Website of the Conference
http://www.coe.int/prosecutors/

Strasbourg, 14 June 2006 CPGE (2006) 06

CO-OPERATION PROGRAMME TO STRENGTHEN THE RULE OF LAW

CONFERENCE OF PROSECUTORS GENERAL OF EUROPE (CPGE)
7TH SESSION

organised by the Council of Europe
in co-operation with the Office of the Prosecutor General of the Russian Federation

Moscow, 5 – 6 July 2006

THE DUTIES OF THE PUBLIC PROSECUTOR TOWARDS PERSONS DEPRIVED OF THEIR LIBERTY

Report

prepared by

Prof. J. L. Murdoch
School of Law, University of Glasgow
Scotland, United Kingdom.

Introduction

A questionnaire prepared by the Directorate of Legal Affairs sought to assess

- the types of decisions on deprivation of liberty in each member State (including their legal basis; the authorities empowered to take these decisions; and which (if any) decisions are subject to review or supervision by the public prosecutor)
- whether and in what circumstances the public prosecutor is empowered to enter places of detention (and what kind of places or institutions, how often, and with or without the permission of other authorities)
- What kind of measures (if any) can be taken by the public prosecutor in case of unlawful deprivation of liberty or in case of torture or inhuman or degrading treatment or punishment (and whether the public prosecutor is empowered to take an immediate decision in such cases)
- Whether it is possible for a person deprived of his liberty to meet the public prosecutor in person and without third party control (and whether a detained person may maintain contact with the public prosecutor without any control by a third party (and vice versa)?
- The manner in which complaints against prison staff are dealt with
- Whether public prosecutor has authority to control and react to the conditions of deprivation of liberty (and how the public prosecutor should react to adverse circumstances; and whether domestic law prescribes any special provisions for such situations); and
- What role (if any) is played by the public prosecutor in the execution of sentences relating to persons deprived of their liberty.

Replies were received from 30 of the 46 member States of the Council of Europe and concerned 32 separate legal systems.[1] It must be stressed that this report cannot in any sense be considered a comprehensive study of the role of the prosecutor in respect of deprivation of liberty. Some responses were particularly full, while others were brief; some provided information only in respect of loss of liberty following upon conviction;[2] some referred directly to provisions of domestic law that were not in turn explained; and not all questions were answered. Some of this was probably attributable to the design of the questionnaire, for it was clear (but only with the benefit of hindsight) that there was some lack of clarity as to whether a response was in respect of deprivation of liberty at the outset of a prosecution (preliminary steps), pending determination of guilt (pre-trial remand in custody), or imprisonment after conviction. Further, several responses also considered other forms of deprivation of liberty (such as under mental health provisions, education of minors, immigration controls, etc) while others did not.

[1] The report in respect of the United Kingdom distinguished between the legal systems of Scotland, England and Wales, and Northern Ireland. The response of Switzerland was restricted to Federal arrangements, and local arrangements existed in respect of the 29 cantons.

[2] Azerbaijan

This, in turn, was explicable by the lack in Europe of any standard meaning for key concepts. State responses to the questionnaire are thus liable to misunderstandings. For example, the term "arrest" variously meant deprivation of liberty effected by a citizen; or by a police officer; or ordered by a judge at the outset of a criminal process; or equally to imprisonment following conviction[3] within the context of 'administrative arrest'. It was also in one response interpreted broadly as synonymous with 'deprivation of liberty'?[4] Even 'deprivation of liberty' was not a straightforward idea – one response (perhaps in order to be fully comprehensive also considered travel bans as of potential interest.[5] This variety of meaning in turn had consequences for other expressions used in reports such as 'apprehension'[6] and particularly 'detention' (which could equally refer to judicially-authorised 'remand in custody'.[7] (The jurisprudence of the European Court of Human Rights recognises this, and insists that the provisions of Article 5 relating to liberty and security of person are to be treated as autonomous concepts, independent of domestic meaning.)

In consequence, the author confesses to a concern that many of the references to state practices that follow (particularly in response to issue one) are at times at best tentative. In this report, however, difficulties of terminology are not critical. The main thrust of the report focuses (as conference discussions are likely to do) upon broad themes and approaches. The detailed minutiae of criminal procedural codes are of less importance as the clear trends and assumptions concerning the responsibilities of prosecutors in handling the two main issues lying behind the questionnaire – protection against arbitrary deprivation of liberty; and prevention of ill-treatment during detention (whether as a result of 'passive' poor conditions of detention, or 'active' and deliberate infliction of ill-treatment). But for the avoidance of doubt, the terms 'arrest', 'apprehension', 'detention' and 'deprivation of liberty' may be treated as synonymous in this report.

Issue 1 : Types of decisions on deprivation of liberty in each member State (including their legal basis; the authorities empowered to take these decisions; and which (if any) decisions are subject to review or supervision by the public prosecutor)

The most significant outcome of state responses is the most obvious: provisions concerning the legal regulation of deprivation of liberty throughout Europe are of some (if not excessive) complexity. In general, it was possible to distinguish between deprivation of liberty within the context of the criminal process and other detentions effected for other legitimate ends (such as detention under mental health provisions). The clear (and often sole) focus of most responses involved the former, no doubt in light of

[3] Moldova (but this itself was not entirely clear as there was a reference to the issue of an arrest warrant by an investigating judge or by a prosecutor in respect of a person apprehended committing an offence)

[4] Eg, Spain "arrest is a preventive measure which is applied with regard to a suspect, accused or convicted offender and which means deprivation of a person of his or her liberty on the basis of a court ruling."

[5] Cf Finland

[6] Eg, Sweden, Turkey (distinctions drawn between the two forms of status)

[7] Lithuania; Moldova

the principal responsibilities of prosecutors. Within this category, it was possible to identify certain forms of deprivation of liberty. But the caveats discussed above must be borne in mind: it was not possible in light of the range of detail supplied and possible difficulties with linguistic distinctions to provide anything other than an overview of certain trends. This report is thus not a comparative analysis of criminal justice systems, even if this were possible in such a restricted format as a report. Rather, the report seeks to identify certain trends and approaches (and thereby to highlight interesting variations and domestic examples) that will help provide a background to conference deliberations.

i. deprivation of liberty at the outset of a criminal investigation : apprehension without prior specific authority

Not every intervention in a criminal investigation will give rise to a "deprivation of liberty" (at least within the context of the meaning of Article 5 of the European Convention on Human Rights). In the context of the initial stages of a criminal inquiry, state authorities often have conferred upon them wide powers of investigation, ancillary to which are rights to detain temporarily an individual in order, for example, to carry out a personal search or to take fingerprints, or to place a suspect in an identification parade. Whether such restricted interference with liberty or movement for such particular and restricted purposes is enough to trigger Article 5's guarantees can on occasion be unclear.[8] Perhaps for this reason, state responses focussed upon the power to detain those reasonably suspected of committing an offence, rather than upon any earlier stage of investigations.

Most responses referred to the power of the police (or a specified rank of police officer[9] or on occasion, of the prosecutor[10] or even a judicial authority[11]) to apprehend a suspect without specific judicial warrant. Such authority is perceived by most states as an

---

[8] See Trechsel, S., "The Right to Liberty and Security of the Person", *Human Rights Law Journal*, 1, 1980, p. 88, at p. 96:

> It is the very short arrest which raises specific problems. In point of fact, … under the legislation of several High Contracting parties there seems to exist certain forms of short-term police arrest which are hardly covered by the exceptions exhaustively listed in Article 5, paragraph 1. [Such short term arrests cannot] fall outside the scope of Article 5 …. It is quite another question, however, whether in such cases all the specific guarantees of Article 5 apply, in particular the right to have the lawfulness of detention ascertained by a court (Article 5, paragraph 4).

However, as long as the relevant level of "reasonable suspicion" exists, detention to question individuals suspected of having committed an offence would now be seen as an integral part of the criminal process and thus justified by Article 5, paragraph 1.*c*.

[9] Monaco
[10] Lithuania; Russian Federation; Turkey (where a person previously apprehended flees)
[11] Portugal

extraordinary power to detain normally only justified on the basis of urgency[12] and subject to well-defined limits.

Within this category of deprivation of liberty, several variations in domestic practices were obvious:

- 'urgency' may be expressed in a variety of ways, some of which referred to immediacy of circumstances (and thus probably more expediency than 'urgency') particularly in respect of the apprehension of a person found in the act of committing a criminal offence[13]
- other grounds recognised by domestic law are more properly expressed as matters of 'urgency' (that is, where there are justifiable reasons exist for taking an individual into custody in order to ensure that the interests of justice are not harmed). [14] For example, deprivation of liberty may be considered appropriate to prevent an individual from attempting to commit an offence[15] or apprehending persons who have escaped from prison[16] or persons likely not to appear when summoned to appear before a court, or who are likely to flee.[17]
- on occasion, grounds authorising deprivation of liberty without judicial authority are not as fully specified, and thus police officers are accorded far greater latitude. For example, such a power may exist in respect of offences carrying a defined minimum sentence of imprisonment[18] or in relation to specific offences[19] (although there may be a qualification that this is permitted only where 'detention is necessary for the proper investigation of an offence'[20] or to prevent, eg, flight.)[21]
- certain legal systems made provision for police-authorised deprivation of liberty with a view to furthering criminal investigation without recourse to judicial/prosecutorial authority.[22]

In such circumstances, the role and responsibility of the prosecutor could vary as between legal systems: in some, the role of the prosecutor as a crucial (or even as the key) agent is stressed, while in others, the pre-eminent role of the police in investigation and apprehension is emphasised.[23] To some extent, the issue is determined by the question of

[12] And, on occasion, where a crime is punishable by a custodial sentence (Portugal); or a specified minimum sentence
[13] Andorra; Croatia; Italy; Lithuania; Turkey;
[14] Portugal
[15] Andorra
[16] Andorra
[17] Andorra; Lithuania;
[18] Moldova (1 year);
[19] Ireland (firearms, etc and terrorist offences; and drugs offences); Italy ('particularly serious offences')
[20] Ireland (offences punishable by a term of imprisonment of 5 or more years)
[21] Sweden (offences punishable by a term of imprisonment of 1 year or more)
[22] United Kingdom (England and Wales); United Kingdom (Scotland);
[23] Eg, United Kingdom (England and Wales); United Kingdom (Northern Ireland)

whether criminal procedure is inquisitorial or accusatorial; but there are differences as even between legal systems in the same 'family'.[24]

The spectrum of responses to the role and responsibilities of prosecutors at this stage thus varies considerably. Where there was a clear role for the prosecutor, this could involve various interventions:

- the prosecutor may issue relevant instructions to the police in relation to apprehension without warrant.[25] This may entail a general review and oversight by the prosecutor of the conduct of a criminal inquiry[26] including the power to provide binding instructions to the police[27]
- the prosecutor may give binding instructions to the police in relation to a deprivation of liberty.[28]
- the prosecutor may question the suspect himself[29]
- even in cases of urgency, detention without warrant still normally calls for a prosecutor's approval unless this cannot be obtained in the particular circumstances[30]
- the public prosecutor has to be contacted, if continued custody (that is, longer than 48 hours) is deemed necessary[31]
- the police must inform the prosecutor immediately of any such arrest without warrant[32]
- the prosecutor must release an individual if the arrest without warrant has been irregular (or if there is a case of mistaken identity)[33]
- the prosecutor is specifically directed to explain to a suspect his rights, etc and to record the fact that this has taken place[34]

In other legal systems, however, responses suggested the focus was less upon responsibilities of the prosecutor than upon the judicial authorities in confirming the detention. In other words, it was essentially a judicial function to scrutinise the continuing lawfulness of the deprivation of liberty. Here, the emphasis is clearly upon ensuring that a detained person is speedily brought before a court (normally within 24 hours, [35] 48 hours[36] or 96 hours,[37] or before 'the end of the day following the arrest').[38]

---

[24] Eg, United Kingdom (England and Wales) (police role in investigation of crime pre-eminent); United Kingdom (Scotland) (prosecutor may give directions to police for investigating crime).
[25] Andorra
[26] Russian Federation (including whether to take an individual into custody, selection of measures of restraint, and placement in psychiatric institutions); United Kingdom (Scotland)
[27] Slovenia;
[28] Slovenia
[29] Sweden
[30] Czech Republic
[31] Austria
[32] Italy
[33] Italy
[34] Russian Federation
[35] Croatia; Iceland; Monaco
[36] Liechtenstein;
[37] Italy; Sweden

However, this was normally without prejudice to the right enjoyed by a prosecutor to decide not to proceed with a case: this could be expressed in negative terms (and thus the prosecutor must declare whether he intends to apply for detention before the court;[39] if so, the suspect would require to be brought to the competent court within 48 hours of arrest,[40] and otherwise the detainee has to be released immediately.)[41]

A further form of extraordinary deprivation of liberty recognised by domestic legal systems is arrest by a private citizen, typically of an individual caught in the act of carrying out a crime[42] or immediately thereafter when necessary to prevent him from fleeing to establish that person's identity, or to secure evidence. The person carrying out the citizen's arrest is normally obliged to accompany the person immediately to the police or inform them of the arrest.[43] The responses, though, did not always clearly specify what role the prosecutor played in such instances, although it seemed in most instances this authorised loss of liberty was treated as akin to deprivation of liberty effected by a police officer.

ii. deprivation of liberty at the outset of a criminal investigation : apprehension with prior specific authority

The ordinary expectation in most (if not all legal systems) is that deprivation of liberty is authorised at this stage by judicial authority. State responses took it as self-evident that a prerequisite in such instances was the existence of reasonable suspicion of criminal activity.[44] Three specific grounds for seeking judicial approval were identifiable:

- *to further the criminal investigation :* most obviously, in order to determine identity, check alibis, collect evidence, etc. The period authorised was not always specified; where it was, on occasion the legal system provides for the release of a detainee by default if the prosecutor takes no steps to initiate proceedings (for example, by providing that detention may last 48 hours[45] and if within that time the public prosecutor fails to initiate proceedings, the detained person must be freed).[46]

- *to secure the interests of justice :* to secure the apprehension of an individual who is on the run or fails to appear at court[47]

- *to implement the sentence of a court:* that is, following upon the conviction of a

[38] Germany
[39] Austria; Liechtenstein
[40] Portugal
[41] Austria ; Latvia (where an additional period of detention of 12 hours may be ordered)
[42] Portugal
[43] Czech Republic; cf. Finand [circumstances in which power to detain not specified]
[44] Andorra; but cf Sweden (distinction between 'probable cause' ad mere 'reasonable cause')
[45] Lithuania
[46] Croatia
[47] Andorra

person sentenced to imprisonment[48] authorisation may be given to apprehend in order to implement the sentence.

In most cases, the role of the prosecutor is central. Normally, it is up to the prosecutor to request the issue of an arrest warrant from a court.[49] Arrest warrants were in certain cases enforced by the public prosecutor's office, whereas the measures concerning its execution are, as a general rule, ordered by the judge.[50] However, in certain legal systems the prosecutor can also authorise deprivation of liberty;[51] in one, there is a specific requirement to seek a prosecutor's approval for re-apprehension in particular cases after an individual suspect has been released.[52] Apprehension following the execution of such a warrant normally required the arrested person to be turned over to a court within a specified period to allow the judge to decide whether to place him in custody or to release him.[53]

iii. deprivation of liberty at the outset of a criminal procedure: judicial remand in custody :

A further key decision taken by the prosecutor is whether to seek pre-trial detention. This is normally sought by the prosecutor[54] in applying to the court[55] for an individual's on remand and thereafter (where there are prescribed periods for its length) for seeking continuation of such detention.[56]

The matter (in terms of the European Convention on Human Rights) is regulated by Article 5(1)(c). The relevant reasons highlighted in the responses were broadly in line with the Court's case law; that is, reasonable suspicion of commission of offence normally entails such factors as

- a danger that he may escape;

[48] Monaco (sentence of at least one year imposed)
[49] Germany; Lithuania
[50] Germany
[51] Eg, Portugal; Turkey
[52] Turkey
[53] Austria (not later than 48 hours upon committal to the court jail (96 hours from the time of arrest ;Czech Republic (24 hours).
[54] Eg, Czech Republic, Russian Federation

[55] Or to a 'judicial officer' who on occasion can be a prosecutor, providing that certain requirements as to independence, etc are met. (See, for example, *Brincat v. Italy*, judgment of 26 November 1992, Series A No. 249-A, paragraphs 17-21; *Niedbała v. Poland*, No. 27915/95, paragraphs 48-57, 4 July 2000 (the public prosecutor combined investigative and prosecutorial roles and had a further role as guardian of the public interest: violation); and *Pantea v. Romania*, No. 33343/96, paragraphs 231-243, ECHR 2003-VI (public prosecutors did not satisfy the requirement of independence from the executive as they acted as officers of the state legal service and were subordinate to the Attorney General and then to the Minister of Justice). None of the state responses mentioned prosecutorial responsibilities in this capacity.

[56] Eg, Moldova;

- a reasonable suspicion that he/she may destroy or fake evidence or clues or obstruct the proceedings by influencing witnesses;
- special circumstances which give rise to justified concern that he/she may repeat the offence or bring it to completion or that he/she may commit an act that he is threatening to commit; [57]

In addition, certain legal systems make provision for additional or alternative grounds justifying deprivation of liberty pending trial: these may include, for instance,

- that the suspicion relates to certain serious crimes (murder, robbery, etc.), as well as any offences which are punishable by a lengthy sentence of imprisonment, or concern serious offences involving particularly grave circumstances associated with the offence.[58]
- the defendant's release would pose a danger to public safety or when the offence has caused disturbance in the community; [59]
- if the offence has caused damage to a third party[60]
- other factors (including marital status,[61] health, etc.[62]

In this area, the issue of importance is the extent to which there is proper scrutiny of the relevance and sufficiency of these grounds in each instance. The extent to which the prosecutor sees this as an initial responsibility, one shared with the relevant judge (or judicial officer within the meaning of Article 5(3) of the European Convention on Human Rights), or essentially that of the judge (with the prosecutor's role essentially that of adversary) is of some interest in this regard. The extent to which decisions are subject to review or supervision by the public prosecutor was a crucial aspect of the questionnaire. It was never specifically recognised that there could be a tension between any perceived responsibility of this kind and the (general) right to act as the "master of the proceedings" (that is, determine such matters as to whether to order a preliminary investigation, whether to initiate criminal proceedings, and whether to terminate criminal proceedings),[63] particularly when the prosecutor may be the only authority competent to propose deprivation of liberty.[64]

In terms of Article 5, a crucial safeguard against the arbitrary application of the law is the requirement that the loss of liberty must be shown to have been necessary in the particular circumstances. This places a real restriction upon the discretionary authority enjoyed by state officials since deprivation of liberty is "only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be

[57] Andorra; Croatia; Czech Republic; Ireland; Lithuania; Portugal; Russian Federation; Slovenia;
[58] Croatia; Lithuania ('grave' or certain 'medium' crimes); Russian Federation ('grave or especially grave' crimes)
[59] Andorra
[60] Andorra
[61] Lithuania
[62] Lithuania
[63] Spain
[64] The Former Yugoslav Republic of Macedonia

detained".[65] Thus it is not enough in itself that the deprivation of liberty is permitted by domestic law: the particular loss of liberty must be considered as necessary in the circumstances to avoid the appearance of arbitrariness in the application of the law. In any case, there is considerable variation in pre-trial detention rates.[66]

The identification of a role in preventing arbitrary loss of liberty was clear in certain responses:[67]

SIGNIFICANT IDENTIFICATION / ASPECT OF RESPONSIBILITIES

- At the stage of first appearance before a judge, the prosecutor is required to carry out an independent examination as to whether there are reasons justifying the remand in custody of the arrested person[68]
- The prosecutor decides on whether to release or arrest a person apprehended.[69]
- The prosecutor must order the release of a person detained without warrant by the police if there is a case of mistaken identity or if the arrest without warrant has been irregular[70]
- Authorising release or the substitution of other devices of a pre-trial detainee once the grounds for continuing detention no longer exist[71]

---

[65]. *Witold Litwa v. Poland*, No. 26629/95, paragraph 78, ECHR 2000-III; see also *Varbanov v. Bulgaria*, No. 31365/96, paragraph 46, ECHR 2000-X. See also Recommendation No. R (80) 11. whereby the Committee of Ministers encouraged member states to regard pre-trial detention "as an exceptional measure and it shall never be compulsory nor be used for punitive reasons". When it is indeed considered "strictly necessary" to deprive a suspect of his liberty, there must be an onus upon the authorities responsible for conducting the investigation and in bringing the person concerned to trial to act expeditiously and to give priority to such cases, but custody pending trial should not be ordered if this would be disproportionate in relation to the nature of the alleged offence or the penalty which the offence carries, and consideration should always be given to whether the use of custody can be avoided by imposing alternative measures.

[66] See Council of Europe Annual Penal Statistics (SPACE), 2003-I (available at www.coe.int): Table 1.2 Prison population rate (including pre-trial detainees) per 100 000 inhabitants ranged from Iceland (39) to Russian Federation (601); Table 5: Untried prisoners as a percentage of the prison population; and untried prison population rate per 100 000 inhabitants ranged respectively between Moldova (1%) and Andorra (54%) – mean 20%; and between Iceland (3%) and the Slovak Republic (54%) – mean 22.5%.

[67] And cf *12th General Report*, CPT/Inf (2002) 15, paragraph 43 (where there is a decision to delay notification of the fact of detention, the reasons for this should be recorded in writing and approved by a senior police officer unconnected with the case or by a prosecutor.)

[68] Germany

[69] Turkey (in the event that no reason for arrest has been made out or the purpose of the apprehension has disappeared); Lithuania

[70] Italy

[71] Russian Federation; Switzerland;

- The prosecutor is under a specific responsibility to advise a court if it has imposed an unlawful sentence[72]
- Recognition of specific control responsibilities of the prosecutor in respect of police-instigated deprivation of liberty of suspects[73]
- Deprivation of liberty effected by non-judicial authorities must be followed by a report to the prosecutor[74]
- Prosecutorial responsibilities concerning the control over lawfulness of operation-search activities taken with the purpose of ensuring obedience of these bodies to legal rules[75] or a specific responsibility to ensure evidence has been lawfully obtained[76]
- Supervision of decisions concerning a detainee taken by relevant authorities (for example, in respect of the imposition of disciplinary sanctions by prison authorities, etc)[77]

LOW / NEGLIGIBLE ASPECT OF RESPONSIBILITIES OR IDENTIFICATION AS 'ADVERSARY' (ie, perception of the prosecutor as one of the parties to a criminal investigation or prosecution)[78]

- Respondent in bail applications[79] and generally in regards to decisions concerning deprivation of liberty[80] through a right of appeal[81] (which may be limited in respect of sentence to certain classes of case)[82]
- Right to determine the nature of pre-trial detention (eg, whether a pre-trial detainee should be segregated[83] or receive visitors)[84]

---

[72] United Kingdom (England and Wales)
[73] Denmark; France (but no details provided)
[74] Portugal
[75] Azerbaijan
[76] Ireland
[77] Russian Federation
[78] But cf Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, paragraph 6:
[T]he Assembly finds that the following particularities apparent in the national practices of member states give rise to concern as to their compatibility with the Council of Europe's basic principles: … ii. the public prosecutor being responsible for, or an intermediary in, initial challenges to decisions to detain; iii. an appeal by the prosecutor against a judicial decision to release a detained person having suspensive effect; ….
[79] Ireland; Monaco (but may also at his own initiative request the release of a pre-trial detainee); Spain;
[80] Moldova; Russian Federation; Slovakia
[81] Azerbaijan ; Croatia; Portugal ; Spain
[82] United Kingdom (England and Wales)
[83] Eg, Monaco
[84] Eg, Monaco (shared with investigating judge) But cf CPT concerns: for example, CPT/Inf (91) 12 (Denmark), paragraphs 29 and 113; CPT/Inf (92) 4 (Sweden), paragraphs 127-130; and CPT/Inf (93) 13 (Germany), paragraph 83 (detailed recommendations include giving reasons for solitary confinement in writing; right of prisoner to present his views on the matter beforehand; and full review and psychiatric assessment at least every three months)

- Responses that as decisions on arrest without warrant and pre-trial remand are for the police and judges respectively, thus there are no powers of review or supervision by the prosecutor[85]

[It may be appropriate to add a note as to the impact of all of this upon the use and length of pre-trial detention in Europe. However, there is surprisingly comparatively little reliable information on pre-trial custody in European states. [86] Quantitative data can provide some indication of pre-trial detention rates in member states in terms of the percentage of the prison population which is untried and the extent to which absolute numbers of pre-trail detainees have increased or decreased through time. But these statistics do not indicate the average length of pre-trial detention. Qualitative data, though, is in shorter supply. Even the most comprehensive Council of Europe survey on domestic practices to secure compliance with Article 5(3) covers only 31 Member States.[87] The readiness of domestic courts to resort to pre-trial detention, the likely length of such, the extent of the development of strategies designed to minimise its length, and the availability of alternatives are the critical variables in any domestic survey.]

iv. Imprisonment following conviction

This issue is considered in respect of issue 7, below (which deals with the role played by the public prosecutor in the execution of sentences relating to persons deprived of their liberty. including weekend / part-time/ house / house imprisonment[88]

v. Other miscellaneous forms of arrest / deprivation of liberty / legal basis

This issue is not covered to any extent in this report, even although a number of responses noted the existence of provisions relating to detention in terms of preventive custodial measures (eg, confinement in a psychiatric institution, in a detoxification centre or in a special educational or rehabilitation institution[89] and either in lieu of or in addition to a sentence)[90] and effected for such purposes as customs and immigration[91] controls and military detention.[92]

---

[85] Ireland

[86] The data on Member States' compliance is drawn *inter alia* from *Analysis of the Replies to the Questionnaire on the Law and Practice of Member States Regarding Remand in Custody,* Council of Europe (PC-DP (2003) 9); Committee of Experts for the improvement of Procedures for the Protection of Human Rights", Doc DH-PR(2005)006rev (data received from 20 states); and EU Commission Staff Working paper: Annexe to the Green Paper on Mutual Recognition of Non-custodial Pre-trial supervision Measures', SEC(2004)1046; and material available on-line (eg, provided by Human Rights Watch (see eg http://hrw.org/reports/2005/spain0105/9.htm)).

[87] See *Analysis of the Replies to the Questionnaire on the Law and Practice of Member States Regarding Remand in Custody.* Strictly, the responses concern 30 Member States and England and Wales, for the UK's response did not cover Scotland or Northern Ireland

[88] Andorra

[89] Andorra

[90] Andorra; Ireland

[91] Andorra

[92] Finland; Spain

Issue two : Is the public prosecutor empowered to enter places of detention? If so, what kind of places or institutions, how often, and with or without the permission of other authorities?

The relevant questions here sought to assess the extent to which prosecutors had authority to visit places of detention and to communicate in private with detainees. Generally, there was an unfettered right of persons deprived of their liberty to communicate in writing with the prosecutor. (But one response did suggest that prosecutorial authority – and possibly legal requirement – extended to the task of reading all correspondence sent to or by prisoners (except pre-trial detainees).)[93]

The responses generated suggested that there were two principal reasons for visiting places of detention– first, to discharge a legal duty of inspection of places of detention (and, to this end, to receive complaints from detainees, and to examine documents, etc)); and second, to further a criminal investigation. In circumstances where the first ground was relevant, there was a correspondingly high level of authority; but where the second alone applied, this was merely conditional.

HIGH LEVEL OF AUTHORITY

The power to visit a place of detention was normally an essential prerequisite for discharge of the responsibility to do so; and domestic law in such instances normally specified the maximum permitted period between such visits: for example:

- at least once every three months[94] (and may be prompted by daily reports submitted by police and prison authorities to the public prosecutor);[95]
- at least every two months (or more often at his own discretion, or upon the request of a natural person or a legal entity based on facts that indicate non- compliance with legal regulations, or upon prosecutor's own activity, from the public prosecutor's other areas of activity, from documents submitted by another government body, and from mass media;[96]
- once per month[97]
- weekly[98]

Other legal systems merely provided unrestricted access at any time[99] (or at regular but unspecified intervals).[100] [In one instance, however, it appeared that the unrestricted

[93] Monaco
[94] Andorra; Monaco (in practice, may hold interviews)
[95] Andorra
[96] Czech Republic
[97] Portugal
[98] Romania (police arrest houses)
[99] Spain ; Latvia (establishment of Specialised Prosecutor's Office to supervise rights of detainees in pre-trial detention or in prison); Lithuania; Moldova; Russian Federation; Slovakia; Spain; Sweden; Switzerland; Turkey (police detention facilities which are visited in practice once per week)
[100] France; Iceland

power of entry was in reality 'of no practical relevance',[101] suggesting that such a power can exist independently of any visitation responsibility.]

NO DIRECT AUTHORITY / MERELY CONDITIONAL AUTHORITY

In other instances, there exists no unrestricted right of access, but a conditional right upon a specified ground (most obviously, in the context of criminal procedure investigations,[102] or to be present at an interrogation with (rather than interrogate) a suspect [103] carried out by judicial authorities or by the police).[104] Alternatively, a prosecutor could seek permission to enter a place of detention from the relevant official (or agency) falling under the Ministry of Justice[105] or from a specified judicial authority.[106]

NO AUTHORITY

In a minority of legal systems, no such authority was recognised as such was essentially unnecessary/[107], that is, the prosecutor had no specific responsibility to monitor places of detention, and the criminal procedure system did not recognise a right of the prosecutor to carry out interrogations of detainees.[108]

Issue three : What kind of measures could be taken by the public prosecutor in case of unlawful deprivation of liberty or in case of torture or inhuman or degrading treatment or punishment?

This question sought to assess the extent to which the prosecutor has a role in taking action where it appears that there may have been an arbitrary deprivation of liberty or the infliction of ill-treatment upon a detainee. Some responses suggested that either issue would fall to be considered as a breach of the ordinary criminal code.[109] Other responses, though, suggested a more proactive responsibility for prosecutors:

i. Unlawful deprivation of liberty

> In the majority of systems, the prosecutor[110] is authorised (and is expected) to order the release of a person detained without lawful authority[111] or mistaken identity[112] or when an arrest warrant is revoked by a court[113] or after a sentence of

[101] Denmark
[102] Austria; Latvia; United Kingdom (Scotland) (to investigate a specific crime)
[103] Azerbaijan
[104] Austria
[105] Finland; Italy
[106] The Former Yugoslav Republic of Macedonia
[107] United Kingdom (England and Wales)
[108] Liechtenstein; cf United Kingdom (Scotland) (after a person has been formally charged, he cannot be interrogated, but may have an interview statement taken)
[109] Slovenia; Sweden ;
[110] Cf Ireland (responsibility lies with the courts).
[111] Spain; Latvia; Moldova; Russian Federation; Slovakia
[112] Portugal

imprisonment has expired.[114] Normally, such orders are binding upon the police or prison service who must execute the orders immediately. Similarly, a prosecutor in several domestic legal orders has jurisdiction to review the expediency and duration of police custody and to initiate criminal proceedings before the courts[115] (or disciplinary sanctions[116] in the event of administrative error) with a view both to punishing any persons responsible for arbitrary deprivation of liberty[117] and also to bring unlawful detention to an end.[118] As an alternative to possessing authority to order release, a prosecutor may be expected to apply to a court for a suspect's release[119] (through, for example, lodging an appeal against an unlawful decision by a court).[120] [And see issue 7, below.]

A similar approach may exist in respect to other forms of deprivation of liberty. Where the reasons for the execution of mandatory institutional or protective education have ceased to exist, the prosecutor is expected to move for the immediate cancellation of such education; and is authorised to make a binding order that a child detained unlawfully should be released immediately after the production of a report to the social and legal child protection authority.[121]

ii. Allegations of ill-treatment

This issue, in particular, was clearly motivated by consideration of the extent to which key players in the criminal process are expected to address the issue of abuse of detainees. The European Committee for the Prevention of Torture, the CPT, has identified what it considers often to be systemic impunity.[122] The responses indicated that the infliction of ill-treatment is invariably a criminal offence; but it is not always obvious what the responsibilities of the prosecutor are in such circumstances beyond

---

[113] Germany
[114] Czech Republic
[115] Italy
[116] Denmark; Russian Federation (may concern placement in segregation / disciplinary facilities, etc)
[117] France; Italy, Monaco; Romania; Russian Federation; Turkey (and the prosecutor may order the judicial police to investigate); United Kingdom (Northern Ireland)
[118] Andorra; Monaco
[119] Liechtenstein; Portugal
[120] Spain
[121] Czech Republic
[122] *14th General Report*, CPT/Inf (2004) 28, paragraphs 25-28:

> The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. All efforts to promote human rights principles through strict recruitment policies and professional training will be sabotaged. In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society. … Combating impunity must start at home, that is within the agency (police or prison service, military authority, etc.) concerned. Too often the esprit de corps leads to a willingness to stick together and help each other when allegations of ill-treatment are made, to even cover up the illegal acts of colleagues

making representations to the relevant prison authorities[123] or having to consider whether to instigate criminal proceedings after instructing an investigation or making inquiries. [124]

In certain countries, however, there appears to be certain proactive responsibilities in certain circumstances: for example, the prosecutor *must* request judicial investigation without delay.[125] The issue may also give rise to consideration as to the conduct of the prosecution against the suspect on account of a general duty to ensure that evidence put before a court has been lawfully obtained.[126]

Issue four : Whether it is possible for a person deprived of his liberty to meet the public prosecutor in person and without third party control (and whether a detained person may maintain contact with the public prosecutor without any control by a third party (and vice versa))?

Following upon the latter two issues, a third and related issue is the extent to which a detainee has a right of contact with a prosecutor. Most responses were positive.

RECOGNISED

- In the majority of responses, no restrictions on the right of contact existed.[127] Indeed, in many, this was an implicit right tied in with a prosecutor's responsibility to investigate places of detention[128] (and thus, for instance, proactive steps are taken to allow contact[129] or to notify the prosecutor of prisoners' requests for private meetings).[130]
- In certain responses, it was made clear that while such a right exists, in theory such meetings hardly ever take place.[131]
- What was not clear from the responses was the extent to which this right is advised to detainees.

[123] France
[124] Andorra; Azerbaijan; Czech Republic ; Denmark; Finland; Iceland; Spain ; Italy Latvia; Liechtenstein; Lithuania; Moldova; Monaco; Romania; The Former Yugoslav Republic of Macedonia; Turkey; United Kingdom (England and Wales) (by police, unless the allegation concerns police ill-treatment)
[125] Austria
[126] Ireland
[127] Andorra; Spain; Iceland; Italy; Latvia (correspondence is not inspected); Lithuania; Monaco (see comment above re. prisoners' correspondence); Slovakia; Spain; Sweden; The Former Yugoslav Republic of Macedonia
[128] Czech Republic (extends to rights to talk with children); Russian Federation (and unrestricted rights of correspondence with the prosecutor)
[129] Turkey (collective meeting with prosecutor; and appointment of specific prosecutor for larger prisons)
[130] Czech Republic
[131] Denmark; Ireland (not the practice for the prosecutor to meet prisoners; but lawful communications from prisoners would not be prevented or restricted); Switzerland; United Kingdom (Scotland); United Kingdom (England and Wales) (no benefit)

In other states, however, there are certain restrictions or necessary prerequisites before such a meeting can take place. Thus the prosecutor may not hold a meeting himself where the presence of a lawyer appointed by the suspect or the court is compulsory,[132] while in other instances the permission of the investigating judge is necessary (but the prosecutor will be precluded from discussing matters connected with the offence since the presence of defence counsel is required. [133]

Alternatively, no such general authority was recognised[134] (although in one, a prosecutor may so meet a detainee on an ad hoc basis upon request).[135]

Issue five : Procedure for complaints against prison staff.

Both the European Prison Rules and the European Committee for the Prevention of Torture, the CPT, consider an effective system of prisoner complaints to be of importance in ensuring the protection of detainees. The Prison Rules thus specify that prisoners should have the opportunity each day to make requests or complaints to the prison director or to the designated manager, and additionally have an opportunity outwith the presence of staff to talk to (and to make requests or complaints to) an inspector of prisons or other authority enjoying the right to visit the prison. Prisoners should also have the right to make confidential requests or complaints to the central prison administration or judicial or other designated authority, the only proviso being that appeals against any formal decisions may be restricted to authorised procedures. Every request or complaint addressed or referred to a prison authority should be promptly dealt with and replied to without undue delay.[136] To these ends, prisoners at the time of admission should be provided with written information about the regulations governing the treatment of prisoners, disciplinary requirements, authorised methods of seeking information and making complaints, and any other information necessary to allow prisoners to understand their rights and obligations and to adapt to the life of the institution.[137] These Rules are mirrored in CPT recommendations and standards. For the CPT, the importance of effective grievance and inspection procedures in helping prevent ill-treatment in prisons is a recurrent theme, and one found in its earliest reports.[138] For the committee, not only should prisoners have available complaints mechanisms both internal and external (including confidential access to an appropriate authority), but also an independent visiting

[132] Portugal
[133] Czech Republic
[134] Liechtenstein; Slovenia ; United Kingdom (Northern Ireland)
[135] France
[136] European Prison Rules of 2006, Rules 70 and 92-93.
[137] European Prison Rules of 2006, Rule 30.

[138]. European Prison Rules, Rules 4-5. Again, this is a recurrent theme in CPT reports from the earliest visits: see, for example, CPT/Inf (91) 10 (Austria), paragraph 87 (independent visiting body would improve standards in police jails); and CPT/Inf (91) 12 (Denmark), paragraph 59 (restrictions on access by board of visitors was “surprising”).

body (such as a board of visitors or supervisory judge) which has the power to hear to take action upon complaints from prisoners and to inspect the establishment's premises.[139]

The question as to how complaints from prisoners are handled produced a wide range of avenues for instigating and investigating such. These included not only (and inevitably) the possibility (or requirement) that complaints are addressed to competent prison staff,[140] but also (normally additionally) to governmental departments or executive agencies,[141] police officials[142] responsible for prisons,[143] judicial authorities[144] (unless better considered a disciplinary matter for prison resolution),[145] and relevant external bodies[146] or agencies specifically established for this purpose.[147] In some instances, too, complaints can be addressed to prosecutors or[148] may meet a prosecutor,[149] or alternatively, a prosecutor only becomes involved if there is an allegation of criminal wrongdoing. [150]

Issue six : Whether public prosecutor has authority to control and react to the conditions of deprivation of liberty (and how the public prosecutor should react to adverse circumstances; and whether domestic law prescribes any special provisions for such situations).

Responses were clearly dependent upon the issue of whether there was a responsibility to supervise places of detention. A secondary issue was the extent to which a prosecutor had the authority to determine (or respond to) detention regimes, particularly in respect of pre-trial detention.

HIGH AUTHORITY : REACTION

Where a prosecutor's responsibilities extended to taking action in respect of visits to places of detention, such an authority to react to conditions of detention generally

---

[139]. *2nd General Report*, CPT/Inf (92) 3, paragraph 54. For further discussion, see Evans, M., "Inspecting Prisons: the View from Strasbourg", in King, R. and Maguire, M. (eds.), *Prisons in Context*, Clarendon Press, Oxford, 1994, pp. 141-159; and Morris, P, "The Prisons Ombudsman: A Critical Review", *European Public Law*, 4, 1998, pp. 345-378.

[140] Austria; Denmark; Iceland; Ireland; Latvia; Monaco; Portugal; Slovakia ; Spain ; Turkey ; United Kingdom (England and Wales) ; United Kingdom (Scotland); United Kingdom (Northern Ireland) ;

[141] Azerbaijan; Iceland; Ireland; Monaco; Russian Federation; Turkey

[142] Iceland

[143] Liechtenstein

[144] Latvia; Portugal; Russian Federation; Slovenia (visits once per week); Spain (appointment of 'guardian judge'); The Former Yugoslav Republic of Macedonia

[145] Andorra; Croatia; Denmark; Spain; Russian Federation

[146] Azerbaijan (Human Rights Ombudsman); Czech Republic; Finland (Parliamentary Ombudsman); Iceland (Parliamentary Ombudsman); Ireland (board of visitors); Latvia (UN, Parliamentary Commission for Human Rights, State Human Rights Agency); Monaco (Council of Europe); Russian Federation; United Kingdom (England and Wales) (board of visitors)

[147] Azerbaijan

[148] Czech Republic; France; Latvia; Russian Federation; Turkey;

[149] Moldova; Portugal (treated in same manner as other complaints)

[150] United Kingdom (Scotland) (and also responsible for investigation of sudden or suspicious deaths)

existed.[151] In some systems, this could also take the form of the right to give a direction which can be enforced where conditions fail to meet legal requirements;[152] but in another, the only action a prosecutor could take was to inform the presiding judge or a judge supervising the enforcement of a custody ruling of any issues (unless the violations constitute an offence).[153]

HIGH AUTHORITY : CONTROL

In a handful of states, the prosecutor can impose restrictions upon pre-trial detainees: for example, special security measures on pre-trial detainees such as with judicial approval (and without such approval in cases of urgency if there is a danger of prejudicing the course of justice, but must thereafter obtain approval);[154] and measures including access to visitors or to newspapers.[155]

LOW / NO AUTHORITY

Several responses indicated that prosecutors had no such responsibilities or authority. [156] The justification for this position was often that this was the responsibility of another individual or agency: for example,

- the head of the institution (but detainees are entitled to apply for review of his decisions by an independent tribunal)[157]
- specified supervisory bodies (eg, annual visit commission of execution consisting of judges and lay persons reviews prisons by contacting prisoners and prison staff)[158]
- investigating judges[159] or senior members of the judiciary[160]
- the Ministry of Justice[161]

One response indicated that conditions of detention would only be of direct concern if these have involved issues concerning the lawfulness of evidence obtained.[162]

Issue seven : What is the role of the public prosecutor in the execution of sentences relating to persons deprived of their liberty?

[151] Andorra; France (representations to the prison authorities; where violence or ill-treatment are reported, may result in an investigation and thereafter proceedings); Latvia (and specialised office established to look after prisoners' rights); Lithuania (separate prisons department established in justice ministry); Moldova; Slovakia; The Former Yugoslav Republic of Macedonia; Turkey
[152] Latvia; Russian Federation
[153] Czech Republic
[154] Germany
[155] Sweden
[156] Spain; Finland; Liechtenstein; Slovenia (although the Ombudsman can also visit prisons)
[157] Austria
[158] Austria
[159] Croatia
[160] Liechtenstein
[161] Monaco
[162] Ireland

The final question concerned the responsibilities of the prosecutor after a sentence of imprisonment had been imposed. Here, there was again considerable variation in response.

HIGH RESPONSIBILITY

- In some states, the prosecutor had a general responsibility to ensure lawfulness of execution of sentences[163] / ill-treatment issues,[164] which could extend to suspension of execution of the sentence[165] (for example, if immediate imprisonment would 'present the person or his family with serious problems disproportionate to the offence'[166] or on health or other relevant grounds)[167] or the taking of other measures (for example, approving settlement of custodial sentences or granting probation).[168]

LOW / NO RESPONSIBILITY

- Other legal systems did not recognise any special duties or rights for the public prosecutor in the execution of sentences relating to persons deprived of their liberty, primarily as the execution of judicial decisions to impose loss of liberty is seen as a matter for court supervision [169] or the prison authorities.[170]
- Many responses, though, noted the right of the prosecutor to seek enforcement of sentences[171] and to be heard at petitions for conditional release and to appeal against such judicial decisions[172] (including limited rights to seek a review against a sentence considered unduly lenient).[173]

Conclusion

The use of torture or ill-treatment or the arbitrary use of detention powers can in a real sense cause harm to the body politic and to the legal system. If the circumstances and manner in which a society deprives its citizens of their liberty reflect in some manner the underlying values of that community, the level of concern to avoid arbitrary detention and to prevent the ill-treatment of detainees provides a ready measure of the practical worth of a legal system in protecting human dignity. The increasing emphasis being placed upon domestic rather than international mechanisms for the protection of

[163] Andorra; Denmark; France; Germany; Latvia (but administrative commissions help determine appropriate placement of persons sentenced to imprisonment); Moldova; Russian Federation; Slovakia; The Former Yugoslav Republic of Macedonia; Turkey
[164] Andorra; Russian Federation
[165] Lithuania (may suspend execution of custodial sentence)
[166] Monaco
[167] Switzerland
[168] Spain
[169] Croatia; Finland; Ireland; Italy; Romania; Slovenia; Sweden
[170] Iceland
[171] Portugal (and to calculate the duration of the sentence imposed)
[172] Austria; similarly Spain; Liechtenstein; Lithuania
[173] Ireland

detainees (both in the work of the CPT, and increasingly being signalled by the European Court of Human Rights and by the Committee of Ministers in supervising the execution of judgments) in turn throws up the issue of the extent of the responsibilities of prosecutors in making effective the protection against arbitrary deprivation of liberty and the prevention of ill-treatment.

The survey of domestic approaches – however less than perfect the data – does suggest some greater potential for proactive intervention on the part of public prosecutors. This is most obvious where there is existing low/minimal authority for such intervention at various points in the criminal process (including post-sentencing decision-making), but doubtless also exists where domestic law already recognises certain rights and responsibilities, for there may be a significant 'gap' between formal powers and duties and actual practice. At the same time, however, it is crucial to respect appropriate constitutional principles protecting fundamental values and assumptions in a European democracy. Yet a greater level of intervention at appropriate stages could result in significant advances in the protection of the detainee without undermining these. If this conclusion is accepted, the survey indicates certain examples of 'best practice' that could be emulated elsewhere in Europe.