EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Exchange of views with the European Committee for the Prevention of Torture (CPT)

Speech by Síofra O'Leary

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President Mitchell,
Mr Giakoumopoulos,
Honourable members of the CPT,

I am delighted to take part today in what has become a traditional and important exchange between the Court and the CPT. Like other traditions, stalled by Covid, our cooperation and dialogue, as evidenced in our frequent references to your work, have survived, although we have not met in person since March 2020.

The need for regular and fruitful dialogue between the Court and the Council of Europe's institutions and bodies is self-evident, as indicated by the Court in its memorandum prior to the 4th Summit.[1]

I form part today of a very CPT-knowledgeable team. Judges Hüseynov and Gnatovskyy are well known to you and require no special introduction. But let me just note that the very fact that two former Presidents of the CPT are today sitting on the Court's bench shows the close link between the work of the Court and your committee, and the high esteem in which that work is held, a point to which I will return in my introductory speech.

I am most grateful to my colleagues for availability to engage in two substantive topics of interest to the Court and the CPT: the issue of informal "prison hierarchies" (which will be covered by Judge Gnatovskyy) and the push-back of migrants (which will be covered by Judge Hüseynov).

Before their interventions, I would like to address the relationship between the CPT and the Court from a more general perspective.

I will do so by looking into: (1) our respective *roles and functions*; and (2) the *complementarity and synergy* one finds in our activities.

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Let me start with *roles and functions*.

[1] In the Memorandum for the 4th Summit of the Council of Europe in Reykjavik, the plenary Court noted that "a strong Court ensures a strong Council of Europe, and vice versa." Council of Europe institutions play a critical role in the overall effectiveness of our Convention system" (see Memorandum of the European Court of Human Rights, 20 March 2023, para 2).

As I have already had the occasion to stress,[2] the different interactions between the activities of the Council of Europe and the work of the Court can be best observed in practice. The Court's role under Article 19 is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In the performance of its tasks under Article 19, the Court operates independently and autonomously.

In relation to individual applications lodged pursuant to Article 34, the exercise of the Court's judicial function pursues a dual role:

> (i) to render justice in individual cases by way of recognising violations of an injured party's rights and freedoms and, if necessary, by way of affording just satisfaction; and
>
> (ii) to elucidate, safeguard and develop the rules instituted in the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.[3]

In each contentious case, the exercise of the Court's judicial function is, by definition, reactive. The Court is responsible for the judicial application of the Convention in individual cases after domestic remedies have been exhausted, in accordance with the principle of subsidiarity.[4]

The Court's function is not to act pre-emptively or to set standards of conduct or best practices in a particular area, including in the prison context. We can only rule on individual cases, although when doing so we not only resolve the case in hand but may also elucidate the Convention standards which are binding on the Contracting Party concerned pursuant to Article 46 § 1 of the Convention[5]; but which are standards having an interpretative precedential effect[6] for all other cases pending before the Court in relation also to other Contracting Parties.[7]

This latter work seeks to prevent violations – ensuring that Council of Europe Member States abide by Convention standards such that there is no need to seise the Court; – but my point is that the adjudicative process itself is reactive.

On the other hand, the Council of Europe institutions and bodies are tasked with overseeing and developing standards within their respective areas of expertise. Their monitoring and standard-setting is generally preventive rather than a reactive. They seek to enhance legislation, establish practices and assist the authorities in ensuring that the relevant framework for the protection of human rights and freedoms has been put in place and that it operates effectively in practice. In each case, the activity is aimed at forestalling rather than remedying violations of human rights.

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[2] Speech Exchange of views with GRECO, 8 June 2023.

[3] *Nagmetov v. Russia* [GC], no. 35589/08, § 64, 30 March 2017.

[4] See Article 1 of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 213. This discussion does not concern the Court's specific advisory function pursuant to Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, ETS 214.

[5] See Appendix IV "Recommitting to the Convention system as the cornerstone of the Council of Europe's protection of human rights" of the Reykjavík Declaration.

[6] The Court has explained that while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (*Muršić v. Croatia* [GC], no. 7334/13, § 109, 20 October 2016, with further references).

[7] For instance, on the basis of the relevant case-law developed in *Muršić* (concerning Croatia which did not have systemic issues concerning conditions of detention), the Court is processing cases concerning overcrowding through the fast-track Committee procedure against various countries. Violations of Article 3 have been found, either by a Committee of Chamber, in close to 500 cases. Many more cases were struck-out following friendly settlements between the parties or on the basis of unilateral declarations by the Governments.

These general observations also hold true for the CPT, although the complementary nature of your mission relative to the Court can be clearly seen in the Preamble to the European Convention against Torture, which makes specific reference to Article 3 of the Convention and its judicial supervisory mechanism.

In its First General Report,[8] the CPT has stressed that "prevention" constitutes the "lynchpin" of the whole monitoring system set up by the European Convention against Torture.[9]

One can also identify certain consequences flowing from this preventive role. I want to mention two of them.

First, the CPT has noted that its work is not limited to assessing whether abuses have actually occurred, but it must also be attentive to the "indicators" or "early signs" pointing to possible future abuses.

Second, and more importantly for our discussion today, the CPT noted the following:

> "to accomplish its preventive function effectively, [the CPT] must aim at a degree of protection that is greater than that upheld by the [Court] when adjudging cases concerning the ill-treatment of persons deprived of their liberty and their conditions of detention".[10]

The CPT has therefore sought carefully to delineate and acknowledge the distinct roles and functions between its preventive monitoring activity and the judicial activity of the Court.

These different roles and functions were of course addressed by the Grand Chamber in *Muršić v. Croatia*,[11] a case which is well known and not in need of special analysis today.

The reason why I mention this case, however, is to dispel the myth about disagreement between the Court and the CPT as regards the issue of minimum personal space in prison cells. Both the Court and the CPT assess the totality of conditions of detention and not only the question of the number of square metres available in a given cell (despite both of them having certain standards or "rules of thumb" in their assessments).[12] In addition, the Court has explicitly noted that:

> "when deciding cases concerning conditions of detention it remains attentive to [CPT] standards and to the Contracting States' observance of them."[13]

It is therefore more appropriate to recognise the Court and the CPT's different roles, functions and responsibilities. These are not, however, in a relationship of tension. On the contrary, the relevant passages from *Muršić* should be understood as a clear sign of complementarity, as evidenced by the substantive section of your General Report from 2021, where you picked up, for example, the relevant parts of § 130 of the Grand Chamber judgment.

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[8] First General Report, CPT/Inf (91) 3, 20 February 1991.
[9] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126.
[10] First General Report, para 51.
[11] Cited above.
[12] See "Living space per prisoner in prison establishments: CPT standards", CPT/Inf (2015) 44, 15 December 2015, paras 19-25.
[13] *Muršić*, § 141.

Turning to other aspects of *complementarity and synergy*, the Court's adjudication of cases under the Convention often involves addressing highly specialised areas of law when interpreting and delineating the rights and freedoms protected by the Convention.

In numerous judgments and decisions the Court has referred to instruments and standards developed by Council of Europe organs, which have complemented the Court's assessment.[14]

The procedural framework of the Court is adversarial in nature, relying heavily on the submissions of the parties and third parties, as well as the rulings of national courts once all effective domestic remedies have been exhausted.

In this context, the Court normally does not and should not engage in its own fact-finding activity. The work of the Council of Europe's institutions, and this is particularly true of the CPT, therefore provides the Court with crucial information about developments "on the ground" which it might not otherwise obtain. You are the Court's "eyes and ears" as regards the general state of affairs in the legal orders of the Contracting Parties to the Convention.

This is particularly important in cases relating to the situation of prisoners and other persons deprived of liberty. The Court's case law on prison conditions and treatment of prisoners abound and often reveal serious shortcomings when it comes to providing them with effective complaint mechanisms and redress. Those who have been deprived of their liberty may consequently not always be able to provide evidence about their specific grievances. The work of the CPT is therefore crucial to inform and complement the Court's assessment by shedding light on the boarder state of a country's prison system, as well as information regarding specific features and practices of individual prisons. *Neshkov and others v. Bulgaria*, is a particularly good example, both in terms of how the work of the CPT fed into the Court's assessment and how it has assisted in the implementation of general measures thereafter.[15]

Prominent examples of the Court relying on CPT findings can be found in relation to deficiencies in the treatment of individuals with mental disorders in the context of compulsory confinement in Belgium (*Rooman*),[16] inadequate provision of mental health treatment of life prisoners in the Netherlands (*Murray*),[17] the issue of preventive detention in Germany (*Ilnseher*),[18] or the detention and treatment of asylum seekers in Greece(*M.S.S.*)[19].

The complementary and synergic relationship between the Court and the CPT can also be illustrated by the cases in which the Court has relied on or referenced materials prepared by the CPT in relation to the legal standards applicable in a particular context.

Take, for instance, the recent case of *El-Asmar v. Denmark*,[20] which concerned the deployment of pepper spray against a prisoner in his cell. Finding a substantive and procedural violation of Article 3, the Court extensively engaged with the 2014 and 2019 reports of the CPT to the Danish government,[21] in which concerns were raised by the CPT as regards the use of pepper spray in Danish prisons. Those findings also tallied with the Court's previous judgment in *Tali v. Estonia*,[22] decided in

[14] *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 74-75, ECHR 2008. Glass, The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents, 17(1) HRLR (2017), 97-125.
[15] See, for instance, *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, §§ 246 and 255, 27 January 2015.
[16] *Rooman v. Belgium* [GC], no. 18052/11, § 120, 31 January 2019.
[17] *Murray v. the Netherlands* [GC], no. 10511/10, § 118, 26 April 2016.
[18] *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 95-96, 4 December 2018.
[19] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 227, ECHR 2011.
[20] *El-Asmar v. Denmark*, no. 27753/19, 3 October 2023.
[21] Reports to the Danish Government CPT/Inf (2014) 25 and CPT/Inf (2019) 35.
[22] *Tali v. Estonia*, 66393/10, § 78, 13 February 2014.

2014, which was itself inspired by the earlier CPT standards, according to which pepper spray should not be used in confined spaces.

The *El-Asmar* case showcases how the CPT reports, which draw on its observations from prison visits and interviews with inmates, provide invaluable guidance on respect for the relevant legal standards in practice, and their contextualisation into practices, concerning particular aspects of imprisonment and other aspects of life in detention.

While you certainly know the details better than I of the reports adopted by the CPT, it is clear that the traffic between us is two-way, with the CPT often referring to the Court's case-law.

Thus, for instance, in the recent report on Belgium, which deals in-depth with the removal operations and orders concerning aliens, the CPT relied extensively on the Court's case-law regarding detention orders and the expulsion of migrants to countries where they run a real risk of ill-treatment.[23]

Similarly, in a recent report concerning the Netherlands, the CPT referred to the various issues addressed in the Court's case-law, including in relation to the treatment of life prisoners, access to a lawyer during the first questioning by the police and conditions in immigration detention.[24]

The Court's case-law also prominently featured in, the 2022 report concerning Bulgaria in relation to the issues of police violence and health care in prisons and psychiatric establishments.[25]

In a number of the CPT's General reports on a variety of issues, such as the prevention of ill-treatment of foreign nationals deprived of their liberty in the context of forced removals at borders,[26] overcrowding,[27] and the complaints mechanisms for persons deprived of liberty,[28] we see the Court's case-law serving as an important point of reference.

The CPT has also referred to the Court's case-law in several of its statements pursuant to Article 10(2) of the European Convention against Torture.[29]

Before passing the floor to Judge Gnatovskyy, I would like to note, in conclusion, a particularly important institutional – or, if you wish, normative – form of synergy between the work of the Court and the CPT.

In 2020, as you know, the Committee of Ministers revised and updated the European Prison Rules ("EPR")[30] and accompanying Commentary,[31] which codify the up-to-date contemporary European rules and standards for the proper management of prisons and just and fair treatment of prisoners.

The Commentary to the EPR recognises that "key factors" in the evolution of these standards have been the Court's case-law and CPT standards.[32] I am also pleased to note that both the Court's

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[23] Report to the Government of Belgium CPT/Inf (2023) 20, 13 July 2023.
[24] Report to the Government of the Netherlands, CPT/Inf (2023) 12, 23 June 2023.
[25] Report to the Bulgarian Government, CPT/Inf (2022) 20, 18 October 2022.
[26] 32nd General Report, CPT/Inf(2023)7, March 2023.
[27] 31st General Report, CPT/Inf(2021)5, April 2022.
[28] 27th General Report, CPT/Inf(2018)4, April 2018.
[29] Article 10(2) provides as follows: "If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter."
[30] Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules, 1 July 2020.
[31] CM(2020)17-add2, 20 February 2020.
[32] Commentary, p. 1.

Registry and the CPT Secretariat contributed with expert advice in the updating process. In this regard, I should add that the institutionalised cooperation which exists between the Court's Registry, not least Kresimir Kamber, here present, and the CPT Secretariat, Hugh Chetwynd and others, is invaluable and allows for enhanced dialogue and exchange of information between the two bodies. Long may this continue.

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The constructive and complementary interaction between the work of the Court and the Council of Europe's institutions and bodies, including the CPT, is testament to the effective functioning of the overall Council of Europe system for the benefit of the protection of human rights, democracy and the rule of law in our member States.

I am looking forward, as indeed are my colleagues, to discussing the substantive topics chosen for today, all of which are topical and important for the both our work.

I thank you for your attention.