public Order, appearing 'neutral' and the Ministry

of Health not answering at all. Although it is clearly helpful for Responses to give direct answers to the specific recommendations, comments and requests for information made in the Reports, there is a danger that this can become overly technical and, as such, lose sight of the general issue underlying the particular point at issue.

One further point should be noted. Almost all the Rapporteurs agreed that officials were more receptive to the points raised by the CPT Reports and its recommendations than was reflected in the official documentation. This should caution us against drawing conclusions too readily from the content and general tenor of the responses: other factors need taking into account when assessing the nature of the State's response to the work of the Committee.

## 5. Impressions of the Impact of the CPT

All of the Country Rapporteurs accepted that it was very difficult to assess the impact of the Committee. Some of the reasons for this, and the conclusions which might be drawn from this, are considered in the following sections of this article. To the extent that it is possible to gauge the potential impact, however, the following views were expressed, either in the written reports or discussions to which they gave rise.

### *5.1. Greece*

The CPT's recommendations had exerted a degree of pressure on the Greek authorities, which had prompted them to attempt improvements which would not have otherwise been undertaken, and to hasten the implementation of others. The pattern of action, however, is inconsistent and does not suggest a concerted attempt to implement the recommendations on a systematic basis. Problems of overcrowding are less severe than hitherto and more work places are available and there has been an increase in the number of occupational training schemes and the levels of medical provision within the prison system has increased. As regards policing, improvements in conditions for detainees at Athens Police Headquarters and the Pireaus Transfer Centre are also noted. On the other hand, it is apparent that neither the CPT Report nor the Government responses seem to address what many consider to be the most pressing problems in Greek prisons, drugs and drugs trafficking. Nor is the response to the suggestions of ill treatment in police custody particularly apparent.

### 5.2. *Italy*

The Country Rapporteurs noted that following the CPT's visit, new rules concerning the transfer of prisoners have been introduced, limiting the use of handcuffs, as have new rules limiting the occasions on which it is permissible to listen to, or record, prisoner's phone calls (although it is unclear whether the authorities subsequently check out the numbers which are called). The maximum period for which a suspect can be held without being permitted to contact a defence lawyer has also been reduced from seven to five days. In all these instances, however, the Rapporteurs are not able to say whether the real pressure for change was from the CPT or from intense media and public pressure. Moreover, they conclude that the Italian Government has not demonstrated a willingness to comply with CPT recommendations regarding overcrowding, lack of regime activities in prisons, the run-down nature of many facilities and the training of personnel.

### 5.3. *Portugal*

The situation in Portugal is, perhaps, somewhat different. There appears to have been a change of emphasis with a change of Government in 1995 and, although many points remain outstanding, there are encouraging signs [such as the establishment of the Inspecção-General da Administração Interna (IGAI)] and programmes of refurbishment and new construction have been drawn up and are under way. There is still much to do regarding the recommendations concerning health care in prisons. A sufficiently firm denunciation of police brutality is still required, and changes to the legal structure are still resisted, particularly as regards access to doctors and lawyers for those in police custody.

### 5.4. *Spain*

The Spanish Rapporteur stressed the mismatch between the picture painted in the Government's Responses to the CPT Reports and his understanding of the real position. This undermined any real prospect of moving towards a meaningful assessment of the impact of the CPT's recommendations since, it was argued, there were, in effect, two dialogues occurring in parallel but at the same time really impacting upon each other: these being between the CPT and the Spanish authorities on the one hand and that between the Spanish authorities and the NGO community in Spain on the other.

By way of illustrating the problems of assessing compliance and impact with reference to the published reports, it was pointed out that in those comparatively rare cases in which sentences handed down against police officers in connection with ill-treatment of detainees, the sentences were rarely served, and pardons had been granted. This fostered a view that the police were 'immune' from prosecution. Such beliefs were hardly compatible with the spirit underlying the work of the CPT.

### *5.5. Turkey*

It is evident from the Public Statements issued by the CPT that Turkey has made no real progress towards implementing the recommendations of the CPT. Indeed, the Country Rapporteur concluded that almost nothing had been achieved as regards prevention of torture and ill-treatment by the police forces in both Ankara and Diyarbakir or the strengthening of the legal safeguards against torture and ill-treatment. Political commitments had not been translated into practical action. Following the issuing of the first Public Statement in December 1992, further visits by the CPT took place, with the aim of reestablishing a degree of mutual confidence but there is no evidence that this has had any tangible results. On the contrary, evidence arising from press coverage surrounding the most recent visits of the CPT suggest that officials were alerted to the possibility of the CPT visiting in order to allow them time to make arrangements that might mislead the Committee. There was also evidence that the Committee's activities were closely monitored by the authorities, in order to exert some pressure upon those with whom it came into contact. It was the opinion of the Rapporteur that the Public Statements were not considered to be particularly significant by the Turkish authorities. Indeed, the issuing of the 2nd Public Statement in December 1996 served only to underline the ineffectual nature of the sanction.

It is clear from these summaries that the predominant view was that the CPT's recommendations had not been enthusiastically embraced by any of the States in question. Although there certainly was evidence of States responding positively to a wide range of suggestions, this was matched, or exceeded, by instances in which the recommendations had been either sidetracked or ignored. There was also a tendency towards paying lip service to the Reports but not, in the eyes of some Rapporteurs and observers, of translating this apparent concern into practical action.

## 6. Determining Compliance

It is against this background that the remainder of this article will turn to the broader issues concerning the ways in which the implementation of CPT recommendations might be encouraged.[19] Before doing so, however, it is necessary to consider in greater detail what is actually meant by 'compliance' with CPT recommendations.

### *6.1. Assessing 'Implementation'*

Implementation is a difficult area for those not intimately involved in the process to assess. Outsiders may have sight of Recommendations presented in the Reports and they might observe that what has been recommended has come to pass but this does not mean that the Recommendation has been 'implemented'. For example, the change in question might have been planned before the Recommendation was made. On the other hand, even if it was not previously planned, the CPT Recommendation might not have been a factor in the decision, which could come about because of pressure from other sources and have been entirely uninfluenced by the fact that the CPT was also pressing in a similar direction. Of course, it is likely that many CPT Recommendations will raise issues which are already well known within the State concerned and so will feed into an ongoing debate and contribute to the outcome. In such a situation it becomes very difficult to assess the degree to which it was the voice of the CPT which brought about a given result. It is better perhaps to think in terms of whether the results sought by the CPT have come to be realised in the State concerned, rather than focus on whether the CPT Recommendations have been implemented. This has the advantage of recognizing the potential impact of the contributions made by other actors. It also places the focus upon the heart of the matter – the improvement in the treatment of detainees – than upon what might become a narrow, technical issue of whether this has come about because of the CPT, a question which it may often be impossible to answer with certainty.

---

[19] The remainder of this article represents the conclusions drawn by the author as one of the Rapporteurs of the Oñati Seminar and will also appear, in a modified form, in the volume of Proceedings to be published by the Association for the Prevention of Torture.

### 6.2. *The identification of factors relevant to 'implementation'*

If the above viewpoint is accepted and understood, the discussions take on a new and more meaningful direction. At first sight, the particular points and suggestions which will be considered below seem to go over old ground and to be chiefly preoccupied with information and communication, rather than with enhancing effective implementation. However, it became clear that the reason for this was twofold. First, there remains a very real need for further development in order to facilitate the practical functioning of the CPT visit mechanism. Secondly, continuous communication and flows of information are crucial to maintaining the momentum created by a visit, thereby sustaining the pressure upon the State to accede to the Recommendations made by the CPT. In the final analysis, it may not matter whether the desired result comes about because of pressure from the CPT or from elsewhere, but if the CPT wish it to be understood that theirs is a significant voice in the process of change then it is important that dialogue be maintained and enhanced with all those engaged in the process.

### 6.3. *Models of compliance with recommendations*

It has already been pointed out that 'compliance' with recommendations can take a number of forms, including obtaining a result which would not otherwise have been possible, or the acceleration of a programme already planned. Both of these results might appear 'positive', but it should also be remembered that they might produce a negative consequence in that something which was planned to have happened may now not happen, or not happen so speedily. In short, compliance with a CPT recommendation may have negative as well as positive effects and it might be necessary to consider these in relation to each other when assessing the overall impact of the CPT's work in a State.

Another way of putting this is to ask whether the CPT's priorities are appropriately ordered for the State in question and is it necessarily the case that the State should adopt them if, in good faith, its assessment of priorities *within the relevant field* is different?

The CPT, for example, may visit a particular institution and be generally complementary about the physical conditions of detention whilst noting poor levels of regime activity and call for improvements in this regard. Is a State justified in concluding that it should devote resources to bringing conditions of detention in other institutions up to what it now recognizes as the CPT's standards as a matter of

greater priority, albeit at the expense of not fully addressing the issue of regime activities in the institution first visited? Should a State be deemed to have 'failed' to implement CPT recommendations if it applies the lessons the CPT has given it to facilities more in need of improvement than those in the context of which the lesson was drawn? Conversely, to what extent should one say that a Recommendation has been 'implemented' if a particular facility is improved in response to a visit but others which are known to the State to be as bad are abandoned, or made worse in consequence (e.g. increasing overcrowding elsewhere). Of course, the ideal is for the State to do both, but at the very least, these questions suggest that a mechanical 'check list' approach to assessing the implementation record of States may not be appropriate. This may be too crude a measure.

## 7. Assisting Compliance

The principal conclusion was that further flows of information were needed in order to both assess and assist the process of compliance. To this end, a number of routes were considered.

### *7.1. Further probing by the CPT*

Knowledge of compliance is inevitably restricted by the confidential nature of the dialogue between the State and CPT and the publication of Reports and Responses does not fully address this problem. We cannot tell how much the CPT knows about the real impact which its visits have within member states, but there is evidence that the published responses of States are not always as full, candid or honest as they might be. Ideally, the Secretariat should be engaged in detailed follow up and developing ongoing dialogue in order to test the degree to which its Recommendations have been taken up at an administrative and operational level.

This could be done by conducting further visits but this is unlikely to be practical, or even well suited to the aim. Other possibilities would include establishing more regular contact with the Liaison Officers and with inspectoral mechanisms already existing within the state concerned and, where they are lacking, giving greater weight to recommendations that they be established. In short, thought could be given to constructing a supporting dialogue with the 'formal partners' which would be inspired by the Visit Reports but would not be directly focused upon them. However, it is suspected that the

resources needed to pursue this path might not be available, or could only become available if there was a fairly fundamental re-appraisal of the CPT's priorities and working methods, the consideration of which is beyond the scope of the present discussion.[20]

### 7.2. *Probing by others*

#### 7.2a. Parliamentary Scrutiny

The CPT stands in a privileged position when seeking to engage in dialogue with States. As several of the Country Reports delivered at this Conference indicate, it can be difficult, if not impossible, for others to gain access to relevant, reliable information. Parliamentarians, however, themselves stand in a privileged position. When a government is slow to authorize publication they can be a potent source of pressure. Equally, when publication has taken place efforts should be made to make CPT Reports and Recommendations known to them and they should be encouraged to use their position to discover what has been the response. To date, this has happened sporadically but to some effect. More attention should be given to fostering their interest.

#### 7.2b. The Legal Community

The Legal Community in member states ought to have a very real interest in the work of the CPT. They provide detailed and reliable information which can be of use when preparing cases, particularly those which involve the jurisprudence under Article 3 of the ECHR.

#### 7.2c. National Inspectoral Agencies

Those bodies which exercise inspectoral functions and/or judicial oversight of the penal system should be made aware of the general standards advocated by the CPT, as well as the contents of Reports relevant to their own national jurisdictions and domestic spheres of competence. This information could be offered outside the CPT-State

---

[20] The need for an increase in the human and budgetary resources of the CPT is highlighted in the recent Report by the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, 26 March 1997, Doc.7784, 'Report on the Strengthening of the Machinery of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Rapporteur Mr Jerzy Jaskiernia), para.50-55.

dialogue arising from a particular visit, in order to emphasise its general relevance to their functions in a non-specific (and therefore potentially less contentious) context.

7.2d. The Academic Community

The work of the CPT should be made better known to the academic community. This would have a number of benefits. It would ensure an ever wider dissemination of knowledge about the Committee and would foster the study of its work. It would also bring a greater degree of critical scrutiny to the working methods and standards of the CPT, placing them within a broader framework and bringing new influences to bear upon them.

7.2e. The Media, Journalists, etc.

More could and should be done to ensure publicity for the work of the Committee. It is recognized that this is not the responsibility of the CPT, and there are dangers of misportrayal and misrepresentation. Yet these are no different from the risks habitually run by other bodies whose work is not fully understood and should not be used as a reason to marginalize their potential to contribute towards the effective implementation of the Committee's Recommendations. It should be remembered that NGOs have relatively little influence in some States and the media, particularly the press, has a greater influence on public opinion and government policy.

7.2f. The NGO Community

Perhaps inevitably, the principal focus of discussion concerned the extent to which the NGO community could and should be involved in the follow-up of CPT Recommendations, both in the sense of monitoring compliance and working in order to achieve it. There was a widespread feeling that some of the smaller national NGOs did not fully understand the manner in which the CPT feels constrained by the principle of confidentiality. It was also felt that the CPT need not adopt quite so restrictive an interpretation. The lack of warmth in the acknowledgement of information submitted – and the failure to provide any meaningful indications of its usefulness to the Committee – could be interpreted (albeit incorrectly) as indifference and this did little to encourage small and often struggling NGOs to embrace the CPT and its work with any real enthusiasm. More could be done to make NGOs feel part of the wider circle of the preventive mechanism.

For example, NGOs who had supplied information to the CPT could be automatically provided with a copy of the relevant Report if and when it was made public – why should they have to request it? There could be increased dialogue with NGOs on the nature of information which the CPT would find valuable and the manner in which it could be most usefully presented. This could include specific details relating to areas on which the CPT had expressed concern in a State.

Suggestions were also made that the CPT could develop a list of 'accredited' NGOs. Whilst this might raise complex issues, it works well in other fora, resulting in better channels of access and a fuller understanding of the procedures involved. This leads to a more productive relationship for all concerned.

## 8. Availability of Information

All of the points made above are linked by a common theme: the need to make the work of the CPT more readily accessible and widely known. Without accessibility and knowledge there is little prospect that the Committee's Recommendations will be embraced by civil society. Central to this is the need to make the Reports available in the language of the country concerned.

### *8.1. Availability*

It is not enough that Reports are available on request in printed form. Requests can take weeks, even months, to be fulfilled, by which time interest may have lapsed. Even if the distribution system could be improved, Reports should now be made available in electronic form, and capable of being down loaded from the Internet. Other areas of the Council of Europe are adopting this practice and it is to be hoped that this is under consideration within the CPT. Alternatively, NGOs, such as the APT, could develop a website with the co-operation of the Committee. This would be a major step forward.

Additionally, the Ministries of Foreign Affairs of many member states now have their own websites. Could they not be encouraged to make Reports available themselves through these channels?

### *8.2. Language*

Above all else, the need to make Reports available in the language of the State concerned should receive further thought. The position

at the moment appears random. It is accepted that there are very real barriers to be overcome, particularly those of cost and delay. A further problem concerns the range of languages: in a number of states there might be a need to produce versions in a variety of languages, including minority languages, the use (or lack of use) of which might be contentious. Accuracy is, of course, a paramount consideration, particularly given the careful nuances of language within the Reports.

On the other hand, translations of Reports and Responses exist for internal use in many States. In the spirit of cooperation these might form the basis of an approved translation, thus eliminating the need to 'start from scratch'. It is also apparent that the use of standard terminology in key statements of standards and recommendations should facilitate translation.

Would it not be possible to produce the summaries of recommendations, or a summary of the Report, it being clear that this was without prejudice to the authority of the Report as a whole?

Finally, would it not be possible to produce the General Reports in a wider variety of languages, particularly the sections of those Reports (such as the second, third and, we understand, the seventh) which set out the CPT's approach to key areas of its mandate?

## 9. General Conclusion

At first sight, it may appear that the points raised in the previous sections do no more than revisit issues raised in the past. It is true that issues of publicity, information and co-operation have long been debated. That they are still considered pertinent suggests that further improvements are needed. On a broader level, it is important to note that the very fact that the discussions kept turning to these questions when attempting to focus on issues of enhancing compliance with CPT Recommendations, suggests that the basic impulse of the NGO community and the guiding spirit of international human rights protection under international law – that the sanction which a State fears most is publicity – is soundly based. This raises important questions for the operation of a mechanism which sees confidentiality as the central pillar of its working relationship with States.

It may be that the CPT is approaching a crossroads. It was – and is – an exciting and innovative mechanism that has great potential. There is, however, a danger that the operation of the mechanism no longer produces the same degree of concern in certain States: having

seen (or thinking that they have seen) what the CPT might mean for them it is possible that some States might come to believe that they have the measure of it. Certainly, once a Public Statement has been issued there is the problem that the CPT has no further forms of pressure remaining at its direct disposal. It is incumbent on all those dedicated to the struggle against torture and inhuman or degrading treatment or punishment to ensure that States do not feel 'comfortable' about their position vis-à-vis the Committee and that they feel the need to embrace the opportunities that a constructive dialogue built around the implementation of CPT Recommendations presents.

---

**Malcolm D Evans** *is senior lecturer in Law at the University of Bristol, specialising in International Law and Human Rights. His most recent publication is Religious Liberty and International Law in Europe (1997, CUP).*

## CONFERENCE REPORT

# REIGNING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS

SYRACUSE, ITALY 16-21 SEPTEMBER 1997

LUCIENNE CURMI

The demands and expectations of the international community are changing constantly – there was a time when we used to think that an international Convention on Torture was unattainable. Today an international Convention on Torture is in force and is actually being implemented. The time has now come to say "no" to impunity. We can no longer have amnesties for war crimes, crimes against humanity, genocide and serious violations of human rights. Bringing to justice perpetrators of such crimes is of the essence, but to do this a permanent international criminal court must be set up. In this context, the expectations of the international community are high and geared towards the proper functioning of a permanent institution having the powers to investigate, try and punish criminals of the stature of Karadzic.

This was the main argument prevailing at this international

conference, ably organised by ISISC (International Institute of Higher Studies in Criminal Sciences) and attended by some of the world's renowned experts, including judges and prosecutors of the ad hoc tribunals for the Former Yugoslavia and Rwanda. Throughout the intense and highly animated plenary sessions, the participants condemned serious violations of international law and reiterated the necessity to assert the rule of law. In his message, H.E. Kofi Annan, Secretary-General of the United Nations, reflected that intra-state hostilities have become a tragic feature of our times; that conflicts of the post Cold War have generated genocide, war crimes, crimes against humanity and serious violations of human rights. Few criminals have been brought to justice. Since World War II there have been over 200 conflicts of a non-international nature. Making criminals accountable is vital and a pre-requisite for post-conflict peace-building.

The establishment of ad hoc tribunals and investigatory commissions, together with truth commissions were vital in replacing impunity with accountability. However, Karadzic and Mladic are still at large, notwithstanding the ad hoc tribunal. There can be no doubt that the time has come to move forward in the setting up of a permanent structure to deal more efficiently with violations of international law in the 21st century. Efficiency is of the very essence if justice is to prevail since "justice delayed is justice denied". Furthermore, delay gives perpetrators time to obfuscate the facts and manipulate the trial, which techniques are used by the more powerful to evade justice.

Among the problems related to the ad hoc tribunals, truth commissions and investigatory commissions, one may refer to divergencies in religion and ethnicity, lack of independence of judiciary and the corruption of police forces, and limiting national laws which impede in-depth investigation. The latter is particularly true in the case of banking laws which do not allow the investigator access to the perpetrator's assets. It was maintained that the relationship between peace, justice and impunity cannot be solved at the national level.

Speaking during the session on *Policy Considerations on Accountability, Peace and Justice*, Professor Nigel Rodley, UN Special Rapporteur, referred to the case of apartheid in South Africa. Apartheid, a violation of human rights which was actually legalised in South Africa, was written in black and white in national laws. The situation is similar when amnesties are given vis-à-vis the crimes mentioned before. When impunity is legalised through amnesties,

an atrocity is being committed and the rights of victims are being violated.

A close link is evident between justice and the peace process. In the mandate given to the ad hoc tribunal in Rwanda, the security council emphasised this relationship by establishing that the situation in Rwanda must cease to constitute a threat to humanity and national security. (refer to UN Res.975) This emerged in the session dedicated to *International and National Prosecutions*. The advantages of international prosecutions are numerous; one may mention the absence of bias which, in a national investigation, could hamper impartiality. The international criminal court would have independent prosecutors with the necessary infrastructure to carry out their tasks, it could and should ensure a fair trial and it would have compulsory powers over states to ensure that victims' rights are protected. As Judge Elizabeth Odio Benito maintained, justice and impunity are mutually exclusive. The international community must ensure that victims' rights are upheld through a permanent structure which admits of no exceptions. One could here mention the notion of absentia and the fact that a person cannot be tried in his absence – is this not a kind of impunity? The International Criminal Court must also be given financial independence to carry out its job. In this regard, the ad hoc tribunal for the Former Yugoslavia has been wrought with political motives. Absence of political will can hamper significantly the work done by the prosecutors and the judges. Likewise, the giving of refuge to well-known criminals is unacceptable. In this regard one may refer to the Canadian-Nuremberg experience, where Canada had become a haven for war criminals. The lesson to be drawn here is that a state must feel it is internationally called upon to prosecute; a sense of international justice sensibility must be instilled.

The Minister of Justice of Rwanda, The Hon. Faustin Ntezilyayo, maintained that a proper justice system could be devised with the cooperation of national prosecutors. The ad hoc tribunal for Rwanda was assisted by national authorities since a lot of evidence was testimonial evidence, and this was only achieved due to cooperation between the parties concerned. This is also the principle of universal jurisdiction. In exceptional cases, international law creates universal jurisdiction as in the crimes being here discussed. However, universal jurisdiction often requires national means to be implemented, as in the Eichmann Case. One cannot emphasise enough the concept of universal jurisdiction: should a Permanent International Criminal Court not be set-up, according to the principle of universal jurisdiction

the perpetrators of such crimes may still be tried and punished. Unfortunately we again witness lack of political will in the implementation of the principle of universal jurisdiction when states show reluctance to prosecute even the most heinous of international crimes. On the other hand, if a state does have the political will then it is in a position to achieve a lot. In Ethiopia, as the Chief Special Public Prosecutor, The Hon Girna Wakjira maintained, after a strict dictatorship regime of 30 years, the new administration set up a special prosecution to investigate serious violations of human rights. There is no doubt that this was a very ambitious project considering that Ethiopia had no infrastructure, no police force and no judiciary at the time.

The third session *Recording the Facts and the Truth* was rich with presentations on South Africa, Cambodia, Argentina and the Former Yugoslavia. An innovative approach was adopted to deal with gross violations of human rights which occurred during the apartheid. In his presentation, Alex Boraine, Vice-Chairperson of the Truth and Reconciliation Commission of South Africa, demonstrated how the truth commission was considered to be the best approach, since an ad hoc tribunal would have created further conflict in a region brimming with troubles. It is held that a successful result is achieved if there is popular support for the option taken. In the case of the truth commission, 90% voted in favour of this solution, which was state funded. The commission was given the extraordinary powers of subpoena and search and seizure, in this way safeguarding a democratic process. Hearings were also open to the media and the public, thus ensuring transparency.

In El Salvador a truth commission of an international nature was set up since in this case the natives were not in a position to render any assistance. The Inter-American commission set as its targets the right of the families to know the truth on what happened and the right of society to know the circumstances in which crimes were committed so as to avoid further perpetration of offences. One should bear in mind that a truth commission is not meant to substitute a proper prosecution. Also, it is not sufficient that an amnesty is democratically approved since notwithstanding popular approval, it may be in violation of a state's international obligations. The majority should not have the right to take away the rights of families.

The success of a truth commission is very much dependant on the role it plays not only vis-à-vis the revelation of truth to families and victims but also in a full-blown prosecution which may follow. Professor Naomi Roht-Arriaza, professor of Law at the University

of California, raised the question as to what degree can information of the truth commission be used in a court of law, especially since it would not have been collected in a judicial setting. How do truth commissions and prosecutions work together? On this matter, a balance was achieved in South Africa. Action must follow revelations and evidence given by victims as otherwise cynicism and disillusionment may result.

In the session on *Compensation and Reparation*, Professor Theo Van Boven, University of Limburg, The Netherlands, drew attention to the fact that often the victims' perspective is embarrassing, which is why national and international societies prefer to overlook the victim. However, reparations in the broad sense are indispensable in the process of doing justice, although they should not be considered as alternatives to justice. Ms Iris Almeida, International Center for Human Rights and Democratic Development, Canada spoke on justice, truth and reparation and how these are at the root of sustainable peace. She identified what one can term to be a "culture of impunity", the reason why gross violations of human rights are not being suppressed. Unfortunately, the picture is not as rosy as some would like to paint it, and it is a fact that not everyone is equal before the law – which is why the world today needs to have a permanent set-up to deal with serious violations of international criminal law.

The question of compensation was further discussed by Professor Peter Baehr, Netherlands Institute of International of Human Rights. What is monetary compensation to a mother who lost her child, or to a wife who lost her husband? Some victims, in fact, do not perceive money as adequate compensation. Other gestures, however, may very well be seen as compensation, e.g. the gesture made by Willy Brandt in kneeling before victims of the Nazis. Thus, compensation and reparation should be given a wider interpretation. The establishment and ascertainment of truth does not necessarily bring about reparation. Tribunals serve to individualise guilt, however the gestures of reparation and compensation are essential, irrespective of how they are received by the victims' families, if they are received at all.

## Concluding Remarks

In the last sessions, an assessment was made of the efforts to develop international principles or guidelines on accountability. Professor Cherif Bassiouni, host of the conference and staunch

promoter of a permanent International Criminal Court, noted that every conflict is sui generis; however does this entitle one to claim that due to the different characteristics of conflict, this brings about a distinction in the nature of the crime of genocide, war crimes, crimes against humanity and serious violations of human rights? Can one truly maintain that these are jus cogens crimes for which there is universal jurisdiction and that therefore there can be no compromise? In the negotiating arena one may perhaps advance other ideas and achieve better world peace.

The Hon Louis Joinet, UN Special Rapporteur, reiterated the previously referred to presence of a "culture of impunity", which he claims, must be combated through the development of a counter-culture which would bring together common forces, i.e. NGOs and the families of victims. To change this culture the victim must be seen as an important component of society having specific rights, namely the right to know, the right to justice, the right to reparation and the guarantees that crimes will not be repeated.

The truth reconciliation commissions must have defined criteria to be effective: there must be the guarantee of impartiality, the mandate must be clear (the commission must not replace regular courts of justice), and there must be the right to justice, i.e. by ensuring that legal mechanisms do not give rise to impunity. Problems related to the commissions include the extradition of offenders – often states invoke national laws on the non-extradition of nationals. Persons being investigated may opt to repent, i.e. to disclose information which may help the commission in the discovery of truth, however one cannot allow the evasion from investigation.

At the conclusion of the proceedings, several general observations were made on the fight against impunity. While there seems to be more consciousness today of the institute of human rights and humanitarian laws, the concept of sovereignty and non-interference in a state's affairs is not easy to overcome, notwithstanding the principle of subsidiarity, i.e. International law prevails over national laws. Also, as Mr Yves Sandoz from the ICRC maintained, for the International Criminal Court to function, the international framework must be strengthened. A judge of high standing must be appointed who must be irreproachable and who will set the principles of exemplarity. In conclusion one must bear in mind that the duty to implement decisions of the International Court ultimately falls on national governments, therefore the international community must provide mechanisms to assist states in this implementation.

There can be no peace without justice, there cannot be impunity

of criminals if peace is to prevail. National amnesties have no place in the International Criminal Court, since the better view is that crimes should be punished and not merely brought to justice.

A significant sign of commitment to this permanent set-up has been demonstrated through the adoption of a Declaration on Democracy by the participants of the Inter-Parliamentary Union Conference in Cairo held at the same time as the Syracuse Conference. The Declaration states clearly that the parties to the Declaration support the establishment of a permanent international criminal court.

It is very encouraging that action promoting the setting up of a Permanent International Criminal Court is being taken by NGOs and academic institutions; that such discussion is taking place on an international level. The conference in Syracuse follows a similar one held in Malta on 12–13 September 1997 by *No Peace Without Justice*, Rome, Italy in collaboration with the University of Malta, also promoting the establishment of a Permanent International Court by 1998. The Malta conference, likewise attended by some of the leading personalities in the fight against impunity, including H.E. Muhamed Sacirbey, Permanent Mission of Bosnia and Herzegovina to the UN, H.R.H Prince Zeid bin Ra'ed of Jordan, also ambassador of Jordan at the UN and The Hon. Marco Pannella, Italian Trans-Radical Party, brought about the desired result – a new impetus in the fight against impunity and general agreement on the need to act with conviction and determination. The participants at the Malta conference reiterated that the setting up of a permanent International Criminal Court can in no way be delayed beyond 1998.

# ABSTRACTS

## JURIDICAL PROTECTION OF FOREIGNERS IN ITALY AND IN EUROPE

GIUSEPPE FINOCCHIARO

In this paper the author analyzes the condition and the juridical status of foreigners in the European juridical systems, tackling the subject under all aspects and from different points of view.

After a short analysis on immigration phenomena in Western Europe, pointing out sociological and historical aspects, the author considers the international protection of foreigners, explaining rights, juridical position and the substantive aspects of the most important conventions on migrants condition.

In this context, Constitutions and most important Acts of member States of the EU concerning foreigners' status are analyzed, with an in-depth exposition on the development of national legislations.

The author then looks at every aspect of national legislations, comparing rules of member States of the EU on entry residence permits, visa policies, expulsion, instruments for immigration control and the struggle against clandestine migration, migrant workers regulations, ILO Conventions on foreigner workers' rights, political and civil rights and foreigners' status in legal systems, criminal trials and in civil proceedings.

In the last part, an interesting short overview on immigration policies of the USA, Japan, Switzerland and East European countries is given.

يحلّل الباحث الحالة والوضع القانوني للأجانب طبقا للأنظمة القانونية الأوروبية ويتطرق للموضوع من كافة الجوانب ووجهات النظر. وبعد مقدمة وجيزة (الباب الأول) حول ظواهر الهجرة في أوروبا الغربية، مشيرا الى الجوانب الاجتماعية والتاريخية، يحلّل الباحث مسألة الحماية الدولية للأجانب، موضحا الحقوق والوضع القانوني ومحتويات أهم المواثيق المتعلقة بالهجرة (الباب الثاني).

وفي هذا الصدد، يتم تحليل الدساتير وأهم القرارات لأعضاء المجموعة الأوروبية حول وضع الأجانب، مع شرح وفيّ حول تنمية التشريعات الوطنية (الأبواب ٣ - ٥).

وبعد دراسة قانون الهجرة الايطالي (الباب ٦)، عالج الباحث كافة الجوانب للتشريعات الوطنية، مقارنا أحكام دول المجموعة الأوروبية فيما يخص الدخول (الباب ٦) والاقامة (الباب ٧) وسياسة التأشيرات والطرد من البلاد (الباب ٨) وأدوات التحكم في الهجرة ومكافحة الهجرة غير القانونية وأحكام العمل بالنسبة للعمال المهاجرين (الباب ٩) ومواثيق المنظمة الدولية للعمل حول حقوق العمال الأجانب والحقوق السياسية والمدنية (الباب ١١) وأحوال الأجانب في الأنظمة القانونية وفي المحاكمات الجنائية وفي الاجراءات القانونية المدنية (الباب ١٢).

ويلقي الباب الأخير (الباب ١٣) نظرة وجيزة وعامة مثيرة للاهتمام حول سياسات الهجرة في كل من الولايات المتحدة واليابان وسويسرا وفي دول أوروبا الشرقية.

# ETAT, SOCIÉTÉ CIVILE ET DÉMOCRATIE DANS LE MONDE ARABO-MUSULMAN

BICHARA KHADER

Since the seventies, we have witnessed the re-emergence of civil society in all Arab countries, albeit at varying degrees. This phenomenon stems from the crisis of the welfare and nationalist State, the erosion of governments' legitimacy, social maturity (due to developments in education) and changes in world geopolitics.

This article analyzes the internal and external conditions in favour of the re-emergence of civil society and the restrictions which limit its effectiveness. This article will also try to analyze the link between economic development and democracy as well as the relation between peace and democratic transition.

It will underline the importance of education to instil in future generations a critical, analytic and scientific mind which is the basis of true democracy and civil participation.

منذ السبعينات، شاهدنا بزوغ المجتمع المدني من جديد في كافة الدول العربية، ولو بدرجات متفاوتة. وجاءت هذه الظاهرة نتيجة أزمة دولة الرفاه الاجتماعي والقومية، وائتكال شرعية الحكومات والنضوج الاجتماعي الناجم عن التقدم في التعليم والتغيرات في السياسات الجغرافية العالمية.

ويعالج هذا البحث الظروف الداخلية والخارجية المؤدية الى بزوغ المجتمع المدني من جديد والقيود التى تحدّ من فعاليتها. كما يحاول هذا البحث أن يحلّل العلاقة بين التنمية الاقتصادية والديمقراطية وكذلك العلاقة بين السلام والمرحلة الانتقالية الديمقراطية.

ويشدّد البحث على أهمية التعليم في تطوير عقل انتقادي ومحلّل وعلمي في الاجيال المستقبلية التي تمثّل أساس الديمقراطية الحقيقية والمشاركة المدنية.

# HUMAN CAPITAL AND ECONOMIC DEVELOPMENT: AN ANALYSIS FOR THE MEDITERRANEAN COUNTRIES

FERDINANDO OFRIA

This research underlines the existence of a considerable correlation between the proxies that represent "human capital" and the per capita income of the countries bordering the Mediterranean. This result suggests that the policy to be followed in order to improve the per capita income of more disadvantaged countries will have to be turned to the strengthening of the factor "human capital" not only by a relevant investment in education, but also by supplying all those goods and social and health services required in order to have the social development supporting the economic one.

يشدد هذا البحث على وجود قدر كبير من الارتباط بين الوكلاء الذين يمثّلون "الرأسمال البشري" والدخل للفرد الواحد في الدول المطلة على البحر الابيض المتوسط. وتقترح نتائج البحث أن السياسة التى يجب تبنيها بغية تحسين الدخل للفرد الواحد في الدول المحرومة تكمن في تعزيز عامل "الرأسمال البشري"، ولا يتم ذلك عبر الاستثمار في التعليم فقط ولكن عن طريق توفير كافة الامكانيات والخدمات الاجتماعية والصحية الضرورية حتى تصبح التنمية الاجتماعية مؤيدة للتنمية الاقتصادية.

# A CHALLENGE TO BE ACCEPTED BY EUROPEAN DEMOCRACIES: THE OBSERVANCE OF HUMAN RIGHTS AND THE EFFICIENCY OF THE FIGHT AGAINST CRIMINALITY

MARIO CHIAVARIO

The first observation made in this article is that while all European states adhere to a democratic system of government, organised crime is constituting an ever-increasing threat to democracies. The author emphasises the need of more commitment in the respect for human rights – a commitment which should be complementary to the safeguard of citizens from all forms of criminality. Recourse to capital punishment or other extreme measures is clearly unacceptable. An analysis of the guide-lines adopted by the European Courts reveals that police action does not go beyond certain limits. The Courts have also encouraged uniformity in the safeguard of human rights and the need to respond to serious criminal phenomena. The importance of a truly credible system of justice, both at the national and the international level with the scope of promoting human rights values in Europeans, is studied in this article. In conclusion, the author maintains that the long hidden banner of human rights – source of strength and courage for individuals and peoples against tyrannies – do not become a mere decorative flag whose splendour pales and finally disappears when touched by the problems and tribulations of daily life.

يستهلّ التقرير بملاحظة حول الخطر الذي تتعرض له الدول الأوروبية في محاولتها للالتزام بالديمقراطية بسبب الاجرام الذي أخذ يزداد عنفا. وبينما يؤكد التقرير رفضه لعقوبة الاعدام ولحلول أخرى لا تحترم حرية الانسان، يشدد الباحث على ضرورة تعهد قوي وملموس تأكيدا على أن احترام حقوق الانسان لا يناقض التعهد من أجل حماية المواطنين من مخاطر

الاجرام. وبعد تحليل اتجاهات المحكمة الأوروبية، يشير التقرير الى ما أصدرته من انذارات محددة لتجنب الشرطة الأعمال البشعة في ممارستها لنشاطها المتعلق بقمع الاجرام. كما يشير الى التشجيعات فيما يخص التوفيق بين ضمانات حقوق الانسان وضرورة مواجهة ظواهر الجنوح الخطرة. وبعد التأكيد على أهمية العدل الذى يوثق به على النطاق الوطني والدولي بغية الاعتراف المتأكد من طرف مواطني أوروبا بقيم حقوق الانسان، يختتم الباحث دراسته املا ألا تصبح راية حقوق الانسان، التي طال غيابها والتى هي بمثابة قوة وبسالة الأفراد والشعوب ضد القوى الطاغية، مجرد عَلَم تزييني يضمحلّ بهاؤه ويختفي نهائيا بسبب مشاكل ومحن الحياة اليومية التي يتعرض لها.

## THE TRAINING OF LAW ENFORCEMENT OFFICIALS

RALPH CRAWSHAW

In this paper it is argued that the normative and technical aspects of policing are inextricably linked. The normative standards referred to are those embodied in international human rights instruments, especially those addressed to police officials. It is also argued that there can be no conflict, nor even tension, between human rights and policing. This is because human rights are protected by law, and the police may not break law in order to enforce law – especially as law enforcement is one of the functions of policing. These arguments are made with particular reference to the international standards on the treatment of detainees, which include the

prohibition of torture and international standards on the interrogation of suspects – a technical policing skill essential to the investigation of crime and, when it is lacking, significant in relation to serious human rights abuses. Training programmes undertaken by some international organisations are described, as are, to a lesser extent, some national initiatives.

يقال في البحث ان الجوانب المعيارية والفنية لواجبات الشرطة مرتبطة ارتباطا تاما. أما النماذج المعيارية المشار اليها في البحث فهي تلك التى تتجسم في الأدوات الدولية المتعلقة بحقوق الانسان، وخاصة ما يتعلق منها بضباط الشرطة. وتقول الدراسة انه لا يمكن أن يحصل أي تضارب أو توتّر بين حقوق الانسان وواجات الشرطة. ذلك أن حقوق الانسان محمية قانونيا ولا يمكن للشرطة أن تخالف القانون بغية فرضه - وخاصة نظرا لأن فرض القانون من بين مهام الشرطة. وتُقدّم هذه المناقشة اشارة خاصة الى المعايير الدولية حول التعامل مع المقبوض عليهم والتى تشمل منع التعذيب والمعايير الدولية حول استجواب المشبوهين. وكل هذه العناصر الفنية ضرورية لتحرّي الاجرام. وكلما انعدمت، تُنتهك حقوق الانسان بطريقة خطيرة. ويشرح البحث برامج التدريب التى تقوم بها بعض المنظمات الدولية، كما تتم الاشارة، بصورة وجيزة، الى بعض المبادرات القومية.

# LES DROITS DE L'HOMME: L'ARME VICTORIEUSE CONTRE LA CRIMINALITÉ ORGANISÉE

MARIO LANA & VITO MAZZARELLI

There exists no social contract in which the State is incapable of guaranteeing the right to life, liberty and security. Further to Rousseau's statement, writers bring forward the basic concept in that organised crime threatens the foundations of any democracy. The assertion of basic human rights is a mission of democracy whilst organised crime is its negation. This is the reason why democracy has to oppose criminality, if it does not want to be overcome by it. Writers pinpoint three fronts to this battle:

a) The actual force of a democratic State should firstly be re-affirmed by the control exerted on its territory, spending of public funds and the ways they are rogatory, at the same time the right that young people have to education should be safeguarded and effectively implemented; the culture of democracy, of its foundations and the reasons for its wide-spread protection and the elimination of all forms of social marginalisation;

b) Secondly, human rights should be re-affirmed especially in a legal context, even as regards to persons prosecuted for crimes associated with organised crime; to an impartial and just sentence as well as to the right of not being subject to torture and to harsh sentences or cruel, inhumane and degrading treatment.

c) Finally, an awareness should be created whereby only in a solid democracy can human rights be re-affirmed, guaranteed and safeguarded; where inequalities, very often in human and disgraceful, can be combated, corruption prevented, where the person endowed with cultural capacities can express himself in a concerted effort and where the community can be educated to pinpoint its needs and finds the means to respond to them.

Only upon such conditions can democracy ascertain itself and stand a chance of combating organised crime.

لا يوجد أي تعاقد اجتماعي يمنع الدولة من ضمان حق الحياة والحرية والأمن. وبالاضافة الى تصريح روسو، يتقدمون الكتّاب بالمبدأ الساسي القائل ان الاجرام المنظم يهدد أسس الديمقراطية وأن الديمقراطية تهدف الى ترسيخ الحقوق الانسانية الاساسية بينما الاجرام يؤدي الى انكارها. وهذا هو السبب وراء ضرورة معارضة الديمقراطية للاجرام لكيلا تُصبح ضحية لها. هذا ويشير الكتّاب الى ثلاث جبهات في هذه المعركة:

أولا - التأكيد على قوة الدولة الديمقراطية عبر التحكم في كافة أنحاء أراضيها، والتحكم في نفقة الاموال العامة وفي نفس الوقت التأكيد على حق الجيل الساعد للتعليم وتنفيذه بصورة فعالة، بل التأكيد على الثقافة الديمقراطية وأسسها وأسباب حمايتها على نطاق واسع وازالة كافة أشكال التهميش الاجتماعي.

ثانيا - ضرورة التأكيد على حقوق الانسان في اطار قانوني وذلك حتى في حالات محاكمة أشخاص متهمين بجرائم تتصل بالاجرام المنظم. كما يجب التأكيد على قضاء منصف وعادل وعدم اللجوء الى التعذيب او المعاملة غير الانسانية والبشعة.

ثالثا - يجب خلق توعية تهدف الى تاكيد وضمان وحماية حقوق الانسان بناء على ديمقراطية قوية حيث يمكن مكافحة عدم المساواة غير الانسانية ومنع الفساد وحيث يمكن للفرد ذي القدرات الثقافية أن يعبّر عن نفسه بصورة

منسقة وحيث يمكن تدريب المجتمع في تحديد حاجاته وايجاد السبل للاستجابة لها.

ولا يمكن للديمقراطية أن تفرض نفسها وأن تكافح الاجرام المنظم الا بناء على هذه الشروط.

# PREVENTION OF DELINQUENCY AND SOCIAL DEVELOPMENT IN FRANCE

MARIE PIERRE DE LIEGE

In recent years, we often considered that serious crime and daily delinquency belonged to two separate phenomena, distinct in nature, actors and solutions.

However, just recently, obvious links emerged between these two forms of criminal activity; organised crime is increasingly relying on individuals, especially youths from a difficult social and financial background, to spread and facilitate their criminal activities (receipt of stolen goods, resale of fraudulent articles, drugs, illegal work etc. Petty delinquency therefore becomes a breeding-ground for serious crime. As a result, two factors are deemed important alongside traditional police and legal methods in order to lessen organised crime: to fight against the risk of petty delinquency by adopting a strategy of social development and aid to persons in trouble and to isolate, where possible, the two societies so as to avoid the development of fields of "cooperation".

في السنوات الاخيرة كنا نعتقد أن الاجرام من النوع الخطير والاجرام اليومي ينتميان الى ظاهرتين منفصلتين عن بعضهما ومختلفتين في

طبيعتهما وفي القائمين بهما وفي حلولها. غير أنه اتضحت منذ عهد قريب صلات واضحة بين هذين النوعين من العمل الاجرامي. ذلك أن الاجرام المنظم أصبح يعتمد بشكل متزايد على أشخاص، وخاصة الشباب، من بيئة اجتماعية ومالية صعبة بغية نشر وتسهيل أعمالهم الاجرامية (مثل استقبال المسروقات واعادة بيع السلع المزوّرة والمخدرات والعمل غير القانوني الخ). وهكذا يصبح الاجرام البسيط مدرسة تدريب للاجرام الخطير. ونتيجة لذلك، وبغض النظر عن أساليب الشرطة والقانون التقليدية، فهناك عاملان هامان يلعبان دورهما في خفض الاجرام المنظم، أي محاربة الاجرام البسيط عن طريق تبنّي استراتيجية التنمية الاجتماعية ومساعدة الافراد الذين يتعرضون للمتاعب من جهة وعزل المجموعتين الاجراميتين لمنع تنمية سبل "التعاون" بينهما من جهة أخرى.

# THE SITUATIONAL ASPECTS OF CRIME PREVENTION: THE THEORETICAL AND PHILOSOPHICAL FOUNDATIONS

SHLOMO GIORA SHOHAM

This study deals with the interactional model of situational violence, examines how violence can be predicted and discusses potential modes of its prevention.

A link will be presented between the predisposing factors on the biological, personal and social levels and the situational interaction, but the predisposition and situational aspects express themselves in different dynamics.

يتطرق البحث الى نموذج التفاعلي للعنف الوضعي ويبحث كيفية التكهن بالعنف وطرق ممكنة لمنع حدوثه. ويشير البحث الى علاقة بين العوامل المتعلقة بنزوع الفرد الى العنف من الناحية البيولوجية والشخصية والاجتماعية من جهة والتفاعل الوضعي من جهة أخرى، مع أن النزعات والجوانب الوضعية تظهر من خلال قوى محرّكة مختلفة.

# RAISING THE PUBLIC AWARENESS ON THE PROTECTION OF HUMAN RIGHTS IN THE FIGHT AGAINST CRIMINALITY

VIVIEN STERN

If we wish to provide education to increase public awareness of the need to respect human rights we need first to understand three factors in the current environment which are strongly influencing public perceptions. These are:

- a redefinition of rights to set the rights of victims against the rights of offender;
- a belief in a new emergence of evil;
- an increase in terrorism.

These factors have led to a questioning of the basic principles underlying the treatment of defendants and convicted offenders. The human rights principles embodied in the Council of Europe were set down and codified after the atrocities of the Second World War and are based on analysis of how those atrocities happened. Half a century has now passed. It is necessary to explain again what are the lessons of the Second World War and how these came to be expressed in the European Convention on Human Rights.

Education in the theory, origins, history and practice of human rights needs to be incorporated into school and university studies. Governments need to establish human rights education units. Non-governmental organisations working for the promotion of human rights need to be encouraged to undertake active and convincing public education work. The Council of Europe should consider establishing a major human rights education programme.

اذا أردنا أن نوفّر التعليم لزيادة الوعي العام حول ضرورة احترام حقوق الانسان فعلينا بادي ذي بدء أن نتفهم ثلاثة عوامل في البيئة السائدة تؤثر كثيرا في الادراك العام وهي :

- اعادة تحديد الحقوق بغية اقامة حقوق الضحايا ضد حقوق مرتكبي الجريمة
- الايمان بظهور جديد للشرّ
- زيادة في الارهاب

وأدّت هذه العوامل الى تساؤل المبادئ الأساسية وراء التعامل مع المدّعى عليهم والمجرمين المحكوم عليهم. وعقب الأعمال الوحشية للحرب العالمية الثانية، وُضعت وسُنّت مبادئ حقوق الانسان، والمتجسدة في ميثاق اللجنة الأوروبية، وتأسست بناء على تحليل حول كيفية حدوث هذه الأعمال البشعة. ولقد مضى نصف قرن من تلك الحرب وقد أصبح من الضروري اعادة شرح دروس الحرب العالمية الثانية وكيف تجسّدت في الميثاق الأوروبي حول حقوق الانسان.

وعلى التربية والتعليم في نظرية وأصول وتاريخ وممارسة حقوق الانسان أن

تدخل المقررات الدراسية والدراسات الجامعية. هذا وينحتم على الحكومات أن تؤسس وحدات حول تعليم حقوق الانسان بينما يجب تشجيع المنظمات غير الحكومية العاملة في مجال تطوير حقوق الانسان للقيام بعمل فعال ومقنع في مجال التعليم العام. كما أنه على المجلس الأوروبي أن يأخذ بعين الاعتبار تأسيس برنامج تعليمي رئيسي حول حقوق الانسان.

# THE PREVENTION OF TORTURE IN SOUTHERN EUROPE: AN EDITORIAL INTRODUCTION

SALVO ANDÒ

The Commission for the Prevention of Torture has, in these years, sought to be an efficient instrument in the fight against torture in an international situation characterized by a lot of attention to what was happening within the States, in particular in the way the penal repressive mechanism was functioning. It appears to us, however, that the current international scene demands a strengthened role for the CPT. With the end of the Cold War, the internal situation in many States is far from stable or peaceful. The same can be said on the international situation. The new conflicts do not only affect the impoverished world but also the developed societies. In this scenario, the CPT does not have the necessary instruments to intervene. The Commission operates on the basis of a fiduciary and cooperative relationship with all states party to the Convention, which receive visits of the Commission. These states are, or should be in favour of the supervisory work carried out by the Commission and are expected to carry out any suggestions made. Yet collaboration is easier for those states having no fear of reprimand by the Commission. On the other hand, cooperation is somewhat difficult when a particular state is not in line with the Convention, or may be covering up for perpetrators of crimes against prisoners. The CPT can be not only

an organ of supervision and reporting, but an organ of action, hastening activity of the future permanent tribunal bearing in mind that the *notitiae criminis* which the committee is able to collect and elaborate are among the most documented which can be collected.

عملت اللجنة لمكافحة التعذيب، خلال السنوات الاخيرة، على أن تكون أداة فعالة في محاربة التعذيب في وضع دولي يتسم بالاهتمام بما كان يجرى في شتى البلاد في مجال الالية الجزائية القمعية. غير انه يبدو لنا أن الساحة الدولية الحالية تتطلب تعزيزا لدور اللجنة لمحاربة التعذيب. ومنذ نهاية فترة الحرب الباردة، لم يستتب الاستقرار والسلام في العديد من الدول. ونفس الحالة تنطبق على السعيد الدولي. فالصراعات الجديدة لا تؤثر العالم الفقير فقط ولكن تؤثر كذلك المجتمعات المتطورة. وفي هذا الاطار العام، تفتقر اللجنة لمكافحة التعذيب الاليات اللازمة للتدخل. ذلك أن اللجنة تعمل على أساس علاقة ثقة وتعاون مع دول المعاهدة التى تزورها اللجنة. هذا و تؤيد هذه الدول، أو بالاحرى يجب أن تؤيد، نشاط الاشراف الذي تقوم به اللجنة، بل يجب أن تنفّذ الاقتراحات المقدمة. غير أنه من الملاحظ أن الدول التى لا تخشى توبيخ اللجنة هي على استعداد أكبر للتعاون، بينما يتعذر التعاون مع الدول التى لا تراعي بنود المعاهدة أو التى قد تخفي المسؤولين عن جرائم ضد السجناء. أما اللجنة لمكافحة التعذيب فيمكنها ألا تكون اداة للاشراف و التحقيق فقط ولكن قد تكون أداة عمل من شأنه أن يعجّل نشاطات المحكمة الدائمة المستقبلية. هذا وعلى اللجنة أن تراعي أن تكون التقارير الجنائية التى تعدّها وتعالجها من أدق الوثائق التى يمكن جمعها.

# THE ASSOCIATION FOR THE PREVENTION OF TORTURE (APT) AND ITS RELATIONSHIP TO THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE (ECPT)

MARCO MONA AND CLAUDINE HAENNI

The Association for the Prevention of Torture (APT) is a non-governmental organization (ngo) based in Geneva, Switzerland aiming to promote instruments as officially acknowledged systems of visits to places of detention which would have the effect of preventing torture and other ill-treatment by disclosing mechanisms and situations that may lead to it. A first success was the adoption of the "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" in 1987. APTs work does not stop here, it aims to a successful implementation of the Convention, but also to promote the prevention of torture as a universal issue. A draft Optional Protocol to the UN Convention against Torture, providing for a universal system of visits to places of detention is currently discussed at the UN. And there are other venues to be explored, mechanisms and criteria which are more adapted to local needs and circumstances. This is why APT is pursuing a close cooperation with other human rights bodies such as the African Commission on Human and Peoples' Rights.

In view of the implementation of the European Convention, APT organized several seminars gathering ngos and other partners to the treaty body; one of them was held in April 1997 in Onati, Spain, with participants from six States of southern Europe.

ان الجمعية لمنع التعذيب عبارة عن منظمة غير حكومية ومقرّها بمدينة جنيف السويسرية. وتهدف هذه المنظمة الى تطوير الأساليب، كالزيارات المعترف بها رسميا لأماكن الاعتقال، بغية منع التعذيب وأي عمل سئ اخر والكشف عن الأنظمة والحالات المؤدية الى ذلك. وفي عام ١٩٨٧ جاء النجاح

الأول المتمثل في تبنّي "الميثاق الأوروبي حول منع التعذيب والمعاملة غير الانسانية والمذلّة أو المعاقبة". أما جهود المنظمة فلم تتوقف عند هذا الحد، بل تهدف الى التنفيذ الناجح لبنود الميثاق من جهة وابراز قضية منع التعذيب كقضية عالمية من جهة أخرى. هذا وتتم حاليا مناقشة مسودّة ميثاق تندرج في ميثاق الامم المتحدة ضد التعذيب من شأنها أن تسهّل القيام بزيارات الى أماكن الاعتقال. كما أنه توجد المزيد من السبل والأنظمة والأسس التى يمكن استطلاعها والتى تناسب الحاجات والظروف المحلية. ولذلك، تتعاون الجمعية لمنع التعذيب بصورة فعالة مع هيئات أخرى تساند قضية حقوق الانسان، كاللجنة الأفريقية حول حقوق الانسان والشعوب.

وتنفيذا للميثاق الأوروبي، نظّمت الجمعية لمنع التعذيب عددا من الندوات شملت منظمات غير حكومية وشركاء اخرين في الميثاق. وانعقدت احدى هذه الندوات شهر أبريل من عام ١٩٩٧ بمدينة أونياتي الاسبانية وشارك فيها مندوبون من ست دول أوروبية جنوبية.

# THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT): OPERATIONAL PRACTICE

ROD MORGAN

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into force in 1989, and is widely regarded as an important development in international law. This article describes the composition and practice of the Committee (CPT) formed under the ECPT, particularly the manner in which the Committee conducts and reports on visits to states party.

ان الجمعية لمنع التعذيب عبارة عن منظمة غير حكومية ومقرّها بمدينة جنيف السويسرية. وتهدف هذه المنظمة الى تطوير الأساليب، كالزيارات المعترف بها رسميا لأماكن الاعتقال، بغية منع التعذيب وأي عمل سئ اخر والكشف عن الأنظمة والحالات المؤدية الى ذلك. وفي عام ١٩٨٧ جاء النجاح الأول المتمثل في تبنّي "الميثاق الأوروبي حول منع التعذيب والمعاملة غير الانسانية والمذلّة أو المعاقبة". أما جهود المنظمة فلم تتوقف عند هذا الحد، بل تهدف الى التنفيذ الناجح لبنود الميثاق من جهة وابراز قضية منع التعذيب كقضية عالمية من جهة أخرى. هذا وتتم حاليا مناقشة مسودّة ميثاق تندرج في ميثاق الامم المتحدة ضد التعذيب من شأنها أن تسهّل القيام بزيارات الى أماكن الاعتقال. كما أنه توجد المزيد من السبل والأنظمة والأسس التى يمكن استطلاعها والتى تناسب الحاجات

والظروف المحلية. ولذلك، تتعاون الجمعية لمنع التعذيب بصورة فعالة مع هيئات أخرى تساند قضية حقوق الانسان، كاللجنة الأفريقية حول حقوق الانسان والشعوب.

وتنفيذا للميثاق الأوروبي، نظّمت الجمعية لمنع التعذيب عددا من الندوات شملت منظمات غير حكومية وشركاء اخرين في الميثاق. وانعقدت احدى هذه الندوات شهر أبريل من عام ١٩٩٧ بمدينة أونياتي الاسبانية وشارك فيها مندوبون من ست دول أوروبية جنوبية.

# PARTNERS TO THE COMMITTEE FOR THE PREVENTION OF TORTURE: COOPERATION AND CONFIDENTIALITY

RENATE KICKER

The disharmony between the principles of cooperation and confidentiality as the main pillars of the European system on the prevention of torture, especially in the relationship between the CPT and its external partners, has again been pointed out in the course of the Onati seminar. The practice of only receiving but not reacting to information by the CPT and of not asking its local partners for specific communications and support is demotivating and hampers a continuing and constructive dialogue. Regular meetings between the CPT and its various partners have therefore been claimed. Standard settings as regards the treatment of persons kept in detention support people working for the prevention of ill-treatment in an environment at risk and should be continued by the CPT. On the other hand, the CPT, in writing the reports, should carefully

consider the legal, social and economic situation of the respective state and should also be open for criticism and corrections in the light of local impracticabilities as regards the realization of their recommendations.

لقد تم الاشارة، خلال ندوة "أوناتي"، الى عدم الانسجام بين مبادئ التعاون والسرية كالأساسين الرئيسيين للنظام الأوروبي حول منع التعذيب، وخاصة في العلاقة بين اللجنة لمنع التعذيب وشركائها الخارجيين. فعملية استلام معلومات اللجنة لمنع التعذيب دون الاستجابة لها ودون الاتصال بشركائها المحليين من أجل الحصول على بلاغات معينة وعلى الدعم يؤدي الى سوء الاهتمام وعرقلة الحوار المستمرّ والبنّاء. ولذا تم مطالبة انعقاد الاجتماعات المنتظمة بين اللجنة لمنع التعذيب وشركائها المختلفين. هذا وتؤيد الترتيبات المقبولة، والمتعلقة بمعاملة المحجوزين، أولئك الأشخاص العاملين في بيئة خطرة في مجال منع سوء المعاملة. كما أنه يجب لهذه الترتيبات من قبل اللجنة لمنع التعذيب أن تستمرّ. ومن ناحية أخرى، على اللجنة، وهي بصدد اعداد التقارير، أن تأخذ بعين الاعتبار الوضع القانوني والاجتماعي والاقتصادي في الدولة المعنية، بل على اللجنة أن تكون مفتوحة للانتقاد والتصحيح في ضوء المشاكل المحلية التى تحول دول تحقيق ما يتم اقتراحه.

# EUROPE DU SUD: UN ENJEU DÉCISIF POUR LE COMITÉ EUROPÉEN POUR LA PRÉVENTION DE LA TORTURE

DIDIER ROUGET

Seven and a half years of work and already 60 visits to member states have demonstrated that the European Committee for the Prevention of Torture (CPT) experience and credibility are now well established. At the international level, the CPT is an essential tool in the protection of human rights. Today, in order to strengthen the protection of persons deprived of their liberty from torture and other forms of ill-treatment, the CPT must prove it can compel states to implement its recommendations. For this to be achieved, it is essential that the human and budgetary resources of the Committee be guaranteed and reinforced.

تبرهن السنوات السبع والنصف الماضية والزيارات الستون الى الدول الاعضاء، على أن خبرة ومصداقية اللجنة الأوروبية لمنع التعذيب قد أصبحتا أمرا ثابتا. وعلى المستوى الدولي، تمثل هذه اللجنة أداة أساسية لحماية حقوق الانسان. وأصبح من الضروري الان، وتوطيدا لحماية الاشخاص المحرومين من ممارسة حريتهم بسبب التعذيب ووسائل أخرى من التعامل البشع، أن تُثبت اللجنة قدرتها على اجبار الدول الاعضاء على تنفيذ توصياتها. وتحقيقا لهذا الهدف فمن الضروري جدا أن تكون المصادر الانسانية والمالية للجنة الأوروبية لمنع التعذيب مضمونة وموطّدة.

كل من أعضاء المجالس النيابية والمجموعة القانونية ووكالات الرقابة القومية والمجموعة الأكاديمية ووسائل الاعلام ومجموعة منظمات غير الحكومية. كما يجب بثّ تقارير اللجنة على نطاق أوسع وأن تكون محرّرة بلغات الدول المهتمة.